



OUTER HOUSE, COURT OF SESSION

[2024] CSOH 87

CA88/23

OPINION OF LORD RICHARDSON

In the cause

CALEDONIA WATER ALLIANCE

Pursuer

against

ELECTROSTEEL CASTINGS (UK) LIMITED

Defender

**Pursuer: Ellis KC, McAndrew; Pinsent Masons LLP**

**Defender: G Walker KC, Broome; DAC Beachcroft (Scotland) LLP**

13 September 2024

**Background**

[1] This case concerns a dispute about jurisdiction which turns on correctly determining the terms and conditions that regulate the parties' relationship.

[2] The pursuer is a joint venture comprising Morrison Water Services Limited and Aecom Limited.

[3] In June 2015, the pursuer, under the name Caledonia Water, entered into an agreement with Scottish Water (the "Alliance Agreement"). The Alliance Agreement allowed Scottish Water to engage the pursuer to carry out project orders. The Alliance Agreement was based on the NEC3 Option C: Target Contract April 2013. Clause 26 of the

Alliance Agreement, read with section 24.3 of the Alliance Agreement Information, obliged the pursuer, subject to certain conditions, to obtain items of plant, material and services from suppliers with whom Scottish Water had agreed contracts under an overarching framework.

[4] In February 2016, the defender entered into an agreement with Scottish Water (the “Framework Agreement”). The Framework Agreement was based on the NEC3 Framework Agreement (April 2013). The purpose of the Framework Agreement was to allow Scottish Water or others carrying out work for Scottish Water to order from the defender on the basis of agreed terms. The scope of the Framework Agreement included the supply of ductile iron pipes, fittings and fabricated pipework.

[5] In terms of the Alliance Agreement, the pursuer was contracted to design and install water pipes for the South Edinburgh Resilience Scheme (“SERS”). SERS was a project involving the replacement of a significant length of water pipework in and around Edinburgh. By a large number of purchase orders, the pursuer ordered substantial quantities of ductile iron pipe from the defender for use in the SERS project. In total, there were 60 orders in various quantities. In each case, the orders were made by a purchase order from the pursuer to the defender followed by an order confirmation from the defender to the pursuer. This pipework was subsequently supplied by the defender and delivered to site. The orders were made over a period from 22 June 2018 to 9 May 2022.

[6] The parties are in dispute both as to the basis upon which their relationship was formed and the terms and conditions which regulate that relationship. The parties are, however, in agreement that each order constituted a separate contract.

[7] The pursuer contends that the contracts were formed between it and the defender and that each contract was a project order, in terms of the Alliance Agreement, calling off work in terms of the Framework Agreement. Accordingly, the pursuer argues that the

contracts were subject to the Scottish Water Terms and Conditions of Contract for the Purchase of Goods and Services under a Framework Agreement, which form Appendix B of the Framework Agreement (henceforth, “Scottish Water’s Standard Terms”). Clause 30 of Scottish Water’s Standard Terms provides that:

“The Contract shall be governed by and construed in accordance with Scots law and any disputes arising shall be subject to the exclusive jurisdiction of the Scottish courts.”

[8] On the other hand, the defender contends that the contracts were formed between the defender and Morrison Water Services Limited – one of the two companies which comprise the pursuer (see [2] above). The defender also argues that the contracts are regulated by the defender’s terms and conditions of sale. The defender’s terms and conditions of sale were referred to on the defender’s order confirmation documentation.

Clause 11.4 of the defender’s terms and conditions provides:

“English law shall apply to the Agreement and its interpretation. The English Courts shall have exclusive jurisdiction over any disagreement between the parties.”

On this basis, the defender contends that this court does not have jurisdiction.

[9] In light of the parties’ dispute as to jurisdiction, I heard a preliminary proof restricted to this issue.

## **Evidence**

[10] The parties agreed a joint minute of admissions. This agreed the provenance of documents and also representative examples of documentation exchanged between the parties in respect of each of the 60 orders placed by the pursuer with the defender. These documents were:

- the defender’s quotation;

- the pursuer's purchase order;
- the defender's order confirmation; and
- the defender's invoice.

*Pursuer's witnesses*

*Andrew McLean*

[11] Mr McLean acted as a buyer for the pursuer. He had been in this position since 2015. He explained that the pursuer had been created specifically to carry out work for Scottish Water under the Alliance Agreement. Under that agreement, the pursuer carried out work on a number of call off projects. One of those was the SERS project. Mr McLean had become involved in the SERS project at around the time construction had started. The SERS project involved the replacement of significant lengths of water pipe in and around Edinburgh. His role had involved procuring pipework and materials for the project.

[12] Mr McLean understood that, in terms of the Alliance Agreement, the pursuer was obliged to procure materials from the Framework Supplier List which had been issued by Scottish Water. The supplier on that list for ductile iron pipework and associated fittings was the defender. Mr McLean explained that the entry on the list which related to the defender included a hyperlink which, if it were followed, would take one to the information in relation to the framework in place. These details included a Supplier Guide or manual which bore to have been prepared by the defender together with details of the framework rates.

[13] Mr McLean's evidence was that a link to the Framework Supplier List had been provided to the pursuer by Scottish Water by email early in 2015. The list had been included in a Document Library which also included Scottish Water's Standard Terms.

[14] In relation to the Supplier Guide, Mr McLean highlighted that the document indicated that part of its purpose was to: “Provide a consistent standard of supplier information to the Framework Users for all Frameworks”. He noted that the document indicated, under the heading “Contractual Options”, as follows:

“The supplier was awarded a Framework Agreement on the basis of the following deviations from SW’s standard specifications and standard contractual terms:

N/A”

The Supplier Guide also detailed the procedures to be used in placing orders with the defender. Paragraph 3.8 indicated that a purchase order was to be issued quoting a unique purchase order number. Thereafter, an order acknowledgement was to be issued by the defender. At paragraph 3.8(c), the guide emphasised that the quantity, price, specification, delivery due date and delivery address ought to be checked.

[15] Mr McLean’s evidence was that the process specified in the Supplier Guide was largely that which had been employed. A purchase order quoting a purchase order number had been issued by the pursuer to the defender. The purchase order referred to the Edinburgh South Project and sought delivery to that project. In response, the defender had issued an order acknowledgement (entitled “Order Confirmation”) to the pursuer again referring to Scottish Water. Mr Mclean’s position was that he had then checked the quantity, price, the specification, the delivery due date and delivery date.

[16] Mr McLean did not check the defender’s terms and conditions which were attached to the defender’s order acknowledgements. This appeared to be for two reasons. First, so far as he was aware, the defender never flagged the issue of its terms and conditions in correspondence or other communication and, secondly, Mr McLean was under the impression that the parties were operating under the Scottish Water framework and that,

therefore, Scottish Water's Standard Terms would apply. Mr McLean recognised that the pursuer's purchase orders also expressly referred to and attached the pursuer's own standard terms and conditions. This was done automatically by the pursuer's systems. According to Mr McLean it was common practice in the water industry for parties to attach standard terms and conditions. However, Mr McLean's evidence was that clients such as Scottish Water put framework agreements in place in order to ensure that suppliers were on consistent terms and rates. This was a water industry norm. Where a framework agreement had been put in place, it would not be normal for the standard terms of either the contractor or the supplier to be used.

[17] In cross-examination, Mr McLean was asked why, given the pursuer was created in order to carry out works for Scottish Water and was obliged to use suppliers under the framework, it had its own set of standard terms and conditions. He was not able to explain this but believed the terms and conditions had originated from Morrison Water Services. This was because the pursuer had used Morrison procurement and accounting systems. Mr McLean also advised that there were other suppliers to the pursuer who were not part of the Scottish Water framework: for example, stationery suppliers. The pursuer's standard terms would be relevant for these suppliers. He explained that there were many such suppliers but they were generally low value as the framework covered the larger value items.

[18] He was also asked about the following wording which appeared on the purchase order:

"Please supply undermentioned goods/undertake the following work, subject to the Purchase Conditions, and instructions hereon and over. If you cannot comply with this order kindly advise the undersigned immediately.

The Purchase Conditions shall prevail to the exclusion of any terms or conditions endorsed upon, delivered with or contained in the Supplier's quotations, acknowledgments or acceptances of orders, specifications or similar documents, or which are implied by trade, custom, practice or course of dealing, and the Supplier waives any right which it otherwise might have to rely on such terms or conditions." (The purchase order is appended below, see Appendix 1.)

He believed that this wording also derived from Morrison's procurement department.

However, the use of these documents containing this wording was not something for which he was responsible. He confirmed that the system had been set up to generate the purchase order together with the pursuer's standard terms and conditions.

[19] Mr McLean explained that all the orders made by the pursuer from the defender were placed under the same account – CALE102S1C. This account had been set up after the pursuer had completed a supplier form which had been emailed to all Scottish Water framework contractors following the defender's appointment to Scottish Water's framework. The account number was quoted in all of the defender's invoices issued to the pursuer. Following the setting up by the pursuer of its account with the defender, Scottish Water emailed the pursuer with the framework rates. The pursuer's account with the defender was also important because Scottish Water was entitled to a rebate based on the volume of materials that were supplied. Although Mr McLean was not involved directly in the calculation and payment of the rebate, he was aware that the defender made payment of the rebate to Scottish Water.

[20] Mr McLean also gave evidence as to his attendance, during the first year of the project, 2016, at quarterly "Framework/Contract" meetings which had taken place. These meetings had been attended by, among others, representatives of Scottish Water, the defender and other Scottish Water alliance partners. Mr McLean emphasised that the projects involved were very significant both in terms of duration and value. These meetings

were convened by Scottish Water in order to ensure that the projects concerned were proceeding as they intended and that no major issues were arising in relation to, for example, the quality and timing of the materials being supplied.

[21] So far as Mr McLean was concerned the framework prices were used for all of the pursuer's orders from the defender. When an item was needed which was not listed, Mr McLean had understood that a rate was generated based on the Scottish Water rates. He accepted that this was an assumption on his part and that he did not know how the rates were generated for bespoke items. However, he confirmed that once a rate had been used for an item, it did not subsequently change.

[22] The defender objected to Mr McLean's evidence, which I heard under reservation, as to his impression that Scottish Water's Standard Terms were applicable on the basis that the direct subjective evidence of one of the parties was not relevant to determining, objectively, what the intention of the parties was (*Luminar Lava Ignite Limited v Mama Group plc* 2010 SC 310 at paragraph 45 per Lord Hodge). The defender maintained the same objection in relation to similar evidence given by two of the pursuer's other witnesses: Mr Walker and Mr Smithie (see below). As a general statement of legal principle that is, of course, correct. However, I do not consider that the application of principle relied upon by the defender should result in the exclusion of this evidence. Accordingly, I repel the defender's objection. The reason I reach that conclusion is that I consider such subjective evidence may be relevant to cast light on factual circumstances which were known to both parties (*Baillie Estates Limited v Du Pont (UK) Limited* [2009] CSOH 95 at paragraphs 14 and 23 per Lord Hodge). In this case, I consider that Mr McLean's evidence is of assistance in casting light on the exchange between the parties of pro-forma documentation – purchase orders and



order confirmations – in the context of procurement in the water industry under a framework agreement.

*David Walker*

[23] Mr Walker was procurement manager for the pursuer and had held this role for 9 years. He had been involved in the SERS project from the outset. His role had been to order the materials required for the project. He had worked in the water industry since 2002.

[24] Mr Walker's evidence was broadly consistent with that of Mr McLean. He gave evidence about the pursuer being established as a customer of the defender. This happened in the summer of 2015. The pursuer, among others, had received an email from Linda Milne, who worked in procurement for Scottish Water on 30 June 2015. The email had been addressed to all of Scottish Water's alliance partners under the framework and had advised that the defender was to be Scottish Water's preferred supplier for ductile iron pipes and fittings. Following on from Ms Milne's email, the pursuer had received an email from the defender requesting that an account form be completed by each of the alliance partners. Mr Walker had passed this on to a colleague, Richard Smithies, for completion. Mr Smithies worked at M Group which included the central procurement function for Morrison Group companies.

[25] Like Mr McLean, Mr Walker was cross-examined as to the use of the pursuer's standard terms and conditions. His position was similar. Mr Walker had not been involved in either the formulation of the terms and conditions or the creation of the system which generated the documents used in procurement. This had been done by the central

procurement function for the Morrison Group companies which was carried out by M Group.

[26] For the reasons noted above (at [22]) in relation to Mr McLean's evidence, the defender objected to Mr Walker's evidence to the effect that he expected the Framework Agreement to apply and would be surprised if the defender thought otherwise. For the same reasons which I have set out in relation to the objection to Mr McLean's evidence, I repel the objection.

*Robert Bath*

[27] Mr Bath is employed by Morrison Water Services Limited as a commercial director. Until January 2023, Mr Bath sat on the board of the pursuer and he had a continuing involvement in projects in which the pursuer had been involved including the SERS project. He had 10 years' experience in the water industry.

[28] Mr Bath gave evidence as to the Alliance Agreement between the pursuer and Scottish Water. This was a contract to design and deliver Scottish Water's "Clean Water Programme". It covered the whole of Scotland and was worth approximately £700,000,000. In terms of the Alliance Agreement, the pursuer required to use the framework contractors and the framework contracts. Mr Bath explained that this was not unusual in the regulated and publicly funded water industry. Scottish Water had entered into a number of framework agreements in respect of its projects. This was to ensure that products being supplied for its projects were being supplied at the agreed rates and subject to the agreed standards and specification.

[29] Mr Bath had no doubt that the defender would have known that the orders being placed by the pursuer were for a Scottish Water project. His evidence was that the defender

had been involved in early dialogue with Scottish Water in relation to the SERS project. The Scottish Water procurement process was transparent and so the defender would have been aware that the pursuer had been engaged by Scottish Water as contractor.

[30] Mr Bath was pressed on the defender's state of knowledge in cross-examination. It was put to him that the position of Mr Baillie, the managing director of the defender, was that he was not aware of the terms of the Alliance Agreement. Mr Bath thought that this was unlikely as it would be good practice to let a supplier access this documentation but he accepted that he could not point to any particular evidence of the defender's knowledge of the Alliance Agreement terms. Even in the event that the defender had not seen the Alliance Agreement itself, on the basis of their early involvement in commercial discussions with Scottish Water, Mr Bath expected the defender to be aware of the obligation on the pursuer to purchase under the Framework Agreement.

[31] For completeness, I note that the defender objected to parts of Mr Bath's evidence on the basis that Mr Bath appeared to be giving evidence as to the correct construction of the Alliance Agreement which was properly a matter of law for the court. Having heard Mr Bath's evidence under reservation, I repel the defender's objection. I do not consider that Mr Bath was, in fact, trying to give evidence as to the correct legal construction of the documents concerned but was, instead, simply providing the background to his understanding of matters.

*Richard Smithies*

[32] Mr Smithies is currently a category manager working in the centralised procurement function within M Group Services Limited which is part of the Morrison Group of

companies. Mr Smithies has held his current position for 5 years. Prior to that he was a procurement administrator within the same department.

[33] Mr Smithies explained that the pursuer utilised some of M Group's centralised administrative functions including in procurement. In particular, this involved the setting up of supplier accounts. Mr Smithies had carried this out in respect of the pursuer's account with the defender. He had completed the defender's new account request form on behalf of the pursuer. Mr Smithies noted that, in completing this form, he had, under the heading "Framework" entered "Scottish Water AMP6". The reference to "AMP6" was an error. This was the equivalent English framework. He accepted that the reference ought to have been to SR15 which is the Scottish programme of which the SERS project is part.

[34] For the reasons noted above (at [22]) in relation to Mr McLean's evidence, the defender objected to Mr Smithie's evidence as to his expectations and the pursuer's intentions in completing the various parts of the new account request form. For the same reasons which I have set out in relation to the objection to Mr McLean's evidence, I repel the objection. In this case, I consider that Mr Smithies' evidence is of assistance in casting light on what is to be taken from the form in question.

#### *Defender's witnesses*

##### *Glenn Wheeler*

[35] Mr Glenn Wheeler is the head of sales at the defender. He has held that position for 19 years.

[36] Mr Wheeler explained that he had been aware of the SERS project for some time prior to orders being placed by the pursuer. He was aware that the project would involve orders of ductile iron pipework being placed by the pursuer with the defender. In total,

Mr Wheeler confirmed that the defender had received 60 orders from the pursuer. In all but four cases, these orders had started with an email from Andrew McLean of the pursuer to Mr Wheeler and his colleague James Wheeler seeking prices. Mr James Wheeler would then provide the prices in accordance with the Framework Agreement to Mr McLean in the form of a quotation. That quotation would always attach the defender's standard terms and conditions. The attachment of the standard terms occurred automatically as a function of the defender's procurement system. Thereafter, the defender would receive a purchase order from the pursuer. The purchase order would have the pursuer's standard terms and conditions attached. The defender would then issue an order acknowledgement to which the defender's terms and conditions were again attached.

[37] Mr Wheeler was aware of the Framework Agreement between Scottish Water and the defender and the framework rates included in that agreement. He accepted that it followed that because the pursuer was working on the SERS project for Scottish Water that the framework would apply.

[38] Mr Wheeler was asked about a Scottish Water Framework/Contract meeting which he had attended on 15 February 2016. Representatives of Scottish Water, the pursuer and a number of other framework contractors had also been present. He did not remember the meeting but accepted that it appeared to be a review meeting for all those involved in Scottish Water framework arrangements.

*James Wheeler*

[39] Mr James Wheeler is an account manager for the defender. This is a role he has held for 4 years. Prior to that he was a sales administrator for 3 years.

[40] Mr James Wheeler became the account manager for Scottish Water just at the time the SERS project was starting. He gave evidence in respect of the exchange of documents between the parties in relation to the 60 orders placed by the pursuer. He explained that the defender's terms and conditions were automatically attached to a quotation or an order acknowledgement when those documents were created in pdf format.

*Stewart Baillie*

[41] Mr Baillie is the managing director of the defender. He has held this position for 10 years. He explained that the defender is the wholly owned UK subsidiary of Electrosteel Castings Limited which is a steel company with its head office in Calcutta, India.

[42] Mr Baillie confirmed his understanding of the exchange of documents between the pursuer and defender which had occurred in respect of each of the 60 orders which had been placed by the pursuer with the defender. Mr Baillie's evidence was consistent with that of Mr Glenn Wheeler. In relation to the defender's terms and conditions, Mr Baillie's position was that he knew that they were favourable to the defender. The driver for seeking to impose them into supply contracts was that purchasers tried to impose their terms and conditions. Mr Baillie considered that that was what had happened in respect of the purchase orders issued by the pursuer. That was why the defender had attempted on two occasions – in the quotation and the order confirmation – to “trump” the pursuer's terms and conditions with their own.

[43] Mr Baillie's evidence was that the pursuer had placed orders with the defender that were outwith the framework arrangements. By this, Mr Baillie meant that the items did not appear on the framework price list and a price was prepared on a spot basis. However, he accepted that, once the price for these bespoke items had been arrived at, no distinction was

made between these items and those which appeared on the framework price list. This included the calculation and payment of a rebate by the defender to Scottish Water in respect of these items.

[44] In cross-examination, Mr Baillie accepted that in terms of the Framework Agreement between the defender and Scottish Water, the defender was obliged to use Scottish Water's Standard Terms in respect of orders placed under the framework. He accepted also that this included the orders placed by the pursuer in respect of the SERS project. However, Mr Baillie's evidence was initially that under the framework, the contractor – in other words, the pursuer – had a choice and was not required to purchase from the defender. Subsequently, he clarified his position to be that the contractor could purchase from another supplier if the framework supplier did not have the goods available.

[45] Mr Baillie accepted that the defender had created a customer account for the pursuer and had allocated the pursuer the account number – CALE102S1C. He acknowledged that this account number had been noted on the documentation which the parties had exchanged including the order confirmations and the invoices issued by the defender.

[46] It was put to Mr Baillie that insofar as the defender sought to incorporate its own standard terms and conditions into the various contracts between the pursuer and defender, this would represent a breach of the defender's contract with Scottish Water. Mr Baillie's initial response was that he had never considered this point. When asked, on a number of occasions, to consider the point, Mr Baillie was unable to answer. He said that, as a non-lawyer, he struggled with the question. He did, however, accept that it was not likely that the defender would try to do something – impose their own terms and conditions into a supply contract – which ran contrary to Scottish Water's express intention.

[47] Mr Baillie also accepted that the pro-forma documents issued by the defender to the pursuer contained wording which he accepted was inapplicable to supply contracts under Scottish Water's framework. So, for example, the letter issued with all of the defender's quotations stated:

“Finally, please note that our offer is made based upon the price and availability that prevails at the time of quotation and whilst we will endeavour to maintain these they are ‘dynamic’ factors and may be subject to change in the interim period.”

Mr Baillie accepted that this was not applicable to the framework rates.

## **Submissions**

### *Pursuer's submissions*

[48] The pursuer's position is that when all the circumstances including the correspondence passing between the parties are objectively construed, it is apparent that the parties intended to incorporate the conditions set out in Appendix B of the Framework Agreement between the defender and Scottish Water.

[49] On this basis, the pursuer moved me to hold that Scottish Water's Standard Terms applied to the parties' contracts and to repel the defender's first plea-in-law.

### *The correct legal approach*

[50] Senior counsel submitted that the starting point in determining whether a contract had been formed and, if so, on what terms, had to be an objective consideration of all communication between the parties whether by words or conduct: McBryde, *The Law of Contract in Scotland* (3<sup>rd</sup> Edn) at 5-04 and 5-46. In the present case, there appeared to be no dispute that contracts had been formed. Accordingly, the court's task was to determine objectively on what terms consensus had been reached. Given the nature of the test, senior



counsel emphasised that the result of a party's actions, objectively construed, may be different from their subjective intentions: *Specialist Insulation Ltd v Pro-duct (Fife) Ltd* 2012 SCLR 641 at paragraph 23 (per Lord Malcolm).

[51] In carrying out the exercise of objectively construing the relevant communications, the pursuer emphasised that the court will have regard to the reasonable expectations of honest, sensible business people based on the shared knowledge of the surrounding circumstances: *RTS Flexible Systems Limited v Molkerei Alois Müller GmbH & Co KG* [2010] 1 WLR 753 at paragraphs 50 and 86 per Lord Clarke; *Baillie Estates* (as above at [22]) at paragraph 25, per Lord Hodge, affirmed by the Inner House (2010 SCLR 192). The pursuer submitted that the surrounding circumstances included both information which was actually known by both parties as well as that which must have been reasonably available to both of them (*Luminar Lava Ignite* (as above at [22]) at paragraph 45 per Lord Hodge).

[52] The pursuer also stressed the importance in the exercise of construction of having regard to the primary purposes that, objectively, the parties intended at the time of the contract (*British Overseas Bank Nominees Limited v Stewart Milne Group Limited* 2020 SC 24 at paragraph 7; *Ardmair Bay Holdings Limited v Craig* 2020 SLT 549 at paragraph 49).

[53] Finally, the pursuer also submitted that, in carrying out this exercise of objective construction, it was relevant to have regard to the actions of the parties after the date of the formation of the contract insofar as those actions might cast light on what a reasonable person understood at that earlier time: *Baillie Estates* (above) at paragraph 26 (per Lord Hodge).

[54] In relation to "battle of the forms" cases, the pursuer submitted that these cases, like all others, required to be considered objectively. The proposition that the "last shot" would be successful in imposing standard terms depended on it being possible to infer that those

terms had been accepted. The drawing of such an inference depended on objective construction of the circumstances of each case. It followed that an objective assessment of the circumstances might displace the result that a traditional offer and acceptance analysis would produce (*Specialist Insulation* (above) at paragraph 18 (per Lord Malcolm); *Tekdata Interconnections Limited v Amphenol Limited* [2009] EWCA Civ 1209 at paragraphs 11, 25 and 35).

[55] Senior counsel also referred to the subsequent consideration of the *Tekdata* decision by the Court of Appeal in *TRW Limited v Panasonic Industry Europe GMBH* [2021] EWHC Civ 1558. In that case, Lord Justice Coulson had endorsed the approach of the judge at first instance who had concluded, on the facts, that the key event was the signing of a customer file even though this event took place prior to any orders for goods actually having been placed (at paragraph 37). Senior counsel drew my attention to the analogy drawn by Lord Justice Coulson between the customer file arrangement in that case and other framework contracts (at paragraph 49).

#### *Application*

[56] Senior counsel accepted that within the documentation exchanged by the parties in respect of each of the orders placed by the pursuer with the defender, there had been references to each party's standard terms and conditions. In particular, this was true of both the pursuer's purchase orders and the defender's order confirmations.

[57] However, when the whole circumstances were considered, the pursuer submitted that the court ought to infer that neither of the parties were intending to contract on the basis of their own terms and were, instead, intending to contract on the basis of the framework conditions, being Scottish Water's Standard Terms. It was submitted that this

inference arose clearly and necessarily from the evidence. The pursuer advanced its submissions under five headings: (i) the background to the contract known to both parties; (ii) the primary objectives of the contracts; (iii) other contractual documentation (construed against that background); (iv) the subsequent actions of the parties; and (v) considerations of commercial common sense.

### Background

[58] As a starting point, both parties were aware that the materials to be supplied were for use on the SERS project and that this was a Scottish Water project.

[59] In respect of the defender's position, it was clear from the evidence of Mr Baillie that the defender accepted that, in terms of the Framework Agreement it was obliged to contract on the basis of the framework conditions. Mr Glenn Wheeler had also understood that the Framework Agreement applied to the SERS project. Senior counsel submitted that this evidence was consistent with a proper construction of the defender's obligations. He founded upon the defender's obligation on clause Z2.3 of the Framework Agreement which provided:

"When a Purchase Order is awarded the Supplier shall enter into a contract with the party awarding the Purchase Order under the Conditions of Contract for the Purchase of Goods and Services set out in the Framework Information."

Senior counsel submitted that, properly construed, this meant that the pursuer, as a water alliance, was a party both entitled to issue purchase orders to the defender and in respect of which Scottish Water's "Conditions of Contract", i.e. Scottish Water's Standard Terms (see [7] above) were to be applied. This followed from the definitions of "Purchase Order" (defined in clause 11.2(8)) and "Others" (defined in clause 11.2(6)) together with the approved list incorporated as Appendix One of the Framework Data, forming part of the

Framework Agreement. The pursuer was a water alliance; the “Water and Waste Water Alliances” were referred to on the approved list; organisations listed on the approved list fell within the definition of “Others”; and “Others”, as defined, were entitled to issue purchase orders.

[60] Senior counsel also pointed out that the Scottish Water’s Standard Terms specifically provided that the buyer (as defined) was not to be bound by any terms or conditions set out in the supplier’s acceptance (clause 3.5).

[61] The pursuer also relied on the fact that there seemed no dispute that the defender was to use the rates detailed in the framework price list. This was as stipulated in the Framework Agreement (clause 3 of the Framework Information). Senior counsel asked rhetorically why should the terms and conditions be treated differently from the rates?

[62] In respect of the pursuer’s knowledge of the defender’s position, the pursuer was aware of the defender’s Framework Agreement. This followed from Mr McLean’s evidence as to the Framework Supplier List issued by Scottish Water and the documentation accessible in the Document Library which included Scottish Water’s Standard Terms as well as the Supplier Guide prepared by the defender in August 2015. The Supplier Guide reflected the defender’s own acknowledgement that contracts to be entered into with Scottish Water’s framework contractors (thus including the pursuer) would be pursuant to the Framework Agreement.

[63] Under this heading, the pursuer also relied on the setting up by it of the supplier account with the defender. That process had been initiated by the defender in response to an email sent by Scottish Water to the pursuer, among others, introducing the defender as a framework supplier. The completed form, which had been approved by the defender, made clear that the customer was the pursuer and that the supply was being made under the

Scottish Water framework (albeit that it appeared that Mr Smithies had wrongly referred to the equivalent English framework).

[64] The knowledge of and participation of both parties in Scottish Water's framework was also evidenced by the Framework/Contract review meetings which had taken place in 2016.

[65] In respect of the pursuer's own obligations under the Alliance Agreement with Scottish Water, it was obliged to obtain relevant materials from the defender under the Framework Agreement. This followed from the obligation set out in section 24 of the Alliance Agreement Information (Appendix 3 of the Alliance Agreement). Section 24.3 provided:

"Other than to the extent that the Alliance Partner's [sic] self delivers works or services, the Alliance Partner shall, to the extent provided for under the Framework Contracts, obtain items of plant and materials, services; or equipment for the works from the appropriate supplier listed under the Framework Contracts unless the prior written permission of Scottish Water has been given to acquire the plant, materials, services and equipment from an alternative source ..." (emphasis added).

This was a clumsily worded provision because suppliers were not listed under the "Framework Contracts" (defined in section 1.1 of the Alliance Agreement Information) but its meaning was reasonably clear. This construction was consistent with the remainder of section 24 as well as clause 26.2 of the Alliance Agreement Core Clauses. Senior counsel submitted that the obligation on the pursuer to contract with the defender using Scottish Water's Standard Terms was simply common sense. It would have been strange for Scottish Water to require the supplier, the defender, to use these terms but not require its contractor, the pursuer, to do so.

[66] Senior counsel accepted that there was no direct evidence that the defender was aware of the pursuer's specific obligations under the Alliance Agreement. However, as

Mr Baillie had accepted in evidence, the defender was both aware that the pursuer as a framework contractor had an obligation to purchase available materials under the framework and aware of its own obligation to use Scottish Water's Standard Terms when supplying under the framework.

#### Primary objectives

[67] The short point that the pursuer made under this heading was that the background circumstances indicated strongly that the primary objective of the contractual arrangements was to supply materials for use in a Scottish Water project in a way which would comply with Scottish Water's framework arrangements. The use of framework contracts in the water industry and its rationale had been spoken to by Mr Bath.

#### Other contractual documentation

[68] Under this heading, the pursuer sought to address the repetition, within the contractual documentation exchanged, of references to the parties' own standard terms and conditions. The pursuer submitted that, in circumstances in which both parties were obliged to use Scottish Water's Standard Terms, little, if any, significance should be attached to this repetition.

[69] This was particularly so where it appeared from the evidence from both the pursuer's and defender's witnesses, that the repetition arose solely as a result of standard protocol and automation. That was the evidence of Mr McLean for the pursuer and Mr Glenn Wheeler for the defender. Senior counsel submitted that a reasonable business person, considering this documentation objectively, would be aware of the fact that it was common within the industry automatically to refer to and attach standard terms and

conditions. Such an observer would distinguish between the parts of the documents which were bespoke and related to particular orders, for example, the materials, quantities and prices specified, and those that were not and did not. In this regard, senior counsel drew attention to the paragraph in the defender's standard letter attaching a quotation which referred to "dynamic factors" affecting pricing. As had been recognised by Mr Baillie, this paragraph had no application to quotations issued in relation to framework projects. A reasonable business person would also attach significance to the fact that although the parties had exchanged email correspondence in relation to each of the individual transactions, neither side had ever referred to the issue of terms and conditions. Senior counsel submitted that it was reasonable to infer from that silence that the parties considered the issue was settled.

[70] Senior counsel submitted that the existence of the pursuer's standard terms and conditions could reasonably be explained by Mr McLean's evidence. They were used for suppliers who were not part of the Scottish Water framework. The mere existence of these terms did not properly give rise to the inference that the pursuer intended to incorporate them into supply contracts concluded with Scottish Water framework suppliers.

[71] In relation to the defender's order confirmations, the pursuer's position was that, considered in context, these were not intended to amount to a counter-offer by the defender and, in any event, the defender supplied the materials in the absence of any acceptance by the pursuer. The pursuer noted that on a number of occasions, arrangements for the delivery of the materials in question had been made at the same time the order confirmation had been issued.

[72] Senior counsel pointed out that the role played by the order confirmation in the parties' exchanges was that of the "order acknowledgement" which was described in the

defender's Supplier Guide. In the Supplier Guide, the order acknowledgement was to be used as an opportunity to check the "entered detail", namely quantity, price, specification, delivery due date and delivery address. There was no suggestion in the Supplier Guide that this document was to be used as a counter-offer imposing new terms and conditions.

[73] Considering the wording of the terms and conditions referenced in the order confirmations themselves, the pursuer submitted that, even working on the assumption that they were intended to be counter-offers, there had been no subsequent acceptance by the pursuer. Clause 3.1 of the defender's standard terms and conditions provided as follows:

"3.1 Any order from you to us is an offer by you to contract with us on the terms and conditions of this Agreement. A contract shall only exist between the parties when our authorised representative in writing accepts your offer."

However, there had been no such acceptance by the defender. Moreover, there were no words or conduct by the pursuer, following the order confirmation, which concluded a contract.

[74] In these circumstances, the pursuer submitted that the defender's conduct in delivering the ordered material to the pursuer was referable only to the pursuer's purchase order. Accordingly, the question for the court was whether the parties' contracts incorporated the pursuer's standard terms (referred to on the purchase orders) or Scottish Water's Standard Terms. The pursuer's answer to this question was, in particular because of the background circumstances referred to, that Scottish Water's Standard Terms were strongly indicated.

[75] Senior counsel accepted that in each case, following the delivery of the materials, the defender had issued an invoice which had again referenced the defender's terms and conditions. However, the defender could still not point to any acceptance by the pursuer of the defender's terms and conditions.



[76] Accordingly, the pursuer submitted that, in all the circumstances, it could be inferred that the parties intended the other to ignore the repeated references to standard terms and conditions (cf *Tekdata* at paragraph 27). Senior counsel stressed the difference between the apparent consensus between the parties as to the application of Scottish Water's framework and the absence of any such agreement in respect of either parties' own terms and conditions (cf *TRW Limited* at paragraph 37).

#### Subsequent actions

[77] Under this heading, the pursuer focussed on two parts of the evidence. First, the pursuer highlighted that the invoices issued by the defender were issued in relation to the pursuer's account with them bearing the reference number CALE102S1C. The pursuer pointed to the evidence as to how the account had been initially set up under reference to Scottish Water's framework.

[78] Second, senior counsel noted that there had been no dispute in the evidence that the defender had provided Scottish Water with a rebate in respect of all of the materials ordered by the pursuer. The defender had been obliged, under the Framework Agreement, to make these rebate payments. This had been conceded by Mr Baillie in evidence. The pursuer submitted that this conduct provided strong evidence that the defender had intended that its supplies to the pursuer would be regulated by the Framework Agreement.

#### Commercial common sense

[79] Although advanced as a separate heading, this amounted essentially to a re-statement of the pursuer's position that a reasonable and honest business person would expect that the contracts between the parties would have been called off in accordance with

the Scottish Water framework. There were clear reasons why Scottish Water would wish a framework to be established and maintained in its supply chain. Mr Bath had touched upon these in evidence. They included, among other things, issues of design and insurance and indemnity. Equally, as Mr Baillie had recognised in his evidence, it would obviously not be in the interests of those who formed Scottish Water's supply chain to act in a way which was contrary to Scottish Water's interests.

### *Defender's submissions*

[80] Senior counsel for the defender moved me to sustain the defender's first plea of no jurisdiction and to dismiss the action.

### *Legal submissions*

[81] Senior counsel for the defender made observations about three of the cases referred to in the pursuer's submissions.

[82] First, senior counsel emphasised that the authorities and, in particular, the *Tekdata* decision, made clear that the traditional offer and acceptance analysis was to be adopted unless the circumstances showed the parties' common intention was otherwise (at paragraph 11 per Longmore, LJ and paragraph 25 per Dyson LJ). He noted that the exceptions to the traditional analysis were "conceptually possible" but rare (paragraph 1 per Longmore, LJ). In this regard, he also drew attention to Lord Justice Longmore's observation, at paragraph 21:

"So, although I am not saying that the context of a long term relationship and the conduct of the parties can never be so strong as to displace the result which a traditional offer and acceptance analysis would dictate, I do not consider the circumstances are sufficiently strong to do so in this present case. Indeed I think it will always be difficult to displace the traditional analysis, in a battle of forms case,

unless it can be said there was a clear course of dealing between the parties. That was never proved.”

[83] Senior counsel stressed in the present case, as in *Tekdata*, that it was necessary to have regard to what actually happened rather than what perhaps ought to have happened (paragraph 15). In *Tekdata*, as in the present case, Tekdata had sought to argue that the express printed terms of the parties’ documentation fell to be disregarded. Lord Justice Dyson had observed, at paragraph 27:

“In my judgment, such a conclusion could only be reached if Tekdata could show that the parties had expressly agreed that these words were to be ignored or if such an agreement was necessarily to be inferred from the circumstances of the case. I acknowledge that this is a high hurdle for Tekdata to surmount, but anything less would lead to an uncertainty which is inimical to commercial relationships.”

[84] Second, senior counsel referred to the observations of Lord Hodge in *Luminar Lava Ignite* (at paragraph 45) that facts known only to one party could not form part of the factual matrix which could assist the court in the construction of the contract. Circumstances had to have been known to both parties or at least such knowledge must reasonably have been available to both. Senior counsel submitted that there had to be limits to this. Senior counsel submitted that something was not reasonably available if it could only be found searching around in the undergrowth of the factual matrix.

[85] In the present case, there was a dispute between the parties as to what was known to both. The defender disputed that the pursuer knew that the defender was obliged to enter into contracts on Scottish Water’s Standard Terms. The defender also disputed that it was aware of the terms of the pursuer’s Alliance Agreement with Scottish Water.

[86] In this regard, senior counsel emphasised that the detail of what was known by each party was important. He submitted that the reality was that the primary objective of the pursuer was to obtain the materials. That was why the pursuer had focussed on the pricing

and specification of the particular items ordered. Neither party had had regard to Appendix B of the defender's Framework Agreement with Scottish Water (which contained Scottish Water's Standard Terms). Appendix B had not been the subject of discussion between the parties at the Framework/Contract meetings.

[87] Finally, in relation to *Baillie Estates*, senior counsel stressed what was said by Lord Hodge at paragraphs 25 and 26. It was necessary for the court to consider events as they unfolded in order to take an objective view of what reasonable people would have understood at the time. Neither party had referred to Scottish Water's Standard Terms. The parties had referred to Scottish Water's framework rates and had conducted themselves consistently with the use of those rates. However, that conduct was not, it was submitted, sufficient to displace the repeated references by both parties to their own standard terms.

[88] Senior counsel stressed that the reference by both parties to their own terms and conditions had to be regarded, on the evidence of both Mr McLean and Mr Baillie, as deliberate. Both had given evidence as to the fact that the procurement systems had been set up to ensure that standard terms and conditions were automatically attached to the contractual documentation which was generated.

#### *Application*

[89] Senior counsel relied upon six factors.

[90] First, neither of the parties had referred to Scottish Water's Standard Terms at the time when they concluded their contracts. Senior counsel submitted that analysing the exchange of documentation between the parties using the traditional offer and acceptance approach, the contracts were formed by the delivery of the materials by the defender, the acceptance of that delivery by the pursuer and payment by the pursuer. On this basis, he

submitted that the “last shot” was the submission of the order confirmation by the defender. However, even if the pursuer were correct about the delivery being referable to the pursuer’s purchase order rather than the defender’s order confirmation, the applicable terms and conditions would be those of the pursuer, referred to on the purchase order, and not Scottish Water’s Standard Terms.

[91] Second, and related to the first factor, neither party had referred to the terms of the pursuer’s Alliance Agreement with Scottish Water.

[92] Third, there was no evidence that the defender was aware of the terms of the Alliance Agreement. Senior counsel accepted that there was evidence that the defender was aware, at a general level, that the pursuer had contracted with Scottish Water. But, specifically, there was no evidence that the defender was aware that the pursuer was obliged to contract on the basis of Scottish Water’s Standard Terms. On this basis, senior counsel submitted that the fact of the pursuer’s obligation fell to be discounted from consideration as it was not knowledge of both parties.

[93] Fourth, there was no evidence that the pursuer was aware of the full terms of the defender’s Framework Agreement with Scottish Water. In particular, there was no evidence that the pursuer was aware of the Z clauses which contained the obligation in clause Z2.3, founded upon by the pursuer, requiring the defender to enter into contracts under Scottish Water’s Standard Terms. Senior counsel submitted that the evidence only went so far as to show that the pursuer had Scottish Water’s Standard Terms, the Supplier Guide and details of the rates and specifications. Senior counsel submitted that the critical witness for the pursuer on this point was Mr McLean. He had not spoken about seeing the Framework Agreement as a whole. Mr Bath had done so but he had been vague about when this happened and Mr Bath had accepted that Mr McLean was the man who mattered on this

point. As to the Supplier Guide, this did not say anything as to the terms of the Framework Agreement. Senior counsel submitted that a reasonable business person looking at the Supplier Guide would not infer that Scottish Water's Standard Terms were to be used.

[94] Fifth, both parties had purported to impose their own terms and conditions by use of the contractual documentation which had been exchanged which clearly referred to and sought to incorporate each side's terms. This was critical given that these exchanges occurred at the time when the contracts between the parties were formed. Senior counsel submitted that, notwithstanding the pursuer's witnesses seeking to play down the significance of the pursuer's terms and conditions, a reasonable business person would infer that these terms were intended to be used for project materials.

[95] Finally, senior counsel accepted that there was evidence to the effect that the automatic incorporation of terms and conditions was common in the water industry. However, he questioned why sophisticated parties would seek to do this. He submitted that the answer was obvious – parties did this because they wanted their terms to govern the relationship. In this regard, senior counsel invited me not to attach significance to Mr Baillie's difficulty in responding to the question of whether by seeking to impose the defender's terms and conditions, the defender was in breach of the Framework Agreement. Senior counsel submitted that the reality was that neither party had their obligations to Scottish Water in mind.

[96] In relation to other factors relied upon by the pursuer, senior counsel submitted that the quarterly Framework/Contract meetings were of no particular significance. Critically, for present purposes, there had been no discussion of the terms and conditions to be used. In the same way, senior counsel submitted that the opening of an account by the pursuer

with the defender had no contractual significance. It was a low-level administrative action which had nothing to do with the negotiation of the contracts.

[97] Drawing these strands together, the defender submitted that the pursuer asked far too much of the surrounding circumstances. These circumstances did not enable the court to conclude that the parties had intended, by either their words or conduct, that the express references to their standard terms and conditions be ignored. A reasonable business person would focus on the unambiguous language which each party had chosen to use repeatedly in the documentation exchanged.

### **Decision**

[98] There are two preliminary matters which narrow and focus the issue which requires to be determined.

[99] First, the parties are agreed that contracts were formed on the basis of the 60 purchase orders issued by the pursuer to the defender. In light of the fact that 60 orders were placed, the materials delivered and the invoices paid, I understand why there is consensus on this point. Accordingly, the dispute between the parties is not whether contracts were formed but rather on what terms.

[100] Second, the issue before the court is one of jurisdiction. This issue turns on whether, as the pursuer contends, the 60 contracts concluded between the parties are governed by Scottish Water's Standard Terms. Unless I conclude that Scottish Water's Standard Terms do govern the parties' contracts, it follows that this court does not have jurisdiction and that the defender's first plea-in-law ought to be sustained. Framed in this way, it is apparent that I should not seek to resolve the parties' competing contentions as which terms and

conditions govern their contracts in the event that I hold that Scottish Water's Standard Terms do not.

*The correct legal approach*

[101] The parties were in broad agreement as to the correct legal approach to be applied.

[102] In order to determine the terms upon which parties have concluded a contract requires an objective consideration of what has been communicated between them by words and action (McBryde at 5-46; *RTS Flexible Systems* at paragraph 45). Senior counsel for both sides invited me to approach matters on the basis of considering what reasonable and honest business people, in the position of the parties and having their shared knowledge of the surrounding circumstances, would have understood by the communications which passed between them (*cf Baillie Estates (OH)* at paragraph 25; *RTS Flexible Systems* at paragraph 86).

[103] In determining what could form part of the material to be considered by the court, both parties also invited me to have regard to Lord Hodge's observations in *Luminar Lava*

*Ignite* at paragraph 45:

"Facts which are known only to one party are not admissible as part of the surrounding circumstances. For such circumstances to be available to the court in its task of ascertaining how a reasonable person would interpret the words of the contract, the circumstances must have been known to both parties or at least such knowledge must have been reasonably available to both of them ..."

Senior counsel for the defender urged me to impose limits on determining what must have been reasonably available to the parties and, as he put it, not to "search in the undergrowth of the factual matrix". However, on considering what Lord Hodge says in paragraph 45 of his judgment together with the references to earlier authority that he makes, it would appear that the courts ought not to adopt "too narrow" an approach to this question (see

Lord Wilberforce in *Reardon Smith Line Ltd v Yvvar Hansen Tangen* [1976] 1 WLR 989



at 996E-F). As Lord Hodge puts it, referring back to Lord Drummond Young's judgment in *Emcor Drake and Skull Ltd v Edinburgh Royal Joint Venture* 2005 SLT 1233:

“Facts of which both parties were aware but which were not at the forefront of their minds may still form part of the objective setting of the contract or, in Lord Drummond Young's words, ‘the commercial context in which the contract occurs’ (para 13).”

[104] Both parties were agreed that, in dealing with so-called “battle of the forms” cases, the correct approach was that which had been adopted by the English Court of Appeal in *Tekdata* and which had been subsequently followed by Lord Malcolm in *Specialist Insulation* and, again by the Court of Appeal, in *TRW Limited*. From these cases, I consider one can derive three propositions. First, in this type of case in which there would appear to be a conflict between the parties' intentions, it is all the more important to approach the question of what the parties intended objectively (*Specialist Insulation* at paragraph 19). Second, the general rule is that a traditional offer and acceptance analysis, which often results in the “last shot” determining the outcome, is to be applied in this type of case. Such an approach has the significant benefit of providing “a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships” (*Tekdata* at paragraph 25 per Dyson LJ). Third, however, it is clear that where either there is express agreement between the parties or such an agreement can be inferred, it may be concluded that the parties intended to ignore the standard terms and conditions they had exchanged (*Tekdata* at paragraph 27 per Dyson LJ; and *Specialist Insulation* at paragraph 19).

#### *The evidence*

[105] As a starting point, I consider that all the witnesses from whom I heard were doing their best to recollect events accurately. Neither party challenged the credibility of the

witnesses in submissions. However, each party raised one issue in respect of the evidence. The pursuer submitted that Mr Baillie had prevaricated when challenged that an attempt by the defender to impose its own standard terms and conditions on the pursuer would represent a breach of the defender's Framework Agreement with Scottish Water (see [46] above). For its part, the defender submitted that Mr Bath had not been reliable in the evidence he gave as to the documentation to which the pursuer had access and, in particular, whether the pursuer was aware of the terms of the defender's Framework Agreement.

[106] I have addressed both of these issues below.

*Contractual background*

[107] In considering, objectively, what has been communicated between the parties in the present case, it is necessary first to determine what was known by both parties prior to the first order being placed by the pursuer with the defender on 29 June 2018. This, in turn, takes one to Scottish Water's framework because it was this set of arrangements which first brought the parties into contact with one another.

[108] It was clear from the evidence that the pursuer first became aware of the defender as a result of the latter being included on Scottish Water's Framework Supplier List as the designated supplier for ductile iron pipework. Several of the witnesses spoke to an email from Scottish Water dated 30 June 2015 to a number of Scottish Water's alliance partners including the pursuer and copying in the defender. This email stated:

"The new framework for DI Pipes and fittings will commence on 1 July 2015 and will run until 31 March 2021 with an option to extend for a further 6 x 1 years

From this date the preferred supplier is Electrosteel Castings UK. The key contact is Darren Wood.

If you know of anyone else who will utilise this framework that I have not included can you forward this on please?

Supplier manual will be with available soon [sic]

Can you confirm if you have any orders ready to be placed with any other DI suppliers? If so can you re-direct to Electrosteel for pricing and lead-times

If you have any questions on this please get in touch"

[109] This email refers to the Supplier Guide or manual which was prepared by the defender. The pursuer's witnesses, in particular Mr McLean, gave evidence about this document and there is no dispute that the pursuer was aware of it and its content.

[110] Following from the email dated 30 June 2015, at the instigation of the defender, the pursuer completed a form and set up a customer account with the defender with the account number CALE102S1C. This form referred both to Scottish Water and to a framework albeit it erroneously gave the equivalent English reference number. There was also evidence of the Scottish Water "Framework/Contract" meetings which had been attended by representatives of the parties as well as of Scottish Water in 2016.

[111] On the basis of this evidence, I find that it was clear to both parties at the outset of their relationship that the supplies to be made by the defender to the pursuer were to be made in the context of Scottish Water's framework. Given the way in which the parties established their relationship, any other conclusion would be impossible. However, the question which then arises is whether this common understanding extended to knowledge by both parties that their relationship was to be regulated by Scottish Water's Standard Terms.

[112] I consider that this question falls to be answered in the affirmative. I reach this conclusion for three reasons.

[113] First, it was the evidence of witnesses for both parties that, certainly at the outset, their relationship was to be regulated by and under Scottish Water's framework. That was the evidence both of Mr McLean, the pursuer's buyer, (at [16]) and of Mr Glenn Wheeler, the defender's head of sales (at [37]). I do not consider that this point is undermined by the fact that Mr McLean might not have been aware of the particular terms of the defender's Framework Agreement which required the defender to use Scottish Water's Standard Terms. Equally, Mr Wheeler's unawareness of the corresponding provisions in the pursuer's Alliance Agreement did not prevent him from understanding that the parties' relationship was to be governed by the Scottish Water framework. Neither Mr McLean, nor Mr Wheeler, nor indeed any other witness indicated that, at the outset, there was any intention that the parties' relationship was to be governed other than by and in terms of the Scottish Water framework.

[114] Second, there is also clear evidence that both parties at least knew of and had access to Scottish Water's Standard Terms. So far as the defender is concerned, these were contained in Appendix B of the Framework Agreement concluded with Scottish Water. As to the pursuer, on the basis of Mr McLean's evidence, I am satisfied that these terms and conditions were contained in the Document Library which was accessed by way of the Framework Supplier List.

[115] Third, this conclusion is strongly indicated by the Supplier Guide prepared by the defender and provided to the pursuer. In the introductory notes, the guide states that its purpose is to:

“- Provide a consistent standard of supplier information to the Framework Users for all Frameworks

- Enable the individual supplier to provide concise guidance as to the particular goods, services, plant and equipment they are providing within the Framework.
- Assist the Framework User to determine what goods, services, plant and equipment are available to meet their needs.
- Reduce the need and time taken related to Framework User/supplier communications, correspondence, clarifications etc by providing sufficient and suitable information.
- Ensure suppliers are treated fairly and consistently by the Framework Users."

[116] On the basis of these notes, it would be reasonable to infer that amongst the information to be covered by the guide would be the terms and conditions under which goods and services were to be supplied. Such an inference is confirmed by paragraph 3.5 of the guide where, under the heading "Supplier Scope" one finds the following information:

"3.5 Contractual Options

The supplier was awarded a Framework Agreement on the basis of the following deviations from SW's standard specifications and standard contractual terms:

N/A".

This paragraph makes it clear that, at the outset of their relationship, both parties were aware that Scottish Water's framework envisaged the use of Scottish Water's standard contractual terms and that the defender did not intend to deviate from them. I note that there is a further reference to the "Framework Agreement Terms and conditions" later in the guide which relates to indexation (see paragraph 9.4).

[117] In this regard, senior counsel for the defender challenged whether the pursuer was ever fully aware of the terms of the defender's Framework Agreement with Scottish Water (see paragraph [93] above). (It was on this point that senior counsel submitted that Mr Bath's recollection was not reliable and the evidence of Mr McLean should be preferred.) The defender also pointed to the absence of any evidence that the defender was aware of the

terms of the pursuer's Alliance Agreement with Scottish Water. On this basis, the defender disputed that there was any common understanding between the parties that their relationship was to be regulated by Scottish Water's Standard Terms. As I understood it, the defender's argument was that unless there was evidence that each party knew of their respective obligations to use Scottish Water's Standard Terms, then there was no evidence that the parties had a common understanding that these terms were to be used.

[118] I consider that the defender's argument is flawed because it over-elaborates the critical question. What matters is whether both parties shared a common understanding that their relationship was to be regulated by Scottish Water's Standard Terms not whether both parties shared a common understanding of why that should be the case. It is only when one delves into the underlying reasoning that each party's respective obligations becomes of significance. However, the defender's approach involves adopting an overly legalistic approach to a consideration of objectively determining the parties' intentions. Having established that the parties shared a common understanding that their relationship was to be regulated by Scottish Water's Standard Terms, I do not consider that the reasonable and honest business person would consider it necessary to probe further into the basis for each party's understanding.

*The contractual documentation*

[119] On the basis of my findings in respect of the background to the parties' contracts, the next stage in the analysis is to consider how the documentation exchanged between the parties should properly be construed.

[120] In approaching this issue, I do not consider that any material distinction falls to be made in relation to the 60 different orders placed by the pursuer with the defender. It was

notable that, in their submissions, neither of the parties sought to argue that any of the orders fell to be treated differently.

[121] As I have noted (at [10]), the parties helpfully agreed representative examples of the documentation which was exchanged. The parties also agreed, as an annex to the joint minute, a schedule detailing which documents were exchanged in respect of each of the 60 transactions. It is apparent from this schedule that, although not identical, the exchange of documentation always included the exchange of one of the pursuer's purchase orders and one of the defender's order confirmation forms. Accordingly, for present purposes what is important is that in respect of every one of the transactions, each party intimated documentation to the other which referred to their own standard terms and conditions.

[122] The pursuer's purchase order is self-evidently a pro-forma document which was completed by the pursuer. A copy of the agreed representative example is appended to my opinion (see Appendix 1). In the middle of the purchase order, the following text appears:

"Please supply undermentioned goods/undertake the following work, subject to the Purchase Conditions, and instructions hereon and over. If you cannot comply with this order kindly advise the undersigned immediately.

The Purchase Conditions shall prevail to the exclusion of any terms or conditions endorsed upon, delivered with or contained in the Supplier's quotations, acknowledgments or acceptances of orders, specifications or similar documents, or which are implied by trade, custom, practice or course of dealing, and the Supplier waives any right which it otherwise might have to rely on such terms or conditions."

Attached to the purchase order were the pursuer's standard terms and conditions.

[123] The defender's order confirmation is similarly a pro-forma document which was completed by the defender. Again a copy of the agreed representative example is appended to my opinion (see Appendix 2). The order confirmation states at the foot of the first page:

"This transaction is subject to our standard Terms & Conditions of Sale". From the evidence

I heard, it was apparent that the defender's standard terms and conditions were automatically attached to the order confirmation.

[124] Accordingly, both the purchase order and the order confirmation contain wording which apparently seeks to oust the incorporation of Scottish Water's Standard Terms. In these circumstances, the question which confronts the court is the same which one considered in *Tekdata* – adapting the formulation of Lord Justice Dyson (as he then was) – does the evidence show that it can be inferred from the circumstances that the parties had agreed that this wording was to be ignored?

[125] I consider that the answer to this question is that, in the circumstances of this case, such an agreement does fall to be inferred. I reach this conclusion principally for four reasons.

[126] First, prior to the first order being placed by the pursuer, as I have already held (at [111] and [112]), there was a common understanding between the parties that their relationship was under and in terms of Scottish Water's framework. Thereafter, it is apparent from the documentation exchanged that both parties were aware that the orders related to Scottish Water's South Edinburgh Project, the SERS project. The defender's quotations were addressed to "Caledonia Water Alliance (Scottish Water)" and gave the customer reference "South Edinburgh". The pursuer's purchase orders sought delivery to "CWA-South Edinburgh". The defender's order confirmations were again made out to "Caledonia Water Alliance (Scottish Water)". The order confirmations also quoted the pursuer's customer reference number CALE102S1C. Furthermore, it was clear from the evidence that, where applicable, the prices that were used were generated in accordance with the framework rates.



[127] Against this background, I consider that it is very significant that at no point during the multiple emails between the parties over the course of the placing of the 60 orders which conveyed the quotations, purchase orders and order confirmations to and fro between them, is there a single reference to any intention by either party to change the basis upon which the orders were to be dealt from the Scottish Water framework to any other basis. Standing the multiple references to each parties' terms and conditions in the documentation exchanged, this silence is particularly striking – why did neither party's representatives question the assertion of the other party's terms and conditions in the documentation which was exchanged?

[128] I consider that the answer to this can be found, in part, in the evidence of both sides' witnesses in respect of using their own terms and conditions. Both Mr McLean and Mr Baillie gave evidence that it was standard practice for both customers and suppliers to seek to impose their own terms and conditions. This evidence was consistent with what appeared to be the practice of both parties to have configured the process of sending documentation to automatically attach their terms and conditions. Mr McLean also explained the reason why he never checked the defender's terms and conditions despite the reference to those terms in the documentation which was exchanged. His position was that, within the water industry, having the framework arrangements was precisely to ensure consistent terms and rates. Mr Bath gave similar evidence in respect of the use of frameworks within the water industry. This was not challenged either in cross-examination or by contrary evidence by the defender.

[129] On the basis of this evidence, it is a reasonable inference from the parties' silence that both parties simply ignored both the inclusion of their own standard terms and conditions and receipt of the other party's in light of their shared understanding that their relationship

was to be governed by Scottish Water's framework. In other words, the parties intended the same regard to be paid to the references to the standard terms and conditions as they did to the paragraph in the defender's quotation concerning the defender's pricing (see paragraph [47] above) – none at all.

[130] This inference is supported by one aspect of Mr Baillie's evidence. Mr Baillie struggled to reconcile the defender's obligations under its Framework Agreement with the apparent attempt to impose its own terms and conditions (see [46]). It was submitted, on behalf of the pursuer, that this difficulty represented prevarication (see [105]). I do not agree. I consider that the reason Mr Baillie struggled to answer this point was, as he said when asked about it in re-examination, it had simply not occurred to him during the process of the orders being placed. The fact that this issue had not occurred to Mr Baillie at the time was precisely because, at that time, the defender was not intending to seek to impose its conditions on the pursuer.

[131] This brings me to the second reason why, in the present circumstances, I consider that an inference falls to be drawn that the parties intended that the wording referring to standard terms and conditions on the documents be ignored. The use by the parties of the purchase order and order confirmation documents was prescribed in the defender's Supplier Guide. Paragraph 3.8 of the Supplier's Guide sets out a procedure whereby a purchaser is to issue a purchase order with a unique reference number to the defender. The Supplier Guide makes the following provision in respect of what is described as "Order Acknowledgement":

"c) Order Acknowledgement

Following receipt of purchase order, a copy of the order acknowledgement will be sent out to the customer via e mail or post within 48 hours of receipt of a 'clean'

purchase order. We would request that this opportunity be taken to check the 'entered detail' in respect of:

- Quantity
- Price
- Specification
- Delivery due date
- Delivery address"

[132] In these circumstances and in the absence of any evidence pointing to a different conclusion, the subsequent exchange of documentation envisaged in the Supplier Guide is further evidence that the parties were seeking to act pursuant to Scottish Water's framework as opposed to trying to oust it. In this regard, it is notable that in the email correspondence contained in the Joint Bundle the defender never refers to documents which bear the title "Order Confirmation" by that title, instead using the term "Order Acknowledgment" which is consistent with the Supplier Guide.

[133] The third reason is connected to the second. Whereas the parties' actions in exchanging documentation in respect of each of the orders are consistent with the Supplier Guide and, as such, Scottish Water's framework, neither party acted consistently with their own standard terms and conditions.

[134] In the case of the pursuer, it is clear from both the layout and the wording of the purchase order that it is intended to be signed by a representative of the pursuer. This can be seen both from the use of the word "undersigned" in the first sentence of that part of the document which refers to the "Purchase Conditions" and from the signature box. None of the 60 purchase orders contained in the joint bundle of documents has been completed.

[135] As regards the defender's documentation, as the pursuer's counsel pointed out, clause 3.1 of the defender's terms and conditions stipulates that a contract shall only exist between the parties when an authorised representative of the defender accepts the

purchaser's offer. Again, this procedure was not followed in respect of any of the 60 orders placed by the pursuer with the defender.

[136] The fact that neither party appears to have acted in accordance with their own standard terms and conditions in the formation of the contracts between the parties is, therefore, a further factor which supports the inference that the parties intended the references to their standard terms and conditions simply to be ignored.

[137] The fourth and final reason for the inference that the parties did not intend to oust Scottish Water's framework is that it is supported by evidence of what the parties, and in particular, the defender did after the formation of the contract. As Lord Hodge confirmed in *Ballie Estates* (at paragraph 26), such evidence is relevant to the extent that it casts light on what reasonable people would have understood at that earlier time. As identified by counsel for the pursuer, I agree that the fact that the defender issued invoices which bore the pursuer's account number, CALE102S1C, issued to it by the defender also supports the inference that the defender considered that its relationship with the pursuer was regulated by the Scottish Water framework. I consider that the same is true of the fact that the defender provided Scottish Water with a rebate in terms of the Framework Agreement.

[138] For completeness, I note under this heading that insofar as the formation of each of the contracts is to be considered in isolation, the parties' actings in respect of the subsequent contracts would remain relevant in respect of the earlier contracts for the reasons identified by Lord Hodge.

### *Conclusion*

[139] In light of the foregoing, I conclude, first, that, considered objectively, prior to any orders being placed by the pursuer with the defender, the parties shared a common

understanding that their relationship was to be governed under and in terms of the Scottish Water framework including Scottish Water's Standard Terms. Secondly, I conclude that, in all the circumstances and for the reasons I have set out above, it is to be inferred that the parties intended that the references to their own standard terms and conditions in the documentation exchanged between them were to be ignored.

[140] In reaching these conclusions, I am conscious of Lord Justice Dyson's note of caution that drawing an inference that express words are to be ignored requires a high hurdle to be surmounted (*Tekdata* at paragraph 27). However, I also recognise, as did his Lordship, that each case requires to be considered, objectively, in light of its own circumstances. In this regard, I note, in particular, that the Court of Appeal in the subsequent case of *TRW Limited* considered that where parties had concluded an arrangement which was held to be akin to a "public procurement framework agreement", the subsequent attempts by one party to impose its own conditions by way of express wording were unsuccessful (at paragraph 49). Clearly, the position in the present case involves precisely the conclusion of such a framework agreement in terms of which both parties undertook to use Scottish Water's Standard Terms in place of their own.

[141] Although not expressly analysed in this way in *TRW Limited*, I consider that the conclusions I have reached are supported by Lord Drummond Young's approach in *British Overseas Bank* (see [52] above). In summarising the approach to contractual construction, his Lordship, in giving the opinion of the court said (at paragraph 7):

"The result of these cases is that contractual provisions must be construed in accordance with the objective intention of the parties: the intention that reasonable persons would have had in the parties' position had they possessed the same background knowledge. It is also appropriate to rely on commercial common sense. The exercise of construction should be both purposive and contextual. Purposive interpretation means that the court should attempt to give effect to the primary purposes that, objectively, the parties intended at the time of the contract.

Determining those purposes will obviously turn on the wording used, but that wording must be considered in such a way as to give effect to the primary objectives of the contract rather than giving undue influence to minor provisions or niceties of wording.”

In the present case, one of the primary purposes of the parties was to participate in Scottish Water’s framework. That is why they both entered detailed agreements with Scottish Water which, among other things, required each of them to contract with the other on the basis of Scottish Water’s Standard Terms.

### **Disposal**

[142] For these reasons, I hold that Scottish Water’s Standard Terms applied to the parties’ contracts and I will repel the defender’s first plea-in-law. I will put the case out by order so that I can be addressed on further procedure in the action in light of my decision. I will reserve all questions of expenses meantime.

## APPENDIX 1

7/20/3

### Purchase Order

No: W1175/00251705/K

Site Contact: ██████████	Tel. No.: ██████████	Date: <b>5 Oct 2018</b>
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Contract Number:	Contract Manager Telephone:	Contract Manager Name:
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**INVOICE MUST QUOTE FULL ORDER NUMBER AND SITE ADDRESS**

<b>Supplier: Electrosteel</b> <b>Electrosteel (Head Office)</b> <b>Ambrose Yard, Broombank Trading Estate, Broombank Road, Chesterfield, Derbyshire S41 9QJ</b>	<b>Contact: Glen Wheeler</b>  <b>Tel No: ██████████</b>	<b>Deliver To: CWA - South Edinburgh</b>  <b>Torduff Road, Edinburgh, EH13 0PB</b>  <b>Delivery Date: 5 Oct 2018</b>
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Please supply undermentioned goods/undertake the following work, subject to the Purchase Conditions, and instructions hereon and over. If you cannot comply with this order kindly advise the undersigned immediately.

The Purchase Conditions shall prevail to the exclusion of any terms or conditions endorsed upon, delivered with or contained in the Supplier's quotations, acknowledgments or acceptances of orders, specifications or similar documents, or which are implied by trade, custom, practice or course of dealing, and the Supplier waives any right which it otherwise might have to rely on such terms or conditions.

MUS Item No.	Supplier Item Code	Qty	Unit	Description	Price Per Unit	Barcode
MPS-279004	FSFS0500B0000AA	31.00	EACH	500MM FLANGED SOCKET EN545 BLUE PN16	████████	████████
MPS-279005	FSFS0700B0000AA	72.00	EACH	700MM FLANGED SOCKET EN545 BLUE PN16	████████	████████

Total Item Ordered Value: ██████████ GBP

Team Name: \_\_\_\_\_ Note: \_\_\_\_\_

All services approved by Caledonia Water Alliance in Accordance with current approved operating procedures and International Quality Standards. Revisions to be advised in writing.

In order to ensure compliance with The Control of Substances Health and Regulations (COSHH) 1994, Please forward Hazard Data Sheets relevant to Items supplied under this order.

Carriage: _____	Terms: _____	For and on Behalf of Caledonia Water Alliance: _____
Req No.: _____	Signature: _____	

Head Office  
**CALEDONIA WATER ALLIANCE**  
 Abel Smith House, Gunnels Wood Road,  
 Stevenage, Hertfordshire, SG1 2ST  
 Tel: 01438 743744 Fax: 01438 369687

Invoice Office  
**CALEDONIA WATER ALLIANCE**  
 Abel Smith House, Gunnels Wood Road,  
 Stevenage, Hertfordshire, SG1 2ST  
 Tel: 01438 743744 Fax: 01462 834829

## APPENDIX 2

6/148/1



Ambrose Yard, Broombank Trading Estate, Broombank Road, Chesterfield, Derbyshire S41 9QJ, UK  
Tel: 01246 264 222 Fax: 01246 264 224 Website: www.electrosteel.co.uk

**Order Confirmation No: ECL 2018/332284      Customer Order No: W1175/00237212/K      Order Date: 28/06/2018**

Customer Name & Address	Customer Details	Delivery Address	Electrosteel Details
Caledonia Water Alliance (Scottish Water) Abel Smith House Gunnels Wood Road Stevenage Hertfordshire SG1 2ST UNITED KINGDOM	Account: CALE102S1C Customer Ref: W1175/00237212/K Contact: Accounts Phone: Fax: Email: pl.invoices@morrisonus.com	Contact: Tel No:	Contact: James Wheeler Email: [REDACTED]  Territory: Scottish Water

## SPECIAL INSTRUCTIONS:

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Line	ECL Part Code	Description	Quantity	Unit Price	UoM	Total	Unit Weight	Line Weight	Due Date
1	FFBF0300B0000AA	300MM BLANK FLG EN545 BLUE PN16	7.00		Each		25.10 kg	175.70 kg	06/08/2018
2	FFBF0300B0000AA	300MM BLANK FLG EN545 BLUE PN16	21.00		Each		25.10 kg	527.10 kg	03/01/2019
3	FFTE0300B0200AA	300X200MM ALL FLG TEE(800MM LONG) EN545 BLUE	4.00		Each		98.30 kg	393.20 kg	06/08/2018
4	FFTE0300B0200AA	300X200MM ALL FLG TEE(800MM LONG) EN545 BLUE	24.00		Each		98.30 kg	2,359.20 kg	03/01/2019
5	FFTE0500B0500AA	500X500MM ALL FLG TEE EN545 BLUE PN16	6.00		Each		245.50 kg	1,473.00 kg	03/01/2019
7	FFTE0500B0500AA	500X500MM ALL FLG TEE EN545 BLUE PN16	2.00		Each		245.50 kg	491.00 kg	03/01/2019
6	FFTE0500B0500AA	500X500MM ALL FLG TEE EN545 BLUE PN16	5.00		Each		245.50 kg	1,227.50 kg	03/01/2019
8	FFTE0700B0700AA	700X700MM ALL FLG TEE EN545 BLUE PN16	3.00		Each		506.00 kg	1,518.00 kg	03/12/2018

This transaction is subject to our standard Terms & Conditions of Sale

VAT No: GB902600053

Co Reg: 4057880

ECL502-01  
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