

OUTER HOUSE, COURT OF SESSION

[2023] CSOH 29

CA62/22

OPINION OF LORD SANDISON

In the cause

MORAY OFFSHORE RENEWABLE POWER LIMITED

Pursuer

against

BLUEFLOAT ENERGY UK HOLDINGS LIMITED

Defender

Pursuer: D M Thomson KC, Tariq; Burness Paull LLP
Defender: Dean of Faculty, McWhirter; Brodies LLP

9 May 2023

Introduction

[1] In this commercial action the pursuer seeks decree for payment to it by the defender of £400 million by way of damages, claiming to have suffered loss in that sum by way of an unlawful means conspiracy amongst the defender and others, or alternatively as a result of unlawful means deployed by the defender. The defender maintains at debate that the action should be dismissed as irrelevant, or at least that certain of the pursuer's averments should be refused probation.

Background

[2] The seabed around Scotland is held on behalf of the Crown by Crown Estate Scotland. In 2017, it announced a project known as ScotWind Leasing, the object of which was to grant lease options over areas of the seabed in order to facilitate the development there of offshore wind farm capacity. The pursuer was incorporated as an indirectly wholly-owned subsidiary of OW Offshore SL, more familiarly known as Ocean Winds, a Franco-Spanish joint venture company with experience in offshore wind power generation, with a view to attempting to participate in the project, and in 2021 it bid for the lease options over five of the seventeen lease sites made available, which was the maximum number of sites that any one applicant could bid for. It was particularly interested in a floating wind farm site known as NE6. The rules of the bidding process placed very particular emphasis on the expertise and experience at project, corporate and individual levels which any particular applicant could bring to bear as a matter that would be accorded significant weight in the assessment of the bids by Crown Estate Scotland. Experience (particularly of previous comparable projects) was considered important because the construction and operation of large offshore wind farms, especially floating wind farms, is a highly complex engineering exercise, and Crown Estate Scotland wanted so far as possible to be assured that applicants would actually be able to complete and successfully operate the projects for which they were bidding. As is usual in bidding processes for contracts with public entities, it was made clear that only the material that was presented as part of a bid would be taken into account in determining the successful applicant. All bidders were required to acknowledge that they were aware that Crown Estate Scotland would be acting in reliance on the information in their bids, and were required to confirm (to a degree in dispute in this case) that that information was comprehensive, accurate and up to date.

[3] The pursuer's bid for the NE6 site was unsuccessful, although it was successful in other bids. The successful bidder for NE6 was a consortium consisting of the defender and ten other corporate entities. The defender is part of a group of companies associated with BlueFloat Energy International SL. The pursuer was unaware of any of the consortium members having significant experience in floating wind farm projects, but became aware that BlueFloat Energy International SL was making public statements suggesting that it was participating in the ScotWind bidding process and was, further, making claims about its relevant experience in the field which the pursuer considered to be untrue. The pursuer commenced the present proceedings and in that context obtained extracts from the bid made by the defender's consortium for the NE6 site lease. It became apparent that that bid had made certain claims about the experience and expertise of members of the consortium and certain of their employees said to have been gained in a previous offshore windfarm project known as WindFloat Atlantic. The pursuer considers that the claims made in the bid were materially inaccurate, maintaining that neither BlueFloat Energy nor any of the consortium partners was involved in that project, and thus had no relevant corporate experience or expertise as claimed. The pursuer further claims that the experience of individual employees of BlueFloat Energy as set out in the bid was grossly exaggerated, false and misleading. It claims that that gave Crown Estate Scotland had a right of action against the defender and its consortium partners. The defender strenuously denies that any claim it or its consortium partners made in the bidding process was materially inaccurate.

[4] The pursuer maintains that the members of the defender's consortium agreed and combined in submitting their bid with a common intention to injure the interests of any other bidding party, including the pursuer, as a corollary of their desire to advance their own interest in winning the NE6 site bidding process. It maintains that they agreed and

combined in order to effect that desired outcome by an unlawful means, namely the making of false claims in the bid which would be relied on by Crown Estate Scotland and increase their bid's score to the detriment of other bidding parties. That unlawful act is said to have been actionable as a breach of contract by Crown Estate Scotland. The unlawful means deployed are said to have affected the freedom of Crown Estate Scotland to deal with the pursuer by distorting the bidding competition and preventing or at least hindering the comparison of bids on a fair basis. Crown Estate Scotland could not award the contract for the NE6 lease site to the pursuer when its bid had ranked below the defender's bid. The pursuer claims that in a bid process which proceeded upon the basis of accurate statements of relevant experience and expertise it would have won the NE6 site lease option, and having failed to do so as a result of the actions of the defender complained of, lost the substantial profit it would have made from the project, or at any rate a material chance of winning the lease option and making such profit, which it estimates as amounting to at least £400 million over the projected lifetime of the ScotWind project.

Defender's submissions

[5] On behalf of the defender, senior counsel made the following written and oral submissions:

Causing loss by unlawful means

[6] In order to establish that the defender had caused the pursuer loss by unlawful means the pursuer would have to prove that the defender (i) had an intention to cause economic harm to the pursuer (ii) by the use of unlawful means, which means (iii) affected Crown Estate Scotland's freedom to deal with the pursuer: *Global Resources Group Ltd* v

Mackay [2008] CSOH 148, 2009 SLT 104 at [17], see also *McLeod* v *Rooney* [2009] CSOH 158, 2010 SLT 499.

Intention

[7] A relevant intention to cause loss would arise if the pursuer established that the defender (a) wished to inflict loss on the pursuer, or (b) the pursuer's loss was a means by which the defender attained some further end, such as its own economic advantage. The pursuer did not claim that the first alternative applied here. In respect of the latter, it was not sufficient that harm to the pursuer was a foreseeable consequence of the defender's actions. Foresight on the part of the defender that its unlawful conduct might or probably would damage the pursuer could not be equated with the relevant intention: *OBG Ltd* v *Allan* [2007] UKHL 21, [2008] 1 AC 1 at [62], where Lord Hoffmann noted that it was:

> "necessary to distinguish between ends, means and consequences. One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions",

and at [166], where Lord Nicholls of Birkenhead observed that:

> "A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant. This intent must be a cause of the defendant's conduct, in the words of Cooke J in *Van Camp Chocolates Ltd* v *Aulsebrooks Ltd* [1984] 1 NZLR 354, 360."

[8] In any event, it was necessary that the defender had to intend to injure the pursuer in particular. In the present case the pursuer did not aver that the defender knew that the pursuer was bidding for the NE6 site lease option, and so the requirement of intention to

injure the pursuer was not met. Reference was made to *Secretary of State for Health* v *Servier Laboratories Ltd* [2021] UKSC 24, [2022] AC 959 at [96]–[99]. The pursuer's attempt to overcome this difficulty by averring that the defender must have known that the pursuer was going to bid for the NE6 site because a former employee of a company associated with the pursuer had gone to work for the defender in mid-2021 was entirely speculative and accordingly not a relevant basis for that claim. Similarly, there was no proper basis for the allegation that the defender would have known from the pursuer's general reputation in the market that it was going to bid for NE6 as one of its selected sites, rather than for one or more of the other sites on offer.

[9] Further, the means said to have been used to attain the defender's end was the claimed inflation of its own employees' experience, not any disparagement of the pursuer's experience. Damage to the pursuer was, accordingly, not the means of attaining the defender's desired end. The pursuer's failure to obtain the lease of the site was merely a foreseeable consequence of the defender's alleged actions. Gain to the defender and loss to the pursuer were not two sides of the same coin, as the defender's actions did not prevent the pursuer from setting out its own experience as it chose. The defender could theoretically have achieved a gain by inflating its own experience, without causing any loss to the pursuer's score. The pursuer achieved the same score it always would have achieved, and was in no way prevented from putting forward its own position in its own bid.

Unlawful means

[10] The pursuer had to aver the use of unlawful means – ie the commission of a wrong that would have been actionable by the third party, Crown Estate Scotland. Here, the alleged wrong, whatever its precise legal categorisation, depended on there having been

some form of misrepresentation, a claim advanced on two bases: firstly, that the defender itself had no involvement in WindFloat Atlantic project; and secondly, that the defender's employees were not "crucial" participants therein. Those contentions were flawed. The defender had never claimed that it had been involved, as a corporate entity, in the WindFloat Atlantic project. It had put forward the experience of its employees as relevant. The bidding documentation drew clear distinctions between project experience, corporate experience and individual experience, and was clear that applicants could rely on the experience of their staff at the appropriate point in their bids, which was what the defender had done. Crown Estate Scotland was well aware that applicants (and indeed the ultimate tenants in terms of the lease options to be granted) could be SPVs, which would self-evidently not have experience as corporate entities, but would rely on the experience of their staff.

[11] Further, the statements complained of were not representations of fact, capable of objective verification. They were all statements of opinion, or "puffs", for example that the participation of certain employees in the WindFloat Atlantic project had been "crucial". It was entirely unclear how the court could ever determine that that was a material misstatement of fact such as to amount to an actionable wrong committed by the defender. The law remained as stated by Lord Chelmsford LC (in the context of a prospectus for public subscription to a company) in *Central Railway Co of Venezuela* v *Kisch* (1867) LR 2 HL 99 at 113:

> "In its introduction to the public, some high colouring, and even exaggeration, in the description of the advantages which are likely to be enjoyed by the subscribers to an undertaking, may be expected, yet no misstatement or concealment of any material facts or circumstances ought to be permitted"

[12] At best for the pursuer, what it complained of could be no more than "high colouring" or "exaggeration" of experience and did not amount to "misstatement or concealment of any material facts or circumstances". Similarly, it was of some moment that the only alleged misrepresentation was said to relate to the defender's own experience, with no attack having been made on that of the pursuer. It was settled in *White* v *Mellin* [1895] AC 154, at 165 per Lord Herschell LC that:

> "Every extravagant phrase used by a tradesman in commendation of his own goods may be an implied disparagement of the goods of all others in the same trade; it may attract customers to him and diminish the business of others who sell as good and even better articles at the same price; but that is a disparagement of which the law takes no cognizance."

[13] In *Erven Warnink BV* v *J Townend & Sons (Hull) Ltd* [1979] AC 731 at 742, Lord Diplock had noted that:

> "Exaggerated claims by a trader about the quality of his wares, assertions that they are better than those of his rivals even though he knows this to be untrue, have been permitted by the common law as venial "puffing" which gives no cause of action to a competitor even though he can show that he has suffered actual damage in his business as a result."

[14] Finally in this context, the claimed falsehoods were in a pre-contractual setting and if they were indeed untrue, that did not amount to any breach of contract as claimed by the pursuer. The bid documentation noted that the actual contract under contemplation, the lease option, might be entered into with an SPV created for the purpose, and any ability of Crown Estate Scotland to withdraw from that contract on the basis of false information in the bid was not in consequence of any cause of action which it had against the defender and the other consortium members. Accordingly, any exaggeration which might have been present in the defender's bid had not been shown, at least on the pursuer's pleadings, to have been actionable in the relevant sense by Crown Estate Scotland.

The dealing requirement

[15] Unlawful means consisted of acts intended to cause loss to the pursuer by interfering with the freedom of a third party, here Crown Estate Scotland, in a way which was unlawful as against that third party and which was intended to cause loss to the pursuer. It did not include acts which might be unlawful against a third party but which did not affect that third party's freedom to deal with the pursuer: *OBG* at [51]. The dealing requirement was affirmed by the Supreme Court in *Servier* in the face of argument that it should be altered or removed – see [94] and [95]. However, the pursuer was not prevented by any conduct of the defender from submitting its own tender response in the way it wanted. Nothing the defender did affected the score that the pursuer received, or affected Crown Estate Scotland's ability to consider and evaluate the pursuer's bid. Accordingly, the present case fell within the description given by Lord Hamblen JSC, speaking for the majority of the Supreme Court (with no dissent thereto in the concurring speech of Lord Sales JSC) in *Servier* at [87]:

> "[Counsel for the appellants] questioned why as a matter of justice, if a defendant obtains patent protection by deceit practised on the EPO so as to profit at the expense of the NHS, redress should be denied because the EPO does not trade with the NHS. One answer is the distinction between this case and the other examples given, namely that there is no suggestion of any lies being told by the respondents about the appellants or its property or anyone they dealt with. The alleged lie is about the respondents' own purported invention and does not in any way relate to the appellants. In such circumstances any damage to the appellants would be 'remote', the term used by Lord Lindley in *Quinn v Leathem* [1901] AC 495".

[16] By the same token, here the claim was that the alleged "lie" was told about the defender's experience – not that of the pursuer. That did not satisfy the "dealing" requirement as defined in *Servier*.

Instrumentality and causation

[17] The alleged unlawful means must in fact have caused loss to the pursuer, rather than merely being the occasion of such loss being sustained: *Racing Partnership Ltd* v *Done Bros (Cash Betting) Ltd* [2020] EWCA Civ 1300, [2021] Ch 233 per Arnold LJ at [154]; *Servier* at [92]. In three-party situations, the function of the delict of unlawful means was to provide a remedy where the pursuer was harmed through the instrumentality of a third party. The pursuer did not aver a relevant case as to how the unlawful means were acted on by Crown Estate Scotland in a manner which caused it loss, alleging only that it reasonably believed that they led to inflation of the defender's score in the bid evaluation process and interfered with the integrity and fairness of the competition process. There was no sufficient stated basis for the reasonable belief claimed. There was no averment that the pursuer and the defender were the only participants in the bidding process for the NE6 site. The use of the "believed and averred" formulation in this context was no more than an attempt to "salve the conscience of the pleader": *Brown* v *Redpath Brown & Co Ltd* 1963 SLT 219. Although the pursuer claimed that, due to lack of actual knowledge of how bids were evaluated, it could go no further than averring its reasonable belief, it could have sought to investigate the matter with Crown Estate Scotland, with or without the assistance of the Court. It certainly could at least have stated its own score. Instead, it chose to rely on vague statements about its own experience and expertise which were difficult to reconcile with its having lost in three bidding competitions for floating sites, one to the defender and two to other bidders. The pursuer had failed relevantly or specifically to aver why the defender, by allegedly inflating its experience of the WindFloat Atlantic project, was successful in its bid at the expense of the pursuer. As a matter of causation of loss, the pursuer's case failed.

Unlawful means conspiracy

[18] A conspiracy to injure by unlawful means was actionable where the pursuer proved that it had suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defender and another person or persons to injure him by unlawful means: *Kuwait Oil Tanker Co SAK* v *Al Bader (No 3)* [2000] 2 All ER (Comm) 271 at [108]. In respect of unlawful means conspiracy, it is "in the fact of the conspiracy that the unlawfulness resides": *Crofter Hand Woven Harris Tweed Co Ltd* v *Veitch* [1942] AC 435, per Lord Wright at 462. It was necessary to scrutinise the acts relied upon in order to see what inferences could be drawn as to the existence or otherwise of the alleged conspiracy or combination – *Kuwait Oil Tanker* at [112]. The pursuer's case in relation to unlawful means conspiracy was predicated on the basis that the defender and its consortium partners had submitted their bid with a statement confirming that all information provided was comprehensive, accurate and up to date. However, it was clear from the bid documentation that that confirmation was required to be provided only insofar as the information in the application related to the particular consortium partner giving the confirmation in question. In other words, each consortium partner, by signing the confirmation statement, only warranted that the information provided in relation to it was comprehensive, accurate and up to date.

[19] The pursuer's case was based on statements which were said to be false in respect of the WindFloat Atlantic project only, and relating to the alleged exaggeration of expertise, whether corporate or employee, by the defender in relation to that project. The pursuer did not and could not aver that any of the defender's project partners was involved in WindFloat Atlantic. It was incorrect to suggest that the consortium partners had in any way certified all information in respect of WindFloat Atlantic as "comprehensive, accurate and

up to date". There was no conspiracy, as the statements of the consortium partners were irrelevant insofar as relating to the information about WindFloat Atlantic. The pursuer's pleadings therefore failed to make out a relevant case of "unlawful means conspiracy" as they failed to identify a relevant basis for the "cooperation of the minds of the conspirators in pursuance of the unlawful design" – *British Industrial Plastics Ltd* v *Ferguson* [1938] 4 All ER 504.

[20] In any event, the pursuer had failed to aver a relevant case of unlawful means conspiracy. Its case was that the defender, and its consortium partners, had acted in concert to misrepresent the defender's experience in respect of WindFloat Atlantic. Knowledge of unlawfulness of the means to be used was a requirement of the delict of unlawful means conspiracy. Each conspirator had to have had that knowledge: *Racing Partnership* at [143] and [147]. Fraudulent misrepresentation required knowledge or positive belief that the statement in question was not true. Mere negligent misrepresentation, which was all that the pursuer's formulation that the consortium partners either knew or "ought to have known" of the falsity of the representations made actually offered to prove, was an entirely insufficient basis upon which to found an allegation of conspiracy. The pursuer did not aver a basis on which the consortium partners had the requisite knowledge. Its averments therefore failed to disclose a relevant "cooperation" or "agreement" and accordingly failed relevantly to aver a conspiracy.

[21] The pursuer's reliance on references to the members of the defender's consortium as its "partners" in this connection was misplaced. "Partner" was defined in the bid documentation as a collective term for lead applicant and the organisations associated with it in the bid, nothing more. In particular, there was no implication that all of the partners were claiming the same experience.

[22] There was, further, no relevant averment of intention to injure. It was "elementary that persons who allege that they are the victims of a conspiracy to injure must prove the conspiracy to injure. They must show that there was a guilty intention to injure in the minds of those whose acts they complain of, and not an innocent intention to further their own interests, or what they honestly conceive to be their own interests": *Crofter Hand Woven Harris Tweed* at 154. For the reasons already advanced, the pursuer's pleadings failed to meet the requisite test.

[23] The pursuer could not keep its claim alive on the basis that it might in due course uncover a new basis upon which to found a conspiracy – *Maroney* v *Hugman* 1997 SLT 240. The pursuer's case in respect of unlawful means conspiracy was bound to fail as the pleadings stood, and should be dismissed.

Public statements

[24] Finally, Article 15 of the Summons, though much reduced by way of adjustment from its original form, continued to narrate a statement that had been made by BlueFloat Energy International SL on its website in respect of the WindFloat Atlantic project. However, the pursuer's case was based on information provided to Crown Estate Scotland as part of the defender's bid being false or misleading. There was no suggestion by the pursuer that website statements formed any part of Crown Estate Scotland's consideration of the defender's bid, and any such consideration would be contrary to the terms of the bidding process. The remaining averments in Article 15 were accordingly irrelevant and ought not to be admitted to probation regardless of what else was to happen in the action.

Pursuer's submissions

[25] On behalf of the pursuer, senior counsel invited the court to appoint the cause to a proof before answer. The pursuer's case was both sufficiently specific and relevant in law to require such a proof.

Causing loss by unlawful means

[26] The essential ingredients of the delict of causing loss by unlawful means were: (i) the defender had the intention to cause economic harm to the pursuer; (ii) the defender acted unlawfully in relation to a third party; and (iii) such unlawful action affected that third party's freedom to deal with the pursuer – *McLeod* v *Rooney* at [17]; Global *Resources Group* v *Mackay* at [17]; and *OBG* at [51]. The pursuer needed to aver and establish all of these matters to succeed.

Intention

[27] The defender must have had the intention to cause economic harm to the pursuer. In this action, however, the defender and its consortium partners' gain and the pursuer's loss were inseparably linked because of the nature of the competitive process. If the defender and its consortium partners were to succeed in the process, the pursuer would fail in that process. Its economic expectations would be damaged. In *OBG*, Lord Nicholls of Birkenhead explained at [164]–[165] that:

> "A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge against the claimant. More usually a defendant intentionally inflicts harm on a claimant's business as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests.

…

> Intentional harm inflicted against a claimant in either of these circumstances satisfies the mental ingredient of this tort. This is so even if the defendant does not wish to harm the claimant, in the sense that he would prefer that the claimant were not standing in his way. "

[28] Similar statements of the law were made in Lord Hoffmann's speech at [62] in *OBG*; and in *Global Resources Group* at [17] and [21]. Thus, the relevant intention to cause loss arose either (i) if the defender wished to inflict loss on the pursuer; or (ii) the pursuer's loss was a means by which the defender attained some further end, such as its own economic advantage. This was a case which fell into the second category.

[29] In support of that position, the pursuer averred the following: (i) there was an intention of the defender and other members of its consortium to injure the pursuer and other bidders in the competition process, as the corollary of their intention to advance their own interests by unlawful means, by way of the making of false statements; (ii) the defender knew that in making false claims about its expertise and experience in the bid, the defender and other members of its consortium inflated the potential scoring of their bid based on the scoring methodology described in the bidding guidance notes; and that the benefit which would accrue to it as a result would injure the pursuer and other competing bidders whose bids were also being scored as part of the same competitive process; (iii) although the principal objective of the defender and its consortium partners making the false claims in the tender submission was (one imagined) to secure to themselves the commercial benefit of winning the tender, their conduct also necessarily had the objective of depriving other bidders, including the pursuer, of that benefit and thereby harming the pursuer's economic interests; (iv) causing loss to the pursuer was the means by which the defender and its consortium partners could achieve their desired objective of ranking above

the pursuer and the other bidders; and (v) the defender and its consortium partners knew, or ought to have known, that their gain and the pursuer's loss were inseparably linked because of the nature of the competitive process.

[30] The necessary intention existed because the loss to the pursuer, and the gain to the defender, were two sides of the same coin. If the defender's false or misleading statements about its own experience and expertise inflated its scoring, and led to it succeeding in the process, the other side of the same coin was that the pursuer would fail in that process. In this respect, Lord Nicholls of Birkenhead noted in *OBG* at [167]:

> "Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort."

[31] The pursuer had, further, averred that it reasonably believed that the defender actually or constructively knew, through its recruitment of persons formerly employed by companies associated with the pursuer, that the pursuer would be submitting bids in the ScotWind project, including in respect of the NE6 site, and in any event that that would have been reasonably obvious to anyone involved in the industry. While the defender disputed that it knew or had any reason to believe that the pursuer was bidding for the NE6 site, it had not committed itself to any wider proposition and the dispute about exactly what the defender did or did not know on that subject could only be resolved by proof.

[32] In any event, it was sufficient in law that the defender and its consortium partners had the requisite intention to injure all other bidders in the competitive process for the NE6 site, whomsoever they might be, as this was the corollary of its intention to advance its

own interests in the same process by unlawful means. The defender's argument that it could only be liable if it intended specifically to target the pursuer, and not merely the class of all bidders apart from its own consortium, was based on a discussion of an academic paper by Lord Sales and Professor Davies in the *Servier* case at [96]–[99]. The authors of that paper had proposed reformulating the tort of causing loss by unlawful means with a narrower definition of intention. However, Lord Hamblen had noted at [97] that the Supreme Court was not invited to revisit the intention test in *OBG* on the basis of that academic paper and that, in any event, *Servier* was not an appropriate case in which to do so. Lord Hamblen further noted at [98] that a similar proposal in an earlier academic paper by Lord Sales had been rejected by Lord Hoffmann in *OBG*. In that case, Lord Hoffmann explained at [60] that:

> "I do not think that the width of the concept of 'unlawful means' can be counteracted by insisting upon a highly specific intention, which 'targets' the plaintiff. That, as it seems to me, places too much of a strain on the concept of intention. In cases in which there is obviously no reason why a claimant should be entitled to rely on the infringement of a third party's rights, courts are driven to refusing relief on the basis of an artificially narrow meaning of intention which causes trouble in later cases in which the defendant really has used unlawful means."

[33] The narrow test of intention argued for by the defender was accordingly incorrect as a matter of law.

Unlawful means

[34] A condition of the delict was that the defender must have acted unlawfully in relation to a third party. In *OBG*, Lord Hoffmann explained at [49] that:

> "In my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss."

[35] In the present action, the false claims made by the defender in the bid submission and their confirmation by it and other members of its consortium that the information provided was accurate were the unlawful means upon which the pursuer relied. The submission by the defender of a bid which contained materially untrue statements would be actionable by Crown Estate Scotland against the defender and its consortium partners as a breach of contract. The bidding documentation separately permitted Crown Estate Scotland in such circumstances to "take such measures or steps as it considers necessary, including exclusion [of applicants] from the ScotWind Leasing process."

[36] The false or misleading statements relied upon in the action fell into five broad categories: (i) statements to the effect that the defender was involved in the WindFloat Atlantic project, despite the fact that it was not involved in that project; (ii) statements to the effect that the defender and its consortium partners were involved in the WindFloat Atlantic project, despite the fact that none of them was so involved; (iii) statements to the effect that the defender's employees were involved in specific aspects of the WindFloat Atlantic project when none of those employees was involved in those aspects of that project; (iv) statements that exaggerated the role and involvement of the defender's employees in the particular aspects of the WindFloat Atlantic project in which they were involved; and (v) statements that exaggerated the role and involvement of the defender's employees more generally in the WindFloat Atlantic project. The pursuer averred that: (i) the defender had made false claims as to its experience and expertise in its bid; (ii) the defender and other members of its consortium had submitted a false confirmation that the claims of expertise and experience in the bid were accurate; (iii) the consortium partners had joined with the defender in those false claims as some of the claims related to the experience of all of them arising from the WindFloat Atlantic project, whereas they all knew that none of them had any experience in

that project; (iv) given the terms of the bidding exercise, Crown Estate Scotland must have relied on the information provided when evaluating and scoring the defender's consortium's bid; (v) the unlawful acts would be actionable by Crown Estate Scotland as a breach of contract; and (vi) separately, the bidding rules provided that where Crown Estate Scotland was of the view that competition might have been distorted, it might take such measures or steps as it considered necessary, including terminating any lease option agreement awarded in consequence of that distortion.

[37] While the defender pointed out that it had only been incorporated in 2020 specifically to participate in the ScotWind project, and therefore obviously was not involved in the earlier WindFloat Atlantic project, that did not excuse it from making false statements about such involvement. It was not known whether Crown Estate Scotland knew that the defender and its consortium partners were not involved with the WindFloat Atlantic project, or whether and to what extent it relied on and gave credit for statements to the contrary. Those were matters for proof.

[38] The defender further claimed that a corporate entity could not itself have experience and that such experience must reside in its staff. However, the bid documentation identified project experience, corporate experience and individual experience separately, so that the experience of individuals working for the defenders and its consortium partners could not properly be claimed as corporate experience.

[39] The defender's next claim, that the extent and degree of involvement of its current employees in the WindFloat Atlantic project were not representations of fact capable of objective verification, but rather statements of opinions or "puffs", was plainly incorrect. The bid stated what were claimed to be facts about what those employees had supposedly done in the WindFloat Atlantic project which were capable of being subjected to objective

assessment. Further, the nature of the bid process entitled (if it did not indeed require) Crown Estate Scotland to rely on whatever claims were made without further investigation. Each bidder had to confirm expressly that the information provided was comprehensive, accurate and up to date. That left no room for any "puff" such as might be found in entirely different trade competition scenarios, such as those being considered in the cases cited by the defender.

The dealing requirement

[40] It was a condition of the delict that the unlawful action in question must affect the third party's freedom to deal with the pursuer. In the present case, the bid of the defender and its consortium partners ranked above that of the pursuer based on their false claims of experience and expertise relating to the WindFloat Atlantic project. This affected Crown Estate Scotland's freedom to deal with the pursuer. It could not award the contract for the NE6 site to the pursuer in circumstances where the pursuer had ranked below the defender and its consortium partners in the bidding process for that site. More fundamentally, Crown Estate Scotland's freedom to deal with the pursuer (and all other tenderers) depended upon the submission of tenders which did not contain materially untrue statements, in breach of the terms of the tendering process.

[41] Lord Hoffmann explained in *OBG* at [46] that the delict focuses on a person's liberty or right to deal with others and on wrongful interferences with that liberty to deal. Baroness Hale of Richmond in the same case at [306] described the wrong on the third party as "inhibiting his freedom to trade with the target". Nothing in *Servier* had changed that. The pursuer averred that: (i) the unlawful means of the defender and its consortium partners affected the freedom of Crown Estate Scotland to deal with the pursuer; (ii) there

was a competitive process conducted by the application of published scoring criteria, in which 125 points out of a total of 450 were linked to the section of the bid which included questions relating to experience and capabilities; (iii) broadly put, it was of the essence of the competitive tendering process that Crown Estate Scotland ought to have been able to deal with the pursuer in circumstances where all submitted tenders (or at least those of the pursuer and the defender's consortium) were assessed on the basis that they were true and accurate and could accordingly be compared on a fair basis; (iv) the unlawful means interfered with the integrity and fairness of the competitive tendering process deployed by Crown Estate Scotland; and (v) the unlawful means interfered with the freedom of Crown Estate Scotland to deal with the pursuer, whose bid was scored as part of the same competition process and using the same methodology.

[42] The defender's position, that nothing done by it affected the score that the pursuer received, missed the point. The defender's inflated ranking affected the ability of Crown Estate Scotland to deal with the pursuer. The pursuer had averred a relevant case that the unlawful action of the defender and its consortium partners affected Crown Estate Scotland's freedom to deal with the pursuer.

Instrumentality and causation

[43] The unlawful means had to have caused loss to the pursuer. The pursuer averred that: (i) in consequence of the defender's conduct it had suffered substantial loss; (ii) it reasonably believed that in a tender process assessed on the basis of accurate statements of relevant experience and expertise it would have won the NE6 site; (iii) in consequence of the defender's conduct, it did not do so; (iv) it had lost the substantial profit it would have made from the project, or at any rate had lost a material chance of winning the tender and

making such profit; and (v) had it won the tender, it conservatively estimated that it would have generated profit of at least £400 million over the projected lifetime of the ScotWind project.

[44] The defender's claim that there was no adequate basis for the belief that the pursuer would have won the NE6 site but for the defender's false statements was misplaced. Without knowing how Crown Estate Scotland scored the submissions, the pursuer's averments on causation necessarily had to proceed on reasonable belief. The pursuer's reasonable belief was based on the scoring methodology as already described, and on Crown Estate Scotland's contractual right to rely on the information contained in the bids. The defender was entitled to call into question the pursuer's belief as to what the outcome of the bid process would have been, but that was a matter for proof. For the purpose of this debate, the pursuer's averment that "it reasonably believes and avers that in a tender process assessed on the basis of accurate statements of relevant experience and expertise it would have won the NE6 tender" was sufficient to be admitted to probation. Reference was made to *Burnett* v *Menzies Dougal WS* [2005] CSIH 67, 2006 SC 93 at [17] for the proposition that it was sufficient for the pursuer's pleadings to be relevant that the averred circumstances were capable of being held to support the averred inference. The circumstances averred here could only be evaluated after proof. The basis of the pursuer's reasonable belief was that NE6 was a site for a floating wind farm, that the bid process favoured those with experience more applicable to offshore wind project development, that the pursuer's parent company was one of the leading developers of offshore wind farms in the world, that the number of developers with proven expertise and experience in designing, constructing, and funding such projects was very small, and that the pursuer was unaware of any member of the defender's consortium having ever delivered an end-to-end

floating wind farm. In these circumstances, the pursuer had averred a relevant case of causation and loss.

Unlawful means conspiracy

[45] The essential ingredients of the delict of unlawful means conspiracy were: (i) an agreement, or "combination", between a defender and one or more others; (ii) an intention to injure the pursuer; (iii) unlawful acts carried out pursuant to the combination or agreement as a means of injuring the pursuer; and (iv) loss to the pursuer suffered as a consequence of those acts: *Kuwait Oil Tanker* at [108] and *Crofter Hand Woven Harris Tweed*. The pursuer needed to aver and establish all four matters to succeed. It was not, however – and contrary to the defender's assertion – necessary that the alleged conspirators had to have subjective knowledge of the unlawfulness of the means which they proposed to deploy, merely that they had to know the nature of the means which were to be deployed: see *Racing Partnership* at [139].

[46] The pursuer had already identified the relevant averments on intention, unlawful acts and causation and loss in its discussion of those same elements in the "causing loss by unlawful means" ground of action.

[47] The pursuer's case on the conspiracy between the defender and its consortium partners was based on inferences that it drew from the facts within its knowledge. It was necessary to scrutinise the acts relied upon in order to see what inferences could be drawn as to the existence or otherwise of the alleged conspiracy or combination: *Kuwait Oil Tanker* at [112]. The question was inextricably linked to the evidence and was not suitable for disposal at debate in the circumstances of this case. The pursuer averred that (i) the defender made false claims as to its experience and expertise in its bid; (ii) the defender and

other members of its consortium submitted a false confirmation that those claims were accurate; (iii) some of the false claims related to the experience of the consortium members arising from the WindFloat Atlantic Project, but each member of the consortium knew that it had had no involvement in that project and each ought to have known that the defender had none; (iv) by submitting the bid, each member of the consortium combined with the defender in these false claims, with a common intention to injure the interests of any other tendering parties as a necessary consequence of their desire to advance their own interest; and (v) the defender inflated its claimed experience and expertise in pursuit of commercial advantage, in conjunction and close co-operation with the other members of its consortium. In these circumstances, the pursuer had averred a relevant case of an agreement, or "combination", between a defender and its consortium partners.

[48] On the issue of the unlawful acts being carried out pursuant to the combination or agreement as a means of injuring the pursuer, the pursuer averred that: (i) although the principal objective of the defender and its consortium members was to secure to themselves the commercial benefit of winning the tender, their conduct also had the objective of depriving other bidders, including the pursuer, of that benefit and thereby harming the pursuer's economic interests, constituting an intention on their part to injure those other bidders; and (ii) causing loss to the pursuer was the means by which the defender and its consortium members could achieve their desired objective of ranking above the pursuer and the other bidders, while they knew, or ought to have known, that their gain and the pursuer's loss were inseparably linked because of the nature of the competitive process. In these circumstances, the pursuer had averred a relevant case that the unlawful acts were carried out pursuant to the combination or agreement as a means of injuring the pursuer.

[49] The defender's position that each consortium member had only certified information in the bid relating to itself was incorrect. Several of the statements relied upon by the pursuer related to claims about the "Partners" in general and their experience in the WindFloat Atlantic project. A claim made about such experience of the partners in general, without distinction, encompassed them all, and each knew that, in relation to it, a claim to experience in the WindFloat Atlantic project was untrue. Each member of the consortium joined in these false claims about that project, and combined in their actions to do so by way of the submission of their joint tender.

[50] The pursuer had further averred that the defender knew that it had no experience in the WindFloat Atlantic project and that the other consortium members knew or ought to have known that the defender had no such knowledge. It averred that the defender had inflated its experience and expertise in pursuit of commercial advantage and in conjunction and close cooperation with the other members of its consortium. In these circumstances, the pursuer had relevant averments about the state of knowledge of the defender and its consortium partners of the unlawful means.

Public statements

[51] Most of the content of Article 15, concerning false or misleading public statements had been deleted by way of adjustment after the pursuer was able to make averments about the actual contents of the defender's bid. There was no basis to seek to exclude the remaining averments from probation.

Decision

Causing loss by unlawful means

Intention

[52] The "intention" element of the delict of causing loss by unlawful means is relevantly averred, because the infliction of harm on the other bidders for the lease option on the NE6 site can properly be said, on the pursuer's averments, to have be the means by which the defender hoped to attain its end of being the successful bidder for that site, rather than merely being a foreseeable consequence of the defender's alleged behaviour. The harm in question was the detriment that would be suffered in the bid evaluation process by other bidders when their bids were scored and compared with the (hypothetically wrongly inflated) score of the defender. That detriment was the means by which the defender – again, on the pursuer's averments – hoped to be preferred to the other bidders in the process and was not merely a foreseeable consequence of what the defender is alleged to have done. The pursuer's averments thus meet the criterion described by Lord Hoffmann in *OBG* at [62].

[53] It is not necessary in law for the pursuer to aver that the defender knew that the pursuer was going to bid for the NE6 site and thus that it specifically was susceptible to harm from the defender's alleged actions. It is enough that, as the pursuer avers, the bidding process was one in which only a very small number of enterprises could be expected to participate given the highly specialised area of industrial activity in question. There is no question in that context of a risk of indeterminate liability being created by failing to insist that the defender required to know specifically the identities of those liable to be harmed by its claimed behaviour. As Lord Hoffmann said in *OBG* at [60], it is not appropriate to insist on a "highly specific intention, which 'targets' the plaintiff". That view

was considered in *Servier* under reference to the criticisms advanced by Lord Sales and Professor Davies in their academic article "Intentional Harm, Accessories and Conspiracies" (2018) 134 LQR 69 that it (the so-called *Sorrell* v *Smith* view, referring to the decision of the House of Lords in that case reported at [1925] AC 700) "seems to come adrift from a view of intention to harm in the sense of specifically targeting the use of unlawful means against a particular person" and that it allowed for liability where a defendant was "broadly aware that he is competing against others in a limited market but [had] only a hazy idea who those others are or which of them might actually be harmed by that defendant's own actions". The Supreme Court in *Servier* did not seek to suggest that the *Sorrell* v *Smith* view of intention was mischaracterised by those descriptions, and was clear that it was not prepared to reconsider the correctness of that view.

[54] I do not consider it necessary in these circumstances to seek to approach the question of intention in this case by reference to the observations of Lord Nicholls of Birkenhead in *OBG* at [167], concerning situations where loss to the claimant is the obverse side of the coin from gain to the defendant. It may well be that in this case the defender would not have been aware that gain to it would necessarily result in loss to the pursuer specifically, even if it knew that the pursuer was definitely bidding for the NE6 site. That is because – as shall be discussed later in the context of instrumentality and causation – it may be that the defender's alleged actions did not cause the pursuer any loss at all, either because the pursuer would have been ranked behind the defender in any event, or because the pursuer was not the bidder which would have won the contest had the defender not done what it is alleged to have done. It suffices in the circumstances of this case to apply the *Sorrell* v *Smith* view of intention discussed above to reach the appropriate conclusion.

[55] It is not, further, necessary in light of the conclusion I have reached to determine the relevancy of the pursuer's averments that the defender did in fact know that it would be participating in the bidding for the NE6 site. Had it been necessary to assess the relevancy of those averments, I would have concluded that, even if the pursuer were to prove all the primary facts averred by it, that would not enable the conclusion properly to be drawn that the defender had in point of fact learned of the intended or actual participation of the pursuer in the NE6 bidding process by one or other of the mechanisms claimed. That would have remained a matter of speculation rather than one of reasonable inference from those primary facts.

Unlawful means

[56] It is common ground that it is a necessary element of the delict of causing loss by unlawful means that the defender's actions should amount to a wrong actionable at the instance of the third party (here, Crown Estate Scotland), or at least that it would be actionable had it caused the third party to suffer loss (see Lord Hoffmann in *OBG* at [49]).

[57] The question of whether what the defender is alleged to have done amounted to misrepresentation is a matter that can only be resolved after proof. The ScotWind Offer Document in response to which the defender's bid was made is, as one would expect, a relatively complex affair, and whether anything that was said in the bid was a statement of fact or merely of opinion, was confirmed by all or fewer consortium partners, or relevantly misrepresented the experience of one or more of those consortium partners or their employees, would depend upon a delicate consideration of all the terms of the Offer Document and the bid together with the factual background underlying the claims made and informing the proper construction of those documents. It cannot be said as a matter of

debate that the pursuer's claim that what was said by the defender and its partners in the bid amounted in whole or in part to material misrepresentation is irrelevant. Similarly, the status of anything said by the defender in its bid as a mere "puff" is not a matter of law that can be determined at debate, though it might well be thought that in the context of formal statements made in a formal bid process (especially when some or all were confirmed as "comprehensive, accurate and up to date"), their ultimate classification as such is an unlikely outcome.

[58] The difficulty for the pursuer in this context, however, arises from its insistence – clear from its pleadings, and expressly re-iterated by counsel in the course of the debate – that the cause of action enjoyed by Crown Estate Scotland was one in respect of a breach of contract by the defender. The relevant section of the pursuer's pleadings (in Article 17 of Condescendence), dealing at that point with the pursuer's conspiracy claim, is in the following terms:

> "The unlawful acts would be actionable by CES. The defender and its consortium partners have made a false Statement of Commitment. There is a breach of contract. Section 4 of the Offer Document ('Evaluation of Responses') also provides that where CES is of the view that competition may have been distorted, the CES 'may take such measures or steps as it considers necessary, including exclusion …'. Therefore, for example, it would have been, and would be open to CES to take action against the defender and its consortium partners based on this contractual right as the competition has been distorted by the false claims made by the defender and its consortium partners in their tender submission."

[59] Later in the same Article, when dealing specifically with its unlawful means claim, the pursuer avers simply that "Those false claims were actionable by CES." There is at no point any description of a non-contractual right to take action which might have been enjoyed by Crown Estate Scotland, and none was canvassed in debate.

[60] Looking in turn at the two potential contractual causes of action identified by the pursuer, the first relies on the "Statement of Commitment" which the defender and its

consortium partners were required to sign. The "Statement of Commitment" was in a template form, covering a wide variety of matters, and included a statement that

> "Insofar as information provided in this application relates to this organisation, we are aware that Crown Estate Scotland are acting in reliance on this information in assessing the application and confirm that it is comprehensive, accurate and up to date".

Whatever the exact import and scope of that provision, it is not possible to regard it as creating any term of a contract. It was made in a context which was not intended to result in the immediate conclusion of any contractual arrangement between the defender's consortium and Crown Estate Scotland; rather, the context was that if a bid was assessed and deemed successful by it, Crown Estate Scotland would in due course offer a lease option to the defender's consortium or to an SPV nominated by it to be the "Tenant Organisation" in respect of the option. The notion that the Statement of Commitment, or at least some of it, formed some sort of free-standing contract or contracts amongst the consortium partners and Crown Estate Scotland is similarly wholly unrealistic. Rather, as I understood counsel for the pursuer to accept in the course of the debate, it was at best some variety of pre-contractual representation.

[61] Turning to the second potential contractual cause of action identified by the pursuer, Section 4 of the Guidance Notes to the Offer Document (rather than of the Offer Document itself, as averred) is in the following terms:

> "Crown Estate Scotland has been careful to ensure that the ScotWind Leasing process is fair and transparent. Where Crown Estate Scotland is of the view that there may have been collusion between a bidder and any other party in such a way as to distort competition, or is of the view that competition might otherwise have been distorted, or that an application is not a bona fide submission, it may take such measures or steps as it considers necessary, including the exclusion of any Project Partners/Lead and Sole Applicants from the ScotWind Leasing process. The bidders will co-operate with Crown Estate Scotland to provide such information that Crown Estate Scotland reasonably requires."

[62] That provision poses even greater difficulties for the pursuer as a putative source of contractual rights than does the Statement of Commitment; in addition to not obviously itself forming part of any contract, being simply put forward as "guidance", it plainly contemplates action being taken as and when Crown Estate Scotland deems fit, whether or not any contract has been entered into between it and anyone at all. It is not possible to see that observation in the Guidance Notes as forming part of any contract conferring rights on Crown Estate Scotland; rather, it is simply a statement of what Crown Estate Scotland might as a matter of fact do if it considered that collusion or distortion had occurred, or that a bid had not been made in good faith.

[63] Another provision of the Offer Document referred to by the pursuer, though not apparently in this context, under the heading "Remedy under the Option Agreement if information provided in an application should be found to be materially inaccurate or misleading" stated that:

> "It is a condition of the Option Agreement that the Tenant Organisation warrants that the information which was provided in an application and upon which Crown Estate Scotland is acting in reliance when reaching a decision on that application is true and accurate. In the event that information provided at the time of application is proven to be false or materially misleading, Crown Estate Scotland may terminate the Option Agreement".

That provision simply made clear that it would be a condition of the contractual arrangement ultimately to be entered into in consequence of the winning bid that the counterparty to Crown Estate Scotland in that arrangement would warrant the truth and accuracy of the information provided in the bid. Any cause of action arising out of such a contractual term, however, would be a cause of action arising out of breach of warranty on the part of the counterparty (the Tenant Organisation) and not out of any breach of contract

on the part of the defender and its consortium in the provision of the allegedly false information in the bid.

[64] The pursuer's averments thus fail to disclose a relevant case that the defender's actions amounted to the wrong of breach of contract actionable at the instance of Crown Estate Scotland. Given the general antipathy of the law to misrepresentation, it seems at least possible that a characterisation of the relevant wrong as other than a breach of contract might have been found relevant, perhaps along the lines of the theory of a continuing responsibility upon the maker of a pre-contractual representation in situations where there is an interval of time between the making of the representation and the conclusion of a contract in reliance upon it, which has existed in English law since *Briess* v *Woolley* [1954] AC 333 and which was imported into Scots law by the decision of the Supreme Court in *Cramaso LLP* v *Viscount Reidhaven's Trustees* [2014] UKSC 9, 2014 SC (UKSC) 121. However, no attempt was made to argue that Crown Estate Scotland had a right of action against the defender other than one based on breach of contract, and it is not for the court to suggest any such argument or to speculate on what the outcome of an assessment of it might have been.

The dealing requirement

[65] The next ingredient of the delict of causing loss by unlawful means is that the unlawful action complained of must affect the freedom of the third party (here, Crown Estate Scotland) to deal with the pursuer. While it would in most circumstances be very unusual for an unfair business practice consisting of false self-praise to affect the freedom of anyone to deal as he or she saw fit in the market, in the context of a bidding process with clearly-defined rules for the evaluation of material put forward, and a requirement to make

the highest scorer in the process the successful bidder, it is clearly unrealistic to claim that a distortion of the process by the statement of falsehoods capable of affecting the scoring outcome cannot affect the ultimate dealing freedom of the relevant third party.

[66] It is nothing to the point that the means of affecting the freedom of Crown Estate Scotland to deal was the making by the defender and its consortium partners of allegedly false statements about themselves, rather than about the pursuer or any other bidder. The legal test places the focus on whether the third party's freedom to deal was arguably affected by the unlawful action claimed to have occurred, not on the precise means by which any such effect may have been achieved. The pursuer has averred a relevant case in relation to the "dealing requirement" of the delict.

Instrumentality and causation

[67] The final element of the unlawful means delict is that the unlawful means must have caused the pursuer loss. The difficulty for the pursuer in this context in the present case is that does not know (and has made no very strenuous effort to find out) whether what the defender is alleged to have done resulted in loss to it by causing it not to win the bidding contest for the NE6 site. It is perfectly possible that there were several bidders in the NE6 lease option competition and that the pursuer would never have won it even if the defender had not done what is alleged. Another bidder, including the defender, might have won the competition in any event.

[68] In these circumstances the pursuer resorts to the "believed and averred" mode of pleading, extolling its own virtues and decrying the perceived shortcomings of the defender, putting those forward as matters of primary fact and declaring that, against that background, it reasonably believes that it ought to, and thus would, have won the contest

had it been left unskewed by the defender. Nothing is said about whether there were any other bidders in the contest, and thus their supposed merits or demerits are not touched upon.

[69] Assuming, without deciding, that the "believed and averred" formulation of pleadings is permissible in any case where the party deploying it is as a matter of fact ignorant about the issue which the use of the formulation is designed to support, whether or not that party has taken any reasonable steps to enlighten itself, it remains the position that the pleadings will still be irrelevant if the primary facts averred are incapable of supporting the suggested conclusion. That is the position here. If the pursuer proved every primary fact it offers to prove, the Court would still be entirely unable to conclude that it would have won the NE6 site competition, or indeed that the defender's alleged falsehoods deprived it of a chance of winning the competition capable of reasonable estimation at any particular level. Any conclusion on those matters would be purely speculative because of the high-level nature of the averred primary facts and the absence of any indication of how the similarly high-level scoring rules were in fact interpreted and applied by Crown Estate Scotland in its evaluation of every bid put forward. The observation of Lord Gill in *Maroney* at 242, that in the circumstances of that case "any inquiry on the pursuer's record could be no more than an expedition based on hope" is equally apposite here. The pursuer's claim to have suffered loss as a result of unlawful means deployed by the defender is irrelevant.

Unlawful means conspiracy

[70] Although the pursuer's primary case is that there was an unlawful means conspiracy against it by the defender and the other members of its consortium, its secondary case, that

the delict of causing loss by unlawful means had been committed against it, formed the primary focus of argument at the debate and has likewise been the matter first dealt with in this opinion. Reading the conclusions already reached in relation to the unlawful means aspect of the case across to the unlawful means conspiracy, it may be seen that the pursuer has failed relevantly to aver that it suffered loss in consequence of the claimed actions of the defender and the other members of its consortium, and its conspiracy case also fails in consequence of that.

[71] In relation to the other elements of the conspiracy case, the pursuer has relevantly averred an intention to injure it for the reasons already stated. It has also relevantly averred that unlawful acts were committed, since the deliberate making of statements known to be false with a view to obtaining gain is an inherently unlawful activity and the unlawful means conspiracy delict has no specific requirement that the unlawful activity undertaken should be actionable by a third party; rather, the control mechanism in the conspiracy delict is found in the need to establish the existence of the conspiracy in the first place.

[72] The existence of a conspiracy is something that very often requires to be established by inference, but it remains essential that the pursuer should aver primary facts which might, if established, enable the conclusion to be drawn that there was an agreement between the defender and one or more of its consortium partners and that unlawful acts (here, the making of statements known to the conspirators to be false, whether or not they appreciated the unlawful quality of what they proposed to do) were carried out pursuant to that agreement as a means of injuring the pursuer.

[73] Although the pursuer's pleadings do it no favours, being unnecessarily discursive and repetitive, when one strips its case in this regard back to its essence, what it amounts to is that the defender and its consortium partners made statements in their joint bid which can

be read as claiming that all of them had experience in floating wind farm projects, specifically the WindFloat Atlantic project (ie "The Partners will use their industry leading floating wind experience built up in their crucial participation in the WindFloat Atlantic (WFA) Project …", "The Partners' experience financing floating wind projects …", "All these were experienced by The Partners during the development, financing and construction of WFA project …", "The Partners' experience developing the WFA project and other industry examples …", and "The Partners … have utilised their prior experience of similar offshore wind projects to benchmark all cost estimates …"), which claims the pursuer maintains to be untrue. It is possible that the defender and its consortium partners got together to make their bid for the NE6 site and, without any agreement to that effect, co-incidentally and independently advanced very similar, if not identical, hypothetical falsehoods about their own experience and the experience of the others, without being aware of the nature of those falsehoods, at least as they pertained to the others. It is, however, far from impossible that from those basic facts one might be prepared after having heard from the relevant actors at proof to infer the presence of the requisite ingredients of a conspiracy to injure. For that reason, I would not have been prepared to hold the pursuer's averments about the existence of a conspiracy irrelevant. It is not necessary in order to reach that conclusion to resolve the parties' dispute about the true import of the Statement of Commitment and in particular whether each partner who gave it should be regarded as having thereby stated only that it was confirming the accuracy of the content of the bid as applicable to it, as having gone further. Whether or not the Statement of Commitment applied to every element of the bid in relation to every partner, every statement complained of by the pursuer was in fact made in the bid by the defender and its consortium partners, and that in itself is sufficient to render the inferences relied on by the pursuer ones available to the court to draw after proof.

Public statements

[74] Had it been necessary to do so, I would have refused probation to the surviving averments in Article 15, relating to public statements made on, and subsequently withdrawn from, the website of BlueFloat Energy International SL, as serving no purpose in informing the assessment of any matter relevantly in issue in the case.

Conclusion

[75] I shall sustain the defender's first plea-in-law, repel the pursuer's pleas, and dismiss the action.