OUTER HOUSE, COURT OF SESSION

[2022] CSOH 85

CA9/22

OPINION OF LORD BRAID

In the cause

LONGHILL WIND FARM LLP

as the assignee of

ENERGIEKONTOR UK LTD

Pursuer

against

(FIRST) MUIRHALL ENERGY LIMITED
(SECOND) MUIRHALL ENERGY MANAGEMENT LIMITED
(THIRD) CROSSDYKES WF LIMITED
(FOURTH) HOPSRIG WIND FARM LIMITED
(FIFTH) LOGANHEAD WF LIMITED
(SIXTH) MEL WWS LIMITED

Defenders

Pursuer: O'Brien KC; Harper MacLeod LLP
Defender: MacColl KC; CMS Cameron McKenna, Nabarro and Olswang LLP

25 November 2022

Introduction

Undisputed background to the contract between the parties

[1] In or about 2017, Energiekontor UK Ltd (EKUK), which develops and operates wind farms, identified the potential for a wind farm at a site at Longhill Burn, West Lothian. The site is (and at all material times has been) owned by the pursuer, a limited liability

partnership, which was then, but is no longer, part of the Energiekontor group of companies.

[2] Because Longhill lies close to the flight path of aircraft using Edinburgh Airport, there is a risk that tall structures such as wind turbines will interfere with the radar system used to manage air traffic, which is operated by NATS (Services) Limited and by NATS (En Route) plc (together, NATS). EKUK was aware that, in accordance with its usual practice, and industry practice, NATS would likely object to any application for planning permission to develop a wind farm, and that a requirement of planning permission, if granted, would be that mitigation measures be undertaken at EKUK's cost.

[3] The group of companies of which the defenders form part, Muirhall, also develops and operates wind farms. A Muirhall company, Tormywheel Wind Farm Limited (TWFL), had previously proposed to develop and thereafter to operate a wind farm at West Calder, also close to Edinburgh Airport. As part of that development, between 2015 and 2017 Muirhall procured and paid for the installation and operation of a new radar system (the New Radar) at Edinburgh Airport. The sixth defender, TWFL and NATS entered into an amended Mitigation and Services Contract in 2017 (the MSC), which governs arrangements between them in relation to the New Radar and the primary radar feed from it.

[4] As it happened, in or about 2017 each of EKUK and Muirhall was in the process of developing a wind farm in Dumfries and Galloway: EKUK at a site at Little Hartfell, and Muirhall at a site at Crossdykes. Muirhall required the consent of EKUK to enable it to take access over Little Hartfell to Crossdykes (without which consent the landowner was not willing to grant a right of access). Following negotiations, in 2018 EKUK entered into missives with the first and sixth defenders, both Muirhall companies, constituted by an offer from EKUK's solicitors and an unqualified acceptance from Muirhall's solicitors both dated

16 August 2019, whereby EKUK agreed to grant the consent required by Muirhall, in exchange for which the first defender for itself, and on behalf of the sixth defender, agreed to consent to EKUK's proposed use of the New Radar. The defenders also agreed to grant a servitude right of access to Little Hartfell over other land owned by it.

The missives

[5] It is condition 3.3 of the missives which has given rise to this action:

> "Muirhall Energy Limited for themselves and on behalf of [the sixth defender] will, within 5 Business Days of receipt of a letter from EKUK and/or [NATS] requesting consent for the use of the New Radar as a radar mitigation solution for Longhill Burn that meets the conditions set out in this Condition 3.3, issue the New Radar Use Consents to [NATS].
>
> [Five conditions are then specified, all to do with the positioning of the turbines]
>
> Declaring for the avoidance of doubt that no sums will be paid or be due to be paid to [a Muirhall company] by EKUK or an Energiekontor Group Company through the operation of the Mitigation and Services Contract as a result of the grant of the New Radar Use Consents and the use of the New Radar in respect of Longhill Burn by virtue of this letter of consent. For the purpose of this condition 3, the location of any turbine shall be measured from the centre point of its tower base on the ground."

The missives define "Energiekontor Group Company" as a company, including a limited liability partnership or limited partnership, which is a member of the same group as EKUK from time to time.

Events following the completion of missives

[6] Following the completion of missives, the first defender issued a notice to NATS on 16 August 2019 (as required by condition 3.1), confirming that it would, when requested to do so, formally consent to the use by EKUK of the New Radar. It subsequently issued the New Radar Use Consents referred to in condition 3.3, formally consenting to that use.

[7] On 25 February 2021 EKUK assigned "its whole right, title and interest…to enforce and enjoy the benefit of condition 3" to the pursuer. On 26 February 2021, EKUK sold its shares in the pursuer's member companies to a third party, CEI 8 UK Ltd, which is not part of the same group as EKUK. The pursuer thereby ceased to be an Energiekontor Group Company on that date.

[8] On 26 February 2021 the pursuer and NATS entered into a mitigation and services contract in relation to the use of the New Radar. In terms of that contact the pursuer was obliged to pay certain sums to NATS including a capex recovery fee of £32,000 per megawatt for the proposed installation capacity of Longhill Wind Farm – which amounted to a fee of £1.6 million.

[9] By a side letter to the pursuer, dated 24 February 2021, NATS acknowledged that the sum charged by it included a capex recovery fee which fell to be paid to the sixth defender in terms of the MSC, and that it was willing to return that fee to the pursuer if the sixth defender waived its right thereto, or if a court held that the sixth defender was not entitled to receive it, and if the fee were returned to NATS.

[10] The pursuer paid the capex recovery fee of £1.6 million to NATS on 17 September 2021, and that sum was paid to the sixth defender by NATS later that month.

[11] The sixth defender has not waived its entitlement to the capex recovery fee, nor has it returned the fee to NATS.

The issues

[12] Against that background the pursuer avers, in brief, that the sixth defender's failure to waive its entitlement to the capex recovery fee, and to return that fee to NATS, amounts to a breach of condition 3.3 of the missives. Alternatively, it avers that the paragraph of that

condition beginning "[d]eclaring for the avoidance of doubt…" (the proviso) was a warranty, which has been breached by the sixth defender's receipt and retention of the capex recovery fee. The defenders deny that there has been any breach of the missives. The summons concludes for various remedies of declarator, specific implement and damages. The principal issues which fall to be resolved are:

i. What is the correct interpretation of the proviso to condition 3.3?

ii. Was the benefit of condition 3, specifically of the proviso, capable of being assigned to the pursuer?

Notwithstanding the remedies sought in the summons, the pursuer's position now is that it seeks only declarator, in terms of conclusion 1(a), that the benefit of condition 3 was assigned to it; and, in terms of conclusion 3, payment by the sixth defender of damages of £1.6 million. The defenders oppose those remedies but have made a qualified concession regarding the claim for damages, that if the pursuer's primary argument is correct, then damages of £1.6 million would fall to be awarded.

The competing constructions of condition 3.3

[13] The pursuer's position is that, properly construed, the proviso to condition 3.3 could not have been intended to refer only to payments made directly by EKUK to a Muirhall company. The parties could not have had in contemplation that the MSC, to which EKUK was not a party, could have imposed any obligation on EKUK, let alone an obligation to pay a Muirhall company. The only meaning to be attached to the words "through the operation of the [MSC]" was that indirect payments routed through NATS were covered by the clause. Unless the clause were construed in this way, those words would have no content. The words at the end of the first sentence of the proviso – "by virtue of this letter of consent" –

referred back to the grant of the consents and the use of the New Radar; it was that grant and use which occurred by virtue of the letter of consent. The sixth defender was under an obligation to waive its entitlement under the MSC to the capex recovery fee, although it did not fall into breach until NATS became under an obligation to pay it the capex recovery fee. Alternatively, in the event that the proviso imposed no such obligation, it was a warranty, which had been breached by the receipt and retention by the sixth defender of the capex recovery fee.

[14] The pursuer also contends that the rights conferred by the condition, including the right to enjoy the benefit of the proviso, were assignable. The pursuer, as EKUK's assignee, stood in its shoes, and a payment by it to the sixth defender, through the mechanism of the MSC, was therefore caught by the proviso.

[15] By contrast, the defenders propose a more literal construction of condition 3.3. They contend that the condition neither created a contractual obligation, nor amounted to a warranty, and did no more than declare the parties' common understanding of the position, namely, that no sums would be paid directly to the sixth defender by EKUK or an Energiekontor Group Company under the MSC and by virtue of the letter of consent. Properly construed the condition did not wrongly conflate, as the pursuer's construction necessarily did, sums paid under two separate contractual obligations: the one, an obligation owed by EKUK to NATS, and the other, an obligation owed by NATS to the sixth defender. The sums paid to the sixth defender by NATS were not paid by virtue of the letter of consent. Nor was the condition intended to cover payments made by the pursuer at a time when it was not an Energiekontor company.

[16] As for assignability, the defenders' position is that, properly construed, condition 3.3 did not create any right which was capable of being assigned, but that even if it did, the contract excluded assignation other than to an Energiekontor Group Company.

The law

Approach to construction

[17] The now familiar principles of contractual interpretation were recently summarised by Lord President Carloway, delivering the opinion of the Court, in *Network Rail Infrastructure Ltd* v *Fern Trustee 1 Ltd* [2022] CSIH 32, 2022 SLT 997 at [28]:

> "[T]he court must strive to ascertain the intention of the parties by determining what a reasonable person, having the background knowledge of the parties, would have understood from the language selected by them…[T]he meaning of the words must be assessed having regard to the other relevant parts of the contract. If there are two possible constructions, the court is entitled to prefer one which is consistent with business common sense…The exercise involves balancing, on the one hand, the language with the factual background and the consequences of any alternative meaning on the other. 'Textualism and contextualism are not conflicting paradigms'."

[18] As regards what is relevant factual background, evidence of pre-contract negotiations is generally inadmissible: *Luminar Lava Ignite Ltd* v *MAMA Group Plc* 2010 SC 310; *Bank of Scotland* v *Dunedin Property Investment Company Ltd* 1998 SC 657, per LP Rodger at 665G. However, it is permissible to have regard to evidence of facts known by both parties, and which cast light on the surrounding circumstances or the commercial purpose of the transaction objectively considered; or to evidence as to the meaning of the words used in the contract: *Luminar Lava*, paras [41] and [42]. To that extent, evidence of things said during negotiations may, on occasion, be admissible.

[19] Finally, the subjective intentions of parties are irrelevant to the issue of construction: *Muirhead & Turnbull* v *Dickson* (1905) 7 F 686, LP Dunedin at 694.

Assignation

[20] Whether an obligation is assignable depends upon whether or not it contains an element of *delectus personae*: *Scottish Ministers* v *Trustees of the Drummond Trust* 2001 SLT 665 (OH), Lord Carloway at [12], citing *Cole* v *C H Handasyde & Co* 1910 SC 68, Lord President Dunedin at 73. The same applies to assignation of rights: McBryde, *The Law of Contract in Scotland* (3rd edition) para 12-33. Whether there is an element of *delectus personae* depends on the facts and circumstances: *Scottish Ministers*, [12]. The clearest example of a contract in which there is an element of *delectus personae* is one where the contract is for a personal service, or where the reputation of the counterparty is relied upon: *Cole*, 73. Ultimately, it is a question of what the parties intended: *Waydale Ltd* v *DHL Holdings (UK) Ltd (No 2)* 2001 SLT 224, Lord Hamilton at 30; McBryde, para 12.37. Relevant factors include: the type of contract; the terms of the contract; and the nature of the respective parties or their business: McBryde, 12.37. Although a contract with a company may involve *delectus personae*, it may be difficult for that to be established where the contract is to last for a number of years: *Scottish Ministers*, [15]. In general, long-term rights are more readily assignable and it is relevant if assignation was commercially foreseeable: *Tolhurst* v *Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 (HL), Lord Macnaughten at 419-420.

The proof

[21] A proof before answer was fixed for inquiry into the relevant factual background, insofar as it properly provided an aid to construction of the missives. At the proof, evidence was given by four witnesses: for the pursuer, by Peter Harrison, EKUK's managing director;

and Pamela Todd, EKUK's solicitor in concluding missives; and for the defenders[1], by Christopher Walker, a director of the sixth defender, and chief executive officer of the first defender; and Sarah McIntosh, who was the solicitor acting for the defenders in concluding missives but who is now the first defender's managing director. A joint minute of admissions was also lodged.

[22] Evidence-in-chief was given primarily by witness statements, on which the witnesses were cross-examined. Large swathes of the statements on both sides were objected to by the opposing party as containing inadmissible evidence. With the agreement of the parties, I heard all such evidence under reservation of competency and relevancy, and cross-examination was carried out on the same basis.

[23] Notwithstanding certain criticisms by senior counsel for the defenders about the manner in which the pursuer's witness statements had been prepared (which I consider were unfounded, but on which nothing turns, since the evidence criticised is either inadmissible or not disputed), I found all the witnesses to be credible and mostly reliable. In truth, the admissible evidence added little to the background which could be gleaned from the missives and the other documents, including the joint minute. Such evidence as was of assistance was not contentious and might also have been agreed, particularly since neither party ultimately took serious issue with the other's objections to its evidence. However, for the sake of completeness, I will briefly summarise the evidence given by each witness, and will identify the evidence I have disregarded as inadmissible. I will then set out the background circumstances which properly inform construction of the missives.

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[1] Although the defences were lodged on behalf of all of the defenders, only the sixth defender actively participated in the proof, being the party against whom payment is sought. Nothing turns on this. For simplicity I will refer to senior counsel as having appeared for the defenders.

Peter Harrison

[24] Mr Harrison spoke to the negotiations between EKUK and the defenders, leading to conclusion of the missives. Much of his evidence is reflected in the undisputed background set out above. Muirhall had approached EKUK in early 2017 requesting approval for rights of access across a site at Little Hartfell (for which EKUK held an option to develop a wind farm) to its Crossdykes site near Dumfries. The landowner had indicated he would not grant a right of access unless EKUK consented. In return, Mr Harrison asked Muirhall if it would consent to EKUK using the New Radar. The original negotiations broke down, Mr Walker of Muirhall stating that Muirhall would not consent to use of the New Radar and that he had other options for access to Crossdykes. Mr Harrison did not view development of Longhill as a priority. As regards mitigation measures, there were three possibilities: Muirhall might change its mind about consenting to use of the New Radar; EKUK might develop its own facility; or EKUK might share a new facility with a third party which was developing a new wind farm nearby.

[25] By November 2018 it had become apparent to Mr Harrison that Muirhall did not have any other options for access to Crossdykes. On 13 November 2018 a meeting took place at the Radisson Blu Hotel in Glasgow between Mr Harrison, Gilbert Stevenson and Duncan Taylor for EKUK, and Mr Walker for Muirhall, when agreement was reached in principle for EKUK to consent to the Crossdykes access, and for Muirhall not to exercise its right of veto over the use of the New Radar.

[26] Mr Harrison told Mr Walker at that meeting that no payment would be made by EKUK which would lead to a receipt by Muirhall. This was the *quid pro quo* for providing consent to enable Muirhall's Crossdykes project to proceed. The turbines there would create

a "wake" effect, reducing the wind flow to EKUK's wind farm at Little Hartfell, and consequently reducing the income derived from that wind farm.

[27] Mr Harrison was aware of the existence of the MSC but Mr Walker made clear throughout that its terms were confidential and could not be disclosed to the pursuer. However, it was well known in the industry (and therefore to Mr Harrison) that it would likely contain a clause whereby any capex recovery fee paid by a third party developer to NATS would be passed on to one or other of the defenders (or to another group company).

[28] Mr Harrison was not then directly involved in the negotiations leading up to the conclusion of missives but he had the final sign-off. He was particularly interested in what became condition 3.3. So far as he was concerned it achieved the desired aim of ensuring that money paid by EKUK would not be passed on to Muirhall.

[29] Finally, in relation to the assignation, Mr Harrison said that all wind farm projects owned by the Energiekontor Group were developed as special purpose vehicles (SPVs), so that it was always envisaged that the site might be sold to a third party once it had been developed. It was reasonably common for interests in wind farms to be sold. Not only did EKUK do that, but so did Muirhall.

[30] I accept that Mr Harrison's evidence is admissible insofar as he described the events leading up to the meeting on 13 November 2018 and spoke to the purpose of the deal, which was in substance that each party had the right, or the perceived right, to prevent a commercial development which the other wanted to pursue; and they would each consent to the other's development. However, his evidence about what was agreed at the meeting (as set out in paragraphs [25] and [26]) is inadmissible as forming part of the pre-contractual negotiations. His evidence about the effect of condition 3.3 (set out in paragraph [28]) is also

inadmissible, being evidence either of subjective intention or non-expert opinion as to what the meaning of the contract is.

Pamela Todd

[31] Ms Todd provided additional background to the negotiations in relation to Crossdykes. She was acting for EKUK in concluding missives. She was aware of the existence of the MSC contract but its terms were confidential and were never disclosed. EKUK's concern, which condition 3.3 was intended to address, was to avoid a situation where the defenders would obtain a further consideration from EKUK (beyond the rights of access provided for in the missives) by the indirect route of EKUK paying NATS for use of the New Radar and NATS then paying Muirhall.

[32] Ms Todd went on to give evidence about the history of condition 3.3. She had spoken to Ralph Hardie (one of the solicitors also acting for Muirhall) on 12 December 2018 and put to him, in line with her instructions from EKUK, that the defenders were not to benefit financially from lifting/waiving the NATS veto. That she had said this was confirmed by the terms of Ralph Hardie's email to her of 13 December 2018, in which he proposed a warranty whereby Muirhall warranted and represented that it would not benefit financially from issuing its consent to use of the New Radar. Thereafter discussions continued between the parties directly.

[33] On 5 April 2019, Ms Todd sent a further draft to Sarah McIntosh that included a new condition 3.3.5 which provided that "no sums will be paid to [Muirhall] through the operation of the [MSC] as a result of the grant of the New Radar Use Consents and the use of the New Radar". She included an explanatory comment in the margin that:

> "EK[UK] are content for money to be passed back from NATS to [Muirhall] under the [MSC] arising from money paid by EK[UK] to NATS for Longhill if there is a limited costs recovery provision in that contract, but because we can't see what it provides for we need some protection against NATS having an obligation to charge some kind of premium. We are proposing this wording so as to prompt a discussion about what can and can't be allowed for here."

[34] On 9 April 2019 Sarah McIntosh sent back a version of the draft offer in which condition 3 had been amended so as to create a condition 3.3 which said "Declaring, for the avoidance of doubt, that no sums will be paid by EKUK directly to a MELWWS Group Company". After a further draft had been exchanged by Ms Todd, and a further comment made that EKUK needed some reassurance about the operation of the MSC, on 18 April Ralph Hardie emailed what he said was to be the final version, again refusing to divulge the MSC.

[35] It is easier to state which parts of Ms Todd's evidence are admissible, than inadmissible. Her evidence that the terms of the MSC were, and remained, confidential is admissible, being evidence of something known to both parties. Her evidence about the explanatory comment in the draft missive in which it appeared is admissible, insofar as it shows that EKUK knew (and that Muirhall knew that it knew) that the MSC likely had a provision providing for the capex recovery fee to be paid on by NATS to a Muirhall company. Beyond that, Ms Todd's evidence was largely about pre-contractual negotiations, which I therefore hold to be inadmissible.

Christopher Walker

[36] Mr Walker spoke to the background leading up to the meeting on 13 November 2018. He spoke to the negotiation over access rights for Muirhall's Crossdykes project. While he did not think that the owner of the land in question legally required to obtain EKUK's

consent, he accepted that was the commercial reality. EKUK's concern was not to have to pay a premium to Muirhall for the grant of the consent to use the New Radar. EKUK were always going to have to make payments to NATS, and to guarantee a radar solution EKUK would have to agree a mitigation and services contract with NATS.

[37] Mr Walker concurred with Mr Harrison that agreement in principle was reached at the meeting at the Radisson Blu Hotel on 13 November 2018, to the effect that EKUK would grant consent to the Crossdykes access in exchange for certain access rights which it needed, and for Muirhall to consent to use of the New Radar. In his witness statement, Mr Walker said that there was no discussion at that meeting of the MSC between the defenders and NATS. However, in cross-examination, he conceded that Mr Harrison might have raised the issue of money and might have said something to the effect that Muirhall was not to benefit by receiving moneys for the use of the New Radar. If that was said, his understanding of what was meant was that Muirhall was not to charge a premium for not exercising its right of veto.

[38] Mr Walker had seen the comment added by Ms Todd to the margin of the draft of 5 April 2019, from which he had understood that EKUK was aware that Muirhall would receive payments from NATS under the MSC but that they wanted to avoid the charging of additional premiums to EKUK. Even apart from that comment, he said it was clear that EKUK was aware that Muirhall was entitled to money back from NATS, and that Muirhall's consistent position was that EKUK did not require to pay any additional premium.

[39] To the extent that Mr Walker proffered his opinion about what the missives (or clauses in earlier drafts) meant, I do not propose to narrate his evidence, since it is clearly inadmissible and neither party contended otherwise. He did relevantly acknowledge in

cross-examination that it was common knowledge that the MSC was between NATS and the two Muirhall companies, and that no EKUK company was party to that contract.

[40] When pressed, Mr Walker was unable to provide an example of a payment made directly to the sixth defender by virtue of the MSC, other than a premium charged for the grant of the New Radar Consent.

[41] Finally, Mr Walker accepted that it was foreseeable that an SPV might change hands over the life of a wind farm, and that such transfers were commonplace within the industry.

[42] I adopt the same approach to Mr Walker's evidence as to Mr Harrison's. His evidence about the lead up to the meeting of 13 November 2018, and the commercial purpose of the deal, is admissible, as is his evidence about the matters which were known to both parties. However, his evidence about the pre-contractual negotiations, and in particular what was said in negotiation at the meeting, is inadmissible. (As such, it is unnecessary for me to resolve the conflict between him and Mr Harrison as to whether money was mentioned at the meeting, but had it been necessary to do so I would have preferred the evidence of Mr Harrison on that point, given that he had a clear recollection of the conversation, which Mr Walker conceded might well be accurate).

Sarah McIntosh

[43] Ms McIntosh confirmed the position regarding the negotiations for the right of access to Crossdykes. She adhered to the view she had expressed at the time that the landowner had not required to obtain EKUK's consent, but she acknowledged that the commercial reality was that EKUK's consent was required. The remainder of her evidence in her witness statement, and in cross-examination, was largely taken up with her own views as to what the various revisals and the final version of condition 3.3 meant. That is irrelevant and

inadmissible opinion evidence, which I therefore disregard. When pressed, she too was unable to give an example of a payment made "through the operation of the MSC", beyond a premium for the letter of consent.

Relevant factual matrix

[44] In summary, I have disregarded all evidence about the pre-contractual negotiations, including evidence of what was said at the meeting of 18 November 2018 about the terms on which EKUK was willing to enter into a deal, and evidence of the various drafts passing back and forth, other than Ms Todd's comment in the margin of the draft of 5 April 2018, which is relevant only to show that both parties were aware of the possibility of money which had emanated from EKUK passing to Muirhall via the MSC. I have also disregarded all evidence about what either party (or their respective solicitors) thought that the missives meant. On the basis of the admissible evidence, I find that the relevant factual matrix is as follows. The commercial purpose of the contract concluded in the missives was that each party was giving up a right of veto, or a perceived right of veto, in order to enable the other to pursue a commercial interest in developing a wind farm: in the one case at Longhill, in the other at Crossdykes. Both parties were aware of the existence of the MSC, and of the fact it was a contract between NATS and one or more Muirhall companies, but that EKUK was unware of its precise terms. Both were aware that Muirhall had a right of veto in relation to the use of the New Radar, and of the likelihood that the MSC would provide for sums paid to NATS by a third party developer such as EKUK (under a separate mitigation and services contract) to be paid in turn to a Muirhall company (but EKUK did not know which one). Finally, both parties were aware that it was commonplace for SPVs, formed to develop wind farms, to be sold to a third party developer.

Decision

The legal effect of the proviso – obligation, warranty or neither?

[45] The first issue to resolve in constructing the proviso is whether it has any contractual effect or simply records a common understanding with no contractual effect whatsoever. If it does have contractual effect, did it impose an obligation on the sixth defender (and if so, what was the obligation), or was it a contractual warranty? Senior counsel for the pursuer submitted, under reference to *Dwr Cymru Cyfyngegig (Welsh Water)* v *Corus UK Ltd* [2007] EWCA Civ 285, [2007] 14 EG 105 (CS), that it is to be presumed that all parts of a formal contractual document are intended to have contractual effect, at least where they appear in the operative part of the document as opposed to the recitals, and that the proviso should therefore be treated as having contractual effect. Whether there is anything as strong as a presumption, I doubt, although I accept that in a contract such as this, drafted and revised by lawyers, parties are unlikely to have included words which are mere verbiage not intended to have any contractual significance at all. That said, and as counsel acknowledged, it is ultimately a matter of construction (as it was in *Welsh Water*) as to whether any particular provision has contractual effect, and, if so, what that effect is.

[46] Reading condition 3.3 as a whole, I cannot read the proviso as imposing a contractual obligation on any Muirhall company, let alone an obligation on the part of the sixth defender to waive an entitlement under the MSC as the pursuer contends. The opening sentence imposes a contractual obligation on a specific Muirhall company, Muirhall Energy Ltd, to issue the New Radar Consents to NATS, within a specific time frame. That sentence, written in the active voice, falls to be contrasted with the passive voice of the proviso – "no sums will be paid or be due to be paid" – which is not suggestive of an intention to impose an obligation on any particular Muirhall company, let alone an

obligation to waive an entitlement it would otherwise have. Indeed, one wonders how an obligation could have been imposed on any Muirhall company which was not party to the missives. Further, the words which introduce the proviso – "[d]eclaring for the avoidance of doubt" – are not redolent of obligation. Finally, despite the valiant attempt by senior counsel for the pursuer to argue otherwise, it is not immediately obvious at what point any obligation to waive an entitlement under the MSC would have become enforceable.

[47] However, simply because the condition does not create a contractual obligation to do something does not mean that it has no contractual effect at all. Aside from the unlikelihood of the parties choosing to include words with no contractual effect, it is still more unlikely that they would have chosen to state a joint understanding of what the effect of the MSC was when, as both parties knew, one of them, EKUK, had no knowledge of what the terms of the MSC were. Despite the opening words "for the avoidance of doubt" – which might on occasion do no more than preface a statement of the blindingly obvious – it is also unlikely that the parties were simply intending to record the fact that no premium was to be charged directly to EKUK by Muirhall as consideration for issuing the New Radar Use Consents. Such a construction would leave the words "through the operation of the [MSC]" without any effective content. Further, as counsel for the pursuer pointed out, it would be unnecessary for the contract to provide that there was to be no payment to Muirhall for that which Muirhall was already obliged by the condition to do. By way of contrast, the missives contain no corresponding provision "for the avoidance of doubt" that EKUK was not entitled to payment for granting the consent which it was obliged to grant.

[48] I therefore conclude that the proviso was intended to be a warranty; and that if sums falling within the meaning of the proviso were paid or due to be paid to a Muirhall company that would amount to a breach of warranty such as to give rise to an entitlement to damages.

The meaning of the proviso

[49] That leads on to consideration of precisely which sums do fall within the meaning of the proviso. There are two competing constructions (it is somewhat ironic that the phrase "for the avoidance of doubt" appears to have created, rather than avoided, doubt): one, as the pursuer contends, that the proviso covered the situation whereby EKUK (leaving aside, for the moment, the issue of assignability) paid a capex recovery fee to NATS, which NATS then paid to Muirhall; the other, that it covered only direct payments by EKUK to Muirhall. (As an aside, this case neatly illustrates why it is impermissible to have regard to pre-contractual negotiations in construing a contract. During negotiations, each party had proposed differing versions of the condition which became 3.3; each, in its own way, clearer than the final version. It would be an impossible task to prefer one of those over the other in construing the different (and less clear) wording ultimately adopted by the parties.)

[50] There is considerable force in the pursuer's argument that unless the condition is construed as it contends, the phrase "no sum will be paid or be due to be paid…through the operation of the [MSC]" would have no effective content. Even on a purely textual approach, the phrase "through the operation of" is wider than "under" or "in terms of", and conveys that the payments intended to be covered by the condition were not restricted to payments contractually due to Muirhall by EKUK. Indeed, if one describes what has actually happened in normal, everyday language, the sixth defender *has* received a payment from EKUK through the operation of the MSC, since it was the MSC which entitled it to payment of the capex recovery fee funded by EKUK (or at least, by its assignee). To express it in that way is not to conflate two separate contractual obligations, as senior counsel for the defenders submitted, but to acknowledge the reality (as did NATS' side letter of 24 February

2021) that the capex recovery fee paid by EKUK under its contract with NATS was in fact passed on to the sixth defender under the terms of the MSC.

[51] A contextual approach reinforces that textual interpretation. Both parties were aware that it was normal within the wind farm industry for NATS to levy a capex recovery fee on wind farm developers and that such a fee would likely be charged to EKUK. Both were aware that it was normal for any capex recovery fee so charged to be refunded to an initial developer in the position of Muirhall (albeit the defenders knew precisely what the MSC provided, whereas EKUK merely knew the sort of provision it was likely to contain). When one throws into the mix that both parties also knew that EKUK was not a party to the MSC and must be taken to have been aware that the MSC could not have imposed any obligations upon it, they cannot have intended that only direct payments were to be caught by the proviso.

[52] Senior counsel for the defenders submitted that, for aught EKUK knew, the MSC did purport to impose obligations on it, and it was logical that they protect themselves against that possibility, but that suggestion is fanciful where both parties had legal advisers who can be taken to have known that a contract between A and B cannot impose obligations on C. Indeed, as soon as one recognises that the MSC could not have imposed obligations on EKUK, the words "through the operation of" the MSC can only be referring to indirect payments, in other words, payments by EKUK to NATS, and thence to Muirhall. It is unsurprising that the defenders' witnesses could not come up with a plausible example of a payment which might have been directly payable by EKUK to Muirhall through the operation of the MSC: it is impossible to conceive of what such a payment might be.

[53] In deference to the defenders' argument, I recognise that the words at the end of the first sentence of the proviso – "by virtue of this letter of consent" – at first sight lend some

support to the defenders' proposed construction. If they refer back to the earlier part of the sentence, so that it can be read, in short, "no sums will be paid or be due to be paid to [Muirhall] by EKUK…by virtue of this letter of consent", that could conceivably be read as merely precluding the payment of any additional fee or premium by EKUK to Muirhall. However, the words "through the operation of the MSC" would then be superfluous; and a better reading of "by virtue of this letter of consent" is that proposed by counsel for the pursuer, namely that those words refer to the grant of the New Radar Use Consents and the use of the New Radar, both of which would indeed occur as a result of the letter of consent having been issued. Further, had the intention been that the proviso simply excluded a direct premium being charged for the non-exercise of the right of veto, the reference would surely have been to Muirhall Energy Limited, rather than to "a [Muirhall] company", since both parties knew that it was that company which was to issue the New Radar Use Consents.

[54] I therefore conclude (a) that the proviso does refer to payments made indirectly by EKUK to Muirhall, that is, to payments made by EKUK to NATS and thence, through the operation of the MSC, to any Muirhall company, including the sixth defender; and (b) that any such payment would constitute a breach of warranty.

[55] Finally, I should mention commercial common sense, alluded to by both parties in their submissions. I have heeded the cautionary note sounded by senior counsel for the defenders to be wary of finding that commercial common sense should lead the court to prefer one construction over the other, and I have not relied on it in favouring the pursuer's construction of condition 3.3. That construction is consistent with business common sense, but so too is the defenders. It may be that one party has obtained a better deal than the other, but I am not in a position to judge whether Muirhall's commercial need for the

Crossdykes access was greater than EKUK's desire to develop Longhill, nor the extent of the harm caused to Little Hartfell by the development of Crossdykes. Senior counsel for the defenders also submitted that it made no commercial sense for the sixth defender to enter into a contract which it knew it would immediately breach. I reject that argument, which apart from anything else appears to do no more than invoke one party's subjective intention or belief as to what the contract meant, which is not a relevant consideration on any view. There are many reasons why a contract might immediately be breached and it is not for the court to speculate why that might be, nor to allow a party to escape the consequences of its actions by invoking commercial common sense.

Assignation

[56] The next question is whether it is essential, to trigger a breach of warranty, that the payment must have been made either by EKUK or an Energiekontor Group Company, or whether a breach was also triggered by payment by an assignee of EKUK which was not an Energiekontor company.

[57] This is inextricably bound up with the issue of assignability, since it is unlikely that the parties intended the rights under condition 3 to be assignable, but that after assignation the proviso would be triggered only by a payment by EKUK rather than by the assignee: such a result would make no commercial sense: *cf Tolhurst*, above, where a reference to "their" land was taken to comprehend not simply the land of the company which was party to the contract but to include an assignee's land. In other words, the parties must have intended either that the benefit of condition 3 was assignable and that the reference to EKUK in the proviso should be read as impliedly including a reference to assignees; or, that the

benefit of condition 3 was simply not assignable: *cf Waydale Ltd*, above, per Lord Hamilton at [30].

[58] Turning then to consider whether the benefit of condition 3 was intended to be assignable, the first point to stress about the assignation is that, although parties tended to focus on whether the right to the benefit of the proviso was assignable, in fact what EKUK assigned was its whole right, title and interest to enforce and enjoy the benefit of condition 3 of the missives – that is, the whole of that condition, not simply condition 3.3 or its proviso. There is nothing in the opening sentence of condition 3.3 which suggests that EKUK may not assign the right to insist that Muirhall should issue the New Radar Use Consents to NATS within five business days of receipt of a letter requesting it to do so.

[59] Senior counsel for the defenders submitted that the reference to "EKUK or an Energiekontor Group Company" in the proviso excluded, by implication, any assignee other than an Energiekontor Group Company. Two points may be made in answer to that. First, it is unclear why a reference in a proviso prefaced by the words "for the avoidance of doubt", towards the end of the condition, should be a determining factor in deciding whether the benefit of the condition, as a whole, was assignable. Second, and perhaps more fundamentally, the intention behind that reference is clearly that an EKUK group company should have the benefit of the proviso *without* being an assignee, hence the reference to group companies is merely a neutral factor. Nor are the defenders assisted by the definition of EKUK in the missives as meaning "[EKUK or] such other Energiekontor Group Company as may, from time to time, be in right to the EKUK Option Agreement". That definition cannot by implication exclude assignees, since in terms of condition 5.3 of the missives, EKUK undertook to take any party to whom they disposed of their interest in the EKUK Option Agreement bound to grant a letter in similar terms as the offer of 16 August 2019.

Clearly the parties did have in contemplation that EKUK might assign at least some of its rights under the missives.

[60] Moving on to consider the broader question of whether condition 3 contained an element of *delectus personae*, such that it was not assignable, the following factors all reinforce the conclusion that the parties did not intend there to be any element of *delectus personae:* that there was to be no provision of services to the defenders in connection with Longhill; that the provisions relating to Longhill were severable from those relating to Crossdyke and Little Hartfell, the only connection being a commercial *quid pro quo*; that use of the New Radar would be required for many years into the future; that as a company, EKUK's ownership and management could be expected to change over that long period; and that the parties had in contemplation that EKUK might dispose of its interest in Longhill over that period. Having regard to that last factor, and the parties' knowledge that it is commonplace within the industry for windfarms to be developed by special purpose vehicles which may be sold on, and that wind farms are operational for 25 years or more, I also consider that it is more consistent with commercial common sense that the rights conferred by condition 3 should be assignable, than that they should not be. There is the final point, already noted, that the pursuer has been the owner of the site all along, and initially enjoyed the benefit of the proviso by virtue of being an Energiekontor Group Company: it would, at the very least, be odd, as the pursuer submitted, if condition 3.3 were not assignable, such that the pursuer ceased to enjoy that benefit.

[61] I conclude for these reasons that the whole benefit of condition 3 was intended to be assignable, and was assigned to the pursuer, necessarily carrying with it the right to the benefit of the proviso; and that the parties necessarily intended that the reference in the proviso to payment by EKUK should include a reference to payment by an assignee.

Breach of warranty

[62] It follows from all of the foregoing that there has been a breach of the warranty in the proviso to condition 3.3, since the sixth defender, a Muirhall company, did receive a payment from EKUK's assignee through the operation of the MSC.

Quantification of loss

[63] As regards the approach to quantification of the loss flowing from that breach of warranty, it was somewhat glossed over in the submissions. Senior counsel for the defenders accepted that if the pursuer's principal argument that the defender had breached an obligation to waive its entitlement under the MSC was correct, then damages fell to be quantified at £1.6 million, but he did not quite make the same concession in relation to the subsidiary warranty argument. However, the pursuer is entitled to be placed in the position it would have been in had the warranty been true. By virtue of the NATS side letter we know that had Muirhall not received any sums from the pursuer, NATS would not have levied the capex recovery fee of £1.6 million. The pursuer has therefore paid £1.6 million to NATS which it would not have paid had the warranty been true. That is therefore the extent of the pursuer's loss occasioned by the breach of warranty. It is entitled to damages of that amount.

Disposal

[64] I will sustain the pursuer's first plea in law to the extent that it refers to the first conclusion, and its second and third pleas in law, repelling the defenders' pleas in law. Thereafter I will grant decree in terms of conclusions 1(a) and 3, finding the pursuer entitled to damages of £1.6 million plus interest thereon as concluded for.