OUTER HOUSE, COURT OF SESSION

[2018] CSOH 26

CA55/17

OPINION OF LORD BANNATYNE

In the cause

AGILISYS LIMITED

Pursuer

against

CGI IT UK LIMITED

Defender

Pursuer: Cormack (sol adv), J Young; Pinsent Masons LLP
Defender: Sandison QC, G Reid; Brodies LLP

21 March 2018

Introduction

[1] This matter came before me in the commercial court for debate at the instance of the Defender.

[2] In the action the Pursuer seeks reparation for inter alia the loss of opportunity to participate in various business opportunities. This claim is made in terms of the fifth conclusion of the summons and the relevant averments in respect to the claim are found, mainly in Articles 26, 27 and 36 of the summons. The background to the claim is a contract between the parties ("the Subcontract").

[3] In short the issue at the debate was whether the Pursuer's claim for lost opportunities is barred by the exclusion of liability provisions in the Subcontract contained in Clauses 25.7.2 and 25.8 (the "Exclusion Clauses").

[4] The material parts of the Exclusion Clauses are as follows:

- 25.7.2

"Subject to…, neither Party shall be liable to the other Party for:…
any loss of profits… business opportunities…"

- 25.8

"Subject to…, the Authority (CGI) shall under no circumstances be liable to the Supplier (Agilisys Limited) for any loss of profits… business opportunities… associated with any PSP contract."

The material averments

"36. In addition to the above claims, the Pursuer has lost the opportunity of further business opportunities which would have existed had the Pursuer not been placed in the position of having to rescind the Subcontract for material and repudiatory breach by the Defender. By means of the partnering and other arrangements under the Subcontract, the Pursuer would have had access to potentially very valuable further business, especially if the ERP and EI Projects had been successful as they would have been but for the breaches of contract by the Defender. In particular the Pursuer has lost the opportunity to:

36.1 pursue the Innovation Ideas as described above;

36.2 participate as contracted for in the Defender's tender to GCC as described above; and

36.3 tender for other Scottish local authority business as further particularised by the Assessment of Losses Arising From CGI Breach of PSP Terms of Contract document produced which shows the calculation of a reasonable estimate of the Pursuer's aggregate loss and damage under this head of loss in the total amount of £25,761,000. As set out in the calculation, the Pursuer has conservatively estimated a probability of 50% of obtaining the further business which would have been the subject of the opportunity which the Defender has wrongfully caused the Pursuer to lose. The projected profit figures have been discounted to net present value also as shown in the calculation."

Submissions on behalf of the Defender

[5] Junior counsel opened his submissions by setting out in a series of propositions the approach which the court must take to the construction exercise.

[6] First, terms of a contract excluding or limiting liability fall to be construed in the same manner as any other contractual term (see: *Photo Production Ltd* v *Securicor Transport Ltd* 1980 AC 827 per Lord Diplock at 851.)

[7] Secondly, in carrying out the exercise of construction the courts have to assess objectively what the contract means, not what was hoped and not what it was intended to mean (see: *Wood* v *Capita Insurance Services Ltd* 2017 AC 1173 per Lord Hodge at paragraph 10).

[8] Thirdly, although a literalist approach was not to be adopted an important starting point in the construction exercise is the language of the provision in question (see: *Arnold* v *Britton* 2015 AC 1619 per Lord Neuberger at paragraph 17).

[9] Fourthly: "this unitary exercise (of construction) involves an iterative process by which each of the rival meanings is checked against the provisions of the contract and its commercial consequences are investigated: In *Re Sigma Finance Corporation* 2010 1 All ER 571, paragraph 12, per Lord Mance JSC. "But there must be a basis in the words used and the factual matrix for identifying a rival meaning", per Lord Hodge in *Arnold* v *Britton* at paragraph 77.

[10] Fifthly, where there is no ambiguity in the wording of the provision or a possible alternative meaning there is no need to look to the question of the surrounding circumstances and the commercial sense of the provision (see: Lord Hodge at paragraph 77 in *Arnold* v *Britton*).

[11] Sixthly, the court should not rewrite a party's bargain where it appears to be imprudent or unwise. This proposition was advanced under reference to the observations of Lord Neuberger in *Arnold* v *Britton* at paragraph 20.

[12] Turning to the Subcontract itself junior counsel said this: the Pursuer's claim was in two parts: first innovation ideas, that was a business opportunity and the claim was calculated by reference to loss of profits. It thus fell four-square within the terms of Clause 25.7.2.

[13] The second part of the Pursuer's claim relates to PSP contracts and these are clearly and unambiguously dealt with by Clause 25.8. The claim is, in any event, calculated by loss of profits. This claim falls four-square within the terms of Clause 25.8. If there was any doubt about that then it clearly falls within the terms of Clause 25.7.2.

[14] Accordingly, both parts of the claim were excluded.

[15] Against the background of the principles in respect to construction he had outlined junior counsel submitted: the Exclusion Clauses were clear and explicit in their terms. There was no ambiguity in either Clause. As he had argued the Pursuer's claims clearly fell within the ambit of the Clauses.

[16] In regard to the Pursuer's approach to construction, he submitted that it fell into error and he made a series of submissions in support of this position.

[17] First, it fell into the error identified by Lord Hodge in *Arnold* v *Britton* at paragraph 78 and Lord Drummond Young (giving the opinion of the court) in *Hoe International Ltd* v *Andersen* 2017 SC 313 at paragraph 20 in that the Pursuer takes as its starting point that there must be an alternative meaning to the Exclusion Clauses as it argues they are not commercially sensible. That is rewriting and not interpreting the contract. What the Pursuer fails to do is at the outset to identify any ambiguity in the Exclusion Clauses and that the

Exclusion Clauses can bear more than one possible meaning. The Pursuer identifies no obvious error in relation to either Clause.

[18] The Pursuer's difficulty is this: there is no obvious ambiguity in the Exclusion Clauses.

[19] What underlies the approach of the Pursuer is to refer to a number of drafting errors elsewhere in the Subcontract to justify rewriting the Exclusion Clauses. However, this approach is misconceived as it does not ask the question: are the Exclusion Clauses capable of supporting more than one meaning?

[20] In respect to the various drafting errors which are referred to within the Pursuer's written submissions he submitted that to rely on errors elsewhere in the Subcontract to justify a different interpretation of the Exclusion Clauses simply did not work. Any such drafting errors had no relevance so far as the meaning of the Exclusion Clauses.

[21] Moreover, he submitted there was a contradiction in the Pursuer's position. The Pursuer's mantra repeated throughout its written submissions was this: the language of the Subcontract could not be trusted. However, both sides were legally represented when the document was drafted and as was accepted by the Pursuer the section dealing with innovation ideas and PSP contracts was a bespoke part of the Subcontract. Thus it was difficult to argue that it was not a part of the contract to which particular attention was paid by parties, as appeared to be at least part of the Pursuer's argument.

[22] Moving on, the Pursuer's argument relied on the proposition that the Defender's construction rendered the obligations in the contract as mere declarations of intent. In answer to that argument he pointed to the other conclusions in the summons, which were not subject to attack based upon the terms of the Exclusion Clauses. This illustrated that the

contract was not rendered of no effect if the Pursuer's claims in terms of conclusion 5 were barred on the basis of the Defender's construction of the Exclusion Clauses.

[23] Next he submitted that part of the approach foreshadowed in the Pursuer's note of argument was that the court should take a subjective approach to construction and this was clearly wrong.

[24] In conclusion he submitted the Pursuer's position comes to this: extra words and qualifications should be added to the clear and unambiguous wording of the Exclusion Clauses. That is not interpretation it is rewriting. The Pursuer has identified no ambiguity or an obvious error within the Exclusion Clauses.

The reply on behalf of the Pursuer

[25] The position advanced by Mr Cormack in short was this: the Defender's proposed construction and application of the Exclusion Clauses is overly simplistic and literal for a contract that is riddled with mistakes, redundancies and solecisms. If correct it has the absurd consequence that very significant rights accorded to the Pursuer under the Subcontract are effectively devoid of any value and in fact are not rights at all.

[26] It was his primary position that the Exclusion Clauses do not refer to liabilities for losses arising from the BC development and PSP arrangements, being those provisions embodied in Clause 8, sections E and F of part 4.1 of the schedule to the Subcontract and annex 3 of part 8.1 of the schedule to the Subcontract. It was his fall back position, that at the very least, the court cannot determine that the foregoing proposition is inevitably incorrect at debate, without the benefit of evidence, a full understanding of the Subcontract, and the subsequent dispute, to put matters in proper context.

[27] He accepted that the approach to construction for which he was arguing requires the court to read the Exclusion Clauses in a contextual and non-literal manner. However, that was justified in that the same approach is required in order to make sense of the Subcontract as a whole. Numerous Clauses, including the Exclusion Clauses, were reproduced in the Subcontract from the contract between Edinburgh District Council ("the Council") and the Defender (the "Prime Contract") in an unaltered form. It is plain, however, that they simply cannot bear the same meaning and scope as in the Prime Contract. Other Clauses have been sought to be adapted from the Prime Contract for the Subcontract, but this has been done defectively. As a result the Subcontract repeatedly requires the reader to take a creative and purposive approach to construction in order to give it any logical or coherent meaning. A literal and textual approach to the Subcontract finds itself going down blind alleys that often lead to dead ends.

[28] In expanding upon the above submissions Mr Cormack set out in a schedule to his written submissions a number of examples of bad drafting and imperfect translation from the Prime Contract to the Subcontract and I have appended to this opinion that schedule.

[29] The above difficulties were of particular importance in that: the Subcontract was never solely a straightforward delegation of certain services from the Prime Contract. Rather it contained a unique and bespoke element that reflected the joint approach by which the parties intended to exploit future business opportunities both with the Council and with other PSPs. These future business opportunities were anticipated to flow to both businesses from the Prime Contract. The parties were intending to co-operate and collaborate together in pitching for such business. In this respect at least, the Subcontract was radically different from the Prime Contract. This aspect was, principally, embodied in the part of the Subcontract he had earlier identified.

[30] In order to properly construe the Exclusion Clauses Mr Cormack submitted that it was necessary to understand the background to the Prime Contract and the Subcontract. It was his position that the important background facts are these: First in the course of 2014 – 2015, the Pursuer and Defender co-operated together with each other to jointly bid for a contract with the Council for the provision of both its existing information and communications technology services and transformation (ie updating and enhancing) certain aspects of those services. The tender also contained the prospect that the Council would act as a lead authority in a framework arrangement on behalf of other local authorities and bodies (referred to as the PSPs). As a result of this co-operative and joint approach, the parties' bid was successful. Second although the bid was a joint one, it was agreed the Defender would take the lead for the contract with the Council, and the Pursuer would only perform certain specified services. Accordingly, in 2015, the parties eventually structured their arrangement as follows:

- The Defender contracted as the main contractor with the Council for the provision of all of the relevant services.
- The Pursuer contracted with the Defender, to delegate the provision of certain aspects of those services, mainly the Transformation Services consisting of the ERP and EI projects referred to in the pleadings.

[31] Turning to the applicable legal principles regarding contractual construction he submitted that these were helpfully set out in *Hoe International Ltd* v *Andersen* at paragraphs 18 to 26.

[32] Mr Cormack submitted that in the present case there were two particular aspects of the general approach which were of significance: (1) the more badly drafted a contract, the more willing a court will be to use contextual evidence and information to depart from the

literal wording. This submission was made under reference to *Arnold* v *Britton* at paragraph 18, per Lord Neuberger and paragraphs 69 to 71 per Lord Hodge; *Mitsui Construction Co Ltd* v *AG of Hong Kong* 1986 33 BLR 7 at page 14 per Lord Bridge of Harwich and *Wood* v *Capita Insurance Services Ltd* at paragraph 10 per Lord Hodge. (2) Terms dealing with less central features of a parties' relationship are likely to receive much less attention by those drafting the contract. In a lengthy and complex contract, a professional drafter may often not achieve a logical and coherent text. There may often be provisions in a detailed professionally drawn contract that lacked clarity. In interpreting such provisions, a judge may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. Further, it is not uncommon for such Clauses to be drafted on the basis of standard terms or past precedents that are not perfectly adapted to their particular circumstances. In such circumstances giving effect to parties' intentions would be defeated by overliteral or formalistic interpretations: see *Hoe International* at paragraph 23 and *Wood* at paragraph 13.

[33] Mr Cormack then moved on to make two further submissions about the approach to construction which he said were of particular relevance in the circumstances of this case. The first point he made was this: there is a general presumption that parties do not lightly abandon a remedy afforded them by the general law. Accordingly, even apparently clear words in an Exclusion Clause can be qualified when looked at in the wider context of the contract as a whole. He directed my attention to *Kudos Catering (UK) Ltd* v *Manchester Central Convention Complex Ltd* 2013 EWCA Civ 38 at paragraphs 20 to 21 and 28 per Tomlinson LJ.

[34] Next he submitted that the courts strive to recognise and give effect to all obligations contained in a contract. Accordingly, they may apply a strained construction of Exclusion Clauses where to do otherwise would make certain contractual obligations devoid of any

obligatory content, or as it is often referred to "a mere declaration of intent". It is presumed that, no matter how widely worded an exemption Clause; parties do not intend to deprive their stipulations of all contractual force. Whilst the court must give effect to very clear words, it will be reluctant to do so in such situations if there is another available construction. To do otherwise would allow one party to simply repudiate the contract in a fundamental way without sanction. Mr Cormack directed my attention to *A Turtle Offshore SA* v *Superior Trading Inc* 2008 EWHC 3034 at paragraphs 99 to 100 and 109 to 114 (*Teare J*), *Kudos Catering* at paragraphs 19, 28 and 29 and *Transocean Drilling UK Ltd* v *Providence Resources Plc* 2016 EWCA Civ 372 at paragraphs 26 to 35 per Moore-Bick LJ. He went on to submit that even in cases where the courts have held the exemption Clause to be clear and binding, they have still indicated that it would not contemplate a deliberate repudiation by one party to the contract, see: *Transocean Drilling* at paragraph 33 per Moore-Bick LJ.

[35] Mr Cormack submitted that when considering the construction of Clauses such as the Exclusion Clauses the proper approach was not to look at the Clauses in isolation in order to identify a mistake or an ambiguity. In support of this proposition he relied in particular on the guidance given by Lord Hodge in *Arnold* at paragraphs 70 and 71.

[36] In particular he relied on Lord Hodge's analysis of the Supreme Court's judgment in *Aberdeen City Council* v *Stewart Milne Group Ltd* 2012 SC UKSC 240 which he set out at paragraph 71 in *Arnold*. In that case Lord Hodge considered that the internal context of the contract had provided the answer. He said in particular this:

> "They [the lower courts] inferred the intention of the parties at the time of the agreement from the contract as a whole and in particular from the fact that the other two methods of disposal required such a valuation. While this line of reasoning was criticised by Professor Martin Hogg 'Fundamental Issues for Reform of the Law of Contractual Interpretation' 2011 15 Edin LR 406 on the ground that it protected a party from its commercial fecklessness, it seems to me to be the correct approach in

> that case as the internal context of the contract pointed towards the commercially sensible interpretation."

[37] The above was the approach which he was urging upon the court in the present case.

[38] Mr Cormack having set out briefly the factual and legal context turned to advance the Pursuer's detailed argument in respect to the Exclusion Clauses.

[39] It was his position that it became clear when one had regard to the Subcontract as a whole, the Prime Contract and the surrounding circumstances that the construction and application of the Exclusion Clauses as advanced by the Defender was shown to be overly literal and formalistic.

[40] Once regard was had to these factors it in particular became clear that: the drafter of the Subcontract has failed in many places to logically and coherently adapt the original provisions in the Prime Contract, precisely as referred to by the Inner House in *Hoe International* and discussed by the Supreme Court in *Wood.* The Court must, therefore, strive to construe it by placing more weight on commercial common-sense, the surrounding circumstances, and the presumption that parties do not lightly abandon their rights.

[41] Clause 25.7.2 cannot, on any view, be applied literally because, for example, a literal application would exclude liability for claims for payment under the Subcontract (which literally would amount to loss of turnover of the relevant party). This cannot sensibly have been intended. At the outset, it is necessary to construe the Clause in a non-literal way in order to make sense of it. In particular, it needs to be restricted as a matter of interpretation to losses of a nature that are not in fact excluded under it. This is because the effect of the Clause is to exclude liability for all of the specified types of loss howsoever they arise, not simply claims for breach of contract or not even just claims arising under the contract. The position is even starker with Clause 25.8.

[42] If the approach to construction he was urging upon the court were followed then the sound construction of the Exclusion Clauses is this: (1) Clause 25.7.2 is to be construed (and in particular the liability being referred to therein) as concerned only with those losses arising from the contract provisions for the services directly delegated to the Pursuer from the Prime Contract (in essence the Transformation Services), and not the bespoke PSP and BC Development Arrangements in the Subcontract; (2) Clause 25.8 is to be construed (and in particular the liability being referred to therein) as concerned only with losses flowing from a properly concluded PSP Contract (as that term itself required to be flexibly construed), and not from the right of the first refusal and co-operation in relation to PSP and BC Development Arrangements in the Subcontract.

[43] At the very least, he submitted the Court cannot and should not reach a concluded view on these matters without hearing evidence of the commercial background and purpose of the Subcontract, as well as taking into account the findings which the Court will be asked to make in due course about the circumstances which have given rise to the respective allegations of fundamental breach.

[44] The position which he advanced as regards the correct construction of the Exclusion Clauses he developed in this way.

[45] As the Subcontract is badly drafted the court should be driven a lot less by semantic niceties and literal meanings. In elaboration of this he submitted that it is obvious that the Subcontract is badly drafted. That was an inescapable feature of any attempt to read it as a whole. It is rife with dead ends, Clauses with no substance, and redundancies as he had earlier illustrated.

[46] These problems arose from, in large part, a seriously flawed attempt to adapt the terms of the Prime Contract to the different commercial relationship that was envisaged as existing between the Pursuer and the Defender in the Subcontract.

[47] There are many aspects of the Subcontract where the reader is forced to depart from literal meanings, ignore obviously inaccurate wording, fill in gaps, and compare provisions in the Subcontract to the Prime Contract in order to make sense of them.

[48] Thus he submitted the court should eschew any suggestions that this is a carefully drafted contract in which parties have very clearly catered for their respective rights, remedies and liabilities.

[49] It flowed from the background of bad drafting that: the Court should not attribute improbable and un-businesslike intentions to the parties if the language used is capable of another interpretation, even a strained interpretation. It should put more weight on contextual factors such as the commercial purpose of the Subcontract, the overall manner in which the Prime Contract has tried to be adapted, and the surrounding circumstances. These factors are particularly important to those parts of the Subcontract that can be clearly identified as unique, different, and bespoke divergences from the Prime Contract.

[50] The second basis for his proposed construction of the Exclusion Clauses flowed from the commercial and factual context of the Subcontract, which he submitted made it inherently unlikely that parties intended to exclude liability for losses arising from the PSP and BC Development Services.

[51] Generally he submitted that evidence of the commercial and factual context of the Subcontract would assist the court in determining the true construction of the Exclusion Clauses.

[52] The points which he intended to advance he accepted could not at this stage be asserted as matters of uncontroversial fact. He recognised that a number of the points he intended to refer to may be controversial and require evidence to be led. However, it was his position, that the issue of construction would be better determined after the hearing of evidence on these matters.

[53] He submitted that the following matters form part of the relevant commercial background to the entry into the Subcontract and were known to both parties at the relevant time. The Pursuer offered to prove these relevant circumstances:

[54] The Invitation to Tender from the Council (ITT): The ITT expressly envisaged that the Council was seeking tenders for a contract not just on its own behalf, but also on behalf of a very wide number of other local authorities, quangos, and public bodies. Accordingly, from the outset, the contract contained potentially substantial commercial benefits to any party beyond the initial services to be provided to the Council.

[55] Initial Rivalry and Teaming Agreement: The Pursuer and Defender were initially rivals for the contract with the Council. However, as a result of negotiations during the bidding process, the parties entered a teaming agreement designed to work collaboratively as partners to obtain the work contained in the Prime Contract and, importantly, the opportunities for future work arising from it.

[56] Partnership between the Pursuer and Defender: When the tender was successful, the parties did not mean for their partnership to simply come to an end. They both envisaged continuing the partnership (in a non-technical sense) to exploit the future local government and public body market together. As was known to the Defender at the time, this potential opportunity was a key factor in the Pursuer agreeing to undertake a subsidiary and

diminished role in the provision of Services, essentially limited to the Transformation Services (and, in particular, the ERP and EI Projects).

[57] Profitability of ERP and EI Projects Alone: As was also known to the Defender at the time through its participation in the Teaming Agreement and general collaboration with the Pursuer, a simple sub-contract merely to perform the ERP and EI elements of the Services under the Prime Contract would not have been sufficiently profitable or commercially sensible for the Pursuer. It could never have justified the costs and management time the Pursuer had expended towards ensuring the Defender was awarded the Prime Contract. Accordingly, the obligation in the Subcontract on the Defender to ensure participation in future local authority business was fundamental to the commercial relationship between the parties.

[58] The Different Relationships: The relationship between the Pursuer and Defender and the relationship between the Defender and the Council in respect of such further opportunities was radically different. As between the Defender and the Council, the Council never had any intention of getting involved in any aspect of such further contracts. They intended to merely provide references for the Defender to other public bodies and local authorities. They did not guarantee any further work or that the Defender would get such work. As between the Pursuer and Defender, the relationship was radically different. Both the Pursuer and the Defender envisaged working together in partnership on all future local government contracts in Scotland.

[59] He went on to say this: the above background is reflected in the area of most substantial divergence between the Prime Contract and the Sub-Contract, namely those dealing with the PSP and BC Development Arrangements. This can be seen by comparing Clause 8 and Section E of Schedule Part 2.1 of the Prime Contract to Clause 8 and Sections E

& F of Schedule Part 4.1 of the Subcontract. The terms of the Subcontract are clear, beyond peradventure, that the Defender was giving the Pursuer an important contractual right of first refusal to be involved in both further services to be provided to the Council and other PSPs that has no analogue in the Prime Contract. In the above context, these rights were of fundamental significance to the Pursuer in entering the Subcontract.

[60] His general submission from the foregoing background was this: the court may well consider, once it had heard all of the evidence in relation to the background, that it was extremely unlikely and improbable that parties seriously intended to exclude all liabilities for losses arising from the PSP and BC Development Arrangements.

[61] The next point which Mr Cormack made was this: the Defender's interpretation would render its obligations in relation to the PSP and BC Development Arrangements a mere declaration of intent.

[62] In expansion of this point he submitted: If the Defender's construction of the Exclusion Clauses is correct, it renders their obligations in relation to PSP and BC Development Arrangements devoid of any obligatory effect. They are a 'mere declaration of intent'. The Court should lean strongly against any such construction if there is a sensible alternative construction of the Exclusion Clauses.

[63] In reality, the only remedy for breach of these obligations is damages, and the only type of loss that could ever be suffered is loss of opportunity. Further, the Subcontract replicates financial remedies and sanctions for both parties that were contained in the Prime Contract, but which simply cannot apply properly to the PSP and BC Development Arrangements. Accordingly, if the Defender's construction of the Exclusion Clauses is correct, these obligations are not obligations at all.

[64] On this construction, the Defender is free to deliberately and cynically repudiate the Subcontract and deprive the Pursuer of any right to be involved in further opportunities. This is, precisely, what the Pursuer avers occurred in relation to the GCC Contract condescended upon. This cannot be what the parties intended as sensible commercial businesses.

[65] The courts apply a strong presumption against construing Clauses as extending to such breaches. The patent, widespread, and imperfect adaption of the terms of the Prime Contract to the context of the Subcontract does not demonstrate a sufficiently clear intention to overcome that presumption.

[66] Moreover, he submitted the Pursuer's construction of Clause 25.7.2 of the Subcontract is consistent with the imperfect translation of the Prime Contract's provisions into the Subcontract.

[67] In support of the above he advanced the following detailed arguments: the Pursuer's construction of Clause 25.7.2 as confined to liabilities arising from the services directly delegated to the Pursuer from the Prime Contract is consistent with the generally imperfect adaptation and accords with commercial common sense.

[68] In the Prime Contract, there is a carefully calibrated and balanced set of remedies, rights and limits that applied to all of the actual services being provided by the Defender. In particular, the Council had two main remedies for a Default by the Defender: (a) if it related to a Measured Service, its sole financial remedy was to impose Service Credits: see Clause 7.3 of Prime Contract; (b) if it related to other types of Services (those generally involving the meeting of Milestones), the sole financial remedy was imposing Delay Payments: see Clause 28.2 of the Prime Contract. These remedies neatly correspond to limits on the Defender' liability under the Prime Contract. In particular, they were framed

principally under reference to the imposition of Service Credits and Delay Payments: see Clauses 25.4.2 and 25.4.3. The overall caps were imposed under reference to the Charges (or Estimated Charges) to be imposed under the Prime Contract. Further, in the Prime Contract, there is no positive obligation on the Council to make further business opportunities available to the Defender, or for the two businesses to co-operate in exploiting them.

[69] In that scheme, it makes understandable and commercial sense for parties to wish to exclude all types of consequential loss, whether direct or indirect. The contract provides a neat, self-contained, system for regulating the parties' liabilities. The parties had expressly catered for what all of their respective remedies would be, and the limits of any liability.

[70] However, as with so many aspects, the drafter of the Subcontract has imperfectly translated these provisions. They still make sense, and clearly apply, to liabilities arising from those services under the Prime Contract being directly delegated to the Pursuer under the Subcontract. In other words, the Transformation Services. There is a clear rationale for the various rights, remedies, and limits on liability to mirror those in the Prime Contract.

[71] But they are meaningless when applied to the PSP and BC Development Arrangements. There are no remedies given to the Defender in the Subcontract equivalent to Delay Payments or Service Credits in respect of these arrangements; and they are framed in a radically different way from in the Prime Contract. In the Subcontract, these provisions impose mutual rights and obligations on both parties, whereas in the Prime Contract they merely imposed much more limited obligations of service on the Defender.

[72] It seems likely this is the correct construction of Clause 25.7.2 even in the Prime Contract. The Defender's construction of Clause 25.7.2 renders Clause 25.8 as otiose and mere verbiage. Clause 25.7.2 would be dealing with precisely the same liabilities as Clause 25.8. It seems clear that, in fact, the drafter of the Prime Contract has made precisely

the same distinction as is being drawn here between Services actually being provided under the Prime Contract (dealt with by Clause 25.7.2), and the further opportunities that might accrue under the more limited obligations of the Authority in relation to further opportunities with PSPs (Clause 25.8).

[73] In these circumstances, it is submitted the correct construction of Clause 25.7.2 in the Subcontract is that it refers exclusively to liability for losses arising in relation to the Services that were directly delegated to the Pursuer from the Prime Contract.

[74] He then turned to Clause 25.8 and submitted even if a correct and commercially sensible construction of this Clause can be arrived at, it simply does not apply to the losses the Pursuer seeks to recover.

[75] Clause 25.8 is a good example of the difficulties arising from the imperfect manner in which the Prime Contract has been translated into the Subcontract. It reinforces the points made by the Pursuer above about Clause 25.7.2.

[76] Clause 25.8 is a direct lift from the Prime Contract. It has been done without any serious attempt at adaptation, and as a result it makes very little literal sense. This is, in part, because the drafter of the Subcontract has simply retained the definition of PSP Contract from the Prime Contract, being: "a contract put in place between the Supplier and a given PSP under the terms of which the Supplier will provide that PSP with Utility Services and potentially Base Services".

[77] In the Prime Contract, this definition makes sense. There are absolutely no circumstances in which the Council would be entering into such a contract itself. Any future opportunities would solely accrue to the Defender in the form of separate contracts. In essence, in the Prime Contract, this Clause operated to exclude liability for losses flowing

from the limited obligation of the Council to provide references for the Defender and to alert them to opportunities.

[78] The Clause makes no literal or direct sense under the Subcontract for, at least, two reasons. First, in the Subcontract, either the Pursuer or the Defender will take the lead and potentially Subcontract to the other. This is clear, for example, from Clause 8.3.4. This refers to the Defender entering into a PSP Contract subcontracting to the Pursuer if the definition of PSP Contract is applied literally, that is impossible because the definition does not apply to contracts entered into by the Defender. Secondly, the Pursuer was never going to provide Base Services and Utility Services in any future contracts. These were reserved to the Defender: see paras 2-3 of the Appendix. The services that were envisaged as being provided by the Pursuer were called the Business Transformation Activities: see paras 1.1.1 and 1.1.2 of both Sections E & F and Appendix A of Schedule Part 4.1 of the Subcontract.

[79] The Defender, in its Note of Argument lodged for the debate, appears content to accept that the term PSP Contract does need to be construed contextually as not being confined merely to contracts between the Pursuer and a PSP, but extending to contracts the Defender might also enter into with a PSP.

[80] In doing so, they accept the basic premise of the Pursuer's argument: these Clauses need to be construed with sensitivity and due regard to the very imperfect way in which the rights and obligations in the Prime Contract have been translated into the Subcontract, and that it is not appropriate or possible to read them in a completely literal way.

[81] The Court may not require to reach a concluded view on the correct construction of Clause 25.8. It may be sufficient that, whatever the correct construction is, it does not clearly and unambiguously apply to losses arising from the rights of first refusal and the co-operation obligations relied upon by the Pursuer in the action. The definition used in the

Subcontract simply does not naturally apply to them. The presumption is that parties will not be taken to have excluded potentially significant liabilities unless very clear language has been used. It plainly has not been used in this case.

[82] If the Court considers it necessary to formulate an objectively correct construction of Clause 25.8, Mr Cormack submitted it can be given some context by reading it as referring solely to liabilities arising from a concluded PSP Contract entered into by the Pursuer with a PSP as a result of references or alerting by the Defender provided under Clause 8 of the Subcontract. This would, broadly, mirror the function it plays under the Prime Contract.

[83] The claim for loss of profit being pursued by the Pursuer in the current proceedings is not associated with a contract it has entered into with a PSP. It arises from the failure to be able properly to operate the right of first refusal and other associated obligations in the PSP and BC Development Arrangements. Accordingly, it has no application to the present proceedings.

[84] The Pursuer, in short, submits the intention of the parties in the Subcontract was to do two things: (1) to replicate the terms of the Prime Contract insofar as it related to the specific Transformation Services being delegated to the Pursuer; but (2) also use the contract to record the distinct and separate partnership arrangement the parties had agreed in respect of exploiting further business opportunities. The Pursuer contends this is clear enough from the terms of the Subcontract, and would be even clearer once the Court has had the benefit of evidence.

[85] The number of patent and latent mistakes throughout the Subcontract, including in the Exclusion Clauses themselves, justify a more contextual approach to construction of the Exclusion Clauses. Having regard to the context as outlined above, it is clear the Exclusion Clauses were not intended to cover losses arising from the distinct PSP and BC Development

Arrangements. A construction of the Exclusion Clauses, and in particular the liabilities being referred to in them, that reflects this gives the Subcontract as a whole commercial common-sense, and avoids the absurdity of turning significant rights into mere declarations of intent.

[86] In the circumstances, he invited the Court to repel the eighth plea-in-law (and delete the supporting averments in Answer 9) in the Defences, failing which to reserve the matter to be dealt with at a future Proof Before Answer.

Senior counsel for the Defender's response

[87] Mr Sandison began by submitting that the approach to the construction of the Exclusion Clauses urged on the court by the Pursuer was not one which was available to the court for the reasons advanced by his Junior.

[88] It was his position that the Defender was not taking a literalist approach to the Exclusion Clauses. On the contrary he quite agreed with the observations of Lord Hodge in *Wood* to the effect that construction was a single process. He accepted that context is important both intra and extra contract.

[89] In respect to the issue of intra contractual context the Exclusion Clauses formed part of section G in the Subcontract.

[90] Section G of the Subcontract was divided into three. The first part was where neither party imposed any limitation on liability (see: Clause 25.1 to 25.3).

[91] Thereafter at Clause 25.4 limitations were placed on liability in certain defined circumstances. He accepted that these limitations of liability applied to works to be done on behalf of the Council.

[92] Thereafter there were the Clauses which were the subject of the debate. These Clauses allow he submitted, for no interpretation but the one put forward by the Defender.

[93] Looking at Clause 25.7.2 the Pursuer sought to construe the words "any loss" in a manner which the wording of that Clause could not bear. Clause 25.7.2 must apply to the Pursuer's claim based on lost opportunities.

[94] The Subcontract then contemplated future business relationships but because of the unknowable nature and extent of any loss which could arise from such future business relationships excluded the possibility of liability being owed by one party to another. It was, he submitted, entirely logical for parties not to accept the unknown, in a sense unknowable liability, which might arise in those circumstances contemplated in the Exclusion Clauses. He described section G as being a logical progression from full liability to limited liability to liability being entirely excluded.

[95] It was his position that from the intra contractual context there was no suggestion that the court could do the considerable violence to the language of the Exclusion Clauses, as urged upon it by the Pursuer.

[96] It was his position that he could not understand why any of the background set out on the Pursuer's behalf could be of any assistance in interpretation of the Exclusion Clauses. There was no suggestion within the pleadings as to how this background could be of any assistance to the court in construction. It is necessary for there to be such averments (see: *Arnold* per Lord Hodge at paragraph 74).

[97] He could not see how these background facts could inform the issue of construction one way or another. There would be no advantage to any proof in respect to these matters.

[98] Turning to the legal principles to be applied when construing a contract he accepted that commercial sense was a relevant consideration. His position was that the submission made on behalf of the Pursuer that reasonable people would not expect exclusion of liability in the circumstances of this case was not well-founded. Rather the unknowability relative to

the future business was such, at the time of the entry into the Subcontract, that no party would expect there to be liability. He submitted that it made perfect commercial sense for parties to say that they were going to work together but that they would not accept any liability arising from that continuing relationship.

[99] As regards the Pursuer's submission that parties do not lightly give up rights which they have in terms of the general law he said this: if there is such a presumption it is a weak one that can only apply where provisions can have more than one meaning. Here there was no basis for suggesting ambiguity. The words "no liability for any loss" could not be said to be ambiguous.

[100] The above presumption was a secondary mode of construction and was simply not one to which the court could turn here given the lack of ambiguity in the wording of the Exclusion Clauses.

[101] So far as the case law to which reference had been made by Mr Cormack to the effect that the courts preferred a construction which did not reduce a contract to a mere declaration of intent, his position was that there were clear limits to such an approach. In any event, there are a whole raft of obligations which are not covered by the total exclusion of liability.

[102] It was his general position that there was nothing in these subsidiary rules of construction of assistance to the court in the present case. They are no more than secondary or last resort rules of construction which cannot apply to the circumstances of the present case.

[103] With respect to the issue of bad drafting he accepted that the authorities tended to suggest that the court could be a little less literalistic where there was a badly drafted contract.

[104] He accepted that there were mistakes in the Subcontract, however, he did not think it was a terribly badly drafted document. In any event, so what if it was badly drafted as a generality. He said the court had to ask itself this question: what about the quality of the drafting in respect to the Exclusion Clauses? These were perfectly adequately drafted. Bad drafting did not provide a way out for the Pursuer. No liability for any loss, he submitted, could not be turned into some liability that is an illegitimate approach.

[105] So far as the interrelation of Clauses 25.7.2 and 25.8 he accepted that 25.8 refers to a PSP contract and in addition he accepted that that is a defined term and in terms of that definition referred to an actual contract. He accordingly accepted for present purposes that 25.8 is dealing with a situation where a contract has been entered into and meant that he could not pray in aid 25.8 in respect to the prospective claims made by the Pursuer. That however did not matter. That of course left him with the terms of Clause 25.7.2.

[106] In any event there was nothing unusual in a contract like this for parties to say here is a blanket clause in respect of things which might come about, what might be described as a generic Clause (25.7.2). There then is a specific example of a case which would come about ie in the present case 25.8. The fact that that fell within the generality of 25.7.2 was of no significance in relation to the interpretation of 25.7.2.

[107] So far as the point sought to be made by Mr Cormack that one reason for not deciding the issue of the sound construction of the Exclusion Clauses at this stage was that there was no decision regarding whether there had been a deliberate breach of contract by the Defenders, he submitted this argument was misconceived. He directed my attention to the observations of Tomlinson LJ in *Kudos* at paragraph 28:

> "I accept that, on the assumption which I have made for the purpose of determining this preliminary issue, we are not concerned with a 'deliberate' in the sense of a 'knowingly unlawful' repudiation, but I am yet to learn that the consequences of a

> repudiatory breach of contract differ according to whether it is informed or uninformed, deliberate or inadvertent, hopeful or hopeless."

He submitted that these observations reflected legal orthodoxy.

[108] On any view the claim in terms of the fifth conclusion fell within the terms of 25.7.2 and was accordingly excluded.

[109] Mr Cormack had on a number of occasions said that what he was doing was reading down the Exclusion Clauses, what he was in fact doing was overturning the clear language used in the Exclusion Clauses.

Discussion

[110] The debate before me raised a short issue of construction.

[111] The legal framework governing the approach of the court to issues of contract construction is summarised by Lord Drummond Young giving the opinion of the court in *Hoe International Limited* v *Andersen* in the following way at paragraph 21:

> "For the proper approach to ordinary cases of contractual interpretation, we are of opinion that regard should be had to the factors listed at paragraph 15 (By Lord Neuberger in *Arnold* v *Britton*), to the opinion of Lord Hodge (in *Arnold* v *Britton*), and to the earlier analysis by Lord Clarke in *Rainy Sky (SA* v *Kookmin Bank Ltd* 2011 UKSC 50)."

[112] The factors listed by Lord Neuberger at paragraph 15 in *Arnold* v *Britton* are these:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd* v *Persimmon Homes Ltd* [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see

Prenn [1971] 1 WLR 1381, 1384-1386; *Reardon Smith Line Ltd* v *Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997, per Lord Wilberforce; Bank of Credit and Commerce International SA* v *Ali [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in Rainy Sky* [2011] 1 WLR 2900, paras 21-30, *per Lord Clarke of Stone-cum-Ebony JSC*."

[113] Lord Clarke in *Rainy Sky* at paragraphs 20 – 21 gives this guidance:

> "20. …It is not in my judgment necessary to conclude that, unless the most natural meaning of the words produces a result so extreme as to suggest that it was unintended, the court must give effect to that meaning.
>
> 21. The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

[114] Lord Hodge in *Arnold* v *Britton* at paragraph 77 then outlines what the unitary exercise formulated by Lord Clarke in *Rainy Sky* involves:

> It is "an iterative process by which each of the rival meanings is checked against the provisions of the contract and its commercial consequences are investigated: In *re Sigma Finance Corporation* 2010 1 All ER 571 paragraph 12, per Lord Mance JSC. But there must be a basis in the words used and the factual matrix for identifying a rival meaning."

The issues

[115] The issues for the court are as follows:

1. Do either or both the Exclusion Clauses properly construed, bar recovery of the loss of opportunities pled by the Pursuer?
2. As part of that, is it necessary for the court to hear evidence about the surrounding circumstances before determining the first issue?

The position of the parties

[116] The initial primary position of the Defender in short was this: the wording of the Exclusion Clauses is clear and unambiguous and there was only one meaning that could be placed on each Clause. The wording of each Clause clearly encompasses the claim made by the Pursuer in terms of conclusion 5 of the summons and such claim was accordingly excluded. It was the Defender's position: that to construe the provisions in any other way did such violence to the language of the provisions as to amount to a rewriting of the Exclusion Clauses. The Pursuer's approach was an illegitimate one as no ambiguity in the Exclusion Clauses was identified by the Pursuer. Rather the Pursuer ignored the wording of the Exclusion Clauses and took as its starting point that they did not make commercial sense and therefore there must be an alternative meaning to them.

[117] The Defender later altered its position in this sense that it conceded for the purposes of the debate that Clause 25.8 could not be relied on by them.

[118] The Pursuer's reply in short was that the Defender's approach was too narrow, simplistic and literalist, for the detailed reasons advanced by Mr Cormack.

[119] In respect to this primary difference in approach to construction of the Exclusion Clauses between the Pursuer and Defender it is important to note at the outset what is said by Lord Hughes in *Rainy Sky* at paragraph 23: "Where the parties have used unambiguous language, the court must apply it." This succinctly repeats what has been said by the courts on many occasions and reflects the well-established law in Scotland. In Bells Principles (10th Ed) at paragraph 524 the learned author observes:

> "It is a golden rule of construction, that the grammatical and ordinary sense of the words used is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the instrument, in which case the

> grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but no further. In other words, the more literal or natural construction does not prevail, if it is opposed to the intention as manifest and apparent by the rest of the instrument (or statute), and if the words either are sufficiently flexible to admit of another construction consistent with that intention or clearly appear to have been used by mistake."

[120] As the above passage also makes clear, in considering the clarity of the language used in the provision the approach is not literalist. Lord Hodge in *Wood* at paragraph 10 emphasises this point and helpfully formulates the court's task:

> "It has long been accepted that (the court's task in ascertaining the objective meaning of the language which the parties have chosen) is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning… Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding existence of the prior negotiations."

[121] In addition Lord Hodge at paragraph 13 in *Wood* gives guidance as to how the courts should use the tools of textualism and contextualism:

> These "are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

[122] Against that legal background I turn to consider the Exclusion Clauses. I firstly consider that the task of construction of the exclusion Clauses is not confined to the words of the Exclusion Clauses themselves. The wording of the Clauses has to be considered in their wider context. As Tomlinson LJ says in *Kudos* at paragraph 22: "the ascertainment of the meaning of apparently clear words is… itself a process of contractual construction".

[123] The context includes the whole terms of the Subcontract and in addition I believe the terms of the Prime Contract. I consider the court in arriving at a true construction of the Exclusion Clauses is entitled to have regard to the terms and meaning of the Prime Contract insofar as they inform the proper construction of the Exclusion Clauses. I would observe that in the recital to the Subcontract (6/2/4) reference is made to the Prime Contract and in particular I note the terms of paragraph (E) of the recital which says:

> "For the avoidance of doubt there are certain terms and conditions set out below which have been classified as 'not used' as part of the initial Agreement. The Parties may agree to re-introduce these provisions in accordance with Change Control as and when these are applicable provided that the Supplier shall not unreasonably withhold its consent to the reintroduction of those provisions. The Parties shall negotiate in good faith to agree such reasonable amendments to clauses from the Prime Contract as may be necessary having regard to the Supplier's current obligations and the need for CGI to meet its obligations to the Authority."

[124] I turn first to consider Clause 25.8. The Defender, as I have said, for the purposes of the debate before me, eventually conceded that this Clause did not, for the reasons advanced by Mr Cormack, apply to the loss of commercial opportunities for which the Pursuer was suing in terms of conclusion 5. However, both in its note of argument and in the speech of junior counsel for the Defender it was contended that the provision applied to the Pursuer's said claim. The arguments in relation to this provision I believe remain of relevance insofar as they inform the true construction of Clause 25.7.2.

[125] It is, I think, clear that Clause 25.8 in the Subcontract is a direct lift from the Prime Contract.

[126] I accept the argument advanced by Mr Cormack that in terms of the Prime Contract Clause 25.8 makes sense.

[127] The question is, does it make any literal or direct sense in terms of the Subcontract? I consider that the answer to that question is no. The reason for that conclusion, as argued by Mr Cormack, first arises from the definition of PSP contract which is retained in the Subcontract and which has been taken as a direct lift from the Prime Contract. It makes no sense because, for the reasons advanced by Mr Cormack, by reference to other terms of the Subcontract itself, it appears that Base Services and Utility Services were reserved to the Defender and it was other services which it was envisaged would be provided by the Pursuer. Thus the Clause appears to serve no purpose in terms of the Subcontract and to be devoid of any content and meaning. It is in a literal and direct sense meaningless.

[128] Moreover, as contended by Mr Cormack, because, by reference to other provisions of the Subcontract it is clear that either party to the Subcontract may take the lead and Subcontract to the other thus the Clause makes no literal sense. It makes sense in terms of the Prime Contract as there are no circumstances in which the Council would be entering such a contract, but not in terms of the Subcontract.

[129] Accordingly I am persuaded that on considering the provision in the wider context of the provisions of the Subcontract as a whole and the Prime Contract provisions, in so far as they inform the meaning of the Clause, the meaning of the language in the provision is open to question. It is I believe ambiguous, in that it is not clear in context what it means. It appears that the language of the Clause has been used by mistake or, put another way, there has been a drafting error.

[130] As argued by Mr Cormack no submissions were made on behalf of the Defender to address the above specific points regarding the meaning of Clause 25.8 although these points were clearly set out in his note of argument.

[131] On the basis of the foregoing analysis, I consider that the Defender was wrong in initially advancing the argument in relation to 25.8 that it could only have one possible meaning. It appears to me that when this Clause is properly construed there is doubt as to the true meaning of the Clause. It seems to me that Mr Cormack in his approach to the construction of this Clause has not adopted an illegitimate approach. Rather he has identified an error in the Clause and only then has sought (by means of other construction tools) to arrive at a sound construction, namely: he seeks to rely on the factual background known to both parties and the issue of commercial common sense.

[132] It has to be borne in mind that ambiguity in the language used in a provision is not the only problem in respect to the language of a provision which the court can deal with by use of the various tools of construction open to it. This is recognised by Lord Hodge in *Arnold* v *Britton* at paragraphs 69-71 where he analyses three authorities which concern the remediation of a mistake by construction. At paragraph 78 he considers whether in the circumstances of the case before him a clear mistake in the use of language can be identified and remedied by construction. It appears to me that in Clause 25.8, for the reasons I have above detailed, there is a mistake which is obvious on the face of the Subcontract.

[133] I have considered at some length Clause 25.8, although reliance on it was ultimately not insisted upon by the Defender, because I believe that the view which I have arrived at regarding its construction is of some significance in respect to the sound construction of Clause 25.7.2. It is of significance I think for this reason: the courts have, in a number of cases, to which I was directed by Mr Cormack, recognised that the more badly drafted a

contract, then the more willing a court will be to use contextual evidence and information to depart from the literal wording of the contract.

[134] The Defender's answer to this point was in essence this: the issue of poor drafting is not relevant in the present case. It was argued that it did not matter that in other places in the Subcontract there had been poor drafting. That took the Pursuer nowhere in that the poor drafting did not bear on the provisions which were being discussed at debate. Such drafting infelicities did not inform the proper construction of the Exclusion Clauses, which were, in any event, entirely clear in their terms. However, for the reasons I have set out above there is a material drafting issue which goes to the heart of one of the Exclusion Clauses the terms of which were at the outset founded upon by the Defender as barring liability. Clause 25.8 is one of only two provisions in the Subcontract in terms of which liability is wholly excluded. It is the provision which immediately follows Clause 25.7.2. I do not believe in these circumstances that there is any merit in the Defender's submission that the issue of drafting errors has no relevance in arriving at a sound construction of the Exclusion Clauses and in particular in arriving at a true construction of Clause 25.7.2.

[135] Overall I believe the drafting difficulties which I have discussed in relation to 25.8 which render it of no literal or direct sense, when taken together with the other drafting infelicities identified by Mr Cormack in the Subcontract do inform the issue of the sound construction of 25.7.2. It seems to me that my above analysis in respect to Clause 25.8 goes to the core of the adequacy of the drafting of the Exclusion Clauses.

[136] Turning to Clause 25.7.2 I think the Prime Contract is part of the context which informs the true construction of this Clause. It is again, I believe, clear that Clause 25.7.2 is an imperfect adaptation of the mirror provision in the Prime Contract.

[137] I accept Mr Cormack's argument that in the Prime Contract there is a carefully calibrated and balanced set of remedies, rights and limits that applied to all of the actual services being provided by the Defender. Thus it is understandable that all types of consequential loss are excluded. On the other hand in the Subcontract the provisions only make sense when applied to liabilities arising from those services under the Prime Contract directly delegated to the pursuer under the Subcontract. They, for the reasons advanced by Mr Cormack, are meaningless so far as PSP and BC development. Clause 25.7.2 in the Subcontract does not make sense in the context of Clause 25.4.2 and 25.4.3.

[138] Beyond the above I believe there is some force in Mr Cormack's argument that the Defender's construction of Clause 25.7.2 renders Clause 25.8 otiose in that as he argues Clause 25.7.2 would cover the same liabilities as Clause 25.8. Again this shows the lack of logic and coherence in the drafting of the Exclusion Clauses.

[139] I am persuaded that the meaning of the language of Clause 25.8, when the appropriate weight is given to the context, namely: the provisions as a whole of the Subcontract and the Prime Contract, is open to question. I consider that as with Clause 25.8 there are clear drafting errors in respect of Clause 25.7.2.

[140] Overall I believe the drafter of the Subcontract has not achieved in respect to the Exclusion Clauses a logical and coherent text. When proper regard is had to the wider context the Exclusion Clauses are not clear and unambiguous. The Exclusion Clauses bear all the hallmarks of an area of a lengthy contract, which has received much less attention than the central terms and accordingly in arriving at a sound construction more weight must be placed on factors such as the background to the deal and commercial common sense (see: *Hoe International* at paragraphs 23-26).

[141] In addition I think it is helpful in arriving at a sound construction of Clause 25.7.2 to consider certain observations of Teare J in *A Turtle Offshore SA* at paragraph 109. He is there considering the sound construction of a clause allocating risk between parties in a towage contract. He first considers a literal construction of the Clause and says this:

> "The words used in clause 18 are of such wide ambit that, construed literally, the owner of the tow must take for his sole account any damage whatsoever suffered by the tow. Thus if the tug owner chose to disconnect the tow and to abandon it at sea in order to perform a more lucrative towage contract and in consequence thereof the tow was lost, that loss would appear to be for the sole account of the owner of the tow and the tug owner would be exempted from liability for his failure to exercise his best endeavours to perform the towage."

[142] He then asks, if that is correct, is that an end of the matter and he goes on to observe:

> "However, contracts are not construed literally but, as it has been put in the past, with regard to the main purpose of the contract or, as it is now frequently put, in the context of the contract as a whole. Thus, however wide the literal meaning of an exemption clause, consideration of the main purpose of the contract or of the context of the contract as a whole may result in the apparently wide words of an exemption clause being construed in a manner which does not defeat that main purpose or which reflects the contractual context."

[143] In the present case if a literal construction is applied to Clause 25.7.2 I believe the main purpose of the contract would be defeated. I believe Mr Cormack submits correctly that on a literal reading of the Clause it would exclude liability for claims for payment under the Subcontract. On any sensible view, on a consideration of the contract as a whole, such a construction would defeat the parties' clear objectives. It would produce a result so extreme as to suggest it was unintended. In such a situation apparently clear words can be qualified when looked at in the wider context of the contract as a whole.

[144] Moreover I consider where the language of 25.7.2 is called into doubt there comes into play the presumption that neither party to a contract intends to abandon any remedies for its breach arising in terms of general law (see: per Lord Diplock in *Gilbert-Ash (Northern) Ltd* v *Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717).

[145] Lord Diplock added that clear words required to be used in order to rebut such a presumption. For the reasons which I have adverted to above I do not think the terms of this provision have that clarity.

[146] Further, this lack of clarity in the provision, in addition brings forward the rule of construction that in construing an Exclusion Clause the court will place a strained construction upon it, if to do otherwise would be to render contractual obligation "a mere declaration of intent". I believe that Mr Cormack is correct in arguing that in respect to a material part of the Subcontract, if Clause 25.7.2 is construed as contended for by the Defender it would amount to no more than a declaration of intent.

[147] Lastly I turn to consider the question of whether the Exclusion Clauses are wide enough to cover deliberate repudiation. I first observe that the remarks of Moore-Bick LJ in *Transocean Drilling* are obiter. However, they do appear to fit with the guidance of Lord Wilberforce in *Suisse Atlantique* at pages 431-2 cited by Teare J in *A Turtle Offshore* at paragraph 110:

> "[An exception clause] must, ex hypothesi, reflect the contemplation of the parties that a breach of contract, or what apart from the clause would be a breach of contract, may be committed, otherwise the clause would not be there; but the question remains open in any case whether there is a limit to the type of breach which they have in mind. One may safely say that the parties cannot, in a contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force; to do so would be to reduce the contract to a mere declaration of intent. To this extent it may be correct to say that there is a rule of law against the application of an exceptions clause to a particular type of breach. But short of this it must be a question of contractual intention whether a particular breach is covered or not and the courts are entitled to insist, as they do, that the more radical the breach the clearer must the language be if it is to be covered…. No formula will solve this type of question and one must look individually at the nature of the contract, the character of the breach and its effect upon future performance and expectation and make a judicial estimation of the final result."

Moreover, when looked at as a whole the analysis of the court in *Kudos Catering* I think tends to support the views of Moore-Bick LJ. I am persuaded that having regard to the foregoing observations that the type of breach can be of relevance when construing an Exclusion Clause

[148] In the whole circumstances I believe for the reasons I have outlined that Clause 25.7.2 lacks clarity. Beyond that, certain considerations which I have sought to identify tend to point away from the construction contended for by the defender. In the circumstances I am not at this stage prepared to hold that the only possible construction of Clause 25.7.2 is that contended for by the Defender. Nor am I at this stage persuaded that the only construction of the Exclusion Clauses is that contended for by the Pursuer.

Conclusion

[149] In the whole circumstances I do not believe that a true construction of either of the Exclusion Clauses can, at this stage, be arrived at. In my view before a sound construction as to the meaning and scope of the Exclusion Clauses can be reached the court will require to have recourse to other construction tools including the background to the deal between the Pursuer and the Defender and in particular the alleged background of mutual cooperation upon which the Pursuer seeks to found requires to be investigated by the leading of evidence. Moreover, I believe that in order to arrive at a true construction of the Exclusion Clauses not only the background to the deal but the construction tool of commercial common sense will require to be had regard to. I do not believe at this stage, as argued by the Defender, I can say that the various background factors including commercial common sense will be of no assistance to the court in arriving at a true construction of the Exclusion Clauses. In order for the court to be fully apprised as to the background of the deal and the issue of commercial common sense it will require to hear evidence. In addition I believe the

court will require to hear evidence on the substantive issues between parties before arriving at a sound construction for the reasons set out at paragraph [147]. I consider that, for all of the foregoing reasons, only after hearing evidence will I be able to arrive at a true construction.

Disposal

[150] Accordingly at this stage of debate I am not prepared to uphold the Defender's eighth plea in law. The issue of the proper construction of the Exclusion Clauses for the reasons above set out requires evidence to be heard. I accordingly reserve the matter to be dealt with at a future proof before answer. I reserve the issue of expenses.

SCHEDULE

Examples of Bad Drafting and Imperfect Translation from Prime Contract to the Subcontract

1. The Subcontract obliges the Pursuer to provide Transition Services: Clause 5.1.1. This is a direct flow-down from the Prime Contract: cf. Clause 5.1.1 of the Prime Contract. However, in the Subcontract, the obligation is meaningless. This is because the definition of Transition Plan refers to a plan in Annex 1 of Schedule Part 6.1, which contains no Transition activities. Allied to this, the definition of Transition Payment then refers to a part of Schedule Part 7.1 that isn't used. This whole part is, accordingly, meaningless verbiage.

2. The Subcontract obliges the Pursuer to provide BC Development Services: Clause 5.2. This, again, is a direct flow-down from the Prime Contract: cf. Clause 5.2 of the Prime Contract. The term BC Development Services is defined: see Schedule Part 1. In general terms, it would appears to oblige the Pursuer to provide services for the development of business cases into extensions of 'Base Services' and 'Utility Services' under the Subcontract. It then refers more specifically to Section E of Schedule Part 2.1 of the Subcontract. The terms 'Base Services' and 'Utility Services' themselves also directly or indirectly refer to services classified in Sections A, C and D and of Schedule Part 2.1. These are, again all direct lifts from the Prime Contract. However, they make no literal sense when transposed into the context of the Subcontract. This is because there are no sections contained in Schedule Part 2.1 in the Subcontract, which simply reproduces all of the OBS (unlike in the Prime Contract). In fact, in the Subcontract these appear to be references to Schedule Part 4.1 (which is a partial and heavily revised version of Schedule Part 2.1 and 4.1 of the Prime Contract). Even if one reads '2.1' as meaning '4.1',

it is still very difficult to make sense of because there are no Base Services or Utility Services referred to in Schedule Part 4.1, and they have been omitted from the main body of the Subcontract: cf. Clauses 5.1.2 – 5.1.4 of the Subcontract and Prime Contract. Accordingly, in order to give any content or meaning to the obligation to provide BC Development Services, it would be necessary to simply ignore the definition of that term other than the last few words and read it as referring to the services outlined in Section E of Schedule Part 4.1.

3. The lack of any substantive content to the terms Base Services and Utility Services (and allied terms such as Operational Services, Service Description, and Operational Services Commencement Date) in the Subcontract has further knock-on effects:

   3.1 First, on the charging provisions. It is clear from Annex 2 to Schedule Part 7.1 that parties intended for the Pursuer to be paid a Base Services Charge in providing a Transformation Director and Architect. However, it is simply not possible to apply Schedule Part 7.1 literally. This is because the various obligations to pay the Base Services Charge and other Service Charges is bound-up with defined terms such as Base Services, Utility Services, Service Cut-Over Date, and Operational Service that, if applied literally, have no content under the Subcontract: see, in particular, Paragraph 2 of Part B of Schedule Part 7.1.

   3.2 Second, on the sanction provided to the Defender of imposing Service Credits (and the allied rights to terminate for the accrual of a certain number of Service Credits in certain periods.) This is because, for example, the term Service Period is meaningless in the Subcontract. It is entirely unclear whether the Defender has any right to impose Service Credits under the Subcontract or not. This, also,

makes it difficult to calculate the limits on liability referred to in Clause 25.4.2 of the Subcontract.

3.3 Third, on the critical definition of Supplier Termination Event. This definition contains various references to certain types of events that entitle the Defender to terminate the Subcontract and also to take other remedies such as insist on appointment of a Remedial Adviser or exercise Step-In Rights. In a number of cases, they either have no content or make little literal sense. For example: limb (a) is meaningless or, at least, very difficult to apply because the term Critical System Failure is meaningless in the Subcontract and the term Critical Performance Failure is difficult to apply because it is ultimately referable back to Service Periods and Service Credits; limb (b) contains an 'aid to interpretation' which is meaningless because the term Service Cut Over Failure is ultimately referable back to a Clause of the Subcontract that is entitled 'Not Used'.

4. There are numerous examples of imperfect transposition where it is necessary to read words as having a different meaning from their literal meaning. Some pertinent examples occur in Clause 25 of the Subcontract. In Clause 25.4.4 and 25.4.5, it is plain that the limits on the Pursuer's liability are intended to be referable to the Defender and not 'the Authority' as they say literally. Similarly, in Clause 25.6.2, the reference to 'Defaults of the Authority' is clearly a mistake and is intended to be Defaults of the Defender. Finally, in Clause 25.8 it is plain the drafter has paid so little attention to the transposition that he has inappropriately retained the word 'the' from the original term 'the Authority', before inserting a reference to the Defender.

5. The term 'Supplier' is, largely, used throughout the Subcontract as a reference to the Pursuer. The term is not, in fact, defined anywhere in the Subcontract because the designation of the parties in the Subcontract has not properly incorporated the definition contained in the Prime Contract in designing the parties. It is, also, confusing because the OBS in Schedule Part 2.1 refer to the Supplier Solution, which is in fact a reference to the Defender's solution under the Prime Contract.