OUTER HOUSE, COURT OF SESSION

[2019] CSOH 72

CA47/15

OPINION OF LORD ERICHT

In the cause

(1) LC MANAGEMENT SERVICES (SCOTLAND) LIMITED

(2) LC MANAGEMENT SERVICES (SCOTLAND) LIMITED as assignee of

LC SERVICES (SCOTLAND) LIMITED

Pursuers

against

(1) THE SCOTTISH MINISTERS

(2) HIGHLANDS AND ISLANDS ENTERPRISE

Defenders

Pursuers: O'Neill QC, Welsh; Balfour +Manson LLP
First Defender: Johnston QC; O'Neill, sol adv; Scottish Government
Second Defender: M Ross QC; E Campbell; Dentons UK

25 September 2019

Introduction

[1] The Nigg Yard, also known as the Nigg Energy Park, consists of land reclaimed from Nigg Bay. It has been used for fabrication and for a variety of oil and gas energy related services such as repair of drilling rigs. In 2011 part of the yard was purchased for commercial re-development by a company within the Global Energy group of companies.

Various public bodies had involvement with the re-development and various awards were made.

[2] The pursuers maintain that these awards included unlawful state aid. They aver that they were a competitor to the company which was the beneficiary of unlawful state aid. They raised an action against the Scottish Ministers and Highlands and Islands Enterprise, claiming that the awards were unlawful in that they were in breach of European Union State Aid Law.

[3] The pursuers conclusions were as follows:

> "1. For declarator that the awards by the defenders of financial aid to undertakings within the group companies owned by Global Energy Holdings Limited between October 2011 and May 2014 were unlawful in that they were awarded in breach of Articles 107 and 108(3) of the Treaty on the Functioning of the European Union, of provisions of European Commission Regulation (EU) No 651/2014 and of the European Commission's Guidelines on National Regional Aid for 2007-2013.
>
> 2. For recovery of the unlawful aid in the amount as determined by the Court in terms of the Commission Notice on the Enforcement of State Aid law by National Courts ([2009] OJC 85/01).
>
> 3. For recovery of illegal interest relating to the unlawful aid in the amount as determined by the Court in terms of the Commission Notice on the Enforcement of State Aid law by National Courts ([2009] OJC 85/01).
>
> 4. For payment by the defenders to the pursuers by way of damages of the sum of TWENTY FIVE MILLION POUNDS STERLING (£25,000,000) with interest thereon at the rate of eight per cent per annum from the date of citation until payment.
>
> 5. For such other order as to the court appears appropriate.
>
> 6. For the expenses of the action."

[4] The pursuers' pleas in law were as follows:

> "1. The Defenders, being in breach of Articles 107 and 108(3) of the Treaty on the Functioning of the European Union, Commission Regulation (EC)

No 800/2008, Commission Regulation (EC) No 651/2014, the Framework on State Aid to Shipbuilding (2003/C 317/06) and the European Commission's Guidelines on National Regional Aid for 2007-2013, declarator should be pronounced as first concluded for.

2. The Defenders, being in breach of Articles 107 and 108(3) of the Treaty on the Functioning of the European Union, Commission Regulation (EC) No 800/2008, Commission Regulation (EC) No 651/2014, the Framework on State Aid to Shipbuilding (2003/C 317/06) and the European Commission's Guidelines on National Regional Aid for 2007-2013, recovery should be pronounced as second and third concluded for.

3. The Defenders, being in breach of Article 108(3) of the Treaty on the Functioning of the European Union and the Pursuers having suffered loss and damage thereby, are liable to the Pursuers in damages under European Union Law.

4. The sum sued for being a reasonable estimate of the Pursuers' loss and damage, decree therefor should be pronounced as fourth concluded for."

[5] The action came before me for debate on the first and second defenders' pleas to the relevancy and competency. The debate was led by the second defenders, with the first defenders adopting the second defender's submissions and making separate submissions on certain matters.

[6] In this opinion I shall first set out the relevant provisions of EU State Aid Law. I shall then consider what is the relevant minimum threshold applicable under EU State Aid Law. Thereafter I will consider whether the pleadings of the pursuers disclose that the minimum threshold has been reached in this case. I shall then consider the relevance of the pursuers' averments on market failure. Finally I shall go on to consider various other matters.

European Union State Aid Law

[7] Article 107 of the treaty on the functioning of the European Union 2012/C326/01 provides:

"1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

…

3. The following may be considered to be compatible with the internal market:

…

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest…"

[8] Article 108 provides:

"1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.
…

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article."

[9] European State Aid Law includes a system of block exemption whereby aid below certain thresholds is compatible with the internal market under Article 107 of the Treaty and exempt from the notification requirement under Article 108.

[10] Article 109 provides:

> "The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure."

[11] One such regulation is Commission Regulation EC number 800-2018, the "General Block Exemption Regulation ("GBER"). The full title of GBER is:

> "COMMISSION REGULATION (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles [107] and [108] of the Treaty (General block exemption Regulation)"

[12] The recitals to GBER explain that the Commission had powers to declare that certain regional aid was compatible with the common market and not notifiable under Article 108(3) (Recital (1)). They also explain that the Commission now had sufficient experience in applying Articles 107 and 108 to simplify and ensure more efficient monitoring of aid by the Commission by replacing various regulations with a single regulation (Recitals (2) to (4)). They further explain the purpose of a system of financial thresholds above which the block exemption does not apply:

> "(23) Due to the higher risk of distortion of competition, large amounts of aid should continue to be assessed by the Commission on an individual basis. Thresholds should therefore be set for each category of aid within the scope of this Regulation, at a level which takes into account the category of aid concerned and its likely effects on competition. Any aid granted above those thresholds remains subject to the notification requirement of article 88(3) of the Treaty."

[13] Article 3 of GBER provides that aid which meets the requirements of GBER has a twofold effect. It:

> "shall be compatible with the common market within the meaning of Article [107(3)] of the Treaty and shall be exempt from the notification requirement of Article [108(3)]".

So the two fold effect of article 3 of GBER is that:

(1) the aid is compatible with the internal market and Article 107 is not breached; and

(2) the aid does not required to be notified under Article 108.

[14] Article 6 of GBER sets out various notification thresholds which apply to various types of aid. In relation to regional investment aid, which is the type of aid relevant to the current action, it states:

"**Individual notification thresholds**

...

2. Regional investment aid awarded in favour of large investment projects shall be notified to the Commission if the total amount of aid from all sources exceeds 75% of the maximum amount of aid an investment with eligible costs of EUR 100 million could receive, applying the standard aid threshold in force for large enterprises in the approved regional aid map on the date the aid is to be granted."

[15] Article 7 provides for different forms of aid to be cumulated in order to assess whether the threshold has been reached:

"1. In determining whether the individual notification thresholds laid down in Article 6 and the maximum aid intensities laid down in Chapter II are respected, the total amount of public support measures for the aided activity or project shall be taken into account, regardless of whether that support is financed from local, regional, national or Community sources.

2. Aid exempted by this Regulation may be cumulated with any other aid exempted under this Regulation as long as those aid measures concern different identifiable eligible costs."

[16] The European Commission has issued guidelines in respect of regional aid, which include specific guidelines in respect of large investment projects. The guidelines in force at the relevant time were the *Guidelines on National Regional Aid for 2007*-13 (2006/C 54/08) (the "RAGs"), which included the following provisions:

"4.3. Aid for large investment projects

60. For the purpose of these guidelines, a 'large investment project' is an 'initial investment' as defined by these guidelines with an eligible expenditure above EUR 50 million. In order to prevent that a large investment project being artificially divided into sub-projects in order to escape the provisions of these guidelines, a large investment project will be considered to be a single investment project when the initial investment is undertaken in a period of three years by one or more companies and consists of fixed assets combined in an economically indivisible way.

...

4.3.1 Increased transparency and monitoring of large investment projects

64. Member States are required to notify individually to the Commission any aid to be awarded to investment projects under an existing aid scheme if the aid proposed from all sources is more than the maximum allowable amount of aid that an investment with eligible expenditure EUR100 million can receive under the scale and the rules laid down in paragraph 67.

The notification thresholds for different regions with the most commonly encountered aid intensities under these guidelines are summarised in the table below.

Aid intensity	10%	15%	20%	30%	40%	50%
Notification threshold	EUR 7,5 million	EUR 11,25 million	EUR 15,0 million	EUR 22,5 million	EUR 30,0 million	EUR 37,5 million

...

4.3.2 Rules for the assessment of large investment projects

67. Regional investment aid for large investment projects is subject to an adjusted regional aid ceiling, on the basis of the following scale:

Eligible expenditure	Adjusted aid ceiling
Up to EUR 50 million	100 % of regional ceiling
For the part between EUR 50 million and EUR 100 million	50% of regional ceiling
For the part exceeding EUR 100 million	34% of regional ceiling

Thus the allowable aid amount for a large investment project will be calculated according to the following formula: maximum aid amount = R x (50 + 0,50 x B + 0,34 x C), where R is the unadjusted regional aid ceiling, B is the eligible expenditure between EUR 50 million and EUR 100 million, and

C is the eligible expenditure about EUR 100 million. This is calculated on the basis of the official exchange rates prevailing on the date of the grant of aid, or in the case of aid subject to individual notification, on the date of notification.

68. Where the total amount of aid from all sources exceeds 75% of the maximum amount of aid an investment with eligible expenditure of EUR 100 million could receive, applying the standard aid ceiling in force for large enterprises in the approved regional aid map on the date the aid is to be granted, and where

(a) the aid beneficiary accounts for more than 25% of the sales of the product(s) concerned on the market(s) concerned before the investment or will account for more than 25% after the investment, or

(b) the production capacity created by the project is more than 5% of the market measured using apparent consumption data for the product concerned, unless the average annual growth rate of its apparent consumption over the last five years is above the average annual growth rate of the European Economic Area's GDP.

the Commission will approve regional investment aid only after a detailed verification, following the opening of the procedure provided for in Article 108(2) of the Treaty, that the aid is necessary to provide an incentive effect for the investment and that the benefits of the aid measure outweigh the resulting distortion of competition and effect on trade between Member States."

What is the relevant minimum threshold applicable under EU State Aid Law?

Second defender's submissions

[17] Counsel for the second defender submitted that the notification threshold was €15 million. This was calculated by the formula set out in paragraph 67 of the RAGs. The application of that formula results in a threshold of €15 million. That had been accepted by the pursuers in their original pleadings but the pursuers had adjusted and now maintain that the threshold is €11.25 million. Counsel submitted that the effect of paragraph 68 was not to create a lower threshold, but must be read separately and provides for what is to happen when the aid is over the threshold and either of conditions (a) or (b) is met. She

submitted that the second defender's reading was supported by paragraphs 6, 7 and 8 of the *Communication from the Commission* 2009/C-223/02.

Submissions for the pursuers

[18] Counsel for the pursuers submitted that the ceiling for allowable aid was as set out in paragraph 67 of the 2016 guidelines and amounted to €15 million. However, the threshold for notification under Article 6(2) of GBER was 75% of that ceiling paragraph 67 figure, that is €11.25 million. You would expect the notification hurdle to be set below the ceiling. Paragraph 68 says that if there is market concentration in a large investment project, the notification at €11.25 million will also trigger a detailed enhanced verification process. Counsel submitted that the distinction between notification and assessment was made clear in case T-671-14 *BMW* v *Commission* ECLI: EU: T: 2017: 599, and also referred to case T-304/8 *Smurfit Kappa Group* v *Commission* EU: T: 2012: 351.

Discussion and decision

[19] State aid is in principle unlawful as it is incompatible with the internal market (Article 107(1)). However, there are some exceptions to this principle set out in Article 107. Some types of state aid are expressly stated to be compatible with the internal market: these include, for example, aid of a social character, or to make good the damage caused by national disasters, or certain aid relating to the re-unification of Germany (Article 107(2)). Other types of state aid such as regional investment aid "may be" compatible with the internal market where such aid does not adversely affect trading conditions to an extent contrary to the common interest (Article 107(3)).

[20] The assessment of whether regional investment aid is indeed compatible with the internal market involves a balancing of the potentially positive effects of the aid against the potentially negative effects of the aid. Article 108 provides for a procedure which gives the Commission an opportunity to undertake such an assessment. Article 108 also provides for a system of block exemptions from Article 108. The system of block exemptions benefits both the member state and the Commission. The member state knows that if the state aid falls within the exemption it is lawful. The Commission does not require to expend its resources assessing every award of state aid but instead can concentrate its resources on the cases which involve a higher risk of distortion of competition.

[21] It was a matter of agreement that the applicable category of aid in this particular case was regional aid awarded in favour of large investment projects. Article 6(2) of GBER, read short, provides that this category of aid requires to be notified to the Commission if the total amount of aid exceeds 75% of the maximum amount of aid an investment with eligible costs of €100 million could achieve, applying the standard aid threshold in the approved regional map. This gives an adjusted notification threshold which is 75% of the normal threshold. This affords the Commission the opportunity to scrutinise awards which are close to the normal threshold.

[22] In order to calculate the normal threshold it is necessary to know the aid intensity specified in the regional map. It was a matter of agreement that the correct aid intensity applicable in this case was 20%. To calculate the maximum aid an investment with costs of €100 million could achieve, the aid intensity of 20% is applied to the costs. 20% of €100 million is €20 million. This gives a normal threshold of €20 million.

[23] However, as we have seen, under Article 6(2) of GBER the notification threshold for regional investment aid for large investment projects is 75% of the normal threshold. 75% of

€20 million is €15 million. So the notification threshold in respect of aid at Nigg Energy Park was €15 million.

[24] The RAGs provide a useful cross check of this figure which confirms that the threshold was €15 million. In paragraph 65 the Commission has calculated the normal notification threshold for certain common aid intensities and set these out in a table. Conveniently for present purposes, it happens to have calculated the normal notification threshold for the aid intensity relevant to this case, ie 20%. The Commission's calculation confirms that the normal notification threshold in the current case is €20 million and accordingly that the notification threshold for the present case is €15 million. The table shows that the Commission has calculated the normal notification threshold for a 20% aid intensity as €20 million. So when one takes 75% of the normal threshold as calculated by the Commission the threshold in this case is €15 million.

[25] Counsel for the pursuers submitted that the notification threshold was 75% of €15 million rather than €20 million, and so the notification threshold in the present case was €11.25 million. He founded on paragraph 68 of the RAGs which refers to 75% of the unadjusted standard ceiling. The flaw in counsel's argument is that he is taking 75% not of the unadjusted standard ceiling (ie of €20 million) but of the ceiling which has already been adjusted under paragraph 67 (ie of €15 million). Accordingly in my view on a correct reading of paragraph 68 the notification threshold is 75% of €20 million that is €15 million.

[26] Counsel for the pursuers sought to derive assistance from the decisions of the European Court of Justice in *Smurfitt* and *BMW*. In my view while these cases provide useful illustrations of the procedure to be followed once the notification threshold has been reached, they do not advance the pursuers' argument as to what the notification threshold is.

[27] In *BMW* the court considered whether the Commission in conducting an in-depth assessment for regional aid to large investment projects was restricted to that part of the aid amount exceeding the notification threshold. It held that the Commission was not so restricted: the presumption of compliance under GBER did not prevail over an individual assessment conducted by the Commission after notification (para 177). However in that case the court was considering a case in which the notification threshold had been met and the aid had been notified. As the court said:

> "As [the aid in question] exceeded the threshold for triggering mandatory notification, the Commission was correct in finding that it had to assess it as an individual aid and not as aid coming under the regulation on block exemption [ie GBER]"(para 176)

[28] *Smurfit* is another example of a case which was notified to the Commission. In that case the Commission took the view that the 25% requirement in paragraph 68(a) of the RAGs had not been exceeded. The court held (para 88) that in these circumstances the Commission had the power to decide not to initiate the formal investigation procedure but had a discretion in that regard and could not justify that decision by claiming that it was required by paragraph 68 of the RAGs not to do so.

[29] While these cases clarify the role of the Commission once an award of aid has been notified, they do not assist with the logically prior question of whether the awards require to be notified in the first place.

[30] Accordingly, in my opinion, the notification threshold in the present case was €15 million.

Has the €15m threshold for notification been exceeded?

The awards

[31] The pursuers averred that the following awards had been made:

(1) An award by the second defender to Global Energy Nigg Limited of £1,694,000, dated 11 December 2012.

(2) An additional sum of £725,000 made by the second defender on 28 October 2013.

(3) An award by Highland Council from the Derelict Land Fund to Global Energy Nigg Limited of £651,897 on 27 February 2012.

(4) Awards to Nigg Skills Academy Limited in or around February and March 2012 amounting to a total of £705,101. These awards consisted of a loan of £250,000 from the second defender, the gross grant equivalent of which is £40,101; a grant by the Scottish Funding Council of £365,000 and a grant by Skills Development Scotland of £300,000.

(5) Financial aids awarded on 2 May 2014 in the amount of £6,532,226.

(6) The designation of Nigg as an assisted area for the purposes of section 35K of the Capital Allowances Act 2001. The pursuers averred that designation attracted financial incentives including advantageous business rates and that companies within the Enterprise Area benefit from enhanced capital allowances.

Second defender's submissions

[32] Counsel for the second defender submitted that it was unnecessary to notify the commission because, taken together, the awards fell beneath the applicable notification

threshold. Counsel submitted that, even if all of the items identified by the pursuers were cumulated, the total would not exceed the €15 million. The total sums averred by the pursuers for cumulation amounted only to €12,961,539. The pursuers' averments about enhanced capital allowances were irrelevant as they did not offer to prove that any such allowances were claimed nor give specification of the value of such allowances. In any event, it was not possible to claim enhanced capital allowances because of the provisions of section 45M of the Capital Allowances Act 2001.

First Defenders' submission

[33] Counsel for the first defender submitted designation of Nigg Energy Park as within the Low Carbon/Renewables North Enterprise Area does not constitute an award of state aid. He further submitted that the pursuers were wrong to aver that designation as an enterprise area attracts advantageous business rates: for the purposes of the Non-Domestic Rates (Enterprise Areas) (Scotland) Regulations 2012 SSI 2012/48 the Low Carbon/Renewables North Enterprise Area does not include the Nigg Energy Park.

Pursuers' submission

[34] Counsel for the pursuers submitted that he was not in a position to place a value on the designation under the Capital Allowances Act. It was the role of the defender (RAGs section 4.1). The cumulated total of the other grants was £10,308,223 and it was reasonably estimated that the gross grant equivalent of the capital allowances would exceed a million pounds and therefore cumulatively exceed the €11.25 million.

Discussion and decision

[35] The cumulative total of items (1)-(5) of the awards averred by the pursuers is £10,308,224. That is well below the threshold of €15m. So the pursuers have pled a relevant case only if the sixth item, that is the designation of Nigg Energy Park as an assisted area for the purposes of section 45K of the Capital Allowances Act 2001, takes the total to over the €15m threshold.

[36] The UK government designated Nigg as an assisted area for the purposes of section 45K by The Capital Allowances (Designated Assisted Areas) Order 2014 (SI2014/3813). The Order came into force on 23 December 2014 and the designations under it are to be treated as having been designated on 1 April 2012.

[37] The pursuers' position was that the designation gave rise to capital allowances and rates relief which were state aid and so required to be cumulated towards the threshold.

[38] In my opinion neither capital allowances nor rates relief are to be cumulated towards the threshold.

Capital allowances

[39] By express statutory provision, the capital allowances which the pursuers seek to accumulate are not available where state aid is provided.

[40] Section 45K provides for capital allowances in respect of first-year expenditure incurred on the provision of plant or machinery for use primarily in an area which at the time the expenditure was incurred was a designated assisted area.

[41] However section 45M(8) provides:

> "(8) A section 45K allowance made in respect of first-year qualifying expenditure is to be withdrawn if –

…

(b) within the period of 3 years beginning when that expenditure was incurred, a relevant grant or relevant payment is made towards any other expenditure which is incurred by any person in respect of the same designated assisted area, and on the same single investment project, as that expenditure."

The definition of "relevant grant or relevant payment" includes (sec 45M(12)):

"a State aid, other than an allowance under this Part"

[42] As the capital allowances under section 45K are not available where state aid is provided, they cannot be cumulated with state aid towards the notification threshold.

Rates Relief

[43] The Non-Domestic Rates (Enterprise Areas) (Scotland) Regulations 2012 (SI 2012/48) grant rates relief in respect of certain Enterprise Areas. The relevant enterprise areas are listed in regulation (3) with reference to definitions in regulation (1). The Nigg Energy Park is not included in the enterprise areas so listed. As it is not included, then rates relief is not available to it.

[44] As there is no rates relief for Nigg Energy Park, then no such rates relief can be cumulated towards the €15m threshold.

The pursuers' averments about market failure

Introduction

[45] The pursuers made detailed averments in article 25 about the award of state aid in the amount of £1.694 million referred to in paragraph [31] above. The award was made under the GBER Scottish Property Support Scheme 2009-2013 ("the SPSS scheme").

[46] The pursuers averred that the award of £1.694 million was unlawful in that the defenders committed four infringements of law. The fourth infringement was the failure to notify the Commission, and I have found that this was not unlawful as the €15 million threshold was not exceeded. The other infringements can be summarised as follows.

(a) In order to award aid under the SPSS Scheme, the second defender needed to evidence market failure. There was no market failure as the second defender made errors in its calculations. The valuation of market value by Graham and Sibbald Chartered Surveyors was flawed: it did not take into account a bid for the Energy Park for £13.25 million not including development costs. The costs of £8.63 million were overstated as there was no Bill of Quantities and an unjustified contingency fee.

(b) The award could not be lawfully made under the SPSS scheme as the pursuers were in direct competition with Global.

(c) The second defender failed to establish an incentive effect for the award. The State aid was awarded while there was a competing bid which was not dependent on state funds. The award could not therefore be made under the SPSS scheme.

The second defender's submissions

[47] Counsel for the second defender submitted that the proof of the pursuers' averments in Article 25 was insufficient to amount to an absence of market failure for the purposes of the SPSS scheme. The definition of market value in "Commission on State Aid Elements in Sales of Land and Buildings by Public Authorities Guidance (97/C209/03 at page 2)" was consistent with the domestic definition of market value under the *RICS Professional*

Standards, Global 2017 page 10 and *Stewart MacDonald & Pamela Coyne, liquidators of Grampian MacLennan's Distribution Services Ltd* v *Carnbroe Estates Limited* 2018 SLT 205 at paragraph 8. The bid was not acceptable: there was a willing buyer and a price of £13.25 million was not achieved. Further, it was not contended that chartered surveyors would have altered their view of market value had they been aware of the unsuccessful bid. There was no offer to prove that the view taken by the implementing bodies was an irrational one: accordingly there was no breach of the SPSS scheme. In the absence of an offer to prove irrationality, there could be no breach. The alleged errors by Graham & Sibbald were insufficient to amount to a breach the SPSS scheme.

The pursuers' submissions

[48] Counsel for the pursuers submitted that the existence of the offer of £13,250,000 demonstrated that there was no shortfall between the acquisition and development costs and the value of the completed project. Therefore no State aid was required to fill the gap and the provision of the £1,694,000 award was not in accordance with section 3 of the SPSS rules. The pursuers' pleadings at Article 25 on market failure were relevant. The averments about the Graham & Sibbald valuation were sufficient for the purposes of a commercial court action, and if necessary could be developed following normal commercial court procedure.

Discussion and decision

[49] The scope of this action is delineated by the conclusions and the pleas in law. These are set out in paragraphs [3] and [4] above. The declarator sought is in respect of breach of Articles 107 and 108(3), GBER and the RAGs, on the basis of a plea in law to the effect that

there has been a breach of these items. The conclusion for recovery is for recovery in relation to these breaches, on the basis of a plea in law to the effect that there has been a breach of these items. The conclusion for *Francovich* damages is on the basis of a plea in law that there has been a breach of Article 107(3). This is not a petition for judicial review of a decision of a public body to award grants. It is an action for declarator and damages for breach of specified items of European State Aid Law. In order to be relevant the pursuers' averments require to go to a breach of one of the items specified in the conclusions and pleas in law.

[50] In my opinion, the pursuers' averments as to infringements (a), (b) and (c) in Article 25 do not go to breach of the items specified in the conclusions and pleas in law. It follows that they are irrelevant.

[51] In submitting that the averments on market failure were relevant, counsel for the pursuers drew my attention to references to market failure in Recital 35 of GBER and paragraph 13 of the *Communication from the Commission Concerning the Criteria for an in depth assessment of regional aid to large investment projects* (2009/C 223/02). However, in my opinion neither of these references assists the pursuers.

[52] Recital 35 of GBER states:

> "It is necessary to establish further conditions that should be fulfilled by any measure exempted by this regulation. Having regard to articles [107(3)(a)] and articles [107(3)(c)] of the Treaty such aid should be proportionate to the market failures or handicaps that have to be overcome in order to be in the Community interest. It is therefore appropriate to limit the scope of this Regulation, as far as it concerns investment aid, to aid granted in relation to certain tangible and intangible investments"

[53] However, this is no more than a recital. It merely explains the reason why the scope of the regulation has been limited. I was not directed to any substantive provision within the regulation which would have been breached by the matters averred by the pursuers.

[54] Paragraph 13 of the *Communication* states:

> "13 While the primary objective of regional aid is to foster equity concerns as economic cohesion, regional aid may also address issues of market failure. Regional handicaps may be linked to market failures such as imperfect information, co-ordination problems and difficulties for the beneficiary to appropriate investments in public goods or externalities from investments. Where, apart from equity objectives, regional aid also addresses efficiency concerns, the overall positive effect of the aid will be considered greater".

[55] However, when that paragraph is read in its context, it is of no assistance to the pursuers. The purpose of the *Communication* is set out in paragraph 8 of the *Communication* and footnote 63 of the RAGs: the Commission is giving further guidance on the criteria it will use when conducting an in-depth assessment of State aid in cases above the notification threshold. The communication does not apply to cases, such as this one, where the notification threshold has not been exceeded.

Conclusion

[56] In summary then, in my opinion the pleadings of the pursuer do not disclose that the minimum threshold of €15 million has been exceeded. Further, the pursuers have not pled a relevant case on market failure. In these circumstances, the action falls to be dismissed.

Other Matters

[57] As I have dismissed the action for the reasons set out above, it is not necessary for the purposes of my decision to come to views on the other matters raised at debate. Nonetheless I will set these out briefly for the sake of completeness.

Competency of the pursuers' second and third conclusions

[58] The defenders challenged the competency of the second and third conclusions. The second conclusion was for recovery of unlawful aid. The third was for recovery of illegal interest relating to unlawful aid.

Second defender's submissions

[59] The second defenders accepted that recovery of unlawful aid could occur and be ordered by the Commission and national courts, albeit there was not an absolute obligation to order recovery (*SFEI* v *La Poste* (see – 39/94) [1996] ECRI-3547, paragraph 68, 70; *Residex Capital* v *Municipality of Rotterdam* (see 275/10) [2011] ECRI-13043, paragraphs 33 to 36; *OTP Bank* v *Magyar Allam* (see – 672/13) [2015] EU: C: 2015: 185 at paragraphs 69 to 74). The 2009 Notice recognised that national procedural rules would apply to recovery of aid awarded. However, the effect of the second and third conclusions would be that the court was being asked to award a decree enforceable against Global Energy in circumstances where Global Energy was not party to the proceedings. Where it is the Commission that is recovering aid, such third parties have an opportunity to comment (Council Regulation (EC) number 659/199 dated 22 March 1999, article 6). A recovery order by the Commission did not give rise to any obligation of direct payment for the beneficiary of aid, but was addressed to the member state and required implementing by the member state (*Telefonica SA* v *Commission*, 19 December 2013, see – 274/12P, para 26). Accordingly there was a two stage approach: the first a decision in principle that the unlawful aid should be recovered and second recovery by the member state. Such a twofold approach should be followed in this case. There are various exceptions to the normal rule that unlawful aid should be recovered which could be advanced only in a case against the beneficiary (Procedural

Regulations of 1999 article 2014 and 2015, article 16 and 17. The only Scottish case which has dealt with recovery of unlawful aid is an example of the second stage (*The Advocate General for Scotland* v *John Gunn and Sons Limited* [2018] SLT 862.

Pursuers' submissions

[60] Counsel for the pursuers explained that intimation of these proceedings had been made on Global Energy who declined to take part and submitted that for that reason alone the second defender's submissions were ill founded. National courts were obliged to protect the directly effective individual rights of affected persons, including the beneficiaries' competitors (2019 Commission Notice para 24). The court is obliged to ensure that its procedures comply with the EU Principle of Effective Judicial Protection: case C-284/16 *Slovak Republic* v *Achmea BV* ECLI: EU: C: 2017: 699; Case 73/16 *Puškár* v *Slovak Republic* ECLI: EU: C: 2017: 725 (27 September 2017) [2017] 4 WLR 209 at section 59. Member states authorities can be ordered to require that any state aid is repaid by the recipient (eg article 16 of Council Regulation 2015 – 1589; Case 52/84 *Commission* v *Belgium* [1986] ECR 89; Case C-232/05 *Commission* v *France* [2006] ECRI-10071, section 42; Case C-419/06 *Commission* v *Greece* 14 February [2008] ECRI-27 (Summ Pub) at sections 38 and 61; Case C-177/06 *Commission* v *Spain* [2007] ECRI-7689, section 46; Case C-214/07 *Commission* v *France* [2008] ECR I-8357, section 44; Joined Cases C-485/03 to C-490/03 *Commission* v *Spain* [2006] ECR I-11887, section 74; Case -304/09 *Commission* v *Italy* [2010] ECR I-13903 at section 37; Case C-363/16 *Commission* v *Greece* ECLI: EU: C: 2017: 746 at sections 44-51). Recovery of unlawful state aid from its beneficiary is not a penalty but a means of eliminating the distortion of competition (Case C-537/08 *P Khala Thüringen Porzellan GmbH* v *Commission* [2010] ECR I-12917; Case C-5/89 *Commission* v *Germany* [1990] ECR 1-3437, section 14; Case C C-169/95

Spain v *Commission* [1997] ECR I-135, section 51; Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, section 104; Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, section 25 and Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, section 64).

Discussion and decision

[61] Had I not dismissed the action, I would have taken the following approach to orders for recovery.

[62] Counsel for the second defenders accepted, correctly in my view, that if the court were to grant declarator in terms of the first conclusion then the member state had an obligation to recover. I would not at this stage have repelled the pleas in law on recovery and excluded the second and third conclusions from the action, but would instead have reserved all matters relating to the second and third conclusions. I would have used the commercial court case management powers to allow the case to proceed to a proof on liability on the first plea in law (declarator) only. If after proof I granted the declarator, I would expect that the member state, through the relevant bodies, would recover the unlawful aid and interest without the necessity of any further order from this court.

[63] The result of splitting the issues before the court in this way would be that if the member state failed to recover, it would be left open to the pursuers to seek further procedure in this court in respect of their second and third conclusions. That would necessitate further pleading to focus the issue in the light of the particular failures of the member state. It would also allow the pursuers to give further consideration of the appropriate wording in a conclusion for recovery. The current wording is silent as to who is to recover, and it is difficult to see how a court order for recovery which did not impose an obligation on any person could be enforced.

The pursuers' averments of causation and loss

Averments

[64] The pursuer sought damages of £25 million on the basis *of Francovich* v *Italy* [1991] ECR I-5357. For breach of Article 108(3). The pursuers averred as follows:

> "If there is a breach of Article 108(3) TFEU then it is open to the European Commission, and it alone, to determine whether there has also been a breach of Article 107 TFEU. Unless and until the European Commission determines that there has been an additional breach of Article 107 TFEU and so determine the nature and extent of the Defenders' breach of EU law, it is not yet possible for the Pursuers to quantify finally the losses they have suffered."

[65] The pursuers then averred the various factors which they averred were relevant to that final quantification exercise.

Second defender's submissions

[66] Counsel for the second defender submitted that the potential for further involvement of the Commission in hypothetical connected proceedings did not remove the obligation upon the pursuers to provide fair notice of their case within these proceedings for *Francovich* damages. No notice was given of even the most basic facts that the pursuers would be required to prove in order to justify any loss. For example there was no notice of:

(a) pre-aid profits associated with competitive activities;

(b) any particular contracts which the pursuers contend they lost to Global Energy;

(c) the value of any such contract;

(d) projected profits, but for the award of aid;

(e) what loss is attributed to each company over which period; or

(f) the benefits received from the sales of assets relied upon by the pursuers.

Fair notice was required so that the defenders would not be taken by surprise at proof (*MacDonald* v *Glasgow Western Hospitals* [1954] SC 453 at 465; *Sajjad Soofi* v *Dykes* [2017] SCS IH40; *Westerton (UK) Limited* v *Edge Energy Limited* [2018] CSOH 97 at paragraph 50; *Melville Dow* v *Amec Group Limited* [2017] CSIH 75 at paragraphs 91, 139 and 180).

[67] Counsel further submitted that there must be a direct causal link between breach of the obligation resting on the member state and the damage sustained by the injured party (*Francovich* v *Italy* (see – 6/90) [1991] ECR I-5357; *Brasserie Du Pecheur SA* v *Germany* (see-46/93) [1996] ECR I-1029). The pursuers had not averred such a direct causal link.

[68] Further, the second defender submitted that averments regarding the competition of IFAB Limited with Global Energy were irrelevant as IFAB Limited was not the pursuer. The pursuers had provided insufficient notice of why any loss to IFAB was a loss of which the pursuers were entitled to claim.

[69] Counsel further argued that the pursuers' averments regarding the award of state aid in May 2014 were irrelevant as the pursuers had also averred that all the assets in the business were sold on 4 October 2014. The pursuers were not trading at that time and were therefore not competitors who suffered a disadvantage as a result of any award of aid in May 2014.

Pursuers' Submissions

[70] Counsel for the pursuers submitted that the pursuers had sufficiently identified the basis on which the sum sought was calculated and offered to prove it. Notwithstanding that some of the payments were actually made after the sale of the pursuers' business to Global Energy, Global Energy was aware that the payments were to be made in advance of October 2013. The pursuers' loss was caused by the unlawful grants of aid placing Global

Energy at a competitive advantage at the time when the funds were to be made available rather than the time the funds were actually made over. The availability of the grants allowed projects to be planned in advance by Global Energy which allowed it to capitalise on its increasingly dominant market position in the geographic location.

Discussion and decision

[71] The defenders seek to have the *Francovich* claim dismissed for lack of specification of loss. As I have already indicated, had I not dismissed the action I would have allowed a proof on liability restricted to the declarator. I would not at this stage have dismissed the *Francovich* claim for lack of specification, but if the pursuers had succeeded on liability I would have taken the specification issues forward through commercial court case management.

Whether case against first defenders should be dismissed

Submissions for first defenders

[72] Counsel for the first defenders invited me to dismiss the action insofar as directed against them. He submitted that the pursuers' pleadings did not contain any relevant averments as to awards of aid for which the first defenders were said to be responsible. The designation of Nigg Energy Park as an Enterprise Area did not confer any rates relief and did not constitute an award of state aid. The designation as an assisted area in respect of section 45K of the Capital Allowances Act 2001 was an act of the UK government, not the Scottish Ministers. Skills Development Scotland and the Scottish Funding Council had legal personality and the first defenders were not responsible in law for any awards of state aid made by them.

Submissions for the pursuers

[73] Counsel for the pursuers submitted that the first defenders had more than a passive role and their fingerprints were all over it. It was their money which was the bulk of the State Aid.

Discussion and decision

[74] Had I not dismissed the action on other grounds, I would have dismissed it *quoad* the first defenders. I have found that there was no State aid in relation to rates relief and capital allowances. It follows that the first defender's actions in designating Enterprise Areas and in entering into a memorandum with the UK government in relation to designation for capital allowances are not grants of State aid. The pursuers did not aver any other specific example of State aid granted by the first defenders. In these circumstances the pursuers have not pled a relevant case against the first defenders.

Order

[75] I shall uphold the first plea in law for the first defenders and the fourth plea in law for the second defenders and dismiss the action.