**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2023] CSIH 25**
**CA9/22**

Lord President
Lord Pentland
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the reclaiming motion

in the cause

LONGHILL WIND FARM LLP

Pursuer and Respondent

against

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

Defenders and (in the case of the Sixth Defender only) Reclaimer

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

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22 June 2023

**Introduction**

[1] This case concerns the construction of a provision in a contract. The parties are at issue as to (i) whether the provision had contractual effect; (ii) if it did, how it should be

interpreted; and (iii) whether there was an effective assignation to the pursuer of the benefit of the contract condition which included the provision.

**Background**

***The defenders' development at West Calder***

[2] The parties are wind farm developers. Between around 2015 and 2017 the defenders were developing a wind farm at West Calder, near Edinburgh Airport. Tall structures such as wind turbines may interfere with the operation of the radar system which is used by the airport to manage air traffic. To mitigate such interference, the sixth defender procured and paid for the installation and operation of a new airport radar system. NATS (Services) Limited and NATS (En Route) plc ("NATS") operate the airport's radar system.

***The Mitigation and Services Contract***

[3] The sixth defender, an associated company, and NATS entered into a Mitigation and Services Contract ("MSC") dated 21 October 2015 and amended and restated on 31 August 2017. The MSC governs arrangements between them in relation to the new radar system. Clause 9.6.1(a) provides:

> "NATS shall determine in its sole discretion the fee and terms for use of the New Radar Feed by third parties. In respect of all Third Party Developers, this shall be subject to the inclusion of a CAPEX repayment fee of £32,000 per MW (consented or proposed installed capacity) in respect of each Third Party Development which shall be payable by such Third Party Developer to NATS … and which NATS shall pay to [the sixth defender] within twenty eight (28) days of receipt of cleared funds from the Third Party Developer by NATS … or any connected person…".

The pursuer is a Third Party Developer, and Longhill Burn Wind Farm is a Third Party Development.

*The pursuer's development at Longhill Burn*

[4] The pursuer was part of the Energiekontor group of companies until its former parent company, Energiekontor UK Ltd ("EKUK"), sold it to a different parent in February 2021. In 2017 EKUK was seeking to develop a wind farm at Longhill Burn, not far from Edinburgh Airport. The site was, and is, owned by the pursuer. In order to prevent NATS from objecting to planning permission for the development, EKUK required to put in place measures to mitigate the interference which its turbines would cause to the airport's radar. EKUK therefore sought permission to use the new radar system for Longhill. Under the MSC the sixth defender had a right to veto third party use of the new radar. EKUK asked the sixth defender to consent to the arrangement. In return for that consent, EKUK agreed to consent to a right of access being granted to the defenders by the landowners over a site at Little Hartfell, Dumfries and Galloway, which EKUK was developing. The defenders needed this access for the benefit of their own development site at Crossdykes, Dumfries and Galloway. The parties' formal written agreement was set out in Consent Missives dated 16 August 2019.

*The Consent Missives*

[5] Condition 3.3 of the Consent Missives stated that the first defender for itself and on behalf of the sixth defender would issue New Radar Use Consents to NATS for the pursuer's use of the new radar system within 5 business days of consent being requested, provided that certain listed conditions were satisfied. A provision at the end of condition 3.3 stated:

> "Declaring for the avoidance of doubt that no sums will be paid or be due to be paid to a MEL WWS Group Company by EKUK or an Energiekontor Group Company through the operation of the Mitigation and Services Contract as a result of the grant of the New Radar Use Consents and the use of the New Radar in respect of Longhill Burn by virtue of this letter of consent. For the purpose of this condition 3, the

> location of any turbine shall be measured from the centre point of its tower base on the ground."

Condition 1.1 provided:

> "1.1 In this Letter of Consent:
> …
> "**EKUK**" means Energiekontor UK Ltd…, or where the context permits, such other Energiekontor Group Company as may, from time to time, be in right to the EKUK Option Agreement or any lease to be granted pursuant to it;
>
> "**Energiekontor Group Company**" means a company… which is a member of the same group as EKUK from time to time;
> …
> **"MELWWS Group Company**" means either (i) any body corporate that is Muirhall Energy Limited or any of its subsidiaries or holding companies or any subsidiary of Muirhall Energy Limited's holding company…; or (ii) any body corporate in which Muirhall Energy Limited or any such holding company or subsidiary and either or both of WWS Partners LLP and WWS Developments LLP together hold a majority of the voting rights and for the avoidance of doubt, for the purposes of this Letter of Consent, includes Crossdykes WFL, Hopsrig WFL and Loganhead WFL;
> **…"**

Condition 5.3 stated:

> "5.3 EKUK undertake to take any party to whom they dispose of their interest in [their option agreement concerning Little Hartfell] bound to grant a letter in similar terms as this letter including this paragraph."

***The assignation***

[6] On 25 February 2021, upon the sale of the pursuer to its new parent company, EKUK assigned to the pursuer its whole right, title and interest to enjoy the benefit of condition 3.

***The contract between the pursuer and NATS***

[7] On 26 February 2021 NATS and the pursuer entered into an agreement regarding the pursuer's use of the new radar system. Under that agreement the pursuer was obliged to pay NATS a capex recovery fee of £1.6 million. The fee was to cover the capital expenditure incurred in relation to the procurement, installation, operation and maintenance of the new

radar system. The MSC between NATS and the sixth defender obliged NATS to pay the capex recovery fee to the sixth defender. In a side letter dated 24 February 2021 NATS undertook to the pursuer that they would return the fee to it if the sixth defender confirmed that it was not entitled to it or refused to accept it or that it waived its right to receive it; or if NATS received confirmation that a competent court or arbitral tribunal or arbitration had determined that the sixth defender was not entitled to receive it; and if the fee was repaid to them by the sixth defender.

[8] The pursuer paid the capex recovery fee to NATS on 17 September 2021, and NATS paid it on to the sixth defender. The sixth defender has not returned the fee to NATS, and so NATS have not repaid it to the pursuer.

**The commercial judge's decision**

[9] The pursuer seeks declarator that the benefit of condition 3 was validly assigned to it. It maintains that the sixth defender is in breach of the provision at the end of condition 3.3, and it seeks damages of £1.6 million. The commercial judge heard a proof before answer. All of the defenders had lodged defences but the sixth defender was the only defender who was represented at the proof. The judge heard evidence relating to the factual matrix of the Consent Missives. At para [44] of his opinion he made findings in relation to that evidence:

> "[44] … On the basis of the admissible evidence, I find that the relevant factual matrix is as follows. The commercial purpose of the contract concluded in the missives was that each party was giving up a right of veto, or a perceived right of veto, in order to enable the other to pursue a commercial interest in developing a wind farm: in the one case at Longhill, in the other at Crossdykes. Both parties were aware of the existence of the MSC, and of the fact it was a contract between NATS and one or more Muirhall companies, but that EKUK was unware of its precise terms. Both were aware that Muirhall had a right of veto in relation to the use of the New Radar, and of the likelihood that the MSC would provide for sums paid to NATS by a third party developer such as EKUK (under a separate mitigation and services contract) to be paid in turn to a Muirhall company (but EKUK did not know

> which one). Finally, both parties were aware that it was commonplace for SPVs, formed to develop wind farms, to be sold to a third party developer. …"

The judge decided that the provision had contractual effect. He was satisfied that the benefit of condition 3 had been validly assigned to the pursuer, and that the provision ought to be construed as referring to payments made by EKUK or an Energiekontor Group Company or an assignee. He was not persuaded that the provision obliged the sixth defender to waive and not to exercise any right it may have under the MSC to obtain from NATS a capex recovery fee NATS had obtained from the pursuer. However, he determined that the provision was a warranty by the defenders that no sum falling within the description set out in the provision would be paid or be due to be paid to a defenders or a related company by EKUK or an Energiekontor Group Company or an assignee. He held that the sixth defender was in breach of the provision. It was common ground that in the event of a breach being established damages of £1.6 million should be awarded. The judge granted declarator that the benefit of condition 3 had been assigned to the pursuer. He granted decree against the sixth defender for payment to the pursuer of damages of £1.6 million.

**The reclaiming motion and the cross-appeal**

[10] The sixth defender reclaims (appeals) that decision. In its cross-appeal the pursuer maintains that the commercial judge erred in deciding that the provision does not oblige the sixth defender to waive and desist from exercising any right it may have to obtain payment from the pursuer via NATS of the capex recovery fee.

**Submissions**

***Sixth Defender***

[11] The judge erred in holding that the sixth defender was in breach. The provision was

not a warranty, let alone a warranty that the sixth defender had breached. In fact, it did not have any contractual effect. It was, at most, a statement of the parties' understanding. There was no need to force substantive content on the meaning of every part of the contract. In particular, there was no need to find content for the phrase "through the operation of the Mitigation and Services Contract". However, it was possible to give that phrase content because, for all that EKUK knew, the MSC might have purported to impose obligations on it to pay sums to one or more of the defenders or a related company. The natural and ordinary meaning of the provision was that EKUK or an Energiekontor Group Company would not have to pay any sum to any of the defenders or a related company as a result of the grant of consents and the operation of the MSC. Payments of sums to or by third parties such as NATS were not matters covered by the provision. If any such payments were covered it was only where their nature was that of a premium rather than a capex recovery fee. Another reason that the payment did not give rise to a breach was that the provision did not extend to payments made by an assignee. Neither the provision nor the definitions of "EKUK" and "Energiekontor Group Company" in condition 1.1 mentioned assignees. In any case, the purported assignation to the pursuer was ineffective because the benefit of the provision was not assignable. There was an element of *delectus personae*.

[12] So far as the cross-appeal was concerned, the commercial judge had been correct to decide that the provision did not oblige the sixth defender to waive and not exercise any rights under the MSC.

***Pursuer***

[13] The provision had contractual effect. There was a presumption that all parts of a formal contractual document were intended to have contractual effect (*Dŵr Cymru*

*Cyfyngedig (Welsh Water)* v *Corus UK Ltd* [2007] EWCA Civ 285, [2007] 14 EG 105 (CS), [13]). The second sentence defined the location of a turbine; that was plainly operative. As EKUK had not seen the MSC, the parties cannot have thought that they were recording a common understanding of its meaning and effect. The purpose of the provision was to provide assurance to EKUK that the MSC's terms would not result in the defenders receiving an undisclosed consideration in addition to the obligations which EKUK undertook in the Consent Missives.

[14] The provision was not concerned only with direct payments. It covered payments made to the defenders or related companies by an EKUK company or an assignee "through the operation of the Mitigation and Services Contract". That was the only interpretation which gave content to the latter phrase and which made sense having regard to what the parties knew about the MSC. The provision did not restrict the payments affected to those having the nature of a premium. The commercial judge had been correct to find that the benefit of clause 3 was assignable; that there had been an effective assignation; that the provision applied to payments made by an assignee; and that it was a warranty. He was also right to hold that the sixth defender was in breach and that the pursuer was entitled to damages.

[15] The cross-appeal had been marked in case the court disagreed with the judge's conclusion that the provision was a warranty, but favoured the submission that the provision obliged the sixth defender to waive and not exercise any right it may have to receive sums from the pursuer through the operation of the MSC. The ground was not developed in oral submissions.

**Decision and reasons**

***Contractual effect?***

[16] The provision is a term of a written contract which was negotiated by the parties. Each was assisted by professional legal advisers. There is no doubt as to the contractual effect of the second sentence of the provision. We are also satisfied that on a proper construction of the provision the first sentence has contractual effect. Ultimately, we understood the sixth defender to accept that. It was right to do so. While the expression "for the avoidance of doubt" is not particularly apt, we consider that its use was simply to emphasise what follows. We note that the contracting parties used the expression in a similar way in condition 2.1. In any case, viewed objectively, the terms of the remainder of the sentence make clear that it was intended to have contractual effect.

[17] A reasonable reader, informed as to the relevant factual matrix, would interpret the provision as an undertaking by the defenders about future facts, *viz.* that no sums would be paid or be due to be paid to a MELWWS Group Company by EKUK or an Energiekontor Group Company through the operation of the MSC as a result of the grant of the New Radar Consents and the use of the New Radar in respect of Longhill Burn by virtue of the Consent Missives (McBryde, *The Law of Contract in Scotland* (3rd ed.), para 20-10; *MacQueen and Thomson on Contract Law in Scotland* (5th ed.), para 4.16). In Scots law it is more accurate to describe the undertaking as a contractual term than to refer to it as a warranty (McBryde, *supra*, para 20-93).

***Assignability***

[18] EKUK could competently assign the benefit of its rights under condition 3. Nothing in the condition is indicative of there being an element of *delectus personae*. There was to be

no provision of services to the defenders in connection with Longhill. The provisions relating to Longhill were severable from those relating to Crossdyke and Little Hartfell, the only connection being a commercial *quid pro quo*. Use of the New Radar would be required for many years into the future. As a company, EKUK's ownership and management could be expected to change, and the parties had in contemplation that EKUK might dispose of its interest in Longhill. It is commonplace within the industry for wind farms to be developed by special purpose vehicles which may be sold on, and that wind farms are operational for 25 years or more. In these circumstances it is more consistent with commercial common sense that the rights conferred by condition 3 should be assignable than that they should not be.

***Payments by an assignee***

[19] The fact that assignees are not referred to expressly in the provision or in the definitions of "EKUK" or "Energiekontor Group Company" in condition 1.1 is not determinative. On a proper construction of the provision payment "by EKUK or an Energiekontor Group Company" should be interpreted as including payment by an assignee (*cf Tolhurst* v *Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414). We are not persuaded that any of the other terms of the missives ought to lead to the opposite conclusion. The reasonable reader would know that the parties would have contemplated that EKUK might dispose of its interest. When regard is had to the relevant factual matrix, it is more consistent with commercial common sense that the rights conferred by condition 3 should be assignable than that they should not be. That being so, it would make no commercial sense if a payment by an assignee fell outwith the ambit of the provision.

***The meaning of the provision***

[20] The issue upon which there was most contention was: whether the provision refers only to payments made directly by EKUK oran Energiekontor Group Company or an assignee to a MELWWS Group Company; or whether it strikes at payments made by EKUK etc. to NATS which are passed on by NATS to such a company through the operation of the MSC. The parties had professional legal advisers. It is fanciful to suggest that EKUK may have thought that a contract to which it was not party could have imposed obligations upon it. The phrase "through the operation of the Mitigation and Services Contract" can only have been referring to indirect payments, ie by EKUK etc. to NATS and thence to a MELWWS Group Company. The sixth defender's suggested construction gives the phrase no real content. Textual and contextual considerations support the pursuer's interpretation. The parties were aware that it was normal in the industry for NATS to levy a capex recovery fee on developers such as EKUK, and that EKUK would know that NATS might well be obliged under the MSC to refund some or all of that fee to the defenders or a related company. The pursuer's interpretation accords with what we understood both parties to accept was the purpose of the provision, *viz.* to ensure that what each party agreed to do under the missives was the sole *quid pro quo* for what the other agreed to do, and that neither was to obtain any payment directly or indirectly from the other.

[21] We reject the sixth defender's argument that if the provision covered indirect payments through the operation of the MSC then it applied only where the nature of the payment was a premium, not where there was refunding of a capex recovery fee. It suffices to say that the language of the provision and the relevant factual matrix provide no support for that contention.

*The cross-appeal*

[22] As already noted, the cross-appeal had only been marked in case the court disagreed with the commercial judge's conclusion that the provision is a warranty but considered that it obliged the sixth defender to waive and not exercise rights under the MSC. The ground was not developed in oral submissions. In those circumstances it is unnecessary to say anything more about it. We shall refuse the cross-appeal for lack of insistence.

**Disposal**

[23] We shall refuse the reclaiming motion and the cross-appeal. However the interlocutor of 25 November 2022 disposing of the action ought to have set out the terms of the declarator granted in respect of conclusion 1(a). A second slip is that the interlocutor decerned "for payment of the expenses in the foregoing interlocutor of today" when in fact the commercial judge had not dealt with the question of expenses. We shall recall the interlocutor in order to correct these slips.