OUTER HOUSE, COURT OF SESSION

[2018] CSOH 115

CA20/18

OPINION OF LORD DOHERTY

In the cause

(First) MAYFLY CONTAINERS LIMITED (In Liquidation) and
(Second) CLARE BOARDMAN and MATTHEW JAMES COWLISHAW,
as Joint Liquidators thereof

Pursuers

against

MONUMENT CONTAINERS LIMITED

Defender

Pursuers: Thomson QC; Harper Macleod LLP
Defender: Connal QC (solicitor advocate); Pinsent Masons

7 December 2018

Introduction

[1] The first pursuer formerly manufactured offshore containers. It entered into administration on 11 September 2015. On 27 June 2016 it moved from administration to a creditors' voluntary winding up. The second pursuers are the joint liquidators of the first pursuer.

[2] In this action the pursuers aver that the defender is in breach of a contract which the first pursuer and the defender entered into in November 2013. The pursuers seek damages from the defender in respect of that breach. The defender challenges the relevancy of the

pursuers' averments. The matter came before me for debate on the commercial roll. In advance of the debate the parties prepared written Notes of Argument. I am grateful to Mr Thomson and Mr Connal for their written and oral submissions. They were of considerable assistance to me.

The background to the contract

[3] The pursuers aver that certain matters were known to both contracting parties at the time the contract was concluded. First, that they had traded with each other for in excess of 30 years. Second, that latterly approximately 90% of the first pursuer's business had come from the defender. Third, that since about 2010 the defender's purchase orders had been spread fairly evenly throughout the year such that (at least) 50% of a year's purchases by it from the first pursuer were ordered in the first 6 month period of each year. In support of the latter averment the pursuers have produced a table (6/17 of process) which bears to show that in each of the years 2010, 2011, 2012 and 2013 more than half of the goods purchased in the year were ordered in the first 6 months. (The table also shows that to have been the position for 2014). The pursuers have incorporated the table *brevitatis causa* in their pleadings.

The contract

[4] The contract was dated 25, 27 and 28 November 2013. It comprised a Minute of Agreement, Standard Terms and Conditions ("the Standard Terms"), a Manufacturer Partnership Performance Scheme ("the Scheme"), and a Price List. The Standard Terms were standard terms and conditions prepared for Swire Oilfield Services Limited and its affiliated companies (of which the defender was one). In the Minute of Agreement the

parties agreed that all transactions entered into between them should be on the terms set out *inter alia* in the Standard Terms, the Scheme, and the Price List. While both the first pursuer and the defender have their registered offices in England, in terms of the contract (i) the parties agreed that the contract, and any dispute or claim arising out of or in connection with it or its subject matter or formation, should be governed by, and construed in accordance with, Scots law; and (ii) the parties irrevocably submitted to the exclusive jurisdiction of the courts of Scotland.

[5] One of the stated aims of the Scheme was:

> "To give the [first pursuer] more certainty on annualised supply demands so it can plan more effectively (to the benefit of both parties);"

The Scheme provided that it was to run for an initial period of 2 years with an option for the first pursuer to extend the period if specific targets were met. It continued:

> "THE SCHEME HEADLINES
>
> The parties agree the following:
> (a) a minimum tonnage of supplies in each year of the Scheme over which a volume discount shall apply;
> ...
> (c) Key Performance Indicators ('KPIs' which are set out in the balanced scorecard, which is attached hereto in the Appendix (the 'Balanced Scorecard').
>
> FURTHER DETAILS
>
> (i) Re (a) above
>
> [The defender] will be bound to purchase in each 12 month period of the Scheme, a minimum of 3,200 tonnes of goods (the 'Minimum Tonnage').
> ...
>
> (ii) Re (b) and (c) above
>
> All [the defender's] purchase orders placed on units of 25% more than the Minimum Tonnage quota within a 12 month period shall be subject to a discount of 3% from the capped list price.

> The discount will be reduced to 1.5% if the [first pursuer] exceeds the KPIs target of 78% (the 'KPI Target') by more than 12% in any continuous period of 9 months.
> ...
>
> (iii) Extension
>
> If the [first pursuer] exceeds the KPI Target by 12% for the continuous period of 6 months prior to the end of year 2, the [first pursuer] has the option to extend the Scheme for a further year...
> ...
>
> (iv) Early termination
>
> [The defender] shall have the right to terminate the Scheme after year 1 if:
>
> (a) In the 12 months preceding the end of year 1, the [first pursuer] has failed to meet the KPI Target by more than 8% (taking an average of those 12 months); or
>
> (b) In any one month in the 4 months preceding the end of year 1, the [first pursuer] has failed to meet the KPI Target by more than 12%.
> ..."

The Appendix to the Scheme contained the Balanced Scorecard. It envisaged scores being given in three key areas, *viz.* HSE, Quality, and Delivery. The Standard Terms provided that in relation to each individual accepted order ("the Contract"):

> "3.0 SUPPLY OF SERVICES
> ...
> 3.2 The [first pursuer] shall at all times, continuously and without interruption... meet any reasonable performance criteria (including performance targets as specified in the Appendix A) for the Services as provided for under the Contract, or as may be notified to the Contractor by [the defender].
> ...
>
> APPENDIX A
> ...
> KPI Management
>
> The relationship between [the defender] and the [first pursuer] is to be managed in a professional and an amicable manner. To aid the assessment of success, the Agreement will be measured according to certain Key Performance Index measures. The KPI measures will be reviewed on a regular basis and this Appendix will be adjusted to reflect the expectation of ever increasing performance. Meetings will be held on a monthly basis to review the KPI performance: Payment of Invoices will only be contingent on successful outcome of the monthly meeting: Success defined

> by a mutually signed minute of the meeting. Failure to meet the KPIs on a systematic basis constitutes a breach of contract.
> ...."

The second part of Appendix A set out the Balanced Scorecard under the heading "KPI Standards".

The pursuers' averments

[6] The pursuers narrate the background to the contract and the material parts of the contractual documents. They aver:

> "4.4 ... [O]n a proper construction of the Contract, and in particular those provisions dealing with Monument's obligation to purchase the Minimum Tonnage, the parties are taken to have intended that purchases totalling the Minimum Tonnage would be made, in the ordinary course of business in each 12 month period of the Scheme with reasonable regularity pro rata throughout the scheme year, such that orders totalling (at least) approximately 50% of the Minimum Tonnage would be placed with Mayfly in the first 6 month period of each scheme year; and totalling 100% of the Minimum Tonnage in each year of the Scheme. *Separatim esto* the parties' contract does not fall to be construed in that manner (which is denied) it was in any event an implied term of the Contract that Monument was obliged to make purchases totalling the Minimum Tonnage in the ordinary course of business in each 12 month period of the Scheme with reasonable regularity pro rata throughout the scheme year, such that orders totalling (at least) approximately 50% of the Minimum Tonnage would be placed with Mayfly in the first 6 month period of each scheme year; and totalling 100% of the Minimum Tonnage in each year of the Scheme. Such a term is necessary to give the Contract such business efficacy as the parties (being reasonable commercial entities) would have intended, consistent with their established course of dealing over many years and consistent also with the plain aims of the Scheme. In the absence of such a term, the whole aim of the Scheme, having particular regard to the fact that Mayfly was (as the parties knew) relying upon Monument for 90% of its business, would plainly be defeated...[T]he Contract did require the Defender to make purchases during the course of each Scheme year and not just by the end of each Scheme year."

[7] The pursuers aver (Article 5) that the parties agreed that the second year of the Scheme should commence on 9 December 2014; that the defender did not meet the Minimum Tonnage in that year; that the tonnage ordered by the mid-point of that year was

989.935 tonnes and that the tonnage ordered by the end of the year was 996.135 tonnes. They aver (Article 6) that the defender breached:

> "(a) its express, which failing its implied obligation, to purchase at least approximately 50% of the Minimum Tonnage by half way through the Scheme year; and (b) its obligation, in terms of the Scheme, to 'purchase in each 12-month period of the Scheme, a minimum of 3,200 tonnes of goods.' ".

[8] The pursuers further aver (Articles 4.4 and 7) that but for the defender's breaches the first pursuer would have been able to comply, and would in fact have complied, with its obligation to supply goods totalling at least the Minimum Tonnage for the second year of the Scheme. It would have earned profits from the defender of about £304,000 and profits from other customers of about a further £99,000. It would not have gone into administration. It would have met the KPI Target and would have sought to exercise its right to extend the Scheme for a further year during which it would have made a profit of £10,000 from its dealings with the defender. It would not have incurred the losses of £1,591,757 which it incurred as a result of the administration and liquidation, or the further costs, fees, outlays and claims totalling £165,563 which were incurred because of the administration and liquidation.

[9] I note, for completeness, that the pursuers also aver that on 1 July 2015 the first pursuer sought confirmation from the defender as to its intentions regarding the placing of orders; that on 10 July 2015 the defender indicated that it was not likely that it would place any further orders in the remainder of year two; that on 11 August 2015 the first pursuer's solicitors wrote to the defender reminding it of its obligation to purchase the Minimum Tonnage; that on 20 August 2015 the defender's solicitors replied indicating that the defender was "fully aware of its contractual obligations and fully intends to abide by them" but that it was "under no obligation to give your client any advance notice of the orders

which it intends to place in the current contract year"; and that the next day an officer of one of the defender's sister companies indicated (on behalf of the defender) to the first pursuer that if there were to be any sizeable orders they would only be placed after a board meeting on 4 November 2015. However, the pursuers do not aver that any of the defender's said conduct amounted to an anticipatory breach of its obligation to place orders for the Minimum Tonnage during year two, nor do they aver that any such anticipatory breach was accepted by the first pursuer.

The defender's submissions

[10] Mr Connal submitted that the pursuers' averments that there was a legal obligation to place orders for at least approximately 50% of the Minimum Tonnage during the first half of each year were irrelevant. On a proper construction of the contract, and applying the familiar principles expounded in *Arnold* v *Britton & Others* [2015] AC 1619 and *Wood* v *Capita Insurance Services Ltd* [2017] AC 1173, the contract contained no such express term. Nor, applying the tests for implication discussed authoritatively in *Marks and Spencer Plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, was it necessary or otherwise appropriate that such a term should be implied.

[11] The pursuers' separate case that the defender breached its obligation to purchase the Minimum Tonnage by the end of year two was also irrelevant. There could be no breach until the expiry of that period, yet the pursuers claimed that the breach caused the first pursuer to enter administration some 4½ months before 9 December 2015.

[12] In any case, in so far as the pursuers sought to recover losses and costs arising from the administration and winding up the claim was too remote. That aspect of the claim did not fall within either limb of the well-known rule in *Hadley* v *Baxendale* (1854) 9 Ex 341. It

was not something which the contracting parties agreed or anticipated that the defender should be liable for (*Transfield Shipping Inc* v *Mercator Shipping Inc* [2009] AC 61, per Lord Hoffmann at paragraphs 12, 14, 19-21 and 23, and Lord Hope of Craighead at paragraphs 29 and 34; *Midlothian Council* v *Bracewell Stirling Architects* [2017] CSOH 87, per Lord Tyre at paragraph 34). Mr Connal accepted that in *Transfield* there had been a market practice in play, and that no such consideration arose here.

[13] Finally, the claim for loss of profits in the third year was irrelevant in the absence of an averment that the first pursuer had in fact opted to extend the contract.

The pursuers' submissions

[14] Mr Thomson submitted that the pursuers' pleadings were sufficient to entitle them to a proof before answer. They complied with the requirements of written pleadings in a commercial action. They gave fair notice of the facts relied upon together with the general structure of the legal consequences which were said to follow from those facts. Reference was made to *John Doyle Construction Ltd* v *Laing Management (Scotland) Ltd* 2004 SC 713, per Lord Drummond Young at pp 722-723; *Heather Capital Ltd (in liquidation)* v *Levy & McRae* 2017 SLT 376, per Lord Glennie at p 397; and Practice Note No 1 of 2017, paragraph 13a.

[15] The pursuers' primary case was suitable for inquiry. On a proper construction of the contract, applying the principles set forth in *Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900, *Arnold* v *Britton, supra*, and *Wood* v *Capita Insurance Services Ltd, supra*, it was an express term that the defender would purchase at least approximately 50% of the Minimum Tonnage by half way through the Scheme year. Were that not so the contract would make no commercial sense. It would be inconsistent with the established trading relationship at the

time of contracting. It would frustrate the reasonable expectations of honest contracting parties acting in good faith: *First Energy (UK) Ltd* v *Hungarian International Bank Ltd* [1993] BCC 533, per Steyn LJ at pp 533-534. Reference was made to *Smith* v *Bank of Scotland* 1997 SC (HL) 111, per Lord Clyde at p 121; *Yam Seng Pte Ltd* v *International Trade Corp Ltd* [2013] 1 CLC 662, per Leggatt J at paragraphs 124, 130, 131, 133, 135, 138, 139, 141, and 145; *Regina (European Roma Rights Centre and Others)* v *Immigration Officer at Prague Airport and Another* [2005] 2 AC 1, per Lord Hope of Craighead at paragraph 60. It was clear from other provisions of the contract that the parties' intention had been that orders should be placed throughout each year. In the Scheme, one of the stated aims had been to give the first pursuer more certainty on annualised supply demands so that it could plan more effectively to the benefit of both parties; and the provisions of Further Details (i), (ii), (iii) and (iv) contemplated looking at the KPI Target over periods of months. The Standard Terms had bound the first pursuer "continuously and without interruption to meet any reasonable performance criteria (including the performance targets specified in Appendix A)". Appendix A provided that the relationship between the parties was to be managed in a professional and an amicable manner. Meetings were to be held on a monthly basis to review the KPI performance. The language of the contract did not conflict with the pursuers' suggested construction, and the context showed that the intention of the parties was as the pursuers averred: *cf Aberdeen City Council* v *Stewart Milne Group Ltd* 2012 SC (UKSC) 240, per Lord Hope of Craighead DPSC at p 247.

[16] If the suggested term was not an express term of the contract, it was an implied term. The implied term did not contradict any of the express terms. On this scenario, whereas the express term relating to Minimum Tonnage governed the position at the end of a year, the implied term regulated the position prior to the end of the year. The term fell to be implied

because without it the contract would lack commercial and practical coherence: *Marks and Spencer Plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd*, *supra*, per Lord Neuberger of Abbotsbury PSC at paragraph 21; *Attorney General of Belize & Others* v *Belize Telecom Ltd and Another* [2009] 1 WLR 1988, per Lord Hoffmann at paragraphs 22-23.

[17] The proposed term was not too vague to be given effect to. It was sufficiently clear in the circumstances to be given meaning and content. Reference was made to *R & J Dempster* v *Motherwell Bridge and Engineering Co* 1964 SC 308, per Lord Clyde at pp 327-328, and Lord Guthrie at p 332.

[18] The defender did not suggest that the pursuers' secondary "12 month" case was not suitable for inquiry. Plainly, it was. The fact of the matter was that the defender had not purchased the Minimum Tonnage during year two.

[19] The criticisms of the relevancy of the pursuers' damages claim were not capable of being adjudicated upon at this stage, before inquiry into the facts. The criticisms appeared to be twofold. First, that unless the defender was in breach at the mid-point of year two there was no basis for saying that the administration had been caused by the defender's breach of contract. Second, and in any case, the losses arising from the administration and liquidation were too remote.

[20] If the pursuers' averments that the defender was in breach by the mid-point of year two were suitable for inquiry, a clear causal link had been averred that the losses arising from the administration and liquidation were caused *inter alia* by that breach. However, even if the only breach was the failure to purchase the Minimum Tonnage during year two, the pursuers offered to prove that but for that breach the administration and liquidation could have been avoided. Reference was made to *Trustees of the WTL International Retirement Benefits Scheme* v *Edwards* [2010] CSOH 34, per Lord Hodge at paragraph 78.

[21] The losses and costs arising from the administration and the liquidation were not too remote. It could not be said that the pursuers were bound to fail to establish that they fell within the second limb of the rule in *Hadley v Baxendale, supra*, per Alderson B at p 355, and were recoverable as losses

> "... such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

Reference was also made to *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd* [1949] 2 KB 528, per Asquith LJ at pp 539- 540. *Transfield Shipping Inc* v *Mercator Shipping Inc* had involved the first limb of the rule in *Hadley* v *Baxendale,* not the second: see Lord Rodger of Earlsferry at paragraph 59. Here, the special circumstance bringing the case within the second limb was the fact that the defender knew that the first pursuer relied upon the defender for ninety per cent of its business.

[22] The pursuers' averments anent the third year claim were suitable for inquiry. They averred that but for the defender's breaches of contract the first pursuer would have continued to trade, would have met its KPI Target, and would have exercised its right to extend the Scheme.

Decision and reasons

Express term?

[23] The exercise of interpretation of the words used in a contract is different from, and usually ought to precede, any consideration of whether a term falls to be implied into the contract (*Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd*, *supra*, per Lord Neuberger PSC at paragraphs 22-31; *Trump International Golf Club Scotland Ltd* v *Scottish Ministers* 2016 SC (UKSC) 25, per Lord Hodge JSC at paragraph 35; *Impact*

Funding Solutions Ltd v Barrington Support Services Ltd (formerly Lawyers at Work Ltd) 2017 AC 73, per Lord Hodge at paragraph 3; and my own Opinion in *Zahid* v *Duthus Group Investments Limited & another* [2018] CSOH 59, at paragraph 14: *cf* Lord Carnwath JSC (at paragraphs 57-74) and Lord Clarke of Stone-cum-Ebony JSC (at paragraphs 75-77) in *Marks and Spencer*, and Lord Mance JSC in *Trump International* (at paragraphs 41-44)).

[24] In *Arnold* v *Britton* Lord Neuberger PSC (with whom Lord Sumption, Lord Hughes and Lord Hodge JJSC agreed) observed:

> "15 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] 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…
> 16 For present purposes, I think it is important to emphasise seven factors."

[25] As in *Zahid*, only the first five need be repeated here. Read short, they were, first (paragraph 17), that:

> "the reliance placed in some cases on commercial common sense and surrounding circumstances…should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision."

Second (paragraph 18), that the less clear the centrally relevant words are, or the worse their drafting, the more ready the court can properly be to depart from their natural meaning. Third (paragraph 19), that commercial common sense is not to be invoked retrospectively: it is only relevant to the extent of how matters would or could have been perceived by

reasonable people in the position of the parties as at the date that the contract was made. Fourth (paragraph 20), that a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. Fifth (paragraph 21), that when interpreting a contractual provision only facts or circumstances which existed at the time that the contract was made and which were known or reasonably available to both parties may be taken into account.

[26] In *Wood* v *Capita Insurance Services Ltd, supra,* Lord Hodge JSC (with whose judgment all the other Justices agreed) observed:

> "10 The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this 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… 11 Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky* case [2011] 1 WLR 2900, para 21f. In the *Arnold* case [2015] AC 1619 all of the judgments confirmed the approach in the *Rainy Sky* case: Lord Neuberger of Abbotsbury PSC, paras 13-14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the *Arnold* case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. 12 This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination

of the relevant language in the contract, so long as the court balances the indications given by each.
13 Textualism and contextualism 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* [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions.
14 On the approach to contractual interpretation, the *Rainy Sky* and *Arnold* cases were saying the same thing.
15 The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation."

[27] The obligation to purchase the Minimum Tonnage is set out in paragraph (a) of the Scheme Headlines and in paragraph (i) of the Further Details, *viz*.:

> "THE SCHEME HEADLINES
>
> The parties agree the following:
>
> (a) a minimum tonnage of supplies in each year of the Scheme over which a volume discount shall apply;
> ...

> FURTHER DETAILS
>
> (i) Re (a) above
>
> [The defender] will be bound to purchase in each 12 month period of the Scheme, a minimum of 3,200 tonnes of goods (the 'Minimum Tonnage').
> ..."

The language used is clear. The provisions are not poorly drafted. On an ordinary and natural reading of them I do not think that they are capable of bearing the construction which the pursuers suggest. Nor in my opinion is there anything in the remainder of the contract, or in any of the relevant surrounding circumstances which the pursuers aver were known (or ought reasonably to have been known) by the parties at the time of contracting, which suggests that the pursuers' interpretation is an available one, or that it should prevail. The stated aim of giving the first pursuer more certainty on "annualised supply demands" tends to reinforce the conclusion that what was obligatory was the purchase of the Minimum Tonnage each year. I am not satisfied that commercially sensible contracting parties would necessarily have required that at least approximately half of the Minimum Tonnage was purchased in the first half of each year. I am not persuaded that the pursuers' construction is an available construction, far less the correct construction. The notional reasonable person in the position of the parties at the time of contracting would not have understood that the provisions in issue obliged the defender to purchase at least approximately 50% of the Minimum Tonnage by the mid-point of each year.

Implied term?

[28] In *Marks and Spencer* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd*, *supra*, Lord Neuberger PSC (with whom Lord Sumption and Lord Hodge JJSC agreed) opined:

"18 In the Privy Council case *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283, Lord Simon of Glaisdale (speaking for the majority, which included Viscount Dilhorne and Lord Keith of Kinkel) said that:

> 'for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.'

19 In *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481, Bingham MR set out Lord Simon's formulation, and described it as a summary which 'distil[led] the essence of much learning on implied terms' but whose 'simplicity could be almost misleading.' Bingham MR then explained, at pp 481 - 482, that it was 'difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue', because 'it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision', or indeed the parties might suspect that 'they are unlikely to agree on what is to happen in a certain…eventuality' and 'may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur.' Bingham MR went on to say, at p 482:

> 'The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. [He then quoted the observations of Scrutton LJ in the *Reigate* case, and continued] it is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred …'

20 Bingham MR's approach in the *Philips* case was consistent with his reasoning, as Bingham LJ in the earlier case *Atkins International HA v Islamic Republic of Iran Shipping Lines (The APJ Priti)* [1987] 2 Lloyd's Rep 37, 42, where he rejected the argument that a warranty, to the effect that the port declared was prospectively safe, could be implied into a voyage charterparty. His reasons for rejecting the implication were 'because the omission of an express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter.'

21 In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in the *BP Refinery* case 180 CLR 266, 283 as extended by Bingham MR in the *Philips* case [1995] EMLR 472 and exemplified in *The APJ Priti* [1987] 2 Lloyd's Rep 37. First, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn rightly

observed that the implication of a term was 'not critically dependent on proof of an actual intention of the parties' when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is 'vital to formulate the question to be posed by [him] with the utmost care', to quote from *Lewison, The Interpretation of Contracts* 5th ed (2011), p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of 'absolute necessity', not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

22 Before leaving this issue of general principle, it is appropriate to refer a little further to the *Belize Telecom* case, where Lord Hoffmann suggested that the process of implying terms into a contract was part of the exercise of the construction, or interpretation, of the contract. In summary, he said at para 21 that 'There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?' There are two points to be made about that observation.

23 First, the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy. (The difference between what the reasonable reader would understand and what the parties, acting reasonably, would agree, appears to me to be a notional distinction without a practical difference.) The first proviso emphasises that the question whether a term is implied is to be judged at the date the contract is made. The second proviso is important because otherwise Lord Hoffmann's formulation may be interpreted as suggesting that reasonableness is a sufficient ground for implying a term. (For the same reason, it would be wrong to treat Lord Steyn's statement in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459 that a term will be

> implied if it is 'essential to give effect to the reasonable expectations of the parties' as diluting the test of necessity. That is clear from what Lord Steyn said earlier on the same page, namely that 'The legal test for the implication of … a term is … strict necessity', which he described as a 'stringent test'.)
> 24 It is necessary to emphasise that there has been no dilution of the requirements which have to be satisfied before a term will be implied, because it is apparent that the *Belize Telecom* case [2009] 1 WLR 1988 has been interpreted by both academic lawyers and judges as having changed the law... And in *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267, paras 34 - 36, the Singapore Court of Appeal refused to follow the reasoning in the *Belize Telecom* case at least in so far as 'it suggest[ed] that the traditional 'business efficacy' and 'officious bystander' tests are not central to the implication of terms' (reasoning which was followed in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43). The Singapore Court of Appeal were in my view right to hold that the law governing the circumstances in which a term will be implied into a contract remains unchanged following the *Belize Telecom* case."

[29] In the present case the pursuers maintain that the suggested term falls to be implied in light of the express terms of the contract, commercial common sense, and the facts known to both parties at the time the contract was made.

[30] I turn then to Lord Simon's requirements, as confirmed and elucidated in *Philips Electronique Grand Public SA* v *British Sky Broadcasting Ltd* and *Marks and Spencer* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd*. It is convenient to consider obviousness first. I can see that it might conceivably be arguable that the notional reasonable person in the position of the parties at the time of contracting may have thought that it went without saying that the defender should give the first pursuer reasonable notice (if requested) as to how and when, at least in broad terms, the Minimum Tonnage was to be ordered in each year. In a similar vein, it might be arguable that the notional reasonable person would have thought it was obvious that orders would be placed at several, or even numerous, points throughout the year. Since neither of these propositions was contended for, and they were not tested in submissions, it is not possible to reach any conclusions in relation to them. I mention them because they appear to me to be better contenders for satisfying the obviousness test than the implied term which the pursuers propose. I am very far from

persuaded that that term was so obvious that the notional reasonable person would have considered that it went without saying. I think it very far from obvious that he or she would have thought that the defender was obliged to purchase approximately 50% of the Minimum Tonnage by the midpoint of each year, and that it would not be at liberty to purchase, eg, 40% during the first 6 months and 60% during the second. In my opinion the pursuers' proposed implied term does not satisfy the obviousness requirement.

[31] Is the proposed term nevertheless necessary to give the contract business efficacy? In *Marks and Spencer* Lord Neuberger PSC accepted (at paragraph 21) that Lord Simon's business necessity and obviousness conditions could be alternatives, in the sense that only one of them need be satisfied; though he suspected that it would be a rare case where only one of them was satisfied. He went on to observe that "the test is not one of 'absolute necessity', not least because the necessity is judged by reference to business efficacy." The object is to give the transaction the efficacy which the parties are taken to have intended. However, there is no doubt that the requirement involves a stringent test. Is this one of those rare cases where, despite not satisfying the obviousness requirement, the proposed term nevertheless falls to be implied on the ground of business efficacy? I think not. While, arguably, business efficacy may have required that there be some spreading of the Minimum Tonnage across each year, I am wholly unconvinced that the contract could not work effectively unless the defender purchased at least approximately half of the Minimum Tonnage in the first half of the year. Adopting the language of Bingham MR (as he then was), it cannot be shown that this was the only contractual solution if the spreading of orders was desired; or that, of several possible contractual solutions for spreading, it was the one which would without doubt have been preferred by a notional reasonable person in the position of the contracting parties.

[32] Since I am not persuaded that either of the obviousness or the business efficacy requirements are satisfied, it follows that the term proposed by the pursuers does not fall to be implied. For completeness, I also provide my views on the rest of Lord Simon's requirements. In the whole circumstances I do not think that the reasonable and equitable condition is met - for largely the same reasons as I have given for holding that the obviousness and the business efficacy requirements are not satisfied. On the other hand, I am satisfied that the proposed term is capable of clear expression, notwithstanding that the obligation is to purchase at least approximately 50% by the mid-point rather than precisely 50%. What "approximately 50%" means would be a matter of construction which would fall to be answered objectively by reference to the notional reasonable person in the position of the parties at the time of contracting. Equally, the proposed term does not appear to me to contradict any of the express terms of the contract.

The pursuers' 12 month case

[33] I am satisfied that the pursuers' secondary "12 month" case is suitable for inquiry. The pursuers offer to prove that the defender did not purchase the Minimum Tonnage during year two; that the first pursuer would have supplied the Minimum Tonnage had it been ordered; and that they have suffered loss because of the defender's said breach.

Damages

Costs associated with the administration

[34] The defender's essential point is that, on the hypothesis that it was in breach (which is not accepted), it was not in breach until the expiry of year two. Therefore the breach could

not, and did not, cause administration costs which were incurred before that date; and the pursuers' averment that the breach did cause that loss is irrelevant.

[35] I am satisfied that the defender's submissions on this point are sound. I agree with the defender that the pursuers' averment that administration costs incurred before the date of the breach were caused by it is irrelevant. It follows that in so far as the pursuers claim that those losses are damages arising naturally and directly from the breach, their averments are irrelevant.

Whether the claims for losses arising as a result of the administration and liquidation are too remote

[36] The defender maintains that even if the pursuers have relevantly averred that losses arising as a result of the administration and liquidation were caused by the defender's breach, the court should conclude at this stage that they were not losses of the sort which were within the reasonable contemplation of the parties at the time of contracting. In my opinion, that would be going too far too fast. The pursuers aver that the parties were aware at the time of contracting that 90% of the first pursuers' business came from the defender. That appears to me to be, at least arguably, a reasonable starting point for maintaining that this aspect of the pursuers' claim is one to which the second limb of the rule in *Hadley* v *Baxendale* applies. In my opinion the pursuers' averments are sufficient to entitle them to inquiry on this point.

The third year claim

[37] In my view the pursuers' averments anent the third year claim are also suitable for inquiry. The pursuers aver that but for the defender's breach of contract the first pursuer

would have continued to trade, would have met its KPI Target, and would have exercised its right to extend the Scheme.

Disposal

[38] I shall put the case out by order to discuss (i) an appropriate interlocutor to give effect to my decision; (ii) any questions relating to expenses which may arise; (iii) further procedure.