



OUTER HOUSE, COURT OF SESSION

[2018] CSOH 124

CA3/18

OPINION OF LADY WOLFFE

In the cause

OUR GENERATION LIMITED

Pursuer

against

ABERDEEN CITY COUNCIL

Defender

**Pursuer: MacColl QC et Turner; Eversheds Sutherland (International) LLP**

**Defender: Mure QC; Morton Fraser**

21 December 2018

**Introduction**

*Background*

[1] The pursuer owns and operates roof-mounted photovoltaic systems on buildings (“the equipment”). The equipment collects solar energy and converts it into electricity, which the pursuer thereafter sells. The defender, a local authority, owns and operates a large number of properties in Aberdeen where the equipment is installed. These arrangements and installations are covered by a Master Agreement (entered into between

the pursuer and defender) and by 72 individual site agreements (entered into among the pursuer, the defender and a third party “the Mark Group Limited” (hereinafter “the third party”)) governing the installations of the system on each of the defender’s properties.

[2] By emails sent on 25 July 2017 (“the email”) and subsequent termination notices the pursuer endeavoured to terminate each of the site agreements.

[3] In this action the pursuer seeks declarator that it has validly terminated each of the site agreements (in conclusion one) and declarator of the defender’s liability to pay the necessary cost of removing the equipment comprising the systems (in conclusion two). It also seeks payment of a figure exceeding £8 million (in conclusion three). The defender challenges the validity of the termination notice relied upon by the pursuer for the purposes of its first conclusion for declarator. As the pursuer’s other conclusions are dependant on the validity of the termination notices, if the defender is correct then the pursuer’s whole action falls.

### *Issue debated*

[4] At procedure roll debate the defender challenged the validity of the termination notice relied upon by the pursuer. There was no discreet challenge to the form of the termination notice itself. Rather, the question was whether the email constituted a “written notice from the former Party requiring payment” in accordance with clause 8.4.3. The defender argued that, as a necessary precondition to the service of any termination notice, the pursuer first required to give written notice requiring payment which complied with clause 8.4.3 of the site agreement. Before considering parties’ arguments, it is necessary to set out the relevant contractual provisions in the site agreements and the terms of the email and termination notice relied upon. It is necessary to refer only to one of each of the site

agreements, emails and termination notices as, apart from relating to the specific properties, they are otherwise in identical terms.

### **The contractual provisions in the site agreements**

#### *Clause 8: Termination*

[5] Extensive reference was made in the pleadings to provisions in the Master Agreement and the site agreements. For the purposes of the debate it suffices to note the terms of clause 8 and, as parties made reference to some other clauses, to summarise these other clauses (namely, clauses 1.1, 6.1, 6.2, 6.7 to 6.8, 10 and 12 of the site agreement).

Clause 8 is headed "TERMINATION". Clause 8.1 provides that the site agreement is to subsist until the 25<sup>th</sup> anniversary of the commencement date, subject to the remaining provisions of clause 8. Clauses 8.2 and 8.3 govern removal of the equipment following the expiry date and enables the defender to offer to purchase the equipment.

#### *Clause 8.4: early termination of the site agreement*

[6] Clause 8.4, which is more detailed, provides the mechanism for early termination of the site agreement in three circumstances specified in sub-clauses 8.4.1 to 8.4.3. So far as material it states:

"8.4. Any Party may terminate this agreement with immediate effect upon written notice to the other Parties if any of the following events shall occur (but subject always to the terms of any Direct agreement entered into):

8.4.1 if the other Party commits any breach of its material obligations under this agreement (including the obligations contained in clause 18) and fails to remedy such breach, if capable of remedy, within 30 days after receiving written notice from (*sic*) the other Party requiring it to do so; or

[...]

8.4.3 if the other Party fails to make punctual payment of any amount properly due to the former Party under this agreement and such amount

remains unpaid at the expiry of 20 Banking Days after receiving **written notice from the former Party requiring payment;**" (emphasis added).

The pursuer relies on clause 8.4.3 to terminate the site agreements. The parties differed as to whether the email complied with the words in bold in clause 8.4.3. (An argument about an alleged want of proper service of the written notice was not insisted in.) Clause 8.5 provides for the pursuer's right to terminate in other circumstances which are not here relevant.

Clause 8.7 requires the defender to pay the pursuer a sum calculated by reference to schedule part 3 of the site agreement in the event the termination arises as a result of the "default" of the defender under *inter alia* clause 8.4.3.

*The other clauses of the site agreements referred to: 1.1, 6.1, 6.2, 6.7 to 6.8, 10 and 12*

[7] Passing reference was made in the course of the debate to several other provisions, as follows:

- 1.1 "Party" means Mark Group, the Council or Our Generation and, together, the Parties.
- 6.1 Mark Group (on behalf of Our Generation [ie the pursuer]) will issue an electronic invoice for the Metered Output once a month and the Council [ie the defender] shall pay the Charges set out in each invoice within 20 days of its receipt. [...]
- 6.2 If in respect of any invoice referred to in clause 6.1, a Party ascertains that information used in preparation of such an invoice is subsequently altered, the Party shall within 14 days of so ascertaining such alteration issue a statement showing the difference between the Charges paid or payable in accordance with such statement and the Charges which would have been so

payable if such statement had been prepared on the basis of the altered information. Statements will be submitted with an invoice for the revised amount due, or by agreement of the Parties the reconciliation shall be carried out at the time the next Monthly or other statement is submitted and included in the invoice issued in respect of it.

- 6.7 If any statement or invoice submitted in accordance with clauses 6.1 or 6.2 is disputed or subject to question by either Party: [...]
- 6.8 In the event that Our Generation changes its collection agent it shall give at least 10 Banking Days prior written notice to the Council.

The site agreement also contained an entitlement of the pursuer to assign its rights and obligations to a subsidiary or holding company (clause 10.2) or to transfer its rights and obligations under the site agreement and its title to the equipment (clause 10.3). Reference was also made to clause 12, containing the provision for "NOTICES". Clause 12.1 stipulated that "Any notice given by either Party to this agreement shall be in writing and shall be deemed duly served if delivered personally or sent by facsimile transmission or by prepaid registered post to" specified addresses and fax numbers. There are also more detailed deeming provisions about the timing of receipt, but these are not relevant to the issue debated. (An argument about a want of proper service was not insisted in.)

### **The documentation the pursuer relied upon to effect termination**

#### *The email relied on as constituting the written notice under clause 8.4.3*

[8] It was common ground between the parties that the pursuer required to give written notice complying with clause 8.4.3 before it could exercise the right to terminate under clause 8.4. The pursuer relies on the email sent by a named individual of "Effective Energy"

dated 25 July 2017 to a named individual of the defender. The subject given for the email was "Statement of Account". Apart from a brief salutation and sign off, the whole text of the email stated: "Please see attached statement of balances now overdue, owing to Our Generation Solar."

*The statement attached to the email*

[9] The document attached to the email ("the statement") took the form of a summary statement. This bore to be issued in the name of "Our Generation Solar 2 Ltd" at an address in East Sussex (at the top left of the statement). Otherwise at the top right the statement contained a logo (the letter "G" in blue contained within the red letter "O") above the words "Our Generation" and, in much smaller font immediately below that, the phrase "Generating Renewable Energy together" ("the OG logo and strapline"). The statement is addressed to a named individual within the defender. The body of the statement contains 12 lines of entry with seven columns. It suffices to note that each line contains the same date as the statement (i.e. 25 July 2017); each was said to be due six days earlier and the invoice figures on each line range between £1,200 and £67,000. At the foot of the page there is a further box, typically found on statements of account, recording sums said to be due within the "current" period, period 1, period 2 and so on. The total of £216,399.24 is recorded as falling within "period 1" and that same figure appears in boxes at the foot of the page marked "Invoice Value Overdue" and "Total Amount Due".

*The invoices supporting the statement*

[10] Reference was made to a sample invoice dated 19 June 2017 relative to the entry on the statement for £57,155.11 (at 6/9/1 of process). This invoice was addressed to a named

individual within the defender's Council Offices. It contained the OG logo and strapline at the top right. The narrative referred to "solar photovoltaic services" and stated that "OGS2 Lost Revenue Due to ACC Insurance Position (Apr 15-Mar 17 Inclusive)". The "Terms" were stated to be "net monthly account" and the payee details at the foot of the page correctly stated the name of the pursuer but provided the wrong company number.

*Parties' comments on the terms of the email and on inaccuracies in the statement and invoice*

[11] The defender highlights a number of errors or discrepancies in the email, statement and accompanying invoices, as follows:

- (1) the email had not been served on the third party to the site agreement, namely the Mark Group Ltd;
- (2) the sender of the email, "Effective Energy", was not a known agent of the pursuer;
- (3) nowhere did the email provide the pursuer's own company name.

The defender also notes that the invoices were recorded as only 6 days overdue. The pursuer's reply is that "Our Generation Solar" is the trading name of the pursuer and the corporate group to which it belonged.

[12] In relation to the statement itself, the defender notes that a company known as "Our Generation Solar 2 Ltd" is not a party to either the Master Agreement or any of the site agreements. Again, the pursuer is nowhere referred to in the statement. While it was acknowledged that the pursuer could assign its rights under the site agreement, this had not happened as no intimation of any assignation had ever been given to the defender. The pursuer did not rely on any assignation. The pursuer points out that the statement contains

the correct OG logo for the pursuer itself. In relation to the sample invoice, this bears in the narrative to relate to a different company (“OGS2”). The pursuer again notes that the OG logo and strap line are those of the pursuer and its corporate group and the pursuer is correctly referred to as the payee. It was accepted that the wrong company number was provided.

### *The termination notice*

[13] The pursuer’s agents sent a letter dated 24 August 2017 to the defender’ offices (“the termination notice”). The Termination Notice subject headings referred to the pursuer and stated “Termination Notice in respect of” a specific site agreement at one of the properties. After referring to the pursuer and the site agreement in respect of the particular property, the termination notice narrated that the defender had “failed to make punctual payment in respect of invoices properly due under” the site agreement; that this sum due had remained unpaid at the expiry of 20 Banking days following the defender’s receipt of the email. The termination notice thereafter provided that, pursuant to clause 8.4.3 of the site agreement, it was terminated with “immediate effect”. There followed a demand following the termination of that particular site agreement.

### **The law**

[14] It was common ground between the parties that the law applicable to the validity of a notice served in terms of a contract had recently (and for this court, authoritatively) been discussed by the Second Division in *HOE International Ltd v Andersen* 2017 SC 313, in which Lord Drummond Young delivered the Opinion of the Court. The relevant legal propositions vouched by the case law include the following:

- (1) Where the validity and effect of a notice provided under a contract is in issue, two distinct types of question may arise. First, are the terms of the notice sufficient to convey the necessary information to the recipient (“the first *HOE* question”)? And second, has the notice been issued in accordance with the contractual provisions governing the notice procedure (“the second *HOE* question”)? (See *HOE International Ltd* at paras 16 & 28). I shall refer to these collectively as the “*HOE* questions”.
- (2) The first *HOE* question turns largely on the construction of the notice itself. This exercise falls to be carried out in accordance with the ordinary principles of contractual construction. The construction of the notice must be approached objectively, the issue being how a reasonable recipient would have understood the notices, taking into account the relevant objective factual context. The subjective knowledge or awareness of the actual recipient is not therefore relevant: see *HOE International Ltd* at paragraphs 28 and 31; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 per Lord Steyn at pp767D-769B, Lord Hoffmann at p775B-C and Lord Clyde at p782D-E.
- (3) The purpose of a contractual notice is important, as is the purpose of any particular requirement that has not been complied with (*HOE International Ltd* at paras 29, 34 and 53).
- (4) A notice must be sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when it is intended to operate; though absolute absence of any ambiguity is not necessary: see *Mannai Investment Co Ltd* (sup cit.) at p782B-D per Lord Clyde. The correct test is: “Is the notice quite clear to a reasonable tenant reading it? Is it plain that he cannot be misled

by it?" (see *Carradine Properties Ltd v Aslam* [1976] 1 WLR 442 per Goulding J at p444, adopted by the House of Lords in *Mannai Investment Co Ltd* and cited by Lord Reed in *Credential Bath Street Ltd v Venture Investment Placement Ltd* 2008 Hous LR 8 at para 46).

- (5) As for contractual requirements for a valid notice (the subject matter of the second *HOE* question), the crucial question is whether strict compliance is required with one or more requirements of the clause that empowers the sending of a notice; a question to which the ordinary principles for the construction of contracts are applicable. The more drastic the consequences of the notice, the greater the need for strict compliance (*HOE International Ltd* at paras 32-34, 40).
- (6) Where strict compliance is required by the contract, then any failure to comply with the contractually agreed requirements will render the notice invalid: see *West Dunbartonshire Council v William Thompson & Son (Dumbarton) Ltd* [2016] Hous LR 8 (Ex Div) per Lord Menzies (delivering the Opinion of the Court) at para 31; *Mannai Investment Co Ltd* (sup cit.) at p776B per Lord Hoffmann. Thus, in respect of the second type of question (see para 13(1), above), the test in *Mannai Investment Co Ltd* is not relevant.

### **The parties' submissions**

#### *The submissions on behalf of the defender*

[15] Mr Mure QC, who appeared on behalf of the defender, made clear that its debate proceeded on certain hypotheses (but not otherwise conceded). The hypotheses were

- (1) that the sum set out in the invoices were "properly due" in terms of clause 8.4.3;

(2) that at the time of the termination notices issued on behalf of the pursuer it was not itself in breach of contract such as to disentitle it from invoking the termination procedure; and

(3) that the termination notice had also been served upon the Mark Group Ltd.

Accordingly, the narrow issue between the parties at debate is whether the email together with the accompanying statement and supporting invoices constituted “written notice from the former Party requiring payment”.

*The second HOE question*

[16] Mr Mure QC argued that in all the circumstances, the email and its attachments did not constitute a “written notice from the former Party requiring payment” in terms of clause 8.4.3, and the termination notices did not validly terminate the site agreements. In order for the termination notices to be valid under clause 8.4, it is necessary that in respect of each site agreement a written notice satisfying the requirements of clause 8.4.3 is first served by the pursuer on the defender and on Mark Group Ltd.

[17] He argued that a clause such as 8.4.3 served several purposes, namely:

- (i) to empower the pursuer to terminate each site agreement with immediate effect if any amount properly due and identified in the notice in respect of that site agreement remains unpaid at the expiry of 20 Banking Days after service of the notice;
- (ii) to put the recipient of the notice on warning that in order to enable that power to be used the other party is requiring payment of an identified amount remaining properly due in respect of that site agreement, that being the amount to be paid if the recipient is to prevent the pursuer from

obtaining the power to terminate the site agreement with immediate effect; and

- (iii) to specify in respect of the particular site agreement to which the notice relates, the amount that the pursuer requires the defender to pay.

The notice's function is therefore to notify information to the recipient in accordance with the contractual requirement, on which that recipient can then act to protect or vindicate its rights.

[18] It is not the existence of overdue invoices but the recipient's failure to comply with the requirement in a valid clause 8.4.3 written notice which provides the basis for the pursuer to terminate the site agreements. The consequence of a valid termination notice is drastic, bringing the parties' contract to an end, potentially long before its intended expiry 25 years from the Commencement Date: see clause 8.1. The termination provisions in clause 8.4 are key terms of the parties' site agreements. Strict compliance with clause 8.4.3 is therefore required.

[19] I did not understand Mr Mure QC to insist on his submission that there had not been due "service" of the written notice (ie the email and supporting documentation). Otherwise, he argued in relation to the formality of the "notice" that the concept of a "written notice" in the site agreements imports an element of formality commensurate with the seriousness of the consequences that may follow. He noted that the site agreement deals with invoices and statements in terms, in other provisions: see e.g. clause 6.1, 6.2 and 6.7. A notice is not therefore to be equated with an invoice or statement.

[20] Turning to the email, this stated that it attached a "statement of balances now overdue". The attached document was headed "Statement" and included the reference to individual invoices (I have described this above, at paras [8] to [10]). Invoices and

statements may be expected to indicate what sums one party asserts are due in terms of each particular site agreement. However, he submitted that such documents are not equivalent to written notices requiring payment of particular sums in respect of particular site agreements. The email and attachment are not, therefore, formally valid as notices under clause 8.4.3 such as to empower the pursuer thereafter to issue a termination notice in respect of any or all of the site agreements.

*The first HOE question*

[21] As a fall back he argued that, contrary to the above submission strict compliance is not required and/or the email and attachment are to be regarded as constituting a “written notice”, they are nonetheless invalid on the basis that the reasonable recipient would be left in no doubt about the pursuer’s intention. In other words, the terms of the email and attachment do not convey to the reasonable recipient the meaning required by the purposes which the parties have agreed the provision in clause 8.4.3 should serve. In particular,

- (1) The email and attachment did not intimate anything beyond the fact that invoices have been issued and are overdue. Re-statement of that fact does not constitute a notice “requiring payment”.
- (2) The email and attachment did not mention clause 8.4.3 of any site agreement.
- (3) The statement attached to the email was not a written notice bearing to be issued by or on behalf of the pursuer. It was a statement from a separate company, Our Generation Solar 2 Ltd with an address in Hove. That name matches the company number listed on the invoices. The defender owed no obligation to that company under either the Master Agreement or the site

agreements. Neither the email nor the statement makes reference to the pursuer.

- (4) Given (i) the contractual provisions anent assignation and transfer, (ii) the use in the email and statement of a company and number different from the pursuer's, and (iii) the fact that the email was issued by a party other than the Mark Group Ltd (cp clause 6.8), even if the email and statement could be construed as "requiring payment" and thus evincing an intention to create the power provided for in clause 8.4 (which is denied), the reasonable recipient would be in doubt about the proper payee.
- (5) The invoices referred to in the statement dated 25 July 2017, although dated 16 and 19 June 2017, bear to include sums being charged in relation to periods from April 2015 to 31 May 2017. Standing the dates of such invoices, and the periods to which they and their attendant breakdowns refer, the email and statement do not convey the impression that the pursuer intends to exercise any rights it may have had under clause 8.4.3 to terminate any site agreement with immediate effect.
- (6) Clause 8.4.3 requires service of a written notice under the individual site agreement, concerning amounts properly due under that site agreement. The email and attachment mention no specific premises nor any specific site agreement under which notice was being served.
- (7) Clause 12 of each site agreement provides for notices to be in writing and to be served upon the addressees or facsimile numbers of *each* of the three parties to the site agreements. The email and attached statement were not served upon

Mark Group Ltd; nor were they served personally, by facsimile transmission or by prepaid registered post.

- (8) In these circumstances, even if the procedure was formally valid, a reasonable recipient of the email and attached statement would not have understood those documents as (i) being more than a statement of account or (ii) intended to form the basis for service of a notice of termination by the pursuer under clause 8.4.3; or at least would have been in doubt about the contractual position.
- (9) The circumstances founded upon above are not mere technical matters, but are, both individually and in combination, essential matters going to the pursuer's jurisdiction or power to issue a notice terminating the various site agreements with immediate effect.
- (10) The reasonable recipient would have been aware that certain invoices had become overdue; but would not have been aware from the email and attachment that payment in respect of each site agreement was now being "required" so as to trigger the pursuer's power to terminate each agreement with immediate effect.

[22] In construing the parties' contract, and the purported notice, a commercially sensible construction points to the need for strict compliance, and in favour of the defender's position. Commercial people understand the basic distinction between an invoice or statement, and a formal written notice requiring payment and intended to trigger a right to terminate a long term contract. Commercial people would not understand the mere repetition of an invoice previously issued as importing a special requirement to pay in terms of clause 8.4.3. Given the structure of the parties' contracts, the potential consequences in terms of termination, the circumstances above, and the prejudice to the defender of failing to

give formal notice requiring payment (thus putting the defender on notice that clause 8.4.3 was in play), a commercially sensible construction does not support the pursuer's position.

[23] Accordingly, even if the three hypotheses he identified (see para [16], above) were to be the subject of proof and were resolved in the pursuer's favour, the pursuer would have failed validly to terminate the site agreements. The Court should sustain the defender's first plea in law and dismiss the action.

### *Submissions on behalf of the pursuers*

#### *Motion*

[24] Mr MacColl QC, who appeared on behalf of the pursuer, explained that his primary position was that the relevancy of the pursuer's case can only be determined after proof and he invited the Court to refuse *in hoc statu* the defender's motion to sustain its first plea-in-law. He moved the Court to allow a proof before answer on all issues. He sought a proof of 8 days.

#### *Outline of pursuer's position*

[25] In relation to the documentation, the pursuer accepts that there are minor errors (some details belonging to a related company) within the terms of the statements that accompanied the email and the invoices to which it refers. However, there were no errors within the terms of the emails (which Mr MacColl QC referred to as "Default Notices") themselves. The parties had been dealing with the project for several years; there was no ambiguity as to the co-parties to the contract or the obligations owed thereby. A reasonable recipient would have construed that the invoices were issued on behalf of the pursuer. In the circumstances, a reasonable recipient in the position of the defender would have

understood the terms and effect of the emails and the termination notices. On a proper construction they were effective to terminate the site agreements. Mr MacColl QC referred to clauses 6.1 and 8.4.3 of the site agreements. It is was the pursuer's case that these provisions were followed. In particular, the pursuer issued invoices to the defender; it gave notice constituted by email pursuant to clause 8.4.3 requiring payment of sums overdue in terms of the invoices as set out in a statement of account attached thereto; and it thereafter terminated the site agreements by written notices constituted by termination notices.

***Interpretation of the documentation: the first HOE question***

[26] Mr MacColl QC argued that the relevant context for the interpretation of the email was comprised of the invoices and statements. In relation to the invoices, Mr MacColl QC submitted that the invoices form a major constituent of the context within which the contractual notices must be interpreted. The invoices were issued under the terms of the site agreements. The pursuer offers to prove as much. Subject to questions surrounding the rates applicable, the invoices have been paid by the defender. Invoices had been paid for 4 years. The invoices were issued in the name of the pursuer. They contained the pursuer's VAT number. For reasons unknown, they have been issued with the wrong company number - for a company related to the pursuer. However, as the defender observes, it is only the pursuer that is party to the site agreements. There was no assignation or transfer of rights to "Our Generation Solar 2 Limited". That was known by the defender and a reasonable recipient in the position of the defender would have understood that any references to Our Generation Solar 2 Limited's details must accordingly be erroneous. He submitted that on any reasonable view, the invoices bear to have been issued by the pursuer.

There is no possible ambiguity and any reasonable observer would have known that these invoices related to the site agreements. Indeed, the defender itself has so proceeded.

*Invoices to be issued/disputed*

[27] Under reference to certain other provisions of the site agreement, Mr MacColl QC submitted further that the defender is deemed to know that in terms of the site agreements monthly invoices were to be issued (clause 6.1). If the defender disputed any invoice, it was required to pay the undisputed and unquestioned items (clause 6.7.1) and otherwise set out its reasons for disputing or questioning the amounts in writing (clause 6.7.2). The invoices were not disputed. The site agreements provide for this position to be remedied in terms of a clause 8.4.3 default notice. As a provision of the site agreements, the defender is deemed to be aware of that consequence. It is in this context that the email was given.

*The email*

[28] Mr MacColl QC noted that the email referred to the trading name of the pursuer rather than its company name. No issue is taken with the addressee, who was an employee of the defender dealing with the site agreements. He submitted that a reasonable recipient in the position of the defender (or its employee) would have known that this was being sent on behalf of the pursuer. Even if that were not the case, the correspondence was sent by the pursuer's collecting agent, Effective Energy. The pursuer was entitled to appoint Effective Energy as its collecting agent (clause 6.8 of the Site Agreement). The pursuer offers to prove that Effective Energy had been so appointed and the defender informed timeously to the issue of the email. In that context, a reasonable recipient would have construed that Effective Energy were referring to the pursuer and dispatching a notice on their behalf. On a

plain reading, the purpose of the email was to inform the defender that the invoices referred in the statement attached thereto were overdue.

*The statement*

[29] Turning to the statement Mr MacColl QC noted that it contained the pursuer's logo. It referred to a number of invoices by reference to their individual dates, invoice references and amounts. He accepted that the statement bears to have been issued erroneously with the name of "Our Generation Solar 2 Limited". However, for the reasons he had already submitted, there can be no reasonable doubt that the invoices referred therein were those issued by the pursuer and falling due in terms of the site agreements to the pursuer.

[30] In the circumstances, any reasonable recipient with the knowledge of the fact of the site agreements between these parties; the installation of the PV Equipment; the Energy production therefrom; the overdue invoices; that payment remained outstanding; and that this was due to the pursuer, would have construed the statement and hence the email to refer to the obligations in respect of which the defender was in default.

*The second HOE question*

[31] In relation to the second of the *HOE* questions, Mr MacColl QC argued that clause 8.4.3 does not require any particular form, merely that the notice be in writing. On an ordinary construction, email is a form of writing. At times, the defender appeared to suggest that a statement with a request for payment would not constitute a notice under 8.4.3. It appeared to do so under reference to clauses 6.2 and 6.7 and an extrapolation that a "statement" is a specific form of document under the site agreements. All contractual references to "statements" within clauses 6.1, 6.2, 6.3 and 6.7 relate to statements of account

for sums which are not overdue. However, there is nothing within the terms of those clauses to suggest that this is in the only purpose to which a statement might be used. Indeed, Mr MacColl QC argued it is commercially nonsensical to suggest that a statement could not be issued to set out the sums which the defender is required to pay in satisfaction of a notice under clause 8.4.3. Provided the terms of the notice accompanying that communicated that payment was required, that is all that is formally necessary.

*The terms of the site agreement*

[32] Mr MacColl QC noted that there is no provision within the terms of the site agreements for the pursuer to provide details of the sums due other than in respect of sums which have not yet fallen due as a result of an invoice (clause 6.1), a statement following alteration of an invoice (clause 6.2), a statement following reconciliation (clause 6.3), or sums requiring payment as overdue (clause 8.4.3). He submitted that the email (whether accompanied by a statement or not), being expressly in respect of overdue sums, was not a statement under clause 6.2 or 6.3. It was not an invoice under clause 6.1. It stated in plain terms that the amounts referred in the statement were overdue. On a proper construction, the term “overdue” to a reasonable recipient dictates and stipulates that immediate payment is required. That is all that is required to satisfy the terms of clause 8.4.3. Accordingly, the email satisfies the requirements of clause 8.4.3 and was valid.

*Intention to create a power*

[33] In relation to the defender’s suggestion that notice of an intention to “create a power” is required, Mr MacColl QC submitted that no such requirement can be gleaned from a proper construction of clause 8.4.3. The reasonable co-party recipient is deemed to be

aware of the terms of the contract (*HOE International Limited* at para 29). There is no reason, therefore, for such notice to be required. Moreover, no such notice requirements are provided in respect of other termination rights: as, for example, clause 8.5. It is not clear why, in this context, a more onerous interpretation should be afforded to clause 8.4.3 to protect the defender from consequences of which it is deemed to be aware.

[34] Mr MacColl QC argued that it is not clear whether the defender seeks to take issue with the notice being served by an agent. There is nothing within the terms of the site agreement to suggest that agents cannot effect notices. It has no bearing on the reasonable recipient's understanding beyond the issues previously addressed. This is not an additional formal requirement. If this criticism is directed at the lack of a written notice more generally, that is constituted by the email.

[35] The email was:

- (1) served by the pursuer's duly appointed collecting agent;
- (2) on behalf of a principal identified by their trading name;
- (3) in respect of whom there was no ambiguity in the full context of the parties' dealings;
- (4) with reference to invoices patently referring to the sums due under the site agreements;
- (5) in respect of sums that were overdue and required immediate payment; and
- (6) to a party who is deemed to be fully aware of its contractual obligations.

In that context it would have been construed by a reasonable recipient as a notice for the purposes of clause 8.4.3.

*The termination notice*

[36] Mr McCall noted that no distinct argument was addressed to the termination notice. On a proper construction, it met the formal requirements of clause 8.4 to be in writing. For the purposes of this debate, it is accepted that the sums were due and that the pursuer was not in breach. The termination notices were accordingly effective to terminate the site agreements. Accordingly, the pursuer should be allowed a proof of its averments.

**Discussion***The second of the HOE questions: the compliance of the email with clause 8.4.3*

[37] As noted in the case of *HOE International Limited* (at para 16, see para [14(1)], above), two questions generally arise in cases concerning the validity and effect of a notice provided under a contract. It is convenient to begin with the second question, namely, whether the written notice comprising the email complied with clause 8.4.3.

*The guidance in HOE International Limited*

[38] The Inner House in *HOE International Limited* affirmed that this is a question of contractual interpretation applying the ordinary principles of the construction of contracts. The crucial question was whether the relevant contractual provision required strict compliance with one or more of the requirements empowering the sending of a notice. The court emphasised three additional matters: first, that, in this context, a purposive construction was particularly important; further, that the more drastic the consequence of a notice the greater the need for strict compliance; and finally, that in the absence of prejudice to the recipient party the court should be slow to hold that failure was fatal to the validity of the notice. (See paras 17, and 32 to 36 of *HOE International Limited*.)

*What does clause 8.4.3 require?*

[39] It was common ground between the parties that clause 8.4.1 empowered a party to terminate the site agreement in certain circumstances. The particular circumstance the pursuer relied on for the purpose of clause 8.4.3 was the asserted failure of the defender to make punctual payment of amounts due to the pursuer. It was accepted by both parties, in my view correctly, that the giving of the appropriate written notice under clause 8.4.3 was a necessary precondition to the subsequent service of any termination notice by the party wishing to terminate.

[40] The giving of the written notice operated as a “trigger” putting the defender on notice that the pursuer wished to exercise the power to bring about an early termination of the site agreement. Whether the pursuer could permissibly exercise that right of immediate termination depended on whether the amount properly due remained unpaid after the expiry of 20 Banking Days **after** the defender had received “written notice from [the pursuer] **requiring** payment” (emphasis added). In my view, this is an important qualification of the exercise of the power to terminate in two respects. First, it was clearly intended to give the party against whom the power of termination might potentially be exercised the right to take certain steps, if it chose, to preclude the exercise of that power. That took the form of being afforded a period of some four weeks to pay the amounts properly due (or, arguably, to dispute whether some or all of the sums claimed were “properly due” - though that issue is presumed for the purpose of the debate). This is a significant countervailing right to what is undoubtedly a drastic consequence flowing from the exercise of the power to terminate and the issue of the termination notice. Secondly, and related to the first observation, the simple fact that sums are unpaid is not what entitles

the pursuer to exercise the right of termination. It is the defender's subsequent failure to pay the unpaid amount within 20 Banking Days required of it by the written notice. The effect of this part of clause 8.4.3 is to change the character of an overdue balance (which is a neutral factor in and of itself and which parties may or may not have tolerated in their dealings), into a form of default (ie unpaid for 20 Banking Days after receipt of the notice requiring payment). Mr MacColl QC appeared to accept this, as he consistently referred to the email as a "Default Notice". If all that was required was a sum that was overdue, then clause 8.4.3 would be otiose. The requirement that there be a "default" (not just an unpaid sum) is in my view wholly consistent with the drastic consequence flowing from exercise of the contractual power to bring about immediate termination. There could hardly be a more drastic consequence than immediate termination. Accordingly, this invites stricter compliance with the terms of clause 8.4.3. Further, in my view, on a proper interpretation of clause 8.4.3 (and following the approach enjoined in *HOE International Limited*) clause 8.4.3 has a dual quality. First, the factual circumstance stipulated in clause 8.4.3 as the precondition for the exercise of the right in clause 8.4 (to effect immediate termination) is the occurrence of the default. The party seeking to exercise that power must send a written notice capable of bringing about that default. In other words, the sums due (even if overdue) must be converted into a default. A simple statement of fact that the sums are due or overdue will not suffice; payment must be *required*. Secondly, in order to comply, the written notice must also communicate to the other party that the pursuer is requiring payment and doing so to establish a default (ie to bring about the circumstance stipulated in clause 8.4.3). This could be communicated in a variety of ways. While it is correct that, as Mr MacColl QC argued, parties are presumed to know the terms of the site agreement, one of the functions of clause 8.4.3 is to give the other party notice that a potential default is

being triggered and to afford it the contractually stipulated standstill period within which it may remedy that default.

[41] The terms of clause 8.4.1 (quoted above, at para [5]) reinforce this analysis. Of the two other circumstances entitling the exercise of the power under clause 8.4 to terminate, clause 8.4.1 is analogous to clause 8.4.3. (Clause 8.4.2 is not analogous, because it concerns events brought about by the actions of the third parties.) In clause 8.4.1 a similar mechanism is deployed: one party may serve a written notice to the other informing it of a material breach; the other party is allowed a period of time within which to remedy that material breach; which failing, the party who sent that notice can terminate the site agreement with immediate effect. Again, being in material breach does not suffice: it is the creation of the default by sending a written notice of material breach coupled with the other party's failure to purge that default, which enables the sender of the notice to exercise the power of immediate termination.

[42] Properly construed, as a minimum clause 8.4.3 required a "written notice from the former Party **requiring payment**". Did the email (read with the supporting documentation) comply? I turn to address that question.

*Did the email comply with clause 8.4.3?*

[43] While there might be arguments arising under this clause about whether sums were "properly due" or whether the defender failed to make punctual payment, the factual hypotheses on which the debate proceeded (see para [16], above) preclude such arguments.

[44] It is relevant to note that the site agreement was anticipated to operate for 25 years. Absent early termination, therefore, it would subsist until April 2037. The pursuer sought to exercise the right of immediate termination just over five years into that 25 year period.

That potentially drastic consequence of operating the clause 8.4 termination provision brings in its train a need for stricter compliance with the requirement to give “written notice...requiring payment”. This does not mean that the communication sent required to be headed up “notice” or “notice for the purposes of clause 8.4.3” or something similar. The defender did not argue for this. On the other hand, the fact that the email was neither a “statement” nor an “invoice” (as defined under the site agreement) did not mean that it necessarily was of the character of a “notice”, as the pursuer’s counsel appeared to suggest. The fact that the clause 8.4.3 is not prescriptive of the form of the notice (so long as it is written) does not relieve the pursuer of complying with what clause 8.4.3 requires.

[45] The simple but fundamental question is, did the email “require payment” to the pursuer such as to create a potential default for the purposes of clause 8.4.3? In my view that email, even read together with the accompanying statement and the supporting invoices, did not do so. Having regard to the draconian consequence of a termination notice, in my view, the pursuer required to communicate to the defender its intention to bring about the circumstances provided for in clause 8.4.3 for the purposes of exercising the right of immediate termination in clause 8.4. A notice compliant with clause 8.4.3 required to be in these terms in order to convert unpaid sums into a default (the first function of the clause 8.4.3 notice). It had to require payment for that purpose. However, the text of the email is almost precatory in its terms: “Please see the attached statement of balances now overdue, owing to Our Generation Solar.” In my view, a simple statement that the balances were “overdue” (by 6 days) and “owed” to Our Generation Solar does not fulfil the requirement of a default notice “requiring payment”. Even if “Our Generation Solar” is understood as encompassing the pursuer, the written notice for the purpose of bringing about the circumstance in clause 8.4.3 required, in my view, to make it clear in some manner that

non-payment within the required period would have particular consequences, ie the pursuer's exercise of its contractual rights to effect immediate termination. The written notice requiring payment required to communicate that the "default" circumstance (ie if sums remained unpaid after 20 Banking Days) was going to be relied upon. This was essential, not least to ensure that the defender could consider whether to purge that prospective default and to afford the defender the contractually stipulated period (of 20 Banking Days) to do so. The email (and its supporting documentation) did not communicate this. It did not comply with the requirements of clause 8.4.3.

[46] I did not understand Mr MacColl QC to contradict Mr Mure QC's submission that the clause 8.4.3 also required written notice to be sent to the third party and that the pursuer failed to do so. On the other hand, I did not understand Mr Mure QC to suggest that there was any prejudice. I would not have been persuaded that this factor, taken on its own, would have rendered the email (had it otherwise complied) non-compliant. Had the email otherwise complied, I would have allowed the pursuer a proof on its averments that the notice had been sent on its behalf by an agent, and that that agent was Effective Energy.

[47] It follows that the termination notice (accepted itself to be sufficient in terms) was nonetheless not preceded, as it required to be, by a written notice requiring payment that complied with clause 8.4.3. It is therefore invalid. As a consequence, the pursuer has no relevant basis to contend that it has brought about the termination of the site agreements. As the remainder of its conclusions are dependent upon the validity of the termination notice, the action falls to be dismissed.

*The first of the HOE questions*

[48] In light of my answer to the second *HOE* question, it is not necessary to determine this question. However, on that matter, had it been necessary to determine it, I accept the defender's submissions. In particular, I accept all of the points Mr Mure QC made (and which are recorded in para [21], above). Of these I found points (1), (5) and (8) the most compelling. The terms of the email, read together with the accompanying statement and supporting invoices, construed objectively and taking into account the knowledge of the parties, did not convey (much less unambiguously convey) to the recipient that the pursuer was "requiring payment" in the sense of bringing into existence the circumstances stipulated for in clause 8.4.3. In my view, the reasonable recipient of the email with all of the background knowledge that was reasonably available to the parties, would not have understood the email (and its supporting documentation) as doing any more than stating that sums were claimed; that these were overdue by 6 days (even though some bore to be calculated by, or accumulated with reference to, a time-frame of up to two years preceding the relative invoice); and (on a generous reading of "Our Generation Solar") owed to the pursuer. The reasonable recipient would not have understood the email (and supporting documentation) as communicating the pursuer's intention to treat those unpaid sums as constituting a default and which, if unpaid after 20 Banking Days, such as to entitle it to terminate the site agreement with immediate effect. Accordingly, I would have upheld the defender's challenge and answered the first *HOE* question in favour of the defender.

**Decision**

[49] For the foregoing reasons, I accede to the defender's motion and will dismiss the action. I will reserve meantime all question of expenses.