OUTER HOUSE, COURT OF SESSION

[2020] CSOH 12

P158/19

OPINION OF LORD CLARK

in the petition of

(FIRST) ABUNDANCE INVESTMENT LIMITED,
and (SECOND) DONALD FRANCIS IRWIN HOUSTON

Petitioners

for

judicial review of decisions of the Scottish Ministers

Petitioners: Webster QC; Davidson Chalmers Stewart LLP
Respondents: M. Ross QC, Jajdelski; Scottish Government Legal Directorate

28 January 2020

Introduction

[1] The petitioners seek judicial review of two decisions made by the respondents in relation to a grant which was offered by the respondents to the company Celtic Renewables Limited ("CRL") on 30 March 2017. The first decision, notified to CRL on 14 November 2018, was that payment of a part of the grant for which CRL had submitted a claim would not be authorised. The reasons given for that decision were that CRL had failed to meet certain conditions of the grant. The second decision, dated 21 December 2018, stated that the respondents adhered to their earlier decision and also that the respondents were not able to

accept any further claims for payment of the grant made after 7 December 2018. The petitioners seek reduction of these decisions on the grounds that each decision involved errors of law *et separatim* was irrational. The petitioners also seek declarator that the respondents are to make payment to CRL of the sum of £1,483,587 which it had claimed under the grant.

[2] The respondents contend that:

(i) the petition is concerned with contractual rights between CRL and the respondents which are not amenable to judicial review and so the petition should be refused as incompetent;

(ii) in any event, the petitioners (who have financial interests in CRL) do not have standing to raise these proceedings;

(iii) in any event, on the merits, the decisions contained no error of law, nor were they irrational.

Background

[3] In terms of section 153(1)(zl) of the Environmental Protection Act 1990 ("the 1990 Act") the respondents may give financial assistance, which can take the form of a grant, to or for the purposes of the programme known as the Low Carbon Infrastructure Transition Programme ("LCITP"). The LCITP was launched on 20 March 2015. Under the LCITP, grants are awarded for innovative low-carbon infrastructure projects in Scotland. In 2016, one of LCITP's competitions for grant funding was the Transformational Low Carbon Demonstrator ("TLCD") invitation. The purpose of the TLCD grants was to assist in enabling projects of that kind to demonstrate that they would work and could be replicated elsewhere. Any grant offered was for up to 50% of the capital expenditure required for the

project. The balance of the funding had to be provided by the applicant from other sources. This was described as "match funding". The total value of grants available to be awarded under the TLCD invitation was up to £40m. Of that total sum, 40% was allocated by the European Regional Development Fund ("ERDF"). The respondents issued the grants and the ERDF funding had to be claimed by the respondents from the ERDF by the end of the calendar year to which the allocation related. The remaining 60% of the £40m total was provided by the respondents from public funds.

[4] In late 2016, CRL applied for a grant for the construction and delivery of a demonstrator biofuel production facility in Grangemouth. The total capital expenditure required for the project was estimated by CRL at just over £18m. The grant applied for by CRL in respect of that capital expenditure was for £9m. CRL's proposal was to build an anaerobic fermentation process plant. The plant would process low-value waste and residues from whisky distilleries (draff and pot ale) and from agricultural farms (potatoes). The processing would generate the substances acetone, butanol and ethanol, which constitute biofuel, and it would also generate high-grade animal feed.

[5] After carrying out due diligence on CRL's application, in the exercise of their powers under section 153 of the 1990 Act, by letter dated 30 March 2017 the respondents offered an LCITP grant to CRL for up to £9m of eligible capital expenditure costs and up to £100,000 of eligible enabling costs in connection with the project ("the offer of grant"). The offer of grant was made subject to various terms and conditions which were set out in the letter. The terms and conditions included the requirement for CRL to achieve specified milestones in relation to the project by particular dates. One of the milestones required CRL to provide written confirmation and supporting evidence of match funding of a minimum of 50% of the project capital expenditure (ie £9m) by 31 March 2017. Another milestone was that CRL

required to provide a financial model reflecting all relevant costs and funding terms by 31 March 2017. Having regard to the date of the offer of grant, further time was allowed for CRL to meet these milestones. The date for the match funding milestone to be met was extended by the respondents on a number of occasions. Another milestone referred to biofuel and high-grade animal feed having to be provided to end-users (who would "off-take" these outputs) by 31 December 2018. The offer of grant stated that the respondents were not bound to pay any instalment of the grant which had not been claimed by 30 October 2018. That deadline was set with reference to the ERDF accounting period, which runs from January to December. In June 2018, the deadline was extended to 7 December 2018.

[6] CRL made a claim for payment under the grant on 3 September 2018. A revised claim for payment was then made on 20 September 2018. The sum claimed was £1,483,587. CRL had previously submitted financial models to the respondents and subsequently submitted a revised financial model to them on 8 October 2018. Having considered the revised claim, the respondents decided that the sum claimed should not be paid. The respondents concluded that the match funding milestone had not been met, that the updated financial model indicated that the project had changed substantially and was no longer commercially viable and that there was no evidence of any off-take agreements for the supply of the output products from processing at the demonstrator facility. By letter dated 14 November 2018, the respondents advised CRL that for those reasons funding could not be released due to non-compliance with grant conditions. The reasons were set out under three subheadings: "Grant Condition 1 – Match Funding", "Grant Condition 2 – Financial Model" and "Grant Condition 3 – Products to End-Users". On 7 December 2018 CRL requested extension of the deadline for submission of claims from 7 December 2018 to

31 March 2019. The respondents had previously advised CRL that the deadline dates related to ERDF funding phases, with phase 1 of the funding ending in December 2018. By letter dated 21 December 2018, the respondents advised CRL that the deadline could not be extended due to CRL's non-compliance with conditions of the grant. The letter also stated that it had been made clear on multiple occasions that no further extension of the deadline would be possible because of the ERDF funding phases.

[7] The first petitioner operates what is described as crowd-funding investment platform, which enables members of the public to invest money in renewable energy projects. Celtic Renewables Grangemouth plc ("CRG") is a wholly-owned subsidiary of CRL. On 11 December 2017, CRG entered into a debenture deed with the first petitioner. As at 31 January 2018, the funds raised through the first petitioner's sale of debentures as a crowd-funding platform amounted to around £5m. CRL also owed the first petitioner £250,000 in fees. From about April 2018, the funding raised through the first petitioner and invested in the project began to be expended. The second petitioner has been a director of CRL since 2011. He is also shareholder and has invested approximately £550,000 in shares in the company. He has also made convertible loans to CRL pursuant to various convertible loan agreements, in the aggregate amount of around £440,000. He is the holder of floating charges granted by CRL as security for at least some of the indebtedness to him under the convertible loans.

Submissions for the petitioners

Competency

[8] The submissions for the petitioners can be summarised as follows. The petitioners were not the recipients of the grant. They had not entered into any contract with the

respondents. The petitioners were seeking to review the actions of the respondents, as a public body. The respondents had exercised a power to decide, in terms of a statutory power under the 1990 Act. The petitioners contended that the exercise of that power was unlawful *et separatim* irrational. Whether it was the case that CRL did not have the money to sue the respondents, or did not wish to sue them, was irrelevant. The petitioners were entitled both in terms of standing and competence to challenge the decisions. The respondents must comply with the law. As a public body, they had been given a power to decide and had failed to comply with the law. Reference was made to *Wightman* v *Advocate General for Scotland* 2019 SC 111. In light of that decision, the formerly restrictive approach to competence was no longer appropriate; the point was preservation of the rule of law. In having regard to irrelevant considerations, the respondents had erred in law. The supervisory jurisdiction existed in order to put that right. It existed for those who did not have a direct legal right to enforce; these were the very circumstances in the present case.

[9] The existence of a statutory component in the matters being decided was a relevant factor. One also needed to look at the nature of the activity being undertaken by the decision-maker. If it was being given a power to decide, that brought with it a requirement not to have regard to irrelevant material and to have regard to proper and material considerations. This would also apply to a situation in which a public body exercised a decision to repudiate a contract. If a public body has a power to decide, it must exercise that power lawfully. CRL could raise a contractual claim. However, the supervisory jurisdiction allowed those who have an interest but have no contractual claim to challenge any power to decide, where the decision-maker is exercising a statutory function. Given the decision in *Wightman*, the petitioners were able easily to meet the test for competency.

[10] Reference was made to *West* v *Secretary of State for Scotland* 1992 SC 385. The requirements set out in that case were met. Jurisdiction included a power to decide. In relation to the reference in *West* to the need for a tripartite relationship, that had bedevilled judicial review in Scotland but the courts had been remarkably willing to find a tripartite relationship. If a tripartite relationship was required in the present case, it could be seen in the legislature, through the 1990 Act, having given the respondents the power to decide on the payment of the grant, and the petitioners as having an interest in seeing that the power to decide is exercised lawfully: *Boyle* v *Castlemilk East Housing Association* 1998 SLT 56. Of course, CRL could not use judicial review, as it had rights as recipient of the grant. The fact that there was an agreement with CRL did not preclude judicial review by the petitioners.

[11] It was possible to be both a decision-maker and the provider of benefits. The public body may be the determiner of whether or not the public funds should be paid as well as being the custodian and the payer of those funds. The position of the respondents that a contractual relationship is not open to judicial review failed to have regard to the statutory background. Decisions which are susceptible to judicial review may also include a failure to perform a contractual obligation: *Bank of Scotland* v *IMRO* 1989 SC 107.

Standing

[12] The proceedings were not brought to vindicate rights vested in a petitioner, but to ensure that this public authority exercised its functions in accordance with the law. Reference was made to *AXA General Insurance Ltd* v *Lord Advocate* 2012 SC (UKSC) 122. Not being a party to the grant was not of itself a sufficient ground to exclude standing. The petitioners did not need to assert a right on their part in order to have a remedy. There was

no prescribed degree of interest other than that the petitioners should be able to demonstrate a sufficient interest in the issues in the petition.

[13] The first petitioner is an investment-based crowd funding platform, regulated by the FSA. The first petitioner identified CRL as an investible forum and so had an interest. It acts as the arranger of investment vehicles and as an agent for investors in respect of those vehicles. The first petitioner had raised some £5m or thereby in investment match funding for the project. Its ongoing interest on behalf of investors was apparent from the terms of the Debenture Deed. Further, having facilitated investment in the project, the first petitioner had a reputational interest in the fulfilment of the project. The second petitioner is an investor in CRL, having invested in excess of £549,000 in the project. As a director and shareholder of CRL, he had also made convertible loans to CRL, in aggregate in the sum of around £440,000.

[14] The petitioners' apprehension was that without funding from the respondents the whole project may be jeopardised rendering it of little or no value, resulting in the loss of some or all of those investments. The more expansive approach to standing in *AXA* post-dated the decision in *R (on the application of Grierson)* v *Ofcom* [2005] EWHC 1899 (Admin) relied upon by the respondents. In any event, the High Court did not refuse the application in that case on grounds of lack of standing. The sheer amount of investment on the part of the petitioners was also a relevant factor to the question of interest. It was in fact remarkable for the respondents to suggest that the petitioners have no relevant interest. A lot of money had been invested on the part of both petitioners. It was very hard to dispute why that would not be a relevant interest. When one balanced the extent of the financial interests with the challenges raised, which had strong demonstrable grounds, there was a sufficient interest.

Grounds of challenge

"Grant Condition 1- Match Funding"

[15] CRL had commenced work in respect of the project, to the knowledge of the respondents, whilst full match funding was sought. On or about 28 August 2018 full match funding was secured in the form of a completed Subscription and Shareholders' Agreement. This agreement was entered into between CRL and others, including Dross Energy Limited. In terms of that agreement there was an irrevocable and unconditional requirement for the parties thereto to apply for the allotment of shares in return for subscription of sums totalling £6,549,360.09. Taken with the investments referred to earlier, that agreement resulted in the provision of full match funding.

[16] The respondents were advised of the completion of match funding on 28 August 2018. The grant did not require the actual drawdown of match funding save in so far as it was required to demonstrate an equivalent drawdown to the claim being made for grant drawdown at the intervals provided in Schedule 1, Part 2. There was a contractual agreement between CRL and others for match funding. Thus, CRL was in a position to drawdown if required and match funding was in place. Accordingly, in context, the respondents' requirement expressed in their letter of 14 November 2018 for full match funding to be available was, in effect, a requirement for full drawdown of match funding. That was unlawful and/or irrational in terms of the grant. In any event, the Subscription and Shareholders' Agreement, taken with the investments made by the first petitioners' clients and the second petitioner, complied with the relevant condition of the grant. For the respondents to say otherwise was unlawful and/or irrational. It was not a requirement that

£9m needed to be actually available; that would be inconsistent with the arrangement for tranche payments.

[17] In any event, at the second LCITP Review meeting held on 23 January 2018 the respondents had agreed that if CRL could not deliver full match funding, the grant would be reduced to that which had been secured by CRL. This was confirmed in an email dated 31 January 2018. The respondents having so agreed and hence waived the requirement for full match funding of £9 million, the petitioners had a legitimate expectation that the respondents would adhere to their position: *CCSU* v *Minister for the Civil Service* [1985] AC 374. To seek to elide payment on the ground that as at 14 November 2018 there was inadequate match funding was therefore unlawful and/or irrational, in light of the match funding that had been secured.

"Grant Condition 2 – Financial Model"

[18] Financial viability of the project was not a condition of the grant. In none of milestones set out in the offer of grant was there an identified financial performance criterion. That was not surprising, as it is a demonstrator plant. The point of the project was to see whether it could be upscaled; it was not an actual production plant. In ascertaining whether or not to award the grant in the first place financial performance was an issue, but when it came to making the grant no financial requirements were required for this demonstrator plant. As the respondents had not set any standard, they could not assess whether the project was in jeopardy. For the respondents to refuse to make payment for want of financial viability was unlawful and/or irrational. The respondents had relied upon an irrelevant consideration and had erred in law.

"Grant Condition 3 – Products to End-Users"

[19] The respondents further asserted, in the letter of 14 November 2018, that "there are currently no off-take agreements or legal heads of terms in place to support the revenue assumptions of the offtake." However, the grant did not require the conclusion of any agreement for the purchase of biofuel or animal feed by any end-user. Further and in any event, the requirement in the milestone for such products to be provided to end-users by 31 December 2018 could not rationally be construed as requiring that to be done before that date. This ground of refusal also referred to financial risk. But that was not a relevant consideration for this demonstrator plant. The letter did not provide an adequate explanation. For the respondents to refuse to make payment on the basis of the absence of such agreements, or indeed the products themselves, was unlawful and/or irrational.

The respondents' letter dated 21 December 2018

[20] On 21 December 2018 the respondents had adhered to their decision of 14 November 2018. For the reasons previously advanced, that decision was also unlawful and/or irrational. Further, in the letter of 21 December 2018 the respondents stated that they were unable to accept claims under the grant made after 7 December 2018. However, paragraph 3.4 of the offer of grant provided that the respondents were not bound to pay claims made by 31 March of the applicable financial year. The relevant financial years were 2017/18 and 2018/19. The respondents' refusal to accept claims after 7 December 2018 was thus unlawful and/or irrational.

Submissions for the respondents

Competency

[21] The submissions for the respondents can be summarised as follows. In relation to the nature and scope of the supervisory jurisdiction, reference was made to *Crocket* v *Tantallon Golf Club* 2005 SLT 663, *Wightman* v *Advocate General for Scotland* and *West* v *Secretary of State for Scotland*. In a case where it is the underlying merits of contractual claims that are truly at stake, rather than the legality of a particular act or decision of an administrative nature, it would be incompetent, or at least inappropriate, to seek judicial review. The source of the powers whose exercise is reviewed, where the supervisory jurisdiction is properly invoked, could lie in a contract, but in a judicial review the court is not determining a contractual dispute about rights and obligations on the merits. The status of the person as a public body, or as acting under statutory authority, did not automatically mean that all acts and decisions of that person are amenable to judicial review. English case law was of little assistance.

[22] In Scotland, the availability of a contractual remedy to the person invoking the supervisory jurisdiction did not necessarily exclude judicial review in circumstances where the decision was of such a general effect or application that judicial review was the only satisfactory way of dealing with the dispute. Further, there were cases where even although the decision related to one individual contract, circumstances could exist which would warrant recourse to the supervisory jurisdiction. Reference was made to *Watt* v *Strathclyde Regional Council* 1992 SLT 324. However, the general position was that once a contract is in place, any decisions under the contract are subject to the ordinary jurisdiction of the court: *Tehrani* v *Argyll and Clyde Health Board* 1989 SC 342; *West* supra. In the present case, for whatever reason, the company itself had not brought a claim. Nothing could be taken from

that fact. It was the investors who were here seeking to protect their investments. So this was litigation being conducted by investors, not acting on behalf of the company, but acting in their own interests. The court was being asked by them to scrutinise a decision not made about them in a decision letter not addressed to them. This was an attempt by two investors to co-opt the court into regulating the relationship between the respondents and CRL. It was simply not open to them to do so.

[23] It was necessary to analyse the nature and basis of the decisions under challenge: *Gray* v *Braid Logistics UK Ltd* 2015 SC 222. The offer of grant had all the hallmarks of a contractual offer, which was accepted by CRL. There was accordingly a contract between the respondents and CRL. The decisions in question were clearly made under that contract. In relation to both decisions, CRL had contractual remedies which it could pursue against the respondents by invoking the ordinary jurisdiction of the court. CRL had not pursued any such remedies. In the exercise of its ordinary jurisdiction, the court would be able to deal with the underlying merits of the dispute and provide CRL with any appropriate remedies.

[24] In addition, in exercising its supervisory jurisdiction, the court would be limited to applying the tests of error of law and irrationality contended for by the petitioners. It would be inappropriate for decisions under the contract, with practical effects on the rights and obligations of the parties to the contract, to be assessed with reference not to the standard of the contractual terms. Further, the ordinary jurisdiction of the court in contractual matters followed the principles of contractual interpretation to establish what the express terms of a contract meant. The supervisory jurisdiction of the court was not constrained by the principles of contractual interpretation or any related strictures on admissible evidence on the question of what decisions were reasonably available to the decision-maker.

[25] None of the authorities relied upon by the petitioners assisted them in contending that the petition is competent. It would be a significant departure from the familiar concept of the rule of law to contend that it includes the performance by the government, and public authorities in general, of their contractual obligations in a question with other persons. The determination of contractual disputes by the court exercising its ordinary jurisdiction is an important part of the rule of law, functioning as it should. *Bank of Scotland* v *IMRO Ltd* and *Boyle* v *Castlemilk East Housing Co-Operative Ltd* could each be distinguished on a number of grounds. Allowing judicial review could usurp the contractual rights and duties of the parties. It also involved a different test, with the potential to give rise to a different outcome.

Standing

[26] While the observations of both Lord Reed and Lord Hope on standing and sufficient interest in *AXA General Insurance Ltd, Petitioners* were acknowledged, on a proper application of the test for standing/sufficient interest, the petitioners did not meet that test. The petitioners had at best a derivative interest in the subject-matter of the petition. CRL was the interested party. The first petitioner was, in essence, a lender to CRL via CRG. The loans were of its customers' money for the purposes of the project. It was not even a shareholder of CRL, nor an officer of CRL. It was not a party to the commercial contracts entered into by CRG in connection with the project. The first petitioner's investment in CRL or the project predated the decisions under challenge by several months and would already have been at risk before the respondents made the decisions which are challenged. The first petitioner's own money was not at stake. Damage to its reputation could not be blamed on the respondents. There was no positive averment that the first petitioner had a financial interest beyond acting as an arranger or agent. The first petitioner must have chosen to

enter into commercial dealings with CRL based on its own assessment of financial and commercial risk, weighing its exposure to CRL's potential default and/or the failure of the project, and with a view to obtaining some benefits from that commercial relationship. Against that background, it would be an extraordinary outcome, even on the most generous approach to standing with reference to *AXA*, if the first petitioner was to be seen as having a sufficient interest in the present petition. The purpose of the supervisory jurisdiction is to ensure the rule of law, primarily in delegated decision-making, not to enable commercial parties to mitigate against the risks of being exposed to conditions of government or local authority funding.

[27] The second petitioner was not a party to any commercial contracts entered into by CRG in connection with the project. The second petitioner's investment in CRL predated the decisions under challenge by three to eight years, and would have been at risk, and known by him to be at risk, long before the decisions in question were taken in November and December 2018. The difficulties that flowed from the different capacities in which the second petitioner was acting (both as part of CRL and separately, in these proceedings, as an investor) illustrated the fundamental problems with judicial review and showed why it was entirely inappropriate. The status of a shareholder, director or investor in a company may perhaps amount to sufficient standing in a particular situation, but in the present case, where CRL had not itself taken any action, neither the first nor the second petitioner had sufficient standing. Reference was made to *R (on the application of Grierson)* v *Ofcom* [2005] EWHC 1899 (Admin), [2005] EMLR 37 and to *Agrotexim* v *Greece* (1996) 21 EHRR 250.

[28] If the petitioners' interests were sufficient, any investor, however indirect, in any project co-funded by the central government would, in principle, be able to judicially review the purely contractual matters between the grantee and the respondents. The non-

availability of a contractual remedy to a third party did not give that third party a sufficient interest to judicially review a decision under a contract, nor did it make judicial review appropriate. The petitioners could not properly be described as busybodies, and they may have their reasons for taking action, but they had done so in an incompetent process in which they did not have a sufficient interest in the subject matter of the application. If the order for payment sought was competent then the court was being invited to do something which directly affected the relationship between the respondents and a party which is not in the litigation. That would be an extraordinary result.

Grounds of challenge

"Grant Condition 1- Match Funding"

[29] The respondents had acted lawfully and rationally in refusing to make payment. The decision to refuse to make payment under the September 2018 application was within a range of reasonable decisions open to the respondents, having regard to the evidence available to them at the time, including the professional advice received from Ernst & Young on the revised financial model submitted by CRL in October 2018.

[30] The amount of the required match funding was at least £9m. Dross Energy Ltd did not, in fact, comply with the obligation to provide its funding contribution to CRL within 60 days of the agreed date. Dross Energy's failure to do so meant, in practice, that, by the time the revised September 2018 application was being determined by the respondents in November 2018, the availability of the entire match funding in the amount of £9 million to CRL was not demonstrated to the satisfaction of the respondents. The respondents were entitled to insist on being satisfied as to the availability of such match funding before releasing public money (other than for enabling costs) on any claim for an instalment of the

LCITP grant. The petitioner's submission appeared to be that a fully signed and executed agreement allowed match funding to be regarded as complete. If the existence of a contract with the funder was supposed to be good enough to demonstrate the match funding was actually in place, that completely failed to recognise the reality of the situation both on paper and in practice.

[31] In relation to the email of 31 January 2018, clause 1.5 of the grant made clear that the terms could not be varied except by an instrument in writing signed by both parties. The email made clear what was actually going on. This was not a final agreement on which a legitimate expectation could properly be based. The email expressly stated that the amount would have to be recalculated and the grant letter would be revised if CRL submitted the required material, which it failed to do.

"Grant Condition 2 – Financial Model"

[32] The requirement for financial viability was a key element of the LCITP programme. The respondents were not offering grants for projects which were not expected to make enough money to be self-sustaining over their assumed life. On the contrary, the grant was awarded on the basis that the project was financially viable. The project set out in CRL's updated financial model, in the context of the application for payment in 2018, was in significant respects different from the project approved for funding in 2017. It was no longer financially viable. The project had been reduced in scale and the demonstrator facility to be constructed was not expected to pay for itself without the need for further government funding over its expected commercial life. In any event, the respondents were advised by Ernst & Young that this was the position, and they were entitled to rely on that advice. The respondents were entitled to refuse to make payment on the basis that the failure to

demonstrate financial viability was a failure to meet the grant conditions and, separately, were entitled to conclude that the future of the project was in jeopardy.

[33] Reference was made to a new production which the respondents sought to lodge. It was a spreadsheet which was CRL's financial model. This was part of CRL's own application for the grant. A second and then third revised financial model were subsequently submitted. The project wasn't about demonstrating how the technology would work but about demonstrating whether the project itself would work and hence whether it was a viable financial proposition. Otherwise there would have been no reason for CRL to follow the guidance and lodge all of the investment, financial planning and financial due diligence documents for the project.

"Grant Condition 3 – Products to End-Users"

[34] CRL's ability to attract suppliers and customers to the project was a key element of the rationale for LCITP funding. The absence of off-take agreements at the point at which a payment claim was made in September 2018 raised legitimate doubts about the revenue assumption for off-take, leading to concerns about financial risk and the viability of the project. The lack of evidence of off-take agreements indicated to the respondents that the grant condition relating to the final milestone of the end of December 2018 was unlikely to be met. The respondents were entitled to consider that, given the absence of off-take agreements with customers, there was no prospect of the product being supplied to the end user by 31 December 2018.

[35] This part of the decision was bound up in commercial sense: if the product was not being sufficiently purchased there were likely to be difficulties. The condition referred to simply came from the purposes of the project. There was a milestone about provision to the

end-user by a specified date. The respondents had the assistance of external advisers. While the letter of grant did not refer to CRL having to be in contractual agreements with the off-takers, it was part and parcel of the issue of viability that there had to be a contractual basis for persons to take the outputs. That was a sufficient ground for the respondents to have identified this condition as a compliance issue.

The respondents' letter dated 21 December 2018

[36] In terms of the grant conditions as varied, the respondents were not bound to pay any instalment of the grant which had not been claimed by the grantee by the amended deadline of 7 December 2018. The respondents were not obliged to further extend the deadline of 7 December 2018 for submission of claims to a date before or indeed after 31 March 2019 to accommodate CRL's inability to submit all claims by 7 December 2018. There was no unlawfulness or irrationality in not extending the deadlines for submission of claims in a time-limited funding round where: (i) the only reasons for any such extension would have been CRL's failure to comply with other milestones in the grant conditions; and (ii) any such extension would have put at risk the respondents' ability to claim 40% of the total grant funding from the ERDF. There was no error of law either in analysis of the contractual obligations or otherwise.

Response for the petitioners

[37] Dealing firstly with the competency matters, the emphasis by the respondents on the contractual relationship was fundamentally misplaced. The fact that the letter was addressed to one party did not mean that others could not raise a petition for judicial review. The rule of law existed for everyone, not just parties who have contracted. There

would be no difficulty in stopping an excessive payment that was unlawful. Thus, it should also be possible to enforce a refusal to pay, if that is unlawful. Taking public procurement as an example, if the company carrying out the contract had received payments exceeding the specified amounts then not only any member of the public but also any unsuccessful bidder would have an interest in a challenge. There was no justification for saying one could not use judicial review to require payment, when declining to make payment if unlawful could be challenged.

[38] Turning to standing, the case law made it clear that it suffices if the person has a sufficient interest that needs to be protected. The approach the petitioners had taken would not open any floodgates. The court could regulate any such concern by using the concepts of interest and standing. The respondents' point that the money was already at risk was of no relevance. The petitioners' concern was that illegality in the decisions had materially increased that risk, not only in purely financial terms. Some £6 million was at risk of being at least partly lost. The first petitioner's role as agents gave them a sufficient interest. They had the ability to act protect the interests of the investors, as well as their reputational interest. In relation to the second petitioner, shareholders' interests were certainly relevant to the test of standing.

[39] Turning lastly to the merits, the letter of 14 November 2018 made no mention of concerns about Dross Energy. On financial viability, the additional production was irrelevant. The respondents were unable to point to any contractual clause about not meeting a financial target. The respondents confused the issue of forecasts with financial viability. Financial modelling is not the same as financial viability. Financial modelling is about what the project may be capable of achieving, but it was never said that if that model was not met then the grant would not be given. If a financial metric is not part of the project

then it is not a relevant consideration on whether or not the project is in jeopardy. As to the issue of the end-user, none of the conditions of the grant involved an end user agreement being in place.

Decision and reasons

Competency

The scope of the supervisory jurisdiction

[40] In *West v Secretary of State for Scotland* the court rejected the idea that the scope of judicial review depended in any way upon the public law/private law distinction. The court stated (at 412) certain propositions which were intended "to define the principles by reference to which the competency of all applications to the supervisory jurisdiction" were to be determined. In its oft-quoted *dictum*, the court went on to state (at 413):

> "The cases in which the exercise of the supervisory jurisdiction is appropriate involve a tri-partite relationship, between the person or body to whom the jurisdiction, power or authority has been delegated or entrusted, the person or body by whom it has been delegated or entrusted and the person or persons in respect of or for whose benefit that jurisdiction, power or authority is to be exercised."

[41] In *Crocket v Tantallon Golf Club*, Lord Reed said (para [37]) that the scope of the supervisory jurisdiction of the Court of Session is the means by which, under the common law, the court ensures that bodies which possess legally circumscribed powers to take decisions or actions, affecting the rights or interests of other persons, exercise their powers in accordance with the limitations and requirements to which they are subject. While the concept of a tripartite relationship, broadly understood, is valuable as a paradigm of the situation in which a body exercises a limited power or authority, it is not to be applied inflexibly (para [40]). That approach has been followed in other cases.

[42] In *Wightman v Advocate General for Scotland*, Lord Drummond Young stated (at para [67]):

> "The fundamental purpose of the supervisory jurisdiction is in my opinion to ensure that all government, whether at a national or local level, and all actions by public authorities are carried out in accordance with the law. That purpose is fundamental to the rule of law; public authorities of every sort, from national government downwards, must observe the law. The scope of the supervisory jurisdiction must in my opinion be determined by that fundamental purpose. Consequently I would have no hesitation in rejecting any arguments based on procedural niceties, or the detailed scope of previous descriptions of the supervisory jurisdiction, if they appear to stand in the way of the proper enforcement of the rule of law."

Thus it is clear that the tripartite relationship test cannot stand in the way of the proper enforcement of the rule of law. In judging whether or not the supervisory jurisdiction is competently invoked, it is necessary to examine the act or decision under challenge and the basis of that act or decision: *Gray v Braid Logistics UK Ltd* (para [22]).

Judicial review of decisions made within contractual relationships

[43] The case law includes discussion of the exercise of the supervisory jurisdiction where contractual rights and duties exist. In *West*, Lord Hope made reference to *Tehrani v Argyll and Clyde Health Board* 1989 SC 342, which concerned allegations by an employee of unfair conduct by his employer, and explained (at 407):

> "The fact was, however, that the board were not performing any function independent of their position as the employers of the respondent to whom they owed a duty to act fairly under their contract with him, and for that reason their duty to act fairly was not open to judicial review."

Lord Hope also (at 410) agreed with the view expressed in *Tehrani* that, on the one hand, rights and remedies enjoyed by an employee arising out of a private contract of employment and, on the other hand, the performance by a public body of the duties imposed upon it as part of the statutory terms under which it exercises it powers, are "entirely distinct". A

breach of the contract of employment "is a matter which must be dealt with under the ordinary jurisdiction by seeking contractual remedies and that it does not give rise to an entitlement to judicial review".

[44] In *Watt v Strathclyde Regional Council*, which was decided before *West*, the court held that the availability of a contractual remedy to the person invoking the supervisory jurisdiction does not necessarily exclude judicial review in circumstances where the decision is of such a general effect or application that judicial review is the only satisfactory way of dealing with the dispute. It was said in *Watt* that there are cases where even although the decision is related to one individual contract, circumstances may exist which warrant recourse to the supervisory jurisdiction (Lord Clyde at 331H). In *West* it was observed (at 411) that the decision in *Watt* was reached as a matter of urgency and that the time available did not enable counsel to explore in argument the nature of the supervisory jurisdiction to any significant extent and accordingly where there is a conflict between what was said in *Watt* and the analysis of the supervisory jurisdiction in its opinion in *West*, the latter is to be preferred. Further, the nature and character of the decision challenged in *Watt* was described in *West* (at 412) as "one taken in the exercise of a statutory power or in the implement of a statutory duty, which, by its nature, was bound to affect all of those in respect of whom the jurisdiction conferred by the statute was to be exercised". The court also noted that in *Watt* Lord Clyde had commented that the petitioner's position was directed essentially at "an alleged excess of power". Just before setting out the requirements of the tripartite relationship quoted above, Lord Hope stated (at 413) that "Contractual rights and obligations, such as those between employer and employee, are not as such amenable to judicial review".

[45] In *Blair v Lochaber District Council* 1995 SLT 407, Lord Clyde referred to this statement by Lord Hope in *West* and said (at 409D):

> "It is reasonable to conclude that the critical sentence is to be read in the context of contracts including contracts of employment. There is no room for judicial review where there are contractual rights or obligations which can be enforced, at least as a matter of general principle. The tripartite relationship explains the availability of judicial review to an employee in cases where the decision making process has been entrusted to a body other than the employer."

The application for judicial review in that case was therefore held not to be competent. This approach was also taken in *Dryburgh v NHS Fife* [2016] CSOH 116. In *Gray v Braid Logistics UK Ltd* the Extra Division referred to the same observations in *West* and held that the decisions which were challenged had arisen out of the bilateral employer employee contractual relationship, that being one of the reasons for concluding that there was no competent invocation of the supervisory jurisdiction. The court also observed that the supervisory jurisdiction may be seen as a development of the *nobile officium* of the court and generally only applies where no other remedy is available.

[46] There are therefore several judgments, including from the Inner House, which support the proposition that decisions made by a contracting party in relation to rights and obligations under the contract are not, as such, amenable to judicial review by the other contracting party. If the decision could also be characterised as one taken in the exercise of a statutory power or in the implement of a statutory duty, which, by its nature, was bound to affect all of those in respect of whom the jurisdiction conferred by the statute was to be exercised, then (as observed in *West*) that is a different matter. Similarly (as also observed in *West*) if the party whose decision is challenged was, in making the decision, performing any function independent of its position as the other contracting party, that is again a different

matter. Thus, decisions made by the other contracting party on these wider grounds can be amenable to judicial review.

[47] The petitioners sought to rely upon *Bank of Scotland v IMRO Ltd,* including the following observation by the Lord Ordinary, Lord Cullen (at 113):

> "Further I am not persuaded that in a case of judicial review jurisdiction may not be founded upon r. 2(2) of Sched. 8. There seems to me to be no reason in principle why a decision or action which is administrative in character and accordingly susceptible to judicial review, should not also be a failure to perform a contractual obligation or a breach of a prohibition contractually undertaken. In such circumstances the rule would afford a ground of jurisdiction in proceedings for judicial review."

However, these comments of Lord Cullen do not deal with competency, but address the separate issue of a contractual ground of jurisdiction on the footing that (as he had already found) the petition was competent. He concluded that the decision by IMRO to refuse to give a waiver could be described, for jurisdictional purposes, as a failure to perform a contractual obligation. In the Inner House, Lord Dunpark explained (at 116) that it was plain from the statutory basis of IMRO's powers that, in considering and refusing the bank's applications, IMRO was performing an administrative function in the field of public law. Lord Morison expressed the view (at 124) that the obligation on which the petition was based "...appears to me to arise rather by virtue of their statutory administrative capacity than from the contractual relationship which they have with their members". IMRO's alleged failure could not, he considered, be expressed as a breach of the contract of membership. Lord Maxwell stated (at 127) that he entertained "…considerable doubt as to whether the alleged failure of duty in this case is a breach of a "contractual obligation" of the kind contemplated by rule 2(2)…" Thus, the Inner House judges were not convinced that the decisions in question were contractual. On that basis, this case, which in any event pre-dates

West and the other cases referred to above, would fit within the wider ground of the decision-maker performing a function independent of its position as the other contracting party.

[48] The petitioners also sought support from *Boyle v Castlemilk East Housing Co-Operative Ltd*, in which Lord Eassie had held that a number of matters pointed to the existence of a jurisdiction which was subject to judicial review. There was, he concluded, a tripartite relationship of the kind identified in *West* between the legislature, the authority as the adjudicator of claims for payment, and the householder making the claim, and it did not matter that the authority both determined and met the claim. In any event, the statute did not create a direct entitlement to payment, recoverable in an action for an ordinary debt. It is therefore clear that the circumstances differed from a contractual claim and that the tripartite relationship test was met on the facts of that case.

Application of the legal principles

[49] Dealing firstly with the act or decision under challenge and the basis of that act or decision, in the course of his submissions senior counsel for the petitioners appeared to show some reluctance towards characterising the relationship between CRL and the respondents as contractual. However, there was no submission made that it was anything other than a contract. Having regard to the fact that an offer to make the grant was made, expressly stated as being subject to terms and conditions, and that CRL accepted that offer, I am in no doubt that CRL and the respondents entered into a contract. The terms and conditions expressly refer to "the Agreement" between the parties. The schedules attached to the offer, which include the milestones, are also expressly stated to be contractual.

[50] While the arguments for the petitioners proceed upon the grounds of errors of law and irrationality, the basis for these contentions is that the respondents had no right, in

terms of the grant, to reach the decisions they made: the errors of law were in reaching decisions that were not permitted by the terms and conditions of the contract; the irrational acts were the taking into account of matters which did not fall within the terms and conditions. The petitioners submitted that the respondents' decision on "Grant Condition 1 - Match Funding" was unlawful and/or irrational "in terms of the grant", and that the other decisions complained of either had no basis in the terms of the grant or involved a departure from the terms of the grant. Thus, the elements of the rule of law which the petitioners claim the respondents to have failed to observe are in reality the terms and conditions of the contract under which the grant was made. It therefore follows that the feature of the rule of law that the petitioners contend was breached by an error of law was a set of terms and condition that two other contracting parties had selected for themselves as the means of regulating their own rights and duties.

[51] For the purposes of the supervisory jurisdiction, it is correct that the source of the power is not crucial and the courts should ensure the proper exercise of discretionary power by public authorities whatever the source of that power. Decisions in respect of specific contractual obligations are not, as such, subject to judicial review. However, the supervisory jurisdiction may still govern, for example, decisions made by a contracting party on the wider grounds referred to in *West* (see para [46] above). In the present case, none of these wider grounds exists. The decision-making process was not entrusted by CRL and the respondents to another person, or by CRL and another person to the respondents. In making the decisions, the respondents were not performing any function independent of their position as the other contracting party. In that regard, the decisions did not involve the performance by a public authority of the duties imposed by the statutory terms under which it exercised its powers and the decisions were not administrative in character. The 1990 Act

does not provide for an entitlement to any specific payment. Rather, it provides the respondents with the power to give financial assistance under LCITP in the manner in which the respondents may think fit. The terms and conditions for LCITP funding for the particular project of the applicant are set by the respondents and form part of the contract. The decisions were not, by their nature, bound to affect all of those in respect of whom jurisdiction conferred by a statute was to be exercised. Moreover, a remedy other than under the supervisory jurisdiction is available to CRL. Accordingly, if this petition had been raised by CRL, the case law makes clear that it would not be competent.

[52] The underlying rationale for the views reached in the cases may well be the simple point that A cannot invoke the supervisory jurisdiction in relation to a decision made by B under his contact with A, because A has access to the ordinary jurisdiction to have the matter determined. It is perhaps arguable that the underlying rationale could be more subtle: that a breach of contract is not, as such and of itself, a failure to observe the law for the purposes of the supervisory jurisdiction. By entering into a contract which carries with it the right of the other party to enforce it or seek a remedy for breach, the public body could be said to have subjected itself to the rule of law, having placed itself within a system of corrective justice which is available to the other contracting party. However, this particular point is not canvassed in the authorities and it was not the subject of detailed submissions by the parties in the present case. I therefore reach no views upon it.

[53] The decisions to which I was referred did not deal in terms with the specific issue in this case, which is whether a third party can use the supervisory jurisdiction in order to challenge a decision by one party made solely under the specific terms of a contract with another party. In my opinion, at least as a matter of general principle, that question must be

answered in the negative. The approach taken in the cases noted above supports that conclusion. While the authorities deal with circumstances in which one contracting party cannot bring a judicial review of a decision by the other contracting party which is merely contractual, it seems to me that an outsider to the contract also cannot invoke the supervisory jurisdiction for that purpose. The underlying rationale that the party complaining of the breach has access to the ordinary jurisdiction is a powerful factor. If he has not chosen to challenge the decision, as the party directly affected, it is difficult to see why an outsider should be able to do so by invoking the supervisory jurisdiction. In addition, there are significant policy concerns which arise if the petitioners are correct. On the matter of interpretation of the contractual terms, the background or factual matrix known to both contracting parties can be important, but a third party may not have that information. The court, faced with an application for judicial review by a non-contracting party and in the absence of the other contracting party, could be asked to interpret the contract on an incomplete basis. It may also be asked to apply principles which are used in judicial review and which go beyond contractual interpretation. Further, various issues arising between only the contracting parties can impact upon the enforceability of their rights and obligations, such as, for example, personal bar, waiver, and the concept of mutuality of obligations. In addition, there is a long history of issues about whether and if so when third parties can acquire any rights under a contract, including a right to enforce it. The matter has always been strictly controlled. Assignation is not necessarily available (indeed clause 11 of the offer of grant in the present case prohibits assignation without the prior written consent of the respondents). To give third parties with an interest in a contracting party (such as investors) the ability to, in effect, characterise the actings of the other contracting party as unlawful simply because they breach the contract would create

very significant inroads into the doctrine of privity of contract. In relation to public authorities, that challenge could be used in many contexts, for example, public procurement contracts or construction contracts. It could give rise to a multitude of actions where the actual contracting party has not taken proceedings but those associated with it seek to use judicial review to enforce its rights. Moreover, the fact that the contracting party has not at the stage of the judicial review application raised proceedings does not of itself mean that it never will do so. Ordinarily, the prescriptive period of five years will apply. Any finding by the court in a petition such as the present would not be binding on CRL, which might itself raise an ordinary action at some later date.

[54] There are therefore cogent reasons, including policy considerations, which point in favour of the general principle of the supervisory jurisdiction being incapable of being invoked by a non-contracting party seeking to establish breach of a specific contractual obligation owed by a public authority to another. Otherwise, subject to the position on standing, public authorities could be faced with a multiplicity of claims, even arising from one particular contract. The consequence that public authorities should be exposed to spending public funds in defending that potential volume of claims is not justifiable. Whether there might be exceptional circumstances in some cases that cause judicial review to be allowed is not something I require to decide upon; it suffices for me to note that none exist in the present case.

[55] If, contrary to that view, a failure by a public authority to comply with any of the terms of a contract it has entered into with any other person is a failure to observe the rule of law and is amenable to judicial review by a third party, then in this case the tripartite test in *West* would require to be met in order for the supervisory jurisdiction to be invoked. Lord Drummond Young referred to problems which might arise where the principles in *West*

stand in the way of the proper enforcement of the rule of law. In a case such as the present, if the contractual obligations of the respondents do indeed form part of the rule of law, proper enforcement lies in the hands of the other contracting party (CRL) under the ordinary jurisdiction of the court. The tripartite test does not therefore stand in the way of proper enforcement of the rule of law in the present context and falls to be applied. Applying it, I see no basis for finding that any tripartite relationship, of the kind described in *West*, actually existed. It is of course true that the legal basis upon which the respondents are able to proceed with the process of awarding a grant is statutory, but, having made that award, the legal basis upon which the decisions in question were made is contractual.

[56] For those reasons, I conclude that the authorities do not support the petitioners' contention that the decisions complained of are amenable to judicial review; indeed, they support the opposite view.

Other matters

[57] The petitioners relied upon an alleged waiver by the respondents of the requirement that the full £9 million of match funding be available. I have rejected that submission. Again, however, that indicates that the petitioners are placing reliance upon the contractual relationship and indeed reliance by them, as a non-contracting party, on an alleged waiver by the respondents in favour of CRL, as the party to the contract. The petitioners' position therefore appears to be that, on the one hand, the existence of the contractual relationship is a somewhat subsidiary or indeed largely irrelevant matter, but on the other hand the contractual terms are effectively the foundation of petitioners' case on the merits and a waiver of contractual rights, by one contracting party in favour of the other, is available to be relied upon by the petitioners.

[58] The petitioners also argued that if a challenge to a decision by a public authority to pay more money than was due under a contract with a private limited company was competent then so too should be a challenge based on a failure to pay monies due. This analogy seems to me to be irrelevant. The over-payment would involve the unlawful expenditure of public money and could impact on the individual taxpayer as well as others. It would not be a decision likely to be challenged by the recipient as a breach of contract. The analogy is of no assistance.

[59] For these reasons, I conclude that the petition has no competent legal basis and on that ground I refuse the petition.

Standing

[60] If my conclusion on competency is incorrect, then the issue of standing requires to be addressed. In *AXA*, Lord Hope referred (para [57]) to the supervisory jurisdiction as extending from the field of private law to the field of public law. He added that in cases that lie within the private law sphere it will no doubt be appropriate to ask whether the petitioner has title and interest to bring the proceedings. He said (para [58]):

> "In cases that lie within the private law sphere it will no doubt be appropriate to ask whether the petitioner has a title and interest to bring the case…The fact that a person upon whom a decision-making function has been conferred by a private contract is amenable to the supervisory jurisdiction is not something that is likely to affect anyone other than the parties to the contract. In that situation the application of the private law test as to whether a title and interest to bring the proceedings has been demonstrated will be perfectly appropriate."

Lord Hope went on to say (para [62]) that "…the private law rule that title and interest has to be shown has no place in applications to the court's supervisory jurisdiction that lie in the field of public law". He held that the words "directly affected" which appeared in the relevant rule of court captured the essence of what was to be looked for and that there was a

distinction between the "mere busybody" and "…the interest of the person affected by or having a reasonable concern in the matter to which the application related". Lord Reed (para [159] *et seq*), dealing with applications to the supervisory jurisdiction of the court (in the context of public law and not applications made "in relation to private bodies"), explains that in an ordinary action the pursuer is seeking to vindicate his rights against the defender, those rights constituting his title to sue, whereas an application to the supervisory jurisdiction is not brought to vindicate a right vested in the applicant but to request the court to supervise the actings of a public authority so as to ensure that it exercises its functions in accordance with the law. Lord Reed referred to Lord Hope's opinion in *West* as making clear "…the essential difference between the nature and purpose of the court's supervisory jurisdiction, on the one hand, and its jurisdiction to adjudicate on disputed questions of right, on the other". Lord Reed went on (para [170]) to say:

> "In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context...What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus conferring standing, depends upon the context, and in particular what will best serve the purposes of judicial review in that context".

[61] No submission was made by the respondents that the petitioners' application for judicial review did not, in Lord Hope's words "lie in the field of public law" and hence that title and interest to sue is required. Accordingly I have not considered that matter. On Lord Reed's approach, it is open to argument that in circumstances such as the present the interest requires to be of particular substance. Indeed, as I have noted above, where the other contracting party is the person principally affected by the decision, and has not chosen (at least as yet) to take action to challenge the decisions, it is difficult to see why anyone else should be permitted to do so. Further, the policy concerns which support the view that

applications of this kind should not generally be permitted could also be applied in the context of the test for standing.

[62] However, the question of standing arises in this case only if the petition is competent. If an application by a non-contracting party for judicial review of decisions of this kind made under a contract is competent, then having regard to the authorities on standing, it is in my opinion difficult to see how these particular petitioners, as significant investors in relation to CRL, do not have the requisite degree of interest. I was not addressed on what different or more substantial interest than that of being an investor of a significant amount in the other contracting party would suffice in order to allow that third party to seek judicial review of contractual decisions by a public authority. No specific example of a non-contracting party, other than an investor, who would have such an interest was identified. I take into account the respondents' submissions about the role of the first petitioner, the nature and extent of each petitioner's involvement and investments and the risks that had already been undertaken. But if review by a third party of decisions made by a public authority under a specific provision of a contract is competent, I conclude on the basis of the submissions made that each of the petitioners would have sufficient interest to challenge the decisions and would therefore have standing. *R (on the application of Grierson)* v *Ofcom* does not in my view assist, partly because it pre-dates *AXA* but also because of factual differences. The fact that the interest is financial is not a problem. To hold that significant investors do not have standing would result (on the hypothesis that the application is competent), in judicial review not being available to persons even where they have a substantial financial interest. This raises the issue of what level of investment in CRL would suffice to allow a petitioner to make an application for judicial review. It is not clear to me how that level could be determined, and it may well be argued that so long as it is not *de*

minimis (having regard to the amount invested and to the resources of the investor) that would meet the test for standing. Of course, this feeds into the policy concerns noted above in relation to competency, as it creates a situation in which public authorities may be faced with a multiplicity of claims.

Grounds of challenge

[63] The grounds of challenge do not arise if my conclusion on competency is correct. However, it is appropriate that I give my decision and reasons on these matters. The letter of 14 November 2018 makes reference to condition 10 and the right to withhold payment if in the respondents' opinion the future of the project is in jeopardy. It then observes that clear progress was not being achieved. Thereafter, it sets out the "three significant grant condition compliance issues" that result in funds not being able to be released, but it is important to note that these come after the overarching points about the project being in jeopardy and suitable progress not having been made.

"Grant Condition 1- Match Funding"

[64] The letter of 14 November 2018 stated that LCITP had been told by CRL that outstanding match funding investment would take place by 25 October 2018, but had then been informed that the majority of the investment had been further delayed. LCITP had received no further information "on the timeline for concluding the match funding". The milestone, and hence contractual condition, in respect of match funding was that written confirmation and supporting evidence of match funding of a minimum of £9m had to be provided. On or about August 2018, CRL entered into a Subscription and Shareholders' Agreement with others, including Dross Energy Limited which was to provide the vast

majority of the investment. That agreement obliged the others to apply for the allotment of shares in return for payment of the subscriptions. The sum involved was just short of £6.55m, which, taken along with the existing investments, would have met the £9m figure.

[65] Dross Energy Ltd was obliged in terms of the Subscription and Shareholders' Agreement to provide its funding contribution to CRL within 60 days of entering into that agreement. It had not done so. When CRL's revised application dated 20 September 2018 was being considered by the respondents, there was therefore a contractual agreement to provide funding but also a failure to comply with that agreement. Thus, there was no "supporting evidence" of match funding other than the existence of an agreement which had not been complied with by the main proposed funder. The mere existence of an agreement without any proper supporting evidence of the assets available to the funder would not in my view have constituted "supporting evidence", but in fact here the position was more stark: there had been a failure to provide the funding to CRL by the due date. I therefore conclude that the decision made on this issue in the letter dated 14 November 2018 was wholly permitted by the terms of the contract. There was no error of law and no irrationality in the decision.

[66] I also reject the petitioners' contention that the respondents had waived the requirement for full match funding of £9 million or agreed that a lower amount could suffice, said to have been confirmed in an email dated 31 January 2018. Clause 1.5 of the offer of grant states that the agreement shall not be varied except by an instrument in writing signed by both parties. No such instrument exists. In any event, the terms of the email do not support the petitioners' position that there was a waiver. It stated that various documents and information required to be submitted by CRL and that, based upon certain factors, "LCITP will take a decision" on whether the lower amounts could be included as

match funding. The email made clear that if the full information required was received, then LCITP would re-calculate the revised grant funding and the grant letter would then be revised accordingly. In the affidavit lodged for the respondents, it is said that no response was ever made by CRL to this proposal and hence the reduction of the grant was never agreed. I did not understand the petitioners to question that evidence.

"Grant Condition 2 – Financial Model"

[67] The letter dated 14 November 2018 stated that "the provision of a financial model showing a viable demonstration project is required" and identified four "key issues" in that regard. The four key issues were: that the updated financial model showed fundamental changes to the agreed project and the previous financial model and business plan, which had attracted the offer of grant; that the updated financial model showed an operating deficit of £13m; refinancing of the project to repay investments from the first petitioner was required and there was no realistic possibility of it being achieved in the time available; and the updated financial model suggested that CRL's plans to generate revenue would be seriously hindered by the unviability of the demonstrator plant. The agreement between the parties is defined as including the invitation to apply for the grant and the grantee's application, as well as the conditions set out in the offer of grant. Condition 10.1 provides that the respondents could *inter alia* withhold payment of the grant if in their opinion the progress of the project is not satisfactory (10.1.4) or the future of the project is in jeopardy (10.1.5).

[68] I reject the petitioners' position that financial viability played no part in the conditions of the grant. The LCITP grant application form referred to the need to submit a full financial model. With is application, CRL submitted a detailed financial model. It also

submitted a detailed business case. In its investment strategy, also submitted with the LCITP application form, CRL referred to it operating a "commercial demonstration plant" and stated that "The scale of the plant will be smaller than planned full scale commercial deployment, but nonetheless sufficient in scale to be commercially viable such that it will make a positive return against investment". It is correct that no specific milestone dealt with that issue, but the fact that a financial model, followed subsequently by revised versions, were submitted by CRL and that the intention of the respondents, as known to CRL, was to offer grants for projects which were expected to make enough money to be self-sustaining, make it clear that the grant was awarded on the basis that the project was financially viable. More specifically, the broadly expressed terms of conditions 10.1.4 and 10.1.5 plainly cover financial viability: the absence of that element can obviously be a key indicator that progress is not satisfactory or that the project is in jeopardy. In reaching this view, I pay no particular regard to the new production (a spreadsheet in relation to CRL's financial model) lodged by the respondents. I note however that in CRL's updated financial model, the project had been reduced in scale and there was an issue about the demonstrator facility being able to pay for itself. The respondents were advised about financial viability by Ernst & Young and relied on that professional accounting advice. There is specific reference in the letter of 14 November 2018 to the individual aspects of condition 10 and the decision plainly fell within the terms of that condition. Accordingly, there was no error of law or irrationality in that aspect of the decision. In reaching that view I also reject the petitioners' position that the project was merely a demonstrator plant and that its point was to see whether it could be upscaled. It is clear from the documentation that the project was not merely about demonstrating how the technology would work, but was truly aimed at demonstrating

whether the project as a whole would work. This included whether it was a financially sound proposition.

"Grant Condition 3 – Products to End-Users"

[69] Under this sub-heading in the letter dated 14 November 2018, the respondents stated that "there are currently no off-take agreements or legal heads of terms in place to support the revenue assumptions of the offtake [*sic*]." Importantly, the letter goes on to state that this again increases the exposure of the project's investors to future financial risk. As the petitioners rightly point out, the terms and conditions of the grant do not expressly require the conclusion of any agreement for the purchase of biofuel or animal feed by any end-user. However, the understanding that CRL would have customers to take these outputs was clearly an implicit part of the rationale for LCITP funding. Commercial common sense would require there to be agreements with customers. Production of the identified outputs, but without any off-take agreements, would take the project nowhere. The specific references in the letter to doubts about the revenue assumption for off-take and financial risk tie in with the concerns about the viability of the project and it being in jeopardy. It is also correct that there was a milestone about provision to the end-user by 31 December 2018 and that the respondents' decision was made on 14 November 2018. I do not therefore conclude that this specific milestone had been breached. Rather, I see the decision under this sub-heading as simply part and parcel of the issue of the progress of the project and whether it was in jeopardy, having regard to commercial and financial viability. I therefore conclude that the respondents were permitted, under the terms and conditions of the grant, to have regard to this issue and to reach the decision they made.

The respondents' letter dated 21 December 2018

[70] In the letter of 21 December 2018 the respondents stated that they were unable to accept claims under the grant made after 7 December 2018. I reject the petitioners' contention that, as paragraph 3.4 of the grant provided that the respondents were not bound to pay claims unless made by 31 March of the applicable financial year (which included 2018/2019), this decision was unlawful or irrational. By letter dated 21 June 2018, the respondents advised CRL *inter alia* that claim documentation and supporting evidence had to be submitted no later than 7 December 2018 "to ensure funding awards can be claimed in line with… (ERDF) requirements". Paragraph 3.4 of the offer of grant simply precludes payment if no claim is made prior to 31 March in the applicable financial year. It does not state or imply that no other financial deadline can be fixed, particularly as a consequence of the availability of funding from the ERDF. The respondents were under no obligation to further extend the deadline of 7 December 2018. The reason given for that being the deadline was that the respondents' ability to claim 40% of the total grant funding from the ERDF would be threatened, that funding being made only for claims submitted before the end of the financial year. There is therefore no error of law or irrationality in the decision made.

Conclusion

[71] Having concluded that the petition is not competent and in any event that the grounds of challenge are not well-founded, I refuse the petition.