OUTER HOUSE, COURT OF SESSION

[2026] CSOH 3

CA30/24

OPINION OF LORD SANDISON

In the cause

BIFFA WASTE SERVICES LIMITED

Pursuer

against

THE SCOTTISH MINISTERS

Defenders

Pursuer: Dean of Faculty, McWhirter; DLA Piper Scotland LLP
Defender: Moynihan KC, Reid KC, Arnott; Scottish Government Legal Directorate

16 January 2026

Introduction

[1] In this commercial action the pursuer, Biffa Waste Services Limited (Biffa), a waste management company, seeks payment from the defenders, the Scottish Ministers, of £51.4 million in respect of losses it claims to have sustained in consequence of the postponement of a deposit return scheme for single-use drinks containers in Scotland. The defenders were given the power to introduce such a scheme in terms of the Climate Change (Scotland) Act 2009, and in due course secured the approval of the Scottish Parliament to the Deposit and Return Scheme for Scotland Regulations 2020, which set out how the scheme was to be implemented. They appointed Circularity Scotland Limited (CSL) as the scheme

administrator. The implementation of the scheme required infrastructure to be put in place which would allow consumers to return empty containers in return for the refund of the deposits they had paid and to enable the recycling of those containers. That work was to be carried out by a logistics provider, to which role the pursuer was appointed by CSL on 18 July 2022.

[2] When the pursuer contracted with CSL, the scheme was expected to go into operation on 16 August 2023, with a longstop date in the contract of 15 August 2024. Section 10 of the Internal Market Act 2020 (the IMA) allowed the UK Government to propose subordinate legislation excluding from the ambit of the Act any measure which had an impact on the internal market of the UK. The defenders formally sought such an exclusion from the UK Government for the deposit return scheme, after some prior discussion, on 6 March 2023. The UK Government had previously refused to grant any general exclusion from the IMA for measures concerning resources and waste on 21 March 2022, having been asked to do so by the defenders.

[3] On 26 May 2023, the UK Government indicated that it was minded to approve a temporary exclusion from the terms of the IMA, enabling the deposit return scheme to proceed for recyclable materials in essentially the form proposed by the defenders, but not extending to glass containers. The defenders considered that the removal of glass from the scheme fundamentally threatened its viability and on 7 June 2023 announced that its implementation would be delayed until at least October 2025. That caused the drinks industry to withdraw necessary funding from CSL, which consequently went into administration on 20 June 2023. Its administrators refused to continue with the pursuer's contract.

[4] The pursuer claims that, while negotiating with CSL for the award of the contract as logistics provider, it became concerned about the outlays it would have to incur to enable it to perform that role, and which it might not recover if the scheme did not proceed as planned, and was assured by a letter dated 17 May 2022 from the Minister for the Circular Economy, Lorna Slater MSP, that the defenders were indeed committed to delivering the scheme, leading it to enter into the relevant contract with CSL and to incur costs in preparation for the scheme going live.

[5] In particular, it claims that the letter amounted to a negligent misrepresentation, having provided assurances in respect of the viability of the scheme without alerting the pursuer to the need for the defenders to apply for an IMA exclusion, whether such an exclusion had been sought, when it would be sought, and the consequences should it not be sought or granted. It is said that, had the defenders exercised reasonable care in providing the assurances set out in the letter, they would have recognised that an IMA exclusion was a material factor as to whether the scheme was viable, and that by omitting mention of that factor, the assurances given in the letter were rendered misleading in circumstances where the defenders knew or ought to have known that they would be relied and acted upon by the pursuer. The pursuer maintains that, had it been alerted to the fact that an exclusion from the IMA had not been sought or granted, it would not have entered into the contract with CSL without confirmation that such approval had been granted or would be sought timeously and granted, which failing it would have considered the scheme unviable and would not have incurred the expenditure that it did.

[6] A separate case based on alleged breach of a duty of care owed by the defenders to the pursuer because of an assumption of responsibility on the part of the former is also advanced. It is claimed that only the defenders were able to apply for an IMA exclusion,

and uniquely had knowledge of whether such exclusion was needed, when it would be applied for and whether it had been granted. They are said to have had a consequent particular responsibility and knowledge in respect of a fundamental step which was required to ensure the deliverability and viability of the scheme, and to have been aware that the pursuer's investment would be instrumental to its deliverability and viability. The pursuer is said reasonably to have entrusted the defenders to take all necessary steps to ensure the viability and deliverability of the scheme. The defenders are said to have breached a duty of care incumbent on them by not alerting the pursuer to the IMA situation and thereby to have caused the pursuer to fail to take steps which would have mitigated its losses.

[7] The defenders maintain that the letter of 17 May 2022 was requested by CSL to provide reassurance about the defenders' commitment to the scheme and the status of CSL. It correctly stated the commitment of the defenders to the scheme but did not cover all aspects of the deliverability of what was a complex set of arrangements. To the extent that the pursuer invested sums in preparing for the anticipated launch of the scheme, that was a risk which it chose to take on a commercial basis, and reliance on the letter to the claimed extent would have been unreasonable.

[8] The defenders further deny owing a duty to the pursuer to volunteer advice or information in relation to the IMA. They deny the existence of any wider duty to the pursuer to take all necessary steps to ensure the viability and deliverability of the scheme, or that breach of any such duty caused the losses said to have been suffered by it.

[9] The matter came before the court for a diet of proof before answer restricted to the questions of whether any relevant duty of care was incumbent on the defenders, and if it

was, whether it was breached and thereby caused loss to the pursuer, leaving over for later determination, if necessary, the quantum of any such loss.

Pursuer's Proof

[10] Michael Topham (53), the Chief Executive Officer of the Biffa group of companies, provided a witness statement in which he stated that the pursuer had become aware of the deposit return scheme being planned in the UK as part of the UK Government's Resources and Waste strategy in around late 2018. Scotland had announced its intention to launch a deposit return scheme around a year earlier. Biffa already collected recyclable materials from retailers, shops, hospitality and other customers, and considered that a deposit return scheme would be a good fit for its waste management expertise and capabilities.

[11] CSL, which was approved by the defenders as the scheme administrator of the Scottish deposit return scheme in March 2021, was a company limited by guarantee, set up by and representing a range of companies associated with drinks production, distribution and sale. CSL members collectively sold more than 90% of the bottles and cans within the scope of the proposed deposit return scheme in Scotland. CSL's role as scheme administrator was essentially to be the management of the flow of deposits from consumers to CSL via retailers, and back again, and the collection of scheme material from retail return points for counting and sorting before being sent for recycling. As the scheme administrator, it was CSL that was to enter into the necessary contractual agreements to allow the delivery of the scheme.

[12] The role of logistics service provider to the scheme was suitable for Biffa's expertise and experience. It submitted a bid to undertake that role, and was advised on 15 November 2021 that it was CSL's preferred bidder. That meant that Biffa was, from that point, the sole

bidder with whom CSL would enter into negotiations for the contract. Those parties signed a letter of intent on 24 January 2022 stating their intention to enter into a contract, and setting out their expectations as to how negotiations would be conducted. Biffa was focused on overcoming the main risks that it foresaw with the contract, which were the large upfront capital requirement required and CSL's lack of financial substance as a contracting counterparty; the uncertainties around service requirement and operating costs; the risks arising from a potential delay to the scheme becoming operational; and the potential cancellation of the scheme or removal of CSL as scheme administrator. The letter of intent had stated that the parties should enter into the contract by 31 March 2022. On 21 April 2022, that deadline was formally extended to 20 May 2022, and was later again extended to the end of July. The extensions were the result of Biffa's concerns regarding protections or mitigations against the identified risks. It repeatedly raised concerns with CSL about the risks it was taking and the financial impact on it in the event that the operational date was delayed or the scheme cancelled, given its significant standing costs and the fact that CSL would have no means to start paying it until the scheme was in operation. CSL was aware of Biffa's concerns as to financial exposure once the contract was executed and had made those concerns known to the defenders.

[13] The first key risk was the upfront capital requirement from Biffa. It was clear from the outset that a significant upfront investment was needed to mobilise the scheme and would require to be spent before it became operational. Although CSL had received approximately £9 million from the Scottish National Investment Bank to get it up and running, it did not have the capital, either from that source or from its members, to make the substantial investment that was needed in respect of vehicles, properties and counting machinery. Its approach was therefore to find a logistics provider who, as well as having the

necessary operating capabilities and experience, had access to the required capital to mobilise the service. The prospect of investing significant upfront sums to set up a new service, in contract with a company that was little more than a shell entity, represented a significant risk to Biffa, and was the subject of much discussion with CSL.

[14] The second key risk was uncertainty about operating costs. Due to the scheme being a new one, nobody was able to say accurately how much it would cost to operate the collection, counting and sorting service. It was unclear how many bottles and cans were going to be returned, and in what locations, and therefore how many collections would be required. That would only become clear once the scheme was up and running.

[15] The third key risk was that of delay or cancellation. From around the time substantive contract negotiations with CSL began, Biffa was concerned that CSL was not on track to deliver the scheme by the intended inception date. It had particular concerns about the readiness of the required IT and infrastructure systems. Concerns about CSL's ability to deliver on time were a constant theme in Biffa's planning and discussions. It was natural for Biffa to be concerned about contracting with a shell company. If it took years for CSL to be ready, the scheme might be repeatedly delayed, Biffa would be constantly bleeding cash, and there was a risk that the scheme could ultimately be cancelled, particularly if there was a loss of enthusiasm for it from politicians. There was also a concern that CSL could be replaced as scheme administrator if there was a protracted delay and the defenders decided that it was unable to deliver the scheme, which would make Biffa's contract worthless.

[16] Before incurring millions of pounds of expenditure in contemplation of the contract, Biffa required financial security. It knew that CSL was in regular contact with the defenders and had access to information that was not in the public domain. It had regular discussions with Lorna Slater MSP and others involved in the scheme. The ideal situation for Biffa

would have been to receive a financial guarantee from the defenders, but CSL maintained that that would not be possible, and so Biffa had to consider what other forms of security would sufficiently comfort it and allow it to enter into the contract. Ultimately, various mitigations and protections were agreed upon.

[17] The first form of mitigation or protection was insurance. David Harris of CSL identified bespoke insurance providers who would be prepared to insure Biffa for some of its potential losses in the event of delay or cancellation of the scheme, with a policy limit of £20 million. The initial proposed policy was created by the insurance brokers at the request of CSL, and then Biffa engaged directly with the brokers. The cost models which Biffa had been building to that point predicted required capital expenditure in the region of £20 million for vehicles, £40 million for construction costs, and £20 million for property liabilities and employees. Biffa wanted the policy coverage to be higher than £20 million, but the policy limit was not negotiable. The policy, once agreed, covered (1) the scheme being cancelled, (2) the scheme being delayed in its entirety beyond 16 November 2023, and (3) CSL being removed as the scheme administrator. The policy premium was £3,136,000, which was paid by Biffa. The policy enabled claims for operational costs if the scheme was delayed for more than three months past the planned operational date of 16 August 2023. If it was cancelled altogether, or CSL was removed as scheme administrator, Biffa's losses would exceed the recoverable amount under the policy. The policy limit was the maximum amount of coverage available in the market to Biffa at the time. The insurance policy was issued on 19 July 2022, the day after the contract with CSL was signed.

[18] The second form of mitigation or protection concerned advanced producer fees. Under the scheme, producers would be required to pay fees to CSL for placing drinks containers on the market, to help cover the costs of running the scheme. In a bid to give

Biffa comfort, CSL put in place an advanced producer fee arrangement with an attractive rate of interest intended to encourage producers to start paying CSL from the scheme's intended inception date, irrespective of whether that had actually happened. This was designed to provide CSL with some funding that could be used to pay Biffa in part if the scheme was delayed. Biffa was not a party to the arrangement. It offered no protection against the collapse of the scheme before the intended inception date, and depended on CSL actually using the funds in question to pay Biffa in the event of delay in that inception.

[19] The third mitigation or protection was the introduction of a longstop date of 15 August 2024 into the contract. If the scheme had not become operational by that date, Biffa would have a right to terminate the contract. The longstop date avoided the risk of Biffa being required to be in a perpetual state of readiness, incurring costs, while the scheme suffered further delays. Its purpose was to provide Biffa with a route to cap its losses if the scheme was beset by very significant delays.

[20] The fourth mitigation or protection was to structure the contract so that it involved Biffa guaranteeing to operate the service for an initial ten-year term and to be paid the costs it incurred plus an agreed profit margin. That addressed the risks associated with the inability accurately to predict the required operating costs, and ensured an adequate recovery of the upfront investment. As long as the scheme proceeded, Biffa was guaranteed to recoup its investment and also to earn a fair profit. The contract also included a mechanism to reward it for delivering cost efficiencies over time.

[21] In May 2022 contractual negotiations were challenging, with many of those mitigations not yet negotiated or in place. Biffa received an email from CSL on 17 May 2022 addressing various points relating to the contract negotiations and the concerns regarding security. It mentioned that a letter from a Minister was on its way to Biffa. That had not

been asked for by Biffa, which at that stage had never met with, or otherwise spoken to, any Scottish Minister. A letter from Lorna Slater, MSP, the then Minister for Green Skills, Circular Economy and Biodiversity, was received by email later the same day. It appeared to put political pressure on Biffa to proceed with the scheme preparations. It stated that the scheme was a flagship policy and emphasised the commitment of Ms Slater and the First Minister to it. It made it clear that the defenders needed Biffa to enter into the contract with CSL, to allow the scheme to go ahead. It provided reassurance that the scheme would go ahead and that the defenders were committed to CSL continuing to act as the scheme administrator. Biffa took the letter to be a form of guarantee, particularly because it was written by the Minister responsible for the scheme. It reassured Biffa that the scheme would happen, meaning that its investment was secure.

[22] Biffa undertook extensive due diligence and focused on mitigating risks before signing the contract with CSL. It assessed the regulatory landscape, contractual obligations, and the political assurances provided. The defenders' written commitment, communicated in the letter from Ms Slater, was a decisive factor for Mr Topham in making the decision to recommend to his board that Biffa should enter into the contract with CSL. The letter made clear that the scheme was not a speculative venture, but was rather a structured, government-backed programme with a clear timeline and public mandate. Board approval was obtained and the contract was signed on 18 July 2022. No single protection or mitigation of risk was wholly decisive. They, along with the reassurance in the letter from Ms Slater, collectively gave Biffa comfort that the scheme was viable and fully supported by the defenders without any remaining obstruction, and that Biffa's investment was as secure as it could reasonably be. Without any one of the protections or mitigations of risk described, the risk profile would have been very different and his decision on whether to

recommend to the board that Biffa should sign the contract would have changed. In particular, had any concerns been raised by Ms Slater as to the need for an IMA exclusion – or indeed if she had simply mentioned that an exclusion was needed and had neither been granted nor even sought – then he would not have recommended board approval. That would have introduced a significant risk of which Biffa was unaware and in respect of which it had no visibility or protection. There had been an earlier open letter from the First Minister issued on 7 February 2022 to the industry in general, providing reassurance about the scheme and confirming that it was going to happen. However, the letter Biffa received directly, acknowledging Biffa's particular special status in the operation of the scheme if the contract was signed, carried much more weight for it in terms of deciding whether to enter into the contract.

[23] In early 2023, CSL had asked Biffa to confirm what its costs would be in the event of a delay to the scheme inception date. Biffa produced some financial models and confirmed how much money it would require each month to keep it going until a rescheduled inception date. The request for the information caused it to suspect that a delay was likely. Mr Topham was also aware that Audit Scotland had reviewed CSL's preparedness for the scheme inception date and that concerns had been expressed.

[24] In April 2023, the defenders announced that they intended to delay the scheme launch to 1 March 2024 to allow "for confirmation of the Internal Market Act exclusion, resolution of outstanding operational issues and extensive testing of IT and logistic systems." On 27 May 2023, the UK Government indicated its willingness to grant a conditional and temporary exclusion of the scheme from the IMA, until similar schemes were to start in the rest of the UK. The exclusion would enable the scheme to deal with plastic bottles and aluminium and steel cans, but not glass. Biffa and CSL communicated to

the defenders their strong views that the scheme could proceed without glass, and reiterated the anticipated drastic negative ramifications of a further delay. Biffa publicly advocated for the scheme to continue from the intended inception date, excluding glass. It had worked up various financial models which proved that the scheme was still financially and logistically viable without glass, and was on track to be ready to start on the intended inception date. Mr Topham also put his views in writing, formally, in a letter to the First Minister dated 5 June 2023, in which he stated his opinion that allowing the scheme to collapse due to the defenders' failure to obtain the requisite IMA exclusion would be a bad signal to businesses that were in principle willing to commit resources into helping the defenders deliver on their ambitions, and would significantly undermine the attraction of long-term inward investment in Scottish green infrastructure and related schemes in the future.

[25] On 6 June 2023 the defenders hosted a virtual meeting involving all major industry stakeholders: producers, retailers, trade associations, as well as CSL and Biffa, when CSL again advocated for the scheme to proceed without glass, in line with the IMA exclusion which had been offered in May 2023. However, on 7 June 2023, the First Minister officially announced that the scheme was going to be further delayed until 1 October 2025, which was the then intended inception date of the UK Government's own deposit return scheme. As a direct result of that further delay, producers could not justify keeping CSL alive, and refused to further fund it, causing it to go into administration on 19 June 2023.

[26] There had been no mention by the defenders to Biffa, in the letter of 17 May 2022 or otherwise, of the need for an IMA exclusion before the scheme would be lawful, until long after the contract with CSL had been entered into. Biffa first became aware of the IMA's impact on the scheme on 28 February 2023 when Mr Topham received an email from David Harris of CSL including a briefing document that the latter had prepared for sharing with

his political contacts in Westminster. Mr Harris also shared a copy of a letter that CSL had sent to the Secretary of State for Scotland on 16 February 2023. He explained that these documents had been prepared for the purpose of encouraging the UK Government to support and grant the exclusion from the IMA that the defenders had, by then, applied for. Prior to 28 February 2023, Biffa had had no knowledge whatsoever that the scheme required an exclusion under the IMA. It did not know that the IMA had any impact on the scheme at all. The IMA was never mentioned, or contemplated, in any of the risk schedules created to assess potential risks to the scheme going ahead or being delayed. If Biffa had been told about the IMA exclusion issue, and that it had not yet been granted, Mr Topham would not have been in a position to recommend to the board that Biffa should enter into the contract. Biffa had trusted the defenders to do only what was in their power, and to comply with any legislative requirements in order to enable the scheme to proceed. The letter of 17 May 2022 made it clear that the defenders were fully committed to the scheme and that it would definitely proceed. Mr Topham considered that to mean that the scheme was on solid legislative footing and that there were no legislative issues. Biffa knew that most producers had expressed a strong preference for a single UK-wide scheme and would have viewed the requirement for UK Government approval of an IMA exclusion as a significant opportunity for them to lobby against Scotland being allowed to implement its own scheme. Therefore, it would have been particularly concerned to learn that there was still an unresolved issue and that the producers would have an opportunity to lobby in relation to it. This would have introduced a significant and incalculable commercial risk against which Biffa could not mitigate.

[27] Mr Topham now understood, because of documents that had been published after the fact by the defenders as a result of freedom of information requests, that there was a

great deal of internal discussion within the Scottish Government in relation to the need for an IMA exclusion. These discussions took place in private and there was no way of Biffa knowing about the issues being discussed. Wider public conversations around the IMA issue did not take place until 2023, well after Biffa had already signed the contract with CSL and had been mobilising, and therefore incurring significant costs, for over six months. Before the letter of 17 May 2022, its costs were negligible. Mr Topham now knew that the defenders had previously applied for a broad exclusion from the IMA to cover multiple policy areas, including the scheme. However, they had received only a limited exclusion in relation to legislation to ban certain single-use plastics in March 2022, meaning that they knew that a specific exclusion for the scheme was still required, and that obtaining an IMA exclusion was by no means a 'rubber stamp' exercise. They learned of their failure to obtain the broad exclusion only weeks before writing the letter to Biffa in May 2022. Mr Topham had met with Ms Slater MSP at her request on 23 September 2022, along with Mr Harris. The contract between Biffa and CSL had been signed over two months previously. The meeting was positive in tone, with discussions primarily revolving around getting ready for the scheme's commencement. Ms Slater did not mention the IMA. She knew that Biffa was expending significant sums of money in preparing for commencement of the scheme in compliance with its contractual obligations, and must have been aware that without an IMA exclusion, it was potentially wasting millions of pounds. After the grant of the limited IMA exclusion in May 2023, the defenders were aware of what the consequences of a delay would be, but prioritised the producers, who were motivated by a desire to avoid spending money to comply with the scheme, over their obligations to Biffa.

[28] In further examination-in-chief, Mr Topham stated that he had been Biffa's CEO since 2018, having first qualified as a chartered accountant and then having worked in the

waste management industry since 2005. The defenders had been keen to get Biffa to sign the contract as logistics provider to the scheme, but its concerns had been relayed accurately to the Minister through CSL. Before Ms Slater's letter direct to Biffa in May 2022, letters had been issued generally to parties interested in the scheme by the First Minister, and specifically by Ms Slater to the insurance brokers looking to arrange the proposed insurance cover for Biffa.

[29] He regarded the letter of 17 May 2022 as providing broad reassurance, an absolute rock-solid commitment to getting the scheme operational by 16 August 2023, and as stating that the defenders had been rigorous in their diligence around CSL and the way it had been set up to oversee the operation of the scheme. It was akin to a guarantee that the scheme was happening, that it had been legislated for and that there was no risk whatsoever around it not going ahead. He saw it as somewhat applying pressure on Biffa to conclude the contract. Any potential problem about intra-UK divergence had never been mentioned to Biffa by the defenders or by Biffa's legal team. He was aware that producers were reluctant to have separate UK schemes because they had single supply chains. He was aware from CSL that there was an issue about the application of VAT to the deposits payable under the scheme, but that was not regarded as an impediment to its commencement. He had first heard of an issue with the IMA in February 2023, from CSL.

[30] The letter of 17 May 2022 had been very persuasive and reassuring in Biffa's decision to proceed with the contract, which at that stage had been on a knife edge. Without such foundational reassurance, he did not think that the contract would have been concluded. He had trusted what had been said and felt entitled to do so. He had mentioned the letter to the Biffa plc board in a call the day after it was received, although he accepted it was not mentioned in any board minute of discussions about the contract. After the letter had been

received, there was no doubt whatsoever that the scheme was going ahead and attention turned to dealing with the risk of delay. Had he been told of the IMA situation in the letter, an exclusion from the Act would have been made a gateway item for Biffa entering into the contract, given the existing awareness of producer reluctance to have a separate scheme for Scotland. Had Ms Slater told him about the IMA issue when he met with her in September 2022, he would immediately have taken legal advice on what could reasonably be done to protect Biffa's position, and would have wanted to pause expenditure.

[31] In cross-examination, Mr Topham stated that the insurance which Biffa had obtained, for coverage of up to £20 million, had been sourced from a non-conventional risk specialist. Three risks were insured against, two of which related to a change in the statutory basis for the scheme; cancellation or repeal, and postponement of the start of the scheme's operation beyond 16 November 2023. The third insured risk was the removal of CSL as scheme administrator. A premium of £2.8 million had been paid, which with tax took the total cost of the policy to £3.1 million. That cost would have been recovered once the scheme's operations commenced, and was felt to be worth it in the context of the risks being faced. The policy covered the period from 18 July 2022 to 31 December 2023, the end date being chosen to give a window to make a claim if the commencement of the scheme was indeed delayed by more than 3 months, to beyond 16 November 2023. The main motivation for taking out the insurance was what was perceived as the high risk of delay leading to subsequent cancellation. The letter of 17 May 2022 gave certainty to the scheme, but Biffa remained concerned about the commencement date. The advanced producer fee arrangements were agreed after May 2022. Biffa wanted CSL to have the ability to pay it from the point at which the scheme was planned to become operational, and this arrangement was helpful additional mitigation in that regard.

[32] The board of Biffa plc had discussed concerns about the contract and the proposed protections on 8 July 2022. It understood the unequivocal support provided by the Minister. At the board meeting on 18 May, Mr Topham had stated that an update note on the scheme would be circulated following the meeting. That update, circulated on 20 May, had not mentioned Ms Slater's letter of 17 May. He had mentioned the letter at the meeting of 18 May, although that was not recorded in the minute of the meeting.

[33] The contract between Biffa and CSL allowed the former to terminate it if the scheme was delayed beyond 15 August 2024. Although the 17 May letter had led Biffa to believe that the scheme had absolute political support and that there were no impediments to it going ahead from a legal point of view, it did not give absolute certainty that it would go ahead in August 2023. Biffa was aware that the political landscape could change, but had received specific, direct, unequivocal and unambiguous assurances from the Minister as to the policy going forward. It remained concerned as to whether the date for going live was deliverable, but no concerns whatsoever as to the scheme going ahead and being on a solid legislative footing. It continued to ask for financial security.

[34] Mr Harris of CSL had informed him that the Minister was going to send a letter to Biffa. He thought that Biffa's solicitors might have checked what was said in the letter about CSL's status in the legislative scheme, but not more widely. Internal discussion within Biffa about the letter had concerned insurance, the status of CSL and the continuing general risk of delay, rather than about anything the defenders had said about the scheme's deliverability. It was clear that the defenders alone could not guarantee that the scheme would go live on 16 August 2023, because it was for CSL to deliver it and Biffa was concerned about CSL's preparations. The letter confirmed the defenders' commitment to the

policy and the scheme, and to support in the latter's delivery by the August 2023 date. There was nothing more to be done or said internally about that.

[35] By mid-July 2022 Mr Topham and Biffa's Chief Financial Officer, Richard Pike, felt in a position to recommend to the board that the contract with CSL should be signed. There remained a considerable financial risk, but the mitigations in place, principally the insurance policy and the agreement for advanced producer fees, sufficed to enable the recommendation to be made. Mr Topham did not think that it was incumbent on Biffa to read all legislation and form a view as to its relevance to the scheme, particularly when it had received direct assurances from the relevant Minister. If there had been discussion in some quarters about the potential impact of the IMA on the scheme, that had not reached Biffa's ears. Biffa was not a member of the System Wide Assurance Group (SWAG) that apparently had raised the IMA issue at a meeting in April 2022 and drawn it to the attention of the defenders' officials. Nor was it aware of concerns along similar lines raised with those officials by the Society of Independent Brewers in June 2022 or by the Scottish Retail Consortium in early July that year. By the time the UK Government was being asked to look sympathetically at granting an exclusion from the IMA for the Scottish deposit return scheme, Biffa, banks funding CSL, producers and retailers had all made substantial investments to make it work, totalling perhaps in the hundreds of millions of pounds.

[36] By the time Biffa met with Ms Slater in September 2022, there remained operational and implementation issues for the scheme. Continuing uncertainty about the VAT treatment of deposits would not have prevented the scheme from going live.

[37] Simon Baddeley (54), Biffa's Commercial Director since January 2020, and its Major Projects Director since July 2023, provided a witness statement in which he noted that in 2021 he was made aware that Biffa was interested in pursuing an opportunity relating to the

deposit return scheme in Scotland. An internal steering committee was established to drive that interest forward. Biffa began engaging in discussions with various organisations and exploring ways in which the scheme might be delivered. In June 2021 CSL issued tender documents for the role of logistics service provider of the scheme, which described an output-based collection, logistics and processing methodology. Mr Baddeley took the lead on the bid process. Essentially, the logistics provider was to collect the materials at source, bring those materials back to designated return points, and thereafter take the materials to central locations to be processed. Biffa was well-placed to provide such a service and created a tender submission explaining its skills, expertise, geographical reach and environmental credentials. It was advised on 15 November 2021 that it was CSL's preferred bidder, and a letter of intent was signed on 24 January 2022, stating the intention of both parties to enter into a contract appointing Biffa as the logistics service provider for the scheme and generally governing the way in which the negotiations would be conducted. It stated that parties should enter into the contract by 31 March 2022, although this deadline was later extended to 22 May and again to the end of July.

[38] Once the letter of intent had been signed, Biffa began engaging in negotiations with CSL in relation to the terms of the proposed contract. Those working on the contract negotiations engaged in regular meetings to work through the fundamental terms and conditions underlying the contract. Biffa was aware that CSL was having meetings with the defenders in relation to the scheme and CSL's progress on delivering it. It understood that the defenders were acutely aware of Biffa's concerns regarding security, but its own contact was always with representatives of CSL. It was regularly assured by CSL that the defenders were doing what they needed to do, and understood that everything was in place in order to allow the scheme to proceed with its full intended scope, including the inclusion of glass.

[39] The scheme had originally been due to become operational on 1 July 2022. However, on 23 February 2022, while negotiations between Biffa and CSL were ongoing, the Scottish Parliament had approved regulations delaying the scheme's commencement until 16 August 2023. The reasons given for the delay related to the COVID-19 pandemic and the UK's exit from the EU. Biffa's knowledge of the previous scheme delay impacted on how it engaged in contract negotiations. It was live to the fact that delays were possible and was also concerned about cancellation of the scheme or the removal of CSL as the scheme administrator.

[40] Biffa would require to incur substantial costs before the scheme actually became operational. This would include the purchase of vehicles, finding and leasing suitable properties (for receiving the scheme articles collected from return points, and onward transfer to the counting facilities), making those properties suitable and fit for purpose, recruiting staff, designing the operations for the scheme services (collection, transfer, counting, administration and preparation for sale) and moving towards delivery of the service. It worked up various estimates of how much capital expenditure it would require to commit before the scheme became operational and all financial models showed that that commitment would be in the region of £80 million, including future property liability. CSL could not provide Biffa with those mobilisation costs. It would not have much funding until the scheme became operational. The way in which the scheme was to be funded was by way of fees charged to producers for all of the products that they put to market, but the majority of the cash flow was anticipated to be created from unredeemed customer deposits. These funding sources meant that there would always be cash in CSL once the scheme was operational. The risk lay in the time period prior to commencement. That led Biffa to ask CSL how it could guarantee the mobilisation costs. Mr Baddeley regularly reminded

representatives of CSL that any progress made in respect of negotiations was subject to Biffa receiving the comfort that it needed to sign the contract.

[41] The contract was explicitly structured as a "costs plus" contract, allowing for Biffa to recover its actual costs incurred in mobilising for the commencement date and then providing the services, plus its profit and overheads, applied as a percentage to all of these costs. Essentially, the agreement was that Biffa's capital investment, which included its financing costs, would be amortised over a 10-year period. Additionally, all mobilisation costs which were not capital items would be recovered in full by Biffa during the first 18 months after the scheme's commencement. The contract also provided for Biffa to receive a management fee in addition to its costs. Accordingly, so long as the scheme proceeded, Biffa was confident that the contract would be profitable. The main risk it was concerned about was the risk that the scheme would not proceed.

[42] The contract contained a commercially standard *force majeure* clause and a long-stop date. The rationale behind this was to control the amount of time that Biffa might be laying out cash in the absence of an operational scheme. The reason for including the longstop date was not because Biffa expected that the scheme would not happen; it was included as a result of its commercial experience. Delay on the part of the defenders to obtain necessary approvals, such as an exclusion under the IMA, or a failure by them to take such a step in sufficient time, was not something that was ever considered or envisaged by Biffa.

[43] The contract with CSL was signed on 18 July 2022, and from that date Biffa was obliged to begin spending in respect of mobilisation costs. Mr Baddeley's understanding was that Biffa had reached a stage where it felt comfortable enough in terms of security to sign the contract for a combination of reasons: the letter from Ms Slater on 17 May 2022 reassuring it that the scheme was proceeding and CSL's position as scheme administrator

was safe; an insurance policy which would pay out a fixed amount in the event that the scheme was delayed or cancelled; CSL putting in place an advanced producer fee arrangement; and the fact that a longstop date in the contract had been agreed.

[44] Around February 2023 Biffa first became aware that there was an issue relating to the IMA and specifically that there was an exclusion required under that legislation which the defenders had not obtained. No one had mentioned that to it before then. It was first raised in the context of CSL's requests to Biffa to create scheme models which excluded glass. In hindsight, the request to consider models which excluded glass seemed to have been linked to the IMA issue, since part of the expected divergence between the Scottish scheme and the scheme that was to be implemented in England and Northern Ireland related to glass. Glass was the heaviest material in the scheme and had the least value to pick up. A deposit return scheme was not necessary to improve upon the rate of recycling for glass and was unlikely to affect significantly the number of glass items recycled. In response to CSL's request for a scheme model excluding glass, Mr Baddeley created an operational redesign, reflecting a 40% reduction in the number of containers being collected, which was the impact of removing glass. It was clear that the scheme was still entirely viable, financially and logistically.

[45] In April 2023, the defenders announced that they intended to delay the scheme launch to 1 March 2024 to allow for confirmation of the IMA exclusion, resolution of outstanding operational issues and extensive testing of IT and logistic systems. In early June 2023, Biffa was made aware that there were going to be further announcements. On 6 June 2023, the First Minister called a meeting to be held virtually for key stakeholders in the scheme, including Biffa. All of the major producers and retailers also had representatives on the call. The First Minister asked each stakeholder a number of questions

including whether the scheme was viable without glass. CSL confirmed on its own behalf and on behalf of Biffa that it was viable and reiterated the level of investment that had been made to date. Other stakeholders stated that they would prefer for the scheme to be delayed so as to run concurrently with the other UK schemes. The next day, 7 June 2023, the First Minister announced a further delay to the scheme, to 1 October 2025. Biffa was not informed of that decision in advance of the public announcement. It did not consider that the scheme needed to be delayed further. Although its preference was to proceed with a scheme including glass, it was prepared to proceed without it. The scheme could have commenced, on time, without glass.

[46] As a direct result of the further delay, producers could not justify keeping CSL alive until such time as the defenders were willing to let the scheme go operational, and so it went into administration on 19 June 2023. Biffa would not have accepted any known risk that an IMA exclusion would not be granted, or that problems with an exclusion would have delayed the scheme.

[47] In cross-examination, Mr Baddeley stated that, at the time the contract with CSL was signed, he was not conscious of Biffa being particularly concerned that CSL might not be ready to have the scheme come into operation on 16 August 2023, although it was acknowledged that there were numerous moving parts in what was a complex scheme and thus many ways in which a delay might potentially occur. That consideration was why Biffa had sought additional security. That the scheme might only commence in part was also a concern. However, Biffa proceeded on the presumption that the full scheme would indeed go live on 16 August 2023.

[48] David Harris (53) gave a statement which narrated that he was Chief Executive Officer of CSL and a director of that company from 30 April 2021. He had a long-standing

background in the plastics recycling and packaging industries. A deposit return scheme was a recycling initiative designed to reduce litter and improve recycling rates by incentivising the return of drinks containers. Consumers would pay a small deposit when purchasing a drink in a bottle or can, which was refunded when the empty container was returned to a designated return point. This approach encouraged responsible disposal, reduced environmental waste, and ensured higher-quality recycling. Such schemes were already in operation in several countries and regions, where they had proven effective in promoting circular economy principles and reducing the volume of single-use packaging waste.

[49] CSL was the creation of a group of around twenty-six members, comprising trade associations, large producers, and retailers. Initially, that industry had actively worked to delay and frustrate the scheme process and sought to prevent it from moving forward. However, it eventually decided to support and assist in the implementation of the scheme. In order to facilitate this, it formed CSL, a company limited by guarantee, to act as a collective delivery agent for both producers and return point operators, such as retailers, restaurants, and others. The defenders appointed CSL as the scheme administrator. It was the only applicant, and it met the necessary criteria. Its role was to facilitate compliance with the regulations for those companies who wished to appoint it as their scheme administrator. It was a mistaken, though common, view that CSL was the defenders' delivery agent for the scheme.

[50] One of Mr Harris's first priorities upon his involvement was to persuade the defenders to revise the initial proposed commencement date for the scheme. It had already experienced multiple delays, and the then-current implementation date, originally set for September 2022, was, in practice, entirely unachievable. Until mid-2021, the relevant Scottish Minister was the Cabinet Secretary for Net Zero, Energy and Transport,

Michael Matheson. He had taken a relatively hands-off stance. Once Lorna Slater became the relevant Minister, she became very involved in the scheme, requesting frequent updates and initiating direct engagement with environmental NGOs, including organisations like Greenpeace. CSL was established to deliver a scheme on behalf of industry, not to serve as an extension of the defenders or part of their political machinery, and found itself increasingly drawn into the political process against its will. It always made it clear to the defenders that it was not their delivery vehicle, and it was for them to set up the required frameworks and infrastructure to deliver the scheme. The defenders did not always appreciate this and, for example, required CSL to commit time and resources in resolving a VAT issue which arose, despite that being a matter for the defenders themselves.

[51] There were very regular meetings with Ms Slater, during which CSL openly discussed the challenges it faced. The industry had established CSL with modest initial loans and had expected it to become financially self-sustaining. The process of securing financial backing was lengthy and complex, involving extensive due diligence, none of which raised the issue of the IMA as a potential problem. The defenders and their commitment to the scheme was critical in securing the confidence of financial backers. The IMA was not raised, as a concern or otherwise, until early 2023.

[52] Biffa was appointed as preferred bidder for a 10-year contract to deliver the services, but in order for it to comply with the obligations it would have, it would require to invest significant capital in preparation for the scheme's launch. The defenders were very keen to have Biffa sign the contract. Without Biffa's financial investment, the scheme would simply not work. It needed guarantees from the defenders about the scheme. A recurring feature of the defenders' oversight was the use of "Gateway Reviews," a standard public sector process involving external assessments of project progress. These reviews were conducted

via virtual meetings, with individuals CSL had never met and who had no involvement or detailed knowledge of the scheme, asking questions about its status and issuing reports on the likelihood of its delivery.

[53] During the summer of 2022, as the contract with Biffa was under negotiation, the defenders were urging CSL to finalise the contract execution. Its pressure on CSL to get Biffa to sign the contract was constant. One key element of the process, and a major contributing factor in getting the contract finalised and signed, was the defenders agreeing to provide a letter of assurance to Biffa. The First Minister had addressed a public letter to the industry; Ms Slater or her office had sent a letter to insurers; and there was a subsequent letter from Ms Slater addressed directly to Biffa. These communications were part of a broader effort to provide reassurance to stakeholders, especially Biffa. The letters were a compromise on the part of the defenders as they were as close to a guarantee as they could provide in respect of the scheme. The letters issued by the First Minister and Ms Slater, the minister in charge of delivering the project, advised that the defenders were committed to the scheme and that it would definitely go ahead, and provided the requisite comfort for Biffa to enter into the contract and incur the necessary expenditure. Mr Harris understood that the drafting and issuing of these letters was subject to significant due process and legal review. Biffa relied on the assurances provided by the defenders and was very keen to receive them.

[54] The letter from Ms Slater to Biffa dated 17 May 2022 was the result of a compromise. CSL had initially requested a formal guarantee to support Biffa's investment. There was an open dialogue with Biffa about the risks, and it was willing to proceed only if someone stood behind the scheme financially. As the defenders were not prepared to provide a financial guarantee, the best that could be achieved was written reassurance of the defenders'

commitment to the scheme and that it would go ahead. It was a comfort letter rather than a binding financial guarantee. The letter was a clear statement of the defenders' commitment to implementing the legislation. CSL had hoped for something more robust, but it was the best that could be achieved under the circumstances. It made no mention of the IMA. It was intended to provide reassurance to Biffa and facilitate its decision to proceed with the contract. The defenders were fully aware that the purpose of the letter was to reassure Biffa and enable it to commit financially. The letters they sent out were carefully drafted, likely with legal input, and were not issued lightly.

[55] On 8 December 2021, Mr Harris received a confidential letter directly from Ms Slater advising that the scheme commencement date would be revised to 16 August 2023. That delay had not by then been announced in the Scottish Parliament. The express purpose of the letter was to provide assurance to funders and contractors that a revised date had been selected. Mr Harris read it as an ongoing reassurance that the defenders were committed to the scheme becoming operational on 16 August 2023 and were content for CSL and any business partners to rely upon that.

[56] In order to provide additional comfort to Biffa, Mr Harris reached out to specialist insurance brokers in order to explore whether insurance coverage was possible. Extensive due diligence was carried out by underwriters when deciding whether or not to provide Biffa with insurance, but the IMA was never raised as a concern. The insurers also received a letter of reassurance from the defenders. No one mentioned the IMA at all.

[57] In CSL's regular meetings with the defenders, it was transparent about Biffa's concerns regarding security and guarantees. There was no indication from the defenders' officials that the IMA or any other legal issue might pose a roadblock. Their message was that the scheme was established in law, and it would be happening. Industry had

previously opposed the legislation, and had the resources to challenge it if it believed there was a viable legal route to do so. Apparently it did not so believe.

[58] The only time the IMA was raised in public prior to it becoming an issue concerning the deliverability of the scheme was during a public meeting organised by industry groups, possibly in early 2022. Fergus Ewing MSP had asked Mr Harris a question about the IMA, and, though caught off-guard, he had responded that CSL did not believe the IMA was relevant to its work, a position which his colleagues later confirmed. CSL's understanding was that the IMA had no impact on the legality or enforceability of the scheme regulations.

[59] The IMA had also been raised as being potentially relevant in 2022, in relation to an issue as to whether CSL could impose compulsory "on pack" labelling. The defenders did not have the devolved power to require this. It appeared that the IMA did not impinge upon the scheme as the scheme regulations predated the IMA and were drafted so to avoid any conflict. There was no suggestion that the IMA would have any influence on the viability or timescale of the scheme.

[60] CSL first became aware of the potential implications of the IMA for the scheme through a press release or social media post in early 2023 involving Blair Bowman, a vocal critic of the scheme and a prominent figure in the campaign against it. That campaign had obtained counsel's opinion suggesting that the scheme might not be compliant with the IMA. CSL was concerned by this development and informed Biffa of it shortly thereafter. CSL sought legal advice, which indicated that while there was a procedural requirement under the IMA related to cross-border trade, it would probably be considered to be a minor administrative matter. It was assured by the defenders that the matter was in hand, that an application for exclusion from the IMA had been submitted, and that approval was expected. The defenders appeared to be regarding the IMA issue as a far greater

impediment to the delivery of the scheme than CSL's own advice suggested, but even then the necessary approval appeared to be viewed as a formality. CSL was also in frequent dialogue with DEFRA, ensured that it was briefed on the IMA process, and asked it to support that process.

[61] Around February and March 2023, the scheme became a matter of increasing public controversy. New challenges to the scheme emerged daily. The IMA became a key item in meetings and discussions with the defenders, as well as in Gateway Reviews. CSL continued to believe that the scheme regulations remained legal and enforceable. It was assured by the defenders and by its own legal advice that an exclusion from the IMA had previously been obtained in relation to single-use plastics regulations without significant difficulty or delay.

[62] Shortly after the appointment of Humza Yousaf as First Minister, on 18 April 2023 he announced a delay to the commencement date for the scheme to March 2024, and the IMA was given as one of the reasons for this. He nonetheless appeared to make a very clear commitment to the scheme, and held a meeting with industry stakeholders, retailers, producers, and return point operators, when he made it clear that the scheme would proceed. The Net Zero, Energy and Transport Committee of the Scottish Parliament asked questions of CSL regarding the scheme's readiness. When asked about the IMA, CSL explained that it understood that the Act would impact on the enforceability of the regulations on producers outside Scotland, but had been reassured by the defenders and its own legal advice that the regulations remained enforceable and the scheme was viable. The committee appeared to have little understanding of the regulations or the role of CSL.

[63] One particularly contentious issue was the inclusion of glass. The glass industry, which was highly organised, had lobbied to be excluded from the scheme. CSL wrote to

several senior UK Government figures, emphasising that the exclusion of glass would have real-world consequences for jobs, investment, and operational planning. When the IMA exclusion was granted for the scheme, enabling it to proceed provided it excluded glass, CSL and Biffa worked to assess the impact and identify ways to mitigate the consequences. Mr Harris publicly defended the viability of the scheme, including appearances on national media, and reiterated that it remained deliverable, despite the removal of glass. Behind the scenes, CSL constantly revised financial models with Biffa to ensure the scheme was not just viable without glass, but that it remained cost-effective.

[64] However, the situation culminated in a critical meeting in late May 2023, during which Mr Harris had a one-to-one conversation with Humza Yousaf. He delivered a 45-minute briefing, outlining in detail the consequences of any further delay or cancellation. The First Minister admitted he was unsure how to proceed. Mr Harris made it clear that any delay beyond a certain point would be tantamount to cancellation. The scheme could not be funded indefinitely, and without funding, the entire structure would collapse. He reinforced this message to the First Minister in a letter of 5 June, outlining a revised financial model following the removal of glass from the scheme. The letter confirmed that the scheme remained viable, though it would require a 10% increase in aggregate producer fees. The letter also noted that Biffa had invested £80 million in preparing for the scheme and warned that several parties, including the defenders, could be exposed to potential claims if the scheme was cancelled. This letter was part of a broader series of communications aimed at preventing the collapse of the scheme.

[65] The situation reached a climax during a large virtual meeting involving all major industry stakeholders: producers, retailers, trade associations, as well as CSL and Biffa. During this call, the First Minister effectively offered industry the option of a long delay.

Given that many stakeholders had not yet made significant financial commitments, they supported the delay. From their perspective, it was an opportunity to avoid immediate costs. Mr Harris was explicit about the consequences of such a decision.

[66] CSL brought in insolvency advisors. A proposal was developed to try to preserve its structure by placing it into a form of operational suspension, so that contracts could remain intact and the scheme could be revived at a later date. This effort to preserve the scheme lasted 4 or 5 days. However, neither industry nor the defenders would commit to the provision of necessary funds, and as a result, the CSL staff lost their jobs and it went into administration.

[67] In cross-examination, Mr Harris stated that, when he and Mr Topham met Ms Slater in September 2022, a great deal of infrastructure remained to be built, but no practical matters were thought to represent a barrier to the scheme proceeding. The law was that the scheme was coming into effect in August 2023. The outstanding VAT issue would not stop that, but needed to be resolved. Questions about the practicality of online take-back and the cut-over period from there being no scheme to there being one in full effect had also previously been raised.

[68] CSL had participated in various Gateway Reviews and had aired its concerns at the relevant times. Its expectations were that those concerns would be resolved as the scheme moved towards commencement. The IMA had first been raised in February 2023 as an issue for the ability of the scheme to commence, following a press enquiry regarding a legal opinion that had then been published. He did not himself understand the exact legalities, but CSL's own legal advice, after consulting with the defenders' legal team, was that this matter was a procedural one which was expected to be resolved, and the defenders were actively working on resolving it. However, the matter appeared shortly thereafter to have

become politicised. The IMA had previously been mentioned at a public meeting in early 2022, but no one in CSL at that time had any knowledge of it. Likewise, in the first half of 2022, the Act had been raised in a meeting attended by some CSL employees as affecting compulsory labelling. Mr Harris was not aware of the Scottish Independent Brewers Association having raised the IMA with Scottish Government officials in June 2022, nor of the Scottish Retail Consortium having done so in early July.

[69] He could not recall in detail how Ms Slater's letter to Biffa had come into being. There had been many occasions when CSL had asked for funding or financial guarantees from the defenders, and the letters to the insurance brokers Lockton and Biffa had been compromises, giving assurances that the defenders were committed to the scheme. The letter to Biffa was a clear commitment to the scheme being delivered, that it would become operational at the expected point, and that CSL would be there to deliver it.

[70] In re-examination, Mr Harris confirmed that he would have informed Biffa had he become aware earlier than he did that the IMA posed a material risk to the scheme. It was difficult to know, if he had had such knowledge, whether CSL would have felt able to sign the contract with Biffa.

[71] Lord Jack of Courance (62), Secretary of State for Scotland from 24 July 2019 until 5 July 2024, provided a witness statement in which he noted that the defenders had announced their intention to introduce a deposit return scheme in the 2017 – 2018 Programme for Government. A public consultation thereafter took place, with the defenders publishing their consultation response on 8 May 2019. On 13 May 2020, the Scottish Parliament approved the Deposit and Return Scheme for Scotland Regulations 2020, setting an initial launch date of 1 July 2022. The launch date of 1 July 2022 was later amended by

way of amendment regulations approved by the Scottish Parliament on 23 February 2022. This delayed the scheme launch date until 16 August 2023.

[72] The UK Government announced its intention to introduce a deposit return scheme in December 2018 as part of its Resources and Waste Strategy for England. It thereafter engaged in a consultation process in respect of the scheme. Brexit then took place, with withdrawal from the European Union on 31 January 2020 and a transition period that lasted until 31 December 2020. On 20 January 2023, the UK Government published its response to the consultation on introducing a deposit return scheme. This consultation response identified 1 October 2025 as the intended implementation date for the scheme in England, Wales and Northern Ireland.

[73] Dovetailing with the end of the Brexit transition period was the IMA, the bulk of which came into force on 31 December 2020. It was enacted to ensure the smooth functioning of trade and regulatory coherence across the UK following its departure from the European Union. Under the IMA, any regulatory divergence that might impede the free movement of goods within the UK required a formal exclusion from the provisions of the Act. While the policy objective of increasing recycling rates was shared across the UK, the implementation of such a scheme in Scotland alone, earlier than in the rest of the UK, raised significant concerns for the UK internal market. In accordance with the provisions of the IMA, the defenders required an exclusion to be granted by the UK Government in order to proceed with the deposit return scheme in Scotland. The initial reason that the defenders required an exclusion was because it planned to introduce their scheme before the UK Government's scheme, which meant that there would be a period of time in which the UK's internal market had differing regulations in respect of the recycling of drinks containers. For

that reason, the defenders always knew that they would require an exclusion from the IMA in order to proceed with its scheme.

[74] The defenders had sought broad exclusions under the Resources and Waste Framework to cover regulations prohibiting the sale of single-use plastics. The UK Government wrote to them on 8 March 2022 confirming that an exclusion had been granted in a narrower scope than requested, to cover single-use plastics only. The deposit return scheme was not included as part of that application or the resulting exclusion. From that date, the Scottish Government knew that it would have to apply for a separate exclusion for that scheme. It was aware from that experience that the process for seeking an exclusion from the IMA was complex and time-consuming. Despite this, it did not apply for an exclusion regarding the deposit return scheme from the IMA until much later. The UK Government did not receive a formal, specific request for an IMA exclusion for that scheme until 6 March 2023. Prior to this, while there had been general discussions in relation to the broader request in 2021 that included both the deposit return scheme and single-use plastics, that was not treated as a formal or actionable request under the agreed intergovernmental processes. The deposit return scheme was not included as part of that application or the resulting exclusion. The defenders were therefore aware that they required to submit a scheme-specific application for an exclusion.

[75] Whether or not glass should be included within the schemes became a contentious issue. It was always the position of the defenders that glass would be included within their scheme. Producers lobbied the defenders to exclude glass from the scheme, as it was felt that including glass would disrupt existing closed-loop recycling systems for glass, increase the use of plastic as a substitute packaging material, complicate logistics, and reduce overall recycling efficiency. Despite vigorous lobbying, the defenders insisted on proceeding with a

scheme including glass. The UK Government formally announced that it would not be including glass within its scheme when it published its consultation response on 20 January 2023. However, the UK Government had informally advised the defenders of its intention to proceed without glass months earlier. Lord Jack supported the UK Government's decision to exclude glass. He agreed with the feedback that the industry had been giving, which was overwhelmingly in favour of excluding glass. There was, and remained, a need for UK-wide consistency in deposit return schemes to avoid market fragmentation. He was concerned about cross-border pricing inconsistencies, such as differing deposit amounts between Scotland and England. Based on what the defenders were proposing, it would be possible to purchase a drinks container in the North of England, cross the border into Scotland to return the container, and claim back a deposit that might be double the amount that had been paid in England. He had not received a single letter of support from the drinks industry for the scheme in the form that Ms Slater was seeking to introduce, but had received over a thousand letters of concern about it from those in the industry. The inclusion of glass was a clear concern. The UK Government's decision to exclude glass from the IMA exclusion was based on consistent feedback from industry, which highlighted the operational and logistical challenges of including glass in a Scotland-only scheme. This decision was also aligned with the UK Government's intention to develop a harmonised, UK-wide deposit return scheme that would exclude glass.

[76] The process for seeking an IMA exclusion was clearly set out and required a detailed impact assessment and justification. The defenders did not provide the necessary documentation or engage in the formal process until a very late stage, despite being aware of the IMA's requirements since its enactment in 2020. They also knew, with absolute certainty, on 8 March 2022 that they did not have an exclusion for the deposit return scheme

in place and that they would require to submit a scheme-specific application. Had the defenders submitted a clear and specific request for an IMA exclusion for the scheme at an earlier stage in 2021 or at least early 2022, when it received the exclusion for single-use plastics which did not include the deposit return scheme, there was a substantial and realistic chance that the UK Government could have assessed the request in a timely manner. This would have allowed for intergovernmental discussions, stakeholder engagement, and the granting of an exclusion that would have enabled the Scottish scheme to proceed on time on 16 August 2023.

[77] The defenders cited the UK Government's partial exclusion for the scheme to proceed without glass as the reason that it required more time to get ready for the implementation of the scheme. In further delaying its scheme from 16 August 2023 to 1 March 2024 and then to 1 October 2025, the Scottish Government caused it to collapse.

[78] Lord Jack rejected any suggestion that the UK Government's actions were politically motivated. The UK Government's primary concern was always to uphold the integrity of the UK internal market and to ensure that any regulatory divergence was managed transparently and collaboratively. There was no rational basis for the defenders to leave it so late to request an IMA exclusion for its scheme. In early June 2023, shortly after the UK Government confirmed that it was granting an IMA exclusion for a scheme not including glass, First Minister Humza Yousaf wrote to Prime Minister Rishi Sunak, urging him to reconsider and include glass, or else the Scottish scheme would be at risk. Mr Yousaf demanded an urgent response and informed the media that he was effectively giving the UK Government an ultimatum. The UK Government's position had always been that regulatory divergence should be managed through collaboration and mutual agreement. The IMA provided a framework for this, but it required timely and transparent engagement. The

defenders were well aware of this, and of the fact that without IMA exclusion the scheme was a non-starter.

[79] In cross-examination, Lord Jack stated that the IMA existed to protect free trade across the United Kingdom, to ensure that there was alignment, and to protect customers and consumers in the event of divergence. It took precedence over common frameworks dealing with matters where consensus could be reached. The deposit return scheme was considerably more complicated than the issue of single-use plastics and it was clear from the outset that a common framework consensus was not going to suffice. The defenders had understood that they would need an exclusion from the IMA and that had been made clear in March 2022 when the exclusion for single-use plastics was granted. A formal request for an exclusion from the IMA was received by the DEFRA Secretary of State on 6 March 2023. There had been prior inter-ministerial meetings involving DEFRA and the defenders at which the matter had been discussed, but Lord Jack had always taken the position that without a written application the question could not be considered; there were too many delicate questions to be addressed, and refreshed impact assessments would be needed. At an inter-ministerial meeting on 6 March 2023, Ms Slater had stated that an IMA exclusion was being requested and would be required before the scheme's launch on 16 August 2023. She had asked DEFRA for a decision on its support for the exclusion and a timeline for when a final UK Government position might be reached. The DEFRA representatives had then acknowledged that the defenders had fully followed the agreed processes for discussing whether anything could be achieved within a common framework and the point had been reached where they were seeking an exclusion. Ministerial views on a recommendation for an exclusion were to be sought. It was unclear to Lord Jack why the defenders had waited so long to ask for an exclusion which was always going to be necessary; it should have been

asked for a year previously, and businesses should not have been encouraged to spend money on the hypothesis that the scheme was going ahead until a suitable exclusion was obtained.

[80] Guidance on the processes for considering IMA exclusions in common framework areas had been published on 10 December 2021. It stated that the party seeking the exclusion should set out its scope and rationale, and that the proposal, together with associated evidence and potential direct and indirect impacts, would be considered in accordance with processes set out in the relevant common framework. The draft resource and waste common framework in existence in 2021 and 2022, within which the deposit return scheme fell, set out processes which had been used to obtain the IMA exclusion for single-use plastics. It provided that the main forum for official level discussion and decision-making would be the Resources and Waste Working Group, then to the DEFRA and devolved administrations' Senior Official Programming Board. Thereafter, if there was divergence, the matter would progress to ministers at the inter-ministerial group, and finally to the UK Government for a final decision on any required exclusion. Lord Jack imagined that DEFRA officials had gone through the initial stages of the process with the defenders' officials in relation to the deposit return scheme, but obtaining an exclusion presented a high bar. The final version of the Resources and Waste Provisional Common Framework Outline Agreement and Concordat was produced and approved by Parliament in December 2022, providing for similar initial stages but more direct routes to UK ministerial decision in the event of ongoing divergence.

[81] Lord Jack had been approached by a DEFRA official in around February 2023 asking whether anything more was needed from the defenders in their case for an exclusion from the IMA in respect of the deposit return scheme. He had stated that more was indeed

needed. The civil servants at DEFRA and working for the defenders had got well ahead of themselves. Detailed impact assessments were requested from the defenders on 17 April 2023, at the first inter-ministerial meeting after the formal application had been made, being the first relevant meeting attended by Lord Jack. The onus was on the defenders to produce those assessments. The existing assessments predated the IMA itself. There was no question of the matter having become politicised; the Secretary of State for Scotland was responsible for the smooth working of the economy and the protection of consumers.

[82] The UK Government had published its own response to the consultation on a deposit return scheme for the rest of the UK in January 2023, and indicated that glass would not be in that scheme so far as it concerned England and Northern Ireland. The Welsh government wanted to include glass in its scheme at the time. Lord Jack wanted a standard deposit rate across the UK to avoid practical difficulties. The defenders would have been well aware at that stage that the DEFRA Secretary of State had serious concerns about including glass in a deposit return scheme, for reasons including contamination and health and safety concerns. The consultation response did not mention the IMA, although it acknowledged that waste management was a devolved matter and that there was to be differential scope between England and Wales on the one hand and Northern Ireland on the other. DEFRA and the devolved administrations knew that an IMA exclusion would be needed in the event of significant divergence. The defenders had chosen not to participate in the consultation and had not come up with any solution to what was elsewhere regarded as a problem in including glass in deposit return schemes.

[83] There had been no pause in the operation of the civil service through the ending of the Johnson government, the Truss period, and the Sunak administration. Lord Jack had been Secretary of State throughout.

Defenders' Proof

[84] Lorna Slater (50) gave a witness statement in which she stated that she was first elected as an MSP in May 2021 after a career in electro-mechanical engineering, and was appointed as Minister for Green Skills, Circular Economy and Biodiversity on 31 August 2021. The larger areas in her portfolio were the circular economy and biodiversity. Within the circular economy area was the deposit return scheme and the Circular Economy Bill. Each of the major projects had a team of civil servants working on them. There was already a dedicated deposit return scheme team when she joined as they were gearing up for it becoming operational.

[85] The Deposit and Return Scheme (Scotland) Regulations 2020 were made on 19 May 2020 under powers provided by the Climate Change (Scotland) Act 2009. The Regulations had overwhelming support, though there was some opposition. They were extensively consulted on in advance of being passed, going through a super-affirmative procedure that involved a lot more consultation than the normal procedure. Various impact assessments were done and then re-done throughout the course of the project.

[86] The deposit return scheme was industry-led. Ms Slater's role was to facilitate industry with implementation and help resolve any difficulties. The Regulations had a date for the scheme to become operational of 1 July 2022, but because of Covid that date was unachievable, and had to be put back to summer 2023. There was other legislation in progress about banning single-use plastics, to bring Scotland in line with the EU. Scotland was going to ban those before England, which would have created a misalignment between Scotland and the rest of the UK that fell foul of the IMA. An IMA exclusion was needed. The process of obtaining the IMA exclusion was followed through the common frameworks.

A broad exclusion was sought, which would have included things like the deposit return scheme, as it would have been a lot of work to get a separate IMA exclusion every time it was proposed to ban a single-use item or take a similar measure on recycling and reuse.

[87] Thousands of businesses would have to organise themselves to comply with the Regulations. That was not going to happen quickly post-Covid, so industry asked for the commencement date to be pushed back. Gateway Review Reports were internal government documents which had been published in this instance. The June 2021 Report was about the initial delay to the commencement date. Around that time, industry was getting together to create the scheme administrator, CSL. The defenders had to approve an application for appointment as a scheme administrator if it complied with the requirements of the regulations. It was for CSL to get industry to comply with the regulations by the commencement date. It was for SEPA to enforce the regulations in the event of non-compliance.

[88] When Ms Slater became the responsible Minister in August 2021, the IMA was not thought to pose a risk to the commencement date at all. An Assurance of Action Plan dated September 2021 identified significant challenges, uncertainties and risks to a scheme commencement date even as late as September 2023. It was a complicated scheme to get in place. It was agreed with CSL that an August 2023 commencement in some form or other was difficult but feasible. CSL had suggested September 2023, but ultimately settled for August. CSL sent her letters dated 16 October and 4 November 2021 listing issues to be addressed. The IMA was not on those lists as it was not considered a concern by anyone at that point. There was no question that the exclusion it was thought would be needed for the scheme would not be granted. The UK Government was at that time saying it was going ahead with its own deposit return scheme which was not too different from the Scottish

scheme and included glass. It was perceived that Scotland was simply going ahead a bit earlier and so the exclusion was needed only to cover that period of time before the UK Government scheme was put in place.

[89] A letter from the UK Government dated 8 March 2022 officially informed the defenders that the UK Government was granting an IMA exclusion in relation to single-use plastics. It did not agree the broad exclusion, including coverage of the deposit return scheme, which had been sought. That meant the process would need to be started again to get an IMA exclusion specifically for the deposit return scheme. That had been communicated to Ms Slater previously at an inter-ministerial group meeting by the UK Government. It had not then indicated what its position was on granting an IMA exclusion for the deposit return scheme. That was not then considered to pose a risk. An exclusion for single-use plastics had been granted and the common framework for obtaining exclusions thus appeared to be working, giving confidence that future exclusions would be able to be secured, although the defenders had concerns about the length of time it had taken. It was known that the deposit return scheme would require an IMA exclusion; that was why a broad exclusion had initially been sought. The experience with the single-use plastics exclusion did not cause Ms Slater any concern about the impact of the IMA on the deposit return scheme as at March 2022.

[90] From March into April 2022, there were issues about how VAT was to be handled, and around labelling and barcodes, which were for industry to agree. None of these was a barrier to the implementation of the scheme, they were just things that needed to be worked through. Ms Slater met with CSL on 27 April 2022, when it asked for a letter to be sent to insurance brokers confirming the defenders' commitment to the scheme and the commencement date as it then stood, as well as indicating that CSL could not have its role as

scheme administrator taken away from it and would continue to be an entity that could do business with Biffa.

[91] Ms Slater also wrote a letter to Biffa on 17 May 2022. She did not write it herself and had no specific recollection of it. Its content was basically the same as the previous one to Lockton, giving reassurances about the defenders' commitment to the commencement date and CSL's status. It would have been written by officials, and a draft would have been sent to her private office for clearance. Ms Slater did not recall whether Biffa needed this letter in order to sign the contract with CSL. At the time the letter was written, she had no knowledge of any matters that were not in the public domain that indicated that the August 2023 commencement date might be jeopardised. The letter was not a general project update. There were many processes still to go through, several of which depended on the UK Government. The question at that time was not whether the scheme would come into operation in August 2023, but what exactly its commencement would look like. On 17 May 2022 Ms Slater knew that an IMA exclusion was required in relation to the deposit return scheme. The defenders had known that all along, as did the UK Government. Ms Slater did not consider that an IMA exclusion would be difficult to obtain and had no reason to think that the scheme would not proceed as proposed on the commencement date of August 2023. Biffa was concerned about the commencement date being pushed back, not about what commencement might look like. There was always going to be a period of transition into the full operation of the scheme. On launch there would be existing goods on shelves and peoples' homes which were not part of the scheme, as well as new items which were part of the scheme. An explanation of that "cut-over" period was not the information the defenders were being asked to share in the Biffa letter. They were being asked for a reiteration of the commitment to the commencement date and about the status of CSL. They were happy to

commit to those things. If the content of the letter did not meet Biffa's requirements, Ms Slater would have been happy to have further correspondence with it, but was not aware of any request for further information following the letter.

[92] A further Gateway Review Report dated 1 June 2022 noted that significantly more resource and better governance was needed in the defenders' role in the scheme. That was attended to. Examination of the minimum viable product for the scheme to commence was also undertaken. It was always known that it would take two or more years for the scheme to be fully implemented and meet its targets. The June Gateway Review noted that a fully functional scheme would not be possible immediately, and that partial functionality might be possible. There were no discussions about re-evaluating the commencement schedule following that Gateway Review Report. Ms Slater remained confident in the August 2023 commencement date despite what was said in the report because Gateway Reviews were not predictors about the viability of the project, but snapshots of the current position and sensible recommendations on what needed to be done. She agreed with the Report's recommendation for a more gradual approach to cutover in order to ensure that delivery of a workable scheme on schedule remained feasible. She was unaware of whether or not Biffa was made aware of the conclusions of the Report. It dealt with CSL, not the defenders.

[93] A letter to CSL dated 18 July 2022 was issued in almost identical terms to those of the Biffa and Lockton letters. Ms Slater did not recall why that letter was needed; it appeared that Mr Harris had asked for it in an email of 14 July 2022. Over summer and into autumn 2022 the defenders issued guidance on an exemption process which would make it easier for retailers to apply for and obtain an exemption from the scheme, in response to industry input. This had the result of reducing the scale of the return point network by half.

[94] On 15 September 2022 Ms Slater received a submission from one of her civil servants concerning seeking an IMA exclusion for the scheme. That submission marked the start of the defenders pursuing an IMA exclusion specifically for the scheme. It advised that there was a high risk that the scheme would be affected by the IMA, and that a specific exclusion would be needed. Ms Slater agreed to commence the necessary work. The UK Government deposit return scheme was an unknown quantity at the time, so the exact nature of the divergence between the Scottish and UK schemes was not known. Until around September 2022 the expected divergence between the Scottish and UK schemes was thought to be about the timings. There was always a possibility for divergence in other areas, such as the powers of the scheme administrator and the level of deposit, but as the UK had no concrete proposals on the table, the extent of any such divergence was unknown. An exclusion for the scheme was needed because it had to be able to diverge on any points where the English regulations said something different from the Scottish regulations. As at 15 September 2022 the need for an IMA exclusion was not thought to pose any risk to the scheme's delivery. It was just a process to be gone through. There was a common framework system to be used to make sure the schemes could be brought into alignment.

[95] The scheme-specific IMA exclusion process was begun in October 2022. Ms Slater was optimistic it would be successful given the shared policy ambitions across the UK and thought that an exclusion could be obtained by late June 2023, although that was not guaranteed. After the process was begun, Ms Slater received weekly updates from officials which were to the effect that things were progressing well. She understood that a recommendation had been made to the relevant UK Minister from officials that the exclusion should be granted.

[96] On 18 November 2022 Ms Slater wrote a note to the First Minister stating that work was being done to overcome identified problems, and that, based on the experience relating to single-use plastics, obtaining an IMA exclusion was unlikely to be straightforward. That experience showed that getting to the end of the common frameworks process was not the end of the matter and that there would still be further challenges to work through. However, Ms Slater had no doubt that an exclusion would be granted. The defenders' schedule would need to be made clear to the UK Government and the matter managed. The Scottish scheme was not high on the UK Government's priority list. Its deposit return scheme officials were engaging well, but there were difficulties in engagement at the UK ministerial level.

[97] The UK Government published the consultation response to its own deposit return scheme proposals on 20 January 2023. It acknowledged that the schemes for England, Wales and Scotland might diverge, but raised no issue about that. On 27 January 2023 Ms Slater wrote a note to the First Minister expressing concerns that initial messaging from DEFRA was that the UK Government would be reluctant to grant an exclusion. The timing of the grant of the exclusion was to be raised with UK Government officials in an effort to speed things up. At that point there were two outstanding issues that were outwith the defenders' control; the need for an IMA exclusion, and whether VAT was to be charged on deposits. The Deputy First Minister wrote a letter to the Chancellor of the Exchequer dated 31 January 2023 expressing grave concern about the delay by the UK Government in confirming the applicable VAT treatment. The Treasury made a decision on that issue on 10 February 2023. The remaining concern was about how long it would take the UK Government to grant the IMA exclusion, not that it would not do so.

[98] On 1 March 2023 registration for the scheme opened for producers, and within 48 hours 90% of drink producers by volume were signed up. Those numbers made the scheme viable. From February or March 2023 Alister Jack started expressing scepticism about the Scottish scheme in the press, particularly in its inclusion of glass. He did not think that glass should be included. He found out, or knew, that the IMA exclusion had not been signed off. That focussed attention on the fact that the IMA could be used in a political way to block Scotland's scheme. The deadline for UK Government ministerial sign-off to an exclusion passed at the end of March 2023. That meant that the IMA issue was now a risk to delivery, as it was unknown how long it would take the UK Government to make a decision. The defenders had done everything they could with respect to the IMA exclusion and followed the process correctly; it was now in the UK Government's hands.

[99] Alister Jack's views in the press created doubt in industry about whether he would allow the scheme to proceed. At an inter-ministerial meeting on 17 April 2023, he claimed the impact assessments had not been done. The defenders then sent all of the impact assessments, as requested, but nothing came of it. At another meeting on 22 May 2023, Alister Jack claimed that the proper process for obtaining an IMA exclusion had not been followed. Ms Slater disagreed. She was told that the UK Government was not prepared to give a timeline for granting an IMA exclusion for the scheme. The UK Government did not have a consistent approach to how it looked at IMA exclusions and the internal market and was acting for reasons of political expediency.

[100] The March 2023 Gateway Review Report identified the impact that the delay to the IMA exclusion was having. It was clear that starting on the scheduled commencement date would be difficult, and the report recommended a delay, not only to allow for work with the UK Government, but also to allow more testing of systems and IT for a smoother launch

day. At that point serious discussion as to the advantages of a short delay to launch started to be considered. The Deposit and Return Scheme for Scotland Amendment Regulations 2023 were laid in Parliament on 17 May 2023, and approved on 28 June 2023. They reduced the requirements around online take-back, introduced exemptions for hospitality venues and low volume products, and increased the minimum container size from 50mls to 100mls. Other than the online take-back issue, the amendments were all a matter of working with industry.

[101] On 26 May 2023 the UK Government granted a partial IMA exclusion. It was discussed at Cabinet. Industry feedback was that the scheme was impossible to deliver because of the wording of the partial exclusion. The scheme had been weeks away from launching with glass. All of the logistics included glass and there had been significant investment in equipment for glass, so it was needed in the scheme to make back the money to cover the costs of the equipment. The stipulated conditions in the exclusion also required that the deposit on items matched the deposit in the English scheme. At that point, the legislation for the English scheme had not been passed. In Scotland, everything had been built around a 20p deposit. It was impossible to change the deposit to match a number that had not yet been determined. It was agreed at Cabinet that the conditions were impossible to comply with. As a result, the commencement date was initially pushed out to 1 March 2024, as an immediate stopgap, by the Deposit and Return Scheme for Scotland Amendment Regulations 2023. In November 2023, the date was again pushed out to 1 October 2025, by the Deposit and Return Scheme for Scotland (Miscellaneous Amendment) Regulations 2023. Pushing the date back was the mechanism used to manage not securing the IMA exclusion. Alister Jack was invited on two occasions by the Net Zero and Energy and Transport Committee to give evidence as to why he did not grant the exclusion. He refused to appear

or to give evidence in writing. The UK Government never provided evidence for its decision to exclude glass from the scheme. All of the business and environmental cases showed that it should be included. The UK Government did not adhere to the common frameworks and could not be compelled to do so. Ms Slater's view was that Alister Jack had seen and taken a political opportunity to discredit her, the Scottish Green Party and the defenders.

[102] In cross-examination, Ms Slater stated that the defenders had known since the IMA was put in place that an exclusion would be needed for the deposit return scheme. Shortly after she became a Minister, she had in September 2021 been briefed on the scheme and had been advised that the proposed English scheme would be likely to exclude glass. She had been advised at the same time that a specific exclusion under the IMA for the Scottish scheme might be required if the broad exclusion then being sought was not granted.

[103] In December 2021 she had advised CSL that the commencement date for the Scottish scheme was to be pushed back from July 2022 to August 2023 at the request of industry. CSL needed to know as soon as possible when the starting date would be. There had to be close engagement and ongoing collaboration between government and CSL if the scheme was going to work, as well as mutual trust and confidence. There was a close working relationship between the defenders and CSL. She had no recollection of having been informed of views expressed by Professor Kenneth Armstrong in January 2022 about the potential impact of the IMA on the deposit return scheme, but had always known that an exclusion would be required. She had been informed in advance of a meeting with CSL in January 2022 that it would ask for a letter from the First Minister to banks and delivery partners re-iterating the defenders' commitment to the scheme and providing reassurance that it would not be cancelled before full implementation. At that stage there were several legal hurdles in terms of UK law for the scheme to surmount, including VAT on deposits,

trading standards and shelf-edge labelling, and the IMA issue. Without an IMA exclusion, the scheme would not be enforceable. At the meeting, CSL had raised concerns from their members and commercial partners about the scheme not proceeding and money being lost as a consequence of that. The scheme had just been delayed by more than a year. A letter of comfort from the First Minister had been issued on 7 February 2022, which had been sent by CSL, with permission, to various parties including Biffa. At a similar meeting in February, it was made clear that Biffa was concerned about its substantial capital expenditure commitment before the scheme went live. Signature of the logistics contract by CSL then had a March 2022 milestone in the planning of the scheme. The established common frameworks were intended to manage divergences between deposit return schemes in the UK so that the IMA could be complied with, but any remaining divergences would need to be managed under the IMA itself. There was divergence on the timing of the Scottish scheme and the schemes in the rest of the UK. Scotland also wished to include glass, and the position of the rest of the UK on that was uncertain until March 2022. In that month it became apparent that the broad IMA exclusion that had been sought for a variety of single-use items was not to be granted and that a specific exclusion for the deposit return scheme would be needed.

[104] At the April 2022 meeting with CSL, the nature of the narrow exclusion granted under the IMA had not been discussed. That meeting again addressed the concerns of Biffa about advance capital expenditure. The March milestone for signing the logistics contract had been missed and a way needed to be found to get a logistics partner signed up. It was suggested that further reassurance that there would not be another scheme administrator, that the scheme would not be cancelled, and that there would not be material delay, would be useful. The defenders were also keen to learn lessons from the protracted discussions on

the single-use plastic exclusion. She was not familiar with the content of the defenders' risk register for the deposit return scheme. She was not involved with the maintenance of that register, did not know who had access to it, and had not participated in any decision either to include or exclude matters from it. The need for an IMA exclusion for the deposit return scheme was no secret.

[105] Her official Charles Holmes had drafted a letter for Lockton dated 6 May 2022. It reinforced the commitment of the defenders to the delivery of the scheme by 16 August 2023 and sought to clarify CSL's role. It did not mention the IMA, VAT or labelling issues. These were issues which the defenders considered could be worked through. There was no reason to expect that an IMA exclusion would not be granted, as it had been in relation to single-use plastics. The UK Government was well-disposed to deposit return schemes as a matter of generality and the exclusion would tidy up the legalities around divergences, including in relation to the inclusion or exclusion of glass, to make sure the various schemes would be interoperable. Interoperability did not have to mean identity between the schemes; the existence of varying deposit return schemes within the EU made that clear. The UK Government had raised no issue with any detail of the Scottish scheme, the nature of which had been clear in regulations since 2020. The IMA was not seen as something that the UK Government would use as a way of allowing or disallowing the scheme to proceed. That was not seen as a risk. An exclusion was seen as the natural conclusion of the processes set out in the common frameworks, not as something that had to be applied for and accepted or rejected. Those processes began in October 2022, which was considered to allow enough time for the exclusion to be produced before the scheme was due to commence. The letter to Lockton was not an update on the risks associated with the project, but was specifically designed to reiterate the defenders' commitment to delivering the scheme on the date given

and to clarify CSL's role. It accurately stated the position on those matters. There were at that point many existential risks to the scheme, such as a failure to sign up a logistics partner, or to get enough producers signed up.

[106] A letter was issued to Biffa on 17 May 2022. Its purpose was to reassure Biffa about the defenders' commitment to the scheme and its commencement date, and its support for CSL. It was not a project update. Biffa had not asked for any further information despite being invited to do so if it had any queries. The letter was supporting CSL in its negotiation with the proposed logistics partner, the appointment of which was its concern. There was nothing new in it, nor anything not already on the public record. That a specific exclusion for the deposit return scheme would be needed, and when the process for obtaining it was commenced, might not be widely known. The purpose of the letter was to give Biffa comfort when it was deciding what to do. When she later met with Biffa in September 2022, that meeting was also about specific matters, in particular the number and location of return points. The IMA issue was never on the agenda, either for the content of the letter or the discussion at the meeting. It was not her responsibility to update Biffa on project risks and management. The scheme had substantial risks around it and the IMA issue was not at those points considered even to be in the top ten risks.

[107] There were times when interaction between business and government would be necessary, and it was important that the former could trust the latter if government was to be effective. The public was entitled to expect competent government, taking decisions on the basis of available and relevant information and having good working relations with colleagues. Identifying risk was key to good decision-making. Ms Slater was not familiar with the Scottish Public Finance Manual, but would not be surprised if it stressed the need to identify and manage risk, to take a systematic approach to identifying it, and to maintain

a clear record of it. She agreed that government departments needed embedded arrangements for identifying, accessing, addressing, reviewing and reporting risk. Risk identification needed to be evidence-based. She was familiar with project management tools which maintained a record of risk and assigned it to an owner who would have responsibility for managing and monitoring it, assessing it by way of a combination of the likelihood of it eventuating and its impact if it did.

[108] It was a surprise to her when it became apparent in 2023 that obtaining an acceptable IMA exclusion would not be a fairly straightforward matter. She considered herself to have been fully informed on the matter. Information and assessments were presented to her through the independent Gateway Reviews, the content of which was acted upon. There were four Gateway Reviews and only the final one, in March 2023, mentioned the IMA. It was well-recognised that the IMA had significant potential to be used to undermine devolution, and that may well have been recorded in various risk registers and in internal correspondence, but the common frameworks process was the mechanism for working through such issues, even though working through its requirements might well not be straightforward.

[109] The common frameworks process for obtaining an exclusion for the deposit return scheme had commenced in October 2022 and was worked on thereafter. The eventual refusal to allow glass to be part of the Scottish scheme, as intimated on 26 May 2023, was not a make-or-break issue; the defenders' position was that the scheme would be better with glass, but also that any scheme was better than none. Ms Slater did, however, consider that the UK Government was acting in bad faith in refusing to allow glass to form part of the Scottish scheme at the eleventh hour. That was a political decision. No evidence justifying it had been provided. The real problem, however, was that despite not previously having

raised any issue with the deposit amount, the UK Government required the Scottish scheme to match its own deposit amount, which had not even been fixed. On 7 June 2023 it had been announced to Parliament that the launch of the Scottish scheme would have to be delayed until October 2025 at the earliest.

[110] Dr Haydn Thomas (36) gave a witness statement and a supplement thereto noting that he had entered the defenders' service in 2019 and been Head of Deposit Return Scheme Policy from July 2022 until September 2023. He had previously worked for DEFRA on environmental aspects of the impact of EU exit on food and food science. He was aware at that point that the IMA could pose a risk to some devolved policies, including to the deposit return scheme. The development of the common framework exclusion process was seen as one mechanism to mitigate that risk.

[111] Following a red-rated Gateway Review of 25 June 2021, Dr Thomas was brought into the deposit return scheme team in a programme manager capacity to support a review of the scheme timelines and to address review recommendations. Gateway Reviews aimed to summarise the key risks for the delivery of the scheme with a headline delivery rating and recommendations on the measures that could be taken to improve delivery confidence. recommendations. The defenders had 12 weeks from receiving a Gateway Review Report to respond with an action plan to address its recommendations. That response would be reviewed by the Gateway Review team, through a shorter but similar "Assurance of Action Plan" process.

[112] Following the June 2021 Gateway Review Dr Thomas continued in his other programme roles, but now had a specific remit to support the deposit return scheme team. Multiple risks had been identified in the Gateway Review. Some related to unresolved policy questions such as the VAT treatment of deposits and online takeback, while others

concerned the operational readiness of the scheme and what its launch would look like. He was involved in delivery feasibility and governance discussions, rather than policy questions. One of the main risks was that CSL would not be able to set itself up as a commercial body with appropriate authority quickly enough. A key focus of the work at this point was to identify a new timeline for the scheme's introduction. The view was that August 2023 was deliverable. The date of 16 August 2023 was agreed, which CSL indicated was acceptable to its members. The September 2021 Assurance of Action Plan noted that there were significant challenges, uncertainties and risks to achieving even a September 2023 go-live date. However, Dr Thomas thought that August 2023 could be met, although it carried risks. The Gateway Review and Assurance of Action Report were published in redacted form on 14 December 2021, and full versions were shared with CSL.

[113] A delay to the scheme was announced in a parliamentary statement by Ms Slater on 17 November 2021 and the new August 2023 date was announced by her on 14 December 2021. A further Gateway Review was conducted in May 2022 and finalised on 1 June 2022. The scheme's rating remained amber/red. The key risks at that time concerned CSL's corporate governance. Dr Thomas was by that time Head of Deposit Return Scheme Policy and was responsible for the Assurance of Action Plan process, which was issued in October 2022. Following that review, the delivery rating was altered to amber, due to improvements in CSL's board and governance structures. There was near-unanimous support from all interviewed, including representatives from across industry, that the commencement date should not change. That was when the Regulations would come into force, but there was also a shared expectation that the scheme would not be perfect at once. There was a collective understanding of the minimum viable product inclusion that would

enable the scheme to launch and be operational, but there would be a transition period lasting some months.

[114] Dr Thomas also kept a risk log from June 2021 to July 2022. At the start of May 2022 both the operator contract and the IMA risks featured in the internal risk log. The risk that the operator contract would not be signed on time was seen as a greater risk to the programme. The IMA risk was ranked much lower; there was not yet a clear understanding of whether an exclusion was required as the scope of the UK Government scheme remained unknown. The actions in place for the IMA in the May 2022 risk register were for the defenders' officials to monitor the UK Government scheme and engage with DEFRA. It was thought that securing an exclusion for the scheme would take less than the 18 months which had been required for single-use plastics as there would be a mutual need for exclusion for both the Scottish and UK Government schemes, and because the process and precedent from the single-use plastics experience was already in place. The primary concern was whether an exclusion would be in place in time for August 2023, rather than that an exclusion would not be granted. The risk register as it stood on 6 May 2022 was shared with the team preparing the Gateway Review in that month.

[115] In June 2022, the risk log was updated. The level of risk in relation to the operator contract increased, but the risk associated with the IMA remained the same. The defenders became aware by early 2022 at the latest that Biffa was the preferred bidder for the logistics contract with CSL. They were told by CSL that for various reasons Biffa was worried about upfront investment. CSL initially asked if the defenders could underwrite that investment or otherwise help, to which the answer was no. CSL said that it was looking to take out insurance, and asking members to underwrite the investment. On 13 July Mr Harris sent

Dr Thomas an email asking for the Minister to issue a letter to CSL in the same terms that it had already issued to Biffa and the insurers. That was done on 18 July.

[116] The risks associated with the need for an IMA exclusion were known to interested parties, though the precise nature of how a risk could materialise was less clear. Solicitors for the Society of Independent Brewers and Associates wrote a letter dated 30 June 2022 pointing out the risks of the scheme infringing the Act, which was shared with CSL. The Scottish Retail Consortium made similar points on 8 July 2022. The impact that had been caused by delay in getting the exclusion for the single-use plastics regulations had resulted in a two-month period during which the regulations had come into force but as the UK Parliament had not yet passed legislation for an IMA exclusion, could not be fully implemented, meaning that the ban applied only to products produced in or imported directly into Scotland. A similar situation might be created in relation to the deposit return scheme if for any reason an IMA exclusion was not finalised by August 2023. There was no incentive for the UK Government to progress quickly.

[117] Dr Thomas was aware that the process of securing an IMA exclusion could take some months and the view had been expressed by those familiar with dealing with the single-use plastics exclusion that an exclusion for the deposit return scheme would need to be an immediate priority once the single-use plastics exclusion process had concluded. It was thought that an exclusion for the deposit return scheme could take up to 9 months. It was unlikely that DEFRA would agree to a blanket exclusion for all aspects of a deposit return scheme and would want any legislation for an exclusion to be specific in its terms. The interaction between the deposit return scheme and the IMA was complex; many elements of the scheme were out of the scope of the IMA and the UK Government had not confirmed its

own final scheme design so it was unknown where there might be alignment or divergence, beyond the commencement date.

[118] The original design of the deposit return schemes in all UK nations was to include glass drinks containers within their scope. However, following industry concerns, the UK Government confirmed that glass would be removed from the scope of the scheme in England and Northern Ireland in March 2022. The defenders were told informally by DEFRA that the decision on glass could still change due to the stronger business case for a scheme that included glass, as well as to ensure interoperability with Wales and Scotland. A final decision on material scope by DEFRA was not taken until November 2022 and confirmed in January 2023, meaning glass would be in scope in Wales and Scotland but out of scope in England and Northern Ireland.

[119] Much of the anticipated time for getting an IMA exclusion for the deposit return scheme related to the time needed for the relative UK statutory instrument to be drafted and go through the required Parliamentary process. The instrument to legislate for an IMA exclusion for single-use plastics was still being worked on and there was little appetite in the UK Government to start work on another exclusion until that exclusion had completed its process. Changes in the UK ministerial teams meant that there was little policy steer from DEFRA in the second half of 2022. UK officials would ask the defenders to wait for stability, or else were prioritising other issues. Dr Thomas took up his formal role as head of the deposit return scheme unit in July 2022. One immediate priority was to seek ministerial approval to proceed with seeking an exclusion for the scheme through the common frameworks process. Some work was already underway on that following the conclusion of the single-use plastic exclusion process and Dr Thomas wanted to start the process in summer 2022 to give sufficient time for it to conclude before August 2023. Any decision to

seek an exclusion was still, at that point, a balance of potential risks. DEFRA was saying that the removal of glass from the English and Northern Irish schemes was still not definite, and the launch dates for those schemes remained unclear. It might have been possible to accept a period during which the Scottish scheme had launched but no IMA exclusion had been obtained, as had been the case for single-use plastics. That would have depended on the length of any gap and the likelihood of any businesses seeking to challenge the scheme during that time, reducing the effectiveness of the policy. Dr Thomas took the view that waiting for further certainty posed a risk that there could be insufficient time to agree and legislate for an exclusion should it be required, recommended that an exclusion should be pursued, and tasked his team with drafting a submission to that effect which was sent to the Minister on 15 September 2022. His view was that without an exclusion there was a significant risk that the scheme could not be implemented effectively in August 2023. The options presented to the Minister were either to do nothing about an exclusion meantime, or else seek an exclusion under the Resources and Waste Common Framework. The Minister agreed with the recommendation to pursue an exclusion.

[120] It was noted to the Minister that the process for excluding from the IMA certain areas within common frameworks by managing devolved policy divergence had been agreed amongst the UK nations. The process which it was anticipated would be followed, given the precedent set in the single-use plastics process, was for officials to initiate discussions regarding policy divergence as part of the Resources and Waste Common Framework, and to produce a paper for submission to the common framework at official working level, setting out evidence supporting the case for an exclusion to the IMA and the scope of that exclusion. There would then be agreement at working level to take the paper to the Senior Officials Programme Board, representing all four administrations, for discussion and

clearance. The request for exclusion would then be raised at ministerial level during regular inter-ministerial group meetings, and a final agreement sought. The UK Government would draft an affirmative statutory instrument to add the exclusion to the list of exclusions in the IMA, and share it with devolved governments for non-binding consent to be sought, before it underwent scrutiny at Westminster and came into force.

[121] It was further noted that a potential exclusion for the deposit return scheme was included as part of initial discussions with DEFRA and other administrations on the scope of the single-use plastics exclusion, that the UK Government was keen to discuss this issue, and that there was no guarantee that an exclusion for the scheme under the common framework process would be obtained, but that officials were optimistic about success given that an exclusion might be beneficial to all UK governments.

[122] The Minister was surprised that the IMA issue was still a risk and had arisen relatively late in the process. Dr Thomas informed her in an email of 20 September 2022 that the matter had been highlighted as a risk for some time, but had emerged pointedly after the attempt to secure a broad exclusion covering the deposit return scheme in the context of the single-use plastics process had failed. He reminded the Minister that one reason for holding off had been to await the outcome of the DEFRA deposit return scheme consultation, in order fully to understand the risks and scope of any required exclusion. That had still not been published, but the point had been reached where it was not possible to wait any longer.

[123] Upon receiving Ministerial approval, the defenders' officials informed relevant DEFRA and other colleagues in late September that they would formally be seeking an exclusion for their deposit return scheme. The formal route for that was the common frameworks working group meeting in October, but discussions had already been taking place at official level. DEFRA welcomed the news and reiterated that it was considering an

exclusion for its own deposit return scheme. DEFRA's preference was for the various schemes to align, but it acknowledged that some specific aspects of the Scottish scheme might require an exclusion until the other UK schemes came into force. It was clear, however, that in two key areas alignment would not be reached by August 2023, which were launch date and the inclusion of glass.

[124] An initial meeting was held on 27 September 2022 with the framework teams within the defenders' establishment to set out exactly what steps would be followed under the framework. A working group made up of all relevant policy and legal teams was set up. A meeting of the resources and waste common framework group was held on 4 October, and it was agreed that a paper dealing with the exclusion request should be brought before the next meeting in December.

[125] In October 2022 the IMA issue was explicitly drawn to the attention of the Gateway Review team ahead of the preparation of an Assurance of Action Plan in that month. It was noted that resolving any risks associated with the IMA by seeking to agree an exclusion was on the defenders' critical path for delivery of the scheme. The risk register was also updated on 10 October 2022 ahead of being shared with the Gateway Review team. Dr Thomas also recalled that he had been interviewed for the October Gateway Review and thought that he had mentioned the IMA issue then. The IMA exclusion would have been the number one thing being focussed on by the deposit return scheme policy team at that point.

[126] The Minister raised the deposit return scheme at the October 2022 inter-ministerial group meeting, but the discussion was primarily in the context of VAT. The fact that an IMA exclusion would be sought through the relevant framework was noted. There was formal confirmation that glass was going to be excluded from the English and Northern Irish schemes at the November inter-ministerial group meeting.

[127] The promised paper was submitted for consideration at the common framework working group meeting on 19 December 2022. The meeting was significantly more confrontational than Scottish officials had expected. While Northern Irish and Welsh officials were supportive, DEFRA senior officials suggested for the first time that there were very significant barriers to agreeing to take a recommendation to ministers, and that further information had to be provided. Concerns were raised about the economic and business impacts of an exclusion. The tone of the meeting suggested that exclusions would not be granted except in very exceptional circumstances. It was agreed that the paper would be revised for resubmission at the next working group meeting, with collaborative input from officials (and if necessary, officials from other UK departments). A specific meeting was to be convened in January, with a view to presenting recommendations at a ministerial quadrilateral meeting shortly after.

[128] There was an inter-ministerial meeting on 18 January 2023 where the scheme was discussed, along with other waste and resources issues. The discussions about the scheme primarily focused on the VAT issue; the IMA exclusion was raised by Ms Slater but not addressed by the attending DEFRA minister.

[129] Dr Thomas met with DEFRA and BEIS officials on 19 and 26 January 2023 to talk through concerns. The official UK Government response to its own deposit return scheme consultation was published on 20 January, confirming that glass would be out of the scope of the English and Northern Irish schemes. The defenders' paper was developed to include more specific detail on the legal interactions between the IMA and the scheme, greater consideration of alternative approaches to manage divergence, some additional evidence on container volumes which could contextualise trade across the UK, and some evidence on the enquiries received from business by that time on the impact of the IMA. A parallel

workstream was taking place on wider interoperability issues. There was a view that some issues could be resolved through scheme design and interactions between scheme administrators. The revised paper was tabled at the third common framework working group on 13 February 2023. Officials from all nations agreed that it was not possible to secure alignment of policies across the UK nations. The discussion resulted in agreement that officials would take away a recommendation to respective ministers that an exclusion should be considered, noting that ultimately this was a ministerial decision. Following the policy agreement on the need for an IMA exclusion at that common framework working group meeting, Dr Thomas had less involvement in the exclusion process as a whole, and others took over. Neither internal planning nor discussions with DEFRA had raised the prospect of a partial exclusion, or one which did not permit divergence in the scope of the respective schemes. The DEFRA Secretary of State was thought to be supportive of an exclusion for the Scottish scheme.

[130] The exclusion request was brought to the relevant inter-ministerial group for a decision in April 2023, at which Mr Jack, the Secretary of State for Scotland, unexpectedly appeared. Instead of an exclusion being agreed, further evidence was requested.

Dr Thomas worked very closely with officials in DEFRA on the additional evidence requests. These had not been set out specifically by Mr Jack, or in one go by DEFRA. The latter acknowledged that the defenders had already provided some of the information Mr Jack stated he required, such as formal impact assessments. The questions felt more like an attack on the policy, looking to undermine the scheme in general, and had stepped quite far away from the process of assessing whether an exclusion should be granted for Scotland. The evidence was well received by DEFRA. In late April or May 2023 the idea that an exclusion might cover only cans and plastic containers was first raised as a possibility.

[131] In cross-examination, Dr Thomas stated that, in May 2022, the defenders were keen that the logistics contract for the scheme should be signed. The defenders' risk register for May 2022 recorded the risk to the scheme from the lack of an operator contract as slightly greater than the risk from the IMA. Neither was an immaterial risk. Other similar registers assessed the risk to the scheme from the IMA as very high. None of the 2022 Gateway Reviews, however, mentioned the IMA issue. The risk register maintained by the SWAG for the deposit return scheme was available to members of that group and its contents tended to leak to the public. As at April and May 2022 it did not contain reference to the IMA risk, as the extent of divergence between the Scottish and other schemes was not known and a full analysis could not be conducted. Including that risk in what was effectively a public register in that state of affairs risked adverse impact on business confidence and readiness. It was not understood at that time that any attempt at judicial review of the deposit return scheme regulations would turn on the IMA. SIBA had corresponded through solicitors on 30 June 2022 raising questions about the impact of the IMA, and had been responded to by Mr Holmes. CSL had been informed about that response.

[132] Charles Holmes (29) provided a witness statement in which he stated that he had joined the Deposit Return Scheme and Extended Producer Responsibility Team in the defenders' establishment in August 2019 as a senior policy advisor. In spring 2020 the Covid-19 pandemic struck, other team members were called away to work on the response to that, and he effectively assumed the role of the person leading on the scheme day-to-day. When Dr Thomas came into the team around June 2021 the implementation and programme-management aspects of the scheme sat with him, whereas Mr Holmes led on the policy side. He ceased working directly on the scheme in September 2022, except for the

interaction between the scheme and packaging responsibilities and the online takeback issue within the scheme, on which he continued to lead until the end of 2022.

[133] The Deposit and Return Scheme for Scotland Regulations 2020 were laid before Parliament on 16 March 2020 and provided for a commencement date of 1 July 2022. Although there were risks, that date was considered one which would make delivery achievable for industry. However, the pandemic significantly affected the relevant industry sectors, resulting ultimately in the Deposit and Return Scheme for Scotland Amendment Regulations 2022, which pushed the commencement date back from July 2022 to August 2023.

[134] Mr Holmes organised the June 2021 Gateway Review, which sought to establish whether, in light of the impact of the pandemic, and anything else that might be relevant, the July 2022 commencement date was still achievable, and if not, what would be an achievable such date. The September 2021 Assurance of Action Plan would have influenced the decision to postpone commencement from July 2022 to August 2023. It stated that there were significant challenges, uncertainties and risks to achieving even a September 2023 go-live date, but that there was consensus around that date and wide determination to avoid further delay. The scheme was being delivered by businesses who were not government contractors and who had significant financial incentives to delay the scheme. Mr Holmes thought that the conclusion of the review process in September 2021 was a little too pessimistic, and too swayed by what had been said by industry. He was confident that an August 2023 commencement date could be met, though it would be ambitious and challenging. Detailed advice was submitted to the responsible Minister and the Cabinet Secretary on 29 September 2021, recommending that the commencement date be moved

from 1 July 2022 to September 2023. The advice also stated that it was possible that an IMA exclusion would be necessary to make the scheme work.

[135] CSL had been approved to operate as the scheme administrator in the spring of 2021 and officials worked with it to understand risks and how they could be dealt with. The Minister wrote to CSL on 8 December 2021. At that time, the regulations still contained the 1 July 2022 commencement date, which CSL had said could not be done. While the intention to change the commencement date to 16 August 2023 had been agreed internally within the defenders by that point, until that was announced to Parliament on 14 December 2021 it was not possible to say clearly to CSL that the July 2022 date would be changed, or what the new commencement date would be. That uncertainty was problematic for CSL in their attempts to agree loans from the banks. A letter dated 8 December 2021 and indicating the proposed change of date was written with the intention of helping CSL obtain finance. It was intended that CSL would be permitted to share that letter with banks, which it was hoped would resolve its difficulty with the lack of certainty around the commencement date when attempting to obtain loans. The letter was subsequently shared with the Scottish National Investment Bank by CSL. CSL needed to know, and be able to advise the banks of, the new commencement date immediately. At the time of the letter there were a number of substantial risks facing the scheme, the vast majority of which would have related to business implementation. Legal risks might also threaten the overall deliverability of the scheme. The UK Government plans for its own deposit return scheme affected the question of whether or not an IMA exclusion would be needed for the Scottish scheme. In December 2021 the need for an IMA exclusion was seen by Mr Holmes as a substantial risk, but one of half a dozen or more substantial risks. The risk was that, if the Scottish scheme could not legally operate without an exclusion, and one could not be obtained, implementation would

have to be delayed until the UK scheme went ahead at an uncertain future date. It was not certain at that time that an IMA exclusion would definitely be needed, and it was not known how the UK Government was disposed towards granting one.

[136] The Deposit and Return Scheme for Scotland Amendment Regulations 2022 were made in February 2022, principally to change the scheme commencement date from 1 July 2022 to 16 August 2023, but also to deal with various policy matters, such as the recycling target for 2023 and online takeback.

[137] The first meeting of 2022 between the Minister and CSL was on 13 January. It was known in advance of the meeting that CSL would ask for a letter from the First Minister to provide reassurance to banks and delivery partners, reiterating the defenders' commitment to the scheme and providing reassurance that it would not be cancelled before full implementation. It was also known by that time that CSL had selected Biffa as its preferred logistics partner. At the meeting, it was made clear by CSL that its members and partners were still concerned that the scheme might not in fact be implemented, leaving them substantially out of pocket. CSL trusted the defenders in their commitment to the scheme, but the problem lay in how to communicate that to other people. It asked if the First Minister could write a letter to express the strength of the defenders' political and policy commitment to the scheme, to be shown to the Scottish National Investment Bank, commercial banks and to the proposed logistics and IT contractors. At the meeting, Ms Slater said that she did not know if the First Minister would write such a letter, but that she could do so herself. In the event, a letter from the First Minister was sent on 7 February 2022. It set out the proposed change to the commencement date, the 2022 draft Regulations by that point being before Parliament. The letter was sent to CSL for it to show to anyone it chose, provided it obtained the defenders' permission first.

[138] The next monthly meeting with CSL was on 10 February 2022 and it was noted that permission had been sought to share the letter with the Scottish National Investment Bank, the Royal Bank of Scotland, Lloyds Banking Group, Biffa and the preferred IT partner. The primary purpose of the letter was to assist CSL with funding; that it went to Biffa and the preferred IT partner was secondary to that purpose. No specific progress on the logistics contract was reported. It was noted that Biffa was concerned about its capital expenditure commitment before the scheme went into operation. There was an open discussion at the meeting about how that risk could be managed, without reaching any definite resolution.

[139] The application for an IMA exclusion for single-use plastics was seen by the defenders as the trailblazer for getting an IMA exclusion for the deposit return scheme. On 8 March 2022 it became apparent that that application had been largely successful, although no broad exclusion encompassing the deposit return scheme was obtained. That outcome made Mr Holmes less concerned about the level of risk that the need for an IMA exclusion posed to the deposit return scheme.

[140] The next monthly meeting with CSL was on 16 March 2022. An update from CSL about its funding issue was awaited. It was then only two weeks before the milestone for signing the logistics contract was due, and an update on progress on that front was also wanted. Mr Holmes was unable to attend the meeting. The next monthly meeting with CSL was on 27 April. By that point, the defenders had received a pre-action letter from the Scottish Grocers' Federation, threatening judicial review of the 2022 Regulations, the business and regulatory impact assessments for which contained numerical errors. The IMA did not feature at all in the proposed legal challenge, which in the event did not materialise. It was known that Biffa continued to be concerned about its potential exposure if the scheme were to be delayed again or to fall through. At the meeting, Mr Harris explained the scale of

Biffa's necessary upfront investment of around £100 million, and explained that Biffa was unwilling to sign the contract and incur that level of capital expenditure if it might be left holding the risk of failing to recoup that capital if the scheme were to be delayed or cancelled or if CSL were replaced as scheme administrator. CSL broached the possibilities of trying to get industry support, obtaining insurance to cover the risk, or having some of the property required leased by CSL rather than by Biffa. CSL explained that the First Minister's letter had been of some help in resolving the issue of Biffa's reluctance to sign the contract but was not decisive. Mr Harris asked if the defenders could underwrite that risk, but Mr Holmes assumed that if that happened there was a significant risk that CSL would be treated as a public body, which was unacceptable to the defenders. CSL asked for a letter from the Minister to be sent to Lockton Companies LLP, its insurance broker, to provide reassurance about its status as scheme administrator, covering the likelihood of another scheme administrator emerging and the potential for cancellation of the scheme or delay. It was hoped that Lockton would then be able to arrange the insurance that CSL sought, to allow it to make progress in the logistics contract negotiations with Biffa.

[141] After it was clarified what Lockton's position was and that the available insurance would allow Biffa to recoup its capital expenditure in the event of CSL's collapse, Mr Holmes drafted a letter to Lockton dated 6 May 2022 and sent it to Ms Slater's special adviser for clearance of the text, which was given. The letter was duly signed and issued, although there were a number of changes between the draft and the signed version, none of which changed its purpose. The defenders thought that if they could say something true and reassuring, that might help move the negotiation with Biffa along. The letter tried to explain the law and the factual background underlying CSL's position as scheme administrator and why the prospect of CSL being removed as scheme administrator was not

a likely one. The main point of the letter was to give assurance that so long as the scheme did not collapse, CSL was going to be the scheme administrator. The other thing the letter tried to do was to make clear the defenders' political and policy commitment to the deposit return scheme and to provide reassurance that there had been no change in that regard. The political and policy commitment to the scheme in the letter was the same kind of commitment that was being made very frequently in public statements. Some of the language in the letter appeared to have been based on that in the letter drafted for exhibition to the Scottish National Investment Bank.

[142] A draft further Gateway Review Report was issued on 12 May 2022. It was quite stark and pessimistic in its conclusions. Mr Holmes disagreed with its conclusions and considered that the review team had been misled by industry lobbying. The risk identified was that the commencement date was not viable at the level of functionality or readiness of the scheme that had previously been wanted at that stage. Mr Holmes continued to think that the August 2023 commencement date was challenging but achievable.

[143] A briefing was provided to Ms Slater for a bilateral meeting with the Parliamentary Under-Secretary of State at DEFRA on 16 May 2022. The advice was that the IMA posed some risk, but that the UK Government response to its own consultation needed to be seen before reaching a definitive view. That was because the level of risk would depend on the degree of divergence between the Scottish and UK schemes, which in turn depended on the implementation timetable and scope of the UK scheme. It was understood that the timetable would be slower for the UK scheme and that England and Northern Ireland would exclude glass. It was noted that further advice was to be provided to the Minister in due course and that it was likely to recommend seeking an IMA exclusion for the scheme as a mitigation for

any divergence that might become evident when the UK Government consultation response was published.

[144] In May 2022, Biffa's concerns, as relayed by CSL, remained that another scheme administrator might replace CSL, or that the scheme would be delayed or cancelled. Mr Holmes did not recall how an initial request from CSL for the issue of a letter to Biffa was made, or how it was thought by CSL that that would help with the signing of the logistics contract. However, it was evident that such a request had been made, as he drafted a letter, which was basically word-for-word the same as the Lockton letter, a cut and paste with limited and superficial changes made when drafting the Biffa letter. The draft Biffa letter was sent to Ms Slater showing tracked changes, in order to illustrate how little it differed from the Lockton letter. That was intended to expedite the process of clearing the Biffa letter. The letter addressed the two points on which the defenders thought they could provide reassurance. The first was that they would change their mind on the scheme from a political or policy perspective and say that it was no longer worthwhile and would not be pursued. That was very much not the case. There was a continuing commitment to the policy at the highest level. Part of the purpose of the Biffa letter was to assert that as credibly as possible. The second point was, again, to clarify CSL's position as scheme administrator. The regulations made it very difficult for the defenders to revoke CSL's status or to appoint another scheme administrator, and Biffa could be given assurance that CSL would be the only scheme administrator, barring exceptional circumstances. It was thought that the letter might help somewhat in what was evidently a difficult commercial negotiation with many factors not under the control of the defenders. Mr Holmes had no reason to think that the August 2023 commencement date was going to be subject to change when he wrote the

letter. As far as he was aware, Biffa never responded to or requested further information following the letter. His draft was approved and issued without any material changes.

[145] Ms Slater's next monthly meeting with CSL was on 19 May 2022. It was known that CSL had made some progress with their insurers since the Lockton and Biffa letters had issued, but the detail remained unknown, and an update from CSL on the position was expected. At the meeting, Mr Harris explained that there had been some progress after the sending of the Lockton and Biffa letters, and CSL now had an offer from an insurer, but it was not aligned with what Biffa was asking CSL to have in place before signing the contract, and so it remained unsigned at that point.

[146] A draft Gateway Review Report dated 12 May 2022 was finalised and issued on 1 June. The delay indicated an unusual degree of challenge and push-back from the deposit return scheme team to the Gateway Review team.

[147] The Minister's next monthly meeting with CSL was on 16 June 2022. Prior to the meeting, CSL had indicated that signing the logistics contract would occur within the next couple of weeks. It was understood that the resolution of the insurance issue relating to Biffa's capital expenditure had allowed the contract negotiations to proceed to the point of being finalised. The meeting briefing contained recommendations from the Gateway Review Report of 1 June, including that the commencement schedule and scope be re-evaluated urgently to determine the potential for some lower risk scheme functionality within the expected schedules. It advised that a more graduated approach to the scale of the scheme would help ensure that its delivery remained feasible despite the Gateway Review suggesting that delivery of the scheme at the current scale by August 2023 was essentially not possible. At the meeting, CSL maintained that the Gateway Review had not been an unfair assessment at the time it was composed, but that things had moved on rapidly since

that point. CSL stated that there was insurance in place for Biffa against scheme cancellation or delay, or CSL losing its position, but Biffa was still not prepared to sign the contract with CSL. That created a risk that its procurement of vehicles would not happen in time for the scheme becoming operational. CSL summed up the situation as creating a red-amber risk at that stage. Mr Holmes was unaware of when the Biffa contract was signed or what ultimately enabled that to happen.

[148] In cross-examination, Mr Holmes stated that he recalled that Ms Slater had been advised in September 2021 that an exclusion under the IMA might be needed for the Scottish deposit return scheme, depending on the outcome of a request for a broad exclusion which had been made. CSL quite often asked the defenders for reassurances, as well as vice-versa, and the two bodies engaged closely and collaborated with each other in a spirit of mutual trust and confidence. He vaguely recalled evidence given to a Scottish Parliament committee by Professor Kenneth Armstrong on 12 January 2022, which posited that core aspects of the deposit return scheme could be disapplied as a consequence of the IMA. He had only become aware of that evidence at some point after it had been given. At a meeting between the Minister and CSL on 13 January 2022, it was mentioned that CSL wanted a letter from the First Minister to banks and delivery partners, including Biffa, providing reassurance that the scheme would not be cancelled before full implementation. By that stage, the IMA had been identified as a provision in law which could derail the scheme, but that was probably not discussed at the meeting.

[149] At a further such meeting on 10 February 2022, further reassurances for Biffa in respect of its anticipated capital expenditure were raised. In March it had become apparent that the UK Government was prepared to grant an exclusion under the IMA for single-use plastics which would not cover the deposit return scheme. In April he recalled a legal letter

on behalf of the Scottish Grocers Federation threatening judicial review of the 2022 Regulations, but that concerned numerical errors in the accompanying Business and Regulatory Impact Assessment and had nothing to do with the IMA. It continued to be known that Biffa was concerned about the risks to it in signing the contract, and the defenders wanted that to happen. One way of addressing the issue was for the defenders to say something true and reassuring that might help the negotiation along.

[150] On 4 April 2022, Jamie Delap of Fyne Ales, a producer for the purposes of the scheme, had emailed Dr Thomas noting that certain risks were not on the risk register of the SWAG and referring to an ongoing review of compatibility with the IMA. Mr Holmes considered that it had been necessary to manage information put into the public domain where there was a threat of being involved in litigation with a stakeholder who would receive that information. In early May he had drafted a letter to Lockton stating the Government's intent, and attempting to persuade it to provide insurance, which did not mention any threat to the scheme from the IMA. Whether the scheme would go ahead was not entirely within the gift of the defenders; the IMA posed a substantial risk. The letter was simply trying to make a couple of points, and it made them.

[151] The Gateway Review conducted in May did not mention the IMA. At a bilateral ministerial meeting on 16 May it had been thought likely but not certain that a specific exception under the IMA would be needed for the deposit return scheme. On the same day it became apparent that CSL wanted a letter sent to Biffa in similar terms to that which had been sent to itself, to help persuade Biffa to sign the contract. Mr Holmes had drafted that letter. It provided reassurance that the defenders were committed to the 16 August 2023 launch date and narrated the suitability of CSL for the role of administrator.

[152] A Notice to Admit procedure resulted in agreement of a substantial number of uncontroversial matters between the parties, in respect of which no proof was, accordingly, required.

Submissions for the Pursuer

[153] On behalf of the pursuer, the Dean of Faculty submitted that it had established that the defenders were liable to make reparation to it, and invited the court to fix a proof on the quantum of damages. There were two bases for the claim. Firstly, the letter of 17 May 2022 amounted to a negligent misrepresentation. It failed to disclose the requirement for an exclusion from the IMA for the deposit return scheme, whether such an exclusion had been sought, what its status was, and the impact a failure to obtain an exclusion would have on the scheme. Secondly, the defenders had breached a broader duty of care owed to the pursuer. They had failed to warn it of the matters just mentioned. Had they done so, it would not have incurred the expenditure it did.

[154] In relation to the first basis of claim, the pursuer's case was that the letter provided a number of assurances in respect of the scheme, but failed to alert the pursuer to the situation concerning the need for an IMA exclusion. Accordingly, it represented a half-truth, as it created a false and misleading impression. A reasonable person writing to the pursuer in order to attempt to reassure it to enter into the logistics contract, having regard to the disastrous consequences for it in the event of the IMA exclusion not being granted, would have disclosed the true position regarding the exclusion. The defenders knew or ought to have known that the letter would be acted on; that was what it was intended to achieve. They had specialist knowledge of the IMA position, and had sole control over whether and when to seek an exclusion. Only the Scottish and UK Governments would have knowledge

of the status of any exclusion request. The pursuer relied on the assurances in the letter. It acted on them and entered into the contract. Had it been alerted to the fact that an exclusion had not been sought or granted, it would have sought additional assurance. It would not have entered into the contract without confirmation that an exclusion had been granted or would be sought timeously and granted. If such an assurance could not be given by the defenders, it would have considered that the scheme was not viable and would not have entered into the contract.

[155] In relation to the second basis of claim, the defenders were uniquely able to seek an IMA exclusion. Only they, and the UK Government, would have had knowledge of the status of a request for such an exclusion. They accordingly had particular responsibility and knowledge in respect of a fundamental step which was required to ensure the deliverability and viability of the scheme. They were aware that the pursuer would be committing significant funds to the scheme and that that investment was required to ensure that the critical infrastructure of the scheme was in place. They knew or should have known that the pursuer specifically would be impacted by their actions. The pursuer entrusted the defenders to take all necessary steps to ensure the viability and deliverability of the scheme. It was reasonable for it to do so given that they had ultimate responsibility for the scheme. The defenders further provided assurances and advice by way of the letter of 17 May 2022 which they knew or ought to have known would be relied upon. In such circumstances, they assumed responsibility to the pursuer in its capacity as preferred bidder for the contract, such that a duty of care arose. They breached that duty. They failed to alert the pursuer that an IMA exclusion was required, had not been sought and had not been granted. They were aware that, as from the execution of the contract in July 2022, the pursuer was (with their encouragement) incurring significant costs in investing in the scheme. That

notwithstanding, at no point did they warn the pursuer of the growing difficulty with the required IMA exclusion. Despite their awareness from at least March 2022 that an exclusion was going to be necessary, they did not apply for it until March 2023, and did not tell the pursuer that. No warnings were ever given. Had the defenders alerted the pursuer to these difficulties, it could have taken steps to mitigate its losses by pausing expenditure. Accordingly, the defenders' failures caused loss to the pursuer. Such losses were foreseeable given the pursuer's key role in investing in and delivering the scheme. It ought to have been clear to the defenders that any breach by them would cause the pursuer loss and damage.

[156] The witnesses spoke to two broad issues. The first was what the defenders knew and did in connection with an IMA exclusion between 2021 and May 2023. The second factual issue was the reliance which the pursuer placed on the defenders. All of the witnesses were credible and reliable, but Ms Slater's evidence showed a complete lack of appreciation of assessment of risk. She appeared not to comprehend the impact of the IMA on the Scottish regulations, and repeated on multiple occasions that the Scottish Parliament had withheld legislative consent for the IMA, as if that were some form of justification for not engaging with it. She sought wrongly to place blame on the UK Government asby falsely criticising it for delay in considering the request for an exclusion during January 2023, when the full scope of the exclusion sought had not even been set out in writing until 13 February 2023. She appeared to ignore the need for the scope and rationale of the policy to be set out by the defenders at the outset and suggested that it was incumbent on the UK Government to raise potential divergence issues. Her recollection was often contradicted by documentation put to her, although she admitted she had not seen many of the documents, such as risk registers, email correspondence and meeting minutes. It was apparent that she was unable to assess or quantify risk. Ultimately, she accepted that a risk existed, that she was told that

the risk existed, and that she did not tell the pursuer of that risk. Her involvement was clearly indicative of negligence.

[157] Many matters were not in active dispute between the parties. The defenders had power to introduce a deposit return scheme in terms of section 84 of the Climate Change (Scotland) Act 2009. The introduction of such a scheme was a flagship policy for the defenders. It had formed part of the Programme for Government of the Scottish National Party. Under the scheme, producers and importers of products in single-use containers would be compelled to add an additional charge onto their products. Single-use containers, at least insofar as envisaged by the defenders in implementing their scheme, included recyclable plastic, cans, tins and glass. The additional charge was a deposit. If the recyclable container was recycled at a recognised return point, the deposit would be refunded to the customer. The scheme was enacted by the Deposit and Return Scheme for Scotland Regulations 2020, made on 19 May 2020. The 2020 Regulations set out how the scheme was to be implemented. The initial scheme commencement date was 1 July 2022.

[158] The IMA received Royal Assent on 17 December 2020. It precluded goods produced in one part of the United Kingdom (the originating part) being subject to different requirements in another part (the destination part). These market access principles came into force on 21 December 2020. The Scottish Parliament withheld legislative consent for the IMA. The defenders frequently expressed their opposition to it on the basis that they perceived that it undermined devolution. Section 10 of the IMA required the defenders to obtain an exclusion from these market access principles for the deposit return scheme. That exclusion had to be obtained from the UK Government. Ms Slater's evidence was that the defenders knew at all material times that an IMA exclusion would be required for the scheme.

[159] The defenders had the power to designate a scheme administrator (section 85 of the 2009 Act). The role of a scheme administrator was to manage the financial and logistical aspects of the scheme. On 24 March 2021, CSL was approved as scheme administrator by the defenders pursuant to regulation 13 of the 2020 Regulations. In December 2021, Ms Slater announced that the scheme would be delayed from 1 July 2022 to 16 August 2023. The scheme required a logistics partner to transport, count and process the containers. The logistics provider role was crucial to the scheme. CSL entered into negotiations with the pursuer in respect of the logistics provider role. CSL and the defenders were aware that the pursuer had expressed concern about the capital expenditure that it would require to make in the event that it became the scheme logistics provider.

[160] The defenders sought a broad exclusion from the IMA under the resources and waste common framework. That was refused on 8 March 2022. From that point, it was known that a specific deposit return scheme exclusion would be needed. As at 17 May 2022, the defenders had not started the process to seek a scheme-specific exclusion. On 17 May 2022, Ms Slater sent a letter to Mr Topham. It expressed, amongst other matters, the defenders' "unwavering commitment" to the scheme. The need for an IMA exclusion was not mentioned in the letter.

[161] The pursuer entered into a contract with CSL on 18 July 2022, in terms of which it became the logistics provider for the scheme. To the knowledge of the defenders, it was required to, and did, commit significant funds towards implementation of the scheme.

[162] The UK Government granted a temporary exclusion from the IMA in respect of the Scottish deposit return scheme on 26 May 2023. That temporary exclusion required (a) an exclusion of glass from the scheme; (b) maximum interoperability with other deposit return schemes within the UK; (c) the securing of a UK-wide agreement on a maximum cap on

deposit levels; and (d) a single UK-wide barcode, and a single UK-wide logo. On 7 June 2023, and as a direct result of the terms of the temporary exclusion, the defenders announced a further delay to the scheme until at least October 2025. As a result of the delay, and the uncertainty it caused, CSL entered administration on 20 June 2023. The pursuer's contract was terminated. The significant investment made by it pursuant to the contract was lost.

[163] Parties were in dispute about the risk posed by the IMA to the scheme. Ms Slater accepted that there was a necessary interaction between government and business. It was important that businesses could trust what the government said. Absent that, the ability of government to interact with business was impaired. The public was entitled to expect competent government. Competence meant decisions were taken based on available and relevant information. Identifying risks was key to good decision-making. There were various means by which the defenders attempted to assess risk. There were risk registers of various kinds, which graded particular risks based on impact and likelihood. There were also Gateway Reviews. Ms Slater attempted to downplay the importance of the IMA exclusion, claiming that she had known since 2021 that an exclusion would be required, that steps were being taken as early as 2021 to seek one, and that she had no reason to doubt that the requisite exclusion would be granted. She thought it could be done fairly straightforwardly. There was no material change in that belief until 2023, when Lord Jack became involved.

[164] However, that position ran directly contrary to the risk registers which had been prepared by her officials and used by her department. She continually fell back on an assertion that she followed the agreed process, a position which again was not supported by the documentary evidence. She had a complete lack of awareness of the importance of an

IMA exclusion and a misplaced optimism about the level of risk associated with it. The evidence showed that there was a very significant risk that an IMA exclusion would not be granted in the form sought and she had ample evidence of that risk. She conceded that, without an IMA exclusion, the scheme could not proceed. However, she conflated this significant risk with multiple other risks, none of which, on her own evidence, would have prevented the scheme from proceeding.

[165] Even on the defenders' best case, a scheme-specific exclusion was not sought until 4 October 2022, twenty-nine months after the 2020 Regulations were passed and seven months after a wider exclusion was refused and it was recognised that a scheme-specific exclusion would be needed. That was around 5 months after the letter of 17 May 2022 was sent to the pursuer claiming an unwavering commitment to the scheme, and around three months after the logistics contract was signed.

[166] Ms Slater's evidence on the risk associated with an IMA exclusion required to be seen in light of the other evidence heard. That evidence showed that in July 2021 discussions regarding a broad IMA exclusion commenced. The initial commencement date for the scheme was July 2022. On 29 September 2021, Mr Aidan Grisewood, a senior civil servant, recommended to Ms Slater that the commencement date be moved, and advised that there was a potential problem with the IMA for the scheme if the broad exclusion then being sought was not obtained. He also advised that the deposit return scheme being contemplated for England was likely to exclude glass and that its operation might be postponed beyond late 2024. Ms Slater accepted, given that advice, that she was aware that the English scheme would be likely to exclude glass and accordingly that she was aware that there would be divergence on timing and scope with that scheme. On 6 December 2021 a paper was prepared by the defenders to justify the broader exclusion sought. It set out their

policy and its impact, and was provided to the UK Government for a decision to be made on the exclusion sought.

[167] On 8 December 2021, a letter was issued by Ms Slater to CSL. There was close engagement and collaboration between the defenders and CSL. There was a degree of mutual trust and confidence between them. At this time there were a number of substantial risks facing the scheme, one of which was the need for an IMA exclusion. In a letter dated 8 December to CSL, Ms Slater advised the latter that the commencement date for the scheme was to be postponed. The letter was to provide CSL with certainty on the date.

[168] On 12 January 2022, Professor Kenneth Armstrong of Cambridge University provided written advice to the Constitution, Europe, External Affairs and Culture Committee of the Scottish Parliament on the issue of the IMA, noting that core aspects of the scheme could be disapplied as a result of the IMA not expressly recognising environmental protection as a legitimate aim for limitation of the application of the Act. Mr Holmes saw that document at some point, Ms Slater did not. Mr Harris was not shown it.

[169] A meeting took place between Ms Slater and CSL on 13 January 2022. A briefing was prepared for that meeting, which explained that CSL was outsourcing the logistics for the scheme to the pursuer. Its involvement as a large and experienced contractor was welcomed by the defenders, who were keen to see the contract signed by March 2022. The briefing note also referred to CSL asking for a letter from the First Minister to banks and delivery partners to reiterate the defenders' commitment to the scheme and providing reassurance that it would not be cancelled before full implementation. The IMA was not mentioned in the briefing document, nor discussed at the meeting. CSL members and others involved in the scheme in various ways were concerned about losing money, potentially a lot of money,

if it was cancelled. The letter from the First Minister was to give reassurance to those concerned, including the pursuer.

[170] The next meeting with CSL took place on 10 February 2022. The pursuer had considerable concerns about the level of capital expenditure it was being asked to commit to, which were relayed by CSL to Ms Slater. The March milestone for signing the logistics contract was approaching.

[171] On 8 March 2022, the UK Government notified the defenders of its decision on the broad IMA exclusion that had been sought, making it clear that it was concerned about respecting market coherence and avoiding uncertainty. Ms Slater was aware from that point that a scheme-specific exclusion would be required, and it ought to have been apparent that the UK Government might not grant the exclusion sought, or might grant it subject to conditions narrowing its scope. The defenders' EUFOR Strategic Environmental Policy Programme Risk Register identified the specific risk to the scheme posed by the IMA and accorded it the maximum possible risk score.

[172] A further meeting between Ms Slater and CSL took place on 27 April 2022. Everyone at the meeting was aware that the pursuer remained concerned about its exposure. The defenders remained very keen for the pursuer to sign the logistics contract. Insurance was proposed as part of a solution to manage the concerns. A letter was to be provided by the defenders to Lockton, CSL's insurance broker. The IMA was not mentioned at the meeting.

[173] On 4 April 2022, Mr Jamie Delap of Fyne Ales, an obligated producer, wrote to Dr Thomas questioning issues that had not been included on the SWAG risk register , including compatibility with the IMA. Mr Holmes saw the email; Ms Slater did not. Nothing about the IMA was added to the SWAG risk register, on one view to avoid an adverse impact on business confidence and readiness, on another because the significance of

the risk was not yet known, although the defenders' risk register for May 2022 and the Net Zero Risk Register both rated it as material. The letter to Lockton did not mention the IMA.

[174] On 16 May 2022, Mr Holmes emailed Ms Slater and others with the draft letter to Biffa. Its purpose was to provide reassurance about the defenders' commitment to the scheme and to deal with the status of CSL, with a view to adding momentum to the logistics contract negotiations. CSL had asked for funding or a guarantee, and the terms of the letter were a compromise. The letter was signed by Ms Slater and issued to Mr Topham on 17 May 2022. It emphasised the defenders' "commitment to delivering DRS by 16 August 2023, which remains unwavering." It affirmed that CSL "was able to demonstrate that it would be in a position to subsist for at least five years". It stressed the importance of CSL's approval as scheme administrator and the unlikelihood of that approval being withdrawn. It stated that "our DRS will be the first in the UK", and indicated that this created an "opportunity to build a high-performing scheme administrator that could be in a position to step up and assist in delivering the UK-wide scheme". It pointed to momentum building behind the scheme and to funding secured by CSL. It encouraged Biffa to enter into the contract, saying that doing so "would be a major vote of confidence in both CSL and DRS, and help to increase momentum towards successful delivery". The letter stated on two separate occasions, "I hope this letter provides reassurance on the Scottish Government's continuing commitment to DRS". It made no mention of the IMA.

[175] On 13 June 2022, Squire Patton Boggs, solicitors, on behalf of the Scottish Grocers Federation, wrote to the defenders. The letter raised the impact of the IMA and asked that an "urgent investigation of the proposals" should be carried out.

[176] The logistics contract was signed on 18 July 2022. The pursuer invested significant sums, totalling £51.4 million, in preparing for the scheme going live. The anticipation was that that sum would be recouped once the scheme was in operation.

[177] On 15 September 2022 a briefing document was issued by a civil servant, John Ferguson, which noted a substantial risk to the scheme as a result of the IMA. Ms Slater accepted that this was not new information and that her understanding of the risk remained constant until Lord Jack's involvement in 2023.

[178] A meeting between the pursuer and Ms Slater took place on 22 September 2022, at which the latter spoke positively about 'getting the job done' on the scheme. The IMA was not mentioned.

[179] On 18 November 2022, Ms Slater provided an update to the First Minister on progress with the scheme's implementation, stating that the IMA was an issue and that, while the common frameworks process was being worked through, it was unlikely to be straightforward.

[180] On 20 January 2023, the UK Government published its response to the consultation on deposit return schemes in the rest of the UK. It proposed not to include glass in the English and Northern Irish schemes.

[181] The pursuer first became aware of the fact that an IMA exclusion had not been sought on 28 February 2023. This was as a result of an email from Mr Harris, who had become aware as a result of a media enquiry. The defenders assured Mr Harris that the necessary paperwork would be completed and that it was not a political issue. The UK Government considered that an application for a scheme-specific exclusion had been made on 6 March 2023. At the inter-ministerial meeting on 17 April 2023 Lord Jack requested further information, including impact assessments.

[182] On 17 May 2023, draft regulations were laid before the Scottish Parliament, the effect of which was to delay the commencement date for the scheme to 1 March 2024. These regulations became the Deposit and Return Scheme for Scotland Amendment Regulations 2023 (SSI 2023/201). On 26 May 2023, the UK Government indicated that it would approve a temporary exclusion for the scheme, subject to a number of qualifications and conditions. On 7 June 2023, the defenders announced a delay to the scheme until at least October 2025.

[183] In summary, Ms Slater was aware of the need for an IMA exclusion all along, and of the substantial risk which that issue posed to the scheme. A full IMA exclusion for the subject-matter of the resources and waste common framework had been sought in 2021. When only a narrow exclusion was granted, it ought to have been clear that written evidence was needed, that the UK Government would scrutinise the evidence, and that they might not grant the exclusion sought. Despite that, the IMA was not featured on a Gateway Review until 2023. It was deliberately not referred to in the SWAG risk register. However, it was included on the defenders' internal risk registers from March 2022, showing a material risk to the deliverability of the scheme. No one outside of the defenders was made aware of that assessment.

[184] The process for obtaining an exclusion required its scope and rationale to be set out. The defenders did not start the process of seeking an exclusion for the scheme until, at the earliest, October 2022. They did not provide any written document setting out its scope and rationale until February 2023. Further information was requested by officials. On 6 March 2023, further detail was provided and the matter was sent to UK Government ministers for consideration and decision. Updated impact assessments were required and requested in April 2023. The original impact assessments pre-dated the IMA.

[185] From March 2022 at the latest, the defenders were aware of the pursuer's proposed involvement in the scheme. Without a logistics provider, the scheme could not proceed. The defenders were aware of the pursuer's concerns about its capital expenditure and sought to provide it with reassurance. The letter of 17 May 2022 was a letter of comfort seeking to persuade the pursuer to enter into the logistics contract. Whilst the defenders were aware of the risks posed by the IMA, at no point did they inform the pursuer of them. The logistics contract was signed in July 2022. There was opportunity before then to warn the pursuer that an IMA exclusion had not been sought and might not be granted, as was disclosed on the risk registers. That was not done. There was opportunity to warn the pursuer after contract signature of the substantial risk, which would have allowed expenditure to be paused. That was not done.

[186] Turning to the law dealing with the nature of the pursuer's claims, it was beyond doubt that public bodies did not enjoy blanket immunity from damages claims, although the nature of their role was amply capable of affecting the nature of any duty of care incumbent on them: *Brooks* v *Commissioner of Police* [2005] UKHL 24, [2005] 1 WLR 1495; *Woodcock* v *Chief Constable of Northamptonshire* [2023] EWHC 1062 (KB), [2023] PIQR P16; [2025] EWCA Civ 13, [2025] PIQR P8; *A* v *Essex County Council* [2003] EWCA Civ 1848, [2004] 1 WLR 1881 at [33]. The leading modern case was *Poole Borough Council* v *GN* [2019] UKSC 25, [2020] AC 780, [2019] 2 WLR 1478, where Lord Reed noted at [65]:

> "It follows (1) that public authorities may owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless such a duty would be inconsistent with, and is therefore excluded by, the legislation from which their powers or duties are derived; (2) that public authorities do not owe a duty of care at common law merely because they have statutory powers or duties, even if, by exercising their statutory functions, they could prevent a person from suffering harm; and (3) that public authorities can come under a common law duty to protect from harm in circumstances where the principles applicable to private individuals or bodies would impose such a duty, as for example where the authority

has created the source of danger or has assumed a responsibility to protect the claimant from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation."

and at [75]:

"…it has been held that even if a duty of care would ordinarily arise on the application of common law principles, it may nevertheless be excluded or restricted by statute where it would be inconsistent with the scheme of the legislation under which the public authority is operating. In that way, the courts can continue to take into account, for example, the difficult choices which may be involved in the exercise of discretionary powers".

[187] In *Robinson* v *Chief Constable of West Yorkshire* [2018] UKSC 4, [2018] AC 736, [2018] 2 WLR 595 his Lordship had observed:

"[41] Equally, concerns about public policy cannot in themselves override a liability which would arise at common law for a positive act carried out in the course of performing a statutory function: the true question is whether, properly construed, the statute excludes the liability which would otherwise arise: see *Gorringe* [*Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057] at para 38 per Lord Hoffmann.

[42] That is not to deny that what might be described as policy considerations sometimes have a role to play in the law of negligence. As explained earlier, where established principles do not provide a clear answer to the question whether a duty of care should be recognised in a novel situation, the court will have to consider whether its recognition would be just and reasonable."

[188] The point referred to in *Gorringe* at [38] was:

"The duty rests upon a solid, orthodox common law foundation and the question is not whether it is created by the statute but whether the terms of the statute (for example, in requiring a particular thing to be done or conferring a discretion) are sufficient to exclude it"

and at [54]:

"if it is not novel, the more limited question is whether the principles from the case law applicable to private individuals would impose such a duty on a public authority and if so, whether to do so would not be inconsistent with the legislation. As Lord Reed explained, an example in relation to inconsistency is that it can arise if there was an exercise of discretionary powers. There may be other pointers to an inconsistency that could exclude the liability, depending upon the statute. It is also clear that imposing a duty cannot be inconsistent if the legislation gave discretion but

> the discretion was exercised carelessly or unreasonably. Moreover, as explained in *Barrett* [*Barrett v Enfield London Borough Council* [2001] 2 AC 550] (at 571) if an element of discretion is involved in an act being done subject to the exercise of the overriding statutory power, common law negligence is not necessarily ruled out."

[189] The pursuer's claim was not based on the exercise of statutory discretion. It did not complain of the delays to the scheme, but rather focussed on the defenders' interactions with it: in particular, a negligent misstatement and a failure to alert it to the absence, and impact of, an exclusion under the IMA. The duties for which it argued were not inconsistent with the 2022 Regulations, the IMA, or the 2009 Act. They arose not from the statutory scheme, but from the fact that the defenders decided to engage with the pursuer in an attempt to persuade it to enter into the contract with CSL. There was nothing in the statutory context which gave the defenders a discretion to mislead the pursuer by advancing assurances which were expressly described as such and yet which were, on the evidence, half-truths. The defenders had made the relevant policy decision at a much earlier stage. They had decided to implement a deposit return scheme. They enacted necessary regulations. They had decided on the form that the scheme would take. They had approved CSL as scheme administrator. The pursuer made no complaint about any of that. Even if one was examining the exercise of a discretion, that could not lawfully be done carelessly or unreasonably. There was no discretion to mislead a commercial entity in order to persuade it to enter into a contract. The present case was not novel. It was based on the well-established principle of assumption of responsibility. The defenders could point to nothing within the statutory context that would cut across the clear and usual position that such an assumption might create a duty of care.

[190] The pursuer's primary case was that the letter of 17 May 2022 was a misrepresentation which induced it to enter into the contract with CSL. The situation in

which someone with specialist knowledge of a topic took it upon himself to offer assurances on that topic was a paradigm case in which a duty of care had been held to arise: *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465, [1963] 3 WLR 101 per Lord Morris of Borth-y-Gest. That case was the "touchstone for liability" for a duty of care relating to negligent misrepresentation: *Batchelor* v *Opel Automobile GmbH* [2025] CSOH 93. This area of law was well settled. The concept of assumption of responsibility had emerged as the single most compelling foundation for the existence of a duty, the focus being on deemed assumption of responsibility for the task in question, rather than an assumption of responsibility for the consequences of its negligent performance, and with the underlying possibility of cautious incremental development in order to fit cases to which it did not readily apply: *Batchelor* at [122]. Incremental development was not necessary in this case, which was a straightforward example of the defenders agreeing to offer reassurance in circumstances where they had specialist knowledge. In *Batchelor* at [123], the court identified that factors pointing towards a possible conclusion that responsibility was assumed might lie in the defenders' knowledge (i) that their statement would be communicated to the claimant; (ii) especially in connection with a particular transaction; and (iii) that the claimant would be very likely to rely on it for the purpose of deciding whether to enter into such a transaction. All of those factors were present in the present case. Given the defenders' unique knowledge of the status of the IMA exclusion process, they possessed a "special skill". The fact that the IMA was a public statute was irrelevant. It was the status of the IMA exclusion that was important and formed the basis of the pursuer's claim.

[191] In *Spring* v *Guardian Assurance plc* [1995] 2 AC 296 at 318, Lord Goff had observed that:

> "it was clear from the facts of *Hedley Byrne* itself that the expression 'special skill' is to be understood in a broad sense, certainly broad enough to embrace special knowledge. Furthermore Lord Morris himself, when speaking of the provision of a statement in the form of information or advice, referred to the defendant's judgment or skill or ability to make careful inquiry, from which it appears that the principle may apply in a case in which the defendant has access to information and fails to exercise due care (and skill, to the extent that this is relevant) in drawing on that source of information for the purposes of communicating it to another".

[192] In *Lennon* v *Commissioner of Police of the Metropolis* [2004] EWCA Civ 130, [2004] 1 WLR 2594 the Court of Appeal, after citing *Hedley Byrne*, held that:

> "[19] … the starting point, as indicated by Lord Browne-Wilkinson in *White v Jones* [1995] 2 AC 207, 272c is to ask the question: 'in the absence of any contractual or fiduciary duty, what circumstances give rise to a special relationship between the plaintiff and the defendant sufficient to justify the imposition of the duty of care in the making of statements?'
>
> [20] Lord Browne-Wilkinson explained that such circumstances can include reliance in cases of negligent statements of advice and the assumption of responsibility for the task. He said, at p 274: 'The law of England does not impose any general duty of care to avoid negligent misstatements or to avoid causing pure economic loss even if economic damage to the plaintiff was foreseeable. However, such a duty of care will arise if there is a special relationship between the parties. Although the categories of cases in which such special relationship can be held to exist are not closed, as yet only two categories have been identified, viz (1) where there is a fiduciary relationship and (2) where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers or advice. In both these categories the special relationship is created by the defendant voluntarily assuming to act in the matter by involving himself in the plaintiff's affairs or by choosing to speak. If he does so assume to act or speak he is said to have assumed responsibility for carrying through the matter he has entered upon. In the words of Lord Reid in *Hedley Byrne* [1964] AC 465, 486 'he has accepted a relationship . . . which requires him to exercise such care as the circumstances require' i.e. although the extent of the duty will vary from category to category, some duty of care arises from the special relationship.'
>
> …

> [26] [T]he principle recognised in the *Hedley Byrne* case rested 'upon an assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill'.
>
> ….
>
> [27] Lord Goff held that the duty of care was not even limited to the provision of information and advice. The 'special skill' spoken of in the *Hedley Byrne* case was 'to be understood in a broad sense, certainly broad enough to include special knowledge'. The principle may apply to a case in which the defendant has access to information and fails to exercise due care and skill in 'drawing on that source of information for the purposes of communicating it to another': p 318h. Similar points on the breadth of 'the governing principle' of assumption of responsibility underlying the *Hedley Byrne* case and the broad approach to the concept of 'special skill' were made by Lord Goff in his speech in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, delivered later in the same month as *Spring*'s case."

[193] In *Customs and Excise Commissioners* v *Barclays Bank* [2006] UKHL 28, [2007] 1 AC 181, Lord Hoffmann held that:

> "[35] … In … cases in which the loss has been caused by the claimant's reliance on information provided by the defendant, it is critical to decide whether the defendant (rather than someone else) assumed responsibility for the accuracy of the information to the claimant (rather than to someone else) or for its use by the claimant for one purpose (rather than another). The answer does not depend upon what the defendant intended but, as in the case of contractual liability, upon what would reasonably be inferred from his conduct against the background of all the circumstances of the case. The purpose of the inquiry is to establish whether there was, in relation to the loss in question, the necessary relationship (or 'proximity') between the parties and, as Lord Goff of Chieveley pointed out in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 , 181, the existence of that relationship and the foreseeability of economic loss will make it unnecessary to undertake any further inquiry into whether it would be fair, just and reasonable to impose liability. In truth, the case is one in which, but for the alleged absence of the necessary relationship, there would be no dispute that a duty to take care existed and the relationship is what makes it fair, just and reasonable to impose the duty."

[194] There could be no doubt that such a proximate relationship existed in the present case given the pursuer's role in the scheme. Without the pursuer, the scheme could not succeed. There was no other prospective logistics operator. The defenders and CSL were aware that the pursuer had concerns about the significant outlay it was being asked to make. They were aware that those concerns were real: as soon as the contract was signed, the

pursuer would be spending money which would be lost if the scheme did not proceed. The defenders chose to reassure the pursuer and thereby persuade it to enter into the contract.

[195] It was necessary to determine the meaning of the letter. It did not matter that the absence of mention of the IMA was an omission rather than a positive assertion. In *Gluckstein* v *Barnes* [1900] AC 240 Lord Halsbury stated that "everybody knows that sometimes half a truth is no better than a downright falsehood." In *Park's of Hamilton (Holdings) Limited* v *Campbell* [2008] CSOH 177, it was held that the task was not the construction of the specific words which had been used in isolation, but of considering whether, when viewed in the light of the surrounding circumstances, the words themselves, or the document as a whole, created a false impression. In *R* v *Lord Kylsant* [1932] 1 KB 442, the Court of Appeal accepted that a statement of facts which were truly stated but which omitted material information "was false in a material particular in that it conveyed a false impression".

[196] The same conclusion applied here. The assessment did not depend on what the defenders intended the words to mean. What mattered was what could reasonably be inferred against the background of all of the circumstances of the case, as already narrated. The pursuer had concerns and the letter was written to allay those concerns, and persuade it, even put it under pressure, to sign the contract. It was reasonable to read the letter, as Mr Topham did, as amounting to a guarantee that the scheme was happening and that there was no risk whatsoever around it not going ahead; a direct unequivocal commitment to the scheme. A package of measures to protect the pursuer's position, one of which was the letter, had been put in place. In May 2022, the contractual negotiations were challenging. Mr Harris contacted Mr Topham to indicate that a letter from Ms Slater was to be provided. Mr Topham had not asked for it, but CSL requested that it be issued to address the pursuer's

concerns. The letter expressed unwavering commitment to the scheme, without mentioning that its viability was subject to obtaining an IMA exclusion, the process for which had not even begun. The notion of "half-truths" applied equally to both cases of fraudulent and negligent misrepresentation. In *Royal Bank of Scotland plc* v *O'Donnell* [2014] CSIH 84, 2015 SC 258 it had been observed that:

> "[27] In some circumstances the concealment of facts may amount to a misrepresentation. That is particularly true of half-truths. To represent a fact but omit a material qualification on that fact or to state one fact but omit other related facts may create a misleading impression. In such a case the failure to disclose the qualification or to present an accurate overall picture will amount to a misrepresentation: Gloag, [The Law of Contract: A treatise on the principles of contract in the law of Scotland, 2nd ed, 1929] 460; *Royal Bank v Greenshields* 1914 SC 259; *Crossan v Caledonian Shipbuilding Co* (1906) 14 SLT 33. This is an important qualification on the general rule that there is no obligation on parties to say anything during contractual negotiations. The most dangerous misrepresentations are frequently those that are closest to the true facts. If a statement is made that bears little or no relationship to reality, it may be relatively easy to expose it as false because there are so many discrepancies with the truth. If, on the other hand, a statement is largely true but false in one critical respect, discovering its falsity is much more difficult. For this reason half-truths are dangerous, and in our opinion the law must be astute to ensure that any statement that is, objectively speaking, misleading is treated as a misrepresentation, with the attendant legal consequences. For this purpose it is the totality of the statement that matters; the fact that individual components are true is immaterial.
>
> …
>
> [28] When a representation is made in the course of contractual negotiations, its purpose, objectively considered, is to induce agreement to a particular contract containing particular contractual terms. For that reason a representation must normally be taken to have continuing effect until the time when a contract is concluded …
>
> [30] Two other cases support this conclusion. … in the recent case of *Cramaso LLP v Earl of Seafield* [2014] UKSC 9, the United Kingdom Supreme Court reviewed a number of authorities, in Scotland, England and Australia, including *Shankland* [*Shankland & Co v Robinson & Co* 1920 SC (HL) 103] and *With* [*With v O'Flanagan* [1936] Ch 575], and concluded that the law 'is thus capable, in appropriate circumstances, of imposing a continuing responsibility upon the maker of a pre-contractual representation in situations where there is an interval of time between the making of the representation and the conclusion of a contract in reliance upon it, on the basis that, where the representation has a continuing effect, the representor has a

continuing responsibility in respect of its accuracy': paragraph 23, per Lord Reed. It was held that the critical representation under consideration by the court, as to the grouse population of a moor, remained in force until a contract was concluded some months later, with a party which was different from the person to whom the representation had been made. Although the law is stated in slightly qualified terms in the passage just quoted, we are of opinion that the continuing nature of the representation will be the norm …

36. The continuing nature of a representation is relevant to negligent misrepresentation, although not in precisely the same way as to innocent misrepresentation. In general, a representation made in the course of contractual negotiations will be presumed to remain valid throughout those negotiations, unless it is limited in time or effect when it is made. That follows from the straightforward point that a representation made during contractual negotiations is made, objectively, with a view to inducing a contract on particular terms. Thus a representation that is made negligently will normally be taken to influence the decision to contract, and hence will give rise to liability in negligence. If the negligence is a failure to correct, that again will normally be taken to have continuing effect until the contract is concluded, and in that way will give rise to liability in negligence.

37. The legal basis for negligent misrepresentation is the ordinary common law duty of care for negligent misstatements, as explained in cases such as *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 ...

38. Liability for negligent misstatement normally requires the existence of a relationship giving rise to a duty of care: *Caparo Industries PLC* … [1990] 2 AC 620–621, per Lord Bridge. When parties undertake contractual negotiations there will usually be no difficulty in concluding that such a relationship exists, in view of the overall commercial context; the parties are communicating with each other with a view to entering into a binding legal relationship…

39. The result is that the criteria for imposing a duty of care will almost invariably exist when a misstatement of fact is made during contractual negotiations and is such that it induced the contract and would have induced a reasonable person to enter into the contract. As Lord Reed indicates in the passage cited, parties are entitled to pursue their own interests, and consequently the law imposes no general duty of care in the conduct of contractual negotiations. That is reflected in the general proposition, mentioned above, that there is no obligation on a party to make any factual representation during contractual negotiations. If a party does say something, however, legal consequences may follow if it is inaccurate.

40. Finally, we should note that a half-truth is quite capable of amounting to a negligent misrepresentation as well as an innocent misrepresentation. The critical question in such a case is whether the omission of a qualification or further relevant information renders the representation that was made objectively misleading. If it

> does, there is a misrepresentation, and if the maker of the representation was at fault in the sense discussed above there is a negligent misrepresentation."

[197] Accordingly, there was no difficulty in applying, in the present context, the notion of "half-truths". The crucial question was whether there was a misrepresentation, which in this context meant giving a false impression. The dividing line between fraud and negligence turned, not on the nature of the misrepresentation, but rather on the intent which underlay it.

[198] The intended meaning of the letter was not relevant. Meaning fell to be ascertained from the surrounding circumstances: *Investors Compensation Scheme Ltd* v *West Bromwich Building Society* [1998] 1 WLR 896. In *Cassa di Risparmio della Repubblica di San Marino SpA* v *Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 CLC 701 at [215] it was noted that:

> "In order to determine whether any and if so what representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee".

[199] The starting point in the present case was the mutually-understood reason why the letter was sought in the first place. At the meeting of 27 April 2022 between Ms Slater and CSL, the pursuer's concerns as to its financial exposure were clearly explained. Three particular concerns were noted: the likelihood of another scheme administrator being appointed; the cancellation of the scheme; and material delay. Against that background, the letter provided an "unwavering commitment" to a given date for the scheme. Accordingly, read in context, the letter provided a false impression. The defenders had unique knowledge as to the status of the IMA exclusion. That could not be ascertained from information available to the public. They knew that, in the event that the pursuer entered into the logistics contract, it would need to commit significant upfront expenditure. They

knew of its concerns about that expenditure. The letter was sent with the purpose of managing those concerns and ensuring that the pursuer signed the contract. In that context, the letter, and its reference to an "unwavering commitment" amounted to a representation that all was well and no significant step that could derail the scheme was still to be taken. It was a half-truth, and it presented a misleading impression.

[200] Ms Slater claimed that the IMA represented one of a number of risks that was not mentioned in the letter, but was unable to identify any other risk that would have ended the scheme in the same manner as failure to obtain an IMA exclusion. The IMA was, inexplicably, not mentioned in any Gateway Review until long after the contract was signed. Accordingly, the one known risk which was not published or made known related to the IMA exclusion and the status (indeed, absence) of the process to obtain it. The defenders did not follow that process correctly. They did not seek an exclusion to ensure that their regulations were enforceable. Only they could do that. It was simply incorrect to attempt to place the IMA in the same position as VAT, IT issues or producer sign-up, all of which were known and quantified risks identified in Gateway Reviews, and were in no way suppressed from the commercial entities whose fortunes depended on the success of the scheme. The only known risk that could derail the scheme and which was not in the public domain was the absence of any IMA exclusion or process for obtaining it. The letter ought to have made reference to the need for an IMA exclusion and the status of that exclusion.

[201] Ms Slater's position was that she had known from 2021 that an IMA exclusion for the scheme was needed in one form or another and that she believed that that exclusion would be obtained fairly straightforwardly under the common frameworks. However, the evidence established that she had ample reason to believe that it might not be granted in the form sought. It was frequently identified by her officials as a significant risk in advance of

the May 2022 letter. It was clearly identified in risk registers from March 2022. The only precedent for seeking an exclusion was in connection with single-use plastics. The defenders did not get what they wanted on that occasion. Ms Slater claimed to be unaware of the legalities of exactly how the IMA worked. Without such awareness, she could not have understood the risks it posed. She had never received any assurance from the UK Government that an exclusion would be agreed, nor any advice to that effect from her civil servants.

[202] As a direct result of the assurances given in the letter, the pursuer entered into the logistics contract. Anyone in the position of the defenders would have understood that the pursuer would rely on the assurances that were given: indeed, reassurance was the accepted purpose of the letter. Mr Topham explained that a variety of matters, including the content of the letter, caused him to recommend to the relevant board that the pursuer should enter into the contract. He was consistent in his position as to his reliance. He explained that putting insurance in place was primarily to deal with the high risk of delay leading to cancellation, not to deal with a risk that the defenders would cancel the scheme before it became operational. He confirmed that the letter was mentioned to the relevant board in a meeting on 18 May 2022.

[203] The defenders suggested that the pursuer could have ascertained the position in respect of the IMA itself, particularly as it had legal advice, and that in such circumstances, it would have been unreasonable for the pursuer to rely on the letter. In *Steel* v *NRAM Ltd* [2018] UKSC 13, 2018 SC (UKSC) 141, 2018 SLT 835 the Supreme Court reiterated the test from *Hedley Byrne* that the defender would not have assumed responsibility towards the representee unless (i) it was reasonable for the representee to have relied on what the representor said and (ii) the representor should reasonably have foreseen that he would do.

In the present case, the status of any IMA exclusion was neither known to nor discoverable by the pursuer. It was not in the public domain and was uniquely in the knowledge of the defenders and the UK Government: cf *So* v *HSBC Bank plc* [2009] EWCA Civ 296 at [51]. In *Park's of Hamilton (Holdings) Limited* v *Campbell* it was observed at [21] that

> "one might expect that if a person reasonably relies on the representation of another to inform his course of action that very reliance would dissuade him from taking an opportunity to investigate the accuracy of the representation."

[204] When faced with a letter setting out an unwavering commitment, the recipient could not be expected to look behind that and question potential legislative hurdles to the scheme. The letter was unequivocal: the defenders would do what they needed to do to get the scheme up and running on the go-live date. In any event, in *Redgrave* v *Hurd* (1881) 20 Ch D 1, the court observed that reliance could be established as a matter of inference. There was a rebuttable presumption of fact that a representee relied upon a representation if he was aware of the representation and it was "of such a nature that it would be likely to play a part in the decision of a reasonable person to enter into a transaction": *Dadourian Group International Inc* v *Simms* [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep 601 at [99] . In those circumstances, reliance by the representee on the representation might be presumed. Further, "an express intention on the part of the provider of the information or advice that the third party will rely upon it will more strongly support the existence of proximity": *Royal Bank of Scotland Ltd* v *Bannerman Johnstone Maclay* [2005] CSIH 39, 2005 1 SC 437, 2005 SLT 579 at [49]. There was no other sensible inference in the circumstances of this case.

[205] Neither the taking out of insurance, nor the provision of a longstop date in the contract, suggested that the pursuer did not rely on the content of the letter. The longstop date allowed for small delays, not a significant delay leading to the collapse of the scheme. The insurance contract did not negate reliance on the defenders taking necessary steps to

implement the scheme correctly. The pursuer accepted that it was aware that things might change after May 2022. However, it did not complain of any such change. Rather, it complained of the failure to disclose that which was known to the defenders (but not to it) when the letter was written: an IMA exclusion was essential, had not been sought, had not been granted and might not be granted. Offering assurances as to the viability of the scheme in such circumstances, and without caveating the letter on the basis of absence of IMA approval, was a clear example of the telling of a half-truth. The purpose of the letter was to persuade the pursuer to commit to significant capital expenditure. A reasonable person writing to it in order to attempt to reassure and persuade it to enter into the contract would have had regard to the disastrous consequences for it in the event of the contract being executed and the exclusion not then being granted. A reasonable person having due regard to the interests of the pursuer as recipient of the letter would have appreciated the need not to create a misleading impression as to deliverability. Such a person would have disclosed the true position regarding the IMA exclusion. The defenders did not. The letter was a negligent misrepresentation.

[206] The secondary ground of liability advanced by the pursuer was the claim that the defenders owed it a duty of care to warn it of the existence and nature of the risk posed to the scheme by the IMA, by virtue of an assumption of responsibility. A public body could be sued in delict: *Robinson* v *Chief Constable of West Yorkshire*. The ordinary principles of negligence applied, so that if conduct committed by a private person would be actionable, then generally it was equally actionable if committed by a public authority. Claims could be brought in negligence where a public authority had failed to exercise due care in performing its statutory functions so long as the circumstances were such as to give rise to a common law duty of care between the public authority and the pursuer: *Poole*. This could include

circumstances where the authority had assumed a responsibility to protect the pursuer from harm, unless the imposition of such a duty would be inconsistent with the relevant legislation: *Poole*; *Woodcock*.

[207] In *Poole* at [64] Lord Reed observed that *Robinson* did not lay down any new principle of law and that *Caparo* did not impose a universal tripartite test for the existence of a duty of care. Instead, it recommended an incremental approach to novel situations, based on the use of established categories of liability as guides, by analogy, to the existence and scope of a duty of care in cases which fall outside those categories. The question whether the imposition of a duty of care would be fair, just and reasonable formed part of the assessment of whether such an incremental step ought to be taken at all. It followed that, in the ordinary run of cases, courts should apply established principles of law, rather than basing their decisions on their assessment of the requirements of public policy and using the *Caparo* tripartite test.

[208] There was nothing novel about the pursuer's claim. It was a simple application of the doctrine of assumption of responsibility. Assumption of responsibility was most commonly encountered when a person in possession of special knowledge or skill conducted himself in such a way as to demonstrate such an assumption, as explained by Lord Goff in *Henderson* v *Merrett* [1995] 2 AC 145, [1994] 3 WLR 761. If one were to envisage an adviser to the pursuer who knew that an IMA exclusion was required and had neither been granted nor even sought, assurances by such an adviser that entering into the contract was safe would be actionable. The position of the defenders was precisely the same. They alone (when considering their interactions with the pursuer) knew the true position.

[209] The nature of an assumption of responsibility was summarised by Lord Reed in *Poole* as follows:

> "[67] Although the concept of an assumption of responsibility first came to prominence in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 in the context of liability for negligent misstatements causing pure economic loss, the principle which underlay that decision was older and of wider significance (see, for example, *Wilkinson v Coverdale* (1793) 1 Esp 75). Some indication of its width is provided by the speech of Lord Morris of Borth-y-Gest in *Hedley Byrne*, with which Lord Hodson agreed, at pp 502-503: 'My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.' It is also apparent from well-known passages in the speech of Lord Devlin, at pp 528-530: 'I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in *Norton v Lord Ashburton* [1914] AC 932, 972 are 'equivalent to contract', that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract …I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care … Where, as in the present case, what is relied on is a particular relationship created *ad hoc*, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility.'
>
> [68] Since *Hedley Byrne*, the principle has been applied in a variety of situations in which the defendant provided information or advice to the claimant with an undertaking that reasonable care would be taken as to its reliability (either express or implied, usually from the reasonable foreseeability of the claimant's reliance upon the exercise of such care), as for example in *Smith v Eric S Bush* [[1990] 1 AC 831, [1989] 2 WLR 790], or undertook the performance of some other task or service for the claimant with an undertaking (express or implied) that reasonable care would be taken, as in *Henderson v Merrett Syndicates Ltd* and *Spring v Guardian Assurance plc* [1995] 2 AC 296. In the latter case, Lord Goff of Chieveley observed, at p 318: 'All the members of the Appellate Committee in [*Hedley Byrne*] spoke in terms of the principle resting upon an assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill. Lord Devlin, in particular, stressed that the principle rested upon an assumption of responsibility when he said, at p 531, that

'the essence of the matter in the present case and in others of the same type is the acceptance of responsibility' … Furthermore, although *Hedley Byrne* itself was concerned with the provision of information and advice, it is clear that the principle in the case is not so limited and extends to include the performance of other services, as for example the professional services rendered by a solicitor to his client: see, in particular, Lord Devlin, at pp 529-530. Accordingly where the plaintiff entrusts the defendant with the conduct of his affairs, in general or in particular, the defendant may be held to have assumed responsibility to the plaintiff, and the plaintiff to have relied on the defendant to exercise due skill and care, in respect of such conduct…'

...

[72] [Previous authorities] should not be understood as meaning that an assumption of responsibility can never arise out of the performance of statutory functions. Dyson LJ based his reasoning in *Rowley* [*Rowley v Secretary of State for Work and Pensions* [2007] EWCA Civ 598, [2007] 1 WLR 2861] on the decision of the House of Lords in *Customs and Excise Comrs v Barclays Bank plc* [2007] 1 AC 181, where the question was whether the bank had assumed responsibility to the Commissioners to prevent payments out of an account, by virtue of having been served with freezing orders. Dyson LJ cited Lord Bingham of Cornhill's statement at para 14 that there was no assumption of responsibility by the bank: they had no choice.
Lord Hoffmann considered the question more fully. He observed at para 38 that a duty of care is ordinarily generated by something which the defendant has decided to do: giving a reference, supplying a report, managing a syndicate, making ginger beer: 'It does not much matter why he decided to do it; it may be that he thought it would be profitable or it may be that he was providing a service pursuant to some statutory duty, as in *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 and *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223.'

[73] There are indeed several leading authorities in which an assumption of responsibility arose out of conduct undertaken in the performance of an obligation, or the operation of a statutory scheme. An example mentioned by Lord Hoffmann is *Phelps v Hillingdon* [2001] 2 AC 619, where the teachers' and educational psychologists' assumption of responsibility arose as a consequence of their conduct in the performance of the contractual duties which they owed to their employers. Another example is *Barrett v Enfield* [2001] 2 AC 550, where the assumption of responsibility arose out of the local authority's performance of its functions under child care legislation. The point is also illustrated by the assumption of responsibility arising from the provision of medical or educational services, or the custody of prisoners, under statutory schemes. Clearly the operation of a statutory scheme does not automatically generate an assumption of responsibility, but it may have that effect if the defendant's conduct pursuant to the scheme meets the criteria set out in such cases as *Hedley Byrne*."

[210] In the present situation, the defenders were not – in their dealings with the pursuer – acting in the operation of a statutory scheme. They were providing reassurances in an

attempt to persuade the pursuer to sign a contract, the initial milestone for which had been missed and the need for which was pressing. There was no statutory requirement on the defenders to speak: they could have said nothing, or declined to offer any assurance, or caveated their assurances, or included a disclaimer. They did none of that, but rather decided to issue the letters of 6 and 17 May 2022. Picking up on Lord Hoffman's observation in *Customs and Excise Commrs*, "a duty of care is ordinarily generated by something which the defendant has decided to do: giving a reference, supplying a report". That was precisely the current situation.

[211] To this one might add the speech of Lord Goff in *Henderson* at [1995] 2 AC 180, where his Lordship explained *Hedley Byrne* as follows:

> "… we can see that it rests upon a relationship between the parties, which may be general or specific to the particular transaction, and which may or may not be contractual in nature. All of their Lordships spoke in terms of one party having assumed or undertaken a responsibility towards the other. On this point, Lord Devlin spoke in particularly clear terms in both passages from his speech which I have quoted above. Further, Lord Morris spoke of that party being possessed of a 'special skill' which he undertakes to apply for the assistance of another who relies upon such 'skill'. But the facts of *Hedley Byrne* itself, which was concerned with the liability of a banker to the recipient for negligence in the provision of a reference gratuitously supplied, show that the concept of a 'special skill' must be understood broadly, certainly broadly enough to include special knowledge. Again, though *Hedley Byrne* was concerned with the provision of information and advice, the example given by Lord Devlin of the relationship between solicitor and client, and his and Lord Morris's statements of principle, show that the principle extends beyond the provision of information and advice to include the performance of other services. It follows, of course, that although, in the case of the provision of information and advice, reliance upon it by the other party will be necessary to establish the cause of action (because otherwise the negligence will have no causative effect), nevertheless there may be other circumstances in which there will be the necessary reliance to give rise to the application of the principle."

[212] There was no set test for determining the existence of an assumption of responsibility. In *JP SPC4* v *Royal Bank International Ltd* [2022] UKPC 18, [2023] AC 461, [2023] 3 WLR 261 at [62] the court observed that the test for determining whether

responsibility had been assumed by a defendant to a claimant was an objective one. A non-exclusive list was proposed including the following factors: the purpose of the task or service and whether it was for the benefit of the claimant; the defendant's knowledge and whether it was or ought to have been known that the claimant would be relying on the defendant's performance of the task or service with reasonable care; and the reasonableness of the claimant's reliance on the performance of the task or service by the defendant with reasonable care.

[213] A further relevant factor could be taken from *Aruchanga* v *Secretary of State for the Home Department* [2023] EWHC 282 (KB), [2023] PIQR P12 where the court dealt with assumption of responsibility in the context where the defendant was the sole body able to take an action. The court observed that:

> "[20] Both counsel accept that this is a case in which it is being alleged that the defendant failed to confer a benefit, rather than a case in which, by reason of some positive act by the defendant, the claimant suffered harm. As such, both accept that (adopting the analysis in *Poole*) one of the factors to which I should have regard is whether the defendant has, by granting the claimant refugee status, voluntarily assumed responsibility for confirming the claimant's refugee status if an inquiry is made.
>
> [21] In this context I take into account that the defendant is the only body able to grant the claimant (or anyone) refugee status. Further, on the basis of the documents which I have seen, it appears that the only record available to, and accessible by, the claimant concerning his refugee status is the statement contained in the letter which he is sent by the defendant: there is no record available to him elsewhere (such as by an endorsement to his passport) and the letter stating that refugee status had been granted recorded that the letter constitutes the claimant's 'authority to remain in the United Kingdom'. Given these facts, it seems to me to be at least arguable that the defendant, having granted refugee status, assumes responsibility for confirming the same given its importance to the claimant as a means of proving that he had lawful leave to remain in the UK, and the reasonable reliance placed upon the document by the claimant."

[214] That suggested that the fact that the defenders were the only party able to apply for an exclusion under the IMA ought to be given weight in determining the existence of an

assumption of responsibility. There was nothing wrong in expecting the defenders to tell the whole truth about the viability of the scheme. It was true that there was no "liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forebears to shout a warning:" *Yuen Kun Yeu and Others* v *Attorney-General of Hong Kong* [1988] AC 175 at 195, quoted by Lord Hope in *Mitchell* v *Glasgow City Council* [2009] UKHL 11, [2009] AC 874, 2009 SLT 247 at [15]. However, the position would be quite different where the defender invited the pursuer to join him on a walk to enjoy the views, without explaining that the walk involved a concealed cliff edge. The defenders were uniquely able to apply for an IMA exclusion. They uniquely had knowledge of when such an exclusion would be applied for. Only they, and the UK Government, would have had knowledge of the status of such exclusion. They accordingly had particular responsibility and knowledge in respect of a fundamental step which was required to ensure the deliverability and viability of the scheme. They were aware that the pursuer would be committing significant funds to the scheme and that its investment was required to ensure that the critical infrastructure of the scheme was in place. They specifically sought to persuade the pursuer to sign. They knew or should have known that the pursuer in particular would be impacted by their actions. The pursuer entrusted the defenders to take all necessary steps to ensure the viability and deliverability of the scheme. That was a reasonable thing for it to do given that the defenders had ultimate responsibility for the scheme. Furthermore, the defenders provided assurances and advice by way of the 17 May 2022 letter which they knew or ought to have known would be relied upon by the pursuer. In such circumstances, they assumed responsibility for the pursuer in the latter's capacity as preferred bidder for the contract, such that a duty of care arose. The parties were in a unique relationship which was akin to a contract.

[215] The factors listed in *JP SPC4* v *Royal Bank International Ltd* were all present. As to the purpose of the task or service and whether it was for the benefit of the claimant, the purpose of seeking IMA approval was to allow the scheme to proceed. Absent that process, the scheme would be unlawful. It might be said that the scheme was in the interests of all members of the public. However, the pursuer was in a unique position in that it had committed significant upfront expenditure to the scheme. The defenders were aware of that expenditure. They knew that it would be lost if the IMA exclusion was refused, or not sought. As to the defendant's knowledge and whether it was or ought to have been known that the claimant would be relying on the defendant's performance of the task or service with reasonable care, the defenders were fully aware of the pursuer's investment. They specifically encouraged that investment by way of the 17 May letter. They were in no doubt that the pursuer was relying on them performing their tasks in respect of implementation of the scheme properly. Indeed, it had sought specific assurance to that effect which was provided by way of the 17 May letter. As to the reasonableness of the claimant's reliance on the performance of the task or service by the defendant with reasonable care, the pursuer had no option but to rely on the defenders. They were the only party able to make an application under the IMA. It was entirely reasonable for the pursuer to rely on the defenders in the circumstances.

[216] An alternative approach was proposed in *Woodcock*, where the court suggested that what was required was a close analysis of the evidence relating to: (a) foreseeability, and the seriousness of foreseeable harm; (b) the known risks; (c) the course of dealing between parties concerned; (d) the express or implied words or actions of the public authority in relation to protecting the pursuer and the pursuer's reliance on that and (e) whether public policy reasons for refusing to impose a duty of care outweighed the public policy in

providing compensation. In respect of (a) and (b) damage to the pursuer was reasonably foreseeable, indeed, it was inevitable, given its investment in the scheme, involving somewhere in the region of £50 million – £100 million. In respect of (c), the parties were engaged in a "course of dealing" exemplified by the 17 May letter, but also the defenders' references to the pursuer in their negotiations with the UK Government. The pursuer was key to successful implementation of the scheme, and the defenders fully appreciated that. In respect of (d), the defenders' unique ability, indeed obligation, to apply for an IMA exclusion meant that the pursuer had no option but to rely on them. They sought to assure the pursuer as to the deliverability of the scheme but at no point mentioned an IMA exclusion. In respect of (e), nothing advanced by the pursuer would offend any principle of public policy: on the contrary, the usual principle – *ubi jus, ibi remedium* – applied: *Woodcock*; *Brooks*. It was clear from the authorities that assumption of responsibility was objective and depended on the whole facts and circumstances. In the circumstances of the present case, the defenders had assumed responsibility and therefore owed a duty of care to the pursuer.

[217] The defenders knew or should have known that the pursuer specifically would be impacted by their actions. Loss to the pursuer was foreseeable, indeed practically guaranteed when a decision was made to delay. The pursuer relied on the defenders exercising their statutory functions correctly. Furthermore, the 17 May letter emphasised, but was not essential to, the existence of an assumption of responsibility. The defenders provided the pursuer with a number of assurances as to the viability of the scheme and the position of CSL. In doing so, they assumed a specific responsibility to protect the pursuer from losses. The 17 May letter provided a clear and unequivocal statement that the defenders were "unwaveringly committed" to the scheme in order to reassure the pursuer

and induce it to finalise the contract. "An assumption of responsibility involves the idea that a person may, by words or conduct, expressly or impliedly promise (or undertake or give an assurance) to take care to protect another person from harm": *Tindall* v *Chief Constable* [2024] UKSC 33, [2025] AC 1046, [2024] 3 WLR 822 at [75]. The 17 May letter contained such an assurance. The pursuer relied thereon in deciding to commit to the contract.

[218] The defenders had argued that it would not be fair, just and reasonable to impose a duty on them, on the basis that the pursuer ought to have known that an IMA exclusion would be needed. That was misconceived. The case was firmly in the territory of assumption of responsibility, and there was no need to resort to a *Caparo*-based analysis of the claim: cf. *Robinson*. The present case was covered by settled law. In any event, the pursuer could ascertain the existence of the IMA but could go no further. It was not a matter of public record that a request for an exclusion had been made (or not made), nor was the status of that process so known. As amongst the pursuer, CSL and the defenders, that was solely in the knowledge of the defenders. Where a party had such unique knowledge of a situation which had a direct impact on another party, it was fair, just and reasonable to impose a duty: *Aruchanga*. The defenders also argued that it would not be fair, just and reasonable to impose a duty where a third party, the UK Government, was involved in the decision-making. However, again, whether and how to seek an exclusion was for the defenders and no one else. It was fair, just and reasonable to impose a duty in these circumstances. That was particularly so where the defenders had encouraged others, including the pursuer, to make significant investment in the scheme without making the request. There was nothing wrong with the notion that, having decided to issue a letter to try and persuade the pursuer to enter into a contract fraught with risk, it was incumbent on the defenders to see that the pursuer was apprised of that risk. That would not have

imposed any disproportionate burden on the defenders. It could have been done with one sentence. The argument that, if the warning had been given, the pursuer would not have entered into the contract was self-evidently a bad one: a desire to obtain a stated aim could not relieve the defenders of what would otherwise be their duty.

[219] The defenders also again argued that the pursuer did not rely, or at least did not reasonably rely, on the defenders. The first question in this regard was whether proof of reliance was necessary on this aspect of the case. The pursuer contended that it is not. Reliance was necessary where a case was based on misrepresentation: *NRAM*; but that was not necessarily the same for a case based on failure to warn. In *White* v *Jones* [1995] 2 AC 207, Lord Browne-Wilkinson said at 272 D-G:

> "In the case of claims based on negligent statements (as opposed to negligent actions) the plaintiff will have no cause of action unless he can show damage and he can only have suffered damage if he has relied on the negligent statement. Nor will a defendant be shown to have satisfied the requirement that he should foresee damage to the plaintiff unless he foresees such reliance as to give rise to the damage. Therefore although reliance by the plaintiff is an essential ingredient in a case based on negligent misstatement or advice, it does not follow that in all cases based on negligent action or inaction by the defendant it is necessary in order to demonstrate a special relationship that the plaintiff has in fact relied on the defendant or the defendant has foreseen such reliance. If in such a case careless conduct can be foreseen as likely to cause and does in fact cause damage to the plaintiff that should be sufficient to found liability."

[220] More recently, in *HXA* v *Surrey County Council* [2023] UKSC 52 , [2024] 1 WLR 335, the Supreme Court said:

> "[108] In the last two paragraphs, we have discussed situations in which there may be an assumption of responsibility, and hence a duty of care owed, by a local authority to protect a child from harm. That discussion suggests that it appears not to be a necessary feature of an assumption of responsibility in this area that there is reliance, in any real sense, by the claimant. For instance, in a case like HXA, where one has a vulnerable young child with learning difficulties, it would be inappropriate to insist on specific reliance by the child in order to find that there was an assumption of responsibility triggering a duty of care during the respite period."

[221] Admittedly, the context of *HXA* was quite different. However, a similar point arose here: if there was a duty to warn, then that duty should have been fulfilled, and if it was not the claim did not fail for want of reliance.

[222] In any event, on the facts in the present case, the pursuer had evidenced its reliance for reasons already discussed. The defenders questioned reliance on the basis that the contract contained a longstop date, that the pursuer took legal advice on the contract, and that it took out insurance. None of these factors negated reliance. The longstop date in the contract allowed for small delays, not a significant delay leading to the collapse of the scheme and termination of the contract. The insurance contract, which covered a portion of the pursuer's outlay, did not negate reliance on the defenders taking necessary steps to implement the scheme correctly. The defenders could not use the pursuer's limited insurance position to negate their own liability for negligence. These were all part of a package of measures. The pursuer relied on the defenders to take the steps they were required to take by law to ensure that the Regulations that they had made would be enforceable, and to advise them of anything that diluted the assurances which they were giving.

[223] Both the case in misrepresentation and that in assumption of responsibility more generally required proof of negligence – ie a failure to exercise reasonable care in the circumstances. The evidence had established that. Evidence that the decision to make the misrepresentation was made deliberately as opposed to negligently did not cause the pursuer any difficulty. The greater included the lesser, and actings which amounted to deliberate wrongdoing would automatically be at least negligent. Moreover, the fact that a misrepresentation was issued deliberately should not be conflated with the notion of dishonesty, the latter being the hallmark of fraud: *Kidd* v *Lime Rock Management LLP* [2024]

CSOH 28, 2024 SLT 347 at [59]. It was entirely consistent with the demarcation between fraud and negligence to hold that a deliberate withholding of material information which was effected without a dishonest intention to deceive the pursuer (and thus not fraudulent) could nonetheless be indicative of negligence, as a failure to take reasonable care for the interests of the recipient In the present case, evidence had been led that the defenders took active steps to prevent the IMA situation becoming known to the public (including the pursuer). It was no part of the pursuer's case that this was done dishonestly or in a deliberate attempt to harm it: but it was illustrative of a lack of reasonable care for the pursuer's financial interests.

[224] The pursuer claimed that the defenders failed to warn it of impending problems with an IMA exclusion. There was ample opportunity to do so. Given that the status of an IMA exclusion was at all times within the knowledge of the defenders, warning the pursuer of any issues with seeking an exclusion fell squarely within its duty. It would only have taken one sentence – in the letter of 6 May, or the letter of 17 May, or in any of the meetings with CSL – for negligence to have been avoided. In reality, the defenders should have told the pursuer from the outset. The IMA was identified as posing a substantial risk to the scheme in September 2021. As at March 2022, the defenders were aware of the need for a scheme-specific IMA exclusion. They did not mention it to CSL or to the pursuer. Instead, they issued letters of comfort that indicated complete and unwavering commitment to the scheme. The risk register identified the risk at the highest possible level. Throughout March to June 2022, the defenders continued to appreciate the significant risk attached to the need for an IMA exclusion. In the instance of Mr Delap's email, a conscious effort was made by officials to keep that issue out of the SWAG risk register.

[225] The contract was signed on 18 July 2022. If the defenders had warned the pursuer before that, as they ought to have done, it would not have entered into the contract. Even after that, there were many opportunities to warn it of impending problems. On 13 September 2022, Ms Slater was provided with advice that there was a substantial risk and that an exclusion was required. The following week, Mr Topham met her. She did not bring the risk to his attention. Instead, she gave no indication that all was not well.

[226] From 4 October 2022 through to February 2023, the defenders started to engage with the IMA process. A paper was prepared in December 2022. More information was requested. A further paper was prepared in February 2023. Again, more information was requested. None of these facts was in the public domain. The defenders never informed the pursuer that the process was taking place. By January 2023, it was explicitly clear that the defenders believed that DEFRA did not understand what was being requested and that the UK Government might refuse the exclusion. However, the pursuer was not told that. On 28 February 2023, Mr Topham became aware of the IMA through Mr Harris, who had received a media enquiry about it.

[227] Ms Slater maintained that she had no reason to believe that there was anything to warn about, because an exclusion was always going to be granted. That ignored the process, which required the defenders to set out the scope and rationale for the proposed exclusion and to provide impact assessments. It seriously underestimated the very fact of the existence and rationale of the IMA itself. The required document proposing an exclusion for the scheme was not prepared until February 2023. Even then, it was insufficient. The approach envisaged by the UK Government and known to the defenders from the experience with single-use plastics required them to provide sufficient information to enable the UK Government to assess whether an exclusion should be granted. In particular, the

defenders ought to have set out the scope and rationale for the proposed exclusion in order to allow consideration of the proposal, associated evidence and potential impact, including an assessment of direct and indirect economic impacts. They failed to provide the necessary level of detail prior to 6 March 2023. In those circumstances, the suggestion that the defenders could be confident that if they followed the process, an exclusion would be granted, was misguided.

[228] Negligence (ie a failure to take reasonable care) was amply demonstrated by the following: Ms Slater accepted that she was proceeding on the basis that she was confident that an IMA exclusion would be granted. If she had not been confident, she would (at least) have told CSL. That confidence was clearly misplaced. It was not evidence-based. She obtained no advice from any of her team that an exclusion was likely to be granted, or what it might have looked like. She did not consult the risk registers, which were readily available. Had she asked members of her team who were familiar with the risk registers (such as Dr Thomas) they would have been bound to tell her what they showed. Her evidence was that she was aware, at least, of the facts contained in the risk register. A person exercising reasonable care and aware of those facts could not have been confident that an exclusion would be granted, or what it would look like. The period during which this confidence was said to have existed was from March 2022 until early 2023. That period saw no approach to the UK Government to discuss the exclusion until October 2022, by which time the contract had been signed. Without discussion with the UK Government, there was no solid foundation for any confidence.

[229] The suggestion of confidence was in any event wholly undermined by the contemporaneous documents. Various documents from September, October and November 2022, already described, showed a clear awareness of a problem. The suggestion

of confidence was also inconsistent with the one previous exclusion process, on single-use plastics. That had been prolonged and did not result in the defenders getting what they had asked for. Success in the exclusion process required engagement within the common framework, which meant the defenders would have to describe the desired exclusion and back up the need for it with evidence. In advance of any attempt to do so, confidence in an undefined and unevidenced exclusion was vacuous. From March 2022, there was clear awareness that England's deposit return scheme would not include glass. The various obvious difficulties that this would have thrown up were accepted by Ms Slater. A reasonable person would have understood that this presented real problems with the supposed confidence that an exclusion could be agreed. Ms Slater's approach to the exclusion amounted to nothing more than blithe assumption. No critical thinking had been demonstrated; on the contrary a lack of reasonable care was patent.

[230] The question of causation might require to be considered differently as between misrepresentation and assumption of responsibility. For misrepresentation, the question was what would have happened if no letter had been sent; whereas for assumption of responsibility (where the complaint was failure to warn), the question was what would have happened if the desiderated warning had been given.

[231] In misrepresentation, a pursuer generally had to show that it would not have entered into the contract (or not on the same terms) but for the misrepresentation. Reliance on a negligent statement constituted a cause of loss "as long as a misrepresentation plays a real and substantial part, though not by itself a decisive part, in inducing the (claimant) to act": *JEB Fasteners Ltd* v *Marks Bloom & Co* [1983] 1 All E.R. 583.

> "… A representee must always be prepared to prove that the representation had an effect upon his mind. But it is sufficient for him to prove that the representation was an inducing cause which led him to act as he did; he need not prove that it was the

inducing cause": *BP Exploration Operating Co Ltd* v *Chevron Shipping Co* [2001] UKHL 50, 2002 SC (HL) 19, 2001 SLT 1394 at [104].

[232] *Raiffeisen Zentralbank Österreich AG* v *Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123, [2011] Bus LR D65 considered the appropriate counterfactual when determining causation. The case suggested that the relevant counterfactual was what the claimant would have done had the misrepresentation not been made, rather than what would have happened if the truth had been told. At [178] - [187], Christopher Clarke J held that in many cases, but not all, the answer to the two questions would be the same. The first question was whether the test in *Raiffeisen* was applicable in Scotland – that is to say (in the present context), did one test causation by imagining that the letter of 17 May 2022 was not sent at all; or by imagining that the letter of 17 May was sent, but in circumstances where it revealed the IMA risk? *Raiffeisen* had not been followed on the question of causation by any Scottish court. It was not consistent with the approach seen in *Royal Bank of Scotland plc* v *O'Donnell*, in which the focus was on the import of the misrepresentation itself, as opposed to imagining a situation in which the representor said nothing. This court was not bound to follow the decision in *Raiffeisen*. That decision contained a contradiction in terms. It started with the uncontroversial proposition that the misrepresentation must be a cause (not necessarily the cause) of the event causing the loss (here, the entering into of the contract). But it then proceeded to the proposition that one tested causation by imagining that no misrepresentation was made at all (ie that the defender had remained silent). That was unprincipled. There was a significant difference between a situation in which a defender remained silent, and one in which that same defender actively encouraged the pursuer to act in a particular way. A defender who said nothing could not be accused of misrepresentation, because (absent a duty to speak) there

had been no misrepresentation. A defender who decided to speak and did so negligently was in a very different position, and should not be entitled to test causation on the basis of a hypothetical state of affairs (silence) which he did not select.

[233] In *Raiffeisen* it was observed at [177]-[191]:

> "[177] The two questions … were as to the position if nothing had been said or if all that had been said was the minimum necessary to prevent any misrepresentation.
>
> [178] In many cases the answer to the two questions will be the same. But not all. It is convenient to take an example. P buys a house from V. He had been considering several houses. He is minded to buy the one which he eventually buys because of its size, shape and character. Shortly before he makes his final decision V's agent tells him that a particular celebrity has the house next door, a circumstance which he regards as advantageous. It is one of the matters he takes into account in deciding to purchase. He had not previously addressed his mind to the characteristics of his potential neighbour. In fact, as it turns out, there is no celebrity next door. Moreover the next door neighbour – Z – whom the agent knows to be the neighbour is one of the few persons, or types of persons, of whom P would never willingly be a neighbour. If he had never been told that there was a celebrity next door, or, having been so told, was then told that there had been a mistake and the celebrity in question did not live there, he would still have bought the house. If he had been told that Z lived there he would not have done so.
>
> [179] In determining whether or not P was induced by the representation to purchase, is it relevant to inquire what P would have done if he had been told: (a) nothing at all; (b) that there was no celebrity next door; (c) that Z lived next door? Question (a) assumes that no representation, and, therefore no misrepresentation, had been made. Question (b) assumes that the representee is told no more than is necessary to ensure that he has not been told an untruth. Question (c) assumes that the representee is given full information as to who actually lives there. In many cases the truth is nothing more than the flip side of the misrepresentation, but, as the above facts show this is not always so. The example taken shows that the representee's state of mind may be different according to whether or not he was given answer (b) or (c)…
>
> [191] A difficult question may arise if, had the representation not been made, a particular factor would never have entered the representee's head; but the effect of the representation was that it did, so that when he contracted it was of importance to him. Suppose that, in the example given in para 178 the buyer would have gone ahead anyway if he had not been told about the celebrity next door but that, once he was told, the identity of his neighbour became an important factor to him such that he would not have gone ahead unless he had been told exactly who the neighbour was. In such circumstances, as it seems to me, it would no longer be relevant simply to inquire what would have happened if, originally, there had been no mention of

> the celebrity. It is otherwise if the identity of the neighbour was always a matter of indifference to him, or, at best, only an encouragement to him to make his decision: see, in this respect, the discussion at para 548 of *Dadourian* where Warren J took the example of information volunteered by the vendor that a neighbouring farmer was intending to create a wildlife haven when in truth he was about to turn it into a pig farm. He thought that, in such a case, the representor would need to show that the representee, if told that what had been represented was not correct, would not have inquired as to the true position."

[234] These passages involved dancing on the head of a pin. There was no need to engage in the mental gymnastics seen in the analysis. The position was far simpler. In any case based on negligent misrepresentation, the pursuer needed to show (a) that there was a misrepresentation; (b) which arose from lack of the necessary standard of care; (c) which was made where there was a duty of care; and (d) on which the pursuer reasonably relied as a cause (not necessarily the cause) of the decision which caused the loss. That was all that is needed. Bolting onto that a further requirement that the pursuer must also show that he would not have acted in the same way absent the misrepresentation imposed an unwarranted and unnecessary further obstacle. A person who entered into a risky venture without any encouragement to do so was in a quite different position from someone who was encouraged so to do by way of misrepresentations, whether fraudulent or negligent. The latter was the victim of a wrong, whereas the former was not. Assimilating the two for the purposes of causation made no sense. The latter had been encouraged, wrongfully, to act in the manner that occasioned the loss, whereas the former had not. There was no need, or basis, for a remedy in the former case. In the latter case, negligence was a cause of the loss. The control mechanism imposed by the law, regarding any finding that he would have proceeded anyway, was found in the doctrine of contributory negligence, not in the denial of causation.

[235] The approach in *Raiffeisen* also ran counter to basic principles in the law of delict, in which the standard question was whether a proven wrong "caused or materially contributed to" the loss. Where a defender conveyed a false impression for the express purpose of persuading a pursuer to act in a particular manner and where he succeeded in that persuasion, the defender had caused or materially contributed to the consequences. That was all that was needed.

[236] The conclusion in *Raiffeisen* that the counterfactual was not one in which the truth was told stemmed from authority, cited at [182], which held that the court was not "in the habit of considering that a falsehood is not to be looked at because, if the truth had been told, the same thing might have resulted". However, that was a different point entirely, which came from cases such as *Downs* v *Chappell* [1997] 1 WLR 426, where Hobhouse LJ said at 433: "The judge was wrong to ask how [the plantiffs] would have acted if they had been told the truth. They were never told the truth. They were told lies in order to induce them to enter into the contract. The lies were material and successful; they induced the plaintiffs to act to their detriment and contract with Mr Chappell." There was a material difference between holding that the victim of a misrepresentation could not be faced with a defence of "I know I lied, but you would have done the same anyway", and holding that the same victim needed to show that he would not have done the same thing if nothing had been said. The latter approach was inconsistent with the decision in *Smith New Court Securities Ltd* v *Citibank* [1997] AC 254, in which *Downs* was in part disapproved. Lord Steyn said at 283:

> "The second case is the decision of the Court of Appeal in *Downs v Chappell* [1997] 1 WLR 426 . The context is the rule that in an action for deceit the plaintiff is entitled to recover all his loss directly flowing from the fraudulently induced transaction. In the case of a negligent misrepresentation the rule is narrower: the recoverable loss does not extend beyond the consequences flowing from the negligent misrepresentation: see *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191. In *Downs v Chappell* [1997] 1 WLR 426, Hobhouse LJ applied this narrower rule to an

> action for deceit. He enunciated the following 'qualification' of the conventional rule, at p. 443: 'In my judgment, having determined what the plaintiffs have lost as a result of entering into the transaction—their contract with Mr. Chappell— it is still appropriate to ask the question whether that loss can properly be treated as having been caused by the defendants' torts, notwithstanding that the torts caused the plaintiffs to enter into the transaction.' That led Hobhouse LJ, at p. 444, 'to compare the loss consequent upon entering into the transaction with what would have been the position had the represented, or supposed, state of affairs actually existed.' The correctness of this proposition in a case of deceit was debated at the bar. Counsel for Citibank in whose interest it was to adopt this proposition felt some difficulty in doing so. In my view the orthodox and settled rule that the plaintiff is entitled to all losses directly flowing from the transaction caused by the deceit does not require a revision. In other words, it is not necessary in an action for deceit for the judge, after he had ascertained the loss directly flowing from the victim having entered into the transaction, to embark on a hypothetical reconstruction of what the parties would have agreed had the deceit not occurred. The rule in deceit is justified by the grounds already discussed. I would hold that on this point *Downs v Chappell* was wrongly decided."

[237] Admittedly, those comments were made in the context of a claim in deceit, not negligent misrepresentation. But the same fallacy was apparent. Where a defender negligently persuaded, by misrepresentation, a pursuer to enter into a loss-making contract, that defender had caused or materially contributed to the loss. It was not necessary in such a case to embark on a hypothetical reconstruction of what the parties would have done had the misrepresentation not occurred. That being so, the pursuer's starting point on causation was that it was persuaded, negligently, to sign a loss-making contract. That should suffice for causation.

[238] Further, and in any event, in the present case it made no difference which approach was adopted. In *Raiffeisen* itself, the judge observed that:

> "[183] In my judgment the relevance of the question – what would you have done if you had been told the truth? – depends on the circumstances and on who is asking the question and for what purpose.
>
> [184] A claimant who gives credible evidence that, if he had been told the truth (there is no celebrity next door), he would not have entered into the contract is likely to establish that if the misrepresentation had not been made he would not have contracted and that it was thus an effective cause of his doing so, since such evidence

> is likely to establish both the importance to him of what he was told and its effect on his mind".

[239] Here, the evidence was clear that if the pursuer had been told the truth (that the IMA position represented a substantial risk to the scheme) it would not have signed the contract. The misrepresentation was thus an effective cause of it doing so. *Njord Partners SMA-Seal LP* v *Astir Maritime Ltd* [2024] EWHC 1682 (Comm) showed that the representee must prove either that it would not have acted, or not in the same way, had the misrepresentation not been made. However, the identification of the appropriate counterfactual if the statement had not been made was a question of fact, and in some cases this might necessarily involve asking what would have happened if the truth had been told. That might be the case where, if the representation had not been made, the true position would have been revealed as a result of questions asked by the representee. In the present case, if there had been no letter then, on the unambiguous evidence of Mr Topham, the contract would not have been signed. Further questions would have arisen as to why no letter of comfort was forthcoming.

[240] *Loreley Financing (Jersey) No 30 Ltd* v *Credit Suisse Securities (Europe) Ltd* [2023] EWHC 2759 (Comm) reiterated that, for reliance in misrepresentation, the correct counterfactual was often that the representation was not made, but in practice, particularly for implied representations, asking what would have happened had the claimant known the truth could be a useful evidential tool. Accordingly, even on the basis of *Raiffeisen*, the point at which the truth became relevant was where, absent the misrepresentation, further enquiry or disclosure would have occurred, leading to a different outcome. That was precisely the position here.

[241] Even if one adopted *Raiffeisen* uncritically, the question was what would have happened if no letter had been sent. Mr Topham's evidence was that without the letter there would have been no contract.

[242] Causation was far simpler in relation to the case in assumption of responsibility. If there was a duty to warn then the only question was what would have happened if the warning had been given. To that question, there was, according to the evidence of Mr Topham and Mr Baddeley, only one answer: the contract would not have been signed.

[243] In conclusion, the letter of 17 May amounted to a negligent misrepresentation. It provided specific assurance on issues within the defenders' sole control. It failed to mention the one legal impediment which was known to the defenders to cause a substantial risk to the scheme. It was a half-truth. Any reasonable person in the position of the defenders would have alerted the pursuer to such a critical issue that might impact its investment. The pursuer reasonably relied on the assurance, which caused it the losses claimed. Alternatively, the defenders owed the pursuer a duty of care. In failing to warn the pursuer of the impending issues with an IMA exclusion at any point between March 2022 and February 2023, the defenders breached that duty and caused the losses claimed.

Submissions for the defenders

[244] On behalf of the defenders, senior counsel submitted that, under section 84 of the Climate Change (Scotland) Act 2009, the defenders had made provision for the introduction of a deposit return scheme in Scotland: the Deposit and Return Scheme for Scotland Regulations 2020 (SSI 2020/154) were made on 19 May 2020. The scheme was legislated for before the IMA was enacted. That Act came into force on 31 December 2020. CSL was

appointed as the scheme administrator and it entered into a contract with the pursuer to operate the scheme on 18 July 2022.

[245] The pursuer's primary case was that it contracted unaware that the full enforcement of the scheme would require an exclusion from the market access principles in the IMA. It claimed that it would not have entered into that contract, and would thus have avoided incurring substantial wasted expenditure, had the defenders told it in the letter dated 17 May 2022 that an exclusion was required. It claimed that that letter amounted to a negligent misrepresentation. The pursuer also advanced a case of breach of a duty of reasonable care, but insofar as the claimed loss stemmed from entering into the contract, it was not clear to what extent that duty was advanced independently of the terms of the letter. The pursuer further claimed that it would have mitigated its loss by pausing expenditure in implement of the contract had the defenders given it a warning, as the handling of the proposed exclusion progressed in 2022, that the grant of an exclusion was likely to be problematic. The pursuer claimed that the defenders owed it a duty of reasonable care to issue a warning. The proof was limited to issues of liability and causation. Neither complaint was well-founded in fact or law and accordingly decree of absolvitor should be pronounced. In any event, there was no evidence bearing on causation in relation to the case about mitigation of loss. The critical factual issue in dispute was reliance and it was common to both the case of misrepresentation and duty of care.

[246] The IMA regulated the internal market in the United Kingdom for goods and services. Its provisions concerning goods were relevant to the scheme. It established market access principles for goods: (a) the mutual recognition principle (sections 2 to 4); and (b) the non-discrimination principle (sections 5 to 9). In short, the market access principles precluded goods produced in one part of the United Kingdom being subject to different

relevant requirements in another part. A relevant requirement was a statutory requirement (sections 3 and 6). Applied to Scotland, the IMA did not affect Scots law imposing different requirements on goods produced in Scotland. But such requirements could not be applied to goods produced elsewhere in the UK which arrived into Scotland (sections 2(3) and 5(3)). Each principle was subject to its own specific exclusions: section 4 for the mutual recognition principle and section 9 for the non-discrimination principle. In addition, section 10 and Schedule 1 set out exclusions from the market access principles. Those exclusions might be amended by regulation by the Secretary of State: section 10(2). Such regulations were subject to the affirmative resolution procedure in the UK Parliament: section 10(8). No procedure for making such regulations was prescribed by the IMA beyond a requirement upon the Secretary of State to seek the consent of the devolved administrations: section 10(9). To date, there had been one such set of regulations: the United Kingdom Internal Market Act 2020 (Exclusion from Market Access Principles: Single-Use Plastics) Regulations 2022 (SI 2022/857). Those regulations related to the Environmental Protection (Single-use Plastic Products) (Scotland) Regulations 2021 (SSI 2021/410) and they provided the necessary exclusion from the IMA requirements for the prohibition on single-use plastic products introduced by the defenders. The temporary exclusion proposed by the UK Government on 26 May 2023 in relation to the Scottish deposit return scheme was not followed up by the enactment of any regulations under the IMA.

[247] Two questions arose in considering whether the IMA affected the scheme. Firstly, was any relevant requirement in the scheme contrary to the mutual recognition principle or the non-discrimination principle? Secondly, if so, was there any applicable exclusion in the IMA or regulations amending the Schedule to the Act? The scheme contained no labelling

requirements, being an issue raised by Jamie Delap on 4 April 2022 and by Squire Patton Boggs on 30 June 2022. Labelling was being discussed by CSL and industry, but did not constitute a relevant requirement and, therefore, gave rise to no issue under the IMA.

[248] The pursuer and defenders were not in a contractual relationship and so the pursuer's case was necessarily a delictual one. Any delictual case required to be founded upon a duty of care having been owed. It was helpful to start by asking whether the claim fell within any recognised category of liability. If it did, the principles applicable to that category of liability should be applied. Resort to the *Caparo* tripartite test, and in particular a consideration of whether a duty of care would be fair, just and reasonable arose only if the case was novel, that is to say, not within any existing category: *Poole* per Lord Reed at [64]. A public authority might owe a duty of care in circumstances where the principles applicable to private individuals would impose such a duty, unless the duty was inconsistent with the legislation from which the authority's powers or duties arose (or, in the defenders' submission, the authority's public law duties): [65]. The pursuer's duty of care case was advanced on the basis that the case was within the recognised category of liability for an assumption of responsibility. It was said that there had been an assumption of responsibility by the defenders to the pursuer. A delictual case of negligent misrepresentation causing economic loss of the kind advanced by the pursuer also came within the same category of liability: *Batchelor* at [122]. It followed that the pursuer's two grounds of action *prima facie* came within the same category of liability and fell to be determined by the legal principles applicable to assumption of responsibility.

[249] Guidance was given in *JP SPC4* at [64] on factors that had been of particular relevance to determining whether there was an assumption of responsibility in relation to a

task or service that was undertaken. The list was not expressed as being exhaustive but highlighted three factors:

> "(i) the purpose of the task or service and whether it is for the benefit of the claimant; (ii) the defendant's knowledge and whether it is or ought to be known that the claimant will be relying on the defendant's performance of the task or service with reasonable care; and (iii) the reasonableness of the claimant's reliance on the performance of the task or service by the defendant with reasonable care."

[250] The present case was closest to *Steel*. That case echoed the second and third of those three factors at [19], with the added statement that any opportunity that the claimant had to seek independent legal advice was a factor bearing on the reasonableness of reliance: [23]. The reasonableness of reliance was in fact a double requirement. Firstly, the pursuer actually had to rely on the matter in question and, secondly, he must have acted reasonably in so doing: *Caparo* at 638C-E, per Lord Oliver; and *Batchelor* at [124]. The four propositions summarised by Lord Oliver overlapped with *Steel* in that the possibility of independent inquiry would be inconsistent with liability.

[251] In *HXA* it had been observed that while assumption of responsibility could be spoken of at a high level of generality, it was helpful to sharpen the analysis by asking what it was that the defender was alleged to have assumed responsibility to use reasonable care to do: [91]. It was necessary to look at the specific duties claimed: [92]. More particularly, where the assumption of responsibility was said to derive from the making of a statement by the defender to the pursuer, the statement must contain some factual material: *Batchelor* [125].

[252] The proper interpretation of any representation was ultimately an objective matter for the court having regard to the whole circumstances. The pursuer had to show that it in fact understood the statement in the sense (so far as material) which the court ascribed to it: *Raiffeisen* at [87]. Issues of causation arose. The counterfactual in "but for" causation was

what the pursuer would have done if no representation had been made: *Raiffeisen* at [180]. It might not be sufficient for the pursuer to prove that he would have acted differently if he had known the truth because that would entitle recovery on the part of someone who gave no thought to the representation or did not understand it to have been made: *Raiffeisen* at [187].

[253] A stand-alone duty of care on the defenders to give a warning of any scope to the pursuer, arising independently of the letter of 17 May 2022, would be novel. A public body exercising statutory powers for the protection of the general public or a particular class of persons did not owe a duty of care to others whose interests might be adversely affected: *Jain* v *Trent Strategic Health Authority* [2009] UKHL 4, [2009] 1 AC 853, [2009] 2 WLR 248 at [28] and [36] – [38]. That reflected the reality that government required a latitude when deciding if, when and how to bring a new statutory scheme into operation. Such decisions were invariably made for the benefit of the general public and should not be circumscribed by private law duties in respect of the economic interests of a particular individual or business. They would invariably require a political judgment. Political and legislative judgments were not immutable: "Parliamentary government is a matter of practical politics. Parliament cannot be taken to have legislated on the assumption that the general state of affairs in which it was thought desirable and feasible to create the power to bring a new regime into effect will necessarily persist in the future.": *R* v *Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513 at 561G; see also Lord Bingham MR in the Court of Appeal at 521A. That was no less true of Holyrood and the defenders than it was of Westminster and the UK Government.

[254] Separately, the law recognised the circumstances in which a public body could and should be held to what it had said it would do. That was the doctrine of legitimate

expectations. A legitimate expectation arose, and a public authority would not be allowed to depart from it, unless it would be fair to do so, where it had made a representation that was clear, unambiguous and devoid of relevant qualification: *Re Finucane's Application for Judicial Review* [2019] UKSC 7, [2019] 3 All ER 191 at [62]. One element of the assessment of what would be fair was whether any change would frustrate any reliance which had been placed on the representation. Accordingly, as in assumption of responsibility, reliance was important. However, it could not be said that the letter of 17 May 2022 created a legitimate expectation (in the public law sense) that the deposit return scheme would commence in August 2023. The pursuer did not rely upon it so commencing. The evidence of Mr Topham was that he did not take the letter of 17 May 2022 as a guarantee that the scheme would commence in August 2023, because it was not within the defenders' control to deliver it by that date, but merely that there was legislative certainty for the scheme going ahead. In the event, the scheme remained on the statute book and was now due to commence on 1 October 2027. In other words, it had been delayed. It was clear that neither did the pursuer proceed in the belief that there would be no changes to the scheme, as it had itself subsequently sought amendments to it. In short, the 17 May 2022 letter did not give rise to a public law legitimate expectation. If the letter did not have that public law consequence it should not have the equivalent consequence in private law.

[255] Considering the reliance placed by the pursuer on the letter of 17 May 2022, when considering what a company knew and why it acted as it did, it was necessary to identify the controlling mind of the company. Depending on circumstance, the controlling mind could either be the board of directors or an individual or individuals acting under delegated authority: *Dryburgh* v *Scotts Media Tax Ltd* [2014] CSIH 45, 2014 SC 651 at [21]. In light of the evidence, there was no reason in principle to depart from that rule here: *Batchelor* at [117].

Mr Topham was unequivocal in his evidence that the decision-maker ultimately was the board. There was no suggestion in evidence that he or any other executive had delegated authority to decide whether or not the contract should be entered into or to decide whether or not the pursuer, having contracted, should continue to incur expenditure. It followed that Mr Topham's personal views when making his recommendation or recommendations to the board were neither here nor there. The appropriate questions were: what was the board told and what basis did it act upon? When Mr Topham talked about the board to which he reported, he was referring to the board of the pursuer's plc holding company. There was no evidence regarding the information actually conveyed to the pursuer, nor as to the basis on which that company acted. The furthest that Mr Topham went was that the plc board was told of the letter orally at a meeting on 18 May 2022. That evidence should not be accepted as reliable: it had no support in the contemporaneous documentation and was not mentioned in his witness statement. In any event, he did not say that the board was shown the letter nor did he say what specifically it was told about it. Even looking at matters on 18 May, and assuming that the board was told of the letter, it remained unknown what it made of the letter, if anything. More significantly, the contract was not entered into for a further two months during which there were detailed negotiations on the terms of the contract and active steps were taken to acquire financial security. It was accepted that none of the papers placed before the board made any reference to the letter and that no board minute referred to it. In short, there was no evidence that the board placed any reliance on the letter. More fundamentally, there was no evidence that the board placed any reliance on the defenders at all.

[256] Separately, and in any event, reliance upon the letter of 17 May 2022 as a guarantee as to the legislative certainty of the scheme going ahead would not have been reasonable.

Mr Topham explained that extensive due diligence had been done before recommending to the plc board that the contract with CSL should be concluded. Given the length and value of the contract, that was appropriate. He confirmed that that due diligence included assessing the regulatory landscape. Any competent review of the regulatory landscape ought to have identified the likely interaction between the 2020 Regulations and the IMA. It was clear that other stakeholders had identified the potential issue, and Mr Topham's evidence was that he had had lots of discussions with stakeholders. Legal advice was readily available, and it was admitted that the pursuer was in receipt of independent legal advice. As well as in-house general counsel, an external firm of international lawyers was retained and advised on the contract. Reliance for understanding the legal landscape ought reasonably to be placed upon the employed or retained lawyers. The pursuer's position was tantamount to arguing that it was absolved from understanding the law because of what was not said in the letter of 17 May 2022; indeed, Mr Topham's evidence was that he did not think it was for the pursuer to consider the legislation given the terms of the letter.

[257] Further, the 17 May 2022 letter ought reasonably to have been understood in the context of the defenders' general public law obligations. The scheme was a general measure introduced for a particular purpose, namely to promote or secure an increase in recycling: section 84(6) of the 2009 Act. The defenders could not properly act for the benefit of a private commercial entity in that context. The reasonableness of any reliance had to be placed in the context of political reality. Between the making of the 2020 Regulations and the decision to delay the August 2023 commencement date there were three UK Prime Ministers, two Scottish First Ministers, and a Scottish General Election. The IMA was also passed after the 2020 Regulations. All of that illustrated how practical politics could change and with it the feasibility of bringing a new statutory scheme into effect. That was all part of

the context in which the 17 May 2022 letter fell to be considered. Any claimed reliance upon the letter should also be placed in the context of an unwillingness to rely upon the First Minister's previous letter to scheme stakeholders generally, which contained substantially the same assurance about the defenders' commitment to the scheme. On the pursuer's case, an assurance from the First Minister was insufficient but an assurance from a non-Cabinet level minister, of the junior coalition partner, was decisive. Reliance was a condition of liability not only in relation to misrepresentation but also in relation to the existence of a wider duty of care. In the absence of any evidence of reliance on the part of the pursuer, the action had to fail on both grounds.

[258] It was not relevant to ask if the pursuer would have acted differently had it known the true position that a scheme-specific IMA exclusion was required and had not been sought. That would be contrary to the proposition in *Raiffeisen* at [187]. It would be finding the pursuer entitled to damages when it gave no thought to the representation that had been made.

[259] The absence of evidence of reliance on the part of the pursuer could not be overcome by inferential reasoning. It reflected the underlying reality. Mr Topham was quite precise in his witness statement and did not suggest anything different in his oral evidence. He said only that the letter was influential for him in the formulation of his recommendation to the board. That was exclusively personal to him. What is more, he framed only the first recommendation to the board for its meeting on 8 July 2022 at which a decision to contract was deferred pending confirmation of insurance and the producer advance fee agreements. The second recommendation, which lead to the decision to enter into the contract, came from another board member, the CFO Mr Pike. The latter's opinion and assessment mattered. Mr Topham maintained that Mr Pike had been sceptical, very reluctant and not

confident in where matters were going, but that by the dates of the respective recommendations he was supportive too. There was no evidence whatsoever of the considerations which influenced Mr Pike. No mention was made of the letter in either recommendation. Whatever Mr Topham's personal thought process may have been, there was no evidence that the letter even subliminally featured in the final decision by the pursuer to contract. Further, there was incontrovertible evidence relating to Mr Pike's attitude. Email communications between Mr Topham and Mr Pike on 17 May 2022 indicated that the latter plainly viewed the letter as an irrelevance. He was insistent that the pursuer adhere to its existing line that financial security was required.

[260] The terms of the contract ultimately entered into positively anticipated delay due to a variety of factors including legislative change. The pursuer drafted a contract that allowed for delay, including delay brought about by the defenders through primary or secondary legislation. The contract even gave the pursuer the option of termination in the event that that delay was of a duration that was unacceptable to it, the option opening if the delay exceeded one year. That strategy was insisted upon by the plc board on 8 July 2022 The contract would be authorised only if financial security was obtained, and it was. The board was alert to the fact that it was carrying a residual risk of about £45 million and was expressly aware of the risk of political change. The pursuer did not proceed on the basis that there was a rock-solid assurance that the scheme would proceed as proposed because it knew that that depended on factors outside the control of the defenders, not least the level of preparation on the part of CSL. As at the date of the letter that was obvious, because there were no contracts in place for the required logistics infrastructure or IT system in addition to the other material matters, such as VAT, that the defenders were progressing. The contract was only entered into when an insurance policy was obtained covering (1) legislative repeal

and (2) legislative delay to launch beyond 16 November 2023. The scheme was not cancelled. It was delayed by the Deposit and Return Scheme for Scotland Amendment Regulations 2023 (SSI 2023/201) made on 29 June 2023. The insurance policy applied. A foreseen contingency occurred, a mitigation measure had been put in place, and it operated.

[261] Mr Topham's evidence advanced varying suggestions as to the meaning he had placed on the letter, but ultimately he seemed to say that he understood from it that the relevant legislation had been passed by a competent authority that had the power to implement it, that there was no uncertainty whatsoever about it going ahead, but that the pursuer would still need protections against the risks if it went ahead late. There is no reference to such an understanding in any of the contemporaneous documents. Plainly the pursuer did not act on the basis that there was no uncertainty whatsoever about the scheme going ahead, because it insured against that very contingency. The interpretation that best reflected the words used in the letter and the context in which it was written (a concern about delay or cancellation) was that it amounted to a political commitment from the minister that she was dedicated to the commencement date in August. Construed as a statement of political commitment, the letter was true. In any event, a statement of intention (political or otherwise) was not factual and would only be actionable if the author had no intention whatsoever of acting in the manner stated. That was not alleged here. There was no misrepresentation in the letter.

[262] At the core of the pursuer's case was the proposition that the defenders were under a duty to provide it with legal advice about the relationship between an Act of Parliament and a set of Scottish regulations. It was not the role of government to provide commercial entities (or anyone else) with legal advice. The evidence indicated that the pursuer did not in fact rely on the letter dated 17 May 2022 but, placing that aside, it was necessary to

consider whether it was reasonable for the pursuer to rely on the defenders to volunteer legal advice to it. The evidence revealed a number of reasons why it was not. First, the pursuer was an experienced commercial entity. It benefitted from an in-house environmental and regulatory team, a general counsel, and external advisers. On that basis alone, it was unreasonable for the pursuer to rely on a government to provide it with legal advice. The evidence did not assist with understanding what legal advice the pursuer in fact received in relation to the IMA, or other legislative risks. Mr Topham's evidence was that the pursuer undertook extensive due diligence and assessed the regulatory landscape before signing the contract with CSL. He did not recall the pursuer instructing its solicitors to look at the basis of the legislation broadly. No evidence was led about the extent to which the pursuer took legal advice on the legislative landscape including the IMA, nor the nature of that advice if it was sought. Absent that evidence, there was no basis to conclude that the pursuer in fact relied on the defenders rather than its own internal and external legal advisors, or that it was reasonable for it to do so. In any event, regardless of the legal advice obtained or not obtained by the pursuer, other evidence indicated that reliance on the defenders to provide legal advice was not reasonable. The IMA was a public general act. The absence of an exclusion for the scheme was there for anyone to see. Whether an exclusion was required was a more complex question, but was identified by those who applied their minds to it. The interaction of the IMA with the scheme was known about when the Internal Markets Bill was debated in Parliament. It was raised at a public meeting with Mr Harris by Fergus Ewing MSP in February 2022. It was addressed in a paper submitted to a Scottish Parliamentary Committee by Professor Armstrong in January 2022. On 4 April 2022, Jamie Delap, a representative of SIBA and a member of the scheme's SWAG, wrote to Dr Thomas in relation to risks that had previously been raised, including

the ongoing review of the compatibility with the UK Single Market Act. On 30 June 2022, a letter was issued by Squire Patton Boggs to Mr Holmes on behalf of SIBA, which had obtained its own legal advice on the IMA question around labelling. On 8 July 2022, Mr Ewan McDonald-Russell of the Scottish Retail Consortium ("SRC") emailed SEPA, copying Ms Ginny Gardner, a Scottish Government official, raising the possibility of IMA engagement. Mr Harris was also aware from some other source at some point during the first half of 2022 of the possibility that the IMA might impact the scheme in relation to labelling requirements. There was consistent evidence that the possibility of an interaction between the IMA and the scheme was being considered by those with an interest in the scheme in the first half of 2022. The potential impact of the IMA was not a matter uniquely within the knowledge of the defenders. They had no reason to think that those with an interest in the scheme were unaware of the potential impact, or that they would not seek their own legal advice on the issue in ordinary course. Mr Ferguson's briefing to Ms Slater dated 15 September 2022 noted that there had already been a number of queries from affected businesses with reference to the IMA and that at least some stakeholders understood the potential impact. The proposition that the defenders had unique knowledge of the IMA was a construct framed on the basis of hindsight. As far as the defenders were concerned, the IMA risk was in the public domain.

[263] The pursuer suggested that an email exchange amongst civil servants of 6 May 2022 regarding whether to include the IMA on the SWAG risk register indicated concealment of the IMA risk. That proposition was untenable. The originating email from Mr Delap related to a risk that was already known about and under discussion. There could be no concealment of a risk that was already identified and in the public domain. Mr Holmes responded to the effect that there was not thought to be IMA engagement in the context of

labelling (which was correct). This did not prevent SIBA from investigating further and from taking independent legal advice. That advice resulted in the letter from Squire Paton Boggs. There was no concealment of a risk. That fact that the IMA risk was not included on the SWAG risk register did not dissuade those external to the defenders investigating the risks posed by the IMA by whatever means they saw fit. At that stage, officials could not have confirmed the defenders' position one way or another on the need for an IMA exclusion. Officials were yet to advise the Minister that an exclusion was definitely required and should be sought. The Minister had yet to provide that instruction. Officials could not publicly endorse the defenders' assessment in relation to the need for an IMA exclusion without knowing what their position would be. The Squire Paton Boggs letter further noted the role of the Competition and Markets Authority in relation to the IMA (cf. Part 4 of the IMA) and the possibility of advice relating to the scheme proposals. That indicated two things. First, there existed a further source of possible advice relating to the impact of the IMA on the scheme. Second, that a law firm with no information other than that in the public domain was able to give a sophisticated degree of consideration to the IMA issue. The defenders maintained that it would have been reasonable for the pursuer (or its advisers) to give consideration to the relevant legislation when deciding whether to enter into the contract with CSL, particularly when it was, on its own evidence, concerned about legislative risk.

[264] The pursuer had been in discussions about becoming CSL's logistics partner since at least late 2021. It became the preferred bidder on 15 November 2021. It signed a letter of intent on 24 January 2022. It would be surprising (and not reasonable) if the letter of 17 May 2022 was the source of confirmation of the status of the legislation. That conclusion was reinforced when it was recalled that (a) the pursuer was unwilling to rely upon the First

Minister's letter to stakeholders; and (b) that the letter of 17 May 2022 was, in Mr Topham's words, unsolicited. The pursuer was aware that the transaction it was entering into involved risk relating to the legislative landscape. It was not reasonable for the pursuer to construe the letter dated 17 May 2022 as providing advice in relation to the status of the legislation. Even if that was how in fact it was construed, it was not reasonable for the pursuer to rely on it for that purpose. Given the costs being outlaid, it would have been reasonable for the pursuer to seek legal advice on the legislative framework surrounding the scheme. The potential for interaction with the IMA was there to be seen, and was in fact seen by others.

[265] In relation to the defenders' compliance with the process for seeking an IMA exclusion, the draft Common Frameworks: Resources and Waste Framework Outline Agreement applied to the scheme and was the only document setting out the procedure during 2021 and 2022. In December 2022, that draft was superseded by the Resources and Waste Provisional Common Framework Outline Agreement and Concordat as approved by Parliament. Both the draft and final Common Framework Agreement contained four stages of engagement at official level (to discuss issues around divergence) before the proposed exclusion would be passed for ministerial decision. This process was followed in relation to the scheme. A broad exclusion was proposed under the Common Framework Agreement in 2021. On 8 March 2022 the UK Government agreed to an exclusion relating to single-use plastics. At this stage, the defenders were aware that a scheme-specific exclusion would probably be required. That expectation was confirmed in written advice to Ms Slater on 15 September 2022. Between March and September 2022, the single-use plastics exclusion had not yet been finalised and legislated for, and the UK Government did not have an appetite to work on another exclusion until that process was complete. The Resource and Waste Common Framework had not yet been finalised. The UK Government had not yet

confirmed its final scheme design. The nature and extent of divergence was not yet known. There was political change over the summer of 2022. Boris Johnston confirmed his intention to resign as Prime Minister in July 2022 and was replaced by Liz Truss in September 2022. Her brief administration was replaced the following month by Rishi Sunak's government. There were three DEFRA ministers during that time and similar turnover in Treasury and business ministers. UK Government officials asked their Scottish counterparts to wait for stability before discussions about the IMA and other policy issues such as VAT were advanced. The process for seeking a specific exclusion for the scheme began on 4 October 2022. In December 2022, the defenders submitted a paper relating to the proposed scheme exclusion to the Common Framework Working Group. The paper was discussed at a Working Group meeting on 19 December 2022. Further information was requested and it was agreed that the paper would be worked on collaboratively. Engagement among officials continued. On 13 February 2023, a revised paper was submitted for discussion at the Resources and Waste Working Group where it was agreed that the next stage would be discussion at the Senior Officials Programme Board ("SOPB") meeting on 22 February 2023. Officials agreed to seek the views of their respective Ministers before the inter-ministerial group meeting on 6 March 2023. At the SOPB meeting on 22 February 2023 two things happened. First, DEFRA officials confirmed that nothing more was needed from the defenders at that time on the case for an exclusion. Second, it was recorded that the issue would go to the inter-ministerial group and to the DEFRA Secretary of State to outline her support in principle. This marked the end of stages one to four of the Common Framework process. At the meeting of the inter-ministerial group on 6 March 2023, DEFRA ministers acknowledged that the defenders had followed the agreed process for seeking an exclusion

to that point. It was agreed that the recommendation for an exclusion would be passed to ministers.

[266] From September 2022 through to early 2023, there was a continued expectation that a scheme-specific exclusion would be granted. Such an expectation was reasonable. The submission prepared for Ms Slater by John Ferguson on 15 September 2022 explained that although the Common Frameworks process might be challenging, it was anticipated that an exclusion should be achievable by June 2023. In her note to the First Minister dated 13 October 2022, Ms Slater recognised the potential challenges but similarly indicated that she expected a successful outcome based on the experience of the single-use plastics exclusion, and the shared policy ambitions of the UK Government. She recorded a view expressed by the UK Government that the scheme should not be affected by the IMA, during the Parliamentary passage of the IMA Bill. On 27 January 2023, Ms Slater provided an update to the First Minister highlighting two significant risks to successful delivery that were entirely dependent on a UK Government decision: the approach to VAT, and the need for an IMA exclusion. Nevertheless, the UK Government consultation response published on 29 January 2023 provided confidence that divergence, even on materials, could be managed. It also appeared from the Common Framework process that DEFRA ministers were supportive of an exemption. In February 2022, Mr Harris discussed the implications of the IMA with his colleagues (the matter having been raised during a public meeting). They reached the conclusion that the IMA had no impact on the legality or enforceability of the scheme regulations. Mr Harris became more concerned about the impact of the IMA in early 2023 when he became aware of an opinion prepared by Aidan O'Neill KC. At that stage, CSL sought legal advice and understood that while there was a procedural requirement under the IMA related to cross-border trade, it was likely to be a minor

administrative matter. Even after the scheme became a matter of increasing public controversy during the first quarter of 2023, Mr Harris understood (on the basis of legal advice) that a carve-out had been achieved for single-use plastics and that the scheme could proceed through a similar process. On 28 March 2023, he gave evidence to the Net Zero, Energy and Transport Committee of the Scottish Parliament. In response to a question about how well prepared CSL was for launch in August 2023, he did not indicate that a significant impediment had arisen because of the IMA. He informed the committee that he had received legal advice that the risk to the scheme was low and that what should have been a low-key procedural matter had become intensely politicised. That accorded with the evidence of the defenders' witnesses, in particular Ms Slater, that the IMA exclusion was thought to be a matter which could be resolved up until there was a change in the political landscape in the spring of 2023. The UK Government decision letter on its proposed exclusion for the scheme was issued on 26 May 2023.

[267] The pursuer's case proceeded on the basis that it had sought assurances as to the deliverability of the scheme prior to entering into the contract, received an incorrect assurance from the defenders in the letter of 17 May 2022 and relied upon that in deciding to enter into the contract. The evidence contradicted that case. The pursuer did not request the letter. It was unsolicited. It did not give an assurance as to deliverability and the pursuer itself had doubts, as late as the end of June 2022, that commencement on 16 August 2023 was deliverable. The decision to enter into the contract was taken by the plc board. The height of the evidence was that the board was told of the letter on 18 May 2022 but there was no evidence of what the board was told. There was no evidence of what the board understood by the letter. In any event, there were negotiations on the terms of the contract over the ensuing two months. The final recommendations to the board in July 2022 made no mention

of the letter. Those who negotiated the contract and made the recommendations to the board were actively concerned about the possibility of delay and put in place a range of mitigations. These included a floating commencement date and a longstop date giving the pursuer the right to terminate and other remedies if the scheme had not come into operation by 16 August 2023. The pursuer took out insurance from specialist insurers to cover cancellation, delay and the removal of CSL. There was an insistence in producer advance payment agreements to meet the risk of delay in the scheme being fully operational. The board only authorised the pursuer to contract when these mitigations were in place.

[268] On one view the sending of the letter by the defender to the pursuer created the necessary nexus between them so as to create a duty of care, but that was simplistic. The guidance in authority was that assumption of responsibility should be approached in a structured way by considering the purpose of the task or service and whether it was for the benefit of the claimant; the defendant's knowledge and whether it was or ought to have been known that the claimant would be relying on the defendant's performance of the task or service with reasonable care; and the reasonableness of the claimant's reliance on the performance of the task or service by the defendant with reasonable care: *JP SPC4*. The nature of the task was important and could itself lead to the necessary inference that the defender knew that the pursuer would rely on what was said. The obvious example would be if the defender knew that the pursuer had concerns on specific matters and was asked by the pursuer to respond. The defender could respond or not. If the defender chose to make a statement relative to those concerns, the nature of the task being undertaken by the defender was providing a response to the concerns raised. If the response was communicated to the pursuer the expectation would be that it might be relied upon, though even that would be dependent on the terms of the response. Here the facts were different. The pursuer did not

request the letter. While the defenders knew what the pursuer's concerns were and chose to respond, there was a question about expectations on both sides, that is to say, by the pursuer and the defenders. Ms Slater was repeatedly asked whether the letter was issued with intent to persuade the pursuer to enter into the contract. Plainly a letter written with that intent would be one that would be likely to create a duty of care. However, Ms Slater would not accept that proposition for the very pragmatic reason that she doubted how persuasive the letter would be. There was good objective reason to accept her evidence. Not least, as a matter of fact, it was not persuasive. So far as it commented on the defenders' commitment to the scheme, it was in materially the same terms as the letter issued by the First Minister to stakeholders generally. That letter did not provide the pursuer with sufficient comfort. Even on the day that it was sent it left Mr Pike unmoved. Mr Topham continued to have concern about the deliverability of the commencement date and he acted accordingly. If reason was needed for the omission of the letter from the recommendations to the board of the plc in July 2023, it could easily be inferred that it was not mentioned because it was of no persuasive value at all.

[269] In truth, the nature of the task being undertaken by the defenders was to provide a political statement of intent, true at the date when it was made but always susceptible to change. The issuing of a statement of political intent that was true at the date when it was made was not a task that gave rise to a duty of reasonable care precisely because it was obvious that it could change. The pursuer appreciated that the defenders' position might change and took the precaution of obtaining special contingency insurance to deal with the matter. There was also nothing underhand in the change that occurred. Between the date of the letter and the eventual decision to delay the scheme there were changes in the governments in the UK and Scotland. The new First Minister was known to have his own

view on the scheme and legislative changes were made. That was all part of the political and legislative background in which commerce had to operate. The scheme was presently in delay. It had not been cancelled. Ms Slater spoke of the political commitment of the defenders in May 2022. In the event, following the qualified decision of the UK Government on the IMA exclusion request, the political judgment changed. That was not a matter suitable for recognition of a duty of care owed by the defenders to the pursuer. That would be so as a matter of generality. More specifically it was true as between the defenders and this pursuer in relation to this particular project because the pursuer always foresaw the political risk. It insured against it. That insurance had been triggered by the events complained of. The proper conclusion was that no duty of reasonable care was owed by the defender to the pursuer relative to the letter of 17 May 2022.

[270] In reality, the case had nothing to do with the terms of the letter of 17 May 2022. The contorted attempts by Mr Topham to advance an interpretation that could give rise to liability really came down to what was omitted from the letter. Even the assertion that the letter was a half-truth came down to the same point: something was omitted. The pursuer's secondary case was that what was missing was a warning that the full enforcement of the scheme was incompatible with the IMA, and an exclusion would require to be secured. The question in law was whether there was a duty to warn but the anterior question was: a duty to warn of what? The evidence of the pursuer proceeded with hindsight. It was now known that the scheme was delayed by the qualified exclusion that the UK Government was minded to agree, but that only emerged in May 2023. The pursuer would have it that that was the only legal impediment to the scheme commencing in August 2023. The existence of a duty of care had to be judged at the date when the duty was said to have arisen. That was either 17 May 2022, when the letter was written, or 22 September 2022 when the meeting

took place amongst Ms Slater, Mr Topham and Mr Harris. Viewed at either date, the IMA was not the only impediment. The VAT issue and online take back remained live and were of concern, as was evident from the Assurance of Action Plan dated 20 October 2022. The evidence of the defenders' witnesses was that an IMA exclusion was only one matter that required work before the commencement date. Was there a duty to give a public warning or project update on all of these matters? The pursuer and others might have stalled investment had a warning been given. That would have jeopardised delivery of the scheme. It might be said that there was no duty to warn of matters that were in the public domain but that only raised the question who knew what and when. The state of knowledge of the defenders in September 2022 was to be seen in Mr Ferguson's briefing of 15 September, which recorded that a number of stakeholders already knew the potential impact of the IMA. A free-standing duty to warn was unnecessary if the pursuer succeeded in its case based on misrepresentation. It came into its own if the pursuer failed in that case, for example, because it did not rely on the letter. The relationship between the IMA and the scheme was a question of law. It concerned the application of a public general statute to a particular statutory scheme. The pursuer's case was that the letter from Ms Slater absolved it of the need to take the rudimentary precaution of checking the legal background to the transaction that it was entering into. There was nothing in the letter to remove that need. The import of the alleged duty to warn was, in reality, a claim of the existence of a duty on the part of the defenders to give legal advice to the pursuer. There was no basis in law for that.

[271] The defenders were acting under the statutory power provided by section 84 of the Climate Change (Scotland) Act 2009 to enact a scheme for the benefit of the public as a whole. In implementing that scheme they owed no duty of care to the pursuer as a party

who might be adversely affected: *Jain*. They owed no more duty of care to the pursuer than to the many other producers and retailers who were known to be spending considerable sums to make preparations to discharge their duties on the anticipated commencement date in August 2023.

[272] On proper analysis, the duty to warn case was simply a variation of the negligent misrepresentation case. Put another way, it was the letter of 17 May 2022 which created proximity. The negligent misrepresentation case was founded upon what were said to be omissions from the letter rather than on anything in it being a misrepresentation. The source of the duty to include the details omitted clearly overlapped with the supposed duty to warn. In substance, the duties were the same. There was no support in authority for a general private law duty upon government entities to warn about the potential application of existing legislation to a proposed statutory scheme. It could not be said that the defenders had some special level of control over the source of the danger (that an IMA exclusion would not be granted) or that they assumed a responsibility to protect the pursuer from that danger. Owing such a duty would be inconsistent with their public law obligations, most particularly not to fetter their discretion or to exercise it for an irrelevant purpose: cf. *JP SPC 4* at [82] – [84]; *Poole* at [76].

[273] If some sort of warning had been given about the IMA in September 2022, the height of the evidence from Mr Topham was that he would have sought legal advice. There was no evidence as to what advice the pursuer might have been given in that event and what it might have then done. The answers to those issues were not self-evident. The pursuer was by then committed to the contract with CSL. A warning about a possible IMA issue would not have been a basis on which to suspend performance under that contract. Separately, failing to fulfil the obligations under the contract would have compromised the insurance

that Biffa had obtained in terms of clause 3.1.3 of the insurance contract. Separately, the insurance would not respond if CSL took a position that the scheme should be delayed (clause 3.2.1).

[274] For all those reasons, decree of absolvitor should be pronounced.

Decision

[275] It is important to note at the outset that the court is not concerned with the question of who (if anyone) ought to be regarded as bearing political responsibility for the failure of the Scottish deposit return scheme to launch in August 2023. Rather, it is only concerned with the legal questions of whether the defenders owed a duty of care to the pursuer in either of the regards contended for, and, if so, whether any such duty was breached and loss was thereby caused to the pursuer. It follows that the matters of law and fact which are truly relevant to the decisions that require to be made form only a limited subset of the wide range of issues dealt with in the evidence led and in the (at times somewhat diffuse) submissions made. The actual issues in the case, once identified, are not particularly difficult to resolve.

[276] Further, a duty of care is only alleged to exist in relation to the question of whether the defenders were obliged to provide the pursuer with certain information, and in relation to the fullness and accuracy of such communication as was made by them to it. Although some criticism was made of the defenders in other respects, for example the timing of the making of their request for an exclusion to cover the deposit return scheme under the IMA, and the manner in which that request was made and progressed, these matters are relied upon only to the extent that they are said to give content to the nature of the defenders' duty

to inform the pursuer of various things, and are not in themselves said to amount to breaches of any duty owed.

[277] When the relevance of this case was initially debated (see [2025] CSOH 9) the defenders sought to argue that at least some elements of the pursuer's claim were not justiciable; in other words, not capable of being the proper object of judicial decision by this court. That position is no longer insisted upon, and it is accepted, in accordance with *Poole*, that a public authority such as the defenders has no blanket immunity from suit in the respects of which complaint is made but that it is, rather, susceptible in principle to being sued in the same circumstances in which a private entity might be sued for the same kind of action or inaction. That general proposition is subject to two qualifications; firstly, the status of the public authority as such and its consequent role in the facts under examination may be matters capable of affecting the incidence and nature of any duty of care, and secondly, the existence of a particular duty may be inconsistent, either more or less subtly, with the proper exercise of its public functions, which ought to prevail. These are matters dealt with in this opinion in the particular contexts in which they arise. It might also usefully be noted at the outset that a public authority is under no general duty to exercise its public functions so as to save others from harm, especially economic harm, and that that is why the pursuer has sought to deploy the concept of an assumption of responsibility to protect it from the loss it suffered as the basis for both elements of its case.

[278] I considered that all of the witnesses whom I heard were doing their best to give a true and accurate account of the facts to which they spoke, and by and large succeeded. There is a particular issue about Mr Topham's reliability (but not credibility) in relation to what he understood from the letter sent to him on 17 May 2022, which I address below. The two politicians who gave evidence, Lord Jack and Ms Slater, appeared to me to be truthful in

relation to the matters of fact to which they spoke and to be recounting in good faith what they thought about the matters of opinion about which they were asked to speak.

Letter of 17 May 2022

[279] The primary way in which the pursuer presents its case is to claim that the defenders made a negligent misrepresentation to it in the letter sent by Ms Slater to Mr Topham on 17 May 2022. Given the centrality of that letter to the pursuer's case, it is appropriate to set out its text in full:

> "Dear Mr Topham
>
> Scotland's Deposit Return Scheme
>
> I understand from Circularity Scotland Ltd (CSL) that Biffa has been selected as their preferred partner to deliver operations and logistics services for Scotland's Deposit Return Scheme (DRS). I believe that CSL has shared with you a letter from the First Minister of Scotland emphasising our commitment to DRS and support for CSL. I wanted to follow this up by providing some more detail about CSL's status as scheme administrator; some of this may already be familiar to you but hopefully the letter will provide you with some helpful reassurance on this subject.
>
> I would also reinforce the First Minister's comments about our commitment to delivering DRS by 16 August 2023, which remains unwavering. As well as our own commitment, I would note that the Scottish Parliament has now voted on two occasions to put DRS in place and that it is a popular scheme with the public.
>
> CSL's overwhelming support from across producer and retail sectors (representing over 90% of each by volume) means that they are uniquely placed to act as scheme administrator. As you will be aware, as the scheme administrator, CSL will be responsible for ensuring that producer obligations under DRS are met, including registration obligations, collection obligations, and payments of deposits.
>
> Under the Deposit and Return Scheme for Scotland Regulations 2020, an application to act as a scheme administrator must be submitted for approval to the Scottish Ministers; nobody can be a scheme administrator without such approval. To obtain approval, an applicant must demonstrate that the scheme is likely to subsist for a period of at least five years, in addition to submittingan operational plan, and any other information requested by the Scottish Ministers.

In its application CSL was able to demonstrate that it would be in a position to subsist for at least five years while delivering on behalf of producers the significant obligation to collect billions of containers a year on a regular basis from tens of thousands of return points across Scotland and manage hundreds of millions of pounds' worth of deposits every year. Having met the requirements in the Regulations, the Scottish Ministers granted CSL approval as scheme administrator on 24 March 2021.

CSL's approval as scheme administrator is not time-limited and the Scottish Ministers could only consider the withdrawal of that approval in the narrow set of circumstances set out in regulation 17(1), which include, amongst others, the commission of an offence under the Regulations, or the supply of false information in the application process. The only circumstance where the Scottish Ministers would be required to withdraw approval is if CSL were itself to choose to withdraw from acting as a scheme administrator. In the absence of the circumstances outlined in regulation 17(1), the Scottish Ministers have no power to consider withdrawal of CSL's approval. In the event that the Scottish Ministers were to consider such a withdrawal, there is a detailed process set out in regulation 17 which allows CSL to make representations to the Scottish Ministers, and the Regulations also provide for a review of any such decision to withdraw an approval.

CSL is the sole approved scheme administrator for Scotland's DRS. We have not received applications to act as scheme administrator from any other body, and to my knowledge nobody else has ever seriously considered the possibility of operating as a scheme administrator: given the economies of scale and the level of industry support for CSL, it would be an extremely onerous task for any other applicant to meet the requirements for approval under the Regulations.

With that in mind we have been working closely with CSL over the past year to help build momentum behind their work to deliver DRS. As you will be aware, our DRS will be the first in the UK, with a scheme the rest of the UK is expected to follow in the next few years. There is therefore an opportunity to build a high-performing scheme administrator that could be in a position to step up to assist in delivering the UK-wide scheme. I am encouraged that momentum is building, as demonstrated in particular by the recent announcement that CSL has secured £18m in loan funding from the Scottish National Investment Bank and Bank of Scotland.

The next significant milestone will be an announcement that CSL has signed a contract with their operations and logistics partner; I understand that you and CSL are currently in negotiations over this contract. Signing and announcing this contract would be a major vote of confidence in both CSL and DRS, and help to maintain and increase momentum towards successful delivery. I hope this letter provides reassurance on the Scottish Government's continuing commitment to DRS and I am happy to provide any further information that may assist in making a decision whether to proceed.

Kind regards"

[280] The immediate difficulty for the pursuer, as it accepts, is that the letter expressly advances no matter of fact which was untrue. The pursuer is therefore compelled to argue that the words used, in the light of the surrounding circumstances, were such as to create a false impression in the mind of a reasonable reader in its position, and having the same known characteristics, and did in fact create that impression in its corporate mind. A convenient place to begin the necessary analysis is to identify the particular false impression which is said to have been created by the letter in that mind.

[281] This raises the question of which natural person or group of such persons is said to have formed that impression and to have caused the pursuer loss by acting under it. The pursuer's answer is that Mr Topham ought to be regarded as its relevant mind for these purposes, despite the fact that the decision which ultimately caused it loss, namely to enter into the contract with CSL, was first authorised by the board of its controlling entity, Biffa plc, and presumably was then, at least in point of form, taken by its own board. Dealing with that matter first of all, it was clear (if only from his own uncontradicted evidence) that a positive attitude on the part of Mr Topham towards the proposed contract was a *sine qua non* to the agreement of the plc board to its being entered into. If he had been against the contract, it would not have been entered into. His evidence, which I accept, was that he formed an impression from the terms of the letter of 17 May which made a real and substantial contribution to his decision to recommend to the relevant board that the contract be entered into, and that without that impression there would have been no recommendation and thus no contract. I regard that as a state of affairs apt to support the conclusion that, to the extent that the letter did give rise to an impression in the mind of Mr Topham, that impression made (albeit indirectly) a contribution to the decision of the

pursuer to enter into the contract which qualifies as a sufficient causal link in law, even given the extreme penury of evidence supporting the existence of any direct influence from the letter acting on the board itself.

[282] The next task is to identify the impression which the letter in point of fact left in Mr Topham's mind. Even on his own account, that is not as easy as it might be, since at various points in his evidence he described that impression in rather different ways. The defenders in their submissions essayed, without conspicuous success, to set out and synthesise the various positions which he had from point to point espoused. Their failure stemmed from the somewhat indefinite nature of the evidence itself rather than from any deficiency in the attempt to capture its essence. However, taking that evidence at its highest for the pursuer, Mr Topham did not seek to maintain that he gained from the letter the impression that there would be no material delay in the launch of the scheme beyond the then-scheduled date of 16 August 2023. He appreciated and accepted that many factors were at that point still in play, most of which were outwith the defenders' control, which could have prevented that happening. Rather, he ultimately maintained that the impression he formed from the letter was that no legislative obstacle remained in the way of the launch of the scheme, that the defenders had done all they could be ensure that the scheme was sound in law, and that nothing further required to be done at that level to enable it to launch. That, of course, would be a view which, if justified, would greatly assist the pursuer in vindicating this branch of its case.

[283] The next question is whether it ought to be accepted that that was indeed the impression that Mr Topham formed from the terms of the letter. The defenders did not seek to allege that he (or Mr Baddeley, the other witness employed by the pursuer) had set out in their evidence positively to attempt to mislead the court on this (or any other) issue, but did

suggest, particularly given the lack of any contemporaneous or documentary evidence supporting his position, that it was one of which he had, with the benefit of what had then happened, subsequently persuaded himself rather than something that he actually thought at the material times. I accept that Mr Topham was in his evidence stating what he now believes to be true about the impression he formed at the time he received the letter of 17 May. However, it cannot be overlooked that that would have been a rather particular and strange impression to form from the words used in the letter. It is intrinsically far more likely that he read the letter – just as it was intended to be read – as providing reassurance at a fairly high level that the defenders had no intention of replacing CSL as scheme administrator and, more importantly, remained resolute in their commitment to the introduction of the scheme. If there had been some source of evidence separate from Mr Topham, either at the time the letter was sent and received, or even up to or at the time that the pursuer became aware that the IMA posed a real problem for the scheme at the end of February 2023, supporting the suggestion that it had actually been understood by him as a representation of the scheme's soundness in legislative terms, it might have been possible to conclude that he did indeed believe that, whatever the inherent likelihood or otherwise of the proposition might be. There is, however, nothing of that sort. Even taking full account of all the background circumstances set out below, that the defenders remained as at May 2022 very supportive of the scheme proceeding to launch is a different proposition, and not merely finely so, from the proposition now being suggested about the sufficiency of its legislative basis. It has not been demonstrated on a balance of probabilities that Mr Topham actually formed the impression he claims about the import of the letter either when it was received or at any time when that might have made a relevant difference to the behaviour of the pursuer.

[284] In any event, it would not suffice for Mr Topham in point of fact to have formed such an impression about the letter. One requires to return to the further and slightly different question initially identified, namely whether a reasonable person circumstanced as was the pursuer would have formed a materially false impression of what was thereby being communicated against the background circumstances. The background circumstances relied upon the pursuer as affecting the view which such a person would have taken of the import of the letter may be set out as follows:

[285] As at May 2022, the defenders were keen, indeed anxious, that the prospective logistics provider to the scheme should be bound into a relevant contract with CSL, as those services were essential to the scheme's implementation and the original target milestone for the signature of the contract, the end of March 2022, had already passed, with the new milestone fast approaching at the end of the month. The pursuer was the preferred and only candidate for logistics provider, and any need for CSL to abandon its negotiations with the pursuer and seek an alternative provider would be likely to lead to a lengthy hiatus and possibly to delay the anticipated launch of the scheme. The pursuer was reluctant to sign the contract because it would be required to make a very significant capital investment before the launch of the scheme in circumstances where cancellation or delay would probably result in that capital being lost, or in a need for extended financing. The concerns centred around the possibility of the removal of CSL as scheme administrator, the cancellation of the scheme, or material delay to its implementation. CSL approached the defenders, as it had done previously in relation to reassurance for stakeholders in general and to the insurance broker Lockton, to see whether something along the lines of a letter of comfort could be issued in order to assuage at least some of the concerns being expressed by the pursuer. The letter was not requested against the background of any assumption or

belief on the part of the pursuer that all was well with the scheme and that it would launch as then anticipated. In circumstances where an assumption or belief of some kind is entertained by a representee, is known to be so entertained by a representor, and a representation is made which does not displace that assumption or belief, it may be easier to regard the representation in question as having misled by silence. However, the pursuer was not proceeding upon any assumption or belief of the kind just mentioned; rather to the contrary. Further, the defenders were not asked to address specific questions in the letter. Where questions are asked and a direct answer to them is avoided, it may again be easier to conclude that a communication could, by accident or design, have diverted its recipient's attention from what it actually wanted to know, and created a false impression. In the present case, the defenders were, quite properly, keeping themselves at some remove from the negotiations between the pursuer and CSL. They had previously refused to involve themselves in the scheme to the extent actually wanted by the pursuer and CSL, involving guarantees or other public funding, and a letter was seen as a compromise between what was desired and what was achievable. The pursuer did not even ask for the letter, which Mr Topham described as "unsolicited", and was unaware that it was to receive it until it was informed of the fact very shortly beforehand by CSL. The terms of the letter were similar to the terms of the letters previously issued by the First Minister to scheme stakeholders generally, and by Ms Slater to Lockton.

[286] Taking all of these matters into account, I do not accept that a reasonable person could have looked at the words used in the letter and taken them either as amounting to a general statement that there was no risk that the scheme would not be proceeding and that all would be well, or to the more nuanced statement about legislative sufficiency which Mr Topham maintained that he in fact took from the words used. It is, indeed, difficult to

see how such a person could have taken that the message being conveyed was anything more than was being frankly stated. Something much more than the wishful thinking upon which the pursuer's case appears to proceed in this regard would be required, indeed something approaching the alchemy capable of transmuting base metal into gold, so far are the words used from the meaning which the pursuer requires.

[287] It was common ground between the parties that a further requirement for the pursuer to succeed in this branch of its case is that any reliance which it placed on the terms of the letter was reasonable in the circumstances. Given that the pursuer's case depends on a construction of the letter which I have held could not have been entertained by a reasonable person, any reliance which might have been placed on that construction could not have been reasonable in nature and the questions of (a) what impression could have been taken from the terms of the letter by a reasonable person and (b) what could reasonably have been done in reliance on its terms, become in effect different ways of expressing the same enquiry.

[288] I have so far set out the reasons why the pursuer's case based on the letter fails in practical terms. In terms of a more legalistic analysis, I accept that the defenders had relevant special knowledge (ie their intentions with regard to CSL as scheme administrator and its general attitude towards the scheme) capable of giving rise to the requisite special relationship in law when they decided to deploy that knowledge in writing the letter of 17 May, and that they thereby assumed responsibility to the pursuer to state those matters with reasonable care. It was reasonable for the pursuer, as the person to whom the letter was addressed, to rely on the terms of the letter as properly construed. Such reliance would have been eminently foreseeable to the defenders when they decided to write the letter. However, the defenders did not breach the duty incumbent on them. The matters which they stated in the letter were true and accurate. A reasonable person could not have

believed from its terms (and Mr Topham, and through him the pursuer, did not in point of fact believe) that any assurance as to the legislative sufficiency of the scheme had been given, nor that any general assurance that all would be well with the scheme had been provided. It would not have been reasonable for a person to rely on those constructions (and the pursuer did not in fact rely on them) in conducting its business. The pursuer's case based on negligent misrepresentation in the letter fails in fact and law.

[289] In these circumstances it is not necessary or desirable to address the more controversial elements of the decision in *Raiffeisen*. At [153] of his judgment, Christopher Clarke J observed, citing *inter alia Dadourian* at [99] and [100] as follows:

> "[153] The authorities establish the following:
>
> (a) A claimant who seeks to claim damages for misrepresentation must show that the representation in question played a real and substantial part in inducing him to enter into the contract in question;
> (b) But it is not necessary for him to prove that the representation was the sole inducement to his decision or that it played a decisive part;
> (c) It is not, however, sufficient for him to show merely that he was supported or encouraged in reaching his decision by the representation in question."

[290] I do not consider that any of those propositions is seriously in doubt as part of the law of Scotland. His Lordship at [162] went on to point out that these formulations involved certain ambiguities and that it was necessary to remember that the representation in issue must play a causative part in inducing the contract, involving "but for" causation. In other words, in order to establish that any particular representation was a real and substantial cause it was necessary to show that but for such representation the claimant would not have entered into the contract on the terms on which he did, even though there were other matters but for which he would not have done so either [170]. Again, none of these observations seems controversial to me. There then follow various remarks about the relevancy of what the representee would have done had the misrepresentation not been

made and the general irrelevancy of what he would have done had he been told the "truth" about the matter being examined and the difficulties which arise if the truth would have had an effect on his actions, notwithstanding that there was no duty on the representor to say anything at all about it. It is not necessary to embark upon an examination of any of those remarks for present purposes. Mr Topham's evidence was that what he regarded as the misrepresentation made to the pursuer caused it in the relevant sense to enter into the contract with CSL. That evidence would, if there had indeed been a misrepresentation, have sufficed to establish "but for" causation. He also indicated that, had the pursuer positively been told about the unresolved IMA issue, it would not without more have entered into the contract either. That evidence (which I accept) means that the potential difficulties canvassed in *Raiffeisen* would not have arisen on the facts of this case. However, since I have held (amongst other things) that there was in fact no misrepresentation at all, the whole issue of reliance on any misrepresentation simply does not arise for consideration.

Duty of Care to Disclose

[291] I turn to that part of the pursuer's case based on a claimed duty in delict on the part of the defenders positively to disclose to it the fact that an exclusion under the IMA was required for the scheme to work as intended, along with whether a request for an exclusion had been made and the stage it had reached. The law on the existence of a duty of care in delict to protect others from suffering economic loss has been extensively developed and refined over decades in order to attempt to strike a fair balance amongst the various interests engaged, and has, at least for now, arrived at a relatively stable position, as demonstrated by the various authorities cited to me. As matters presently stand, the concept of an "assumption of responsibility" has emerged out of the initial notion of a "special

relationship" figured in *Hedley Byrne* to become the principal means of describing and explaining the circumstances in which a duty of care to protect another against pure economic loss may be recognised in law, with the possibility of what is "fair, just and reasonable" performing a residual and interstitial role in cases not capable of being fitted within that concept but which are nonetheless thought appropriate to warrant the recognition of a duty of care. It is not, however, necessary in the present case to consider what might be "fair, just and reasonable" in the circumstances, since the pursuer adamantly and repeatedly maintained that its case fell squarely within the concept of assumption of responsibility as presently recognised in law (albeit it might represent the application of that principle to an unfamiliar set of circumstances), and that no recourse to any other means of recognising the existence of a duty of care was required. I accordingly proceed on that basis, which is that on which the parties prepared and presented their evidence and submissions.

[292] The notion of assumption of responsibility does not require that the defenders ought subjectively to have appreciated that they were assuming a responsibility towards anyone carefully to carry out a task or to provide information. The question is whether a reasonable observer of what the defenders did in the circumstances which pertained would objectively have concluded that such an assumption had taken place. It must not be overlooked, however, that the objective conclusion that there was an assumption of responsibility, though it may to some extent be an approximation of the essence of that which is being searched for, must find some reasonably realistic foundation in the facts of the case; it is not a label that can be attached to a set of circumstances merely because the existence of a duty of care might be thought to be appropriate on some other theory of what the right thing to do would be. Nor does a decision that there was at least some assumption of responsibility on the facts of a case entail that that assumption extends to all matters for which the

defender in question might conceivably have made such an assumption; the precise extent of the assumption must be ascertained by the application of the same objective principles as are used to discern its existence in the first place (*HXA*). There may also be cases where the scope of the duty created by an assumption of responsibility does not extend to the kind of loss in fact suffered by the pursuer, although no such issue arises in this case.

[293] Previous authorities have dealt with sets of circumstances which may assist in the conclusion that an assumption of responsibility took place, although none has attempted an exhaustive definition and it may well be that such a definition cannot sensibly be constructed. Moreover, the key features of a case which have rendered it one in which an assumption of responsibility has in the past been recognised may not play such a significant role in other cases where the context in which those features appear is different. The voluntary deployment of some special skill, private knowledge or privileged position for the benefit of another has, however, long been recognised as a factor which is at least very likely to have to have been present if the conclusion that an assumption of responsibility should be deemed to have taken place is to be made (*Spring*; *White* v *Jones*).

[294] The pursuer maintains that its participation as logistics provider to the scheme was, at least by May 2022, central to its timely launch. For the reasons already mentioned, that must be accepted. It maintains that the defenders were aware, in general terms at least, of its concerns about the risks posed to it by the need for advance capital investment to enable it to perform its functions under the proposed contract with CSL, and that it was foreseeable that the collapse of the scheme, or material delay to its implementation, was (depending on its exact nature) liable to cause potentially serious loss to the pursuer. Again, that emerges fairly clearly from the evidence. It also points out, correctly, that the defenders had some special knowledge about various matters relevant to the scheme, in particular whether a

request for an exclusion from the IMA had been requested and the stage of processing any such request had reached. It also notes that the defenders voluntarily chose to involve themselves in the events leading up to the pursuer contracting with CSL, most notably by writing the letter of 17 May. The pursuer also argues that the purpose of the letter of 17 May was to persuade it to enter into the CSL contract, and that it was a party particularly vulnerable to any failure, or material delay in implementation, of the scheme.

[295] On the other side of the coin, it may be observed that the participation of entities other than the defender (such as CSL, an IT provider and obliged producers themselves) was equally important to the scheme, so that the importance of the pursuer was not unique. The defenders were not themselves proposing to be a party to any contract with the pursuer, and had indeed made it clear that they were not interested in providing public money or guarantees to anyone participating in the operation of the scheme. They had the public interest to protect and consider, including what consequences the disclosure of private information might have to the future of the scheme, and were not simply concerned with whatever private interests might become engaged. The structure of the scheme placed responsibility for complying with the statutory requirements it imposed on producers of material falling within its scope. That they had, by and large, chosen to seek to discharge those responsibilities by creating and financing CSL, and that CSL in turn chose to seek to engage a separate logistics provider in the form of the pursuer, were not matters instigated by the defenders, and CSL was in no sense their emanation or arm's length agency. Although the letter of 17 May was certainly intended to try to influence the pursuer's decision as to whether or not to enter into the CSL contract, the proposition that it was intended to persuade it to do so, like many aspects of its case, is pitched just a little more highly than the reality justifies, which is that the letter presented the pursuer with certain

information which it might or might not find useful in making its decision. Likewise, the presentation of the pursuer as vulnerable in the period leading up to the conclusion of the CSL contract, while true as far as it goes, is not quite the whole truth; it was a very experienced commercial operator which was well able to protect its own interests robustly, and was negotiating – with various safeguards – a contract which certainly posed risks but also brought with it the prospect of very substantial financial rewards. Nor do I accept as entirely accurate the pursuer's characterisation of what happened in relation to the matters raised in the Delap letter as being that the defenders deliberately sought to conceal the IMA issue from it or from the public at large. The Delap letter indicated that members of the SWAG were aware of an issue arising out of the IMA in some respect or other. Although the pursuer was not a member of the SWAG, any such member could have told it about, or publicised, the perceived issue, and the whole episode is more accurately regarded as one of uncertainty as to what the defenders' position then was, and what they should formally say to the members of the SWAG standing a background threat of litigation from one of its members for other reasons, resulting in a decision to say nothing until that risk receded.

[296] In the present case, the defenders did have private knowledge about various matters pertinent to the scheme. That included, as already mentioned, their intentions in relation to the continuation of CSL as the scheme administrator (although, as the letter points out, there was not much to be done about it even if they were to take against CSL) and their ongoing commitment to the policy embodied in the scheme. It also extended to whether or not a request for an exclusion under the IMA had been made and the state of the processing of that request from time to time. That latter knowledge was shared by the UK Government. The fact that the IMA might impact on the anticipated operation of the scheme was not known only to the two governments involved, although the precise nature and extent of that

impact was not well-understood by anyone, and the fact that there was no statutory instrument providing an exclusion for the scheme was a matter of public knowledge at all material times.

[297] All of that, however, while it might be relevant to inform the answer to the question of whether it would be fair, just and reasonable to recognise the existence of a duty of care on the part of the defenders (and would by no means necessarily call for a positive answer to that question) tends to distract attention from the issue which arises in a case squarely based on a claim of assumption of responsibility, namely what, if anything, was it that the defenders chose to do to involve themselves in the question of whether the pursuer should enter into the proposed contract with CSL, so as to warrant the conclusion that they assumed responsibility for the accuracy of some information provided or for the care with which some task had been undertaken, and if there was such an assumption of responsibility, to what lengths did it extend?

[298] It has already been noted that the sending of the letter on 17 May 2022 was a voluntary act on the part of the defenders which involved them in the pursuer's decision as to whether to enter into the contract with CSL, that that involved the statement of something involving knowledge particular to the defenders, and that the pursuer's reliance on what was said was both foreseeable and (so far as it did not extend beyond the true import of the letter) reasonable. These circumstances undoubtedly gave rise in law to an assumption of responsibility on the part of the defenders that reasonable care had been taken in the statement of the matters of private knowledge contained in the letter. However, they do not support the suggestion that the defenders were thereby undertaking a wider responsibility that the pursuer had been or would be provided with such information, whether private or otherwise, as it might reasonably require in order to decide whether or not to enter into the

contract with CSL. Indeed, the last sentence of the letter indicates that if the pursuer wanted any further information on that subject, it should ask for it. If further such enquiries had been made, and responded to, then it is likely that the defenders would be regarded as having assumed responsibility for the truth and accuracy of what they then chose to say, at least insofar as it concerned knowledge private to them. However, no such enquiries were made and no further information was provided.

[299] I note again that the question is not whether the defenders should in some sense have undertaken a wider responsibility to the pursuer, but whether, objectively viewed, they did do so. So viewed, they did not. The nexus or proximity between the parties, created by the defenders' choice to issue the letter of 17 May in the terms in which it was written, did not – objectively viewed – extend beyond those terms. I have already indicated the proper construction which falls to be put on those terms, which simply do not reach the extent for which the pursuer contends. There was no implicit promise that the defenders would take care to protect the pursuer more generally in the provision of information which might reasonably be thought relevant to the decision it had in hand.

[300] I do not overlook that letters had previously been written to stakeholders in the scheme generally (by the First Minister) and to Lockton (by Ms Slater). Those letters were not addressed to the pursuer and were not sent in the context of its decision as to whether to enter into the contract with CSL, materially reducing the prospect of reasonably foreseeable reliance on them for that purpose. In any event, their material terms closely resemble those of the letter of 17 May and do not provide any greater basis for a more general assumption of responsibility by the defenders than did it. There was also a meeting between Ms Slater and the pursuer in September 2022, but there is no suggestion that any private information was provided by the defenders to the pursuer at that stage or that it concerned in any way

the pursuer's contract with CSL; the meeting principally dealt with a request by the pursuer for a reduction in the number of container return points which it would have to service, to which the defenders acceded. The contract with CSL had already been signed and the defender was contractually committed to the expenditure which constituted its loss. The evidence at proof established that, had it been told in September 2022 that there was a need for an IMA exclusion which had not been granted, it would have sought advice from its solicitors as to what it could do about that situation, but there was no evidence as to what advice it would have received and what action it would have taken in response to that advice. It is somewhat less than obvious that it would have been properly advised that it was lawful to suspend the due performance of the contract because of a claimed misrepresentation or failure to disclose a material matter on the part of a stranger to that contract. The pursuer attempted to argue that that lacuna in its case concerned only the quantum of its losses, a matter excluded from the scope of the proof which was heard, but any assessment of such losses could only occur if the pursuer had, by way of that proof, shown that it had indeed suffered some loss in consequence of a breach of duty on the part of the defenders. It has not shown that there was any breach of duty arising out of events after the contract was signed, nor – even if there was – that any such breach more probably than not caused it any loss at all.

[301] The conclusion that the defenders owed no duty of care to the pursuer to the extent that it claims makes it unnecessary to deal at length with the various other issues which would have arisen had I determined that such a duty existed. Had the defenders assumed a more general responsibility of the kind for which the pursuer contended, then I do not consider that it would in point of law have extended to the disclosure of matters in the public domain (not being matters of special or private knowledge on the part of the

defenders), and thus would not have required them to tell the pursuer that the IMA posed a risk to the implementation of the scheme as envisaged or that no statutory instrument providing an appropriate exclusion was in force, which were both matters capable of being established by anyone who chose to look into them. Rather, it would have required the defenders to inform the pursuer of matters specially known to them (or to them and the UK Government) only and any liability for its breach would have depended on such matter being something which a reasonable person in the position of the pursuer would have wished to know about in deciding whether, and if so on what terms and with what safeguards, to contract with CSL.

[302] Given that it was generally known from at least March 2022 that the IMA might pose a substantial risk of one kind or another to the orderly functioning of the scheme and thus to the magnitude of profit that the logistics provider might be able to make from it, that the only prior experience of the defenders in seeking an IMA exclusion, for single-use plastics, had taken a lengthy period and demonstrated that the attitude of the UK government might be unpredictable, and that generally an irreducible element of uncertainty surrounded what might happen to a request for an exclusion for the scheme, it appears to me that the defenders would, if they had assumed a greater responsibility to the pursuer than they in fact did, have been obliged to disclose whether or not such a request had been made, and (had it been made) what its status was, until the point at which the CSL contract was concluded, when reliance by the pursuer on such material for that purpose would have ceased to become reasonably foreseeable. That is notwithstanding the belief of Ms Slater, genuinely held on at least colourable grounds until early 2023, that the matter of the IMA exclusion was unlikely actually to pose a problem for the scheme. The criterion for disclosure of matters known specially to the defenders cannot properly, on this scenario, be

restricted to what they might subjectively have thought the pursuer needed to know any more than it can be so restricted to what the pursuer might subjectively have wanted to know; it must refer to that which a reasonable person in the position of the pursuer would have wished to know if the requirement of foreseeable and reasonable reliance as part of the recognition in law of any assumption of responsibility is to be met.

[303] As already noted, I accept the pursuer's position that, had it been told that an IMA exception had not been applied for or granted, it would not while that situation pertained and without more have entered into the contract with CSL, at least on the terms in which it did. Although the defenders sought to make much out of the question of whether it would have been reasonable for the pursuer to rely on what it had been told (or indeed not told) about the IMA given that it was a public general statute and that there was at least some understanding or belief amongst some stakeholders and others in the course of 2022 that it posed a risk of some kind to the scheme, a restriction of any duty of care to the disclosure of material private information along the lines already discussed, and in accordance with what the authorities recognise as the sort of situation giving rise to a special relationship apt to indicate an assumption of responsibility, would have dealt fully with that concern.

[304] Finally, I reject the defenders' argument that the public law doctrine of legitimate expectation has any relevance to this private law case. That doctrine may operate to restrict the freedom of a public authority to act in a manner which it would otherwise have been able to; the question of its private law liability to another party for doing what it was entitled to do as a matter of public law is a quite different question with no necessary correlation to the doctrine.

Disposal

[305] For the reasons stated, I shall repel the pleas-in-law for the pursuer, sustain the third plea-in-law for the defenders, and grant decree of absolvitor accordingly.