OUTER HOUSE, COURT OF SESSION

[2025] CSOH 62

CA15/24

OPINION OF LORD SANDISON

In the cause

GLENFIDDICH WIND LIMITED

Pursuer

against

DORENELL WINDFARM LIMITED

Defender

Pursuer: Thomson KC, Ford, (sol adv); Brodies LLP
Defender: Borland KC, T Young; Pinsent Masons LLP

10 July 2025

Introduction

[1] In this commercial action the pursuer, which is the registered proprietor of Scaut Hill, Glenfiddich, claims that certain substantial payments are due to it in terms of a lease of that property which it entered into with the defender in November 2015. The lease was for the purpose of enabling the defender to construct and operate a windfarm there, which it did. It has operated the windfarm since March 2019. At times, the defender has not generated electricity from the windfarm (or not fully taken advantage of its generation capacity) despite having been able to do so. The principal dispute between the parties concerns the pursuer's claims that, in consequence of that lack of generation, the defender

obtained certain benefits, the value of which falls to be taken into account in calculating the sums due to the pursuer in terms of the lease. It seeks declarators as to what it says are its rights under the lease, and decree for the sums allegedly underpaid. The defender denies that, on a proper construction of the lease, the benefits said to have arisen in consequence of the non-generation result in payment obligations due to the pursuer by it. The matter came before the court for a diet of proof before answer to resolve the dispute.

Relevant terms of the lease

[2] The definitions section of the lease entered into between the parties contains the following provisions:

> "'**Constraint Benefit'** means a relief, payment, reduced charge or avoided charge received by the Tenant from the Transmission System Operator in relation to a cessation, reduction or constraint in the export of electricity from the relevant Facility to the Transmission System;"
>
> "'**Gross Income'** means in respect of each Rent Year (or part of a Rent Year as the case may be) the aggregate of (i) CfD 1 Revenue; (ii) CfD 2 Revenue; (iii) PPA 1 Revenue; (iv) PPA 2 Revenue; (v) Benefits Revenue; (vi) Constraint Benefit; and (vii) Loss of Revenue Claim in respect of that Rent Year (or partial Rent Year as the case may be), declaring for the avoidance of doubt that:
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> …
>
> (C) the formulae calculating each of the CfD 1 Revenue, CfD 2 Revenue, PPA 1 Revenue and PPA 2 Revenue are not intended to calculate actual revenues due to the Tenant in respect of amounts due to the Tenant pursuant to the Initial CfD or the Extension CfD or in respect of the sale of Electrical Output and no account shall be taken of, or adjustment made in respect of any actual income received by the Tenant under the Initial CfD or the Extension CfD or any actual income received by the Tenant in respect of the sale of the Electrical Output;
>
> (D) the declaration at (C) above is without prejudice to the calculation of Benefits Revenue, Constraint Benefits and Loss of Revenue Claims;
>
> …"

[3] It may be convenient to explain at this point that CfD revenue is, in essence, income flowing to the defender in respect of the windfarm's generation of electricity under the UK's Contracts for Difference scheme designed to incentivise investments in renewable energy projects in the UK (ie, subsidy) and that PPA revenue is income flowing to the defender in consequence of the sale of electricity which had been generated in terms of a Power Purchase Agreement, a type of contract for the onward sale of electricity which the defender in fact entered into with its related company EDF Energy Limited (EDFE). This dispute is not concerned with either of those types of revenue.

[4] The definitions section in the lease also includes:

> "'**Loss of Revenue Claim'** means in respect of a Facility, all amounts received by the Tenant pursuant to a claim by the Tenant against any person for any reason for the loss of or reduction in revenue of the Tenant from that Facility, including any compensation amounts payable in accordance with Clause 5.1.9 and including a claim for loss or reduction of revenue pursuant to a turbine availability, energy production or power output warranty contained in a turbine supply agreement or turbine maintenance agreement, but expressly excluding:
>
> > (a) all amounts received by the Tenant in respect of all claims for loss of or reduction in revenue (including liquidated damages) due to delay in commissioning under a turbine supply agreement, balance of plant agreement or other construction phase agreement; and
> >
> > (b) all amounts received by the Tenant (including, but without limitation, pursuant to insurance claims) in respect of the repair, replacement or renewal of any Generating Assets (or other equipment (including cables) installed by the Tenant on the Site) and irrespective of whether or not the Tenant applies such amounts for the repair, replacement or renewal of such Generating Assets or other equipment;"
>
> "'**Minimum Annual Rent'** means **SIX MILLION POUNDS (£6,000,000) STERLING** per annum index-linked to the date payment of each instalment of the same falls due in terms of this Lease;"

[5] The substantive provisions of the lease concerning the payment of rent include the following:

"**Subsequent Rent Years Rent**

3.3.6 in respect of each subsequent Rent Year except the Last Rent Year (subject to any deduction or deductions due in accordance with Clauses 3.3.3, 3.3.5 and/or 3.3.7) the greater of:-

(a) the Minimum Annual Rent in respect of the relevant Rent Year; or
(b) the Gross Income Rent for the immediately preceding Rent Year;

Provided always that (i) where the Gross Income Rent for the immediately preceding Rent Year has not been certified as at the first Quarter Day of the relevant Rent Year then the first instalment due on the first Quarter Day of the relevant Rent Year shall be one quarter of the Minimum Annual Rent and thereafter on or prior to the next Quarter Day in the relevant Rent Year the Tenant shall make a balancing payment of the difference (if any) between what was actually paid on the said first Quarter Day and what would have been paid on the said first Quarter Day if the Gross Income Rent had been so certified, together with Interest thereon from the first Quarter Day until the date of payment and (ii) for each CfD Expiry Rent Year, for the purposes of Clause 3.3.6(b) the Gross Income Rent for the immediately preceding Rent Year shall be whatever the Gross Income Rent for such immediately preceding Rent Year would be if there was deducted from the calculation of Gross Income in respect of such immediately preceding Rent Year an amount equal to the aggregate of (a) all Aggregate Difference Amounts payable under the Initial CfD in respect of such immediately preceding Rent Year; and (b) all Aggregate Difference Amounts payable under the Extension CfD in respect of such immediately preceding Rent Year;

3.3.7 in respect of each subsequent Rent Year except the Last Rent Year the sum (if positive) calculated by deducting (i) the greater of (a) the Minimum Annual Rent for the relevant Rent Year and (b) the Gross Income Rent calculated in respect of the Gross Income for the immediately preceding Rent Year (the '**Preceding GIR'**) from (ii) the Gross Income Rent calculated in respect of the Gross Income for the relevant Rent Year (the '**Current GIR'**) provided always that (I) if the Current GIR is less than either the said Minimum Annual Rent or the Preceding GIR, no sum shall be payable by the Tenant pursuant to this Clause 3.3.7 and (II) if the Preceding GIR is greater than each of the Current GIR and the said Minimum Annual Rent the difference between (A) the Preceding GIR and (B) the greater of (1) the said Minimum Annual Rent and (2) the Current GIR shall be deducted from the rent payable under Clause 3.3.6 and/or Clause 3.3.8 in respect of the immediately succeeding Rent Year and (where necessary to permit the deduction of the full amount of any such difference) deducted from the rent

payable under Clause 3.3.6 and/or Clause 3.3.8 in respect of each of the subsequent Rent Years; provided that any such deduction or deductions shall not result in the rent payable in any subsequent Rent Year being less than the Minimum Annual Rent;"

"**Interest**

3.3.10 Interest shall be payable on any rent (or any payment due by the Landlord to the Tenant) that has not been paid within 7 days of becoming payable, to accrue from the date the same became payable."

Witnesses

Pursuer's proof

[6] **Colin Reilly** (46), the pursuer's finance director, spoke to a witness statement provided by him and dealing with the sums which would be due to the pursuer should particular constructions of the lease be accepted by the court. In cross-examination, he stated that he had not been a director of the pursuer when the lease was entered into and could not comment on the factual matrix known to the parties at that time. He spoke to various items of correspondence which had passed between the parties or their representatives after the dispute had emerged, as part of a line of questioning which seemed designed to (and quite effectively did) demonstrate that the pursuer had, over time, struggled to articulate the exact legal basis of the case it wished to make against the defender. He confirmed that it was common knowledge in the energy industry that Power Purchase Agreements of the sort which had been entered into between the defender and EDFE to facilitate the sale of the energy being generated by the former would be likely to involve a charge being made by the "offtaker" (as the party performing the function of EDFE in the arrangement is known) for the services being provided, although the amount of the charge would depend on various factors likely to be known only to the parties to the PPA in question.

[7] **Thomas Bent** (56), an energy consultant, was led as an expert witness by the pursuer. He spoke to a report previously prepared by him and to a written record of the points of agreement and disagreement between him and the expert instructed by the defender composed on 17 February 2025, after they had met and discussed matters. There followed an extensive cross-examination which, insofar as it did not concern matters which were uncontentious as between the experts and parties, was largely taken up in elucidating and challenging the witness's views on how it might be appropriate to characterise various aspects of the system whereby energy supply and consumption in the UK is managed, all as set out in something called the Balancing and Settlement Code (BSC), which will afterwards be described. However, there was no dispute as to the terms of the BSC, nor any dispute that it is, as one would expect given its importance and complexity, operated in practice exactly according to its terms. The issue in this case is how the lease falls properly to be construed against that factual background, so far as it was or ought to have been known to the parties at the time of contracting. The views expressed by Mr Bent (and, equally, by the defender's expert Mr Evans) beyond the uncontroversial matters were simply expressions of opinion as to how the processes of the BSC might best be characterised, elicited with a view to enabling submissions to be made as to whether what had happened did or did not correspond with descriptions contained in the controversial provisions of the lease. The opinions expressed by the experts as to how the processes of the BSC might best be described were not matters upon which they possessed any special knowledge or experience, and had no greater value than had they been expressed by someone plucked at random from the street to whom the BSC processes had been described. This is not a criticism of either expert. Both were indeed highly knowledgeable and experienced in the matters of fact to which they spoke, and both gave their evidence carefully and with great

propriety. The difficulty is that they were both conscripts in an expert arms race on which the parties had unnecessarily embarked, reflecting an unfortunate contemporary tendency to adduce the evidence of skilled witnesses in relation to matters not properly calling for, or addressed by, such evidence. That approach grossly and unnecessarily complicated the presentation and consideration of the merits of the case.

[8] I have in any event carefully considered everything said and reported upon by the expert witnesses, but have been unable to escape the conclusion that, beyond the agreed matters of fact, their evidence was, if not entirely incompetent as being directed in essence at the issue of law for the court's sole determination, at the very least quite irrelevant to the decisions which require to be made. I have accordingly not set it out at length in this opinion, which already risks being overly long and complex.

Defender's Proof

[9] **Gareth Evans** (45), an energy markets adviser, was the expert instructed by the defender. He spoke to his own report and to the joint record of the experts' positions. The remarks which I have just made in relation to the evidence of Mr Bent apply equally to that of Mr Evans.

Background

[10] The rent clauses of the parties' lease provide for an index-linked minimum annual rent of £6,000,000 but otherwise make extensive and complex provision for rent payments to be calculated by reference to the annual gross income received by the defender out of the operation of the windfarm. The pursuer maintains that the defender has failed to declare to it all of that gross income for the rent years ending on 31 March 2022, 2023 and 2024 and consequently has underpaid rent for those years.

[11] In order to understand the nature of the dispute, it is necessary to know something of the operation of aspects of the UK electricity market. The following account of that background is taken from the facts acknowledged in the pleadings, the joint minute of admissions entered into by the parties, and the uncontroversial description of those aspects given by the experts. It should be noted that it is not intended, in particular, to describe the operation of that market in any detail beyond that necessary for the resolution of the current disputes. The description given is a simplified account of what happens, but is sufficient for that purpose.

[12] The defender, as operator of the windfarm, is a generator of electricity. That electricity can be traded in advance of its generation to buyers. In this case, that has been achieved by way of the Power Purchase Agreement (PPA) which has been put in place between the defender and a related company, EDFE, which is a supplier of energy to consumers. By way of the PPA, the defender agreed in advance of generation to provide EDFE with a certain volume of electricity. EDFE, in turn, entered into contracts with its customers on the basis of that expected supply from the defender. The defender also entered into a metered volume reallocation notice (or MVRN) with EDFE, the nature and significance of which will afterwards be considered.

[13] If the UK's energy system is to operate effectively, it requires to have rules for situations where the amount of electricity generated or used by a participant in the wholesale electricity market differs from that which that party had purchased or sold in forward markets. Those rules are set out in the Balancing and Settlement Code (BSC). Both the defender and EDFE are parties to the BSC and are bound by its terms.

[14] The Transmission System Operator (TSO) (currently a company called National Energy System Operator Limited) is the operator of the UK electricity transmission system.

Its primary role is to balance the high voltage electricity network in real time, ensuring that supply meets demand, and alleviating any transmission or delivery issues. It endeavours to balance the system in the most efficient and economic manner possible. This may require it either to increase, or alternatively to constrain or curtail, the overall generation of electricity. It achieves that by a system of "offers" and "bids". An "offer" describes the situation when a generator declares itself willing to produce a greater volume of electricity than it had contracted to provide, for a proposed consideration. A "bid" is when a generator offers, in response to a request by the TSO, to reduce the amount of electricity it will produce, again for a proposed consideration. Essentially because wind is a free resource and the operation of windfarms is a heavily subsidised industry, the economics of the situation are such that the operator of a windfarm may well only be prepared to submit a bid to reduce its electricity generation on terms that involve it being paid to do so.

[15] The process of offers and bids happens in advance of the time of generation or non-generation, in respect of half-hour periods. The TSO considers the offers and bids it has received in respect of such a period and, again in advance of time, decides which to accept. The present case concerns the consequences of various bids made by the defender which the TSO accepted. Once the period in question has ended, actual generation is compared to what the relevant generator had previously agreed to produce in that period, and a balancing or settlement process to deal with the imbalance which has been created as the result of the TSO's acceptance of an offer or bid begins.

[16] When an electricity generator ceases or curtails the generation of electricity using its plant as a result of the acceptance of its bid from the TSO, various processes are carried out by other bodies which assist in the operation of the BSC. Firstly, a successful bidder's BSC account will receive something called Period BM Unit Cashflow, a sum of money which can

be either positive or negative and will reflect the consideration forming part of the accepted bid. The defender accepts that what it receives in this connection falls to be regarded as part of its gross income for the purposes of the lease, and it has accounted for those receipts and paid rent accordingly. (It may be added that, even when the BSC expresses itself in English rather than in mathematical formulae, it tends not to do so very straightforwardly; "Period" refers to the half-hour periods in which the system operates; "BM" is shorthand for "balancing mechanism"; "Unit" refers to the generating unit in question, in this case the windfarm; and "Cashflow" more simply refers to the flow of cash between the system and operator of the unit.)

[17] It is a further element of the process which happens in consequence of an accepted bid which is the principal cause of dispute in this case. Where the TSO has accepted a bid from a party to the BSC, that party will be allocated electricity from the system in order to meet the supply obligations which it has already entered into but which it can no longer meet in consequence of having curtailed its own generation. That allocation is of something labelled Period BM Unit Balancing Services Volume, and is a surrogate for the electricity which would otherwise actually have been generated but for the instruction from the TSO to constrain generation. (The jargon not previously explained refers to the volume of electricity allocated as a part of the services used to keep the system in balance.) The volume of electricity which is allocated is determined in accordance with formulae set out in the BSC. The further wrinkle which arises in this case is that, because the defender and EDFE have entered into an MVRN, the energy which would otherwise, for the purposes of the BSC, be regarded as flowing to the defender's windfarm energy account as Period BM Unit Balancing Services Volume was in fact credited to EDFE's account instead, as something called (more straightforwardly in this case) Credited Energy Volume. EDFE can trade in

the energy credited to it as a result of the defender having curtailed its generation in exactly the same way as it can trade in energy actually generated and contributed to the system by the defender. One important consequence of that is that, in terms of the PPA between the defender and EDFE, the latter is obliged to, and has, paid the former for energy credited to its account as a result of the operation of the imbalance mechanisms in the BSC in just the same way as it is obliged to, and has, paid it for energy actually generated by it.

[18] It is only necessary further to know for present purposes that the TSO does not itself execute the payment of Period BM Unit Cashflow, the allocation of Period BM Unit Balancing Services Volume or the crediting of energy to the accounts of offtakers such as EDFE. Rather, the administrative activities required to give effect to the decisions made by the TSO in relation to accepted bids and offers are carried out by separate corporate entities created to perform those functions in accordance with the provisions of the BSC. There have been no changes to the terms of the BSC which are relevant to this dispute since its inception in 2001.

[19] In essence, the pursuer contends that the system produces for the defender a benefit which relate to the cessation, reduction or constraint of the export of electricity from the windfarm to the transmission system, thus falls to be regarded as what the lease calls a constraint benefit, and as such is part of the gross income which has to be declared and form part of the rent calculation. Alternatively, the pursuer maintains that the benefit received falls to be treated as a loss of revenue claim under the lease, as a claim made by the defender or those empowered by it to do so when there is a loss of or reduction in revenue because electricity is not being generated by the windfarm, with similar consequences for the gross income and thus rent calculation. A further dispute concerns warranty claims, ie payments received by the defender under warranties it enjoyed from the supplier of its generating

apparatus in respect of its quality. Those payments are also said to be the fruits of loss of revenue claims under the lease which ought to have been declared as part of gross income for the rent year in which they were received, rather than in respect of the years in which the claims came into existence.

Submissions for the pursuer

[20] On behalf of the pursuer, senior counsel submitted that it had established that the sums paid by the defender by way of rent were substantially below those properly due. The defender was due in terms of Clause 3.3.6 of the lease to pay, for each of the disputed rent years, a sum equivalent either to the Minimum Annual Rent of £6,000,000, or else calculated by reference to the preceding year's Gross Income Rent, whichever was higher; and in any event, under Clause 3.3.7, an additional rent for each rent year calculated as the difference between the rent paid under Clause 3.3.6 for that year, and the Gross Income Rent for that rent year, if greater.

[21] "Gross Income", from which the Gross Income Rent was calculated, was made up of various different headings. What might fall into two of those ("Constraint Benefit" and "Loss of Revenue Claim") was disputed. More particularly, the disputes were: (1) whether the defender had received reliefs from the TSO during periods of constraint which fell within the definition of "Constraint Benefit", or if not which constituted a "Loss of Revenue Claim", under the lease and, if so, how any such relief fell to be valued; and (2) whether a Loss of Revenue Claim was to be accounted for in the year in which it was paid or in the year in which it was accrued.

[22] The evidence established that the defender had been given a volume of energy comprising

> "…relief...[from] the Transmission System Operator in relation to a cessation, reduction or constraint in the export of electricity from the [defender's windfarm] to the Transmission System"

(ie, a constraint benefit within the meaning of the lease) which had a real and very substantial value. The pursuer's evidence on the quantification of its claims, if they were made out in principle, was unchallenged.

[23] The pursuer's case in outline was that, under the provisions of the BSC, a volume of electricity was credited for the benefit of the defender as a result of a decision that only the TSO was empowered to make. It was the TSO which gave mandatory directions to which the other parties involved in the operation of the BSC had no choice but to give effect. The volume of electricity credited for the benefit of the defender had a material financial value. One analysis was that what EDFE paid the defender for in terms of the PPA, during periods of constraint, was Period BM Unit Balancing Services Volume. The alternative analysis was that what EDFE paid the defender for, during such periods, was Credited Energy Volume, which it received into its own account. EDFE only had that Credited Energy Volume because of the diversion of that valuable asset to it by dint of the MVRN. On this view of things, it was difficult to conceive of a more obvious case of diversion of a benefit. The lease could not sensibly be interpreted as meaning that the defender could avoid the definition of constraint benefit (and thus avoid the consequences of its receipt of such a benefit for the purposes of Gross Income and Gross Income Rent) by deciding, at its own hand, to enter into an MVRN.

[24] Under the lease, the parties agreed that (subject to the Minimum Annual Rent) the rent was to be calculated by reference to the gross income received by the defender. Gross

income was defined in the lease. The core of the dispute was whether what had happened in consequence of the TSO's acceptance of bids made by the defender amounted to the conferring of a constraint benefit (as also defined in the lease) on it. The pursuer maintained that it did.

[25] In construing the lease, the court was invited to have regard to the general principles of contractual construction described in *Lagan Construction Group Ltd* v *Scot Roads Partnership Project Ltd* [2023] CSIH 28, 2024 SC 12, *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Limited* [2020] CSIH 2, 2020 SC 244, 2020 SLT 575 at [9] - [17], [19] - [21], and *HOE International Limited* v *Andersen* [2017] CSIH 9, 2017 SC 313 at [23] to [26]. Commercial common sense required to be given proper weight when a contract was construed, adopting a sensible, commercial interpretation. The existence of a system of constraint, and of the BSC, had to be taken as matters of context which informed the proper construction of the lease.

[26] Reference was also made to *Aberdeen City Council* v *Stewart Milne Group Ltd* [2011] UKSC 56, 2012 SC (UKSC) 240, 2012 SLT 205 at [18], [21] - [22] and [2010] CSIH 81 at [10]. To the extent, if any, that the lease failed to achieve its apparent purpose, then the court should have regard to whether this was oversight. If the clear objectives of the parties were at risk of being defeated, the court should demur from a construction that enabled that. Provided that undue violence to the words in the contract could be avoided, they should be given effect to so as to achieve the parties' objective.

[27] The court required to look at the lease and consider what the parties intended was to happen during periods of constraint, and the extent to which payments, reliefs, reduced charges or avoided charges were received by the defender from the TSO. There was nothing particularly complicated about the language used in the lease. In essence, it said that when

the TSO directed that the windfarm be turned off, and in consequence provided things of value, rent was to be paid by reference to those things. The fundamental point was that the application of the provisions of the BSC, during constraint, very obviously gave rise to the receipt of payments and reliefs "…in relation to the cessation, reduction or constraint in the export of electricity from the relevant Facility to the Transmission System". At the time the parties entered into the lease, the BSC was in place. Its existence was referred to in the lease. It was not surprising that the definition of constraint benefits referred both on the one hand to payments (apt to cover the Period BM Unit Cashflow) and on the other to reliefs (apt to cover the Period BM Unit Balancing Services Volume or its analogues). It would not make sense to conclude that the parties intended that during periods of constraint, the defender would receive from the TSO a volume of electricity from which it could then generate income (amounting to £36.695m in the 2023 rent year and £40.631m in the 2024 rent year) and in respect of which it would pay nothing at all to the pursuer by way of rent. That would create a massive windfall to the defender that was absurd and irreconcilable with the contract as a whole.

[28] The parties had been applying a broad brush in defining constraint benefits. They identified as falling within the ambit of the concept not just payments, but also reliefs, reduced charges and avoided charges. A "relief" was not difficult to understand in the context against which the lease was entered into. A quantum of energy was applied to relieve the defender from the situation in which it had not itself generated that quantum of energy, in respect of a cessation, reduction or constraint which had occurred at the direction of the TSO. The defender's entire approach to construction of the lease essentially required the court to find that, in the definition of constraint benefits there, the parties did not have in mind the application of the very scheme for provision of constraint payments and reliefs

which actually existed at the time of contracting. That would be a most remarkable thing for the parties to have agreed. It would have taken very clear language to allow the conclusion to be reached that, although the parties wished to include the receipt of payments and reliefs from the TSO in relation to constraint in the calculation of Gross Income and Gross Income Rent, they only had in mind some unknown and unspecified *ad hoc* or *ex gratia* payments or reliefs from the TSO, but not the payments and reliefs provided for under the purpose-built scheme established by the BSC, and pursuant to which the very system of balancing, including constraint, was operated.

[29] Without the system allocating energy to make up for that which had not been generated at the behest of the TSO, the defender would not have been able to enter into trades with EDFE in respect of the energy which it had expected to generate without adverse consequences. It would not have been able to enter into a PPA under which EDFE agreed to pay sums to it calculated by reference to that energy. Given the existence of the MVRN, the amount of energy which the system made available to make up for the consequences of curtailment had been received, not by the defender, but by EDFE as Credited Energy Volume. If the court were to conclude that meant the defender had not received a valuable relief directly then, in the alternative, it was difficult to conceive of a clearer case of diversion by the defender of something that it lay within its power to deal with. It was obvious having regard to the terms of the BSC that the only reason that EDFE was in receipt of that credited energy was because the defender had elected to use an MVRN to deliver it into its hands. It was the entering into of the MVRN, a matter of choice for the defender, that achieved that result. Although the pursuer was aware when it entered into the lease that a PPA had been or was to be concluded with EDFE, it did not know that a MRVN was also to be used. A helpful analogy might also be drawn with the "redirection" of earnings in the

field of taxation, as discussed in *Advocate General for Scotland* v *Murray Group Holdings Ltd* [2017] UKSC 45, 2018 SC (UKSC) 15, 2017 SLT 799.

[30] The parties' clear objective was to rentalise the value of the benefits received by the defender, or at its direction, during periods of constraint. The parties could not sensibly be taken to have intended that, simply by the defender's decision to divert a valuable asset to EDFE by dint of the MVRN the rent payable under the lease would be materially diminished. The defender's construction of the lease would cause fundamental harm to the parties' objectives as there set out.

[31] The pursuer adopted a fallback position to the effect that, in any event, the benefits generated in the event of constraints required by the TSO could properly be regarded as Loss of Revenue Claims under the lease. Claims were made by the defender or those empowered by it to do so when there was a loss of or reduction in revenue. That loss or reduction in revenue arose because electricity was not being generated. That situation fell within the intent of the parties to ensure that payments or amounts received by the defender in respect of revenue that was not attracted by the production of electricity (regardless of the vehicle by which those sums reached the defender) was included in the calculation of the rent due. A Loss of Revenue Claim was a component of Gross Income under the lease. Following the acceptance of a bid by the TSO, an amount of electricity was made available by the TSO. It could fairly be said that that amount of electricity was something that could be "claimed" by the defender as a result of the acceptance of the bid. It was claimed because there was a loss of revenue by the defender from the windfarm as a result of the TSO instructing that it be shut down. The value of that claim was what it could be sold for. As a further alternative, a payment made by EDFE to the defender under the terms of the PPA

satisfied the definition of a claim against a person made by reason of the loss of or reduction in revenue of the defender from the windfarm.

[32] The next question was how to value constraint benefits for the purposes of the lease. It was first necessary to determine how the disputed revenue fell to be valued in principle in terms of the lease (assuming that it did at all). It was then necessary to determine the amount of the defender's gross income in each of the disputed rent years, and to calculate the Gross Income Rent in the disputed rent years on that basis. The final stage of the analysis was to determine if there had been any underpayment by the defender in each of the disputed rent years and what if any sums were due, having regard to two Clauses 3.3.6 and 3.3.7. Should any sums be brought out as due by that exercise, it would finally be necessary to determine any interest that fell due under Clause 3.3.10.

[33] Dealing firstly with the question of how the energy made available by the system in consequence of a period of constraint was to be valued, the lease did not prescribe any means or mechanism for the valuation of constraint benefits. It followed that a reasonable way of valuing such a benefit had to be devised. An obvious way of doing that was to determine how much the conferral of the benefit in question allowed the defender to realise under its PPA with EDFE.

[34] Although EDFE charged a management fee in respect of its arrangements with the defender, there was no evidence that the pursuer was aware, actually or constructively, of the existence far less the level of that fee at the time it entered into the lease. There was, in addition, no evidence to the effect that the particular fee charged by the defender was objectively a "reasonable" fee. It was not possible to construe the lease as meaning that the pursuer agreed that the sums to be included within the definition of constraint benefit were to be reduced by an unknown amount, arising from a private bargain between the defender

and EDFE, such that anything less than 100% would be rentalised. The definition of gross income was not drafted such that the defender was entitled to deduct any expenses in order to reduce its rental liability.

[35] If the valuation exercise required to proceed on the basis that what was being valued was a Loss of Revenue Claim, the actual payment from EDFE to the defender was the appropriate mode of valuation, since the definition of such a claim turned on amounts received by the defender.

[36] Turning to the dispute about the rent years in which successful warranty claims had to be accounted for, it was agreed as background fact that, during the 2022 rent year, the defender had received £1,628,958 in respect of such claims, relating to claims made in preceding years, and that during the 2023 rent year, it received £2,054,009, again relating to claims made in preceding years. It was not disputed between the parties that sums paid to the defender under warranty claims qualified as Loss of Revenue Claims. The proper construction of the definition of a loss of revenue claim was that it comprehended amounts *received* by the defender pursuant to a claim. In order to satisfy the definition, a claim not only had to have been made, but an amount had to have been received pursuant to that claim. It followed that a loss of revenue claim in respect of any rent year had to refer to amounts received during the course of that rent year, regardless of when the right to make such a claim had accrued. Neither the mere existence, nor the making, of a claim under a warranty constituted in itself an event giving rise to a loss of revenue claim. It followed that the gross income for the 2022 rent year included the sum of £1,628,958 in respect of warranty claims received in that year, and for the 2023 rent year included the sum of £2,054,009 similarly received.

[37] Details of the calculation of the pursuer's pecuniary claims was provided, bringing out a claimed Gross Income for the 2022 rent year of £66,180,764 and consequent Gross Income Rent of £9,745,075. As the defender had only paid £8,496,981 for that year, the additional rent due under Clause 3.3.7 was £1,248,094. For the 2023 rent year, Gross Income was claimed by the pursuer to be £73,555,264, bringing out a Gross Income Rent of £12,399,895. As the defender had only paid £9,480,725 for that year, the additional rent due under Clause 3.3.7 was £2,919,170. For the 2024 rent year, the defender had paid £10,406,641, which was the minimum annual rent under the lease. It ought to have paid rent by reference to the Gross Income Rent for the preceding year in terms of Clause 3.3.6, amounting to £12,399,895. The additional sum of £1,993,254 was accordingly due for that rent year.

[38] In terms of Clause 3.3.10, interest at the rate of 4.5% above the published base rate of The Royal Bank of Scotland plc from time to time was payable on any rent that had not been paid by the defender to the pursuer within 7 days of becoming payable, to accrue from the date the rent became payable. Mr Reilly had given unchallenged evidence of the interest due, in terms of which the interest that was payable as at 5 March 2025 was £1,121,966.66, and which continued to accrue at the pactional rate thereafter.

Submissions for the defender

[39] On behalf of the defender, senior counsel invited the court to grant decree of absolvitor. The relevant principles of contractual interpretation were well known, and might be summarised in four points:

(i) In interpreting a contract, the court was striving "to ascertain the intention of the parties by determining what a reasonable person, having

the background knowledge of the parties, would have understood from the language selected by them": *Network Rail Infrastructure Ltd* v *Fern Trustee 1 Ltd* [2022] CSIH 32, 2022 SLT 997 at [28].

(ii) The "[p]arties' intentions are most obviously gleaned from the language they have chosen in the contract. The court should not search for drafting infelicities in order to justify a departure from the natural meaning of that language. It should identify what the parties have agreed, not what it thinks common sense may otherwise have dictated": *Lagan Construction* at [10]; *FES Ltd* v *HFD Construction Group Ltd* [2024] CSIH 37, 2025 SC 51, 2025 SLT 134 at [24]. That process would inevitably involve asking what was the natural and ordinary meaning of the words used by the parties in the document which contained their agreement: *Wood* v *Capita Insurance Services Limited* [2017] UKSC 2, [2017] AC 1173, [2017] 2 WLR 1095 at [10] - [14]; *Midlothian Council* v *Bracewell Stirling Architects* [2018] CSIH 21, 2018 SCLR 606 at [19].

(iii) This meant that particularly "where a contract is a complex and sophisticated one prepared and negotiated by skilled professionals…it may be interpreted principally by textual analysis": *Lagan Construction* at [10].

(iv) That the natural meaning of the words of the contract had produced a bad bargain did not justify the court rewriting it: *Scanmudring A/S* v *James Fisher MFE Ltd* [2019] CSIH 10, 2019 SLT 295, at [82]; *National Commercial Bank Jamaica Ltd* v *NCB Staff Association* [2024] UKPC 2 at [32].

[40] The court should treat *Aberdeen City Council* v *Stewart Milne Group Ltd* with considerable care. Its ratio was unclear. Subsequent case-law had re-emphasised that the

processes of implication of terms and of construction of a contract should be seen as quite separate tasks and regarded *Stewart Milne* as having been decided on the basis of implied terms: eg *Marks & Spencer Plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, [2015] 3 WLR 1843 at [30] and [75] - [76]. *Stewart Milne* was decided before *Wood* and all of the subsequent Inner House authorities applying the latter case. An argument premised on *Stewart Milne* had been rejected in *Paterson* v *Angelline (Scotland) Ltd* [2022] CSIH 33, 2022 SC 240, 2022 SLT 1395 at [15], [26] and [32] - [35]. Nor was the present case analogous to the circumstances of, or contractual wording in, *Stewart Milne*, where the express wording of the contract had driven the result.

[41] It was common ground that the lease was negotiated at arms' length by experienced and sophisticated business people and reputable firms of solicitors for both parties. Accordingly, the court should principally adopt a textual analysis of it. There was no scope for resort to generalised argument along the lines that parties must have intended the lease to capture all income or that there was something wrong with the defender monetising something not falling within its terms. There was no suggestion by the pursuer that any term fell to be implied into the lease. It was, in truth simply, complaining about a bad bargain. The evidence before the court was that arrangements under a PPA for delivery of volumes of curtailed energy to a third party offtaker like EDFE, and reciprocal payment therefor, was a standard practice. The pursuer accepted that it was aware before the lease was entered into that the defender would be entering into a PPA. It claimed not to have realised that the defender would be paid in terms of the PPA when it was not generating electricity, and was asking the court to fix its own unilateral error by bringing such revenue within the terms of the lease.

[42] The parties had chosen not to define "Gross Income", at least in relation to energy generated, under reference to the actual revenue or income received by the defender. The pursuer sought to subvert that choice by having actual income received by the defender under the PPA in respect of non-generation included within the rent calculation. Constraint benefits and loss of revenue claims represented separate revenue or income streams deriving from sources distinct from the CfD or PPA. A constraint benefit was something received by the defender from the TSO, not something received from EDFE under the PPA.

[43] The pursuer faced three insuperable difficulties. Firstly, no energy credited to any accounts under the provisions of the BSC was a relief within the definition of a constraint benefit in the lease. Secondly, any energy which had been credited pursuant to the BSC had been credited to EDFE, not the defender. Thirdly, the defender had not received anything from the TSO.

[44] It was useful to consider what the word "relief" normally meant in a legal context. In *Taylor (HM Inspector of Taxes)* v *MEPC Holdings Ltd* [2003] UKHL 70, [2004] 1 WLR 82 at [14] Lord Hoffman had drawn a distinction between a primary liability and a secondary right of relief. That distinction was part of the ordinary meaning of the word and was also present in the most common area where the word was used in a legal context, being in the law concerning cautioners and other obligants who had a right of relief. Reference was made to Bell's *Dictionary* (7th ed), pp 904 - 905; and to Stroud's *Judicial Dictionary* (7th ed), pp 2343 - 2344.

[45] Period BM Unit Balancing Services Volume was a unit of energy used in multiple formulae in the BSC. It was simply one part of the computation of the primary cashflows ultimately received by the defender. One element in a whole series of calculations could not sensibly be isolated and described as a relief from something that never actually happened

in the real world and which the BSC was designed to avoid happening. Only one cashflow could be said to come from the TSO under the BSC in the event of a constraint, namely Period BM Unit Cashflow, which had always been included by the defender as a constraint benefit in its gross income certificates under the lease. It did not require to include anything else as a constraint benefit in those certificates.

[46] The difference between Period BM Unit Cashflow, on the one hand, and Period BM Unit Balancing Services Volume, on the other, was that the former had the characteristics of a straightforward monetary transaction between the TSO and the defender. The latter was a volume of energy which never belonged to the TSO. It was not described in the BSC as a relief from anything. In a situation of curtailment or constraint, the defender received only two revenues: (i) Period BM Unit Cashflow, which was ultimately derived from the bid accepted by the TSO; and (ii) payments under the PPA received from EDFE. Period BM Unit Balancing Services Volume was, in essence, an accounting tool, an adjustment which required to be made under the BSC so that market participants' commitments were not undermined. It was part of a system designed to avoid market participants dealing with virtual amounts of energy being penalised by actions that required to be taken in the physical world which were initiated by the TSO as part of its function of keeping energy generation and consumption in balance across the network.

[47] For Period BM Unit Balancing Services Volume to be brought within the concept of constraint benefit, it would have to be translated into a monetary amount for the purposes of calculating Gross Income Rent under the lease. The pursuer sought to do this by referring to sums received by the defender under the PPA from EDFE (albeit by a calculation which artificially ignored the management fee charged by EDFE). However, the PPA was irrelevant. It had nothing directly to do with Period BM Unit Balancing Services Volume or

the BSC. The implication of the pursuer's approach was that the single payment received from EDFE under the PPA had to be treated differently depending on whether or not it related to metered output or a situation of curtailment, despite the amounts being essentially identical in both situations. The divergent treatment of the same basic revenue stream was illogical and led to absurdity.

[48] In any event, Period BM Unit Balancing Services Volume was neither received by the defender nor given by the TSO and consequently could not fall within the definition of constraint benefit under the lease. If one identified where the volume of energy represented by curtailment ended up, it was plain that it ended up in the energy account of EDFE. Thus, if it had to be characterised as being received by anyone, it was received by EDFE. It was not given by the TSO to anyone. The TSO did not have it in the first place, and so it could not be given by the TSO to the defender or received by it. The administration of the relevant part of the BSC was carried out entirely separately and independently from the TSO. If the BSC was to be analysed as providing some form of relief to the defender, that relief could only sensibly be characterised as coming from the entities in charge of administering the BSC. The TSO played no part in performing any of the calculations in the BSC that were relevant in the present case. For all of these reasons, the court was invited to find that as a matter of fact and law nothing beyond Period BM Unit Cashflow qualified as a constraint benefit for the purposes of the lease.

[49] Nor did the circumstances relied upon constitute a loss of revenue claim. The pursuer did not identify how the energy credited in consequence of the provisions of the BSC could be said to constitute an "amount" of money such as to fall within the definition of the concept of a loss of revenue claim in the lease, or what claim was said to have been made by the defender in respect of it - including against whom it was made, for what, how it was

made and when - or the loss or reduction of revenue with which such a claim was said to have been concerned. Viewed sensibly, the definition of a loss of revenue claim was referring to a monetary amount received by the defender pursuant to a claim made by it against a person relating to loss of or reduction in revenue. The credited energy was not a monetary amount and could not fall within the definition. The defender had made no claim for it, whether against the TSO or anyone else. The pursuer's loss of revenue claim was obviously ill founded, and the court should reject it.

[50] Finally, nothing that would otherwise have qualified as a constraint benefit had been diverted in any legally relevant way. If something had indeed been diverted, but did not constitute a constraint benefit, then its diversion was legally irrelevant. The pursuer did not even attempt to indicate what element of gross income any diverted benefit would represent on this hypothesis. Its argument came to no more than the assertion that because EDFE paid the defender for credited energy under the PPA, those payments ought to be treated as rent under the lease. There was no basis on any proper principle of interpretation for that sort of approach to be taken to the detailed and carefully negotiated terms of the lease. The parties had set out the composition of gross income and the various definitions of the elements referred to therein without in any way attempting to catch actual amounts payable under the PPA.

[51] The warranty payments should be allocated to the rent year for which they replaced lost revenue. There was little to provide express guidance on this issue from the terms of the lease, but as warranty claims fell under the category of loss of revenue claims, the essential purpose of which was to cover actual amounts received by the defender for the loss of or reduction in revenue, they should be allocated to the period in which the revenue lost was sustained. In each rent year, the calculation of rent under the lease depended on whichever

was the greater of the Minimum Annual Rent for that rent year and the Gross Income Rent for the preceding rent year. It would seem absurd that the Gross Income Rent for a given rent year could be altered by reference to the value of warranty claims which had been accrued in a different year. The court should prefer an interpretation that avoided such absurdity.

[52] If the court was not with the defender on the interpretation issues, the quantum of any claim should be based on the System Imbalance Price, which is what the defender would have avoided having to pay. (The System Imbalance Price is calculated on the basis of the cost incurred by the TSO in balancing the system, taking into account accepted bids and offers, and is applied to the difference between the contracted and actual generation for each period to produce an imbalance charge made on each affected market participant.) The pursuer had led no evidence that would permit the court to perform the necessary calculation. Secondly, if it was legitimate to approach the quantification issue under reference to sums received by the defender under the PPA, then that should reflect the actual payments received by the defender. The definitions of constraint benefits and loss of revenue claims both referred to actual receipts by the defender. It was agreed that the defender did not receive a gross amount from EDFE, but rather an amount net of the EDFE management fee. There was no proper basis for excluding the amount of the management fee from the valuation exercise. A management charge was an entirely standard feature of PPAs.

Decision

[53] It is necessary for the proper disposal of this case once again to consider the nature of the principles of contractual construction in the law of Scotland. Explanations of those

principles have been essayed, with varying degrees of emphasis on different aspects of the construction process depending on the facts under consideration, in several recent cases in the Inner House of this court. The division of the court which decided *Ashtead Plant Hire Co Ltd* was composed of three former commercial judges, each with extensive judicial and wider professional experience of the various problems thrown up by the task of construction in many different contexts. In such circumstances, it is hardly surprising that the opinion issued in that case represents, by some considerable margin, the most considered, thoughtful and thus useful exposition of the approach to be adopted to the often delicate task of the construction of commercial contracts available in the recent Scottish jurisprudence; an exposition which, moreover, fully has regard to and accurately reflects the import of the wider UK authorities of great weight, in particular *Rainy Sky* (which itself forms part of a stable and continuous legal tradition also reflected in *Arnold* and in *Wood*, as the latter case expressly acknowledges). Taking as read the basic, now uncontroversial but often in itself unilluminating proposition that the ultimate aim of contractual construction is to determine what a reasonable person with all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, the two key themes of *Ashtead* are, firstly, that a contract must invariably be construed *contextually*, that language is inherently ambiguous, and in no serious field of discussion is it possible to reach an intelligent view on the meaning of a particular passage without placing that passage in context ([10]); and secondly, that in interpreting a contractual provision the court should adopt a *purposive* approach, meaning that it should have regard to the fundamental objectives that reasonable persons in the parties' position would have had in mind. Put another way, the substance of the parties' agreement, construed objectively, should prevail over niceties of wording ([11]).

[54] From *Ashtead* and *Rainy Sky* one may draw the further basic proposition that where contractual wording is capable of having more than one meaning, that which makes better commercial sense (ie that which better reflects how a reasonable person in business would be likely to conduct his or her affairs in a particular situation) according to the fundamental purposes of the contract may properly be preferred, even if a more natural meaning which produces a reasonable result is also available. A reasonable person in business will not ordinarily enter into bargains that operate in an arbitrary manner (*Ashtead* at [12], [16]; *Rainy Sky* at [21]).

[55] There are, of course, limits to what can be achieved by the exercise of construction. If all the matters which require to be considered lead very clearly to a conclusion that a particular meaning is the one at which the reasonable person being figured would arrive, the court must give effect to that conclusion, however surprising or unreasonable the result might be. It is not and never has been the law that a court can decide and apply what bargain it considers the parties ought to have made if acting sensibly as opposed to ascertaining the true nature of the bargain which in fact they did make.

[56] Sometimes that proposition is expressed by saying that where the parties have used unambiguous language, the court must apply it (eg *Rainy Sky* at [23]), or more elaborately that "Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation." (*Society of Lloyds* v *Robinson* [1999] WLR 756, per Lord Steyn at 763). In placing a focus on the language under examination, however, it is necessary to bear in mind that "language is a very flexible instrument" (*Co-operative Wholesale Society Ltd* v *National Westminster Bank plc* [1995] 1 EGLR 97, per Hoffmann LJ). Lord Steyn, immediately after the sentence from *Society of Lloyds* just quoted, added that

> "Words ought … to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language."

His Lordship had already written extrajudicially that "speaking generally commercially minded judges would regard the commercial purpose of the contract as more important than niceties of language" (Contract law: Fulfilling the reasonable expectations of honest men (1997) 113 LQR 433 at 441), all as noted in *Rainy Sky* at [25]. The language used in a contract is always, obviously and by necessity, highly significant in determining the true nature of the bargain, but can never in itself constitute the alpha and omega of the construction process.

[57] Several passages in the "celebrated" speech of Lord Hoffmann in *Investors Compensation Scheme Ltd* v *West Bromwich Building Society* [1998] 1 WLR 896 further emphasise the inherent difficulties in adopting an overly narrow linguistic approach to the task of construction:

> "(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co Ltd* [1997] AC 749.
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had…" ([1998] 1 WLR 913C - E).

> "'doing violence' to the natural meaning of the words … is an over-energetic way to describe the process of interpretation. Many people, including politicians, celebrities and Mrs. Malaprop, mangle meanings and syntax but nevertheless communicate tolerably clearly what they are using the words to mean. If anyone is doing violence to natural meanings, it is they rather than their listeners" ([1998] 1 WLR 913G).
>
> [The judge in the Court of Appeal] "said that the [first instance] judge's construction was not an 'available meaning' of the words. If this means that judges cannot, short of rectification, decide that the parties must have made mistakes of meaning or syntax, I respectfully think he was wrong." ([1998] 1 WLR 914F).

[58] The passage in *Mannai Investments* there referred to is in the following terms:

> "It is a matter of constant experience that people can convey their meaning unambiguously although they have used the wrong words. We start with an assumption that people will use words and grammar in a conventional way but quite often it becomes obvious that, for one reason or another, they are not doing so and we adjust our interpretation of what they are saying accordingly. We do so in order to make sense of their utterance: so that the different parts of the sentence fit together in a coherent way and also to enable the sentence to fit the background of facts which plays an indispensable part in the way we interpret what anyone is saying. No one, for example, has any difficulty in understanding Mrs. Malaprop. When she says 'She is as obstinate as an allegory on the banks of the Nile,' we reject the conventional or literal meaning of allegory as making nonsense of the sentence and substitute 'alligator' by using our background knowledge of the things likely to be found on the banks of the Nile and choosing one which sounds rather like 'allegory.' Mrs. Malaprop's problem was an imperfect understanding of the conventional meanings of English words. But the reason for the mistake does not really matter. We use the same process of adjustment when people have made mistakes about names or descriptions or days or times because they have forgotten or become mixed up. If one meets an acquaintance and he says 'And how is Mary?' it may be obvious that he is referring to one's wife, even if she is in fact called Jane. One may even, to avoid embarrassment, answer 'Very well, thank you' without drawing attention to his mistake. The message has been unambiguously received and understood." ([1997] AC 749 at 774 D - G; [1997] 2 WLR 945 at 967G - 968B).

[59] The process of construction, if undertaken properly and responsibly, is rarely simple - at least in the kind of cases which are brought for the adjudication of the senior courts. It is "essentially one unitary exercise" (*Rainy Sky* at [21]), a "composite exercise, neither uncompromisingly literal nor unswervingly purposive" (*Arbuthnott* v *Fagan* [1995] CLC 1396, per Lord Bingham of Cornhill at 1400). It is an "iterative process by which each

suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated": *Wood* at [12], citing *Arnold* at [77] and *In re Sigma Finance Corp* [2009] UKSC 2, [2010] BCC 40 at [12], and it matters little whether one commences the exercise with an examination of the "factual background and the implications of rival constructions or a close examination of the relevant language in the contract", so long as the indications furnished by each are balanced in the final analysis. It is not necessarily the case that that the language of a contract falls to be favoured in that balance when the product of professional drafters, as is made clear when *Wood* at [13] is read as a whole. The circumstances in which a contract was produced, insofar as they are truly known in any particular case, constitute no more than one element in the mix of factors which a proper process of construction requires to consider delicately in order to come to the legally correct conclusion. Unfortunately, because of the deceptive simplicity of concentrating on the "natural and ordinary" meaning of the language used in a contract, there is a constantly-present temptation to overlook, or pay insufficient attention to, the context in which the language in question appears and the purpose which it was intended to serve. That is a temptation which, it might be thought, not all of the Scottish cases cited to me have entirely succeeded in avoiding. The risk of a lapse into what was called in *Ashtead* at [16] a "brutal literalism" must always be recognised, not only because it is an approach apt to produce arbitrary results but because it represents, inherently, an inadequate discharge of the judicial responsibilities requisite in carrying out the task of contractual construction.

[60] I turn finally in the review of apposite authorities to *Aberdeen City Council* v *Stewart Milne Group Ltd*. It is, after all, the only authority cited to me in this case in which the UK Supreme Court sitting on a Scottish appeal opined on a matter of contractual

construction. For my own part, I do not find the case a difficult one to understand, although I may have gained some advantage in that regard by dint of having throughout the litigation been senior counsel for the successful party. Far from being an outlier in the field, the case is very firmly located in the mainstream of the principles of construction already discussed. It will be recalled that, put simply, the dispute concerned a sale of land by a local authority to a developer, with provisions for a uplift on the initial sale price when the developer disposed of or otherwise dealt with its interest in the land in question at a point in time when, it was anticipated, its value would have been enhanced. The contract was a relatively complex one which had been negotiated and drafted with the assistance of capable professional advisors. In due course the developer disposed of the land at less than its then open market value to a related company (a situation not expressly dealt with by the uplift provisions) and claimed that no further price was payable. Lord Hope of Craighead DPSC at [22] found the position "quite straightforward". The *context* showed that the intention of the parties (though not what they had actually said) *must be taken to have been* that the base figure for the calculation of the uplift was to be the open market value of the subjects at the date of the event that triggered the obligation. The language of the contract did not say that that was their intention; it simply provided the background material from which that deduction could be made. The deduction was supported by a consideration of what commercial sense would indicate one might have expected parties circumstanced as they were to have intended. In those circumstances, the only remaining question in Lord Hope's view was whether the actual language used prevented the conclusion that the parties' plain (but unexpressed) intention was that which the context indicated, and he determined that it did not.

[61] A few points may be made about Lord Hope's observations. Firstly, his Lordship stressed the centrality of context in determining the proper construction of the contract. Secondly, the outcome indicated by context was checked against the language actually used, albeit that outcome was so clearly indicated by the context that the remaining question was reduced to one of whether the language used prevented that outcome. Thirdly, the case is illustrative of the points forcefully made by Lord Hoffmann in *Investors Compensation Society* and *Mannai Investments* set out above concerning the inherent limitations of language as determinative of the proper construction of contracts and notices. In the course of the argument in *Stewart Milne*, Baroness Hale JSC observed (as noted by Lord Clarke JSC at [31]) that the case was not one where there were two alternative "available" constructions of the language used. On the contrary, the successful construction was not "available" by reference to that language but was, rather, as Lady Hale put it, a case in which, *notwithstanding the language used*, what the parties must have intended was clear.

[62] None of these features of *Stewart Milne* places it in some unusual category amongst cases dealing with contractual construction. Nor can it sensibly be contended that it was not, after all, a construction case but was, rather, one concerned only with the implication of terms. Lord Hope's judgment is clearly reasoned, and his conclusions expressed, in terms of the law and principles of contractual construction. Not only did Lady Hale, Lord Mance and Lord Kerr JJSC formally concur with that judgment, but Lord Clarke at the start of [32] expressly noted that he entirely agreed with those conclusions. Only at [33] did his Lordship explain that an alternative way of arriving at the same result was to analyse the situation in terms of the principles governing the implication of terms (at which Lord Hope's judgment had already hinted). All of the other members of the court agreed with that observation. The notion of an implied term had never arisen at any stage in the progress of

the case through the court hierarchy and had not been argued before the Supreme Court or raised in argument by any of the members of that court. All that was ultimately being said by Lord Clarke was that the case could equally validly be analysed by the implied terms route as by the construction route, that both kinds of analysis were aimed at discovering the answer to the same question - what did the contract mean? - and that he personally (for reasons upon which he did not elaborate, perhaps precisely because the matter had never been argued) preferred the former route. Nothing in that remotely detracts from the validity of the contractual construction route explained at length by Lord Hope, with which analysis all of the other judges, Lord Clarke not excepted, agreed. *Marks & Spencer* v *BNP Paribas* does not suggest otherwise; indeed in that case Lord Clarke accepted that:

> "… both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. On that basis it can properly be said that both processes are part of construction of the contract in a broad sense." ([2015] UKSC 72, [2016] AC 742, [2015] 3 WLR 1843 at [76], see also Lord Carnwath JSC at [62])

[63] The jurisprudential undergrowth thus cleared, one may proceed to examine the facts of the present case. The pursuer's principal case is that the defender received a "constraint benefit", the value of which it ought to have accounted for in the calculation of its gross income within the meaning of the lease, and which would thus have fed through into the rent payable for the rent years in issue. It will be recalled that a constraint benefit is one of the elements going to make up that gross income and that the definition of a constraint benefit in the lease is as follows:

> "'**Constraint Benefit**' means a relief, payment, reduced charge or avoided charge received by the Tenant from the Transmission System Operator in relation to a cessation, reduction or constraint in the export of electricity from the relevant Facility to the Transmission System;"

[64] The defender disputes that anything amounting to a constraint benefit within that definition materialised during the rent years in question. Looking firstly at the context in which the language used in the lease falls to be considered, it is apparent, from the very appearance of the concept of constraint benefit as an element within the bundle of things going to make up gross income, that as a matter of principle, at least, gross income was intended to comprehend not only receipts from the actual generation of electricity but to certain kinds of support or advantage that might transpire in relation to a cessation, reduction or constraint in the export of electricity from the windfarm to the transmission system.

[65] The superficial purpose of the clause in the lease defining a constraint benefit is, of course, to indicate just what kinds of support or advantage would qualify for inclusion in the sums going to make up the relevant gross income. In itself, that way of describing the purpose of the clause under examination adds little or nothing to the exercise of construction, but when one considers the matter slightly more deeply, it is noteworthy, and indeed significant, that counsel for the defender was unable, just like his counterparts in *Rainy Sky* and *Stewart Milne*, to explain on any principled basis what purpose the parties to the lease, as presumably commercially sensible entities, might have had in excluding from the concept of constraint benefit any consequence conferring material value on the defender which flowed from the application of constraint by the TSO on the operation of the windfarm.

[66] The defender's argument was, rather, focussed on the language of the clause defining a constraint benefit. When considering the language of the clause, it would be easy, but wrong, to overlook that the name given to the concept being described is exactly that - "constraint benefit". At its lowest, that choice of name indicates that what the parties

are thereafter trying to describe is a benefit flowing from a constraint on the windfarm's generation. The defender, however, submits that the language of the definition requires that it should (a) receive (b) a relief (c) from the TSO before a constraint benefit can exist for the purposes of the lease, and that none of those conditions is satisfied on the facts of what happened. Those arguments must now be considered and weighed in the balance as part of the construction exercise.

[67] It is appropriate to consider the definition of constraint benefit as a whole rather than artificially to treat it as three separate and unrelated parts. Had there been no MVRN in place, then the constraint imposed by the TSO would have resulted in the calculation of Period BM Unit Balancing Services Volume and a commensurate allocation of energy to the defender's account for the purposes of the BSC, which energy it could (and would) have dealt with by selling it. That energy would have been received by the defender into its account and it is not difficult to see it as a relief, not in the narrow and technical sense concerning primary and secondary obligations favoured by the defender but in the more natural and ordinary sense as a form of assistance provided in order to eliminate or mitigate the effects of a situation otherwise productive of difficulty or inconvenience. The energy which would have been allocated to the defender's account in the situation currently being figured would have been provided to assist it out of the difficulty or inconvenient situation in which it would otherwise have found itself as a result of having been prevented by TSO's decision to constrain its electricity production from generating electricity which it could then sell and indeed had already agreed to sell into the market.

[68] The only difficulties which would arise with the language of the definition of constraint benefit applying in that situation would be the fact that the allocated energy might on one view not be regarded as having been received "from" the TSO, in the sense

that the energy in question never belonged to or was under the direct control of the TSO (as opposed to simply being energy available in the BSC system for use in addressing imbalances resulting from constraint decisions), and also because its actual allocation to the defender would have occurred, not at the hands of the TSO itself, but rather by the actions of one of the companies charged with the administration of the consequences of the TSO's constraint decisions for the purposes of the BSC. However, I do not consider that those issues would prevent energy so credited to the defender as being regarded for the purposes of the lease as a constraint benefit. If a literal approach was taken to the construction of the definition of constraint benefit, there could never be any such thing at all, since the only element of the BSC with which the TSO is for present purposes concerned is choosing whether to accept or reject bids and offers and making the consequent constraint decisions. Accordingly, nothing that the defender might receive would ever come from the TSO if a narrow approach to the word "from" were to be adopted. The parties, contracting as they did against a knowledge of the terms of the BSC (which remain in relevant regards meantime unchanged), cannot be supposed to have defined by dead letters as one potential element of gross income something that could never actually come into existence. The defender's position, taken both before and during the litigation, that Period BM Unit Cashflow does qualify as a constraint benefit, seems to me tacitly to acknowledge as much, since that does not come "from" the TSO in any more literal sense than does Period BM Unit Balancing Services Volume. Rather, it is clear that the word "from" in the definition of constraint benefit is used in the sense of indicating a place or position where (or, as here, a legal person by whom) some action or motion is originated and which goes thence. That is a natural meaning of the word, if not the most ordinary one in modern usage.

[69] Although the defender does not concede as much, I would accordingly conclude that any energy credited to it in terms of the provisions of the BSC as a result of a constraint decision taken by the TSO would qualify as a constraint benefit within the meaning of the lease. That conclusion does not, however, in itself resolve the dispute in the present case, since no energy was so credited to the defender. Rather, the energy which the system made available as a relief (in the sense already discussed) for the consequences of the TSO's constraint decision was credited to the energy account of EDFE. That occurred solely because, in addition to entering into a PPA with EDFE, the defender also executed a MVRN, the effect of which was to direct that energy which would otherwise have been credited to the defender in terms of the BSC should instead be credited to EDFE. A MVRN is not a necessary concomitant of a PPA, but equally is by no means an unusual expedient to which the parties to a PPA may have resort. It is common ground that the pursuer did not positively know that the defender would enter into a MVRN when the lease was concluded.

[70] Returning to the definition of constraint benefit, a relief was made available in relation to a constraint which on a proper construction came from the TSO in the sense already discussed. The relief itself was not received by the defender, but the defender did receive something as a direct result of the relief having been - by its own choice - conferred on EDFE rather than upon it. In terms of the PPA, it received payment from EDFE in respect of the relief which EDFE had received as a result of the TSO's constraint decision. Is that a situation falling within the definition of constraint benefit for the purposes of the lease? In my opinion it is not necessary to consider or apply any supposed special rule of law dealing with the diversion of benefits. Rather, the question can be answered by the continued application of familiar principles of construction. It is difficult to see why the defender's voluntary interposition of EDFE into the arrangements which would otherwise have

pertained ought to make a difference to the amount of rent payable by the defender, especially since it did itself receive substantial benefit from the situation which it had created; this was not a case in which any benefit flowing from the constraint decision was diverted wholly and permanently away from it. Just as Lord Clarke observed at the end of [33] in relation to the functionally somewhat analogous situation which pertained in *Stewart Milne*, the parties could not sensibly have intended that that benefit should be left out of account in the calculation of the sums due to the pursuer as rent under the lease. The proper construction of the definition of constraint benefit is that it encompasses a benefit which accrues to the defender and arises in consequence of a constraint decision made by the TSO. That construction accords with the context and purpose of making benefits flowing to the defender as a result of the TSO's constraint decisions matters of which account falls to be taken in computing the gross income of the defender from the operation of the windfarm and thus the rent payable under the lease. It makes commercial sense. It does not, in the words of Lord Hope in *Stewart Milne*, do undue violence to the language used in the lease - it covers a situation where there remains a receipt on the part of the defender which flows from a relief made available in terms of the BSC in consequence of a constraint decision of the TSO.

[71] It would be possible to arrive at the same conclusion by considering the issues in terms of the law of implied terms. One can assume from the background circumstances that the parties to the lease, or an officious bystander, would have said that the situation now under consideration would result in the existence of a constraint benefit if asked about it at the time when the lease was entered into. Alternatively, one can say that a term treating that situation as resulting in the existence of such a benefit is necessary to make the contract work or to give it business efficacy. As had already been pointed out, this is simply an

alternative route to discovering the true nature of the bargain which was made. I would prefer, however, to rest my conclusion on the principles of construction already explained, essentially because I consider that the nature of that bargain does emerge tolerably clearly from the terms of the lease rather than having to be implied therein.

[72] I turn to the more minor elements of the dispute. Firstly, I deal with the alternative and subsidiary submission by the pursuer, that the defender falls to be regarded as having received the benefit of a loss of revenue claim in consequence of the arrangements set in train in terms of the BSC as a result of the TSO's constraint directions. The definition of a loss of revenue claim, so far as material, is:

> "'**Loss of Revenue Claim**' means in respect of a Facility, all amounts received by the Tenant pursuant to a claim by the Tenant against any person for any reason for the loss of or reduction in revenue of the Tenant from that Facility … including a claim for loss or reduction of revenue pursuant to a turbine availability, energy production or power output warranty contained in a turbine supply agreement or turbine maintenance agreement … [subject to certain specific exclusions concerning commission delays and equipment repair]".

[73] I do not consider that this clause can properly be construed as covering any payment flowing from a constraint decision made by the TSO. Its context, purpose and language combine to indicate clearly that it was intended to cover situations where the defender has made a claim against a person, and consequently received a payment, because of something for which that person is legally responsible having had an adverse effect on its revenue, not simply on its generation. The BSC arrangements, taken along with those made under the PPA, mean that the defender's revenue has not been materially adversely affected because of something for which someone else is responsible. No claim has required to be made against anyone and thus no payment has been received in consequence of any such claim. In any event, the fact that I have determined that the payments made to the defender by EDFE in respect of the energy credited to its account as a consequence of the TSO's

constraint decisions and the existence of the MVRN qualify as constraint benefits means that there is no need for, and no commercial sense supporting, a further clause covering the same subject-matter.

[74] Secondly, the question arises of what value is to be ascribed to the constraint benefit received by the defender for the purposes of inclusion in the gross income calculations. Since, on my analysis of the relevant provisions of the lease, that benefit consisted of the receipt of the payments made to the defender by EDFE for the energy credited to it in consequence of the BSC and the MVRN, *prima facie* the amount of those payments represents that value. That, after all, is the gross amount of what was received by the defender as the benefit flowing to it from the constraint imposed by the TSO. It is entirely consistent with the basic notion that what is being looked for is something (in this instance called a constraint benefit) which is in a meaningful sense part of the gross income flowing to the defender out of the operation of the windfarm. Although Declaration C attending the definition of gross income in the lease makes it clear that the concepts of CfD and PPA revenue are not intended to be the production of a calculation of actual income streams, Declaration D states that that is without prejudice to the calculation of, *inter alia*, constraint benefits - implying at least that actual income is what is to be relevant to that element of gross income. The defender's somewhat faint suggestion that the System Imbalance Price should be used to represent the contribution of constraint benefit to gross income is entirely unrealistic; it is the contribution required to or from the BSC system to enable the smooth operation of the balancing mechanism and is of no utility in the assessment of the value of the benefit received by the defender in consequence of the TSO's constraint decisions.

[75] The pursuer maintains that the 6.5% management fee deducted by EDFE in accordance with the terms of the PPA from what might otherwise be the price payable for

the volume of energy credited to it in consequence of the operation of the BSC and the MVRN ought not to be an allowable deduction from the assessed value of the relevant constraint benefit in the hands of the defender. However, the amount net of that management fee is what was actually received as gross income by the defender in respect of the non-generation of energy by it in consequence of the TSO's constraint decisions. If it had been suggested, and made out in the evidence, that the arrangements entered into between the defender and EDFE were uncommercial and artificially depressed the defender's relevant receipts to a level materially below that reasonably attainable in the market for the volumes of energy in question, then further delicate consideration might have been required as to the precise construction of the concept of receipt in the definition of a constraint benefit. As it is, however, no such claim was made. Indeed, the pursuer's expert, Mr Bent, who had relevant experience in PPAs, was asked in cross-examination about charges typically made in such arrangements, and indicated that, beyond a residual 2% or so fee for financial risk to which an offtaker would be exposed, the quantum of further charges would depend on the nature of the services being provided. He did not suggest that a total fee of 6.5% was likely to be excessive or uncompetitive, or even that it merited further examination. In these circumstances, the value of the constraint benefits received by the defender remains the amount actually received by it from EDFE in respect of the energy credited to it in consequence of the TSO's constraint decisions.

[76] The final issue in dispute is whether warranty claims fall to be accounted for in the rent year(s) to which they relate or the rent year in which the amount which they produced was actually received by the defender. It is common ground that warranty claims are a subset of loss of revenue claims, and the pursuer in essence argues that because the definition of those claims refers to amounts received by the defender pursuant to a claim,

the point of receipt is the relevant juncture for accounting purposes. However, standard accounting practice proceeds, for good reason, on an accruals basis, recognising revenues and expenses when they are earned or incurred, regardless of when cash is exchanged, thus giving a more accurate view of overall financial performance in a given period. The parties to the lease must be taken to have contracted against that background and some indication in the lease that cash accounting was to be used instead for loss of revenue claims would be required in order to displace a tacit understanding that the standard practice would be that which would be followed. The fact that the definition of loss of revenue claims deals with "amounts received" is not such an indication; it merely recognises that a claim that does not ultimately result in an amount being received is not one that is contributing in any way to the gross income of the defender and is thus not one of which any account need be taken in the calculation of gross income. I recognise that delay in ascertaining the defender's gross income for any particular rent year is liable to be inconvenient when the amount of that income may well govern the amount payable in the next rent year, but the parties made detailed provision for such an eventuality in the proviso to Clause 3.3.6, thus neutralising any difficulty that might otherwise have existed in that regard. It follows that amounts received in satisfaction of warranty claims fall to be accounted for as gross income in the rent year(s) to which the relevant claim relates.

Disposal

[77] Given that my decisions on the various issues in dispute present a pattern which was not anticipated in the detailed calculations presented to me by the pursuer, I shall give parties the opportunity to consider their positions and either agree the precise terms of the

orders required to give effect to those decisions or to make their respective submissions in that regard at a By Order hearing shortly to be fixed.