OUTER HOUSE, COURT OF SESSION

[2025] CSOH 9

CA30/24

OPINION OF LORD CLARK

In the cause

BIFFA WASTE SERVICES LIMITED

Pursuer

against

THE SCOTTISH MINISTERS

Defenders

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

28 January 2025

Introduction

[1] In this commercial action, Biffa Waste Services Limited (the pursuer) seeks an award of damages from the Scottish Ministers (the defenders). The action arises from the Scottish Ministers' decision to delay the coming into effect of the Deposit Return Scheme for Scotland ("the DRS"). Biffa committed significant funds towards implementation of the DRS and argues that the Scottish Ministers are liable for the loss of those investment and management costs, amounting to £51.4m, and also for the loss of profits that would have been generated, said to be £114.8m.

[2] Biffa makes two separate claims: firstly, that the Scottish Ministers owed a duty of

care to Biffa, based on an assumption of responsibility, and breached that duty; secondly, that Biffa relied upon a letter dated 17 May 2022 sent by the minister (Lorna Slater MSP) to Biffa, which turned out to be a negligent misrepresentation. Each of these allegations is denied by the Scottish Ministers. The case called for a diet of debate, with the Scottish Ministers seeking a finding that there was no duty of care owed by them and so there should be decree of *absolvitor*. In the event of that finding being refused, the Scottish Ministers seek dismissal of the action, arguing that the pursuer's case on both grounds is irrelevant.

Background

[3] In accordance with the standard practice at a debate, Biffa's factual averments about the background are taken *pro veritate.* In any event, a number of points are not disputed. In terms of the Climate Change (Scotland) Act 2009, section 84, the Scottish Ministers have the power to introduce a DRS. The introduction and implementation of a DRS is a Scottish government policy, as is stated in the Programme for Government in September 2017. The Deposit and Return Scheme for Scotland Regulations 2020 set out how the DRS was to be implemented.

[4] A DRS is a scheme whereby producers and importers of products in single-use containers are to be compelled to add an additional charge onto their products, to be paid by the customer. Single-use containers, as envisaged by the Scottish Ministers in implementing the DRS, include recyclable plastic, cans, tins and glass. The additional charge constitutes a deposit. If the customer placed the recyclable container in what is termed a recognised return point, the deposit would be refunded to the customer. Once the single-use containers are placed in the return point, they would require to be transported, counted and recycled.

[5] Under section 85 of the 2009 Act, the Scottish Ministers have the power to designate a

"scheme administrator". The role of a scheme administrator is to manage the financial and logistical aspects of the DRS, subject to oversight from the Scottish Ministers. Circularity Scotland Limited ("CSL") was approved as scheme administrator by the Scottish Ministers. Biffa's averments say that a "logistics provider" is essential to the implementation and successful delivery of the DRS, given their responsibility for collecting, counting, transporting and recycling of material. On 18 July 2022, Biffa entered into a contract with CSL, in terms of which Biffa became the logistics provider for the DRS.

[6] Biffa avers that before entering into the contract, it raised concerns with CSL in connection with the significant upfront financial outlay that Biffa would have to make. It sought assurances as to the deliverability of the DRS. On 17 May 2022, Lorna Slater MSP, Minister for Green Skills, Circular Economy and Biodiversity, on behalf of the Scottish Ministers wrote to Mr Topham, Biffa's CEO. Ms Slater MSP was the minister responsible for the DRS. The letter notes that Biffa had been selected as CSL's "preferred partner to deliver operations and logistics services". The background to the letter, as averred by Biffa, was that Biffa specifically sought assurances from the Scottish Ministers as to the deliverability of the DRS prior to incurring the expenditure it would commit and incur on entering into the contract.

[7] In the letter, the minister refers to the Scottish Ministers "commitment to delivering DRS by 16 August 2023, which remains unwavering". The letter states that CSL "was able to demonstrate that it would be in a position to subsist for at least five years". It refers to the importance of CSL's approval as scheme administrator and the unlikelihood of that approval being withdrawn. It states that "our DRS will be the first in the UK", and that this creates 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 points to momentum

building behind the scheme and to funding secured by CSL. For Biffa to enter into the contract, that "would be a major vote of confidence in both CSL and DRS, and help to increase momentum towards successful delivery". The letter goes on to state "I hope this letter provides reassurance on the Scottish Government's continuing commitment to DRS".

[8] While the DRS is a scheme the Scottish Ministers can implement, the matter is governed by UK legislation, which among other things allows the UK government to control what can be done on certain recycling matters in devolved jurisdictions. Put simply, the United Kingdom Internal Market Act 2020 ("IMA") precludes goods produced in one part of the United Kingdom (the originating part) being subject to different requirements in another part (the destination part). These can be described as market access principles. Applied to Scotland, the IMA does not affect the Scottish government imposing different requirements on goods produced in this country, but those requirements cannot apply to incoming goods produced elsewhere in the UK, unless there is approval. To introduce the DRS, given that it would also deal with goods produced elsewhere in the UK, section 10 of the IMA requires the Scottish Ministers to obtain an exclusion of the DRS from the market access principles. The letter sent by the minister to Biffa did not state that IMA exclusion was needed, or that it had not been sought or that it might not be granted.

[9] The contract between Biffa and CSL was for an initial period of 10 years and was anticipated by Biffa to generate profit of £114.8m. From May 2022, Biffa invested significant sums in preparing for the launch of the DRS, including (i) purchasing assets, such as counting and sorting machines, containers, vehicles for collection and machinery to recycle; (ii) entering into leases for sites; (iii) recruitment; and (iv) negotiation of sub-contracts. Biffa invested £51.4m in preparing for the DRS going live. The anticipation was that that sum would be recouped once the DRS was in operation. The DRS "go live" date was, as

envisaged by the Scottish Ministers, initially 1 July 2022. By amendments to the regulations on 24 February 2022, it was postponed to 16 August 2023. It was further delayed until 1 March 2024. It was then, on 2 November 2023, postponed until 1 October 2025.

[10] At some point, the Scottish Ministers asked the Secretary of State of the UK government for an exclusion under the IMA. The date when this was done is a matter in dispute between the parties. The UK government consider that the request was made on 6 March 2023. The Scottish Ministers say they had commenced the "approval" process earlier. On 26 May 2023, the UK government approved a "temporary exclusion" from the terms of the IMA. The temporary exclusion was for the period from the launch of the DRS until planned schemes are in place in the rest of the UK. The temporary exclusion covered plastic, aluminium, and steel cans. It did not cover glass. In response, dated 2 June 2023, the Scottish government said that "[t]he removal of glass fundamentally threatens the viability of Scotland's DRS with reduced revenue for the scheme administrator. Removing glass will also have a significant impact on business" and would put "companies at a competitive disadvantage".

[11] On 7 June 2023, the Scottish Ministers announced the delay to the DRS until "at least October 2025". In the Scottish Parliament, the minister, Ms Slater MSP, explained that "[the Scottish Ministers] have been left with no other option than to delay the launch of Scotland's DRS, until October 2025 at the earliest based on the UK government's current stated aspirations". A further delay to 1 October 2027 was announced on 25 April 2024.

[12] Biffa avers that the decisions to delay created significant uncertainty and that producers refused to fund CSL given the position taken by the Scottish government. The delay led to CSL going into administration on 20 June 2023. Biffa's contract with CSL was terminated by the administrators and Biffa's position as logistics provider ended. Biffa's

investment, and the opportunities it created, are said to have been lost. On the pursuer's pleadings, financial investments were also made by CSL, banks that provided start-up funding to CSL, retailers and drink producers.

The pursuer's case

[13] In Article 17, the pursuer makes the following averments about the duty of care:

> "17. The Scottish Ministers owed the pursuer a duty of care. The Scottish Ministers are in breach of that duty. The Scottish Ministers were uniquely able to apply for Internal Market Act approval. They uniquely had knowledge of whether such approval was needed, when such approval would be applied for and whether such approval had been granted. Only they, and the UK Government, would have had knowledge of the status of such approval. The Scottish Ministers accordingly had particular responsibility and knowledge in respect of a fundamental step which was required to ensure the deliverability and viability of the DRS. The Scottish Ministers were aware that the pursuer would be committing significant funds to the DRS. The Scottish Ministers were aware that the pursuer's investment was required to ensure that the critical infrastructure of the DRS, including collection, counting and processing facilities was in place. Without the pursuer's investment, the DRS would not proceed. Accordingly, the Scottish Ministers were aware that the pursuer's investment would be instrumental to the deliverability and viability of the DRS. In the circumstances, the Scottish Ministers knew or should have known that the pursuer specifically would be impacted by its actions. The pursuer entrusted the Scottish Ministers to take all necessary steps to ensure the viability and deliverability of the DRS. It was reasonable for the pursuer to do so given that the pursuer had ultimate responsibility for the DRS. Furthermore, the Scottish Ministers 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, the Scottish Ministers assumed responsibility for the pursuer in the latter's capacity as preferred bidder for the contract, such that a duty of care arose."

[14] The alleged breaches of duty are set out in Article 18, and the opening points are as follows:

> "The Scottish Ministers breached their duty of care to the pursuer. Firstly, they failed to alert the pursuer that Internal Market Approval was required, had not been sought and had not been granted. Secondly, the Scottish Ministers failed to apply to the UK Government for Internal Market Act approval timeously…They ought to have applied for approval at an earlier stage, and in particular before encouraging the pursuer to enter into the Contract and providing the assurances referred to hereinafter. By not applying for approval until March 2023, the Scottish Ministers

created a situation in which there was insufficient time for them to implement the DRS with any changes necessitated by the approval process."

[15] The pursuer goes on to aver that:

> "Had the Scottish Ministers not breached their duty of care, the DRS would not have been delayed and CSL would not have entered administration. Had they timeously sought approval from the UK Government, the extent to which approval would be granted would have been known at an earlier stage. In that situation, there would have been time to implement the DRS. It would not have been necessary to abandon the DRS as in fact happened. *Esto* the DRS would have had to be abandoned in any event, the defenders' failure to take reasonable care in applying for IMA approval meant that the problem therewith did not materialise until much later than should have been the case, in which time (as the defenders knew) the pursuer continued to invest and expend money in the scheme."

[16] In relation to alerting or warning the pursuer, the following is then averred (with some minor typing errors in referring to "the pursuers"):

> "*Separatim*, and in any event, the defenders were aware that from execution of the Contract in July 2022 the pursuers were (with the encouragement of the defenders) incurring significant costs in investing in the DRS and in getting it ready for launch. Notwithstanding that awareness, at no point in time did they warn the pursuers of the growing difficulty with IMA approval. Despite their awareness from at least March 2022 that approval was going to be necessary, they did not apply for same until March 2023, and did not tell the pursuers that this was so. Despite their awareness in November 2022 that approval had neither been sought nor granted and was thus likely to be problematic, the defenders did not alert the pursuers to this. Despite their awareness, expressed by December 2022 but in any event obvious from the moment the Contract was entered into, of the ongoing expenditure by the pursuer and the fact that absence of approval would cause significant loss to the pursuer, no warnings were given. Had the defenders alerted the pursuers to said difficulties, the pursuer could have taken steps to mitigate its losses by pausing expenditure on the scheme. Accordingly, the Scottish Ministers' failures to take reasonable care has caused loss to the pursuer."

[17] The breaches of duty are said to have resulted in the loss of £166.2m, comprising the investment and management costs (£51.4m), and the loss of profits that would have been generated (£114.8m).

[18] On the alternative ground of action, negligent misrepresentation, Article 20 includes these points:

> "20. *Separatim, esto* the defenders are not liable to the pursuer on the foregoing basis, in any event the 17 May 2022 Letter amounts to a negligent misrepresentation. It provides a number of assurances in respect of the viability of the DRS. However, it fails to alert the pursuer to the need to apply for UK Internal Market Act approval, whether such approval had been sought, when it would be sought and the consequences should it not be sought or granted. It makes no reference to the fact that such approval was a requirement of the DRS proceeding as planned. The fact that such a significant step had not been taken by the Scottish Ministers, ought to have been raised with the pursuer in the 17 May 2022 letter. Instead, the letter purports to assure the pursuer that the DRS is entirely deliverable and that the Scottish Ministers were committed to its delivery… [T]he 17 May 2022 letter created a false and misleading impression and amounts to a misrepresentation. That misrepresentation was negligent. A reasonable person writing to the pursuer in order to attempt to reassure and persuade the pursuer to enter into the Contract would have had regard to the disastrous consequences for the pursuer in the event of the Contract being executed and IMA approval not then being granted. A reasonable person having due regard to the interests of the pursuer as recipient of the letter and its assurances would have appreciated the need not to create a misleading impression as to deliverability. Such a person would have disclosed the true position regarding IMA approval. The failure to do so meant that the letter was a half-truth, as the writer should have appreciated."

[19] This alternative ground of action is claimed to have resulted in loss of the investment and management costs (£51.4m).

Issues

[20] The principal issues to be determined in this debate are whether the following arguments on behalf of the Scottish Ministers succeed at this stage: (i) that the Scottish Ministers did not owe a duty of care to Biffa; (ii) that the terms of the letter dated 17 May 2022 did not amount to a negligent misrepresentation. Various points arise on each ground. One important factor, on both grounds, is whether the pursuer relied upon the defenders and if so whether that reliance was reasonable. There are also some further points raised by the defenders in relation to the relevancy of the pursuer's case on causation and loss.

Submissions

[21] The parties lodged detailed notes of argument and a bundle of authorities containing a large number of cases. Oral submissions were heard over a two-day period. These have all been considered. The arguments made require quite an extensive assessment. It is not appropriate to set out the submissions in detail. What follows is a brief summary of the key points, with some submissions referred to further in due course when it comes to assessing each side's position and explaining my decision and the reasons for it. In noting the submissions, I have followed the structure used by parties, dealing firstly with duty of care, and the sub-issues of (i) imposition of a duty of care on a public authority, (ii) assumption of responsibility and (iii) causation, and then dealing secondly with negligent misrepresentation.

Submissions for the defenders

Duty of care

<u>(i) Imposition of a duty of care on a public authority</u>

[22] The timing of initiation of the process to secure an exclusion called for political judgment. There is no criterion on which a court can determine the reasonableness of the political choices made by the Scottish Ministers. The decision on the part of the Scottish Ministers to proceed as they did is non-justiciable because it was part of a delicate political process of conducting inter-governmental relations. There can be no liability if the decisions that are taken fall within the ambit of a reasonable exercise of discretion: *Carty* v *Croydon LBC* [2005] 1 WLR 2318; *N* v *Poole Borough Council* [2020] AC 780. There is no averment by the pursuer that any of the decisions that were taken were unreasonable. The first ground of action is irrelevant on that basis.

[23] If the issue is justiciable, no duty of care was owed. The Scottish Ministers ought to be unfettered in their ability to pursue their public law obligation to seek an exclusion in order to commence the DRS on the appointed day. Issuing the warning that the pursuer maintains the Scottish Ministers should have given in the exercise of their duty of care could have prevented fulfilment of the public law duty, because a decision by the pursuer to pause expenditure could have jeopardised implementation on the appointed day, rendering futile the attempt to secure an exclusion for commencement on that day. There ought not to be recognition of a duty of care creating a risk of that outcome. It is not fair, just and reasonable because it involves promoting the interests of the pursuer over those of the general public.

[24] The pursuer was one of many making a financial investment to ensure that the scheme was implemented. The DRS was not a scheme to benefit any of them. It was for the benefit of the general public because it promotes net zero. Where the statutory power is intended to protect a class of persons, no duty of care is owed to others who provide the services to achieve that end: *Jain* v *Trent Strategic Health Authority* [2009] 1 AC 853. The same applies with even greater force to the DRS, which was to promote the interests of the general public as opposed to a specific class. No duty of care was owed to the pursuer or any of the others who required to invest to provide the infrastructure necessary to operate the scheme. The nature of the task, with its emphasis on the broader public interest, is itself a strong indicator against the imposition of a duty of care in favour of any section of the public: *Davis* v *Radcliffe* [1990] 1 WLR 821.

(ii) Assumption of responsibility

[25] *JP SPC 4* v *Royal Bank of Scotland International Ltd* [2023] AC 461 identifies three factors that have been of particular relevance to determining whether there is an assumption

of responsibility in relation to a task or service that is undertaken. The general circumstances, absent the letter, do not satisfy the first and second factors. The letter does meet them to a degree. The critical event is the date and terms of the UK government's decision. The pursuer did not act reasonably. There was nothing said by the Scottish Ministers, not even in the letter of 17 May 2022, that could reasonably provide a basis for any external party such as the pursuer to make any proper assumption about the negotiating position of the UK government and its willingness to agree to the implementation of the DRS "as proposed" in accordance with any particular timetable for negotiations.

[26] The pursuer avers that in the contract there was a longstop date (for the DRS to go live) of 15 August 2024 with a £20m insurance policy in place that included cover for the risk of delay. These factors alone give reasons to say that the pursuer did not make the assumption averred. Other terms in the contract, as referred to in Answer 8 for the defenders, support that position. The pursuer has made no relevant averments that it relied on the Scottish Ministers to commence the DRS on 16 August 2023. Even if there was any measure of reliance it was not reasonable.

[27] The pursuer admits that it was in receipt of independent legal advice. The absence of an exclusion for the DRS was a publicly accessible fact. The pursuer does not say whether or not it took advice on the possible impact of the IMA. The pursuer does not plead that it was unaware of the IMA and a risk that it might affect the DRS. The pursuer has failed to aver the conditions necessary for the recognition of a duty of care based on assumption of responsibility.

[28] The duty to warn is to be seen in the context of the *dictum* of Lord Goff in *Davis* v *Radcliffe*, at 826-827. The fact that the Scottish Ministers had to balance competing considerations is a strong factor against recognition of a duty of care. The critical fact is that

the pursuer avers that had a warning been given it would have paused its investment. That in itself could have jeopardised implementation of the DRS on the appointed date of 16 August 2023 and done so even before any "application" was made to the UK government for an exclusion and before the attitude of the UK government was knowable. It would be inappropriate to recognise a duty of care that could have adversely affected achievement of the objective of the timeous commencement of the DRS.

[29] The same applies to the proposition that there was a duty to make a "timeous application". The appropriate time at which to make an "application" is a political judgment that depends in part on the state of readiness to provide the information that may be required in support of the application. The timing of any "application" will also depend on the procedures that require to be followed.

[30] The stage at which a "formal request" could be made to UK Ministers was subject to agreement by officials for all parties and was not in the control of the Scottish Ministers. Unilateral performance by the Scottish Ministers would not necessarily have achieved the outcome desiderated. There is no averment giving any reason to suppose that the result of an earlier application could or would have been a speedier decision by the UK government. The date of the decision was dependent on multi-party assessment of relevant information and that obviously takes time.

(iii) Causation

[31] In relation to causation, on the alleged breach of the duty of care, it is necessary to recall that the UK government decision omitted glass. In respect of the costs of £51.4m claimed to have been wasted, on the weaker alternative rule the pursuer pleads a duty to make an application by the end of 2022. The pursuer does not make clear when expenditure

was incurred in providing infrastructure for glass and to what extent that could have been minimised by an earlier decision pursuant to an application made at the end of 2022.

[32] The claim for loss of profits of £114.8m assumes that the DRS would have gone ahead had there been an earlier UK government decision. However, there is no averment implying that an earlier decision would have included glass. The pursuer's case therefore assumes the omission of glass. It is not said what part of the £114.8m estimate of profit is attributable to glass. The averments of loss are essentially lacking in specification and so are irrelevant. Moreover, the pursuer's position is that if it had been warned it would not have entered into the contract, which would have resulted in no profit.

Negligent misrepresentation

[33] The suggestion that the letter of 17 May 2022 amounts to a negligent misrepresentation is directly covered by *NRAM* v *Steel* 2018 SC (UKSC) 14. The pursuer avers that "the letter purports to assure the pursuer that the DRS is entirely deliverable". On no reasonable reading does it do so. The letter did not exclude the possibility of change. There is nothing in the letter fettering discharge by the Scottish Ministers of their public law duty to keep the DRS under review and act as needs must.

[34] The pursuer's lack of candour regarding fundamental terms of its contract is critical to the relevancy of the case. The terms of the contract are inconsistent with the assumption that the pursuer avers that it made and inevitably lead to the question why these provisions were framed as they were. That bears on the critical pre-conditions of reliance and reasonable reliance.

[35] The absence of any averment that the pursuer was unaware of the IMA is also relevant more particularly given that: (a) the pursuer had independent legal advice; (b) the

Act is a Public General Statute; (c) it had impacted a Scottish scheme to regulate single use plastics; and (d) the absence of any exclusion in favour of the DRS was an accessible fact. As regards (d), it only required examination of Schedule 1 of the IMA and a check that no amending Statutory Instrument had been enacted. There is no relevant case of negligent misrepresentation.

Submissions for the pursuer

Duty of care

(i) Imposition of a duty of care on a public authority

[36] The primary fallacy in the Scottish Ministers' argument is that it proceeds on the basis that the issue in this action is an exercise of some form of statutory discretion. This argument mischaracterises Biffa's claim. The Scottish Ministers were obliged to apply for IMA exclusion for the DRS. There is no discretion on the part of the ministers whether to apply. Should they fail to apply with sufficient time, the policy cannot proceed. Moreover, there is nothing in the statutory context which gave the ministers a discretion to mislead Biffa by advancing assurances and yet which were, as averred, half-truths (and as such, no better than lies).

[37] A failure to apply timeously which risks the policy, particularly where the decision-maker (the UK government) repeatedly states that insufficient information has been provided, must fall within the category of being so unreasonable that it falls outside the ambit of the discretion. It is clear from Biffa's claim that their position is that the Scottish Ministers have acted carelessly, unreasonably, and indeed, negligently. The present case is a clear one of assumption of responsibility. As stated in *N* v *Poole Borough Council*, the question is one of whether such a duty of care exists. It is not, as the Scottish Ministers

claim, a matter of simple justiciability. But if the approach taken in earlier cases in relation to justiciability is applied, it does not prevent the pursuer's claim.

(ii) Assumption of responsibility

[38] There is nothing novel about Biffa's claim. It is a simple application of the doctrine of assumption of responsibility. The Scottish Ministers and Biffa were in a unique relationship which was akin to a contract. Whilst the factors stated in *JP SPC 4* v *Royal Bank of Scotland International Ltd* are non-exhaustive, they are all met here. Reference is made to *Woodcock* v *Chief Constable of Northamptonshire* [2023] PIQR 450.

[39] The letter dated 17 May 2022 emphasises, but is not essential to, the existence of an assumption of responsibility. The Scottish Ministers provided Biffa with a number of assurances as to the viability of the DRS and the position of CSL. In doing so, they assumed a specific responsibility to protect Biffa from losses. The letter provides a clear and unequivocal statement that the Scottish government was "unwaveringly committed" to the DRS in order to reassure Biffa and induce Biffa to finalise the contract. The letter contains an assurance. On averment, Biffa relied thereon in deciding to commit to the contract.

[40] The present case is covered by settled law and the need to show that imposing a duty of care would be fair, just and reasonable does not arise. In any event, where a party has such unique knowledge of a situation which has a direct impact on another party, it is fair, just and reasonable to impose a duty: *Aruchanga* v *Secretary of State for the Home Department* [2023] PIQR P12. Whether to apply for an exclusion and how to apply is for the Scottish Ministers and no one else. It is fair, just and reasonable to impose a duty in these circumstances. This is particularly so where the Scottish Ministers have encouraged others, including Biffa, to make significant investment in the DRS without making the compulsory

application.

[41] The longstop date in the contract allowed for small delays, not a significant delay leading to the collapse of the DRS and termination of the contract. The insurance referred to in the contract, which covered a portion of Biffa's outlay, does not negate reliance on the Scottish Ministers taking necessary steps to implement the DRS correctly. Any legal advice plainly could not comment on whether IMA approval had been sought and the status of it, given that such issues are not in the public domain, and are exclusively a matter for the Scottish Ministers.

(iii) Causation

[42] On the defenders' point that, had there been a warning the contract would not have been entered into and no profit would have been made, that is a counterfactual account. The contract was entered into and loss of profit occurred. It is no answer to say if we had told you the truth you wouldn't have signed the contract. In relation to glass not being excluded under the IMA, how that affects the amounts of loss can be determined at the proof.

Negligent misrepresentation

[43] A situation in which someone with specialist knowledge of a topic (here, the DRS itself) takes it upon herself to offer assurances about it is a paradigm case in which a duty of care has been held to arise: *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465. Given the Scottish Ministers' unique knowledge of the status of IMA approval, they possessed a "special skill". Reference is made to *Spring* v *Guardian Assurance PLC* [1995] 2 AC (HL) 296; *Lennon* v *Commissioner of Police of the Metropolis* [2004] 1 WLR 2594 and *Customs and Excise Commissioners* v *Barclays Bank* [2006] UKHL 28; [2007] 1 AC 181. There can be no

doubt that a proximate relationship exists here, given Biffa's role in the DRS.

[44] The letter was sent with the purpose of managing Biffa's concerns and ensuring that they signed the contract. In that context, the letter, and its reference to an "unwavering commitment" is seen as a representation that all was well and no significant step that could derail the DRS was still to be taken.

[45] In *Gluckstein* v *Barnes* [1900] AC 240, at 250-251, Lord Macnaghten of the House of Lords commented that "everybody knows that sometimes half a truth is no better than a downright falsehood." Reference is made to *Park's of Hamilton (Holdings) Limited* v *Campbell* [2008] CSOH 177. In any event, the meaning conveyed by the letter is a matter for proof: *University Court of the University of St Andrews* v *Headon Holdings Limited* [2017] CSIH 61. There are sufficient averments in the summons to entitle the pursuer to a proof before answer on the issue of misrepresentation.

[46] A reasonable person having due regard to the interests of Biffa as recipient of the letter and its assurances would have appreciated the need not to create a misleading impression as to deliverability. Such a person would have disclosed the true position regarding IMA approval. The failure to do so meant that the letter was a half-truth, as the writer should have appreciated.

[47] In those circumstances, it is plainly not unreasonable for the pursuer to have acted in reliance on the defender's statement (*NRAM Ltd* v *Steel*). Biffa had no means to find out whether and to what extent IMA exclusion had been applied for. Reference was made to *Redgrave* v *Hurd* 1881 20 ChD 1. It can be inferred that Biffa did rely on the statement.

Decision and reasons

Duty of care

[48] Cases of this sort can, in England, be brought to an end by a strike-out if it is clear that the pleadings do not disclose circumstances giving rise to a duty of care: *HXA* v *Surrey County Council* [2024] 1 WLR 335, at paras 102-104. This accords with the well-known test in *Jamieson* v *Jamieson* 1952 SC (HL) 44, at 50, expressed from the other angle, that an action will not be dismissed as irrelevant unless it must necessarily fail even if all of the pursuer's averments are proved. As noted above, the defenders seek *absolvitor* on the basis that there can be no duty of care, which failing, dismissal.

The approach to be taken

[49] It is important to note that the law on a duty of care owed by a public authority has developed over the years. The most relevant recent decision is *N* v *Poole Borough Council* in which Lord Reed conducted an extensive and thorough review of earlier authorities, from around 1995. Lord Reed referred (at para 64) to *dicta* from *Robinson* v *Chief Constable of West Yorkshire Police* [2018] AC 736, and stated that the case did not lay down any new principle of law, but clarified certain matters:

> "…the decision explained, as *Michael* had previously done, that *Caparo* [1990] 2 AC 605 did not impose a universal tripartite test for the existence of a duty of care, but 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 them. The question whether the imposition of a duty of care would be fair, just and reasonable forms part of the assessment of whether such an incremental step ought to be taken. It follows 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 …the decision confirmed, following *Michael* and numerous older authorities, that public authorities are generally subject to the same general principles of the law of negligence as private individuals and bodies, except to the extent that legislation requires a departure from those principles. That is the basic premise of the

consequent framework for determining the existence or non-existence of a duty of care on the part of a public authority."

[50] Having considered these and other authorities, Lord Reed stated (at para 65):

"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."

[51] Lord Reed also said (at para 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".

[52] It is worth noting that in *Robinson* Lord Reed observed (at paras 41 and 42):

"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* 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."

[53] The point referred to in *Gorringe* v *Calderdale Metropolitan Borough Council* [2004] 1

WLR 1057, para 38, is this:

"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".

[54] The fair, just and reasonable test, as stated in *Caparo Industries plc* v *Dickman* [1990] 2 AC 605, gave rise to the specific points on justiciability applied in *X (Minors)* v *Bedfordshire County Council* [1995] 2 AC 633, although as noted below these were called into question in a later case. The Supreme Court's more recent approach indicates that if a case is novel, the wider question of whether it would be fair, just and reasonable to impose the duty of care then arises. 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* (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.

[55] In their note of argument the defenders suggest that the present case is novel and hence the tripartite test in *Caparo Industries Plc* v *Dickman* falls to be applied, including whether the imposition of a duty of care would be fair, just and reasonable. However, in the final submissions for the defenders it was recognised that this case may be within the ordinary run of cases for which the established principles of law apply. I am not persuaded that the present case can properly be described as novel. The fact that the pursuer specifically relies upon an assumption of responsibility to protect from harm, which falls

into the ordinary run of cases, makes it clear that the well-established law on that doctrine is to be applied.

[56] That being so, the issues now to be addressed are whether the pursuer has a relevant case on assumption of responsibility and, if so, whether to impose the duty of care would be inconsistent with the legislation. In assessing assumption of responsibility, it is necessary to consider whether there was reliance, and indeed reasonable reliance, on the responsibility said to have been assumed. I shall therefore begin by considering the question of assumption of responsibility, including reliance, and what the defenders' refer to as the particular duties, and then turn to the question of inconsistency. Thereafter, in case the view reached that this is not a novel form of action is wrong, or indeed that the wider issues on justiciability fall to be considered, I will give my views on those matters.

Assumption of responsibility

(i) Legal principles

[57] There are numerous previous judgments which explain what is required for an assumption of responsibility. In *Poole,* Lord Reed referred to earlier authorities on this ground of action. Lord Reed states (at para 67) that some indication of the width of the concept of assumption of responsibility is set out in *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465 in the speech of Lord Morris of Borth-y-Gest, at 502-3, including the following points:

> "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…
>
> 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."

[58] Lord Reed also referred to the speech of Lord Devlin, at 528-530, on the categories of special relationships, stating that where there is an assumption of responsibility in a relationship equivalent to contract, there is a duty of care. The reference to "special skill" in *Hedley Byrne* was discussed further by Lord Goff in *Henderson* v *Merrett Syndicates Ltd* [1995] 2 AC 145, at 180, where he said:

> "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."

[59] In *Lennon* v *Commissioner of Police of the Metropolis* the Court of Appeal, after citing *Hedley Byrne* above, considered 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. The court referred to *White* v *Jones* [1995] 2 AC 207, where Lord Browne-Wilkinson said, at 274, that in relation to special relationship one factor is:

> "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…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."

[60] In *Poole,* Lord Reed refers (at para 68) to *Spring* v *Guardian Assurance plc*, in which Lord Goff of Chieveley referred to *Hedley Byrne* and observed, at 318:

> "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."

[61] In *Poole*, Lord Reed was addressing the question of assumption of responsibility against that background and in the context of a public authority. He explained (at para 82):

> "It is of course possible, even where no such assumption can be inferred from the nature of the function itself, that it can nevertheless be inferred from the manner in which the public authority has behaved towards the claimant in a particular case. Since such an inference depends on the facts of the individual case, there may well be cases in which the existence or absence of an assumption of responsibility cannot be determined on a strike-out application. Nevertheless, the particulars of claim must provide some basis for the leading of evidence at trial from which an assumption of responsibility could be inferred."

[62] The Privy Council gave guidance on assumption of responsibility in *JP SPC 4* v *Royal Bank of Scotland International Ltd*, at para 64, identifying key factors, although stating that these factors listed are not expressed as being exhaustive:

> "(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."

[63] Finally, there are also useful comments on assumption of responsibility made by the Supreme Court in *Tindall and another* v *Chief Constable of Thames Valley Police* [2024] UKSC 33, at para 75:

> "While somewhat elusive - and possibly having different requirements in different contexts (eg pure economic loss and misrepresentations) - for present purposes 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. In some situations, but not all (for an exception, see *HXA* v *Surrey County Council*, para 108), it is also a necessary element that the claimant has relied on this promise…The principle of assumption of responsibility can also be invoked to explain the duty of care that arises when a person voluntarily accepts a specific role or enters into a specific relationship with another person which carries with it recognised responsibilities to protect the other person's welfare."

(ii) Application of the law

[64] The defenders argue that the circumstances do not satisfy the first and second criteria referred to in *JP SPC 4,* but accept that the letter does meet them to a degree. The principal focus of the defenders' position is the contention that the pursuer did not in fact rely, or in any event did not reasonably rely, on the absence of a warning, or on the timeous conduct of the application process, or the letter. Some of the defenders' additional challenges relate to justiciability and these are considered when I deal with that matter below.

(a) Reliance and reasonable reliance

[65] The pursuer avers that it:

> "…was entitled to assume, given the content of the 17 May 2022 letter, that necessary intragovernmental approval had been sought by the defenders and would be granted in terms that allowed the DRS to proceed as proposed."

The defenders submissions are noted above. Among other things, they say that if the pursuer did make this assumption, it did not act reasonably in doing so, in part because the decision as to whether to allow the implementation of the DRS "as proposed" was a matter for the UK government and parliament. It is also said that there are matters which the pursuer should have known (including the publicly accessible fact of whether there was a statutory instrument granting exclusion of the DRS) which affect reliance. The defenders go on to say that there is a lack of candour on the part of the pursuer to accept the other terms of the contract referred to in the defenders' answers and that these terms show there was no reliance, or at least no reasonable reliance.

[66] The defenders' challenges to the pursuer's position raise some important points, but I am not persuaded that they show the pursuer's pleaded case on assumption of responsibility must necessarily fail. The pursuer's averment that it and the Scottish

Ministers were in a unique relationship which was akin to a contract cannot be ruled out as unprovable, given the role of Biffa as the only logistics provider for the DRS and thus being integral to the delivery and success of the DRS. The key aspects of progressing with the DRS were under the responsibility of the defenders. It was their decision to proceed with it and they came under the duty, which the defenders accept, to take it forward. The pursuer's averments indicate that it relied on the Scottish Ministers to properly manage the steps towards implementation, particularly steps that were in their sole control, including seeking the necessary exclusion. The pursuer avers that the defenders were aware of the pursuer's position in that regard, and must have known that the pursuer, as well as others, would be impacted by any failure to obtain an IMA exclusion.

[67] In relation to what level of progress had occurred in the inter-governmental discussions and negotiations, it does seem fair to argue, as the pursuer submitted, that only the ministers knew anything about that matter. The existence of IMA and whether exclusion had in fact been granted can be described as legal matters, but Biffa does not admit that it knew these points and more importantly any of the other points on progress, which are said by the pursuer to be questions of fact that only the ministers knew. It is submitted for the pursuer that from Biffa's side nobody gave a thought to the IMA and no-one thought it would cause a problem or might apply. As is explained in the reference below to Lord Hodge's comments in *Park's of Hamilton (Holdings) Limited* v *Campbell*, the existence of an opportunity to find out the true position does not, as a matter of relevancy, negate any reliance and indeed that reliance could dissuade the pursuer from taking an opportunity to investigate the accuracy of what was said.

[68] The pursuer also contends that it meets the factors stated in *JP SPC 4* v *Royal Bank of Scotland International Ltd.* It is not possible to rule out that contention as bound to fail. The

task or service was expected to give benefit to the pursuer, knowing that the expenditure would be lost if the IMA approval was refused, or not sought. As the defenders had knowledge of the pursuer's investment, it is arguable that they must have known the pursuer was relying upon their tasks in respect of proper implementation of the DRS. When one adds in the pursuer's interpretation of the letter, it could mean the Scottish Ministers encouraged the investment, in part because Biffa had sought specific assurance.

[69] As to the reasonableness of the pursuer's reliance on the performance of the task or service by the defenders with reasonable care, the defenders had the duty to seek the exclusion under the IMA and so it may be reasonable for the pursuer to rely on the Scottish Ministers to perform that task with reasonable care. It is important to have proper regard to how the letter could, arguably, also support the pursuer's position on reasonable reliance. As is accepted by the defenders, the proper interpretation of the letter is a matter to be determined at a proof.

[70] Turning to the contract, the pursuer's pleadings state that the contract is referred to for its terms, beyond which no admission is made. That can be read as the pursuer agreeing that the terms of the contract are as stated in the contract document lodged. In any event, as was accepted for the pursuer, in a commercial action where there is a contract of some potential relevance and it is put before the court in a production, the pragmatic and appropriate course at a debate is for the court to take the relevant terms fully into account even if not averred by the pursuer. I have done so. I have also considered what is said in Answer 8 for the defenders. At first sight, it may seem questionable why, if the pursuer was relying on the alleged assumption of responsibility, it nonetheless took out insurance. However, insurance may well be regarded as a standard feature in a contract of this type and the figure for insurance (£20m) can be seen as somewhat limited in light of the actual

investment and expenditure clearly known to Biffa and what is claimed to be the potential profit that would have been made. Taking precautions in the contract, such as insurance, do not necessarily indicate a lack of reasonable reliance.

[71] In relation to the potential delay, the contract terms accommodated that possibility and there was the reference to a longstop date, defined in clause 1.1 as 15 August 2024. The contract did not take 16 August 2023 to be a guaranteed date. This indicates an understanding by the pursuer that there could be some delay. But precisely how that delay might come about may not necessarily have been known to the pursuer and the pursuer's case is that it understood and expected the defenders to timeously propose for exclusion. While the longstop date shows the possibility of some delay, it did not deal with a significant delay of the kind that occurred here and gave rise to the contract ending. The amendment of the go live date beyond 15 August 2024 being, under the contract, a customer material breach, could result in remedies for the pursuer from CSL, but that does not necessarily mean the pursuer did not rely on the defenders.

[72] The fact that the contract contained a *force majeure* clause, defined in clause 1.1 as including "acts of government", may indicate that the pursuer was aware that policy changes may occur. But that, and the other contract terms referred to by the defenders, do not mean that the pursuer's case must necessarily fail. When a pursuer has made an averment that it relied on the assumption of responsibility and has proffered reasons which could indicate that was reasonable, to undermine that position at a debate requires more than just inferences from the terms of the contract. It is another example in this case of a matter that can only be determined on the facts made out in the proof. For the reasons explained, I am not able at this stage to conclude, directly against the pursuer's pleaded position, that the commercial risk to the pursuer was covered in the contract and that the

contract demonstrates no reliance, or no reasonable reliance, on the defenders exercising due skill and care.

(b) Particular duties

[73] The defenders view the pursuer's alleged breaches as referring to specific duties. The defenders' challenge to the first one as a duty (to alert or warn the pursuer) focusses mainly on whether those are matters which are non-justiciable or not subject to a duty of care, and that is discussed below when dealing with justiciability. The challenge to the second one as a duty (the timing of seeking exclusion in moving forward with the DRS) includes the pursuer not taking the proper approach to the procedure. There is a specific process to be followed in the protocol. A particular feature is the requirement to exclude what this devolved administration wishes to do, in relation to the DRS, from the IMA. That has to be discussed with, and proposed to, the UK government which will then make the decision on exclusion.

[74] The guidance protocol (headed "Process for considering UK Internal Market Act exclusions in Common Framework areas") sets out what is to be done. The first sub-heading is "Proposal and consideration of exclusions" and the terms refer to "the exclusion seeking party" and "proposed exclusion". It mentions that matters should be taken forward consistent with the established processes as set out in the relevant Common Framework. The next sub-heading is "Agreement of an exclusion request". The mechanism set out in the Common Framework document covers the process, including discussions between senior officials and between ministers.

[75] The defenders criticise the pursuer's reference to there having to be an "application" for exclusion. In their note of argument, the defenders accept that, having enacted the DRS

with the affirmative consent of the Scottish Parliament, they had a plain duty under public law to take the necessary steps to pursue an exclusion to permit the scheme to commence in its enacted form on the go live date of 16 August 2023. In Answer 13 there are detailed references to the process to be followed, including the discussions that take place on the matter of exclusion. If, following discussions, there is a policy divergence, for example Scotland say we will have a scheme with glass and England say without glass, that will require an amendment to the legislation. There is some force in the defenders' submissions, given what has to be done in the process, including the discussions and negotiations. But in light of the references in the protocol to seeking and proposing an exclusion and it requiring a request, to characterise it as an application may not be wholly misconceived.

(c) *Conclusions on assumption of responsibility*

[76] Applying what is said in the authorities, I am satisfied that the pursuer's averments provide a sufficient basis for contending that there was a special relationship with the defenders, which carried with it recognised responsibilities, the defenders having special skill or knowledge and the pursuer entrusting them. The averments also support reliance by the pursuer on the defenders exercising due skill and care, and that reliance being reasonable. Whether or not the legal requirements can be established will depend upon the evidence led at the proof and what, if any, inferences can be drawn from it.

Would imposing a duty of care be inconsistent with the legislation?

[77] If what is done involves the exercise of a statutory discretion, that generally only gives rise to liability in delict if it is so unreasonable that it falls outside the ambit of the discretion. Statutory discretions are not to be unduly fettered. The defenders submit that

their decisions involved an exercise of discretion. However, it is not clear from the legislation that deciding whether or not to alert or warn the pursuer falls within a statutory discretion. It is not the pursuer's averred position that the Scottish Ministers had considered the matter and decided not to warn. It is clear that the defenders have a duty to seek the exclusion under IMA, and there is no statutory discretion in that regard. The process of precisely when to seek an exclusion plainly does involve a degree of discretion, but the pursuer's claim is that the proposal for exclusion fell outwith the properly required timing and so was, by necessary implication from the averments, unreasonable and indeed wrong. The pursuer avers that a reasonably competent person would have applied for approval by certain dates. Reasonable discretion would arguably not permit this alleged failure and imposing a duty of care would not be inconsistent with the legislation if the pursuer is correct that any discretion was exercised carelessly or unreasonably.

[78] No terms in the legislation were identified by the defenders as giving rise to an inconsistency. On the ordinary interpretation of the test as articulated in the authorities, it cannot be said at this stage that the imposition of a duty of care based on assumption of responsibility must necessarily be inconsistent with the legislation. The pursuer's case is not bound to fail on that ground.

Justiciability

[79] The defenders argue that the pursuer's claim based on a duty of care is irrelevant because it relates to issues that are non-justiciable or should not give rise to a duty of care. In developing these submissions, reference was made to a number of textbooks and authorities, including: *De Smith's Judicial Review* 9th ed., at 7-054 - 7-056; *R* v *Home Sec, Ex p. Fire Brigades Union* [1995] 2 AC 513; *HXA* v *Surrey County Council*; *JP SPC 4* v *Royal Bank of*

Scotland International Ltd; *Jain* v *Trent Strategic Health Authority*; *Rowling* v *Takaro Properties Ltd* [1988] 1 AC 473; *Davis* v *Radcliffe* [1990] 1 WLR 821; *Brooks* v *Commissioner of Police* [2005] 1 WLR 1495; *Charlesworth and Percy on Negligence* 15th ed., paras 2-36 and 2-354; *Graham Barclay Oysters Pty Ltd* v *Ryan* [2002] HCA 54. Reference is also made in the defenders' note of argument to other authorities, including certain passages in *N* v *Poole Borough Council*.

[80] Several of the cases prior to *Poole* proceed on the basis that it is necessary that public authorities are able to act in the public interest and so if an issue is unsuitable for judicial resolution it is not justiciable. That may arise when there is the making of a policy decision, such as balancing public interests with other interests, allocating resources or distributing risks. As is explained by Dyson LJ in *Carty* v *Croydon*, at para 21:

> "Certain decisions are simply not justiciable at all. Thus where the decision involves the weighing of competing public interests or is dictated by considerations which the courts are not fitted to assess, they will be likely to hold that the issue is non-justiciable: see, for example, per Lord Hutton in *Barrett* at p 583D. These cases are comparatively rare."

[81] In *X (Minors)* v *Bedfordshire County Council*, in addressing the question of whether it was fair, just and reasonable to impose a duty of care, Lord Browne-Wilkinson concluded, at 749-751, that there were a number of reasons of public policy for denying liability: the multi-disciplinary nature of the system of decision-making; the delicacy and difficulty of the decisions involved; the risk that local authorities would respond to the imposition of liability by adopting a defensive approach to decision-making; the risk of vexatious and costly litigation; and the availability of administrative complaints procedures.

[82] When considering *Phelps* v *Hillingdon London Borough Council* [2001] 2 AC 619 in the *Poole* case, Lord Reed observed (at para 51) that in addressing counter-arguments based on public policy, the committee called into question much of the policy-based reasoning advanced by Lord Browne-Wilkinson in *X (Minors)* v *Bedfordshire*. Lord Reed also

mentioned *D* v *East Berkshire Community Health NHS Trust* [2004] QB 558, decided by the Court of Appeal in 2003, and said (at para 56) that the Court of Appeal's reasoning in that case effectively knocked away the public policy objection to liability. The case was appealed to the House of Lords and the appeal was refused.

[83] In *X (Minors)* v *Bedfordshire County Council*, this was said (at 741):

> "Much more difficult is the question whether it is appropriate to decide the question whether there is a common law duty of care in these cases. There may be cases (and in my view the child abuse cases fall into this category) where it is evident that, whatever the facts, no common law duty of care can exist. But in other cases the relevant facts are not known at this stage. For example, in considering the question whether or not a discretionary decision is justiciable, the answer will often depend on the exact nature of the decision taken and the factors relevant to it. Evidence as to those matters can only come from the defendants and is not presently before the court. I again agree with Sir Thomas Bingham M.R. that if, on the facts alleged in the statement of claim, it is not possible to give a certain answer whether in law the claim is maintainable then it is not appropriate to strike out the claim at a preliminary stage but the matter must go to trial when the relevant facts will be discovered."

[84] In *Barrett* v *Enfield Borough Council* [2001] 2 AC 550 a similar point was made (at 574):

> "With great respect to the opinion of the members of the Court of Appeal, I have come to the view that this claim should not be struck out at this stage on that ground. It may well be that many of the allegations will be difficult to establish and that they will fail. In my opinion, however, the importance of seeing in each case whether what has been done is an act which is justiciable or whether it is an act done pursuant to the exercise or purported exercise of a statutory discretion which is not justiciable requires in this kind of matter, except in the clearest cases, an investigation of the facts."

[85] It is perhaps also worth noting that, while the law has moved on from the approach explained by Hale LJ (as she then was) in *A* v *Essex County Council* [2004] 1 WLR 1881, she referred (at para 33) to potential lines of inquiry including justiciability and whether there was an exercise of statutory discretion, and she also said "In all but the clearest cases it was important to see on the facts proved whether what was alleged was justiciable…".

[86] It is obviously correct that introducing the DRS was a matter of policy of the Scottish government. However, the points complained of by the pursuer are not about the general decision to bring in the DRS, but the particular means of taking it forward, including what was said and not said to the pursuer in the course of doing so. The defenders say that the process itself was about bringing a policy into effect, in the public interest. But as the defenders accept there is a specific duty to implement the DRS, and in that regard to seek exclusion. Seeking an exclusion can be viewed as a necessary step to implement the policy rather than a policy decision in itself.

[87] In relation to the first alleged breach (not alerting the pursuer or giving the warnings) the defenders make the point that doing so would impact upon the policy and indeed the public, because the result would be that the entities involved in the DRS, including Biffa, may well depart from the scheme. Drawing from *Rowling* v *Takaro Properties Ltd*, at 502, the defenders submit that in doing so the imposition of a duty may lead to harmful consequences and so "the cure may be worse than the disease". It may be correct that an obligation to warn could jeopardise the objective of the Scottish Ministers on the DRS and cause adverse consequences. Not giving a warning can arguably be seen as being in the public interest. There may also be a potential concern as to whether there was a duty to warn, if that was to happen before discussions with the UK government and when the Scottish Ministers did not know what the outcome might be.

[88] But it is equally clear that the letter dated 17 May 2022 contains a number of points said to have been relied upon by the pursuer. The claim that the pursuer should have been alerted or warned on the matters it contends has to be considered in the whole circumstances. It is accepted by the defenders that the proper interpretation of the terms of the letter is something that can only be determined at proof, having proper regard to the full

context. To that extent, the letter is potentially relevant on justiciability, as well as on whether there was an assumption of responsibility.

[89] It can be said that the process in relation to IMA involves inter-governmental relations regarding the passing of subordinated legislation. The timing of initiation of the process to secure an exclusion is said by the defenders to have called for political judgment. The defenders say the court is being asked to interfere with that matter. Again, however, the central point is that exclusion under the IMA is required and the precise issue raised is whether it was not sought within a reasonable time. The pursuer also refers to the UK government repeatedly stating that insufficient information has been provided by the Scottish Ministers. It is arguable (although of course whether that argument succeeds remains to be seen) that this is not a political or policy decision, but simply an inappropriate delay, which may be unreasonable.

[90] The defenders' point out, in relation to the pursuer's reference to the "application" for exclusion, that of itself it is not enough to achieve the outcome, which depends on whether or not it is granted by the UK government. That is no doubt correct, but the pursuer offers to prove that it made the assumption, from the information, that exclusion had been sought and would be granted.

[91] I therefore conclude that if, contrary to the view I have reached, the question of whether it would be fair, just and reasonable to impose a duty arises, or in any event the broad approach to justiciability falls to be applied, these are matters that can only be determined after the evidence has been led, as is reinforced by several of the authorities referred to earlier.

Breach of duty

[92] The defenders' challenges to the pursuer's case largely focus on the existence of a duty of care. For example, it is said in the defenders' note of argument that the pursuer has failed to aver the conditions necessary for the recognition of a duty of care based on assumption of responsibility. The defenders' note goes on to consider the specific duties, again largely on the question of whether they are relevantly pled. The defenders say that, absent specification of what is required for an application for exclusion to be made, the pleadings on that alleged breach are essentially lacking in specification and are irrelevant.

[93] It is accepted by the defenders that in a commercial action when issues of specification are raised that may not give rise to dismissal, as was explained by Lord Hodge in *Soccer Savings (Scotland) Ltd* v *Scottish Building Society Ltd* [2012] CSOH 104 (at para [26]) and in *Symphony Equity Investments Ltd* v *Shakeshaft* [2013] CSOH 102 (at para [29]). It may well be appropriate for the court to ordain the party whose pleadings are general but in some respects in specific to give specification in advance of the proof, by the means identified by Lord Hodge. As a consequence, the defenders did not rely on lack of specification as such and the main thrust of their submissions is about relevancy.

[94] The defenders' challenges on the relevancy of the pursuer's averments on breach of duty are noted above. They include that the defenders can be viewed as having commenced the "approval" process by the end of 2022 and so even if a duty of care existed, there was no breach. It is also said that the focus on the actions of the Scottish government would be irrelevant because unilateral performance by them of the duties would not necessarily have achieved the outcome desiderated.

[95] The pursuer makes a number of averments about the alleged breaches, as noted earlier. On the first of the defenders' points above, the pursuer's position is that there was a

breach by the time of each of the dates stated, and so it is not a weaker alternative approach. The other issue raised is really about what is required in the agreed protocol. The very fact that the Scottish Ministers had commenced the "approval" process is not the same as the timing of seeking the exclusion. On the pursuer's averments, despite the defenders' awareness from at least March 2022 that approval was going to be necessary, they did not apply for the same until March 2023. Whether discussions and agreement with officials for other parties could have been done and achieved by then remains to be seen. Again, this raises a question which can only be properly assessed in the light of all of the relevant evidence.

[96] On the second point, it is obviously correct that the decision on exclusion is a matter for the UK government, but the pursuer's position is that it was entitled to assume, given the content of the 17 May 2022 letter, that necessary inter-governmental approval had been sought by the defenders and would be granted in terms that allowed the DRS to proceed as proposed. It is argued that whether exclusion had been sought, what the UK government's reaction had been and what progress had been made, were all known by the Scottish Ministers and not the pursuer. As noted above, the pursuer's submission is that from Biffa's side nobody gave a thought to the IMA and no-one thought it would cause a problem or might apply, which is the implication of the averments made.

[97] For these reasons, the pursuer's case on breach of duty will not necessarily fail.

Causation

[98] The pursuer claims to have suffered loss of profit and costs as a consequence of entering into the contract, and the contract then coming to an end because the DRS was

delayed. In the oral submissions for the pursuer, it was made clear that if the warning had been given the pursuer would not have entered into the contract.

[99] Senior counsel for the defenders submitted that the loss of profit claim (and perhaps also at least part of the costs claim) were irrelevant based on the breach of duty to warn, because the contract would not have been entered into if the duty had not been breached. The Dean of Faculty described the defenders' point as counterfactual, the matter to be addressed being that, as a result of the failure to alert or warn, the pursuer entered into the contract.

[100] Causation is, of course, not about what would have happened if there was no breach of duty; rather, it is about whether what actually occurred was a result of the breach of duty. Those are the facts that will require to be determined. In this case the pursuer is saying that there was pure economic loss, because if there had been no breach in relation to warning it would not have entered into the contract (and hence it would have avoided the loss it made of the costs). But the pursuer also says that as a consequence of that breach of duty it entered into the contract, from which it expected to make a profit of £114.8m. In short, the breach of not giving the warning contributed to the pursuer entering into a contract from which a substantial profit would result, which it appears could not have been attained if there had been no breach. This is, no doubt, a somewhat unusual proposition.

[101] The complexity here is that there are what could be described as two rather divergent alleged breaches of duty: the lack of warning and the failure to timeously seek an exclusion. While somewhat unusual, the consequences of the first breach (entering the contract and being given an opportunity to make substantial profits) do flow from the alleged breach. However, that merely opened up the prospect of making a profit, rather than causing the loss of profit. In order to actually make the profit, the contract would have

to continue. If the second alleged breach had not occurred, arguably that would have allowed the contract to continue and hence profits could have been made. But if there was no breach arising from the timing of the application, there may well be difficulties in finding that the lack of a warning itself caused a loss of profit.

[102] It remains to be seen, at the proof, which, if any, of these breaches are established. If the timing point succeeds and the warning point fails, the defenders' issue of causation on loss of profit may not arise. If the pursuer succeeds on both, the loss of profit may derive only from the timeous application point. However, the effects, and any interaction, of these alleged breaches must be determined after the evidence has been led. No averments require to be excluded from probation.

[103] The pursuer's case proceeds on the basis that the DRS scheme was expected to continue as proposed by the Scottish Ministers. However, if the exclusion proposal had been granted within a shorter period of time, it is clear that, as was the case when it came to be granted, it would not have applied to glass. The pursuer does not aver that the loss of profit and loss of costs are calculated on the basis that glass would not be involved in the DRS. So, the amount of loss specified (probably both costs and profit) may well be affected by the glass element not being allowed in the DRS, and that could result in a lower, but as yet unidentified, claim. However, that also does not give rise to the exclusion of any averments from probation. When fixing the diet of proof, it will be a matter for the judge dealing with case management as to whether to ordain the pursuer to give more specification of the losses claimed.

[104] As noted earlier, reliance and reasonable reliance by the pursuer will require to be established. These have a bearing on causation, but are also integral matters on assumption of responsibility and have already been dealt with above.

Negligent misrepresentation

[105] The pursuer's alternative case is that what is said in the letter amounts to a negligent misrepresentation. This ground seeks damages for the costs rather than the loss of profit. Negligent misrepresentation is considered by the Supreme Court in *NRAM* v *Steel* 2018 SC (UKSC) 141 and it states (at para [19]) that it is for a representee to establish that it was reasonable for him to have relied on the representation and that the representor should reasonably have foreseen that he would do so. The court adds (at para [23]) that any opportunity that the claimant had to seek independent legal advice is a factor bearing on the reasonableness of reliance. The court also notes (at para [24]) that the concept of assumption of responsibility applies.

[106] In *Park's of Hamilton (Holdings) Limited* v *Campbell* Lord Hodge held that:

> "[18] The words used in that letter are, in my view, capable of bearing the interpretation that the enhanced price for the defender's shares was in consideration of the consultancy services which he was to provide. Whether the pursuers can establish that they amounted to a representation that the price enhancement was to be the only remuneration which the defender would receive for the consultancy may depend on the evidence about the surrounding circumstances. The task is not the construction of the specific words which were used in isolation. Rather it is 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…
> [20] It appears, as the defender asserted, that there had been an opportunity for the representatives of the pursuers and other shareholders to examine the finalised Consultancy Agreement and to ask questions about it at the settlement meeting before signing the Share Purchase Agreement. But the existence of such an opportunity does not, as a matter of relevancy, negate any reliance which they placed on the defender's alleged representation.
>
> [21] On the contrary, 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. I accept, in that regard, the approach taken by the Court of Appeal in *Redgrave* v *Hurd* [1881] 20 ChD 1 that, where a person makes a material representation which is calculated to induce another to enter into a contract and the other enters into the contract, the court may infer that the other acted in reliance on

> the representation in the absence of evidence either that he was aware of facts which contradicted the representation or from which it can be inferred that he did not rely on the representation."

[107] The pursuer's averments on assumption of responsibility, including in relation to the letter, are sufficient to go to proof. As has been mentioned earlier, the defenders accept that the true interpretation of the letter is also a matter to be determined at the proof. This is clearly correct, as Lord Hodge observed, when the terms of the letter have to be considered in context. The pursuer avers that it relied on the assurances in the letter. Among other things, it is argued for the pursuer that it complains:

> "of the failure to disclose that which was patent, and known to Ms Slater (but not to Biffa) when the letter was written: IMA approval was essential, had not been sought, and had not been granted. Offering assurances as to the viability of the DRS in such circumstances, and without caveating the letter on the basis of lack of IMA approval, is a clear example of the telling of a half-truth."

[108] In relation to negligent misrepresentation, the defenders again contend that the terms of the contract show that there was no reliance, or at least no reasonable reliance. The pursuer avers *inter alia* that anyone in the position of the minister would have understood that Biffa would rely on the assurances that were given; indeed, reassurance was said to be the plain and explicit purpose of the letter.

[109] Evidence that the pursuer was aware of facts which contradicted the representation or from which it can be inferred that the pursuer did not rely on the representation could negate the pursuer's case, but it is the giving of that evidence and viewing it in the full factual context that is required. In essence, the pursuer contends that the defenders chose to say what they did in the letter and knew or ought to have known that the pursuer would rely on it. Accessibility by the pursuer to independent legal advice and what, if any, advice was or should have obtained can only be dealt with on the evidence. At this stage in the case, it is not possible to conclude that the pursuer was aware of facts which contradicted

the representation or from which it can be inferred that it did not rely on the representation. On these submissions, nothing further arises beyond the points already considered above about reliance and reasonable reliance on the alleged assumption of responsibility. It follows that this is a matter on which the pursuer's case will not necessarily fail.

[110] The other causation point noted earlier, in relation to whether the loss of profit could have resulted from the failure to warn and/or the appropriate time for the exclusion proposal, does not apply here. The focus is on the letter itself and what that induced the pursuer to do. Moreover, this part of the claim is about the investment and management costs, and not the loss of profit. The pursuer's position is that if the assurance had not been given in the letter, the pursuer would have considered that the DRS was not viable and would not have entered into the contract and hence would not have spent the costs. There is a relevant case on causation.

Conclusions

[111] There are a number of challenges made by the defenders to the pursuer's case, which raise questions of some significance and importance. While it can be possible in certain cases to deal with these issues at a debate and dismiss the action, to do so would require it to be clear that the pleadings do not disclose circumstances giving rise to a duty of care and that the pursuer's case must necessarily fail even if all of the pursuer's averments are proved. For the reasons given above, I have decided that these tests are not met.

[112] On the first part of the claim, for the pursuer to succeed at the proof the court will have to be satisfied on the following points: there was an assumption of responsibility; the duty was not inconsistent with the statutory powers and duties of the defenders; the pursuer relied, and reasonably relied, upon the defenders' conduct; the breaches of duty

occurred; and the loss was caused by the alleged breaches. On the alternative case on negligent misrepresentation, the pursuer mainly requires to prove that the pursuer's contention on the proper interpretation of the letter, when viewed in its full context, is correct, and that the pursuer relied, and reasonably relied, upon it, causing the loss of costs. Questions also remain in play about the amount of loss on costs and profit which the pursuer can establish.

[113] As is made clear in a number of the authorities, key matters raised in a case of this kind will commonly require to be determined at a proof. All of these issues remain live and the outcomes will depend upon the court's assessment of the evidence.

Disposal

[114] As a consequence, I shall repel the defenders' first plea-in-law. A proof before answer will be fixed. In the meantime, all questions of expenses are reserved.