



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2015] CSIH 85  
CA93/12

Lord Justice Clerk  
Lady Paton  
Lord Menzies

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE CLERK

in the reclaiming motion by

SALT INTERNATIONAL LTD (formerly NATIONWIDE GRITTING SERVICES LTD)

Pursuers and Reclaimers;

against

THE SCOTTISH MINISTERS

Defenders and Respondents:

Act: O'Neill QC; Heggie Alexander

Alt: Clark QC, O'Neill, Solicitor Advocate; Scottish Government Legal Directorate

1 December 2015

**Introduction**

[1] This reclaiming motion (appeal) concerns an alleged breach by the defenders of the Public Contracts (Scotland) Regulations 2006 when purchasing de-icing salt over the severe weather winters (winters 1 and 2) of 2009/10 and 2010/11. At the material time, the defenders did not consider that the Regulations applied to the transactions. They did not attempt to comply with them. In the action, they concede their applicability, but rely on extreme urgency to justify derogation from the tender procedures otherwise required. The pursuers seek declarators that contracts awarded to six different companies breached the 2006 Regulations in a variety of different ways. They conclude for damages in respect of an alleged consequential loss of profits.

[2] The Lord Ordinary disposed of two preliminary issues in favour of the pursuers, *viz.* a plea of time-bar raised by the defenders ([2013] CSOH 119) and the allowance of an amendment by the pursuers to the claim for damages ([2014] CSOH 41). Upon the amended pleadings, and following the deletion of part of the damages claim relative to alleged loss of haulage profits, damages were restricted to just over £3m. Neither decision is now subject to challenge; the ground of appeal in relation to time-bar not having been insisted upon at the conclusion of the hearing.

[3] In terms of an Opinion dated 17 October 2014, the commercial judge expressed his intention to find in favour of the defenders. Whilst the extreme urgency in winter 2 was, to an extent, self-created by the defenders, the judge held that the pursuers would not in any event have been successful tenderers. By interlocutor dated 28 October 2014, the judge assoilzied the defenders. He found the pursuers liable for 90% of the expenses. The pursuers reclaim on the basis that the judge erred in his decisions on the merits and damages. They did not insist in their ground of appeal based on the “EU common law” case. The defenders cross-appeal the finding of “self-created” urgency in winter 2. The liability for expenses is challenged, but the judge was not asked to provide written reasons for that decerniture.

## **Background**

[4] The defenders are responsible, in terms of the Roads (Scotland) Act 1984, for the trunk road network. They carry out that responsibility through their agency, namely Transport Scotland. The agency enters into winter maintenance contracts with certain private Operating Companies (OCs) in respect of each of four regions. The contracts require the OCs to deliver a level of service designed to deal with the winter conditions normally associated with the region and to provide such resources as are required to deal effectively with all winter conditions that can be expected to arise. It is for the OCs to provide the resources, including depots, materials, labour and plant, needed to fulfil the contractual obligations. It is thus the OCs that normally procure and provide the de-icing salt. Similar arrangements are put in place by local authorities, who are responsible for the non-trunk road network. Some of the local work may be performed by direct labour organisations.

[5] The winter maintenance contracts will generally have been awarded following upon a tendering process compliant with the 2006 Regulations. They will have been operating for periods of some years. In normal course, there would be no need for the defenders to become involved in the purchase of de-icing salt. That would be for the OCs to organise as part of the contracts or for the local authorities as part of whatever arrangements they had entered into. Because of this, it was the defenders’ view that they did not have to comply with the Regulations. They could use the OCs as a vehicle for any purchases. Whilst, against the backdrop of the operating winter maintenance contracts, that view may be understandable, what happened in fact was different. Because of the exceptional conditions, the defenders set about purchasing de-icing salt themselves in order to deal with what was perceived by them to be an emergency situation, threatening not only the road network but the health and safety of the public. That spirited action, it is accepted, engaged the Regulations. It ultimately prompted the current litigation.

## **The Regulations**

[6] The 2006 Regulations implement the Directive 2004/18/EC (the “Public Sector Directive”) of

the European Parliament and Council on the co-ordination of procedures for the award of public supply and services contracts. They specify the procedures to be followed. These require the contracting authority to use the open or restricted procedures prescribed, unless use of the negotiated procedure is permissible. The former procedures involve, in essence, a public tendering process whereas the latter allows the contracting authority to select the particular “economic operator” with which to negotiate. A contracting authority is permitted to use the negotiated procedure, without the prior publication of a contract notice seeking tenders, when the time limits in the prescribed procedures cannot be met:

“(but only if it is strictly necessary) for reasons of extreme urgency brought about by events unforeseeable by, and not attributable to, the contracting authority” (reg 14(1)(a)(iv)).

The time limits for tenders are, in broad terms, respectively at least 52 (reg 15(3) the open procedure, open to all economic operators) or 37 (reg 16(3) the restricted procedure, limited to selected economic operators) days from the publication of the notice, although these periods can be reduced in certain defined circumstances, notably when an electronic form of notice is employed. There is an accelerated restricted procedure involving a minimum 15 day (reducible to 10 day) period for the receipt of tenders (reg 16(6)). The procedures applicable to the evaluation of tenders involve considerations primarily of price, but they also include an assessment of the operator’s economic and financial standing, as well as its technical ability.

[7] The 2006 Regulations specify the remedies for breaches. They implement the Council Directive 89/665/EEC (the Remedies Directive), which requires member states to ensure that remedies are effective. Regulation 47 provides that the obligation on the contracting authority to comply with the Regulations “(1) ... is a duty owed to an economic operator”. It provides that a breach of duty is actionable:

“(5) ... by any economic operator which, in consequence of the breach, suffers, or risks suffering, loss or damage ...”.

Regulation 47A then states that:

“(7) ... the Court does not have power to order any remedy other than an award of damages in respect of a breach of the duty ... if the contract in relation to which the breach occurred has been entered into ...”.

### **The Commercial judge’s reasoning**

[8] In a commendably short and lucid Opinion, the commercial judge made certain critical findings. He rejected the contention that, because the defenders had not relied on it at the time, they could not invoke the extreme urgency provision in regulation 14(1)(a)(iv) (*supra*). It was for the court to determine the applicability of the regulation in all the circumstances. The judge then addressed each element of the criterion in the regulation which allows the use of the negotiated procedure.

[9] In relation to winter 1, the commercial judge held that, when the defenders had purchased the de-icing salt, the situation had been one of extreme urgency. If, as was about to be the case, the stocks had become exhausted, the roads would have become unsafe and might be rendered

impassable. That would cause a risk to public safety. It would have a profound impact on the economy. By January 2010, stocks of de-icing salt were dangerously low across the country. The First Minister had intervened personally to secure a supply from INEOS Enterprises Ltd, a private company with a stock of, in effect, table salt. The situation had been brought about by events, namely unexpected climate conditions. These had been unforeseeable. The long-range weather forecasts had not predicted the early arrival of winter or that it would be exceptionally cold and long lasting. In previous years, the salt bought by the OCs had sufficed.

[10] The lack of salt had not been attributable to the defenders. Once winter had begun, any supplies obtained through the open or restricted procedures would have arrived too late. The defenders' officials gave evidence that even the accelerated restricted procedure would have taken three months. The use of the negotiated procedure had been strictly necessary because the purchase of the salt had been required to protect public safety and to ensure that the economy did not fail. The commercial judge had been aware that there had been a report in July 2009, which had recommended that highway authorities in England should hold a salt reserve and establish a framework agreement in order to widen sources of supply. A commercial company had also circulated a warning about insufficient salt supplies.

[11] The commercial judge reached the opposite conclusion in relation to winter 2. Although the situation had also been one of extreme urgency caused by unforeseen events, those events had been brought about by the defenders. By this time, the defenders had been aware that the salt supply arrangements were fragile. They ought to have acted sooner and arranged matters in such a way as to be able to hold a tender exercise if necessary. As matters progressed, a review by the Scottish Salt Group took some eight months. This recommended the establishment of a strategic salt stockpile to provide the extra resilience needed. The recommendation from the relevant official was to stockpile 30,000 tonnes. This was in addition to the supplies ordered, in normal course, by the OCs in the terms of their contractual obligations.

[12] When he came to look at the issue of damages, the commercial judge made certain critical findings-in-fact. First, in relation to winter 1, he found that the pursuers would not have made a bid in any tendering process. This was because, as of late 2009, according to their own commercial director, they had no interest in buying salt. They had no contracts for onward supply meriting any importation. Any tender would, in any event, have been unsuccessful. The pursuers would not have been regarded as credible bidders given that: (a) they only had one year's accounts; (b) they had never imported any salt; and (c) they had not supplied any salt.

[13] In relation to winter 2, the commercial judge found that the pursuers would not have tendered. If the defenders had acted in terms of the 2006 Regulations, they would have established a framework agreement with perhaps four suppliers. Procurement could have started in June or July 2010. The defenders would have sought tenders for the supply of a total of 30,000 tonnes as a strategic stock. This would not have been restricted to imported salt, because that would have conflicted with the Regulations. According to the pursuers' director, the pursuers would not have tendered in these circumstances. They had not done so in respect of a 3 year framework agreement in relation to salt which had been advertised by Scotland Excel on behalf of the local authorities in Spring 2010.

[14] The commercial judge held that, if they had tendered, the pursuers would not have been successful. The defenders would have scrutinised tenderers carefully, in order to assess their

probity, financial standing and technical ability. The pursuers had a very limited track record, with only one year's accounts. They could not have undercut the normal suppliers on the price of the preferred brown rock salt. The pursuers had only been incorporated in September 2008. They had initially been involved in providing gritting services from their base in Southampton, using brown rock salt. They had made their first purchase of marine salt in April 2010, taken delivery the following month and supplied their first customer only in September 2010. They had lodged their first tender in a public procurement exercise at the end of 2011. They had arranged their first supply to Scotland only in the summer of 2013.

[15] The commercial judge noted that there was no evidence upon which to conclude that the pursuers would have tendered at a particular price. There was therefore no basis for calculating any loss of profit. In relation to the loss of a chance, the judge held that this had not been established, given that he had held that the pursuers would not have tendered in the first place.

[16] It is important to observe that the commercial judge did not find the pursuers' commercial director to be a witness of credit, standing the terms of his prepared witness statement. The judge's entitlement to reject his testimony is not the subject of any challenge.

## **Submissions**

### *Pursuers*

#### GROUND 1 - EXTREME URGENCY

[17] According to the pursuers, their case was a simple one. It had to be decided consistently with the relevant principles of EU law and the jurisprudence of the Court of Justice of the European Union. Any provision of EU law which allowed for derogation required to be interpreted narrowly and strictly according to its terms. The procedure, which allowed the defenders to award a contract directly, still required the publication of a contract award notice (Public Sector Directive, Art 35(4)). The extreme urgency defence was a belated *ex post facto* attempt at justification. The defenders could have published a voluntary *ex ante* transparency (VEAT) notice at EU level prior to an award of the contract.

[18] The defenders had wrongly thought that they had found a way around the requirements by using the OCs. This had been proved to be wrong. Article 31(1)(c) of the Public Sector Directive, which was the provision which regulation 14(1)(a)(iv) implemented, expressly required the court to address itself to the contracting authority's reasons for seeking to use the extreme urgency derogation. The court had to consider whether those reasons justified such a departure. If the court were to uphold the defenders' belated reconstructed defence, this would open the way to abuses. The policy considerations strongly militated against such a reading.

[19] The correct approach to regulation 14(1)(a)(iv) was that it had to be interpreted strictly. If one of the conditions for its application were not satisfied, the contracting authority could not derogate (Case C-24/91 *Commission v Spain ("Madrid University")* [1992] ECR I-1989 20 at para 13). Many claims of derogation had failed on the ground that the extreme urgency experienced had been foreseeable. The derogation could not be relied upon either to justify the use of the negotiated procedure as part of any strategic planning or to avoid possible future emergencies (Case C-328/92 *Commission v Spain ("re pharmaceutical emergency")* [1994] ECR I-1569 22).

[20] The defenders' case was periled on the Opinion of the Advocate General in Case C-525/03 *Commission v Italy* [2005] ECR I-9405 28. That case was distinguishable. It was not decided on the

basis of an extreme urgency derogation. The urgency there had been an outbreak of forest fires which, as distinct from keeping roads open, involved immediate harm to life and property. Insufficiency of de-icing stock was eminently a matter attributable to the responsible authorities. Given the time lapse between the ordering and receiving of the salt, it could never be said that the conclusion of a contract for salt was ever “strictly necessary” for dealing with an actual emergency.

[21] The evidence did not support any finding that the derogation had been made out for winter 1. The legal and evidential burden fell upon the defenders to establish the exemption. Except in relation to the INEOS salt, the defenders had led no evidence about any other contract. The commercial judge had upheld the defence without any consideration of any particular contract. The evidence had been that the winter prior to winter 1 had been severe. This had exposed the lack of robustness in the salt supply chain throughout the United Kingdom, including Scotland. The defenders had to demonstrate that compliance could not have been achieved by using the accelerated restricted procedure provided for under Article 38(8) of the Public Sector Directive. The court should examine any claim of urgency with a sceptical eye (*Case C-24/91 Commission v Spain (supra)*).

[22] Even if regulation 14(1)(a)(iv) could be reconstructed after the event, the defenders had not produced evidence to support its application. The witnesses from the defenders’ Public Procurement Directorate had had no knowledge of what contracts had been entered into or the reasons for them. The claims made in their witness statements, that the requirements of the regulation had been met, were made from a position of ignorance and based on an error of law.

[23] When a contracting authority elected to use the negotiated procedure, there ought to be a record of that (Public Sector Directive, Art 43). No record, relative to any of the contracts concluded by the defenders, was ever published in the Official Journal, nor was there any formal written report made by the defenders under the public procurement regime.

### Ground 3: declaratory remedies

[24] The pursuers had a right, as a matter of EU law, to an effective judicial remedy. At the very least, this required the court to pronounce a declarator detailing the breach which the court’s judgment established. The defenders contended that the only remedy available was one of damages, on the basis of the terms of regulation 47A(7) which proceeds upon the Remedies Directive Article 2.7. However, that article was an inclusive, rather than an exhaustive, statement of remedies.

[25] Doubts expressed in non-EU law cases, in relation to the Scottish courts pronouncing “bare declarators”, were not relevant to EU law cases (*Treaty on European Union*, art 19(1); *Charter of Fundamental Rights*, art 47(1)). Declarators may be particularly important in cases where public authorities had acted in breach of the law (*Docherty v Scottish Ministers* 2012 SC 1250 at paras 39-40, 57). The practice of the Court of Session was consistent with that of the UK Supreme Court in EU law cases (*R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs (No. 1)* [2013] UKSC 25). Under the Remedies Directive, Member States were required to set up “effective and rapid remedies” to facilitate domestic enforcement (*Case C-26/03 Stadt Halle v TREA Leuna* [2005] ECR I-1 29). The commercial judge had given no explanation for his decision to refuse to grant declarator. The Court of Justice itself granted “declarations” (*Commission v Spain (“Madrid*

University”) (*supra*); *Commission v Spain* (“re pharmaceutical emergency”) (*supra*); joined cases C-20/01, C-28/01 *Commission v Germany* [2003] ECR I-3630). A private contractor seeking to enforce European procurement law was acting in the public interest (*Evropaiki Dynamiki v European Investment Bank* [2011] ECR II-6367).

#### Ground 4: damages

[26] A breach of the rules *per se*, without establishing fault, was sufficient to found a right to damages (Case C-568/08 *Combinatie Spijker Infrabouw* [2010] ECR I-12655 at paras 91-92; Kaléda: “Claims for damages in EU procurement ...” (2014) 39 *Euro Law Rev* 193 at 197).

[27] The pursuers’ claim for damages was advanced on the basis that they would have succeeded in securing a contract or contracts and that, in any event, they were unlawfully excluded from the chance of doing so (*Exel Europe Limited v University Hospital Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 (TCC), at para 48). This approach to quantification for the loss of a chance had been followed in the Court of Justice (Case T-461/08 *Evropaiki Dynamiki v European Investment Bank* (*supra*)). The pursuers needed only to prove that they had had a quantifiable chance of winning the contract (*Aquatron Marine v Strathclyde Fire Board* [2007] CSOH 185). Their losses should be assessed on the assumption that they would have won the contract and then discounted by applying the probability/percentage chance of having done so (*European Dynamics v HM Treasury (sued as Buying Solutions)* [2009] 128 *Con LR* 36, at para 23).

[28] The court was entitled to reconsider the evidence. It was not bound by the findings-in-fact of the commercial judge, where he had demonstrably failed to consider relevant testimony, where his findings-in-fact could not be explained or justified, or where the court was satisfied that he could not reasonably have reached the decision (*Royal Bank of Scotland v Carlyle* 2015 SLT 206, at para 21). There was no irrebuttable presumption to the effect that a judge has taken account of the whole of the evidence.

[29] There had been evidence that the pursuers had had access to an extensive and unrivalled global network of suppliers of salt. The pursuers had supplied substantial gritting salt to the Highways Agency in England and to the Welsh Government in winter 2. The commercial judge had failed to consider this. He had erred in holding that a framework agreement would have been established, when one was already in existence and available. The judge had erred in holding that a hypothetical procurement exercise would have resulted only in orders for 30,000 tonnes of salt in the summer of 2010. The notice would have sought 160,000 tonnes of salt, with different delivery dates. Any tender exercise would have been weighted in favour of white marine salt, so as not to disrupt the existing chain of supply of rock salt to local authorities. The judge had misdirected himself in holding that the pursuers had failed to prove loss in the absence of evidence of the price at which they would have tendered.

#### Ground 5: Expenses

[30] EU public procurement law was based on the premise that it is in the public interest that there should be effective private enforcement of the rules by economic operators. A significant breach of the regulations should be recognised in expenses. The litigation concerned the public law duties of the defenders and their obligations to comply with the public procurement regime. It had been brought in the public interest, as well as in the private commercial interests of the

pursuers. The breach which had been established was not minor or technical, nor had it been an isolated incident.

### *Defenders*

#### GROUND 1 – EXTREME URGENCY

[31] The defenders maintained that the essential question was whether the findings-in-fact made by the commercial judge could properly be attacked. The principles applicable in relation to the role of an appellate court were familiar. First, there was no reason to conclude that evidence had been overlooked at first instance merely because it had not been expressly mentioned in the judge's opinion. The weight to be given to the evidence was pre-eminently a matter for the judge, subject to the requirement that his findings be such as might reasonably have been made. His judgment could only be interfered with if his conclusion was rationally unsupportable or he had gone "plainly wrong". In relation to both grounds of appeal 1 and 4, it could not be said that the findings-of-fact were unsupported by evidence, or rationally deficient. The source of evidence, on all matters of substance upon which the pursuers relied, was the testimony of their commercial director. His evidence on the key issues had not been accepted by the judge.

[32] The defenders had led five witnesses. They had lodged a witness statement from the First Minister. This had provided a graphic testament, in straightforward and compelling terms, of the way in which the defenders had dealt with a potentially catastrophic series of events by the swift and timely acquisition of emergency supplies of de-icing salt.

[33] The commercial judge had concluded that the extreme urgency exception had applied in winter 1. He had found that it had been impossible for the defenders to have complied with the time limits for an open, restricted or accelerated procurement procedure. Once winter had begun, any supplies obtained by way of a compliant procurement procedure would have come too late.

[34] The pursuers' contention, that it was an error to find that a contracting authority could *ex post facto* rely upon the extreme urgency defence, was unsustainable. There may well be circumstances which would justify that defence, where the contracting authority had not considered it because it was under the impression that another legally compliant basis for procurement existed. There was no basis for the view that a subjective failure to consider the extreme urgency defence at the time of procurement resulted in it being incapable of being invoked. In relation to the criticism about lack of record keeping, it was illogical and absurd to suggest that the absence of a record of events precluded a contracting authority from proving the existence of all the circumstances relevant to the extreme urgency situation.

#### GROUND 3 – DECLARATORY REMEDIES

[35] The pursuers' claim was brought in terms of the 2006 Regulations, which created a self-contained statutory regime. The only remedy available, in circumstances such as the present, was damages. In terms of regulation 47(1), the duty owed was to economic operators and not the public in general. Regulation 47(5) provided that a breach was only actionable by an economic operator who had in fact suffered, or risked suffering, loss. Regulation 47A(7) limited the available remedy, in a case such as the present, to damages. The pursuers were not entitled to any remedy, including declarator, unless they could establish that they had suffered loss. Regulation 47A(7) was based upon the Remedies Directive (art 2.7), which specifically provided that the only remedy

would be damages. The European Court of Justice cases, cited as involving declarations, were all public enforcement cases. The declaration in *R (ClientEarth) v Secretary of State etc (supra)* was in the context of the Air Quality Directive, affecting individuals. The court would not generally pronounce a bare declarator in the absence of another operative conclusion.

#### GROUND 4 – DAMAGES

[36] The only witness to fact, on what the pursuers would have done had a tendering exercise taken place, was their commercial director. His evidence had not been accepted for a number of reasons. There was no challenge to that. This caused the pursuers an insurmountable difficulty since the commercial judge had held as a matter of fact that the pursuers would not have lodged a tender.

[37] In terms of regulation 47A(1)(b)(iii), the court may award damages to an economic operator which has suffered loss. The court had a discretion, but it could not award damages unless there was loss caused by the breach of duty. There must be a direct causal link between the breach and the damage sustained. The breach had to be “sufficiently serious”. The test was whether the State manifestly and gravely disregarded the limits on its discretion. The criteria had to be not less favourable than those applying to similar claims based on domestic law (joined Cases C-46 and C-48/93 *Brasserie du Pecheur v Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport, ex parte Factortame* [1996] ECR I-1029). In the absence of these various conditions being complied with, there should be no award of damages (Case C-568/08 *Combinatie Spijker Infrabouw v Provincie Drenthe (supra)*).

[38] Under domestic law, it was not clear that the loss of a chance of future profit, based upon breach of contract principles, was the appropriate basis for an award of damages in a case such as this. Where an assessment had followed a contractual analysis, that had been done by reference to the concept of an implied contract (*Harmon CFEM Facades (UK) v House of Commons* 1999 WL 1457322 at para 216). In the absence of an implied contract, the better analysis may be that damages should be assessed by reference to the principles which apply in relation to breach of a statutory duty.

[39] The pursuers required to “establish that its tender would either have succeeded or stood a good chance (*Harmon CFEM Facades (supra)* at para 361). They needed to show that they had “wrongly been deprived of a contract or of a real and substantial chance of being awarded a contract” (*ibid* para 307). If the pursuers had had no such chance, their claim could proceed no further (*ibid* para 259). Damages would be awarded to the pursuers only if they had established that they were certain, or virtually certain, to have been awarded a contract (*Aquatron Marine v Strathclyde Fire Board* [2007] CSOH 185, at para [100]).

[40] In cases where there had been an award for loss of a chance, there had been evidence of the pursuers’ tender prices (see *Aquatron Marine v Strathclyde Fire Board (supra)*). In considering whether the pursuers had a real or substantial chance of succeeding in a tender exercise, the court required to have evidence: that such an exercise would have taken place on a particular basis; and that the pursuers would have submitted a tender at a winning level. The commercial judge had properly held that the pursuers had not led evidence in support of the key stages of the tender process.

## GROUND 5: EXPENSES

[41] The commercial judge, in the exercise of his discretion, had made an award against the pursuers of 90% of the expenses. He had reached that conclusion in circumstances in which he had disbelieved the pursuers' central witness and found that the pursuers' case had been one predicated upon a false premise, that the pursuers would have bid for a contract, and in which the operative remedy sought had been a substantial award of damages from public funds. The pursuers had identified no reason why the court should interfere with the judge's exercise of his discretion. The contention that the pursuers had brought the action in the public interest, as well as in the private commercial interests of the pursuers, was as embarrassing as it was untrue. The judge had required to consider which party had achieved substantial success. The two principles were: (1) that the party achieving substantial success should be awarded the expenses; and (2) that they should be awarded against the party which has unnecessarily caused the proceedings to occur.

## CROSS-APPEAL

[42] The commercial judge had accepted that, in relation to winter 2, the purchase of de-icing salt had occurred in circumstances of extreme urgency, which had not been foreseeable. He had held that these events were nevertheless attributable to the defenders. This conclusion was inconsistent with the judge's findings on the amount of de-icing salt which would have been bought, had the defenders engaged in a compliant procurement exercise. Such an exercise would have related to 30,000 tonnes of de-icing salt, which would have been bought in June or July 2010. Any subsequent shortage of supply during winter 2 could not be said to have been attributable to any wrongful inaction. It was not a self-created situation. It was harsh for the judge to proceed as he did on the basis that the review should have been completed earlier, when the equivalent exercise in England had been completed later.

## Decision

### GROUND 1 – EXTREME URGENCY AND CROSS APPEAL

[43] The pursuers' case is indeed a straightforward one. It is, however, one which requires to be considered in terms of the 2006 Regulations. That is how it is framed in the pleadings and that is how it was dealt with before the commercial judge. The pursuers' attempts to divert attention away from the Regulations and onto the EU Directives themselves are misconceived. It was not suggested that the Regulations fail to implement the EU Directives fully or correctly. Where a directive has been properly implemented in national law, there is no scope for giving any underlying directive direct effect, especially where that would involve circumventing the plain terms of the implementing legislation (*Felicitas Rickmers-Linie KG & Co v Finanzamt für Verkehrsteuern* [1982] 3 CMLR 447, Slynn AG at 455, judgment at paras [24]-[26]). There is no case based on any inconsistency between the spirit or aims of the Directives and their manner of implementation either in the Regulations or by the courts (cf *Marks and Spencer v Customs and Excise Comrs* [2003] QB 866, judgment at paras 25 *et seq*). Accordingly, the court will not attempt to decide the case under reference to the terms of Articles of the Public Sector Directive 2004/18/EC or the Remedies Directive 89/665/EC, but in terms of the 2006 Regulations themselves.

[44] The defenders did not consider that the Regulations applied to their salt purchases. They did not therefore apply their minds to their terms. In particular, they did not pause to reflect on whether they required to use the open or restricted procedures or whether they were entitled to use the negotiated procedure on the basis of extreme urgency in terms of regulation 14(1)(a)(iv)). However, now that a breach has been alleged, it is for the court to analyse objectively whether, at the time, a particular procedure or procedures required to be adopted. If, as a matter of fact, the defenders had the option of using the less onerous negotiated procedure, that would be the extent of their obligation at least in circumstances where, as here, it is clear that they would have used that option had they applied their minds to the application of the Regulations.

[45] The terms of regulation 14(1)(a)(iv) allow a contracting authority to use the negotiated procedure in certain defined circumstances. No doubt the onus was on the defenders to prove the existence of these circumstances, but once evidence has been heard questions of onus seldom arise. The courts must examine the evidence of such circumstances with a critical, although not a sceptical, eye, given the general intention of the Regulations to create a transparent, open and fair system of tendering except in defined circumstances. The commercial judge heard this evidence. It was for him to make appropriate findings in fact based upon it. This court could only interfere with his findings if the legal test for doing so were met. That test was reiterated by Lord Reed in *Henderson v Foxworth Investments* 2014 SC (UKSC) 203 (at paras [58] *et seq*) under reference to *McGraddie v McGraddie* 2014 SC (UKSC) 12, following the *locus classicus* of *Thomas v Thomas* 1947 SC (HL) 45 (Lord Macmillan at 59), derived from *Clarke v Edinburgh and District Tramways Co* 1919 SC (HL) 35 (Lord Shaw at 37). As Lord Reed put it:

“[67] ... in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.”

As was said in *S v S* [2015] Fam LR 257 (LJC (Carloway) at para [22]), this last sentence is the modern exposition of when a finding-in-fact can be said to be “plainly wrong”.

[46] The commercial judge found in fact that, in relation to both winters 1 and 2, at the point when the defenders contracted for more salt, the situation was one of extreme urgency. It is perhaps difficult to envisage why the defenders would have contracted at all, if that were not so, given the contractual arrangements with the OCs. Be that as it may, the judge adequately, and succinctly, explains the rationale for his findings based on the evidence, notably the danger to public safety and the threat to the economy caused by the early onset, and continuation, of extreme weather conditions in circumstances where the stocks of salt were almost exhausted. He concluded that the salt would simply not have arrived on time had the open or restricted procedures been adopted. The pursuers’ submissions to the contrary amount simply to a disagreement with the judge’s findings. They rely upon the shortest possible period for tendering under the accelerated restricted procedure. However, these periods are only one element in a heavily regulated tendering exercise. Time requires to be taken in relation to, amongst other things, the preparation of offers, the appointment of examiners, and the consideration of tenders

and tenderers. The judge heard evidence on the time which a tender process under the accelerated restricted procedure usually takes. He was entitled to have regard to this in making his findings-in-fact.

[47] In relation to whether the urgency was attributable to the defenders, the commercial judge made different findings in respect of winters 1 and 2. Once more, he adequately explains these findings as based on the evidence which he had heard. For winter 1, the severity and prolonged nature of the winter weather had not been forecast and, as the judge found, the defenders had no reason to think that the normal quantities of salt bought by the OCs would not suffice. The pursuers point to the 2009 report, which suggested the creation of a salt reserve in England, and to the warning by a commercial company about salt supplies. These were two factors which might have persuaded the judge to reach a different conclusion. They were considered by him, but not regarded as significantly persuasive. The difference between both weather conditions and contractual arrangements between Scotland and England may have played a part. Whether that is so or not, the judge reached a conclusion which was based on the evidence and is rationally explained.

[48] Equally, in relation to winter 2, the judge was entitled to take into account what was known to have happened in winter 1 and thus to reach the opposite conclusion. The defenders complain that the judge ought to have held that the review should have been completed earlier, given the time it took in England. That, once more, was a factor for the judge to consider. He did not regard it as decisive. Once the winter 1 problems had been recognised, it is a short step, in a matter concerning public safety, to anticipate that the same situation may arise in the future, notably the next winter, and to take immediate steps to deal with the risk.

[49] For these reasons, the contentions of the pursuers on the first ground of appeal are rejected and the cross appeal from the defenders is refused. There is simply no basis, applying the proper test for the review of fact, to interfere with the commercial judge's findings. For completeness, the absence of certain records is of no materiality in this area.

### GROUND 3: DECLARATORY REMEDIES

[50] The idea that a person is entitled to an effective remedy is not unique to EU law. The maxim *ubi jus ibi remedium* is well known in Scots procedure. The key word is "effective". The courts do not normally engage in the granting of declarators where there is no practical consequence in doing so (*Drennan v Associated Ironmoulders of Scotland* 1921 SC 151, LJC (Scott Dickson) at 162, Lord Ormidale at 168). In relation to private rights, the rule normally requires some form of patrimonial interest. It is, however, open to persons seeking to vindicate certain public rights, including those relating to the environment, to do so in the absence of such an interest. The pursuers are a private limited company whose existence is purely commercial. Despite the assertions made at the Bar, it cannot reasonably be maintained that they are seeking to vindicate a public right. They are attempting to secure substantial damages for loss sustained by them as a consequence of an alleged breach of the Regulations. A bare declarator, were it competent, would not provide them with an effective remedy.

[51] The effective remedy available under the 2006 Regulations, where contracts have already been entered into, is one of damages. In terms of regulation 47A(7) that is the only competent remedy. This is consistent with regulation 47(1), which provides that the duty owed under the

Regulations is one, not to the general public, but to an economic operator. Such an operator may sue for damages (reg 47(5)), but a bare declarator is not competent. Ground of appeal 3 must accordingly fail.

#### GROUND 4

[52] In terms of regulation 47(5), a breach of duty owed under the Regulations is actionable only where the economic operator suffers (or risks suffering) loss or damage. It is for the operator to bring himself within this provision by demonstrating that he has so suffered. The loss of a chance in a tendering process may sound in damages, but that can only arise if it is established that the operator had such a chance and that it had a “measurable, non-negligible value” (*Kyle v P&J Stormonth Darling WS* 1993 SC 57, Lord McCluskey at 69). There can be no damages where, on the evidence, it is established that the economic operator would not have availed himself of the opportunity to tender or if it is demonstrated that he had no chance of success.

[53] It was essential to the pursuers’ case that they proved that, had a tender process been initiated, they would have tendered. The only evidence to support the pursuers’ position came from their commercial director, whom the commercial judge did not regard as credible and reliable. That judgment is not under challenge. It effectively ended the pursuers’ case on damages in its entirety. The judge went further in making a positive finding that the pursuers would not have tendered in relation to either winter 1 or 2. His finding is adequately explained and justified, under reference for winter 1, to the pursuers’ nascent state at the time, and for winter 2, to the director’s own statement that they would not have done so if the offer was, as the judge held, in the form of a framework agreement for only 30,000 tonnes. The fact that the pursuers did not make a bid for the local authority contracts was significant. The judge adequately explains and justifies his conclusion that the pursuers would have failed in any bid by referring to, first, their lack of track record as tenderers to be relied upon and, secondly, the absence of material upon which it could be inferred that they would have been able to undercut the main competition.

[54] In these circumstances, where the commercial judge’s finding-in-fact are unimpeachable, there is no scope for any revaluation of the evidence. The complaint from the pursuers included a contention that the judge had not taken account of relevant testimony, but there is no substance in this criticism. Once the pursuers’ director’s evidence was found to be unacceptable, there was no route available upon which to build a credible and reliable claim for damages. His evidence about the pursuers’ abilities was rendered valueless as a consequence of the judge’s rejection of his testimony as a generality.

[55] Finally, on this ground, the finding that any tendering exercise would have extended only to 30,000 tonnes through a framework agreement over the Summer 2010 was amply justified by the evidence about what the relevant official in fact recommended.

#### GROUND 5: EXPENSES

[56] Expenses generally fall upon the party who has caused the litigation. This action is one by a commercial enterprise seeking to secure damages. They failed in this exercise and, in normal course, would be liable for the expenses. The contention that the pursuers were seeking to promote compliance with the public procurement regime is not accepted for the reasons already

explored. There is, again, no basis for interfering with the commercial judge's decision, especially in the absence of any request from parties to the judge to set out his reasoning in writing.

[57] For all these reasons, the court will refuse the reclaiming motion and cross-appeal and adhere to the interlocutor of the commercial judge dated 28 October 2014.