OUTER HOUSE, COURT OF SESSION

[2014] CSOH 151

CA93/12

OPINION OF LORD WOOLMAN

In the cause

NATIONWIDE GRITTING SERVICES LTD

Pursuer;

against

THE SCOTTISH MINISTERS

Defenders:

Pursuer: O'Neill QC, M Ross; Heggie Alexander
Defender: Clark QC, O'Neill, Solicitor Advocate; Scottish Government

17 October 2014

Introduction

[1] Scotland experienced severe winters in 2009/2010 and 2010/2011. Each year the cold weather arrived early. There were prolonged periods of ice and snow. As a result, the roads required extensive gritting. Between January 2010 and March 2011, the defenders bought de-icing salt for that purpose at a total cost of about £10 million. They made their purchases direct from several sources. They did not, however, buy any salt from Nationwide Gritting Services Limited ("NGS"), a supplier of de-icing salt based in Southampton.

[2] In the present action NGS claims that the defenders breached public procurement law by failing to hold a competitive tendering procedure. The defenders deny infringement. The liability question turns on the "extreme urgency" exception contained in the Public Contracts (Scotland) Regulations 2006 ("the 2006 Regulations"). The defenders contend that the situation was critical. Without sufficient supplies of salt, the Scottish economy would be seriously affected. The icy roads presented a risk to the safety of the population.

[3] With regard to damages, NGS maintains that it would have been successful in any tender exercise held by the defenders. It seeks to recover £3.2 million, being its estimate of its lost profits. In the alternative, it claims for the loss of the chance to bid for the contracts in question. The defenders submit that even if they were in breach, the court should not award damages. They argue that NGS has failed to prove any loss.

[4] The issue of damages requires consideration of the tender exercise that NGS says that the defenders should have conducted, in particular: (a) its timing, (b) the type of procedure that would have been followed, and (c) the terms of the tender notice. Those factors inform the answer to two key questions.

First, whether NGS would have submitted a tender. Second, whether its tender would have been successful.

Background

[5] Under the Roads (Scotland) Act 1984 the Scottish Ministers are responsible for the trunk road network, including the motorways. The local authorities are responsible for the local road network. Transport Scotland is an executive agency of the Scottish Ministers and manages the roads function on their behalf. I shall refer to them together as "the defenders" in the course of this opinion, unless the context requires otherwise. The defenders have contracts with four operating companies to carry out the day-to-day maintenance of the roads. The contracts state that the winter maintenance season lasts from 1 October until 15 May.

[6] The road authorities use de-icing salt to prevent the roads and pavements from icing up in freezing conditions, as well as to melt any ice or snow that has formed. The active ingredient within de-icing salt is sodium chloride. Of the two main types, white marine salt has a higher purity (98 - 99.5 per cent) than brown rock salt (90 - 94 per cent). White marine salt works more rapidly, is cleaner and is easier to spread. Despite these advantages, the road authorities usually buy brown rock salt. They do so on grounds of price. In normal market conditions, brown rock salt costs up to £15 per tonne less than white marine salt.

[7] White marine salt is more expensive because it is imported from various countries, including Egypt, Tunisia, Morocco, India, Mexico and France. The price of an individual shipment depends upon various factors, including the level of demand, the prevailing currency exchange rates and freight costs. Delivery may take six weeks or more, depending upon the length of the voyage and the time taken to load and unload the vessel. White marine salt is generally transported to the United Kingdom on cargo vessels of between 25,000 - 40,000 tonnes. Most Scottish ports can only receive vessels not exceeding 30,000 tonnes. There are two exceptions. Invergordon can receive 50,000 tonne vessels. Hunterston is the only deep-water port in Scotland and it can take larger vessels (70,000 - 80,000 tonnes). Customers are not keen to receive salt from Hunterston, however, because it is principally used for coal shipments. Salt discharged there is often contaminated with soot.

[8] The principal UK suppliers of de-icing salt are Cleveland Potash Ltd, Irish Salt Sales and Salt Union. Each owns and operates a brown rock salt mine. The main UK salt importers are J C Peacock & Co Ltd and Salinity Ltd. NGS is a relative newcomer to the salt industry, having been incorporated on 26 September 2008. Its financial year ends on 31 August each year. It began by providing gritting services from its base in Southampton, mainly using brown rock salt. The milestones relating to its white marine salt business can be traced as follows: (i) it made its first purchase in April 2010, (ii) it took its first delivery in May 2010, (iii) it supplied its first customer in September 2010, (iv) it lodged its first tender in a publicly advertised procurement exercise toward the end of 2011, and (v) it arranged its first shipment to Scotland in the summer of 2013.

[9] It was not until April 2012 that a customer informed NGS that the defenders had purchased de-icing salt in the two winters in question ("winter 1" and "winter 2"). That was the first time that NGS had become aware of these contracts. It immediately sent a formal request to the defenders seeking details of the procurement process that had taken place. In particular, it asked for the dates on which the relevant contract notices had appeared in the *Official Journal of the European Union* ("the *Journal*"). The defenders replied on 30 May 2012 and stated that the operating companies and the local authorities normally procured de-icing salt. Transport Scotland had taken over responsibility in winters 1 and 2, however, because of the extreme urgency of the situation.

[10] NGS did not accept that explanation. It raised the present action on 28 August 2012, claiming that the defenders breached the 2006 Regulations by failing (i) to treat economic operators equally and without discrimination; (ii) to act in a transparent and proportionate manner; (iii) to

publish a contract notice inviting tenders in the *Journal*; (iv) to award the salt contracts following a tender procedure; (v) to award the contracts on the basis of the lowest or most economically advantageous offer; and (vi) to publish contract award notices in the *Journal.*

[11] The defenders took two preliminary points. The first related to time-bar. They argued that NGS had the necessary grounds to bring proceedings more than three months prior to the date upon which it served the summons. They founded on two reports published in August and December 2010 respectively. Each report was available on-line and stated that the defenders had purchased emergency supplies of salt in winters 1 and 2. Following a debate, I held that the claim was not time-barred: 2013 CSOH 119. The second point related to the right of NGS to revise its written pleadings to expand its claim. I allowed it to do so: 2014 CSOH 41.

The Public Contracts (Scotland) Regulations 2006

Underlying policy

[12] The 2006 Regulations stem from the Public Sector Directive (2004/18/EC). Contracting authorities have three key obligations: (a) to advertise public contracts in advance, (b) to hold a fair and competitive tendering procedure, and (c) to notify awards in the *Journal* after they are made. The policy underpinning this branch of the law is clear. It aims to promote free and fair competition throughout the European Union by establishing a culture of transparency. To borrow the famous words of Justice Louis Brandeis:

> "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

The 2006 Regulations have since been replaced by the Public Contracts (Scotland) Regulations 2012.

The tender procedures

[13] In terms of the 2006 Regulations, the defenders purchased the salt using the "negotiated procedure" without a prior notice. NGS claims that they should have held a competitive tender exercise using either the "open procedure", or "the accelerated restricted procedure". A key issue concerns the period those procedures would have taken. I received helpful evidence on this point from the director and deputy director of the Scottish Government Procurement Directorate, both of whom have wide experience in this area.

[14] They explained that a tender exercise for de-icing salt would have a number of discrete stages. First, the defenders would have developed a procurement strategy after consulting with other interested parties. Subsequently, they would have drafted a specification, prepared the contract documents, evaluated possible tenders, and debriefed unsuccessful bidders. A pre-qualification stage would have extended the period. The two Directorate witnesses, Mr Merrill and Mr McNulty stated that if everything had gone smoothly the "open procedure" would have taken about six months and the "accelerated restricted procedure" about three months.

Scotland Excel framework agreement

[15] Contracting authorities can also choose to enter into a framework agreement. Such contracts are made with more than one supplier and set out the general terms on which future contracts will be made. The parties negotiate the specific terms at a later date. The procedure is relevant in this case, because on 17 March 2010 Scotland Excel placed an advertisement in the *Journal.* It sought bids for a framework agreement for various types of salt and de-icing products. Scotland Excel is a body set up to procure goods and services on behalf of the Scottish local authorities.

[16] Mr Hamilton stated that Transport Scotland did not formally become a member until early 2014. Although NGS pointed to certain documents that suggested it had joined at an earlier date, I accept Mr

Hamilton's evidence on this point. I am equally satisfied that Transport Scotland could have procured salt through Scotland Excel if it had wished to do so at any stage.

[17] The framework agreement was to last for three years, with an option to extend it for a further year. Scotland Excel envisaged that there might be about ten suppliers and the total value of the contract was potentially worth £35 million. The selection criteria were weighted 70 per cent toward price and 30 per cent in respect of other factors. Scotland Excel notified the successful bidders in July 2010. The significance of this framework agreement in this case is that NGS did not make a bid. I shall consider this below in my discussion of loss.

Regulation 14

[18] The "extreme urgency" provision is contained in regulation 14(1)(a)(iv) of the 2006 Regulations. It provides that a contracting authority may use the negotiated procedure without the prior publication of a contract notice:

> "when (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, the time limits specified [for the other procedures] cannot be met".

[19] Three principles govern the application of that provision: (a) it is strictly construed, (b) it does not apply to 'self-created' situations, and (c) any risk to human health and safety may be relevant: see *Commission* v *Italy (re flood safety works in the River Po)* [2004] ECR I-8121; *Commission* v *Spain (Madrid University)* [1992] ECR I-1989; *Commission* v *France (Rennes Railway)* [2000] ECR I-8377; *Commission* v *Germany (Ems)* [1996] ECR I-1949; *Commission* v *Italy* (Case 194/88R) [1990] 1 CMLR 813; *Commission* v *Spain* C-24/91; Trepte, *Public Procurement Law in the EU* (2007) para 7.56.

Winter 1 (2009/10)

Prior period

[20] The preceding winter (2008/09) was also a cold one, particularly in the south-east of **E**ngland. Following that winter, the UK Roads Liaison Group, which included representatives from Transport Scotland, carried out a review. In its report, *Lessons from the Severe Weather* (July 2009), it recommended that the highway authorities in England should hold a salt reserve and consider establishing a framework agreement to widen the sources of salt supply. That same summer, Peacock Salt Ltd circulated a document entitled *No Salt? Use Plan B* warning that the United Kingdom had insufficient salt reserves and that the authorities should consider importing supplies from overseas.

Weather and road conditions

[21] Winter 1 was the second coldest in Scotland since 1914. The north of the country had the coldest winter on record. There was widespread frost from October onwards. Significant snowfalls took place from the middle of December until the end of February. In many areas the daytime temperature rarely rose above freezing between 17 December and 15 January. As a result there was little thawing. Overnight temperatures were low and in certain areas regularly fell to -15°C or below. By Christmas, much of the Highlands had 30cm or more of snow. Further snowfalls occurred during March and April 2010, with only a few mild intervals, mostly in the west and south of the country. The bad weather led to significant disruption to the local and the trunk road network. There were lengthy closures. Some roads were only passable with extreme care. The severity of the winter affected the whole of the UK and mainland Europe.

The availability of salt

[22] Following the early onset of winter, salt stocks in Scotland rapidly dwindled. The principal suppliers exhausted their surface stocks and their combined production of salt was insufficient to meet demand, which was high across the United Kingdom. The problem was compounded because the road

authorities began the season with lower stocks than usual due to the heavy usage in the previous winter. The stocks that were available were unevenly spread.

[23] By January 2010 stocks of de-icing salt across Scotland were dangerously low. On 3 January Cleveland Potash referred to the situation as being "desperate and demanding". On 4 January twelve local authorities reported that they had, at most, only two days of supplies. On 6 January, Dumfries & Galloway Council was "nearly out of salt". Matters began to improve at the end of the month as further supplies became available. Salt was delivered from abroad in February. At the end of February, however, the defenders again feared that salt supplies might run out. The severe conditions abated in March and salt that arrived from Egypt on 25 March was stored at Perth harbour.

The Scottish Ministers' response

[24] The defenders' twin aims were to keep the economy going and to protect public safety. In the words of Mr McNulty, it was "almost unthinkable that you would place the public in jeopardy". The defenders activated a number of bodies to deal with the crisis: the Scottish Cabinet sub-committee on resilience, the Scottish Government resilience room, the Transport Scotland resilience room, and the Scottish Salt Group. They liaised closely with one another, the local authorities, the operating companies and the UK Salt Cell. They determined what salt stocks were available, when future supplies were expected, what purchases to make, and which areas deserved priority.

The INEOS purchase

[25] In early January, the First Minister learned that INEOS Enterprises Ltd had a quantity of salt at its Grangemouth premises. He contacted the company's principal, Mr Jim Ratcliffe. The salt in question was fine un-dried vacuum salt. It is akin to table salt and is primarily used in the preparation of brine for chemical production. Mr Salmond relayed the terms of his discussion to Transport Scotland. On 15 January Mr Edmond, its head of network maintenance, wrote to his colleague Mr Ainslie McLaughlin, the director of major transport infrastructure projects, to seek approval to derogate from the 2006 Regulations. Mr Edmond referred to the adverse weather conditions, the diminishing stocks of de-icing salt, and the lack of time to use normal procedures. Mr McLaughlin approved the request on the same day. The defenders then purchased about 12,000 tonnes of salt from INEOS for £569,780.75 and collected some of the salt the following day. During winter 1, the INEOS salt was spread by shovel on footpaths and roads. It was too fine for gritting machines. In winter 2 a method was devised to mix it with sand and gravel for use in such machines.

Winter 2 (2010/11)

The prior period

[26] In light of the problems experienced in winter 1, the defenders asked the Scottish Salt Group, chaired by Mr Edmond, to carry out a review and to make recommendations for improving winter resilience in Scotland. The group included representatives from the Society of Chief Transportation Officers in Scotland, the Convention of Scottish Local Authorities and the Society of Local Authority Chief Executives. In March 2010 it issued a questionnaire to the local authorities, the operating companies, the salt suppliers and the weather forecasters. It held meetings with those parties in April and May. There was no general sense of anxiety, but some concerns were expressed. For example, the minute of the meeting with Peacock Salt on 13 May states that:

> "Scottish Councils may not be taking on board that salt will again be in short supply this year if there is a similar winter to last year. Suppliers are unable to mine salt quickly enough to meet potential demand at the start of winter."

[27] The Group published its report on 27 August – *Scottish Road Network: Lessons learned and recommendations following the events of winter 2009/10*. It recommended that the defenders should establish a strategic salt stockpile "to provide the extra resilience needed, should the next winter be as severe as last

winter, and given the projected shortfall of UK production against possible demand." The Group recognised that it would not be possible to create a large holding that autumn, because of the low stock levels at the end of the previous winter and the high demand across the UK. The Group recommended that the government should monitor the situation during the course of the winter, before deciding upon permanent arrangements.

[28] A similar exercise took place in England. Its review group published its report on 27 July 2010: *The Resilience of England's Transport Systems in Winter* ("the Quarmby report"). It predicted that 85,000 tonnes of de-icing salt would be required to grit the English road network in winter 2, but the figure would be higher if the weather was very cold. It recommended "a pragmatic 2-stage approach", involving the procurement of an initial quantity of de-icing salt and a review of the position at the end of December. On the basis of the Quarmby report, the Highways Agency decided to create a stockpile of 250,000 tonnes of de-icing salt.
[29] The Quarmby recommendations were discussed within Transport Scotland and the Scottish Salt Group. In the event, Mr Edmond recommended to the defenders that they should establish a strategic salt stockpile of 30,000 tonnes and review the situation at the end of December. He did so on the basis (i) that it was appropriate to take into account the weather conditions over a period of years, and (ii) it was inappropriate to create a stockpile based upon the most extreme situation. While Mr Edmond accepted that 30,000 tonnes was a rough estimate, he felt that it was about right having regard to the amount of salt purchased the previous year, its usage, and the responses from the salt suppliers, and the local authorities. The defenders accepted that recommendation and began to procure supplies to hold as a strategic reserve.

Weather and road conditions
[30] Winter 2 also began early. There was frost and snow from October onwards. Heavy snowfalls began in late November. On 2 December, the *Scotsman* newspaper reported that "Scotland is in the grip of the worst winter in 45 years, as snowstorms and icy conditions continue to batter the country, causing widespread disruption". Many major routes were affected. The Forth Road Bridge was closed for the first time since it opened in 1964. The M8 motorway between Edinburgh and Glasgow was closed on 6 December and did not fully reopen until 11 December. Motorists found themselves trapped for long periods, some overnight. The emergency services and roads authorities rescued some of those who were stranded. Many schools were closed and non-essential hospital operations were postponed. Conditions improved in mid-February, but there was another short severe period around mid-March. The Meteorological Office has stated that it was "the coldest December in over 100 years".

Government response
[31] As a result of the heavy early usage of salt, the stocks held at the beginning of winter 2 were distributed almost immediately. Fortunately, a shipload of salt from Peru arrived at Leith docks on 28 November, just in time for the onset of the worst conditions. The defenders again activated the various resilience bodies that had operated in winter 1. Mr Edmond explained that the real problem in both winters 1 and 2 arose because of the heavy early usage. He pointed out that in the winter of 2012/13 more salt was used than in either winters 1 or 2, but there was no emergency situation.

Mr Alan Wylie
[32] A chapter of the evidence related to Mr Alan Wylie. Between 1980 and 2000, he was the sales manager of Peacock Salt Ltd. During that period, he was involved in the design and installation of (a) the Eurotunnel de-icing system; (b) a salt-to-brine plant at Aberdeen port; and (c) a salt saturator to de-ice motorways. After leaving Peacock, he operated as a salt consultant from his home in Dunbartonshire, initially through European Salt Consultants Ltd and latterly as a sole trader. In the course of his career, Mr Wylie has developed contacts with salt suppliers and brokers across the world.
[33] Mr Wylie met the general manager of NGS at a trade show in Cardiff in September 2009. A business relationship developed, which was of great assistance to NGS in obtaining business. Mr Karia, its

commercial director, said that overseas suppliers treated NGS with trust and respect, "they welcomed us with open arms, as if they were dealing with Mr Wylie". Although the precise contours of the business relationship were not defined, one point was clear. Mr Wylie was not an agent and did not have a mandate to bind NGS. It did not remunerate him. Instead he received a commission from suppliers from whom he generated sales.

[34] On 6 January 2010, Mr Wylie telephoned Mr Gordon Sinclair, a road area manager for Transport Scotland. The two men had known one another for many years. Mr Wylie stated that he could arrange to deliver a substantial quantity of salt from Egypt. He added that the prices would be competitive and that the salt could be delivered in late January or early February. Mr Wylie did not mention NGS during the course of these discussions. The defenders assumed that any contract would be made with the Egyptian company.

[35] The defenders recognised that the Egyptian salt might solve the acute problems that they faced. At the same time, they wished to guard against any waste of public money. At that time they were receiving a high number of unsolicited approaches, some without merit. Accordingly, they decided to probe Mr Wylie's position. Their investigations disclosed that he was an individual trading from a private address and that a company that had operated from that address (European Salt Ltd) had been dissolved in September 2009. Mr McNulty checked Mr Wylie's website, which he said did not "inspire confidence". BEAR Scotland Ltd outlined concerns about (i) trading with an unfamiliar source and (ii) the quality of the salt.

[36] Having regard to these factors, the Procurement Directorate advised the defenders that the proposal was too risky to be worth pursuing. It was concerned about public money being paid in advance when there was a degree of "vagueness around the offer and the availability of the salt". On 8 January the defenders decided not to explore matters further with Mr Wylie.

[37] Mr Wylie contacted Mr Sinclair again on 24 May and 21 December 2010 and said that he could arrange to supply white marine salt at competitive rates for early delivery. In early 2011, Mr Wylie invited the defenders to send a representative to Southampton to view the storage facilities of NGS. The defenders did not respond to these proposals. Although the defenders' witnesses were hazy on this point, it appears that they still believed that a question-mark stood against Mr Wylie's ability to fulfill any contract.

[38] From February 2011 onwards Mr Karia sent a series of emails to Mr Wylie suggesting that he explore market opportunities in Scotland.

[39] I do not accept NGS' submission that Mr Wylie played a significant role in this case. For a substantial period he did not disclose that he had commercial links with NGS. The defenders assumed that he was either a principal or an intermediary for a foreign supplier. They had no duty to negotiate with him. Indeed the suggestion that they should have obtained salt through him without holding a competitive tendering exercise runs contrary to the thrust of their complaint in this action.

[40] In any event I hold that the defenders acted responsibly by carrying out due diligence. It was for them to determine whether or not to proceed with his proposals. Mr Karia himself acknowledged that there could be difficulties in dealing with foreign suppliers.

Did regulation 14 apply?

Preliminary

[41] Apart from the INEOS purchase, the defenders did not rely upon regulation 14 at the material time. The Transport Scotland officials thought that as the salt purchases were made through the operating companies, the procurement rules did not apply. That misconception persisted for some time. In May 2012, Mr Edmond wrote to NGS as follows "A derogation was only required [for] the salt procured by INEOS directly by Transport Scotland. The trunk road operating companies do not require such a derogation as they and not Transport Scotland were procuring the salt."

[42] That view is manifestly mistaken and the defenders do not rely upon it in this action. If it were correct, it would subvert the public procurement regime. Contracting authorities could circumvent their

obligations with ease by using another enterprise to procure the goods or services in question: Arrowsmith *et al EU Public Procurement Law: an Introduction* para 4.2.1.

[43] NGS submitted that if the defenders did not consider that the "extreme urgency situation" exception applied at the relevant time, it cannot be prayed in aid now. I disagree. The court must determine whether the criteria in regulation 14 are met, having regard to the whole circumstances. It is not surprising that Mr Edmond and Mr Hamilton made the mistake. They are engineers, not lawyers, and their priorities lay elsewhere. As Mr Edmond said:

> "I personally was not worried about procurement issues at all, I was worried about obtaining salt."

[44] I also reject NGS' submission that the defenders did not lead sufficient evidence to establish that the section 14 conditions were present. The witness statements are replete with the necessary information.

Were the criteria met in winter 1?

[45] I conclude that the criteria for the application of Regulation 14 were satisfied in winter 1 for the following reasons.

a. *Was there a situation of extreme urgency?* Yes.If the stocks of de-icing salt were exhausted, the Scottish roads would become unsafe and might be impassable.That would give rise to risks to life and limb and have a profound impact on the Scottish economy.

b. *Was it brought about by events?* Yes, the unexpected climate conditions caused the situation.

c. *Were those events unforeseeable by the defenders?* Yes.The long-range forecasts did not predict that the winter would arrive early, be exceptionally cold and last longer than normal.In previous years the salt had been procured through the operating companies.They had not experienced a problem with salt supplies in the previous winter.

d. *Were those events attributable to the defenders?* No.The lack of salt cannot be attributed to the defenders.The UK Roads Liaison Group recommendations did not relate to Scotland.

e. *Was it impossible for the defenders to comply with the time limits for an open, restricted, or accelerated procurement procedure?* Yes.Once the winter began, any supplies obtained by way of a compliant procurement procedure would come too late.

f. *Was it strictly necessary for the authority to use the negotiated procedure?* Yes.As the stocks of de-icing salt rapidly depleted, the defenders had to obtain new supplies to protect public safety and ensure that the economy did not stall.Even in February 2010 the defenders were entitled to procure supplies in this manner.No one knew when the bad weather would end.

[46] *Commission* v *Italy* C-525/03 provides assistance on the question of foreseeability. The background circumstances were that the Italian government had declared a state of emergency following an outbreak of forest fires. It subsequently purchased two helicopters to deal with such situations, but without holding a tender exercise. The Advocate General (Jacobs) concluded that the Italian government had made out a *prima facie* case of extreme urgency. Despite forest fires being a regular occurrence throughout southern

Europe in summer, he observed that in some years they may be of "such exceptional intensity or extent as to be legitimately regarded as unforeseeable" (at para 64). The same observation can be made in the present case.

Were the criteria met in winter 2?

[47] I conclude that the criteria for the application of Regulation 14 were, however, not satisfied in winter 2 for the following reasons.

i. *Was there a situation of extreme urgency?* I answer this question in the affirmative for the same reasons as winter 1.Unless the roads and pavements were treated, there was the risk of serious accidents.Elderly and vulnerable people could be placed in peril.Schools would be closed.Interruption to the flow of traffic would cause major economic disruption.

ii. *Was it brought about by events?* Yes, for the same reasons as winter 1.

iii. *Were those events unforeseeable by the defenders?* I also answer this question in the affirmative.Looking at the long-term pattern, I accept Mr Hamilton's statement that "nobody expected another harsh winter, the third in a row."

iv. *Were those events attributable to the defenders?* Yes.I answer this question and the two succeeding ones on the basis that the situation was a 'self-created' one.The defenders knew from winter 1 that the salt supply arrangements in Scotland were fragile in conditions of severe weather.It was incumbent upon them to act sooner.They knew that more salt might be required for winter 2.Accordingly, they had to arrange matters so that they could hold a tender exercise in advance, if necessary.

v. *Was it impossible for the defenders to comply with the time limits for an open, restricted, or accelerated procurement procedure?* No.In commissioning the Scottish Salt Group to produce a report, the defenders either were aware, or ought to have been aware, of the time constraints.They should have had the 2006 Regulations in mind.

vi. *Was it strictly necessary for the authority to use the negotiated procedure?* No.I conclude that the defenders do not satisfy this test for the reasons just given.It only became strictly necessary for them to procure salt using the negotiated procedure without a notice because of the delay in the review procedure.

Other factors relied upon by the defenders

[48] The court's task is to focus on the precise words of regulation 14 and determine whether all of the constituent elements are present. I therefore reject several other submissions made by the defenders as being irrelevant: (a) that the Scottish Procurement Directorate would have sanctioned a derogation in both winters if it had been asked; (b) that other contracting authorities in England, Wales and the Netherlands also procured de-icing salt at the material time without seeking tenders; (c) that NGS made significant

profits from supplies it made to the authorities in those countries; and (d) that the European Commission has taken no enforcement action in respect of any of those contracts.

Damages

Introduction

[49] Both parties cited a very large number of authorities in respect of the recoverability of loss, including Case C-568/08 *Combinatie Spijker Infrabouw*; Case C-314/09 *Strabag* [2010] ECR I-8769; Case T-340/09 *Evropaiki Dynamiki* v *European Commission* 10 April 2014; Case T-160/03 *AfCon Management Consultants* v *European Commission; Harmon VFEM Facades (UK) Ltd* v *House of Commons* 1999 WL 1457322; *Aquatron Marine* v *Strathclyde Fire Board* [2007] CSOH 185. NGS must establish the following key elements: (i) the breach was sufficiently serious to warrant damages, (ii) NGS had a real and substantial chance of being awarded a contract, and (iii) there is a causal link between the breach and the loss.

[50] NGS seeks to recover damages of £3,022,607.28. That figure is based upon the total purchases of de-icing salt made by the defenders. The Scottish Performance Audit Group has calculated that the defenders purchased (a) 20,366 tonnes at a price of £1,118,950.75 in winter 1, and (b) 156,582.70 tonnes at a price of £9,777,883.06 in winter 2. Originally, NGS also sought £723,000 in respect of lost haulage costs, but that claim was deleted at the start of the proof and the loss calculation adjusted to reflect that deletion.

Winter 1

[51] The question of loss does not strictly arise in relation to winter 1. If I had held that the defenders had breached the procurement rules I would, however, still not have awarded damages in favour of NGS. I develop my reasoning below in relation to winter 2, but I shall mention two points here. First, I conclude that NGS would not have made a bid. Mr Karia said that in late 2009, NGS had no interest in purchasing salt. At that stage it had no large contracts for onward supply and therefore a large shipload was not commercially viable. Second, if there had been a competitive tender exercise, I hold that NGS would not have been successful because it would not have been regarded as a credible bidder, given that (a) it only had one year's accounts, (b) it had not imported any salt; and (c) it had not made any salt supplies.

Winter 2

General

What type of procurement exercise would have taken place?

[52] I accept the view of Mr Edmond and Mr Hamilton that if the defenders had sought to procure salt in advance of winter 2, they would have been likely to establish a framework agreement with perhaps four suppliers. To do so would have given the defenders both more flexibility in their arrangements and greater reassurance that their future needs could be met.

When would it have taken place?

[53] The defenders should have ensured that they were in a position to implement the Scottish Salt Review Group recommendations by way of a compliant procedure. That required them to establish a tighter time frame for the group's work. It seems unlikely that they could have undertaken the open procedure, as that would have had to commence in about April 2010. But procurement could have been made by way of the accelerated restricted procedure starting in June or even July 2010.

What would the defenders have procured?

[54] NGS submitted that the defenders should have specified in its tender notice that they were seeking: (a) 160,000 tonnes of de-icing salt, (b) split into smaller quantities with different delivery dates; and (c) imported from abroad. There are question-marks against each of these stipulations.

i. NGS based its figure on the amount actually purchased by the defenders and the Quarmby report.Mr Edmond, however, was the best person to evaluate matters in the summer of 2010.He reviewed all the available evidence and decided that 30,000 tonnes was the appropriate amount.That was a reasonable

view for him to take.He saw no basis upon which the defenders should commit to an excessively high resilience level.The court must be wary of 'second guessing' such decisions.

ii. Splitting the overall figure into smaller quantities was also a matter within the province of the contracting authority.Mr Edmond recommended that the defenders review the situation in December.That was a pragmatic approach, as the winter could have been a mild one.

iii. NGS submitted that the restriction to seek only imported salt was necessary to avoid disruption to the domestic supply chain.I see no basis upon which the defenders could have imposed such a condition.To have done so would have been to infringe procurement law.

Would NGS have lodged a tender?

[55] Mr Karia stated that if the defenders had carried out a competitive tendering exercise, NGS would "undoubtedly" have made a bid, because a contract to create a strategic stockpile of salt would have played to its strengths. That assertion was based upon his expectation of the procurement procedure that the defenders would have followed. The position would be radically different if they had (i) invited tenders for a framework agreement, (ii) included brown rock salt, and (iii) sought a total of 30,000 tonnes. In that scenario, I conclude that NGS would have not made a bid.

[56] Even if the defenders had invited tenders along the lines suggested by NGS, however, Mr Karia's assertion is still surprising. One would expect a relatively new company to bid for contracts. A question therefore arises. If NGS did not tender for the high value Scotland Excel framework agreement in the spring of 2010, why would it have bid for a much smaller contract in the summer? The Scotland Excel contract appeared to be attractive from the perspective of NGS. It specified white marine salt as well as brown rock salt. It was to operate for three years, with a possible extension of one year.

[57] Mr Karia stated that it would have been 'pointless' for NGS to make a bid. He explained that the local authorities would have only used NGS as a backstop. When demand was low, it would not have received any orders. When demand exceeded supply, it would have expected NGS to supply salt at unprofitable rates.

[58] My reservations about Mr Karia's evidence begin with his witness statement. It is 72 pages long and contains 324 numbered paragraphs. It was partly drafted by his legal representatives and contains a number of words and phrases with which he was not familiar, as well as extensive extracts from emails recovered from the defenders and excerpts from the defences. As a qualified solicitor, I would have expected him to be aware that these factors adversely affected the authenticity of his statement.

[59] More importantly, a great deal of his statement comprises opinion, rather than factual evidence. He provides his views on procurement policy, the validity of individual lines of defence and the application of Regulation 14. With regard to the conduct of other parties, he alleges: (i) that Transport Scotland was not open and honest in its dealings; (ii) that it favoured companies with whom it had established relationships; (iii) that the other salt suppliers were part of an 'old boy network'; and (iv) that they decided who would lodge tenders for particular contracts. When pressed on whether he was alleging price-fixing, Mr Karia said that he preferred the expression "they work together". He also alleged that while NGS would comply with any salt framework agreement, the other suppliers "interpreted this very perversely". He based his comments on conversations with unnamed individuals. That is an unsatisfactory foundation for such serious allegations.

[60] Mr Karia had a tendency to avoid answering questions. For example, he repeatedly refused to give a direct answer to a line of questions about whether NGS had secured a discount from certain salt suppliers.

He was also inclined toward exaggeration. He said that "there is no conceivable reason why Transport Scotland would not buy from NGS"; that NGS "would have been 100% successful"; and that in any competitive tendering process with Peacock as a rival bidder, NGS "would beat them hands down".
[61] I concluded that Mr Karia's evidence was strongly coloured by his mistaken belief that the Scottish ministers did not wish to do business with NGS and that it was linked to some form of cartel with the other salt suppliers. That undermines my confidence in his evidence.

[62] Standing the failure by NGS to apply for the Scotland Excel contract, the fact that it had not supplied any customers by that date and also that in email correspondence with Mr Wylie it did not turn its mind to making supplies in Scotland until early 2011, I conclude that NGS would not have lodged a tender in any procurement exercise conducted by the defenders in 2010.

Would a tender made by NGS have been successful?
[63] NGS claims that if the defenders had carried out a competitive tendering process, its bid would have been successful, as it "would have been able to beat [its] competitors … in terms of price for the product, time of delivery, reliability of service, and transport and storage costs." There are significant question-marks against that proposition.
[64] First, the defenders would have regarded a proposed salt contract as being both of high value and strategically important. They would therefore have carefully scrutinized candidates to assess their probity, financial standing and technical capability. By the summer of 2010, NGS had a limited track record. It had only taken delivery of two shiploads of salt, had not supplied any customers and did not possess Scottish storage facilities. Mr Makin, who provided expert accountancy evidence on behalf of NGS, described its business in 2010 as "fairly slender". Although the absence of two years' audited accounts was not fatal, it counted against NGS in any competition against rival bidders.
[65] Second, as Mr Karia himself repeatedly stated, in normal market conditions, NGS cannot beat the suppliers of brown rock salt on price. There is therefore no reason to suppose that in this instance NGS' bid would have been successful.

Proof of Loss
[66] There is a further hurdle for NGS. In the summons it refers to the prices actually paid by the defenders and then avers that it "would have tendered at less than this sum". That is the foundation of its damages claim. Any assessment of the likely success of its tender turns on that issue. NGS did not, however, lead evidence about the prices at which it and its competitors would have tendered. That was a material omission, given Mr Karia's statement that its tender prices varied considerably, depending upon demand, volume (the most important factor) and delivery period. Without knowing the relevant tender prices, I cannot determine that the defenders would have awarded a contract to NGS. That would be a matter of conjecture.
[67] NGS led detailed accountancy evidence from Mr Chris Makin. The defenders levelled some criticism at his approach, as he carried out an audit of the loss calculation that NGS had already made. I found Mr Makin to be a careful and helpful witness and accepted that he was unable to adopt his preferred methodology of calculating loss using the raw data, because it only became available at a late stage. But for the reasons outlined, I can see no basis for arriving at any figure of loss that is soundly based. I therefore hold that NGS has failed to establish that its claim would have succeeded.

Loss of a chance
[68] The alternative claim runs into the same difficulty. In the absence of a finding that NGS would have made a bid and the price at which it would have done so, I cannot make an award for loss of a chance. The absence of a causal nexus and the evidence of loss prevent a reasoned conclusion on this point. Mr O'Neill submitted that a discount of 20 per cent would be appropriate. I conclude that any figure is a matter of

conjecture. Given all the variables and so far as I am able to do so, I would have applied an 80 per cent discount, as I conclude that NGS only had a very low chance of being awarded any contract by the defenders.

The EU Common Law Case

[69] NGS also pleaded an "EU common law case". It submitted that the defenders had breached the obligations of equal treatment and transparency imposed by articles 18, 34, 49, 56 and 106 of the Treaty on the Functioning of the European Union. I hold that this ground of action is misconceived. The defenders do not have a liability independent of the 2006 Regulations. It is difficult to conceive why a contracting authority that is successful in relation to Regulation 14 might yet be liable: Trepte, *Public Procurement Law in the EU*, Oxford, 2007, at para.1.45. In any event, the difficulties in relation to loss would remain.

Conclusion

[70] For the reasons given, I find in favour of the defenders. I shall direct that there be a By Order hearing at which the precise orders can be discussed. Meantime I reserve expenses.