OUTER HOUSE, COURT OF SESSION

[2026] CSOH 90

CA77/25

OPINION OF LORD LAKE

In the cause

WILLIAM CAMPBELL RECYCLING LIMITED

Pursuer

against

SCOTTISH SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS

Defender

Pursuer: Young, T; Harper Macleod LLP
Defender: Dean of Faculty KC et Forbes, K; Morton Fraser MacRoberts LLP

18 September 2026

Introduction

[1] In 2021 the pursuer entered into an agreement with the defender for the provision of waste management services for various sites that they operated around Scotland. The 2021 Agreement followed on from earlier agreements. Services under the agreement were provided in two distinct ways. For some sites, the pursuer entered into agreements on the defender's behalf with Veolia resulting in contractual relationships between Veolia and the defender. In respect of other sites, the pursuer entered into agreements with third parties as subcontractors to them to provide services. Either party was able to bring the

2021 Agreement to an end by giving 5 year's notice provided that the notice period could not expire prior to 31 December 2038.

[2] While initially the relationship between the parties was good, from about 2022, it began to deteriorate. The details of this are pled at length but the element that is material for present purposes is that from December 2023 the defender sought details from the pursuer of its risk assessments and procedures regarding safety in respect of the performance of the contract services in and around the sites. Correspondence was initially between the parties but developed to become correspondence between their solicitors. On 14 February 2024 the solicitors for the defender sent a letter to the solicitors for the pursuer with three headings. The first two consisted of the names of the parties. The third one stated, "Waste Services Contracts: ULTIMATUM LETTER". The body of the letter contained the following:

> "We refer to previous correspondence. As you are aware, our respective clients are in a commercial arrangement governed by the services agreement dated 5 July 2021. In terms of Clause 6.3 thereof:
>
> 6.3 Either party shall have the right to terminate the contract forthwith if the other is in default of any material obligation in this Contract and such breach has not been remedied within 30 days of a request being made by the party not in default.
>
> On behalf of SSPCA, we hereby intimate that we consider that WCR is in default of its obligations under the contract, for the reasons set out below. We hereby require that default to be remedied within 30 days of this request, in the manner set out below. In the event of the default not being remedied, we hereby intimate that SSPCA will consider itself immediately thereafter to be entitled to terminate the contract under said Clause 6.3."

The letter went on to state that the pursuer had sought information from the defender to enable it to assess health, safety and environmental risks arising from the performance of the services. It enclosed a further copy of the defender's Health and Safety questionnaire and required that it be filled out for each site serviced by the defender. It referred to statutory obligations incumbent on the defender and said that it was not possible for them to achieve compliance with these without the information sought. The letter said that in not providing the information, the pursuer was in breach of an implied term that it would carry out its services in a way that does not place the defender in breach of the law. It stated that if the information was not provided within the period of 30 days specified in Clause 6.3, the defender would be entitled to terminate the contract.

[3] Although the pursuer disputed the existence of the obligation referred to by the defender, they compiled information in response. They sought to email it to the defender but were unable to do so because of the file size. Instead, they sent it by DX. The defender states that the letter and the documents were received by them on 27 March 2024. On 21 March 2024 solicitors for the defenders sent a letter to the solicitors for the pursuer in which they stated that there having been no response to the letter of 14 February 2024 within 30 days, they were terminating the contract. The dispute concerns whether the defender was entitled to terminate the contract by that letter or whether it was itself a repudiatory breach of contract which entitled the pursuer to terminate the agreement and seek damages.

[4] The pursuer contends that the defences do not state any relevant defence to the declarator sought in the first conclusion to the effect that the parties' contract was not determined by the defender's notice and the second conclusion that the defender's notice was itself a repudiatory breach of contract, and that the pursuer had accepted that breach by their notice and brought the contract to an end. On that basis the pursuer sought decree in terms of those two conclusions *de plano* leaving the third conclusion seeking damages. The defender's position is that the issues between the parties cannot be resolved as an issue of relevancy and that a proof before answer will be required.

Contentions for the parties

[5] In outline, the submissions for the pursuer were centred around the following propositions:

(a) A notice given under Clause 6.3 requesting that a remedial action is taken to end a breach of a material obligation in the contract should be strictly construed and must state the primary facts on which it proceeds and specify the obligation which it is said had been breached.

(b) The only obligation said in the ultimatum letter to have been breached was to carry out the contract services in a way that does not place the defender in breach of the law. It is not possible for the defender to seek now to rely on any other terms of the Agreement – whether express or implied - or further alleged breaches of the Agreement. To the extent that the defender seeks to rely on additional terms, the letter would have required to provide adequate notice in terms of Clause 6.3. Here it did not and it is therefore invalid in so far as any other breaches are founded on.

(c) In addition, the further obligations now referred to by the defender do not exist under the agreement and the averments regarding them are irrelevant.

(d) The only obligation relied on in the letter was one to carry out the services in a way that did not place the defender in breach of the law. No such obligation existed and there was therefore no relevant basis on which the defence could be maintained.

[6] The defender's position in response may be summarised as follows:

(a) The defender had not changed its position and is still founding on the breach of the obligation referred to in the letter of 14 March. What the defender argues in the defences is consistent with the ground founded on the ultimatum letter and, when regard is had to the context in which it was sent, the notice conveyed all that it was required of it to function as a request under Clause 3.4. The term founded on was sufficiently identified in the letter, was a term in relation to which there were relevant averments and the pursuer was told what it needed to do to remedy the breach.

(b) Even if the letter was not valid as a notice under Clause 3.4, the defender has made relevant averments that the pursuer had acted so as to be in material breach of contract and, in that situation, the pursuer is not able to enforce the contract against the defender. In particular, a party in breach of a contract cannot sue the other party for damages. The existence of that other breach of contract would mean that it would have been open to the defender to have terminated the contract on that other basis.

[7] By way of response to the defender's position elaborated in submission, the pursuer argued that there are no averments as to what elements of context are relied on in support of the defender's contention. In relation to any allegations of breach of contract not stated in the ultimatum letter, they argued that it is not open to the defender to rely on them now as a defence to the first two conclusions as opposed to issues of quantum. They contended that there are no relevant averments to support the existence of any other obligation. In relation to the argument that the pursuer cannot rely on an alleged breach of contract to obtain decree *de plano* where the defender has set out a relevant case that the pursuer was itself in breach of contract, it was submitted that (a) there are no averments of such material breach by the pursuer, (b) that any point that the defender could have terminated anyway would be relevant only to damages and was not a defence to the first two conclusions and (c) that,

even if the pursuer was in breach, it would affect only their ability to enforce the primary obligations under the contract and did not affect their entitlement at common law to rescind the contract when faced with a repudiation.

[8] The defender raised two further issues; (a) that the averments on quantum were wholly lacking in specification and (b) that the pursuer made averments that their solicitors did not have authority to accept service of the ultimatum letter. In response the pursuer submitted that concerns over the extent to which the defender had notice of the basis on which the pursuer claimed damages should be addressed by a case management order in future and that the averments regarding a solicitor's authority were part of background only and they did not take any point that the notice was ineffective because it was served on the solicitor rather than them directly.

The issues

[9] Having regard to the submissions, it appears that the issues which have to be resolved in order to give a decision in this matter are:

(i) Did the obligation identified in the ultimatum letter exist?

(ii) Did the other obligations on the pursuer identified by the defender exist?

(iii) For a letter to be effective under Clause 6.3, was it necessary that it specify the obligation allegedly breached?

(iv) Did the ultimatum letter give the pursuer adequate information to satisfy the requirements of Clause 6.3?

Existence of the obligation referred to in the ultimatum letter

[10] The ultimatum letter identifies the obligation said to have been breached as follows:

> "The contract is a contract for services. In common with all such contracts, it is a term implied by law, failing which a term implied as a matter of fact, that WCR will carry out its services in a way that does not place our clients in breach of the law."

The pursuer submitted that as a matter of law this obligation cannot arise and that the defence is accordingly irrelevant. The defender submits that their averments are sufficient and that the matter requires to be considered at a proof before answer after all the evidence is heard. I consider that the averments as to the obligation not to put the defender in breach of its obligations in relation to health and safety are relevant and it cannot be said that the defender must necessarily fail. I doubt whether it could be said that such a condition arises in all contracts for services as the letter states, but, having regard to averments that of necessity the services are performed on the defender's premises and require use of large vehicles, it is possible that there is an obligation that the services must be carried out in a way that would not result in the defender breaching the averred statutory duties. That is sufficient for the averment to be relevant.

[11] The pursuer submitted that the defender was seeking to imply a term on the basis that it was reasonable and this was expressly said not to be permissible by the Supreme Court in *Marks & Spencer plc* v *BNP Paribas Securities Services* [2015] UKSC 72, [2016] AC 742. The pursuer relied in particular on dictum of Lord Simons of Glaisdale in the Privy Council in *BP Refinery (Westernport) Pty Ltd* v *Shire of Hastings* (1977) 180 CLR 266 which was quoted in paragraph 18 of the majority judgment in *Marks and Spencer*. In my view, however, the focus cannot be on that passage to the neglect of what Lord Neuberger said in paragraph 21 of that judgment. He refers to the tests for implication of terms to be found in cases including *The Moorcock* (1889) 14 PD 64, *Reigate* v *Union Manufacturing Co (Ramsbottom) Ltd*

[1918] 1 KB 592, *Shirlaw* v *Southern Foundries (1926) Ltd* [1939] 2 KB 206, *Equitable Life Assurance Society* v *Hyman* [2002] 1 AC 408 *and Attorney General of Belize* v *Belize Telecom Ltd* [2009] 1 WLR 1988. He then goes on to state that he considers that the requirements of business necessity and obviousness are alternatives and that, when considering business necessity, the test is not one of "absolute necessity" but is that in the absence of the term, "the contract would lack commercial or practical coherence". Formulated in that way, the test of business efficacy is capable of being met on the averred facts. The defender offers to prove that if they are not given the information they seek, performance of the works would involve them in unlawful activity and, in that situation, it could be said that the contract would lack commercial or practical coherence.

Did the other obligations on the pursuer identified by the defender exist?

[12] The pursuer also refers in the defences to an obligation on the pursuer to co-operate with them. I consider that the position here is the same as with the obligation that was referred to in the letter. I do not consider that it can be said that the defender must fail to establish that such a term was implied even if they establish their factual case. Accordingly, the defences are not irrelevant.

Is it necessary to specify the obligation said to have been breached in the letter?

[13] The pursuer submits that the possible effect of a letter under Clause 6.3 is such that the importance of identifying the obligations in question is obvious. In support of the submission that it is necessary to identify it, the pursuer relied on a decision in *Lombard North Central Plc* v *European Skyjets Ltd* [2020] EWHC 679 (QB), paras [63] – [66]. A

submission was made there that, where a contract entitles a party to serve a notice which materially increases the burden on the other party,

> "then unless the express terms of the contract preclude it, the notice must state the primary facts relied upon giving rise to the entitlement with sufficient specificity that those stated facts can be checked by the recipient."

It was argued there that this meant that it was necessary to identify the breach as a matter of business sense. In that case, Freedman J thought that, put at its lowest, this has a real prospect of success and that the interpretation contended for was required to give commercial sense to the term entitling the party to serve a default notice. It is important to note, however, that the issue in that case arose in the context of an application to set aside a judgment which had passed some time before and the question before the court was whether there were sufficiently good prospects to justify doing so (paragraph 26).

[14] The defender referred to the decision of Popplewell J in *QOGT Inc* v *International Oil & Gas Technology Limited* [2014] EWHC 1628 (Comm) which was adopted by Lord Doherty in *Oil States Industries (UK) Limited* v *Lagan Building Contractors Limited* [2018] CSOH 22. This includes the following statements in relation to a notice under a contract,

> "Its purpose is to enable the recipient to understand what contractual right is being relied upon, and what he is alleged to have done wrong, with sufficient clarity that he can assess the validity of the notice and take such steps as are open to him to remedy the alleged breach" (paragraph 112).
>
> "the notice must be sufficiently clear to enable a reasonable recipient (that is to say one having all the background knowledge reasonably available to the recipient at the time of the notice) to understand the contractual basis for the notice and the nature of the breach which is alleged to have occurred, so as to be able to assess the validity of the notice and take such steps as are open to him to remedy the alleged breach" (paragraph 113).

The defender submits that the test stated by Popplewell J is satisfied by the notices here. The notices made it readily apparent that the defender required that the pursuer provide a completed questionnaire and that, if they did not, the defender would consider the pursuer to be in breach of contract. If the pursuer considered that it was not obliged to provide the notice, the letter gave them sufficient information to be able to challenge it. The letter referred to the provision in the agreement under which it was served (Clause 6.3), indicated what the defender required of the pursuer, stated the contractual obligation said to give rise to the requirement to act and specified the consequences if they did not act. As the defender submitted,

> "The core question is whether the Pursuer was obliged to provide the questionnaires. If it was not, there is no breach. If it was, then the nature of the breach (failure to provide the questionnaires) could not have been made more clear."

[15] It is necessary to distinguish the various issues that may arise; (a) what does the contract require of a notice, (b) did the notice comply with the requirements of the contract and, (c) if it did not strictly comply, is it nevertheless valid. There is a danger of confusion when statements pronounced in relation to one issue are applied to the others. The issue considered under this heading is the first of these issues – does the Agreement impose a requirement to identify the obligation said to have been breached?

[16] In relation to the first issue, I do not consider that much assistance can be obtained from the cases that were cited. *Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd* [1997] AC 749 and *HOE International Ltd* v *Andersen* 2017 SC 313 referred to by the pursuer do not assist in relation to this issue. Neither is concerned with determining the requirements imposed by a contract as to the contents of a notice. They consider whether notices that had been served but which did not comply with the requirements stated in the contract might nonetheless take effect – the third issue. The statements that notices must be sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate must be read in that context and is not intended to impose an additional requirement. *Lombard North Central* was considering the

issue of the requirements imposed in the agreement but I do not consider that it vouches, and still less is authority for, a proposition that when a notice is served there is always a legal requirement to specify the obligation which has been breached. It was a preliminary decision and was dependent on the facts of the case. Although in *QOGT Inc*, Popplewell J refers to the notice making the recipient aware of the "contractual right relied on" and "contractual basis for the notice", it is not clear that this is intended to refer to the underlying obligation said to have been breached rather than the term of the contract giving rise to the right to serve a notice.

[17] If an obligation to identify the obligation breached is not to be implied generally as a matter of common law, it is necessary to consider whether the terms of the particular agreement have the effect of imposing such an obligation. In my view, in this instance they do. Clause 6.3 quoted in the ultimatum letter entitles a party to make a "request" to the other party if they are in default of a material obligation. It then specified the action that may be taken if such breach is not remedied within a period of 30 days. It is clear from the terms of the clause, that the request must be to remedy the breach of a material obligation which the party making it considers has taken place. As the request must be to remedy the breach, it follows that the breach must be identified. That in turn requires that the obligation said to have been breached is identified. This is not a matter of implication of a term in the way considered in *Marks & Spencer*. It is what was described by Lord Wilberforce in *Liverpool City Council* v *Irwin* [1977] AC 239 in his fourth category – establishing what the contract is (page 254 A-B).

Did the ultimatum letter give the pursuer information to satisfy the requirements of Clause 6.3?

[18] Whereas the preceding questions require consideration of the agreement between the parties to determine what is required for a request, this one considers the adequacy of the letter. For the pursuer, it was submitted by reference to *Mannai Investment* that, in order to be valid and effectual, such a notice had to be sufficiently clear and unambiguous as to leave a reasonable recipient in no reasonable doubt as to how and when they are intended to operate. By reference to *HOE International* they submitted that in assessing whether this test is met, regard must be had to the purpose of the notice and where, as here, the consequences are more drastic, the greater the need for compliance. As I note above, these decisions are concerned with the extent to which a notice may be effective in the absence of strict compliance with the requirements of the underlying contract. What is relevant to the present issues, however, is that in both cases it was decided that when assessing the adequacy of a notice, it should be construed in accordance with the principles that govern the construction of commercial contracts (*Mannai Investments*, pp 767D-769B, and *HOE International*, para [28]). The practical effect of this is that the ultimatum letter must be considered in light of the correspondence that it is averred was exchanged between the parties in the preceding months.

[19] The next issue is to what extent it is necessary that there be strict compliance with the requirements for such a notice derived from the agreement. The pursuer submits by reference to the decision of Lord Drummond Young in *HOE International* that the more drastic the consequences the greater the need for strict compliance and, by reference to *Obrascon Huarte Lain SA* v *HM Att Gen for Gibraltar* [2014] BLR 484, that the purpose of the notice is to give the recipient a chance to put right its failure. I agree with both propositions.

The effect of the ultimatum letter was to create a situation in which, if remedial action was not taken, the defender would be entitled unilaterally to terminate a contract which otherwise would last until at least 2038. I think that the effect of the letter can therefore properly be described as drastic and that a strict approach is required.

[20] I have noted above that the terms of Clause 6.3 are such that a request to remedy a breach served under it should identify the obligation said to have been breached. This was done in respect of the obligation not to put the defender in breach of its statutory obligations but not in respect of the obligation to co-operate with the defender. Taking the required strict approach, the letter is therefore not effective in relation to the latter obligation.

Mutuality of contract

[21] The defender made a further submission to the effect that they averred that the pursuer was in breach of contract at the time of serving their notice purporting to terminate the contract and the requirements of mutuality of contract therefore meant that they were not entitled to exercise their contractual remedies. In addition, it was said that if it was established that the pursuer had been in material breach of contract, the defender would have been entitled to terminate at common law in addition to the rights under Clause 6.3 and that this would be relevant when considering damages. The averments as to obligations on the pursuer and breach of them were therefore relevant. In this regard, the defender made reference to *Graham & Co* v *United Turkey Red Co* 1922 SC 533, *Forster* v *Ferguson & Forster, Macfie & Alexander* 2010 SLT 867, *C&S Associates UK Limited* v *Enterprise Insurance Company Plc* [2015] EWHC 3757 (Comm) and *Dalton Group Ltd* v *City of Edinburgh Council* 2023 SLT 237. It was accepted by counsel for the pursuer that these averments might be

relevant to the issue of damages, but it was contended that they were not a basis on which to refuse the pursuer's motion for decrees of declarator to be granted.

[22] As I have set out above, I consider that there are relevant averments for the defender as to the existence of terms which they claim were breached by the pursuer. Determination of the issues of whether there were such terms, their materiality and whether they were breached requires consideration of the facts. This is therefore another area of the case in which it cannot be said that the defender will fail even if they prove their case. If the defender succeeded in proving their case in this regard it would not merely affect the quantum of damages. On the basis of the comments in para [15] of Lord Clarke's opinion in *Forster* it could affect the entitlement of the pursuer to terminate the contract. For this reason, they are a relevant defence to the declarators sought.

Other issues

[23] The defender submitted that the pursuer's averments on quantum were wholly lacking in specification. They are indeed brief. However, no application was made to have the pursuer provide further details of this at the early stages of the case. In cases being dealt with under chapter 47 that is the appropriate way for a party to raise concerns as to the lack of specification of their opponent's case. The concerns expressed as to lack of specification can be addressed as an aspect of case management in future.

[24] The defender also raised the issue of whether the pursuer sought to argue that the termination notice was invalid because it was sent to their solicitors rather than them. My attention was drawn to calls in the pleadings regarding this matter which had not been addressed. Counsel for the pursuer indicated that the defender's concern was based on a

mis-reading of the pleadings and that no point was taken to the effect that the solicitors lacked authority to receive the notice. This need not be considered further.

Disposal

[25] On the basis of the foregoing, I refuse the motion for the pursuer to grant decree *de plano* in terms of the first and second conclusions. Clearly, further procedure will be required in this case. In that situation, it will be put out By Order to enable parties to address me on how effect should be given to this Opinion and what further procedure there should be.