



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 26

CA137/18

OPINION OF LORD ERICHT

In the cause

IAN DUNCAN

Pursuer

against

GLASA LLP

Defender

Pursuer: Simpson QC, McLelland; Drummond Miller LLP

Defenders: Mure QC, Massaro; CMS Cameron McKenna Nabarro Olswang LLP

3 March 2020

[1] This is one of three cases arising out of an aborted project for a hydroelectric dam and turbine on the Kildermorie Estate. The cases are all commercial actions. At the Procedural Hearing the commercial judge allowed a diet of debate and appointed parties to lodge a joint list of questions for the court. I was informed by parties that the intention was that further procedure, including matters of specification, would be ordered in due course depending on the answers to these questions. The cause called before me for a debate on the agreed joint questions. In this opinion, I shall, after having set out the background, address each question in turn. The questions deal with issues in the three cases as a whole, and are not ascribed to a particular case. I shall treat this opinion as the lead opinion applicable to all three cases.

Background

[2] Prior to the hydro electric project, Kildermorie Estate was owned by the Duncan family. The Estate as a whole was managed by the Kildermorie Partnership ("KP"). The partners of KP were Ian Alexander Duncan ("Mr Duncan"), Carol Hammond Duncan and Alexander James Duncan. Heritable title to the Kildermorie Estate was divided, with part of the Estate being owned by KP, part of the estate being owned by Mr Duncan in a personal capacity and part of the estate being owned jointly by Mr and Mrs Duncan.

[3] In outline, the proposed hydro electric project was for a joint venture with an electricity company, SSE Generation Limited ("SSE") for the construction of a new hydro electric dam and turbine house on the estate and the sharing of the profits of that new scheme. A small existing hydroelectric scheme on the Kildermorie estate was to be incorporated into the project.

[4] A Limited Liability Partnership ("Glasa LLP") was set up as a joint venture vehicle for the project. A Limited Liability Partnership Agreement (the "Agreement") was entered into dated 20 and 21 June 2010. The parties to the Agreement were KP and SSE. KP entered into the Agreement in pursuance of its business of managing Kildermorie Estate. Recital D stated:

"The Parties have agreed to enter into a joint venture through the vehicle of an LLP in order to operate in business together and in particular from the Date of Commissioning to operate the Kildermorie Hydro Electric Scheme and to effect the Glasra Hydro Scheme Development for their mutual benefit as afternoted, utilising their respective facilities and areas of expertise"

[5] Certain conveyancing documentation was entered into in relation to the Scheme as follows:

- (1) Deed of Servitude dated 21 June 2010 granted by Mr Duncan in favour of KP over land in the Kildermorie Estate owned by Mr Duncan (the “IAD Servitude”);
- (2) Deed of Servitude dated 21 June 2010 granted by KP in favour of Glasa LLP over land in the Kildermorie Estate owned by KP (the “KP Servitude”);
- (3) Disposition dated 21 June 2010 by KP to Glasa LLP whereby KP conveyed to Glasa LLP part of the Kildermorie Estate owned by KP which was to be the site of the turbine house, together with the servitude rights (and under the servitude conditions) in the IAD Servitude;
- (4) Disposition dated 21 June 2010 by KP to Glasa LLP whereby KP conveyed to Glasa LLP part of the Kildermorie Estate owned by KP which was to be the site of the reservoir and dam, together with the servitude rights (and under the servitude conditions) in the IAD Servitude and the KP Servitude.

[6] SSE had an option to terminate the Agreement and wind up the LLP (clause 17.1 of the Agreement). SSE exercised this option in 2014.

[7] The three commercial court actions arise in relation to the consequences of the termination, in particular in respect of activities undertaken on the estate prior to the termination and remedial works.

[8] In the current case, Mr Duncan sues Glasa LLP in respect of construction works, remedial works, damage to roads, tree felling and loss of value of the estate due to reduction of deer numbers as the result of vehicular access and tree felling and Mr Duncan’s management time. He sues under the Agreement (on the basis that he has a *ius quaesitum tertio*) and under the IAD Servitude.

[9] In the case of *Kildermorie Partnership v Glasa LLP* (CA 138/18), KP sues Glasa LLP in respect of construction works, damage to roads, loss of income and profit from shooting and holiday lets, tree felling, Mr Duncan's time and solatium.

[10] In the case of the *Kildermorie Partnership v SSE* (CA139/18), KP seeks to enforce SSE's obligations under the Agreement to put Glasa LLP in funds, so that Glasa LLP is in a financial position to meet awards made by the court if KP or Mr Duncan, as the case may be, is successful in the other two actions.

Terms of the Glasa LLP Limited Liability Partnership agreement between Kildermorie Partnership and SSE

[11] The Limited Liability Partnership agreement between the Kildermorie Partnership and SSE included the following provisions:

"1. **DEFINITIONS AND INTERPRETATION**

1.1 In this Agreement, the following expressions shall, unless otherwise specified or the context otherwise requires, have the meanings set opposite them respectively:

...

Access Roads means the existing tracks and new tracks to be constructed on the Subjects and the Property all as shown per the solid green, solid pink, solid purple and broken pink and broken orange lines on Plan A;

...

The Act means the Limited Liability Partnership Act 2000;

...

Business means the business of owning, developing and operating the Hydro Scheme Developments for the purpose of harnessing water power to generate electricity on the Property;

...

Commencement Date means the date of the final execution of this Agreement;

Commencement of Construction means the date on which the LLP notifies KP in writing, giving no less than 7 days' notice, using the style of notice set out in Part 13 of the Schedule that it intends to initiate the Glasa Hydro Scheme Development under the Planning Permission and to take first entry onto the Subjects, excluding any operations relating to site investigations;

...

Date of Commissioning means (other than intermittent exportation of electricity for testing purposes prior to commissioning of the Glasa Hydro Scheme Development), the date on which electricity is first commercially exported from the Glasa Hydro Scheme Development;

...

Dispositions means the disposition by Ian Alexander Duncan and Mrs Carol Hammond Duncan as Partners of and Trustees for the firm of Kildermorie Partnership in favour of the LLP in respect of the generating station site for the Glasa Hydro Scheme Development and the disposition by Ian Alexander Duncan and Mrs Carol Hammond Duncan as Partners of and Trustees for the firm of Kildermorie Partnership in favour of the LLP in respect of the site for the reservoir and dam for the Glasa Hydro Scheme Development, each in the form agreed by or on behalf of KP and SSE;

...

Expiry Date means 85 years from the Commencement Date;

...

Glasa Hydro Scheme Development means the construction, maintenance and operation, (and if applicable) decommissioning, removal and site restoration of a hydro-electric generating scheme together with all necessary ancillary plant, Electricity and Telecommunication Cables, buildings, dam, reservoir and equipment required for generating electricity situated on the Subjects are shown indicatively on Plan A and Plan B and pursuant to the Planning Permission;

...

Guarantee means a parent company guarantee in terms of Clauses 17.8 and 20 hereof;

...

Hydro Scheme Developments means the Glasa Hydro Scheme Development and, following its conveyance to the LLP in accordance with this Agreement, the Kildermorie Hydro Scheme;

...

Kildermorie Hydro Scheme means the existing operational hydro scheme as at the Date of Commissioning owned by KP and located on the Property together with all related necessary ancillary plant, Electricity and Telecommunications Cables, buildings, dam, reservoir and equipment required for generating electricity situated on the Property and/or the Subjects all as shown outlined in red on Plan B;

LLP means the limited liability partnership to be incorporated in Scotland under the Limited Liability Partnerships Act 2000 pursuant to this Agreement;

Members means (subject to any such person ceasing to be a Member in accordance with this Agreement) SSE and KP and any persons who are from time to time admitted as members of the LLP in accordance with the terms of this Agreement and the Act;

...

Plan A means the plan of the Property, identified as Plan A and annexed at Part 1 of the Schedule or such substitute plan as KP and SSE may agree;

Plan B means the plan identified as Plan B and annexed at Part 1 of the Schedule or such substitute plan as KP and SSE may agree;

...

Planning Permission means the consent under section 36 of the Electricity Act 1989 (as amended) to be obtained by SSE following its Application of 10 December 2009 per Schedule Part 4 in respect of a generating scheme at Kildermorie, permission under the Town & Country Planning (Scotland) Act 1997, and authorisation under the Water Environment (Controlled Activities) (Scotland) Regulations 2005, and such other statutory consents and permissions as may be required at the time to enable the Hydro Scheme Development to proceed;

...

Property means the property at Kildermorie Estate, Alness, Ross-shire outlined in red on Plan A;

Property Documents means the Dispositions, the disposition by Ian Alexander Duncan in favour of Himself and Mrs Carol Hammond Duncan the Partners of and Trustees for the Kildermorie Partnership in respect of the site for the generating station for the Glasa Hydro Scheme Development, the deed of servitude by Ian Alexander Duncan in favour of Himself and Mrs Carol Hammond Duncan the Partners of and Trustees for the Kildermorie Partnership, and the deed of servitude by Ian Alexander Duncan and Mrs Carol Hammond Duncan as Partners of and Trustees for Kildermorie Partnership in favour of Glasa LLP each on the form agreed by or on behalf of SSE and KP;

Record of Condition means the written and photographic record of the condition of the Subjects and the Access Roads produced by the parties (i) in respect of the land to be used for the Glasa Hydro Scheme Development prior to the Commencement of Construction and in accordance with Clause 27.2 and (ii) in respect of the Kildermorie Hydro Scheme; such record of condition to be completed in any event at the sole expense of SSE, and by agreement between the Members; and failing agreement as to its terms to be prepared by such independent chartered surveyor as may be appointed (on the application of either Member) by the Chairman of the Scottish branch of the Royal Institution of Chartered Surveyors; the said Record of Condition following completion to be signed by the parties hereto as relative to this Agreement;

...

Restoration Period means the period of time following the Expiry Date during which the LLP whom failing KP (being able to call upon the Guarantee and such further financial provision as may have reasonably been required by the Authorities) shall carry out decommissioning, restoration and removal works of the Glasa Hydro Scheme Development;

...

Servitudes means the servitudes granted from time to time by KP and by Ian Alexander Duncan in favour of the LLP as owner of the Subjects;

...

Subjects means the subjects from time to time owned by the LLP and forming part of the Property on Plan A as such subjects may be amended or increased pursuant (i) to the conveyance to the LLP of the Kildermorie Hydro Scheme pursuant to Clause 27.1 and (ii) to any Additional Disposition and including, where the context permits, the Servitudes;

Table of Tree Crop Compensation means the table of crop compensation in respect of areas of trees to be felled forming Part 11 of the Schedule which

shows the compensation payable per hectare of trees according to their age and yield class indexed in accordance with the Forestry Commission Standing Timber Price Index, as may be in force at the time.

...

- 1.2.8 A reference to a **party** is a reference to a party to this Agreement and, subject to Clause 15, a reference to a **party** includes a reference to that party's successors in title, assignees and transferees (in any).

...

2. COMMENCEMENT

...

- 2.2 Immediately following incorporation of the LLP, KP shall deliver the duly executed Disposition to SSE which SSE shall register on behalf of the LLP.

- 2.3 The LLP shall subsist until the Expiry Date unless and until the LLP shall previously be wound up in accordance with the terms of this Agreement or the provisions of the Act.

...

6. MANAGEMENT

- 6.1 Save as otherwise expressly provided in this Agreement or as may otherwise be agreed by the members in writing:

6.1.1 all matters regarding the control or management of the Business and the operation of the LLP shall be determined by the Members;

6.1.2 the approval of a Member or Members holding over 50% of the Relevant Percentages shall be sufficient to determine any matter, such approval to be either by way of a written resolution which is circulated to all Members (provided that the same shall be deemed to be passed no earlier than three Business Days after its circulation but thereafter as soon as it has been approved by Members holding over 50% of the Relevant Percentages) or at a meeting of the Board in accordance with the following provisions of this Clause 6.

...

- 6.4 Unless determined otherwise by the Members, SSE is authorised on behalf of the LLP to undertake the matters set out in Part 10 of the Schedule and, to the extent that the LLP proceeds with the Glasa Hydro Scheme Development,

SSE will act in accordance with the standards that may be expected of a reasonable and prudent developer of hydro electricity generation schemes.

...

8. FINANCING OF THE LLP

...

8.2 On the date of this Agreement, SSE shall pay £50 to the LLP by way of capital contribution. KP shall, pursuant to the Property Documents, transfer the Subjects in terms thereof and thereafter be deemed to have made a Capital Contribution to the LLP in the amount of £1,000,000. On the date of this Agreement KP shall procure the execution and delivery to the LLP or its advisers of the Property Documents.

8.3 SSE shall at its sole discretion determine from time to time the amount of additional capital or other form of funding that it contributes to the LLP in order to fund the LLP's construction, development and operation of the Hydro Scheme Developments, provided that, to the extent to which the Glasa Hydro Scheme Development is progressed, all funding for the costs incurred by the LLP in the Hydro Scheme Developments shall be contributed by SSE together with, in each case when the same become payable, amounts equal to the general administrative costs of the LLP and the amounts set out in Clause 22 as payable to KP, and SSE shall make such contributions to the LLP accordingly.

...

12. OBLIGATIONS OF THE MEMBERS RELATING TO THE HYDRO SCHEME DEVELOPMENTS

12.1 KP shall provide at its own expense such local monitoring and other service facilities in relation to the Hydro Scheme Developments as specified in Part 6 of the Schedule and as the Members may reasonably determine as appropriate.

12.2 KP shall comply with the obligations set out in Part 6 of the Schedule.

12.3 SSE shall, and shall procure that the LLP shall, comply with the obligations set out in Part 7 of the Schedule.

12.4 The parties shall adopt the Record of Condition prepared by the parties prior to the Commencement of Construction of the Glasa Hydro Scheme Development.

12.5 The planning application in respect of the Glasa Hydro Scheme development is appended as Part 4 of the Schedule.

12.6 SSE shall, to the extent necessary for the operation of the LLP's business and permitted by applicable law and regulation, use the consent under Section 36 of the Electricity Act 1989 (as amended) for the Glasa Hydro Scheme Development, the Controlled Activities Regulations licence for the Glasa Hydro Scheme Development and the Schedule 5 Licence for the Glasa Hydro Scheme Development (the Consents) for the lawful operation of the Glasa Hydro Scheme Development and shall exhibit the Consents to KP if requested to do so.

12.7 In the event that:

12.7.1 Commencement of Construction of the Glasa Hydro Scheme Development has not occurred within 5 years of the Final Consent Date, and/or

12.7.2 Commencement of Construction has occurred but the LLP has ceased to complete material construction of the Glasa Hydro Scheme Development within 5 years of Commencement of Construction:

KP shall be entitled but not bound to terminate this Agreement and either to wind up the LLP or to require SSE to transfer its interest to KP or to its nominee for a consideration equal to the greater of (a) £1 or (b) the aggregate of any amounts standing to the credit of any account of the LLP and which may subsequently be paid to the LLP in respect of the period prior to termination, less any sums due and payable to KP at the date of such termination.

...

15.4.4 The assumption by any Family Member as a partner of KP or the resignation of any partner of KP shall not require the consent of the Members but KP shall as soon as practicable notify the other Members of such assumption or resignation.

...

15.7 KP hereby warrants that it is entering into the arrangements contemplated by this Agreement in pursuance of its existing business of managing the wider Property.

...

17. TERMINATION / CONTINUATION

- 17.1 Without prejudice to the terms of Clause 17.7 hereof, SSE shall have the option to terminate this Agreement and to wind up the LLP, (unless during the applicable notice period KP notifies SSE that it wishes to acquire, or procure that its nominee shall acquire, SSE's interest for the greater of (a) £1 or (b) the aggregate of any amounts standing to the credit of any account of the LLP and which may subsequently be paid to the LLP in respect of the period prior to termination, less any sums due and payable to KP at the date of such termination (a **Transfer Notice**) in which case SSE shall transfer its interest for such consideration):
- 17.1.1 prior to the Commencement of Construction by giving not less than three months written notice to KP to that effect and at the expiry of said notice this Agreement shall terminate and, unless a valid Transfer Notice has been given, the LLP shall be wound up; and
- 17.1.2 at any time following the Commencement of Construction by giving not less than twelve months' prior written notice and at the expiry of said notice the Agreement shall terminate and unless a valid Transfer Notice has been given the LLP shall be wound up;
- declaring that in the event that SSE exercises this option to terminate this Agreement the LLP shall be obliged to continue to pay all sums due hereunder up to the date of such termination, and to effect reinstatement in terms of 17.7.
- ...
- 17.3 Upon the termination of this Agreement, pursuant to Clause 16 where KP is the Defaulting Member, SSE shall have the option either to:
- 17.3.1 procure that the LLP shall grant a lease in the form set out in Part 12 of the Schedule to SSE or another SSE Group Member, then procure that the LLP shall reconvey to KP the Subjects for £1 and then acquire, or procure that another SSE Group Member shall acquire, the interest of KP (save for any rights to the Subjects) for a consideration equal to any element of KP's Capital Contribution which has been made in cash and the return of any other cash standing to the credit of the KP Current Account; or
- 17.3.2 require KP or its nominee to acquire SSE's interest and in consideration thereof procure that the LLP grants SSE or another SSE Group Member nominated by SSE a lease in the form set out in Part 12 of the Schedule.
- 17.4 The termination of the Agreement howsoever caused shall be without prejudice to any obligations, rights or liabilities of any of the Members which

have accrued prior to such termination or claims which any Member may have against another for antecedent breach and shall not affect any provision of this Agreement which is expressly or by implication provided to come into effect on or continue in effect after termination (including, without limitation, Clause 17.3).

- 17.5 The provisions of Clause 8 of this Agreement shall remain in full force and effect and continue to be enforceable in accordance with their terms notwithstanding that the Member ceases to be a Member. The termination of Membership does not affect the rights and obligations of any party accrued under this Agreement as at the date of this Agreement, and those rights and obligations shall continue to be enforceable in accordance with their terms.
- 17.6 SSE in hereby authorised to execute on behalf of the LLP a lease in favour of SSE or its nominee in the form set out in Part 12 of the Schedule where such lease may be granted pursuant to Clause 17.3.
- 17.7 Prior to the termination of this Agreement (whether at the natural expiry of this Agreement or otherwise including where terminated in accordance with Clause 17.1 or 17.2) failing which during the Restoration Period SSE shall, or shall procure that the LLP shall, comply with the following restoration obligations unless a lease is granted pursuant to Clause 17.3:
- 17.7.1 In the event that the Glasa Hydro Scheme Development ceases to be operational on a permanent basis (which for the avoidance of doubt shall mean two consecutive years of *bona fide* non-operation following the Date of Commissioning), the LLP shall be obliged:
- (a) to:
- (i) reinstate fully and expeditiously all damage caused to the Property by the construction of the Glasa Hydro Scheme Development and make safe the buildings and erections and apparatus on the Property erected on or for the purpose of the Glasa Hydro Scheme Development to the state shown in the Record of Condition unless required otherwise by the Authorities; and
 - (ii) unless otherwise agreed in writing by KP, within one year of notice being given to the LLP by KP and/or the Authorities (as the case may be), ensure that (a) the reservoir has been made and certified safe to the extent that the Reservoirs Act 1975 as amended or re-enacted may require and (b) such reservoir and the dam being rendered into a condition which is suitable and to the reasonable satisfaction of all relevant Authorities having regard to the assumption (if not a fact) that neither the dam nor the reservoir will be subject to continuing maintenance

declaring for the avoidance of doubt (and notwithstanding the provisions of Clause 17.7.1(b) hereof) that the dam will be removed only in the event that either the relevant Authorities or KP (with the consent of the relevant Authorities) require the LLP to remove the dam; and further declaring that the LLP shall carry out the necessary reinstatement works to the reservoir and/or within one year of notice having been served upon them by KP (or such other period as may be stipulated by the Authorities), failing which KP shall be entitled to call upon the Guarantee in order to meet the costs of any outstanding restoration/removal works and to instruct and execute such necessary works to the state shown in the Record of Condition, the Guarantors being obliged to meet any shortfall in the LLP's reimbursement of KP for the costs reasonably and necessarily incurred by KP in so doing; or

- (b) unless otherwise requested by KP in writing, to remove the Glasa Hydro Scheme Development (but consistent with the provisions for the dam referred to in Clause 17.7.1(a) above, and not only to make safe the intakes and underground tunnels all in accordance with the Planning Permission, but which will also be adjusted, removed and/or covered to permit water to flow down the original water courses but also so that no structures are visible on the surface) and to reinstate the Subjects including any Access Roads as referred to in paragraph 1.2 of Part 5 of the Schedule and any additional parts of the Property used by the LLP referred to in paragraph 1.1 of Part 5 of the Schedule, and the Subjects shall be in no worse condition than as reflected by the Record of Condition, such restoration to be in accordance with the terms of the Planning Permission and to the reasonable satisfaction of KP.

...

19. RIGHTS OF THE PARTIES IN RESPECT OF THE PROPERTY AND THE SUBJECTS

- 19.1 KP shall have the rights set out in Part 8 of the Schedule in addition to any other rights set out in the Agreement.
- 19.2 SSE shall have the rights set out in this Agreement.
- 19.3 The LLP shall have the rights in respect of the Property and the Subjects set out in Part 5 of the Schedule in addition to any other rights set out in this Agreement.
- 19.4 KP warrants that immediately prior to the transfer of the Subjects to the LLP, KP will have a valid and marketable title to the Subjects and immediately

prior to the grant of those of the Servitudes as are granted by it, it will have valid title to grant those Servitudes.

20. **GUARANTEE**

20.1 SSE will, prior to the Commencement of Construction and by way of provision for restoration costs for works referred to in Clause 17 hereof, provide KP with a Guarantee in terms satisfactory to KP acting reasonably to cover the estimated costs of the full cost of the decommissioning, removal and reinstatement obligations of the LLP are set out within the Planning Permission and maintain such sum (subject to any review as per Clause 20.3 hereof) throughout the duration of this Agreement including the Restoration Period until fulfilment of the LLP's restoration obligations hereunder but subject always to the provisions of Clause 17.8.

...

24. **ASSIGNATION**

Without prejudice to Clause 15 no party shall be entitled without the prior written consent of the other parties to this Agreement to assign or transfer either the benefit or burden of this Agreement or any right and/or obligation under this Agreement save for any assignment or transfer by SSE that is required as a result of statutory obligations (in which case SSE shall notify KP of the same).

...

28. **TREE FELLING**

28.1 If SSE by written notice to KP requests that the trees growing upon any area of ground covered by a Felling Licence be felled after the Commencement Date and KP consent to such request, then KP (subject to any provisions required by the Planning Permission and/or relevant Felling Licence) will arrange a standing sale to achieve a clear fell of the said area in accordance with the terms of the said felling licence and the LLP will pay to KP within 30 days of receipt by KP of written evidence confirming sale compensation at the rate of £5.56 per tonne (Index Linked) for all timber harvested and sold together with reimbursement of all necessary forestry work costs, declaring that any such felling and harvesting will require to be carried out only between the months of March and October in each year and the LLP shall be obliged to pay such compensation whether or not the Glasa Hydro Scheme Development proceeds.

28.2 Subject to the agreement of KP, such agreement not to be unreasonably withheld or delayed, where the Glasa Hydro Scheme Development requires the felling of any trees on the Subjects of the Property.

- 28.2.1 KP or the LLP shall carry out all tree felling in accordance with a felling programme agreed in advance between KP and the LLP (both acting reasonably) and in accordance with the UK Forestry Standard as amended from time to time and the LLP will make payment as per the Table of Tree Crop Compensation for the trees (but for the avoidance of doubt any trees felled under Clause 28.1 shall not be compensated for by reference to the Table of Tree Crop Compensation), be it conifers and/or broadleaf trees (if any) removed from pipelines, cables, the power house and Access Roads as well reimbursement to KP of all necessary forestry work costs but declaring that in the event that KP keep the timber arising from KP or the LLP's felling, then the amounts as calculated from the Table of Tree Crop Compensation will be reduced by the value (if any) of the timber felled as evidenced by the payment schedule (on a standing sale basis) from the timber purchaser;
- 28.2.2 subject to the agreement of KP all timber felled by the LLP shall be stacked at convenient locations to be agreement between the members acting reasonably;
- 28.2.3 the timber felled as aforesaid shall belong to the owner thereof who shall be entitled to dispose of the same and retain the full proceeds thereof. No timber shall be sold or otherwise disposed of by the LLP.
- 28.3 In the event that the Subjects include areas of standing timber which are not felled by KP or the LLP then (a) KP on behalf of the LLP shall have the right at all times to manage such areas of standing timber including the right to thin, fell and replant such areas as KP in consultation with the SSE (both parties acting reasonably) shall agree and (b) the LLP in consultation with KP shall be entitled at any time throughout the duration of this Agreement to fell the same subject to the provisions of Clause 28.2.
- 28.4 KP will be responsible for clearing any associated wind blow that occurs due to the removal of trees during construction and for a period of five years after Commencement of Construction and LLP shall pay compensation to KP accordingly on the basis of the Table of Tree Crop Compensation as per Clause 28.2.1.

...

32. ENTIRE AGREEMENT

This Agreement together with any documents referred to in this Agreement and/or any other documents entered into on or after the date of this Agreement which specifically refer to this Agreement in either case between the Members or between any of the Members and the LLP are party constitute the entire agreement between the Members with respect to the subject matter thereof and expressly exclude any

warranty, condition or other undertaking implied at law or by custom and supersede all previous agreements and understandings between the Members with respect thereto and each of the Members acknowledges and confirm that it does not enter into this Agreement in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Agreement (or in one of such documents).

...

**SCHEDULE
PART 5
USE OF THE SUBJECTS AND THE PROPERTY**

- 1.1 The LLP shall have the right, and shall use the Property and the Subjects only until the Expiry Date and, where applicable, during the Restoration Period:
- 1.1.1 to construct, operate, inspect, maintain, upgrade, renew, repair, restore, remove and decommission and, subject to KP's approval, enlarge a dam, a reservoir, a hydro power station, intake sites, head pond areas, and such other weirs dams, plant equipment and other structures on the Subjects in connection with the Hydro Scheme Development to be operated by the LLP declaring that any enlargement, apart from any enlargement necessary as a consequence of a change in statutory requirements due to changes in legislation (which shall be deemed to be approved), shall be subject to the written approval of KP having first been provided with a fully detailed proposal and associated plans, such approval not to be unreasonably withheld or delayed;
 - 1.1.2 to construct, use inspect, maintain, repair and renew the Access Roads;
 - 1.1.3 to access to over and across the Subjects and the Property adjacent to the Subjects for the purposes of site investigation and survey work, construction, maintenance, operation, improvement, renewal, repair, decommissioning, removal and restoration of the Hydro Scheme Developments subject to the prior agreement of KP (acting reasonably and without undue delay) as to the location of such accesses, compounds, or areas that may be required from time to time. This includes without limitation lay down areas in order to facilitate the rights granted in 1.1.1 above but subject always to the KP having approved, prior to commencement of construction, a plan showing the indicative layout of the proposed Hydro Scheme Developments including areas of temporary occupation required to facilitate construction, such approval not to be unreasonably withheld or delayed but declaring for the avoidance of doubt that any minor changes, being those which do not require a further application to be made for Planning Permission or a variation to the existing consent,

shall be deemed to have been approved by KP. The right of access so conferred is conditional upon the LLP making good any damage to the reasonable satisfaction of KP and consistent with the information contained within the Record of Condition;

...

- 1.2 Subject to Part 8 of this Schedule, the LLP shall have an exclusive right of pedestrian and vehicular access via the Access Roads to and from the Subjects and to neighbouring land adjoining the Property upon which the Hydro Scheme Developments which are located and are to be constructed for the purposes of construction, maintenance, decommissioning, removal and restoration of the Hydro Scheme Developments until the Expiry Date and during the Restoration Period and that via the Access Roads and to construct new roads as shown indicatively in solid purple, solid pink and broken pink on Plan A or by such other routes as shall be agreed between KP and the LLP acting reasonably and which new roads shall be deemed to be Access Roads. The LLP shall be obliged to ensure that all vehicular access to and across the Subjects by it or on its behalf is in suitable vehicles so as to cause the least practicable damage to the said roads and others and the Subjects and the Property, including where appropriate low ground pressure vehicles. In the event that damage is caused to the said roads and paths then the LLP shall repair the damage within 21 days of the damage being notified to the LLP, and in the event that the damage is not so repaired within the 21 day period to allow the said roads and paths to be used by a vehicle appropriate for that particular road or path then KP shall be entitled to repair the said road or path and charge the LLP for the reasonably and properly incurred costs of repairing same. In so far as within the control of the LLP, none of the roads or footpaths constructed or reconstructed as part of the Hydro Scheme Developments will constitute a public right of way other than any already previously designated as such a right of way.

SCHEDULE

PART 7 LLP OBLIGATIONS

- 2.4 To pay any rates, developments tax or charges including any aggregates tax assessed on the Hydro Scheme Developments due to its use on the Subjects.
- 2.5 To free, relieve, indemnify and hold harmless KP against all actions, proceedings, damages, penalties, costs, charges, claims and demands incurred to KP in consequence of any breach of the provisions of this Agreement by the LLP or those for whom the LLP is responsible in law and against all loss and damage arising as a result of the exercise by the LLP of the rights conferred on it by this Agreement including (notwithstanding the foregoing generally) from any damage that may be caused to fisheries and

the water environment as a direct result of the Glasa Hydro Scheme Development.

- 2.6 Without prejudice to the foregoing indemnity, to maintain public liability insurance cover to a sum of not less than Ten Million Pounds Sterling (£10,000,000) in respect of each and every loss and to provide evidence of such cover annually on the written request of KP or such greater sum to be agreed by the parties (making reference to an expert if necessary as per Clause 26) on the tenth anniversary of the Commencement Date and on each subsequent tenth anniversary thereafter, and such sum to cover for the avoidance of doubt the Restoration Period.
- 2.7 Not to object to any application for consent or permission for development on the Property by KP which would not have any material effect on the Development, and further not make any such objection without first discussing the basis of any objection with KP.
- 2.8 To keep all equipment forming part of the Hydro Scheme Development in good working order and the exterior of any structures built for the purpose of the Hydro Scheme Development on the Subjects in good and tenable repair.
- 2.9 To display such warning or other notices as are required by statute but subject thereto not to display any advertisements on the Subjects or elsewhere on the Property without the prior written agreement of KP who shall not withhold their consent unreasonably.
- 2.10 Subject to Clause 2.1 in Part 7 of the Schedule to this Agreement to comply with the Planning Permission and any relevant consents and to use best endeavours not to damage or disturb or pollute any existing drains, waterways, fences or walls on the Subjects and for the Property, but in the event that such damage is caused to remedy same as may be directed by the relevant Authorities or by KP acting reasonably (if there is no relevant Authority applicable in the circumstance), or if not possible to remedy to pay reasonable and appropriate compensation to KP and such other third parties as the case may be in lieu.
- 2.11 From the Commencement of Construction and in accordance with the Record of Condition until at least the third anniversary of the Date of Commissioning, and other than extraordinary damage caused by KP, to be solely responsible for the repair, maintenance and where necessary renewal of the Access Roads referred to in paragraph 1.2 or Part 5 of this Schedule and having reinstated the same to the condition required by the provisions of Clause 12.4, but not before 3 years from the Date of Commissioning to contribute, according to user, to the cost of maintenance, repair, and when necessary for the foregoing purpose, renewal of the same so as to preserve them in that condition but declaring that the LLP shall, at their own sole

expense, repair as soon as reasonably practicable, any extraordinary damage caused to the said roads by the LLP but declaring that the LLP shall carry out adequate repairs, weather permitting, to allow access for normal estate purposes at all times. The LLP shall be entitled to request that KP carry out maintenance, repair, and when necessary for the foregoing purpose and renewal of the Access Roads, and where reasonable KP shall carry out the same, subject to the aforesaid provisions that costs shall be borne by the LLP.

...

- 2.15 The LLP shall repair and make good (or if it is not possible to repair or make good then to adequately compensate for) any surface damage to ground suffered as a result of the construction work or in exercise of any of the rights granted under this Agreement.

PART 13

FORM OF NOTICE (COMMENCEMENT OF CONSTRUCTION)

The Glasa LLP
(Registered in Scotland with registered number)
[Address]

To: The Kildermorie Partnership
[Address]

Dear Sirs

Commencement of Construction

We refer to the LLP Agreement amongst you, SSE Generation Limited and ourselves dated 2010 (**the LLP Agreement**). Terms defined in the LLP Agreement shall have the same meaning when used in this letter.

We hereby give you notice that we intend to initiate the Glasa Hydro Scheme Development under the Planning Permission and to take first entry on to the Subjects (excluding any operations relation to site investigations) on [date].

[Date] shall therefore be the Commencement of Construction for the purposes of the LLP Agreement."

Terms of the IAD Servitude

[12] The relevant provisions of the servitude granted by Mr Duncan in favour of the Kildermorie Partnership are as follows:

"DEED OF SERVITUDE by

IAN ALEXANDER DUNCAN residing [address] (who and whose successors as proprietors of the Benefited Property (after defined) are hereinafter referred to as the '**Burdened Owner**')

in favour of

IAN ALEXANDER DUNCAN and Mrs CAROL HAMMOND DUNCAN, both residing [address] the present Partners in the firm of Kildermorie Partnership (who and whose successors as proprietors of the Burdened Property (after defined) and hereinafter referred to as the '**Benefitted Owner**')

1. DEFINITIONS AND INTERPRETATIONS

1.1 Definitions

In this Deed:

'Benefited property 1' means ALL and WHOLE the subjects shown delineated in red and crosshatched on Plan 1 annexed and signed as relative hereto and being the subjects disposed by and shown on the plan annexed and signed as relative to the Disposition by the Burdened Owner in favour of the Benefitted Owner dated of even date herewith and registered or about to be registered in the Land Register of Scotland (being the subjects to comprise a Generating Scheme);

'Benefited Property 2' means ALL and WHOLE the subjects shown delineated in red and coloured red on Plan 2 annexed and signed as relative hereto and being the subjects disposed by and shown on the plan annexed and signed as relative to the Disposition to be granted by the Benefited Owner in favour of Glasa LLP and to be registered in the Land Register of Scotland (being the subjects comprising the existing Hydro Scheme);

'Benefited Property 3' means ALL and WHOLE (1) the subjects shown coloured in yellow, and (2) the subjects shown outlined in blue, on Plan 3 annexed and signed as relative hereto and being the subjects disposed by and shown on the plan annexed and signed as relative to the Disposition by the Benefited Owner in favour of Glasa LLP dated of even date herewith and registered or about to be registered in the Land Register of Scotland (being the subjects comprising the Dam and Reservoir);

'Burdened Property' means All and Whole that area or piece of ground extending to Seven Hundred and Forty Eight hectares and Forty Two decimal or one-hundredth parts of a hectare (748.42ha) or thereby in the said Parish and County and being the subjects registered in the Land Register of Scotland under Title Number ROS9481;

...

‘Servitude Area 1’ means the ALL and WHOLE (i) the solum of the roadway shown coloured blue on Plan 4 annexed and signed as relative hereto, (together with such adjoining land extending up to twenty metres on either side of the roadway as is required by the Benefited Owner), and (ii) the solum of that area of ground shown coloured purple on the said Plan 4 (together with such adjoining land extending up to twenty metres on either side of the roadway as is required by the Benefited Owner).

‘Servitude Area 2’ means ALL and WHOLE those areas shown in dotted blue lines on Plan 5 annexed and signed as relative hereto;

‘Servitude Conditions’ means the conditions under which the Servitude Rights are to be exercised set out in Part 2 of the Schedule; and

‘Servitude Rights’ means the servitude rights set out in Part 1 of the Schedule.

...

GRANT OF SERVITUDE

IN CONSIDERATION of certain goods and onerous causes but without any consideration being paid to the Burdened Owner by the Benefited Owner, the Burdened Owner grants the Servitude Rights but subject always to the Servitude Conditions.

DATE OF COMMENCEMENT OF SERVITUDE

The Servitude Rights granted in the Schedule of this deed will be exercisable with effect from 21 June 2010 notwithstanding the dates of this Deed. The Servitude Rights granted in Schedule Part 2 will be exercisable from the date of commissioning of the existing Hydro Scheme notwithstanding the dates of this Deed.

...

Part 1

The Servitude Rights granted in favour of Benefited Property 1. Benefited Property 2 and Benefited Property 3

The following servitude rights are imposed on the Burdened Property in favour of Benefited Property 1, Benefited Property 2 and Benefited Property 3:

1. A servitude right of vehicular (including heavy vehicles) and pedestrian access and egress at all times over and across Servitude Area 1 for the

purpose of laying, constructing, inspecting, repairing, maintaining, renewing, replacing and widening the road over Servitude Area 1 to such a standard as is required by the Benefited Owner to successfully operate a generating scheme at the Benefited Property 1, an existing hydro scheme at the Benefited Property 2 and a new hydro scheme at the Benefited Property 3 but provided always the Benefitted Owner shall not be entitled to use or encroach upon land outwith Servitude Area 1 other than the adjoining land extending to up to twenty metres on either side of the roadway as hereinbefore referred to.

2. A servitude right of vehicular (including heavy vehicles and plant and equipment) and pedestrian access and egress at all times for all purposes over and across Servitude Area 1 (as upgraded in terms of Servitude Right 1 above) to the Benefited Property 1, the Benefited Property 2 and the Benefited Property 3.
3. A servitude right to widen the roads and verges and the right to upgrade the drainage ditches along Servitude Area 1.
4. A servitude right of vehicular (including heavy vehicles and plant and equipment) and pedestrian access and egress at all times over and across the Burdened Property to erect and install a bridge over the Allt a Chlaiginn burn and a section of new road between the points A and B the route of said new road to be agreed between the parties (both acting reasonably) and thereafter a servitude right of vehicular (including heavy vehicles and plant and equipment) and pedestrian access and egress at all times over and across the said bridge and new road for all purposes.
5. A servitude right to lay, construct, inspect, repair, maintain, renew and replace underground and overground water pipelines along Servitude Area 3, together with a servitude right of access, at all times, thereto.

Part 2

The Servitude Conditions

The Servitude Rights created by this Deed are subject to the following Servitude Conditions:

1. The Benefited Owner will:
 - 1.1 make good on demand all damage caused to the Burdened Property and / or the Servitude Area 1, by reason of the exercise of the Servitude Rights by the Benefited Owner or their tenants, agents, employees, workmen and others authorised by them from time to time, to the reasonable satisfaction of the Burdened Owner;
 - 1.2 use their best endeavours to ensure that the Servitude Rights are exercised so as to cause the minimum disturbance, nuisance or annoyance as is reasonably

practicable to the Burdened Owner and their tenants or occupiers, and all other adjoining or neighbouring proprietors, tenants or occupiers, and

- 1.3 indemnify the Burdened Owner in respect of all claims, demands, expenses, liabilities, actions or others arising in consequence of the exercise of the Servitude Rights by the Benefited Owner.
2. The Benefited Owner will at all times maintain the road in good repair and condition to the reasonable satisfaction of the Burdened Owner.
3. The Benefited Owner will pay to the Burdened Owner on demand from time to time a share, apportioned on the basis of use, of the costs properly and reasonably incurred by the Burdened Owner in repairing, maintaining, repairing, renewing and replacing the Servitude Area 1 other than during the first three years from the date of entry hereunder during which period the Benefited Owner will meet the whole costs of maintaining, repairing and renewing Servitude Area 1. If the Benefited Owner fails to pay in full any such sum so demanded within twenty one days of the date of demand interest at Four per cent per annum above the base lending rate from time to time of the Royal Bank of Scotland Plc will run thereon on any outstanding balance from the date of demand until payment in full by the Benefited Owner.
4. In the event of the Benefited Owner requiring the removal of fences in order to exercise any of the Servitude Rights such fences will be replaced by the Benefited Owner at their sole expense along such new fence line as agreed with the Burdened Owner, both parties acting reasonably.
5. If the Benefited Owner require to fell trees for the purposes of carrying out the construction of the new bridge and road the Benefited Owner shall by written notice to the Burdened Owner request that the trees growing upon Servitude Area 1 covered by a Felling Licence be felled after the date of commencement of the servitude and the Burdened Owner consents, such consent not to be unreasonably withheld or delayed, to such request, then the Burdened Owner will arrange a standing sale to achieve a clear fell of the said area in accordance with the terms of the said felling licence and the Benefited Owner will pay to the Burdened Owner compensation at the rate of £5.56 per tonne Index Linked for all timber harvested and sold together with reimbursement of all necessary forestry work costs within 30 days of receipt by the Benefited Owner of written evidence confirming such sale and costs, declaring that any such felling and harvesting will require to be carried out only between the months of March and October in each year.

The Burdened Owner and the Benefited Owner shall carry out all tree felling in accordance with a felling programme agreed in advance between the Burdened Owner and the Benefited Owner (acting reasonably) and in accordance with the UK Forestry Standard as amended from time to time and

the Benefited Owner will make payment according to the Table of Crop Compensation per Schedule 4 for the trees but for the avoidance of doubt any trees felled per the paragraph above shall not be compensated for by reference to the Table of Crop Compensation be it conifers and/or broadleaf trees (if any) removed from pipelines, cables, the power house and Access Routes as well reimbursement to the Burdened Owner of all necessary forestry work costs but declaring that in the event that the Burdened Owner keep the timber arising from the Benefited Owner' felling, then the amounts as calculated from the Schedule will be reduced by the value (if any) of the timber felled as evidenced by the payment schedule (on a standing sale basis) from the timber purchaser; and in the event of any difference of opinion on the terms of this clause it shall be interpreted in accordance with the Glasa LLP Limited Partnership Agreement dated 20 and 21 June 2010."

Terms of the KP Servitude

[13] The KP Servitude defined the Kildermorie Partnership as the "Burdened Owner" and Glasa LLP as the "Benefited Owner" and included the following provisions:

"DEFINITIONS AND INTERPRETATIONS

1.1 Definitions

In this Deed:

'Benefited Property 1' means ALL and WHOLE the subjects shown delineated in red and crosshatched on Plan 1 annexed and signed as relative hereto and being the subjects disposed by and shown on the plan annexed and signed as relative to the Disposition by the Burdened Owner in favour of the Benefitted Owner dated of even date herewith and registered or about to be registered in the Land Register of Scotland (being the subjects to comprise a Generating Scheme);

'Benefited Property 2' means ALL and WHOLE the subjects shown delineated in red and coloured red on Plan 2 annexed and signed as relative hereto and being the subjects disposed by and shown on the plan annexed and signed as relative to the Disposition to be granted by the Benefited Owner in favour of Glasa LLP and to be registered in the Land Register of Scotland (being the subjects comprising the existing Hydro Scheme);

'Benefited Property 3' means ALL and WHOLE (1) the subjects shown coloured in yellow, and (2) the subjects shown outlined in blue, on Plan 3 annexed and signed as relative hereto and being the subjects disposed by and shown on the plan annexed and signed as relative to the Disposition by the

Benefited Owner in favour of Glasa LLP dated of even date herewith and registered or about to be registered in the Land Register of Scotland (being the subjects comprising the Dam and Reservoir);

'Burdened Property' means All and Whole that area or piece of ground extending to Seven Hundred and Forty Eight hectares and Forty Two decimal or one-hundredth parts of a hectare (748.42ha) or thereby in the said Parish and County and being the subjects registered in the Land Register of Scotland under Title Number ROS9481;

'Glasa LLP' means Glasa Limited Liability Partnership having its Registered Office at Inveralmond House, Two Hundred Dunkeld Road, Perth

'Index Linked' means in relation to an amount specified in this Lease, that amount multiplied by RPI_n/RPI_a where RPI_n is the RPI for the month preceding the requirement for indexation and RPI_a is the RPI for February 2008. For the sake of clarity any indexation will be on an upwards only basis. In the event that the said index ceases to be published, there shall be substituted reference to such alternative index as shall be agreed between the Landlords and the Tenants, acting reasonably.

'Schedule' means the schedule annexed to this Deed of Servitude;

'Servitude Area 1' means the ALL and WHOLE (i) the solum of the roadway shown coloured blue on Plan 4 annexed and signed as relative hereto, (together with such adjoining land extending up to twenty metres on either side of the roadway as is required by the Benefited Owner), and (ii) the solum of that area of ground shown coloured purple on the said Plan 4 (together with such adjoining land extending up to twenty metres on either side of the roadway as is required by the Benefited Owner).

'Servitude Area 2' means ALL and WHOLE those areas shown in dotted blue lines on Plan 5 annexed and signed as relative hereto;

'Servitude Conditions' means the conditions under which the Servitude Rights are to be exercised set out in Part 2 of the Schedule; and

'Servitude Rights' means the servitude rights set out in Part 1 of the Schedule.

...

Part 1

The Servitude Rights granted in favour of Benefited Property 1. Benefited Property 2 and Benefited Property 3

The following servitude rights are imposed on the Burdened Property in favour of Benefited Property 1, Benefited Property 2 and Benefited Property 3:

1. A servitude right of vehicular (including heavy vehicles) and pedestrian access and egress at all times over and across Servitude Area 1 for the purpose of laying, constructing, inspecting, repairing, maintaining, renewing, replacing and widening the road over Servitude Area 1 to such a standard as is required by the Benefited Owner to successfully operate a generating scheme at the Benefited Property 1, an existing hydro scheme at the Benefited Property 2 and a new hydro scheme at the Benefited Property 3 but provided always the Benefited Owner shall not be entitled to use or encroach upon land outwith Servitude Area 1 other than the adjoining land extending to up to twenty metres on either side of the roadway as hereinbefore referred to.
2. A servitude right of vehicular (including heavy vehicles and plant and equipment) and pedestrian access and egress at all times for all purposes over and across Servitude Area 1 (as upgraded in terms of Servitude Right 1 above) to the Benefited Property 1, the Benefited Property 2 and the Benefited Property 3.
3. A servitude right to widen the roads and verges and the right to upgrade the drainage ditches along Servitude Area 1.
4. A servitude right of vehicular (including heavy vehicles and plant and equipment) and pedestrian access and egress at all times over and across the Burdened Property to erect and install a bridge over the Allt a Chlaiginn burn and a section of new road between the points A and B the route of said new road to be agreed between the parties (both acting reasonably) and thereafter a servitude right of vehicular (including heavy vehicles and plant and equipment) and pedestrian access and egress at all times over and across the said bridge and new road for all purposes.
5. A servitude right to lay, construct, inspect, repair, maintain, renew and replace underground and overground water pipelines along Servitude Area 3, together with a servitude right of access, at all times, thereto.

Part 2

The Servitude Conditions

The Servitude Rights created by this Deed are subject to the following Servitude Conditions:

1. The Benefited Owner will:
 - 1.1. make good on demand all damage caused to the Burdened Property and / or the Servitude Area 1, by reason of the exercise of the Servitude Rights by the Benefited Owner or their tenants, agents, employees, workmen and others

authorised by them from time to time, to the reasonable satisfaction of the Burdened Owner;

- 1.2 use their best endeavours to ensure that the Servitude Rights are exercised so as to cause the minimum disturbance, nuisance or annoyance as is reasonably practicable to the Burdened Owner and their tenants or occupiers, and all other adjoining or neighbouring proprietors, tenants or occupiers, and
- 1.3 indemnify the Burdened Owner in respect of all claims, demands, expenses, liabilities, actions or others arising in consequence of the exercise of the Servitude Rights by the Benefited Owner.
2. The Benefited Owner will at all times maintain the road in good repair and condition to the reasonable satisfaction of the Burdened Owner.
3. The Benefited Owner will pay to the Burdened Owner on demand from time to time a share, apportioned on the basis of use, of the costs properly and reasonably incurred by the Burdened Owner in repairing, maintaining, repairing, renewing and replacing the Servitude Area 1 other than during the first three years from the date of entry hereunder during which period the Benefited Owner will meet the whole costs of maintaining, repairing and renewing Servitude Area 1. If the Benefited Owner fails to pay in full any such sum so demanded within twenty one days of the date of demand interest at Four per cent per annum above the base lending rate from time to time of the Royal Bank of Scotland Plc will run thereon on any outstanding balance from the date of demand until payment in full by the Benefited Owner.
4. In the event of the Benefited Owner requiring the removal of fences in order to exercise any of the Servitude Rights such fences will be replaced by the Benefited Owner at their sole expense along such new fence line as agreed with the Burdened Owner, both parties acting reasonably.
5. If the Benefited Owner require to fell trees for the purposes of carrying out the construction of the new bridge and road the Benefited Owner shall by written notice to the Burdened Owner request that the trees growing upon Servitude Area 1 covered by a Felling Licence be felled after the date of commencement of the servitude and the Burdened Owner consents, such consent not to be unreasonably withheld or delayed, to such request, then the Burdened Owner will arrange a standing sale to achieve a clear fell of the said area in accordance with the terms of the said felling licence and the Benefited Owner will pay to the Burdened Owner compensation at the rate of £5.56 per tonne Index Linked for all timber harvested and sold together with reimbursement of all necessary forestry work costs within 30 days of receipt by the Benefited Owner of written evidence confirming such sale and costs, declaring that any such felling and harvesting will require to be carried out only between the months of March and October in each year.

The Burdened Owner and the Benefited Owner shall carry out all tree felling in accordance with a felling programme agreed in advance between the Burdened Owner and the Benefited Owner (acting reasonably) and in accordance with the UK Forestry Standard as amended from time to time and the Benefited Owner will make payment according to the Table of Crop Compensation per Schedule 4 for the trees but for the avoidance of doubt any trees felled per the paragraph above shall not be compensated for by reference to the Table of Crop Compensation be it conifers and/or broadleaf trees (if any) removed from pipelines, cables, the power house and Access Routes as well reimbursement to the Burdened Owner of all necessary forestry work costs but declaring that in the event that the Burdened Owner keep the timber arising from the Benefited Owner' felling, then the amounts as calculated from the Schedule will be reduced by the value (if any) of the timber felled as evidenced by the payment schedule (on a standing sale basis) from the timber purchaser; and in the event of any difference of opinion on the terms of this clause it shall be interpreted in accordance with the Glasa LLP Limited Partnership Agreement dated 20 and 21 June 2010."

Question 1: Is "Commencement of Construction" having taken place, as that phrase is defined in clause 1.1 of the LLP Contract, a requirement for the Pursuers to be able to found upon the undernoted obligations in the LLP Contract?

- a) Clause 17.7
- b) Clause 28.4
- c) Schedule Part 5, paragraph 1.2
- d) Schedule part 7, paragraphs 2.5, 2.10 and 2.15 (as read with clause 12)

Pursuers' submissions

[14] Counsel for the pursuers submitted that the principles applicable to the interpretation of contracts were well known and summarised in *Arnold v Britton* [2015] AC 1619, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, *Aberdeen City Council v Stuart Milne Group* [2012] SC (UKSC) 240 and *Rainy Skye SA v Kookmin Bank Co Ltd* [2011] I WLR 2900. He submitted that it was common ground that the "Commencement of Construction" had not taken place. However, the "Commencement of Construction" was not a prerequisite to the pursuers succeeding in its claim. "Commencement of Construction" was a defined term in clause 1.1 of the LLP Agreement. It was used in certain clauses (eg 12.7,

12.4, 22, paragraph 2.11 of part 7 of the schedule) but not on the clauses relating to these obligations: The clear inference was that parties did not intend it to have any significance to these obligations. The terms of clause 17.7 envisaged its application before, as well as after the Commencement of Construction. Clause 28.4 must be considered in the context of clauses 28.1, 28.2 and 28.3 which include the period prior to Commencement of Construction. There was no provision anywhere in the LLP Agreement which postponed the rights in schedule part 5, paragraph 1.2 until after the commencement of construction. Schedule part 7, paragraphs 2.5, 2.10 and 2.15 applied “throughout the duration of this agreement”.

Defenders’ submissions

[15] Counsel for the defenders submitted that the answer to this question was yes. The obligations listed in this question had no application to this case because each of them only applied after “Commencement of Construction”, which did not take place.

[16] He referred to *Rainy Sky SA v Kookmin Bank Co Ltd*, *Arnold v Britton*, *Wood v Capita Insurance Services Ltd* [2017] AC 1173 and in particular submitted that effect must be given to clear and unambiguous language (*Rainy Sky at para [23]*; *Arnold at paras [17] and [18]*).

[17] The parties had agreed a very specific method of documenting the date of “Commencement of Construction”. Clause 1.1 envisaged that operations relating to site investigations would be carried out without any “Commencement of Construction”.

[18] The Kildermorie Partnership had termination rights under clause 12.7, exercisable if there were “Commencement of Construction”. The parties were required to adopt the Record of Condition prior to Commencement of Construction (clause 12.4). Prior to Commencement of Construction, SSE was required to provide a guarantee (clause 20) [22.3].

[19] He further submitted that clause 17.7 had no application if “Commencement of Construction” had not taken place. In support of this argument, he referred to the proviso in clause 17.7.1, the use of the word “instruction” in clause 17.7.1(a)(i), the requirement in clause 17.7.1(b) for reinstatement to the standard in the Record of Condition, and 17.7.2 which envisaged a guarantee in place prior to its operation.

[20] He submitted that clause 28.4 had no application unless there had been “Commencement of Construction”. He referred to the wording of the clause, and the distinction made between “construction” and “site investigations in the agreement” eg clause 31.1.4.

[21] He further submitted that paragraph 1.2 of schedule part 5 similarly had no application unless there had been “Commencement of Construction” as it refers to the Hydro Scheme Development which was a defined term with that effect.

[22] He further submitted that paragraph 2.5 of schedule part 7 related to damage as a result of the “Hydro Scheme Developments” which only arises after “Commencement of Construction”.

Discussion and decision

[23] In answering this question, I shall consider the general structure of the Agreement and then the particular clauses referred to in the question.

General structure of the Agreement

[24] The Agreement discloses that the project was to proceed in accordance with certain milestones.

[25] The first milestone was the Commencement Date, ie the date of final execution of the Agreement (clause 2.1, definition 1.1). Glasa LLP would be set up and the necessary land would be disposed to it by KP by the dispositions referred to above. Planning permission would then be obtained (see definition of Planning Permission cl 1.1).

[26] Another milestone was to be the “Commencement of Construction”, which was defined as:

“the date on which the LLP notifies KP in writing, giving not less than 7 days’ notice, using the style of notice set out in Part 13 of the Schedule, that it intends to initiate the Glasa Hydro Scheme Development under the Planning Permission and to take first entry onto the Subjects, excluding any operations relating to site investigations”

[27] Another milestone was the “Date of Commissioning”, which was defined as the date on which electricity is first commercially exported from the project.

[28] However the milestone of “Commencement of Construction” was never reached. In terms of cl 17.1 SSE had an option to terminate the Agreement and wind up the LLP, either prior to or at any time following the Commencement of Construction. It exercised that option in 2014, prior to the Commencement of Construction.

a) *Clause 17.7*

[29] For the reasons set out in my answer to question 4(a), the answer to question 1(a) is no.

b) *Clause 28.4*

[30] Clause 28.4 uses the word “construction”. In my opinion this means something other than is meant by “Commencement of Construction” The clause provides that KP is responsible for windblow “during construction and for a period of five years after

Commencement of Construction". That envisages that "construction" can precede "Commencement of Construction": otherwise the words "during construction and" would be superfluous and have no meaning. The clause should be construed in a way that gives effect to these words. I give further consideration to the meaning of "construction" in paragraphs [39] - [40] below.

[31] The answer to this question is no.

c) *Schedule Part 5, paragraph 1.2*

[32] Paragraph 1.2 gives rights of access over the Access Roads "for the purposes of construction... of the Hydro Scheme Developments". There is no express restriction of the exercise of that access to after the Commencement of Construction. The definition of "Hydro Scheme Developments" includes Glasa Hydro Scheme Development which is defined as the "construction ... of a hydro-electric generating scheme". There is no express restriction in that definition restricting "construction" to after the Commencement of Construction. For the reasons set out in paragraph [40] below, "construction" can take place prior to "Commencement of Construction".

[33] The answer to this question is no.

d) *Schedule part 7, paragraphs 2.5, 2.10 and 2.15 (as read with clause 12)*

[34] Some of the paragraphs in Part 7 are expressly time limited to take effect only after "Commencement of Construction". For example paragraph 2.11 begins "From the Commencement of Construction". Paragraphs 2.5, 2.10 and 2.15 have no such express limitation. In my opinion the scheme of part 7 is that the obligations contained within it take

effect from the execution of the Agreement unless expressly stated to take effect from the Commencement of Construction.

[35] The answer to this question is no.

Question 2: Insofar as those obligations are dependent upon construction having taken place (even if “Commencement of Construction” has not taken place), are the Pursuers’ averments sufficient to set up a relevant case that there has been “construction” within the meaning of the LLP Contract?

Pursuers’ submissions

[36] In relation to the extent to which the obligations are dependent upon construction having taken place, counsel for the pursuers submitted that paragraphs 2.5 and 2.10 of schedule part 7 make no reference to construction. The occurrence of “construction” is not a necessary prerequisite to the application of paragraph 2.15 of schedule part 7. The repair obligation in paragraph 1.2 of schedule part 5 was not dependent upon construction having taken place. The reference in clause 28.4 to “the removal of trees during construction” does not limit the application of the clause, but makes clear that parties used the word “construction” to signify a broad range of activities after execution of the LLP Agreement. Clause 17.7.1(a)(i) depends in part on “construction” having taken place as it requires reinstatement of damage. Clause 17.7.1(b) does not depend on construction having taken place.

[37] With reference to the word “construction” (that is with a small “c”), counsel submitted that the LLP Agreement did not define “construction” but did use it in a broad sense to signify activities taking place prior to the Commencement of Construction (eg clause 1.1, clause 28).

Defender's submissions

[38] Counsel for the defender submitted that the answer to this question was no. The LLP Agreement distinguished "construction" from "site investigations". The pursuers did not aver when "construction" started or why what happened on the site went beyond "site investigations".

Discussion and decision

[39] The word "construction" is not a defined term. It must bear its ordinary meaning. It includes physical activities and works which are for the purpose of building the scheme.

[40] The pursuers aver:

"Initial works were carried out over the period 2010 to 2013. These included carrying out environmental impact assessments, survey and site investigation work and the drilling of cores as part of the foundations of the dam" (art 3).

They go on to make averments about the transport round the estate of drilling rigs excavators and Halfingers. They aver that "the works done towards the construction of the Glasa Scheme" required the felling of trees. They specify that trees were felled to (1) create an access road to an intake to allow SSE to do preparatory work relating to the intake, (2) clear a pipeline route to allow SSE to survey and mark out the route of the pipeline, (3) clear the proposed turbine house to allow SSE to survey the site and (4) clear the bypass track route so that large vehicles brought on to the Estate could access without inflicting further damage to certain roads. They aver that representatives of SSE "wanted the trees felled so that construction work could be carried out on the programme". In my opinion these averments are habile to show that "construction", in the ordinary meaning of the word, took place prior to the Commencement of Construction. The answer to this question is yes.

Question 3: Assuming Mr Duncan's averments to be true, do any of the following provisions of the LLP Contract confer a *ius quaesitum tertio* on Mr Duncan and does Mr Duncan relevantly aver that any such *ius quaesitum tertio* right was created by delivery or otherwise?

- a) **Clause 12.3 in conjunction with paragraphs 2.5, 2.10, 2.15 and 2.16 of Part 7 of the Schedule;**
- b) **Clause 19.3 in conjunction with paragraph 1.2 of Part 5 of the Schedule;**
- c) **Clause 17.7;**
- d) **Clauses 28.2.1 and 28.4**

Pursuers' submissions

[41] Counsel for the pursuers submitted that although the LLP Agreement did not express or confer rights upon Mr Duncan as an individual, it did confer various rights on Glasa LLP which were exercisable over land Mr Duncan owned (clause 19.3; schedule part 5; clause 1.1, definition of "access roads" and "Property") and imposed obligations on Glasa LLP and SSE which related to that land (clause 2.3 and schedule part 7). Further, the LLP Agreement imposed obligations on SSE and Glasa LLP to remedy damage caused to the part of the estate owned by Mr Duncan, or through the exercise of rights over land owned by him (eg schedule part 7, paragraphs 2.5, 2.10 and 2.15; schedule paragraph 5, paragraph 1.2; clause 17.7). It was plain from these provisions that the commercial intention of the parties was for loss suffered by the estate to be remediated at the cost of SSE, whether that damage was suffered on the part of the estate owned by the Kildermorie Partnership or on the part of it owned by Mr Duncan. To exclude claims by Mr Duncan in relation to the part of the estate he owned would defeat that purpose and the express terms of the LLP Agreement. To prevent that outcome it was necessary to construe the LLP Agreement as conferring a *ius quaesitum tertio* on Mr Duncan to enforce the remediation obligations in relation to the estate land he owned and the loss he had suffered. A *ius*

quaesitum tertio can arise without delivery if there is an inference that the right can no longer be revoked (*Carmichael v Carmichael's Executrix* 1920 SC (HL) 195), and this was the case here. Mr Duncan was a party to the LLP Agreement in his capacity as a partner of the Kildermorie Partnership and was therefore aware of its terms. Further Mr Duncan had granted the dispositions of KP land and servitude of his own land in fulfilment of the LLP Agreement. The IAD Servitude made exclusive reference to the LLP contract and so in his personal capacity he had been made aware of its terms (schedule part 2, paragraph 5). Further the LLP Agreement gave Glasa LLP and SSE rights over land owned by Mr Duncan (eg Schedule part 5 and definitions of "Property" and "Access Roads" in clause 1.1). The obligations undertaken to remediate Mr Duncan's land were a clear *quid pro quo* for Mr Duncan having made these contributions to the project and were clear evidence that the rights were intended to be irrevocable, which was sufficient for the *ius quaesitum tertio*.

Defender's submissions

[42] Counsel for the defender submitted that the answer to this question was no. He submitted that the contract expressly excluded the possibility of an implied enforcement right by the entire agreement clause (clause 32). There were no averments that Mr Duncan was identified in the agreement, and this was necessary in order for him to have *ius quaesitum tertio* rights (*McBride*, para 10.17; *Welsh & Forbes v Johnston* (1906) 13 SLT 805 at 8.07). Clause 15.7 made clear that the reason why the Kildermorie Partnership was a party was because it had an interest in the whole estate as property manager. The LLP Agreement made commercial sense without the implication of *ius quaesitum tertio* rights. Such rights should not be implied. It was a detailed agreement arrived at with solicitors' advice Mr Duncan signed the contract on behalf of the Kildermorie Partnership, and if he

had rights under the contract it is to be expected that these would have been expressly included and he would also have signed as an individual. Mr Duncan in a personal capacity was expressly excluded by definitions in the contract. Mr Duncan is not required to participate in the preparation of the Record of Conditions. Mr Duncan is not the only possible beneficiary as the Kildermorie Partnership may also be a beneficiary: in these circumstances it is not easy to infer *ius quaesitum tertio* rights (*Scott Lithgow Ltd v GEC Electrical Projects Ltd* 1989 SE 412 (OH), which was consistent with the high test to be imposed for implied contractual rights (*Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] AC 742).

[43] Counsel further submitted that the wording of the specific provision founded upon by Mr Duncan excludes any suggestion of *ius quaesitum tertio* rights. He referred to paragraph 1.2 of part 5 of the schedule (which was enforceable by the Kildermorie Partnership, not Mr Duncan), clause 28 which was clearly for the benefit of the Kildermorie Partnership), clause 12.3 and paragraphs 2.5, 2.10, 2.15 and 2.16 of part 7 of the schedule (expressly stated to be in favour of the Kildermorie Partnership) and clause 17.7 (which creates rights on the part of the partnership).

[44] Counsel further submitted Mr Duncan had failed to demonstrate that the *ius quaesitum tertio* rights were intended to be irrevocable (*Carmichael v Carmichael's Executrix* 1920 SC (HL) 195, *Granite City Estates Ltd* [2018] CS0H 55 at para [31]. There was no averment as to delivery. He had possession of the document because he had signed it as a partner. He further submitted that absent express liability, there was no basis to infer an intention that a damages claim would be available to Mr Duncan (*Scott Lithgow Ltd v GEC Electrical Projects Ltd* 1989 SE 412 (OH) at page 438; *Gloag on Contract* (2nd edition p239).

Discussion and decision

[45] A *ius quaesitum tertio* arises where contracting parties intend to confer a right on a party who is not party to the contract. The intention to benefit the third party will usually be demonstrated by an express contractual term conferring the right. The third party must be identified, either expressly or by implication. (*Carmichael v Carmichael*, McBryde Contract para 10.17, *Welsh v Forbes and Johnston*.)

[46] In my opinion it is clear from the terms of the Agreement that the parties to the Agreement, that is KP and SSE, did not intend to confer a *ius quaesitum tertio* on Mr Duncan as an individual. The following factors demonstrate that KP and SSE had no such intention.

[47] Firstly, the intention of KP and SSE was that the Agreement would not be between SSE and the owners of the various parts of the Kildermorie Estate, but would instead be between SSE and KP as manager of the entire Estate. The Agreement was part of a complex negotiation with SSE in which Mr Duncan took part both as an individual and as a partner in KP. The negotiations covered the entire Kildermorie Estate, parts of which were owned by KP and parts of which were owned by Mr Duncan personally or jointly with his wife. As a result of these negotiations, various legal documents were entered into. KP and SSE had the benefit of legal advice, as did Mr Duncan in his personal capacity. The legal documents were drafted by solicitors. Mr Duncan entered into the IAD Servitude in a personal capacity. He entered into the KP Servitude and the Agreement in his capacity as partner of and trustee for KP. Had Mr Duncan chosen to enter into the Agreement in a personal capacity as the owner of part of the Kildermorie Estate, the Agreement could have been enforced by him in his personal capacity. However, Mr Duncan chose not to do so. Instead, KP entered into the Agreement as manager of the entire Kildermorie Estate, including the parts owned by Mr Duncan. This was made explicit by clause 15.7, which states:

“KP hereby warrants that it is entering into the arrangements contemplated by this Agreement in pursuance of its existing business of managing the wider Property”

[48] “Property” is defined as property at Kildermorie Estate (cl 1.1). Accordingly the contractual structure is that the rights to enforce the Agreement against SSE are held by KP as manager of the estate and not by the individual owners of part of the estate such as Mr Duncan.

[49] Secondly, if there had been an intention to grant rights in favour of Mr Duncan despite the fact that he was not a party to the Agreement, then the normal way for this to be done would be for the Agreement to expressly grant rights in favour of Mr Duncan as an individual. If the intention of the KP and SSE was to grant rights in favour of Mr Duncan personally, then there is no reason why KP and SSE could not have expressly included these rights in the Agreement. Inclusion of an express *ius quaesitum tertio* right in favour of Mr Duncan would also have satisfied the legal requirement that the third party must be identified, as Mr Duncan would have been named as the recipient of these rights. The lack of such a normal provision is a strong indication that KP and SSE did not intend to grant rights in favour of Mr Duncan.

[50] Thirdly, it cannot be the case that KP and SSE intended to imply rights in favour of Mr Duncan into the Agreement. The Agreement expressly excludes any such implication.

Clause 32 states:

“This Agreement together with [certain other documents not relevant here] constitute the entire agreement between the Members with respect to the subject matter thereof and expressly exclude any warranty, condition or other undertaking implied at law or at custom...”

[51] Accordingly, on a proper construction of the Agreement, KP and SSE did not intend to grant a *ius quaesitum tertio* to Mr Duncan in his personal capacity and the answer to this question is no.

Question 4: Can the Pursuers relevantly found upon the restoration obligations in clause 17.7 of the LLP Contract given that:

- a) **the Date of Commissioning (as defined in clause 1.1) has not occurred?**
- b) **no Record of Condition (as defined in clause 1.1 and referred to in clause 12.4) has been produced?**

Pursuer's submissions

[52] Counsel for the pursuers submitted that the answer to this question was yes. The opening words of clause 17.7 provided that the defender's "restoration obligations" were to apply in wide circumstances: it would significantly narrow these obligations if they were to be made dependent on either the Date of Commissioning having occurred or a Record of Condition having been up.

[53] He submitted that clause 17.7.1 imposed an obligation to remove the Glasa Hydro Scheme Development and reinstate the property, the words in brackets applying only to one particular context. The purpose of the clause read as a whole was to give the Kildermorie Partnership the right to insist on SSE removing the development and remediating the land, but only if the development and become redundant. "Glasa Hydro Scheme Development" was widely defined to include the range of activities over a lifetime of the scheme, going far beyond the words specified in the brackets. The words in brackets should be treated as providing a definition for use in the circumstances of where the development has been commissioned but is no longer in use. There was no obvious rationale why SSE's obligation to remove its development should be conditional upon the development having been commissioned in terms of clause 1.1, definition of "Date of Commissioning". That factor had no rational connection to the remedial tasks. As between the parties, SSE brought

technical expertise and were to fund this scheme and it was therefore consistent with that to construe SSE's remedial obligation as applying in broad circumstances.

[54] He further submitted that it was common ground that no Record of Condition was prepared. The "Record of Condition" was no more than an evidential record of the condition of parts of the estate and its absence did not prevent clause 17.7.1 from being applied. There was nothing in clause 17.7.1 to suggest that the preparation of a Record of Condition was a condition suspensive. The obligation specifies the standard of repair and can be enforced as long as the pursuers can prove the condition of the property before the scheme. The record of condition was to be repaired at SSE's cost and was for them to repair and they should not be able to escape their remediation obligations by failing to do so. There was no obligation on the parties to adopt the Record of Condition unless Commencement of Construction occurred (clause 12.4, but clause 17.7 triggered the restoration obligations even if Commencement of Construction had not occurred).

Defender's submissions

[55] Counsel for the defender submitted that the answer was no.

[56] He submitted that clause 17.7.1 applied after Commencement of Construction, and in any event applied after the Date of Commissioning. The clear wording of clause 17.7.1 was that it had no application to this case. In any event, the absence of a Record of Condition means that no content can be given to the obligations in clause 17.7.1.

Discussion and decision

a) *the Date of Commissioning (as defined in clause 1.1) has not occurred?*

[57] The structure of clause 17.7 of the LLP Agreement is that there is an introductory paragraph numbered 17.7 which is in general terms and imposes specific restoration obligations which are listed in 17.7.1, 17.7.2 and 17.7.3.

[58] Neither 17.7.2 nor 17.7.3 are applicable to the facts of the current cases so can be dealt with briefly. Clause 17.7.2 applies to restoration where additional works are required to comply with planning consent. That is not the scenario here. Clause 17.7.3 applies where instead of the Glasa Hydro Scheme Development being removed and restoration taking place, the Development is transferred to the LLP. Nor is that the scenario here.

[59] 17.7.1 provides for restoration obligations which apply

“In the event that the Glasa Hydro Scheme Development ceases to be operational on a permanent basis (which for the avoidance of doubt shall mean two consecutive years of *bona fide* non-operation following the Date of Commissioning).”

That event has not occurred. It was common ground between the parties that the “Date of Commissioning” had not occurred. The Date of Commissioning is the date on which electricity is first commercially exported from the Glasa Hydro Scheme Development (clause 1.1 of LLP Agreement). So 17.7.1 appears to apply where the development has been constructed and is operational but subsequently ceases to be operational for a period of two years. That is not the scenario here. The scenario here is that SSE has exercised its right under clause 17.1 to terminate the Agreement prior to the Date of Commissioning and indeed prior to the Commencement of Construction.

[60] Taking clause 17.7.1 in isolation, the reinstatement obligation appears to be narrowly drafted and appears to be applicable only after two years non-operation after the Date of Commissioning. But that is not the end of the matter. The Agreement has to be read as a

whole and clause 17.7.1 must be read along with the termination provisions in 17.1.

Clause 17.1 gives SSE the option to terminate in two circumstances: prior to

Commencement of Construction and following Commencement of Construction. The

termination is not dependent on the Date of Commissioning having occurred. The

Agreement may be terminated under clause 17.1 before the Date of Commissioning, either

by being terminated before Commencement of Construction or by being terminated between

Commencement of Construction and the Date of Commissioning. Clause 17.1 specifically

provides for reinstatement upon termination in terms of clause 17.1. It concludes with the

following declaration:

“declaring that in the event that SSE exercises this option to terminate this Agreement the LLP shall be obliged... to effect reinstatement in terms of 17.7”

That is a clear expression of intention that the reinstatement provisions of clause 17.7 apply

on termination under clause 17.1, notwithstanding that such termination may pre-date the

Date of Commissioning or Commencement of Construction. A further clear expression of

that intent can be found in clause 17.7 which introduces and governs clause 17.7.1 and

makes specific reference to termination under clause 17.1:

“Prior to the termination of this Agreement (whether at the natural expiry of this Agreement or otherwise including where terminated in accordance with Clause 17.1 or 17.2) failing which during the Restoration Period SSE shall, or shall procure that the LLP shall, comply with the following restoration obligations... unless a lease is granted pursuant to clause 17.3”

“Restoration Period” is defined, in short, as the decommissioning period starting 85 years

from the date of execution of the Agreement. (clause 1.1)

[61] In my opinion the Agreement has to be read as a whole. The parties have provided

for early termination prior to the Date of Commissioning or Commencement of Construction

(clause 17.1). The parties have provided for reinstatement in the event of early termination

(Clause 17.1 declaration). The parties have provided that reinstatement in the event of early termination will be in accordance with clause 17.7.1 (Clause 17.1 declaration, Clause 17.7 introductory paragraph). The clear intention of the parties was that there would be an obligation to reinstate on early termination prior to the Date of Commissioning or Commencement of Construction. The clear intention of the parties was that such reinstatement would be in accordance with 17.7.1 (a) and (b). Clause 17.7.1 must be read *mutatis mutandis* in order to give effect to that intention.

[62] The answer to question (a) is yes.

b) *no Record of Condition (as defined in clause 1.1 and referred to in clause 12.4) has been produced?*

[63] The Record of Condition must be adopted prior to the Commencement of Construction (clause 12.4). The parties are under no obligation to adopt it at any time earlier than immediately prior to the Commencement of Construction. A Record of Condition will be available if there is early termination under clause 17.1 after Commencement of Construction. But it will not necessarily be available if the early termination is before Commencement of Construction. Clause 17.7.1 makes express reference to the Record of Condition. However, clause 17.7.1 must be read *mutatis mutandis* to give effect to the clear intention that it applies on early termination. That intention would be frustrated if the application of clause 17.7.1 in respect of early termination prior to Commencement of Construction depended on the arbitrary factor of whether the parties happened to have adopted a Record of Condition prior to the time when they were legally obliged to do so.

[64] Reading the Agreement as a whole, the answer to question (b) is yes. The Agreement has been terminated prior to the time at which the parties were legally obliged to adopt a

Record of Condition. As there is no Record of Condition, the onus will be on KP to aver and prove the condition of the Subjects and Access Roads prior to the works undertaken by SSE/Glasa LLP.

Question 5: Are conditions 5 in Part 2 of the Schedule to the IAD Servitude and 7 of Part 2 of the Schedule to the KP Servitude enforceable by Mr Duncan and KP respectively against Glasa as praedial burdens? If not, do the Pursuers aver any other basis upon which these burdens can be enforced against Glasa?

Pursuers' submissions

[65] Counsel for the pursuers submitted that both servitude deeds referred to servitude rights and conditions and were intended to be conventional servitude conditions (*Tennant v Napier Smith's Trustees* [1888] 15 R 671). The conditions which provide for tree felling apply to tree felling carried out for the purpose of Glasa LLP servitude rights and were therefore related to them and of praedial significance. The conditions do not infringe any of the limitations which apply to servitude conditions and are enforceable as such (*Cusine and Paisley, Servitudes and Rights of Way* paras 14-06 FF).

[66] Counsel further submitted that it was not, in any event, necessary for the servitude conditions to qualify as praedial burdens. The KP Servitude is enforceable as a contract between KP and Glasa (Reid, *The Law of Property in Scotland*, paragraph 392; cf *Title Conditions (Scotland) Act 2003*, section 61.) Similarly, although the IAD Servitude was not granted directly by Mr Duncan to Glasa LLP, Glasa LLP was the only intended beneficiary and there was no justification as between Mr Duncan and Glasa LLP to apply restrictive rules of enforcement necessary to protect singular successors.

Defender's submissions

[67] Counsel for the defenders submitted that the answer to these questions was no. Counsel further submitted that the IAD Servitude was unenforceable against Glasa LLP as a singular successor. In order to be a real condition, binding on singular successors the condition must have a connection with the servitude and must be praedial (*Cusine and Paisley, Servitudes and Rights of Way* para 13.09, 14.07 – 8) and the servitude condition was neither of these. He submitted that a servitude of construction could not be created under common law (*Campbell's Trustees v Glasgow Corporation Ltd* (1902) 4F 752 at page 75 – 78). The relevant conditions do not regulate the servitude of access but are a mechanism for parties to enter a different contract concerning the price payable for felled timber. Further, the conditions do not meet the praedial test. The conditions are for the benefit of the burdened property owner not the property. A praedial servitude cannot require the payment of an indefinite sum unconnected with the essence of the servitude (*Corporation of Tailors of Aberdeen v Coutts* (1840) 1 Robb 296 (HL) at page 340 and 323; *David Watson Property Management v Woolwich Equitable Building Society* 1992 SLD 430 (HL) at p 434K).

Discussion and decision

[68] I shall consider each servitude separately.

IAD servitude

[69] This deed of servitude was granted by Mr Duncan in favour of KP. It sets out various servitudes in Part 1 of the Schedule which are subject to various servitude conditions set out in Part 2 of the Schedule. However, Mr Duncan does not seek to enforce a

servitude condition against KP. Instead he seeks to enforce it against KP's singular successor, Glasa LLP. He does so in his action against Glasa LLP (CA137/18).

[70] To be enforceable against a singular successor, a servitude condition must be praedial. The test for whether a servitude condition is praedial is two-fold, and is conveniently set out by Cusine and Paisley in *Servitudes and Rights of Way* at paragraph 14.08 as follows:

“Because it is connected with the underlying servitude, the servitude condition must have a praedial nature. This rule also has two aspects. First, a servitude condition must not impose a personal obligation upon the dominant proprietor which is unrelated to the exercise of the servitude. Secondly, the servitude condition must confer a benefit on the servient tenement and not just the then proprietor”

[71] Servitude condition 5 consists of two paragraphs. The first paragraph relates to the felling of trees “for the purposes of carrying out the construction of the new bridge and road”. The Deed of Servitude does not contain a servitude of construction of a new bridge and road. However it does contain a servitude of access to allow construction of a road (servitude in para 1 of Part 4 of the Schedule) and a servitude of access for the erection of a bridge and new road (servitude in para 4). The servitude rights of access merely facilitate the construction by allowing the owner of the dominant tenement to have access over the servient tenement for the purposes of carrying out construction. In these circumstances the felling of trees is not for the purpose of exercising the servitude right of access but for the collateral purpose of construction and is unrelated to the exercise of access under the servitude.

[72] It is clear from the wording of the second paragraph that it deals with a different matter from the first paragraph: the second paragraph provides that it does not apply to trees felled per the first paragraph. The second paragraph applies to trees “removed from pipelines, cables, the power house and Access Routes.” The servitudes in Part 1 include

servitude rights of access (paras 1 and 4), a servitude right to widen roads (para 3) and a servitude right to lay and construct pipelines (para 4). In my opinion the felling of trees in order to exercise rights of access, to widen roads and lay and construct pipelines is related to the exercise of the servitudes.

[73] I turn now to the second part of the test, namely whether servitude condition 5 confers a burden on the servient tenement and not just the then proprietor. In my opinion it does. The servitude condition deals with paying the owner of the land in respect of trees removed from the land in order to exercise the servitude rights. It applies where the servitude right cannot be exercised because it is impeded by trees. The condition makes provision for who is to undertake the work necessary to put the land in a fit state for exercise of the servitude. In the first paragraph the work is to be undertaken by the landowner and in the second paragraph the work is to be undertaken by the landowner and servitude owner, and in each case provision is made as to who is to bear the cost. In principle that is no different from the situation where a servitude right cannot be exercised because of lack of a suitable roadway and a condition makes provision for who undertakes and bears the cost of constructing the roadway. Payment to a landowner in connection with the felling of trees on the route of a servitude to enable the servitude to be exercised is payment to the owner in his capacity as owner and not in a personal capacity.

[74] Accordingly, I find that the condition in the first paragraph of Condition 5 in Part 2 of the Schedule to the IAD Servitude is not enforceable by Mr Duncan against Glasa LLP as it does not satisfy the first limb of the test. The second paragraph on the other hand does satisfy both parts of the test and so is enforceable by Mr Duncan against Glasa LLP as singular successor, subject to the answers to the other questions addressed in this opinion and to detailed averment and proof that the felling was for the specific purpose of exercising

the particular servitudes of access, road widening and pipelaying and was not just general treefelling for the purposes of the Hydro project.

[75] Turning now to the second question, in my opinion Mr Duncan does not aver any other way in which the servitude conditions could be enforced against Glasa LLP. Glasa LLP is sued in its capacity as singular successor and stands in the same position as any other singular successor being sued under the IAD Servitude. The answer to the second question is no.

KP Servitude

[76] This deed of servitude was granted by KP in favour of Glasa LLP. It sets out various servitudes in Part 1 of the Schedule which are subject to various servitude conditions set out in Part 2 of the Schedule. KP seeks to enforce it against Glasa LLP. KP does so in its action against Glasa LLP (CA137/18).

[77] Servitude condition 7 is in identical terms to servitude condition 5 in the IAD Servitude. The servitude rights are broadly similar. There is a servitude to lay and construct pipes (para 7 of Part 1), and various servitudes giving access for the purposes of constructing or widening roads. The main difference is that there is no servitude right of access for the specific purpose of erecting and installing a new bridge and road such as is to be found in paragraph 4 of the IAD servitude. That is a significant difference as the first paragraph of condition 7 applies to such a servitude. The servitude conditions must relate to a servitude. The first paragraph bears to relate to a servitude over KP's land but no such servitude is granted. Accordingly the first paragraph cannot satisfy the first limb of the test. Other than that, in my view in respect of the first question put to me there is no material difference between the terms of the KP Servitude and the IAD Servitude and accordingly my

answer on the first question is the same. Accordingly, I find that the condition in the seventh paragraph of Condition 7 in Part 2 of the Schedule to the KP Servitude is not enforceable by KP against Glasa LLP as it does not satisfy the first limb of the test. The second paragraph on the other hand does satisfy both parts of the test and so is enforceable by KP against Glasa LLP, subject to the answers to the other questions addressed in this opinion and to detailed averment and proof that the felling was for the specific purpose of exercising the particular servitudes of access, road widening and pipelaying and was not just general treefelling for the purposes of the Hydro project.

[78] I turn now the second question.

[79] A restriction on the use of land which is not transmissible to a singular successor may nevertheless receive effect as a personal contract between the original contracting parties (eg *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Limited* at p 802). However, in my opinion a claim against Glasa LLP on the basis that Glasa was original party would put KP in no better position than its claim on the praedial basis.

[80] The issue which arises on a claim against Glasa LLP as original party is whether servitude condition 7 is enforceable by KP as a term of the Deed of Servitude. That issue turns on construction of the Deed of Servitude. The Deed of Servitude grants the Servitudes “subject always to the Servitude Conditions” (cl 2). Accordingly the Servitude Conditions are not free standing contractual obligations: they have effect only in so far a particular servitude granted in the Deed of Servitude is subject to them.

[81] The first paragraph of condition 7 applies only if Glasa LLP requires to fell trees for the “purposes of carrying out the construction of the new bridge and road”. There is no servitude which mentions a new bridge and road. There is no servitude to which this

condition can be subject. The answer to the second question in respect of the first paragraph of condition 7 is no.

[82] By contrast, there are servitudes to which the second paragraph can be subject. It follows that the second paragraph of the servitude condition can be enforced against Glasa LLP as a personal contract. It must however be borne in mind that the scope of the second paragraph is limited by the servitudes which are subject to it. It is not a free-standing legal obligation applying to parts of the Estate not owned by KP. Nor is it a free-standing legal obligation applicable to all parts of the Estate owned by KP: it applies only to the parts of the Estate owned by KP which are affected by the Servitude Rights. Accordingly in my opinion the answer to the second question is yes, subject to the answers to the other questions addressed in this opinion and to detailed averment and proof that the felling was for the specific purpose of exercising over KP's land the particular servitudes of access, road widening and pipelaying set out in the KP Servitude and was not just general treefelling for the purposes of the Hydro project.

Question 6: Are parts of Mr Duncan's case insofar as based on the IAD Servitude irrelevant because the IAD Servitude (or any part of it) is unenforceable for any of the following reasons:

- a) **The absence of a definition of "Servitude Area 3";**
- b) **The absence of a "Table of Crop Compensation per Schedule 4";**
- c) **The absence of a grant of any servitude rights in respect of Servitude Area 2;**
- d) **The designation of Mr Duncan as owner of the "Benefited Property" in respect of the Servitude.**

Pursuers' submissions

[83] Counsel for the pursuers submitted the defective drafting might be disregarded if the meaning was apparent from the whole (*Hunter v Fox* 1964 SC (HL) 95). The court may

correct an error as a matter of construction (*Chartbrook Ltd v Persimmon Homes* 2009 1 AC 1101). Extrinsic evidence may be used to interpret the wording (*Robson v Chalmers Property Investment* 1965 SLT 381, 2008 SLT 1069; *Houldsworth v Gordon Cumming* 1910 SC (HL) 49).

[84] The reference to “Servitude Area 3” should be a reference to “Servitude Area 2”.

This was apparent when one compared the wording in the KP Servitude and also the LLP contract. The intended route of the pipelines for the hydro scheme was beyond doubt. Two servitude deeds were used because part of the estate was owned by the Kildermorie Partnership and part by Mr Duncan.

[85] Counsel further submitted that servitude condition 5 provided that the clause shall be interpreted in accordance with the Agreement. It was plain that the Table of Crop Compensation was the table at part 11 of the schedule to the LLP contract. This interpretation did not infringe section 5 of the Title Conditions (Scotland) Act 2003 because (1) servitude condition 5 was a servitude condition and not a real burden and (2) the condition would retain in contractual effect as between the two original parties.

[86] He further submitted that the absence of a grant of servitude rights over Servitude Area 2 supported the argument in relation to Servitude Area 3.

[87] He further submitted that the designation of Mr Duncan as owner of the “Benefited Property” was a drafting error and it was clear from the deed as a whole that Mr Duncan was the owner of the Burdened Property and the Kildermorie Partnership the owner of the Benefited Property.

Defenders’ submissions

[88] Counsel for the defenders dealt with questions 6 and 7 together and submitted that the answer in each was yes. He submitted that the rules for interpreting servitudes not

known to law are the same as for real burdens (Cusine and Paisley para 15.06; cf Title Conditions (Scotland) Act 2003 at section 14), and the full terms of the condition must be set out in the deed (*Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas Ltd)* 1939 SC 788 at page 802, a rule preserved in the 2003 Act unless it is a public document section 5). There was no Table of Crop Compensation in the deed and therefore no such table in the Register.

[89] He further submitted that in any event there were no averments as to what the table was, such that this could be proof by extraneous evidence, even if that was competent.

[90] The IAD Servitude had other defects: the burdened and benefited owners were confused and there was no grant of a servitude right over "Servitude Area 2", and so the deed did not make sense and could not be given effect to (*Hunter v Fox* 1964 SC (HL) 95 at page 99; Cusine and Paisley para 14.47).

[91] He further submitted in relation to the KP Servitude that there was no definition of Servitude Area 3 and no reference at all to the construction of the bridge. Condition 7 did not make sense and could not be given effect to.

Discussion and decision

(a) Absence of definition of "Servitude Area 3"

[92] Paragraph 5 of Part 1 of the Schedule provides for a servitude of pipeline over Servitude Area 3. This is the only reference to Servitude Area 3 in the Deed. The Definitions section (section 1.1) contains a definition of Servitude Area 2. There is no other reference to Servitude Area 2 in the Deed. Servitude Area 2 is defined as meaning areas shown in dotted blue lines on Plan 5 annexed to the Deed. There is a plan attached to the deed and that plan has areas shown in dotted blue lines. The legend on the plan describes these dotted blue lines as "Buried Pipeline". Reading the Deed as a whole it is clear that the reference to

“Servitude Area 3” in paragraph 5 of Part 1 of the Schedule is a typographical error for “Servitude Area 2” and the servitude of pipeline in paragraph 5 is over the dotted blue lines identified as pipeline in Plan 5. It is apparent to the reader that there has been a mistake. In these circumstances the Deed should be construed so as to give effect to the parties’ intention (*Hunter v Fox, Chartbrook v Persimmon Homes*). The answer to this question in respect of (a) is no.

(b) *The absence of a “Table of Crop Compensation per Schedule 4”;*

[93] The servitude condition in the second paragraph of paragraph 5 of Part 2 of the Schedule to the IAD servitude provides for “payment according to the Table of Crop Compensation per Schedule 4” There is no Schedule 4 to the IAD Servitude. There is no Schedule 4 to the Agreement, but there is a Schedule divided into different parts. Part 4 of the Schedule to the Agreement contains a planning application, not a Table of Crop Compensation. Part 11 of the Schedule contains a Table of Crop Compensation. Part 12 of the Schedule consists of a draft lease and is headed “STYLE OF LEASE IN THE EVENT OF TERMINATION IN TERMS OF CLAUSE 17”. Part 4 of the Schedule to the style lease consists of a Table of Crop Compensation, which is the same table as appears in part 11 of the Schedule to the LLP Agreement. Although clause 17 made provision for the possibility of the style lease being entered into at the option of SSE, SSE did not exercise that option and the lease was not entered into. The servitude condition provides that in the event of any difference of opinion on the terms of this clause it shall be interpreted in accordance with the Agreement.

[94] A servitude condition is binding not only on the parties to the deed of servitude but also on their singular successors. It is therefore important that full information about the

servitude condition is contained in the Deed of Servitude. The Deed of Servitude is a public document available from the Registers of Scotland. Singular successors are entitled to rely on the information which is publicly available in the Registers. They are not bound by information contained in private contracts which are not publicly available. The principle that parties may rely on the faith of the record is a long established one. As Lord Reid said in *Hunter v Fox* at p 99:

“This provision appears in the Register of Sasines, which is open for all to see, and a purchaser is entitled to rely on the faith of the record. He is not concerned with the intention of the person who created the burden: he is concerned with the words which appear in the Register of Sasines.”

[95] In my opinion the principle of faith of the record is equally applicable to a servitude condition. In my opinion the Agreement cannot be referred to in interpreting the servitude condition as between Mr Duncan and the singular successors to KP. The servitude condition must be interpreted in accordance with the terms of the Deed of Servitude.

[96] There is no Schedule 4 of the Deed of Servitude. The Deed of Servitude contains no Table of Crop Compensation. In these circumstances the second paragraph of condition 5 of Part 2 of the IAD Deed of Servitude is void from uncertainty.

[97] The answer to this question (b) in respect of the second paragraph is yes.

[98] The answer to this question (b) in relation to the first paragraph is no, as there is no reference in the first paragraph to the Table of Crop Compensation and so the question does not arise.

(c) *The absence of a grant of any servitude rights in respect of Servitude Area 2*

[99] Although there is no grant of servitude rights over Servitude Area 2, there is a grant of a servitude over Servitude Area 3 which, for the reasons set out above is a typographical

error for Servitude Area 2 and should be construed as referring to Servitude area 2. The answer to this question (c) is no.

(d) *The designation of Mr Duncan as owner of the "Benefited Property" in respect of the Servitude.*

[100] In my opinion it is clear from the face of the document that there is an error in the designation of Mr Duncan as owner of the Benefited Property and of the partners in KP as owner of the Burdened Property. Quite simply the drafter has got these the wrong way round. The drafter got these the right way round in his definition of Mr Duncan as the "Burdened Owner" and the partners as the "Benefited Owner". There is no dispute that the area of ground defined as the "Burdened Property" was owned by Mr Duncan. The various areas of "Benefited Property" are defined in clause 1.1 in terms of various dispositions and there is no dispute that the parties to these dispositions are correctly identified as Mr Duncan as Burdened Owner and the partners of KP as Benefited Owner. In these circumstances it is clear that a mistake has been made and it is clear from the terms of the Deed as a whole (including references in the Deed to documents available from the Land Registers of Scotland) what the correct position is. It is open to the court to correct this mistake as a matter of construction (*Hunter v Fox, Chartbrook v Persimmon Homes*), which I now do. The answer to question (d) is no.

Question 7 Are parts of KP's case insofar as based on the KP Servitude irrelevant because the KP Servitude (or any part of it) is unenforceable because of the absence of a "Table of Tree Crop Compensation per Schedule 4"?

Pursuers' submissions

[101] Counsel for the pursuers submitted that Glasa LLP's claim under the KP servitude was not rendered irrelevant by the absence of a Table of Crop Compensation for reasons similar to those in question 6. Whilst owner of one of the benefited properties, Glasa LLP benefited from the servitude rights and was subject to its conditions.

Defender's submissions

[102] The defender's submissions on this question are set out in relation to the previous question.

Discussion and decision

[103] There are no material differences between the wording of the IAD Servitude and the KP servitude in relation to this issue. However, whereas the IAD servitude is sought to be enforced against a singular successor, the KP servitude is sought to be enforced against the original party. A contract can be enforced against the original party even in circumstances when it cannot be enforced against a singular successor (eg *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Limited* at p 802). Accordingly the answer to this question is not the same as the answer to question 6(b): the principle of faith of the record does not apply.

[104] As between parties to an agreement, the parties are entitled to provide that another contract may be looked at to assist with interpretation. The wording of the second paragraph of condition 7 states:

“in the event of any difference of opinion on the terms of this clause it shall be interpreted in accordance with the Glasa LLP Limited Partnership Agreement dated 20 and 21 June 2010”.

That wording demonstrates a clear intention on the part of the parties that the Agreement could be looked at. In my view the Agreement can be looked at to interpret the words “Table of Crop Compensation per Schedule 4”. Examination of the Agreement discloses that there is a Table of Crop Compensation which is a defined term in the Agreement. The Table of Crop Compensation appears in two places in the Agreement. It appears in Part 11 of the Schedule to the Agreement. It appears in Part 4 of the Schedule to the Style Lease to be found in Part 12 of the Schedule to the Agreement. In my opinion the intention of the parties was that the “Table of Crop Compensation” referred to in the Servitude was the same table as appears in the Agreement. The answer to the question is no.

Question 8: Do the Pursuers aver a relevant case about the ways in which they contend that the IAD Servitude and KP Servitude respectively were exercised by Glasa which engage the servitude conditions? Does a relevant case for enforcement of the servitude conditions in the IAD and KP Servitudes depend upon the road having first been upgraded under servitude right 1 of each servitude?

Pursuers’ submissions

[105] Counsel for the pursuers submitted that the answer to the first of these questions was yes. The actions included averments about vehicles being taken across the estate roads, and to the felling of trees (a) to create an access to the Magharaidh intake (Servitude Right 3 in the KP Servitude), (b) to clear the route for the pipeline north of the Abhainn Na Glasa river (Servitude Right 7 in the KP Servitude and Servitude Right 5 in the IAD Servitude) and (c) to clear the route for the bypass route (relevant to Servitude Rights 1 and 4 in the IAD Servitude).

[106] Counsel for the pursuers submitted that the answer to the second of these questions was no. There was no provision to that effect. Most of the servitude rights were exercisable

prior to the road being upgraded, and the concomitant servitude conditions were also enforceable.

Defender's submissions

[107] Counsel for the defender submitted that the answer to issue 8(a) was no and to issue 8(b) yes.

[108] He submitted that the pursuers required to establish that the servitudes were being exercised and that therefore the servitude conditions were engaged.

[109] Conditions 1 and 2 of the two servitudes provided expressly that they apply to damage caused "by reason of the exercise of the Servitude Rights and there were no averments about the use of the servitude. Nor were there any adequate averments of a demand having been made in terms of condition 1.

[110] In respect of conditions 5 and 7 of the servitudes, relating to tree felling, the condition applies where trees require to be felled for the purposes of carrying out the construction of the new bridge and road. The conditions were not applicable as there were no averments that there was any work done to construct a road or bridge.

Discussion and decision

[111] Mr Duncan's averments about damage caused to roads are his action against *Glasa* (CA137/18) at article 15 of condescence. At article 15 Mr Duncan avers that

"throughout the course of the construction works that were undertaken, the defender ..used heavy vehicles on the roads in the Kildermorie Estate, including the roads over which it had rights under the IAD servitude"

He narrates damage caused by these vehicles and goes on to aver "Accordingly, the

Defender became liable to pay the costs of the damage in terms of conditions 1 and 2 of the

IAD Servitude". His averments are in very general terms. They do not specify what servitudes have been exercised nor what damage has been incurred in the exercise of what servitude.

[112] In my opinion, Mr Duncan's averments are irrelevant and lacking in specification as he does not aver how damage was caused in the exercise of the particular servitude rights. However I take into account that the commercial judge case managing this case set it down for debate at an early stage to clarify the legal issues before any further adjustment. I would propose to use case management powers to give Mr Duncan an opportunity to aver his case in fuller detail. I would order him to list each servitude on which he founds and to aver details of how that servitude was exercised and what damage was incurred in the course of such exercise.

[113] For example, the obligation to make good damage under Servitude condition 1.1 in part 2 of the Schedule to the IAD Servitude is limited to damage "caused to the Burdened Property and/or the Servitude Area 1 by reason of the exercise of the Servitude Rights." In order to properly aver a relevant case by reason of the exercise of Servitude Right 1 Mr Duncan would require to aver details of vehicles accessing the Burdened Property and/or Servitude Area 1 for the particular purpose of "laying constructing, inspecting, repairing, maintaining, renewing ,replacing and widening" the particular road mentioned in that Servitude Right 1. He would require to aver what damage was caused in exercising access for those purposes. In order to properly specify a relevant case by reason of the exercise of Servitude Right 2 Mr Duncan would require to aver that the road had been upgraded in terms of Servitude Right 1 and that it was subsequently used for access and that damage had been caused in exercise of that access. I would require Mr Duncan to aver *mutatis mutandis* the equivalent details for all other servitude rights on which he founds.

[114] The same issues of relevance and specification arise in relation to KP's claim for damages for the exercise of servitudes under the KP Servitude in *KP v Glasa LLP* (CA138/18). These issues in that case fall to be dealt with in the same way: I would require KP to list each servitude right on which it founds and give full specification of its exercise and the damage caused by such exercise. For example Servitude Right 3 is a servitude right of vehicular access to widen roads and verges and upgrade drainage ditches. KP makes no averments that roads or verges were widened or drainage ditches were upgraded. KP makes no averment that any vehicle exercised access in order to widen the roads or verges or upgrade drainage ditches. KP makes no averment of any damage caused by vehicles accessing to widen or upgrade. If KP was founding on Servitude Right 3, it would require to specify details of (1) the widening of specific roads and verges and the upgrading of specific ditches, (2) access by vehicles for such widening and upgrading and (3) damage caused by such access.

[115] Accordingly, on the basis of the current pleadings the answer to the first question is no.

[116] The answer to the second question depends on which Servitude Right is sought to be enforced.

[117] In the IAD Servitude, Servitude Right 2 is stated to be over Servitude Area 1 as upgraded in terms of Servitude Right 1. Accordingly Servitude Right 2 does not arise until the road has been upgraded and the answer to the second question in respect of Servitude Right 2 is yes. Servitude Right 4 falls into two parts: a right of access to build a new road and bridge and thereafter a right of access over the road and bridge. In respect of the second part, the answer to the second question is yes. The answer in relation to Servitudes 1, 3 and 5, which are not conditional on a road being upgraded or built, is no.

[118] In the KP Servitude, Servitude Right 2 does not arise until the road is upgraded and the answer to question 2 in respect of Servitude Right 2 is yes. Servitude Rights 1,3,4,5,6 and 7 are not conditional on the upgrading of the road and the answer to question 2 in respect of these Servitude Rights is no.

Question 9: Is any obligation on Glasa to pay compensation under servitude condition 5 of the IAD Servitude, servitude condition 7 of the KP Servitude, and clause 28 of the LLP Contract conditional upon (a) Glasa making a request by written notice that trees be felled, (b) the tree felling being carried out in accordance with an agreed felling programme; and (c) of the other procedures specified in those clauses being satisfied?

Pursuers' submissions

[119] Counsel for the pursuers submitted that the answer to this was no. The various procedural provisions were not conditions suspensive of Glasa LLP's obligation to pay compensation merely establish a mechanism for reaching agreement on the trees to be felled and ensuring the trees were felled in a responsible manner. A failure to follow these procedures might have given the parties reason to object to the felling at the time, but the procedures had no continuing relevance once the trees had been felled. Once parties agree which trees were to be felled, and the trees were felled without objection, Glasa LLP's obligation to pay compensation was triggered. Accordingly a relevant claim for tree felling compensation did not require any averments about the procedures specified in the questions.

Defender's submissions

[120] Counsel for the defenders submitted that answer to this question was yes.

[121] Clause 28 had not been complied with as no written notice had been given. There was no averment of a tree felling programme having been agreed in advance. In any event the clause only applies after “Commencement of Construction”.

[122] He submitted that the relevant servitude conditions should be given the same interpretation as clause 28.

[123] He further submitted that the pursuer’s averments anent discussions about felling with a representative of SSE were irrelevant and lacking in specification.

Discussion and decision

IAD and KP Servitudes

[124] Condition 5 of the IAD Servitude and condition 7 of the KP servitude are the same and so I shall treat them together.

[125] Conditions 5 and 7 contain two separate and distinct paragraphs.

[126] The meaning of the first paragraph is clear. Liability under the first paragraph arises only in the circumstances where the Benefited Owner wishes to fell trees for carrying out the construction of a new bridge and road. If so the benefited owner must give a written notice. If the Burdened Owner consents then the Burdened Owner arranges a sale. Compensation is payable in relation to “such sale”. The condition is not a general provision for compensation for tree felling. It is a provision for compensation for a specific sale specifically requested by the Benefited Owner. In order to plead a relevant case for payment under the first paragraph of condition 5 or 7 Mr Duncan or KP would require to aver that the felling was for the purposes of the construction of the new bridge and road, written notice had been given and consented to and a sale arranged. Accordingly in relation to the first paragraph of condition 5 and 7 the answer to (a) is yes (b) is no and (c) is yes.

[127] The second paragraph does not apply to tree felling in respect of the new bridge and road. Instead it applies to trees removed from pipelines, cables, the power house and Access Routes. No written notice is required and all that is required is an agreed tree felling programme. In relation to the second paragraph of conditions 5 and 7 the answer to (a) is no (b) is yes and (c) is yes.

Clause 28

[128] Clause 28.1 is conditional upon a written notice but makes no reference to a tree felling programme. The answer in respect of Clause 28.1 is (a) yes (b) no (c) yes.

[129] Clause 28.2 makes no reference to a written notice but obliges KP or Glasa LLP to carry out tree felling in accordance with a felling programme agreed between them in advance. The answer in respect of Clause 28.2 is (a) no (b) yes (c) yes.

[130] Clause 28.3 (a) permits KP to fell trees by agreement with SSE. The answer in respect of clause 28.3(a) is (a) no (b) yes (c) yes.

[131] Clause 28.3(b) permits Glasa LLP to fell trees subject to the provisions of Clause 28.2. The answer in respect of clause 28.3(b) is accordingly the same as the answer in respect of Clause 28.2.

Clause 28.4 applies to windblow rather than felling and so the question is not relevant.

Question 10: Is the term 'damage' in servitude condition 1 of the IAD Servitude to be interpreted as encompassing the loss of capital value averred by Mr Duncan in Article 20 of CA137/18? If it does not, is any other relevant case for recovery of this sum pled?

Pursuers' submissions

[132] Counsel for the pursuers submitted that either servitude condition 1.1 or servitude condition 1.2 was broad enough to allow recovery of the loss claimed in respect of stalking, being a loss of capital value of the affected land, attributable to damage inflicted upon it.

Defender's submissions

[133] Counsel for the defenders submitted that the answer to question 10 was no.

[134] Counsel submitted that the damage referred to in condition 1.1 of the IAD Servitude was property damage, not pure economic loss. The indemnity provision in condition 1.3 was directed towards liabilities incurred to third parties and was not an indemnity in respect of loss and damage, which would not be praedial.

[135] He further submitted that the losses were too remote. They were not losses which arose in the ordinary course of things, and there were no averments to establish that the losses could have been within the reasonable contemplation of the parties (McBride, *The Law of Contract in Scotland* paras 22.65 – 22.73, *Balfour Beatty Construction (Scotland) Ltd v Scottish Power Plc* 1994 SC (HL) 20).

Discussion and decision

[136] Servitude Condition 1 contains three sub-conditions but the word “damage” appears in only the first of these.

[137] Servitude Condition 1.1 obliges the Benefited Owner to:

“make good on demand all damage caused to the Burdened Property and/or the Servitude Area by reason of the exercise of the Servitude Rights by the Benefited Owner..to the reasonable satisfaction of the Burdened Owner”

[138] In my opinion the damage referred to here is physical damage to the Burdened Property or Servitude area and not the loss of capital value of the Estate. In terms of condition 1.1, the damage must be caused to the specific items of heritable property defined as the Burdened Property or Servitude Area. Condition 1.1 provides that the damage must be of a kind which can be “made good” to the reasonable satisfaction of the Burdened Owner. The words “made good” and the reference to reasonable satisfaction connote

physical repair to property. Loss of capital value due to the voluntary departure of wild deer to neighbouring estates cannot be said to be damage to the land itself. For these reasons, the answer to the first question is no.

[139] I now turn to the second question.

[140] Condition 1.3 is an obligation on the Benefited Owner to indemnify the Burdened Owner in respect of claims by third parties. Such an indemnity is commonly found in servitudes (Cusine and Paisley para 5.31). The claim for loss of capital value is not a claim by a third party and so cannot be relevantly founded on condition 1.3.

[141] Condition 1.2 obliges the Benefited Owner to:

“use their best endeavours to ensure that the Servitude Rights are exercised so as to cause the minimum disturbance, nuisance or annoyance as is reasonably practicable to the Burdened Owner”

[142] Mr Duncan pleads a case on disturbance. He avers in article 20 that there has been a reduction in deer numbers as “a direct result of the disturbance created by the Glasa LLP”. The disturbance arose “from the passage of heavy vehicles, the felling of trees”. He avers that “the reduction in the number of deer able to be supported by the Estate has caused a loss of Capital Value during the period required to return the woodland to its previous extent”.

[143] In my opinion Mr Duncan does not plead a relevant case on liability due to the passage of heavy vehicles. In order to do so he would require to aver that Glasa LLP had not used its best endeavours to ensure that the exercise of the access rights caused more than minimum disturbance. He would require to specify what the minimum disturbance would have been and to what extent that minimum had been exceeded. He would require to aver what the effect on the deer would have been had the minimum not been exceeded. He does

not aver a causal link between the passage of vehicles and the sum sought by way of capital value; he calculates that sum only by reference to loss of woodland.

[144] Nor does Mr Duncan plead a relevant case on liability due to the felling of trees in respect of the exercise of the Servitude Rights. He does not aver what the minimum disturbance by way of cutting down trees for the purpose of exercise of the servitude would have been. He does not aver to what extent that minimum was exceeded. He does not aver that Glasa LLP failed to use best endeavours. He does not aver which particular rights of servitude required the cutting down of trees. He does not distinguish between the felling of trees on Mr Duncan's property and the felling of trees on parts of the Estate owned by other parties. Condition 1.2 can only apply to the part of the Estate owned by Mr Duncan and cannot apply to (for example) the felling of trees to clear the turbine site, which was owned by Glasa LLP.

[145] The answer to the second question is no.

Order

[146] I shall put the case out by order for discussion of further procedure in the light of the answers to the foregoing questions.