OUTER HOUSE, COURT OF SESSION

[2019] CSOH 113

CA49/18

OPINION OF LORD CLARK

In the cause

SCOT ROADS PARTNERSHIP PROJECT LIMITED

Pursuer

against

THE SCOTTISH MINISTERS

Defenders

Pursuer: Borland QC, Manson; DAC Beachcroft Scotland LLP
Defenders: MacNeill QC, van der Westhuizen; Anderson Strathern

31 December 2019

Introduction

[1] The pursuer contracted with the defenders to carry out works on certain motorways in central Scotland. In relation to the M8 motorway, part of the works involved a new section of carriageway being constructed near Baillieston. The new section required to be connected, or tied-in, to the existing carriageway. The carriageways were at different levels and the tie-in works were complex. The initial arrangement for the tie-in works was for lanes of the existing carriageway to be closed in stages to allow the works to be done. This would have kept the motorway open and in use. In due course, a new proposal was made to change that arrangement, by closing the existing carriageway completely for a period of

time and diverting traffic, to allow the tie-in works to be done. In order for that new proposal to be progressed, the pursuer had to submit a traffic management proposal and a communications plan to the defenders for approval. In this action, the pursuer seeks declarator that the defenders are in breach of contract by failing to approve, on or before 21 October 2016, a traffic management proposal and communications plan in relation to the new proposal for the Baillieston tie-in on the M8 motorway, which the pursuer says were submitted by it to the defenders. The defenders contend that the material submitted by the pursuer did not, on a proper construction of the relevant contractual provisions, constitute a traffic management proposal and a communications plan and hence nothing capable of being approved was in fact submitted. The case called before me for a proof before answer.

Background

[2] In brief summary, the background is as follows. On 13 February 2014, the pursuer and the defenders entered into an agreement in relation to a motorway improvement project for works on the M8, M73 and M74 motorways ("the MIP"). The agreement was described as a design, build, finance and operate agreement ("the DBFO agreement"). The pursuer is a special purpose vehicle and was employed by the defenders as the contractor under the DBFO agreement. The pursuer sub-contracted the construction works to a joint venture, described as the Ferrovial/Lagan Joint Venture ("FLJV"). On 13 February 2014, the pursuer and FLJV entered into a contract known as the new works agreement ("NWA"), in terms of which FLJV was to provide certain works and services to the pursuer in relation to the MIP. Transport Scotland dealt with matters on behalf of the defenders.

[3] As the MIP proceeded, the progress of works across the site was noted to be slower than required to satisfy the construction programme contained within Schedule 3 of the

DBFO agreement. Commercial disputes also began to block progress, and cash-flow was described by FLJV personnel as being a matter of significant concern. Discussions took place between the pursuer, the defenders and FLJV to explore whether any agreement could be reached to ensure completion of the MIP within the previously committed timescales and with cost certainty. The parties discussed a potential Agreement for General Settement ("the AGS"). For present purposes, a key part of those discussions concerned the proposal made by the pursuer about the Baillieston tie-in works.

[4] On 12 August 2016, Mr Pascual of FLJV sent a letter to Mr Valtuena –Ramos of the pursuer. The heading referred *inter alia* to "RE: BAILLIESTON TIE-IN WORKS ADVANCED INFORMATION". The letter began by stating:

> **"**We enclose to this letter advance information for our traffic management proposal required to facilitate the Baillieston tie in Works in cognisance of the critical nature of these Works."

It ended in the following terms:

> "It is our intention to submit a Contractor Notice of Change, traffic management proposal and communication package in advance of the implementation and no later than four weeks prior to the 21st October 2016."

The letter was sent under reference to the then existing draft of the AGS. An email was sent on the same day by Mr Pascual to Mark Miller of the pursuer, with the letter attached. Mr Miller forwarded it to Andrew Leven of Transport Scotland, saying that this was the letter to be "added in" to the AGS, and asking Mr Leven whether the letter should come from FLJV or the pursuer. Mr Leven responded by email shortly afterwards, saying the letter should come from the pursuer and adding "but probably worth us reviewing it first to ensure that we are content".

[5] On the morning of 17 August 2016 Mr Miller emailed Mr Leven asking "have you any comments or is it OK for me to formally issue and incorporate in the [AGS]?" The response by Mr Leven very shortly afterwards was as follows:

> "We have not yet completed our review.
>
> As you can imagine, we see the implications of signing up to this letter as very significant, and we will have to take an appropriate amount of care in ensuring that we don't agree to something which we would subsequently seek to alter. Should you wish to issue immediately, I would expect us to require revision prior to execution of any agreement.
>
> An immediate observation is that the proposal contains no communications strategy. We would require – as a minimum – that the intention to undertake substantial comms (including commercial radio) be included within the proposal. We will revert once we have more to say."

[6] Mr Leven then sent an email dated 24 August 2016 to Mr Miller and Mr Valtuena-Ramos, stating *inter alia*:

> "Letter does not include comms proposals. This needs to be added to allow it to be accepted. Letter must include a commitment to extensive and continuing comms throughout the works, including the provision of commercial radio in advance (2 weeks) and throughout the period of the diversion as a minimum.
>
> Appropriate traffic management to be provided as agreed with consultees… "

[7] The initial letter of 12 August 2016 was then revised by FLJV and a further letter was sent to the pursuer by FLJV on 5 September 2016. The letter dated 5 September stated:

> "Further to the requests received for further clarifications in relation to our traffic management proposal required to facilitate the Baillieston tie in Works, we address the clarifications sought in this letter."

The letter went on, under the sub-heading "Design Rationale for Proposal", to explain why the particular proposal was the best solution. It referred to "our proposal detailed below". There was then a further sub-heading "Details of Proposal" under which the nature of the tie-in proposal was explained. There was a further sub-heading: "Implications of Traffic Management", under which the letter stated:

> "In support of the above please find attached a traffic model and the drawings showing the proposed TM layout and diversions.
>
> Traffic management will be provided as agreed with the Consultees and this will include the implementation if so required of mobile ADS either end of the A8 works to alert motorists to the works (four weeks in advance of works commencing) and remaining in place during the works.
>
> It is confirmed also that the proposal will include the provision of a dedicated recovery service located immediately adjacent to the A8/A89 roundabout for the full duration of its use as a diversionary route from the A8/M8 traffic.
>
> The traffic management proposal will also include the analysis and provision if required of temporary traffic signals along the A752 subject to consultation with North Lanarkshire Council."

Further on in the letter there was a further sub-heading "Programme for Implementing the Change and Communications" under which the following was stated:

> "It is our intention to submit a Contractor Notice of Change, traffic management proposal and communication package in advance of the implementation and no later than 6 (six) weeks prior to the implementation of the Works or as may be otherwise agreed the Scottish ministers.
>
> We confirm that FLJV is committed to extensive and continuing communications for the duration of the works, including the provision of commercial radio in advance (2 weeks) and during the existence of the diversion. Any modification to the communications protocols during the period will be submitted for the approval of the Scottish Ministers."

For present purposes, it suffices to characterise a Contractor Notice of Change as a notice of a proposed change to the works.

[8] As the pursuer had been advised by Transport Scotland that the letter to be referred to in the AGS had to come from the pursuer itself, the pursuer sent Transport Scotland a letter dated 6 September 2016, which adopted and incorporated the terms of the letter dated 5 September 2016 from FLJV. The letter dated 6 September 2016 from the pursuer to Transport Scotland was headed:

> "M8, M73, M74 MOTORWAY IMPROVEMENTS DBFO
> BAILLIESTON TIE IN WORKS ADVANCED INFORMATION"

The letter stated:

> "Further to our various meetings, discussions and emails (12 and 24 August 2016), we enclose for your attention a letter from the New Works Contractor, who is undertaking the work on our behalf, outlining advanced information relating to the proposed traffic management requirements at Baillieston tie in and comprising the following information…".

The information included the letter from FLJV dated 5 September and the material which FLJV had enclosed with that letter, listed as "Proposal, Baillieston TI-Works Phase 1-A1, Baillieston TI-Works Phase 2-A1", "Programme of Works – Baillieston programme 15 05 17", "Traffic Management – Drawings…" comprising four drawings and "TM Model Baillieston TM Works, M8-A8 Closure, Evaluation Report, 22-07-16".

[9] On 15 September 2016 the pursuer, the defenders and FLJV entered into the AGS. The AGS provided, *inter alia*, for FLJV to receive substantial additional sums of money and a waiver of claims against it, and for the Permit to Use ("PTU") dates for Phase 1 and Phase 2 of the works to be achieved by 31 May 2017. For present purposes, it suffices to define the PTU date for each phase as the date on which the defenders acknowledge the issue by the pursuer of substantial completion certificates and confirm that the phase of the works is to be made available for public use with immediate effect.

[10] The AGS also provided (in stipulation eighth of clause 2) that:

> "Unless otherwise agreed between the Parties in writing, the parties agree to carry out the undertakings and conditions set out in Appendix B of the AGS, to each of which the parties bind themselves."

The conditions in Appendix B included the following:

> "I) The approval by the Scottish Ministers of:

> B.1 Traffic management proposal and communications plans on or before the 21st October 2016, which are required to facilitate the tie-in at Baillieston (new M8 Ch 0 to 600), subject to the submission of the following:
> (i) The traffic management proposal and communications plan for consideration no later than four weeks prior to implementation of such traffic management scheme and such proposal shall be similar in all respects to the advance information provided by [the pursuer] to the Scottish Ministers in its letter reference SRP/01/1.2/MRM/LB/6636, dated 6 September 2016.
> (ii) Company Notice of Change submitted in accordance with the DBFO Agreement."

[11] A Company Notice of Change ("CNC") concerns a change (for example to the works) proposed by the pursuer in accordance with Clause 36 of the DBFO agreement. In terms of that agreement, to seek to introduce such a change, the pursuer required to serve a CNC on the defenders. The CNC required to set out the proposed change in sufficient detail to enable the defenders to evaluate it in full, including the programme for implementing the change. It also required the pursuer to specify the reasons for proposing the change and to request the defenders to consult with the pursuer with a view to deciding whether to agree to the change and, if so, what consequential changes the defenders required as a result. The pursuer also required to indicate in the CNC if there were any dates by which a decision by the defenders was critical. Further provisions of the DBFO agreement stated that the defenders were required to evaluate the change in good faith, taking into account all relevant issues, and that as soon as practicable after receiving the CNC, the parties were to meet and discuss the matters referred to in it.

[12] By letter dated 3 October 2016, FLJV submitted a Contractor Notice of Change to the pursuer. The letter began:

> "Further to previous correspondence and subsequent discussions regarding our traffic management proposal to facilitate the Baillieston tie in Works, we now by this letter formally submit Contractors Notice of Change No 24 for your consideration and agreement."

The letter dated 3 October 2016 had a sub-heading "Programme for Implementing the Change and Communications" under which the following was stated:

> "It is our intention to submit a traffic management proposal and communication package in advance of the implementation of the works."

[13] By email dated 17 October 2016, the pursuer sent to Transport Scotland the letter of 3 October 2016, and the documents attached thereto, along with a letter from the pursuer dated 18 October 2016 (which was then sent in hard copy the next day). The letter dated 18 October 2016 stated:

> "M8, M73, M74 MOTORWAY IMPROVEMENTS DBFO
> COMPANY NOTICE OF CHANGE NO 24
> As required by Clause 36.1 of the DBFO Agreement, we would advise that we wish to introduce a Company Notice of Change the details of which are contained within the attached documentation:
> 1. Company Notice of Change No 24
> 2. Supporting documentation in satisfaction of the requirements of Clause 36.2 of the DBFO Agreement.
>
> In accordance with Clause 36.4 of the DBFO Agreement we are available to meet should you consider it necessary to discuss the content of this submission."

The CNC ("CNC 24") attached to the letter stated that the pursuer wished to introduce a change entitled "Baillieston Tie-In Works TM Arrangements" to take place "during the period from Thursday 5 January 2017 to Thursday 16 March 2017 or thereabouts." It went on to say that in satisfaction of the pursuer's obligation to provide sufficient information to allow the defenders to evaluate this CNC, further documentation was attached. This included FLJV's letter dated 3 October 2016 and the letter dated 5 September 2016 "and the information contained therein, as previously submitted". It also included the material which had been attached to the letter dated 5 September, referred to above. CNC 24 also stated:

> "Therefore we would request that Scottish Ministers enter into a period of consultation with SRP and other interested parties such as the Designer, New Works

> Contractor and Operations & Maintenance Contractor to fully evaluate this change and if satisfied to provide their agreement to this Notice of Change".

[14] Also on 18 October 2016 there was a "high-level" meeting the minutes of which state:

> "TM Baillieston tie-in: FLJV to confirm 12/01 to 27/03/2017: CoNC No 24 sent to TS. TS to approve."

The minutes for the high-level meetings on 25 October 2016 and 9 November 2016 were, on this matter, in the same terms. The dates referred to in the minutes are different from those stated in CNC 24, which were, as noted above, 5 January 2017 to 16 March 2017, or thereabouts.

[15] The pursuer averred that it did everything required of it, timeously, to put the defenders in a position to issue the relevant approvals and fulfil the relevant conditions. In particular, the pursuer contended that: the material submitted 17 October 2016 constituted the traffic management proposal and communications plan called for by paragraph B.1 (i) of Appendix B of the AGS. Accordingly, the pursuer averred, the defenders ought to have accepted the traffic management proposal and communications plan (which were both in the form of CNC 24) on or before 21 October 2016 as required by that paragraph.

[16] The pursuer therefore sought declarator to the effect that, by failing to approve on or before 21 October 2016 the traffic management proposal and communications plan referred to in paragraph B.1 of Appendix B of the AGS, the defenders were in breach of the obligations incumbent upon them. The declarator sought by the pursuer is stated in its second Conclusion, which referred to the failure of the defenders to issue the approvals "specified in the document entitled 'Schedule of Required Approvals' appended hereto…". The schedule lists the traffic management proposal and the communications plan. It does not include CNC 24.

[17] The defenders' position was that prior to October 2016 the pursuer had not submitted a traffic management proposal or a communications plan as required by paragraph B.1 (i) of Appendix B to the AGS.

[18] The pursuer had an averment that the defenders' alleged failures had served to frustrate the ability of the pursuer and FLJV to complete the works required under the DBFO agreement and the NWA prior to the PTU dates. The pursuer submitted that this averment was simply designed to give information about the commercial significance of what were said to be the consequences of the alleged breach by the defenders. The defenders' position was that their approval of CNC 24, a traffic management proposal and a communications plan, in January and February 2017, did not delay the achievement of the PTU dates of 31 May 2017 provided for in the AGS, or the completion of the relevant works by the dates provided for in the AGS. The court was not given detailed evidence or submissions by either party on this matter and I proceed on the basis that it concerned only the potential commercial significance of the alleged breach.

The issue

[19] The substantive issue which arises for determination is therefore whether the documents submitted by the pursuer constituted the "traffic management proposal" and "communications plan" that required to be submitted under paragraph B.1 (i) of Appendix B to the AGS. The defenders did not give approval on or before 21 October 2016. Accordingly, if the two parts of the issue are each answered in the affirmative, it follows that the defenders were in breach of their obligations under paragraph B.1 (i).

Objections to evidence

[20] Before turning to the substantive issue, I require to deal with objections made by the pursuer to the relevance and admissibility of evidence. Put broadly, the pursuer objected on those grounds to a great deal of the evidence sought to be led on behalf of the defenders. The defenders submitted that virtually all of the evidence objected to was relevant and admissible. To set this matter in context, I shall set out, in very brief terms, the evidence led and the parties' submissions on the objections, and then explain my decision and reasons on the points raised in the pursuer's note of objections. Thereafter, I shall address the two parts of the substantive issue.

The evidence

[21] The first witness was the pursuer's General Manager, Mark Miller. His evidence covered the contents of what were claimed by the pursuer to be the traffic management proposal and communications plan submitted to the defenders, together with the relevant correspondence and documentation pertaining to the same. During the course of cross-examination by senior counsel for the defenders, senior counsel for the pursuer made a number of objections. As these were largely the same as the points raised in the pursuer's note of objections I will not rehearse them here. Mr Miller explained that each side had lawyers involved in putting together the AGS. He stated that the closure was of an extremely busy part of the motorway and the diversion of, say, 100,000 vehicles per day was a major undertaking. Everyone involved would know that to be the case. He explained that, in his view, a traffic management proposal is different from a temporary traffic management scheme ("TTMS") which is something referred to in the DBFO agreement. While consultation and certification for a TTMS would be required in due course prior to

construction, as stated in the DBFO agreement, the traffic management proposal referred to in the AGS was different; it was just a proposal or plan.

[22] After the evidence of Mr Miller had been led, the parties reached agreement about the evidence of most of the other witnesses and dealt with this matter in a joint minute. The agreement was that the evidence of the pursuer's witnesses Raul Pascual, Alfredo Sobrino, and Alexander Little and of the defenders' witnesses Graeme Reid, Graham Porteous and Alastair Somerville, was to be taken as that set out in the witness's principal witness statement and (where one had been lodged) the supplementary witness statement, but subject always to any questions of admissibility, competency and relevancy. It was further agreed that an absence of cross-examination of any of the foregoing witnesses did not imply acceptance of their evidence.

[23] Raul Pascual was the Project Manager for the FLJV. His evidence included the submission of what he said were the traffic management proposal and communications plan to the defenders together with the relevant correspondence and documentation pertaining to these. He discussed *inter alia* the letters dated 12 August 2016 and 5 September 2016 from FLJV, the letter (with enclosures) dated 6 September 2016, and CNC 24 and the attendant documentation. Alfredo Sobrino is the Construction Manager for FLJV. He gave evidence about aspects of the background to the entering into of the AGS, including the causes of delays in carrying out the works, the complexity of the Baillieston tie-in works, the AGS having been entered into in order to achieve the PTU dates of 31 May 2017, and the importance of approval being given timeously to allow that to happen. He profoundly disagreed with the view that CNC 24 could only be approved once the defenders and the consultees had signed the appropriate certificates. He mentioned the fact that when CNC 24 came to be approved in February 2017 no certificates were required. Alex Little is the Traffic

Management Manager for the FLJV. He spoke to many of the same areas of evidence as Mr Pascual.

[24] The evidence of the defenders' witnesses Andrew Leven and Lawrence Campbell was not covered by the joint minute and so these two witnesses were led on behalf of the defenders. During the project, Andrew Leven worked within Transport Scotland's Major Transport Infrastructure Works Directorate. His evidence included an explanation of the communications work required to be undertaken in relation to the closure of a motorway as part of the MIP. He also discussed what the defenders needed to understand about what the pursuer intended to do in relation to both traffic management and communications, and that communications plans had been used during the MIP for works that has required communications. He spoke to what the defenders needed to understand in order to accept CNC 24. He explained what a traffic management proposal should include, and why a CNC was required. He provided evidence about difficulties that had been experienced throughout the project. He also discussed the pursuer's prior conduct in relation to traffic management proposals and communications plans.

[25] In cross-examination, he accepted that in terms of the DBFO agreement the defenders were responsible for all stakeholder communications and all media communications and that this contractual term had not been varied. There had been a dispute in 2015 about which party was to pay for certain forms of communication, in particular regarding commercial radio slots. He agreed that as at the summer of 2016 there was a significant delay in the project and that the Baillieston tie-in was time-critical. It was significant in scale and formed part of the critical path for completion of the contract works. It was a common objective of all three parties to facilitate the pursuer to have PTUs on 31 May 2017. The time gap between execution of the AGS and the date when approval of any traffic management

proposal was required by the defenders was just over five weeks, which he accepted was "not a long time" for consideration and approval of documents. His position was that the submission by the pursuer of consultation certificates from various stakeholders was part of the process of the pursuer gaining approval from the defenders under the AGS. In order to agree CNC 24, the defenders would have to be comfortable that stakeholders were comfortable with the proposals. He agreed that the AGS itself did not mention a requirement for the submission of consultation certificates.

[26] He was taken through the detail of the correspondence. He accepted that the dates of Thursday 5 January 2017 to Thursday 16 March 2017, or thereabouts were being suggested by the pursuer in CNC 24 as the starting date and completion date for the tie-in and that these were the same dates as mentioned in the programme sent on 5 and 6 September 2016. He accepted that the traffic management proposal was exactly the same as in the letters of 5 and 6 September 2016, so far as related to the works referred to in the letters. It was similar in all respects to what had been proposed in the letter of 6 September 2016 "in terms of the diversion round Baillieston". However, he disagreed with the proposition that what was submitted on 17 October 2016 complied with all of the requirements of paragraph B.1. In particular, there was, in his view, no communications plan. He was taken to the minutes of the high level meeting on 18 October 2016 and the reference to CNC 24 with the action "TS to approve". While there was no record in this section of the minutes that what had been submitted was lacking in any respect, he would not expect there to be a mention of that matter. The same points applied to the minutes of the next high level meeting, on 25 October 2016. It was put to him that Transport Scotland ought to have approved the documents submitted, prior to 21 October 2016. His response was that they couldn't approve the material received. A number of issues had not been

addressed. The effect on the travelling public had to be mitigated and managed. Proper communication was needed. The views of other stakeholders were required. It was also necessary to understand traffic management of other areas.

[27] In re-examination, when asked whether was there sufficient information to allow the defenders to authorise CNC 24, he said that the material presented would not have been enough for him responsibly to conclude that the M8 should be closed for that period of time. At that point, Transport Scotland did not have the information from the pursuer which in due course (prior to February 2017) they were given. If the proposal and plan could have been approved when the AGS was signed, that could just have been done at that point. The AGS imposed the separate requirement for approval to give time for the material to be considered. It was necessary to understand and accept that FLJV could do what they said they were going to do in the time stated. Transport Scotland had to understand that was realistic and what had in fact occurred was that in the period from the signing of the AGS up to approval in February 2017 Transport Scotland had worked with the pursuer to understand it. The fact that the minutes of the high level meetings did not record frustration on the part of the pursuer or FLJV about CNC 24 not having been approved was what one would expect, given that it was known to them that CNC 24 had been submitted and not yet approved. When asked to clarify his position that the traffic management proposal submitted in CNC 24 was the same as in the letters of 5 and 6 September 2016, he replied that the traffic management on the road network at the time the closure of M8 was going to happen (the diversion around Baillieston junction) was the same as in the letters. In relation to the communications plan, he was asked whether the information given in the letters and CNC 24 would ensure that the public were adequately informed. He responded that a

communication proposal would have to be much more involved and have much more detail for that purpose.

[28] Laurence Campbell was, in effect, the defenders' representative on the site for the M8 project. He adopted his witness statement and his supplementary witness statement. There was no cross-examination, but the pursuer maintained its objections about the relevance and admissibility of parts of his evidence. In his witness statement and supplementary statement he gave evidence about what was presented by FLJV in relation to the benefits of the proposal to close the M8, and about the proposed duration. He explained what a traffic management plan and communications plan required to include, and what the material submitted did not include and why it could not be approved. He also gave evidence about why CNC 24 could not be approved, with reference to matters that were still to be finalised. In his supplementary witness statement, he set out what a communications plan entailed, referring to the practice in relation to previous submissions. He mentioned an example of what previous submissions had contained.

[29] Graham Porteous was Head of Construction at Transport Scotland during the MIP. In his witness statement he dealt with the importance of timing in relation to a communications plan. He also spoke to what had been dealt with between the parties in the past in relation to traffic management proposals.

[30] Alastair Somerville was the Project Manager for the MIP. He gave evidence, in his witness statement and supplementary witness statement, in relation to the certification process involving consultees. He also explained certain background circumstances concerning what a communications plan entailed, with reference to the practice adopted by the parties in relation to previous submissions. He further explained what was not included

in the letter of 6 September 2016, with reference to what a traffic management proposal and communications plan required to contain.

[31] Graeme Reid had worked for Transport Scotland as Project Sponsor for the MIP. In his witness statement he spoke to the background to the proposal for works at the Baillieston tie-in, the development of a traffic management scheme for the tie-in, the relevance of the works at the Raith interchange, and the preparation of the AGS. He stated that any delay in approving what had been submitted by the pursuer was a result of the failure by FLJV to confirm timescales and therefore what traffic management restrictions were planned on the network, and their failure to provide a communications plan. The final traffic management proposal was not produced until 2 January 2017, with sign-off by the consultees on 27 January 2017. Shortly afterwards, CNC 24 was approved. Various changes, including in relation to timing, were made prior to approval. The proposal ultimately implemented was materially different from that made in the original submission of the CNC in October 2016. The timing of the Baillieston tie-in works related to delays by FLJV in completing the works at Raith and in finalising their traffic management proposal and communications plan. His supplementary witness statement included comments on several of the witness statements lodged by the pursuer.

[32] At the pre-proof by-order it was indicated on behalf of the pursuer that a note of objections to evidence proposed to be led on behalf of the defenders would be lodged. The pursuer proposed that no submissions on the objections should be made until the stage of final submissions, but that in the meantime the court should allow the evidence to which objections were taken to be heard under reservation of questions of competency and relevancy. The defenders did not oppose that suggestion. This can often be an appropriate

approach, partly for the reason that frequent interruptions of the proof may be avoided. I therefore allowed the evidence to proceed on that basis.

Submissions for the pursuer on the objections

[33] The pursuer contended that the defenders had sought to adduce swathes of irrelevant and inadmissible evidence. The core relevant issue for the court was the proper construction to be given to the relevant provisions in the AGS. That was a matter for the court and the only evidence which could be relevant to that exercise comprised: (a) the words in the AGS itself; and (b) the joint understanding and common purpose of the parties at the time when they signed the AGS.

[34] The defenders had failed to set up any case in their pleadings as to the relevant factual context or background which was known to both parties at the time when the AGS was signed. To the extent, therefore, that the defenders sought to lead evidence relative to context or background, the pursuer objected to it (as set out in the note of objections) on the basis that the defenders had no pleadings for any of it. Furthermore, in the statements lodged, the defenders sought to adduce irrelevant evidence which related to subjective intentions and objectives, and which in many cases arose from events that occurred and correspondence that was exchanged after the AGS was signed. These were not matters to which the court could have regard in undertaking the exercise of contractual construction. To the extent, therefore, that the defenders sought to lead evidence relative to such matters, the pursuer objected to it on the basis that it was irrelevant and inadmissible.

[35] Similarly, the defenders sought to adduce evidence of events which occurred and correspondence which was exchanged after the date when the pursuer contends the AGS was breached (21 October 2016). This evidence could have no relevant bearing on the

question of whether or not the defenders were in breach as at that date. Further, the defenders' witnesses made assertions about the meaning and effect of the words in the relevant provisions of the AGS, and the DBFO agreement, which were not admissible. The same objection applied to subjective assertions as to what was required in relation to traffic management proposals and communications plans. Reference was made to *Luminar Lava Ignite Limited* v *Mama Group plc* 2010 SC 310, *Kennedy* v *Cordia Services LLP* 2016 SC (UKSC) 59, Walker and Walker *The Law of Evidence in Scotland* (4th ed, paras 16.1.3-16.1.5), *Mannai Investments Co Ltd* v *Eagle Star Life Assurance* [1997] AC 749, and *QOQT Ins* v *International Oil & Gas Technology* [2014] EWHC Civ 1628. The specific passages of evidence in the witness statements and supplementary witness statements lodged by the defenders to which objection was taken and the particular grounds for objecting to each passage were identified in the note of objections.

Submissions for the defenders on the objections

[36] The defenders' position was that, on a proper analysis, the witnesses had provided evidence about matters which were or would have been known to both parties, including relevant background circumstances, and also had given evidence in response to evidence by the pursuer's witnesses. This included that the parties were familiar with communications plans. It was accepted that there was the occasional assertion of subjective views, such as what the defenders were "prepared to accept". The evidence of the witnesses required to be read in the context of their other evidence about what was known by the parties in relation to traffic management proposals and communications plans. For example, Andrew Leven and Laurence Campbell spoke to the pursuer's prior conduct in relation to traffic management proposals and communications plans, which would have been known to both

parties. Mr Campbell was entitled to express the view that the absence of the details he had referred to made it obvious, that is to say apparent to all parties, that what was contained did not constitute a traffic management proposal or a communications plan.

[37] The defences had given notice (in Answer 21) of the defenders' position that what had been submitted by 21 October 2016 was not a traffic management proposal nor a communications plan. The defenders' position was spelt out. There could be no doubt that the defenders had always maintained the effect that the surrounding circumstances had, namely that what had been submitted by 21 October did not comply with the requirements of a traffic management proposal and a communications plan and further that what was required was what was in due course submitted on 15 February and 12 January 2017. Reference was made to *Arnold* v *Britton* [2015] AC 1619 in which Lord Hodge stated (para 74) that there much to be said for what Lord Drummond Young set out in *MRS Distribution* v *DS Smith (UK) Ltd* 2004 SLT 631 (para 14) where he referred to facts and circumstances extraneous to the contract itself. Matters of common knowledge which "obviously" do not require to be the subject of averment would include the size and importance of the M8 and that closing the carriageway and diverting traffic through neighbouring roads was a major and complex undertaking requiring the most careful planning and forethought. The question of fair notice also required to be seen in the context that in commercial actions pleadings in traditional form are not normally required or encouraged and that normally pleadings should be in abbreviated form. The overriding requirement is one of fair notice. There is a desire for pleadings in commercial actions to be concise and a recognition that detailed notice may be given in ways other than formal averments. Reference was made to *Soccer Savings (Scotland) Ltd* v *Scottish Building Society Ltd* [2012] CSOH 104 (*per* Lord Hodge at para [26]), and *Symphony Equity Investments Ltd* v *Shakeshaft* [2013] CSOH 102 (*per* Lord

Hodge at para [38]). It was not accepted that notice of the defenders' position in the defences was deficient and did not allow the proof to be conducted fairly, but insofar as more detail of that position was illuminating to the pursuer, ample detail was provided in the witness statements that were exchanged on 19 March and 16 April 2019.

Decision and reasons on objections

Relevant legal principles

[38] The principles which govern the relevance and admissibility of evidence in a case such as the present can be summarised as follows.

(i) The general rule is that the court will not have regard to statements of parties or their agents in the course of negotiation of a contract as an aid to the construction of the words which the parties used in the final version of the contract, which alone expresses their consensus: *Luminar Lava Ignite Limited v Mama Group plc* (*per* Lord Hodge at para [39].

(ii) as an exception to the general rule, evidence of the factual background to the contract is relevant where the facts are known to both parties and those facts can cast light on either (a) the commercial purpose or purposes of the transaction objectively considered; or (b) the meaning of the words which the parties used in their contract. The two cases very often overlap as the ascertained commercial purpose may give meaning to particular words or phrases: *Luminar Lava,* (para [42]). Facts which are known only to one party are not admissible as part of the surrounding circumstances. For such circumstances to be available to the court in its task of ascertaining how a reasonable person would interpret the words of the contract, the circumstances must have been known to both parties or at least such knowledge must have been reasonably available to both of them. Most background facts which are relevant to the written contract are things which must be taken to have been

known by both parties to the contract, but there is a need for particular care where the respective parties to a contract had differing degrees of knowledge about the background circumstances: *Luminar Lava,* (para [45]).

(iii) Evidence based upon events after the date when the contract was entered into said to bear upon commercial purpose or the intention of the parties is irrelevant and inadmissible.

(iv) There is much to be said for the practice of requiring parties to give notice in their written pleadings both of the nature of the surrounding circumstances on which they rely and of their assertions as to the effect of those facts on the construction of the disputed words: *Arnold* v *Britton* (*per* Lord Hodge at para 74), under reference to Lord Drummond Young in *MRS Distribution Ltd* v *DS Smith (UK) Ltd* (para 14):

> "… in Scottish practice, if a party to a contract intends to rely on specific facts and circumstances extraneous to the contract itself, he must normally aver what those facts and circumstances are. Obviously this does not apply to matters that are common knowledge, but anything that is peculiar to the contract in question, or goes beyond the sphere of common knowledge, must normally be the subject of averment. In this way, Scots law should be able to avoid the difficulties that seem to have affected English law following the decision in *Investors Compensation Scheme Ltd v West Bromwich Building Society* … [where] evidence of extraneous facts and circumstances was regularly led at great length, regardless of the materiality of such evidence to the construction of the contract".

(v) A witness cannot usurp the function of the court by offering opinion on matters central to the outcome of the case or by speaking to matters of law and should avoid doing so as such evidence is inadmissible: *Kennedy v Cordia Services LLP* (per Lord Reed and Lord Hodge at paras [49] and [65]-[66); Walker and Walker, *The Law of Evidence in Scotland* (4th ed, paras16.1.3-16.1.5).

(vi) The approach to be taken in relation to the construction of items of correspondence or contractual notices and similar documents is that of the objective reasonable recipient who is armed with the relevant background knowledge known to both parties: *Mannai*

Investments Co Ltd v *Eagle Star Life Assurance* (*per* Lord Steyn at 767G-768H); and *QOQT Ins* v *International Oil & Gas Technology* (para 113).

Application of these principles

[39] As senior counsel for the defenders correctly observed, in commercial actions pleadings in traditional form are not normally required or encouraged. Normally, pleadings should be in abbreviated form: Practice Note No 1 of 2017, paragraphs 13(a) and 14(a). There remains, however, the overriding requirement of fair notice. Senior counsel for the defenders submitted that there is a recognition that detailed notice may be given in ways other than formal averments, citing two passages from Opinions of Lord Hodge in commercial actions:

> "Commercial procedure is sufficiently flexible to ensure that fair notice is given of a party's position before a proof is heard, either through the recovery of documents or by ordering signed witness statements on specific issues." *Soccer Savings (Scotland) Ltd* v *Scottish Building Society Ltd* (*per* Lord Hodge at para [26]).

and

> "The rules governing commercial actions give the court sufficient powers of case management to require timely disclosure of a party's case where the pleadings are not sufficiently specific, for example by the early disclosure of signed witness statements. I think that fair notice can be achieved by those means." *Symphony Equity Investments Ltd* v *Shakeshaft* (*per* Lord Hodge at para [29]).

[40] However, in reaching a proper understanding of these observations by Lord Hodge, one must consider the context in which they were made. In *Soccer Savings (Scotland) Ltd* v *Scottish Building Society Ltd*, the court was dealing with a debate in which the defender sought dismissal of the pursuer's case *inter alia* on the ground of lack of specification. Counsel for the defender submitted that a general averment by the pursuer that it had complied with its obligations was insufficient and that there had been a failure to respond to calls. Further specification was needed. It was in that context that Lord Hodge made the

observations referred to above, and concluded that he was not prepared to dismiss the action for lack of specification on that issue. In *Symphony Equity Investments Ltd* v *Shakeshaft*, the court was again dealing with a debate and counsel for the pursuer submitted that a general averment lacked specification and therefore failed to give fair notice of what was asserted. Lord Hodge was persuaded that it was not appropriate to dismiss the averments on the matter for want of specification and then made the comments noted above. Thus, in each case there was, at debate, a submission seeking exclusion of averments or dismissal of the action based upon a lack of specification. In a commercial action, when such issues are raised, it may well be appropriate to ordain the party whose pleadings are general but inspecific to give specification in advance of the proof by the means identified by Lord Hodge. If a party considers that a general averment is lacking in specification, that is commonly expected to be raised either at the preliminary hearing or the procedural hearing stage, so that appropriate orders can be made. But that is a completely different situation from the present case. Here there is simply no averment, general or otherwise, by the defenders to the effect that specific facts and circumstances extraneous to the contract itself are relevant to the matter of construction. When such facts and circumstances are said by one party to inform the meaning of the words in the contract, that is plainly a material, indeed fundamental, point upon which fair notice should be given. In that regard I agree entirely with the observations made by Lord Drummond Young, quoted above. In the present case, the defenders made no such averments. I also note, in passing, that in the defenders' note of argument lodged in advance of the proof there is a section headed "Relevant Background". It refers to the background being set out in detail in the witness statements, which it then says is summarised briefly below. That summary refers only to

very general matters which are the subject of agreement in the pleadings or the joint minutes, including the letters dated 5 and 6 September 2016.

[41] Applying the relevant legal principles to the present case, I conclude that the majority of the evidence sought to be relied upon by the defenders is irrelevant and inadmissible. Addressing the specific passages of evidence identified in the pursuer's note of objections, I therefore exclude any evidence about pre-contractual negotiations which does not fall within the exceptions recognised in *Luminar Lava*. I also exclude all of the evidence which concerns subjective intention or understanding or the meaning of the words used in the parties' contracts. Further, I exclude evidence as to matters which are not the subject of averments as being known to both parties prior to the date of entering into the contract (unless these are matters of common knowledge, in the sense used by Lord Drummond Young, or were not the subject of objection). I also disregard all of the evidence about post-contractual actings, insofar as that is relied upon in relation to the meaning of the terms of the contract. I therefore sustain the objections of the pursuer on those grounds to the specific passages of evidence listed in its note of objections, although of course only to the extent of the precise terms in which the objections were articulated. There were also many objections made by the pursuer during the course of the oral evidence. Most of these were dealt with during the proof. In respect of those on which I reserved my decision subject to competency and relevancy, I take the same approach as just stated.

[42] I turn now to deal with the substantive issues.

The substantive issues

Submissions for the pursuer

[43] The written submissions for the pursuer can be summarised as follows. In the negotiations of the AGS, a common objective of the parties was to arrive at a mechanism whereby Transport Scotland, on the one hand, were happy that the traffic management proposal which was actually going to be implemented would be the same as that contained in the letters of 5 and 6 September 2016, and, on the other hand, that the pursuer/FLJV had the necessary comfort that they would get speedy approval of the proposal which they needed to utilise in order to progress the works. On a straightforward approach to the wording of paragraph B.1 of Appendix B of the AGS, there was an unqualified contractual obligation on the defenders to approve the relevant traffic management proposal and communications plan in relation to the Baillieston tie-in works.

[44] Thus, paragraph B.1 stipulated very specific requirements as to the content and timing of what was to be submitted by the pursuer. If the pursuer complied with these requirements, there was an obligation on the defenders (through Transport Scotland) to approve what was submitted. In relation to the content requirements, the pursuer required to submit a traffic management proposal – and a communications plan – which were "similar in all respects" to what was contained in the pursuer's letter dated 6 September 2016. Furthermore, the pursuer's submission needed to take the form of a CNC. As to timing, the pursuer's submission required to be made no later than four weeks prior to the implementation of the relevant traffic management proposal. With regard to the phrases used in paragraph B.1 (i), neither of the expressions "traffic management proposal" or "communications plan" was a defined term in any of the contractual agreements. There was

no relevant and admissible evidence of these terms being used in some specialised sense. Hence these expressions should be given their natural and ordinary meanings.

[45] On 17 October 2016, the pursuer submitted CNC 24 to Transport Scotland. The fact that CNC 24 included the pursuer's traffic management proposal was accepted by Mr Leven of Transport Scotland in cross-examination. The said traffic management proposal was "similar in all respects" to the proposal made in the pursuer's letter of 6 September 2016. That too was accepted by Mr Leven in cross-examination. CNC 24 included FLJV's letter of 5 September 2016. That letter stated, in relation to communications, that FLJV planned: (a) to submit a communications package no later than six weeks prior to the implementation of the Baillieston tie-in works; and (b) to undertake an extensive and continuing campaign of communications for the duration of the works, including the provision of commercial radio in advance and during the existence of the diversion. The terms of the letter of 5 September 2016 had been the subject of previous discussion and adjustment, and were in a form agreed to by Mr Leven. What was contained in the 5 September 2016 letter constituted FLJV's "plan" in relation to communications regarding the Baillieston tie-in works. In cross-examination, Mr Leven had accepted that what was set out in the 5 September letter was FLJV's "plan" in relation to communications.

[46] On the foregoing basis, as at 17 October 2016 the pursuer had provided all that was required by paragraph B.1 of Appendix B. CNC 24 and the accompanying documents proceeded on the basis that the Baillieston tie-in works were scheduled to start on 5 January 2017. The submission of CNC 24 on 17 October 2016 was accordingly made more than four weeks prior to the proposed implementation of the works. Thus, the pursuer satisfied all the requirements of paragraph B.1 and the defenders were under an unqualified obligation to approve the relevant traffic management proposal and communications plan no later than

21 October 2016. They failed to do so and were accordingly in breach of their obligations under the AGS. The declarator sought by the pursuer in terms of the second conclusion of the summons should therefore be pronounced.

[47] These points were developed in the oral submissions for the pursuer, summarised briefly as follows. The language of the parties' agreement (the AGS) was the only direct objective evidence of their common intentions. The language used should usually speak for itself. The parties are masters of their own agreement and anything which marginalises the meaning of their words used is a direct assault on their autonomy. The background that the court could take into account was limited. The defenders did not have a basis in common facts or approach which supported a finding that there was one type of communications plan which had a particular form, content or level of detail. This left the natural and ordinary meaning of the words communications plan.

[48] The letter of 6 September was a central facet of paragraph B.1 of Appendix B of the AGS. It was clear from the correspondence that prior to entering into the AGS the parties were seeking to agree the terms of the letter to be referred to in its provisions. Mr Leven had stipulated the requirements regarding communications about the Baillieston tie-in. These were all taken up and incorporated in the letter of 5 September 2016.

[49] The danger for the pursuer was that if it deviated from what had been agreed then Transport Scotland could turn round and say that the condition precedent (of being similar in all respects) had not been satisfied. The letters of 5 and 6 September were proposals which were agreed, but nothing more than that. The critical point that the defenders missed was to forget sub-paragraph (ii) of B.1: the proposals had taken the form of a CNC. Once cloaked as a CNC, the proposals took on a significance that they otherwise did not have, because the pursuer was making a contractual proposal to approve a CNC which would

have contractual effect. A plan is a simply way of proceeding. It could be stated in high level terms or in detail but a high level plan is still a plan.

[50] There was no point raised by the defenders and nothing recorded in the minutes of the high-level meetings to effect that no traffic management proposal had been submitted or no communications plan had been submitted. On the contrary, what the minutes of those meetings recorded was the requirement for action on the part of Transport Scotland to approve CNC 24. Further, CNC 24, in the same terms, was approved by the defenders on 6 February 2017.

[51] As to the defenders' submission that a reasonable person would have noted that the letter of 5 September promised future additional material, if one took Mr Leven as a reasonable person that argument failed. In any event, the letter of 5 September didn't promise future additional material. The references in it to what the traffic management proposal "will" include should be read as meaning "does include". There was no evidence that a temporary traffic signal (referred to in that part of the letter) was ever required as part of the ultimate scheme.

[52] Turning to the defenders' position that the pursuer needed to produce consultation certificates to obtain approval, there was no mention in the AGS of consultation certificates having to be submitted. In an earlier iteration of the AGS, Mr Campbell said that Transport Scotland were asking for consultation certificates to be a condition precedent, but this was not there in the ultimate version. The parties had not used the defined terms from the existing contracts which would include the need for certification. That was significant because paragraph B.1 itself showed that when the parties wished to use defined terms they did so, such as the term "Company Notice of Change". It was accepted that a temporary traffic management scheme was in due course required. That would require consultation

certificates to be produced. The defenders did not need to approve them, they simply had to acknowledge them. The two went in parallel: the pursuer was to submit a traffic management proposal and proceed with the temporary traffic management scheme consultation process. In any event, if the AGS was inconsistent with the DBFO agreement, the former trumped the latter, according to its provisions. The practical effect of all of this was that the pursuer would have approval of CNC 24, but could not immediately start the works as there required to be a consultation exercise. The consultation exercise was running in parallel and in fact was concluded at the end of October 2016, so works could have started then.

[53] The defenders' position created a "Catch 22" situation: they argued that because dates were not finalised, the submission was incomplete. But if that was correct the pursuer could never have satisfied the provisions. The defenders contended that until the specific details were determined a communications plan could not be finalised. This was again a Catch 22: the pursuer could never satisfy the condition precedent. In any event, the DBFO agreement recognised that further remaining details could be agreed. The defenders contended that dates were not sorted out, but they were made clear in the proposal, as Mr Leven accepted.

Submissions for the defenders

[54] In brief summary, the written submissions for the defenders were as follows. The declarator sought by the pursuer should be refused; the pursuer had failed to establish breach of the requirements of paragraph B.1 of Appendix B. The obligation to approve did not arise. The putative obligation was "subject to" the submission to the defenders of a traffic management proposal and communications plan which were "required to facilitate

the tie-in". These were to be submitted "for consideration" no later than four weeks prior to the implementation of such "traffic management scheme" and such "proposal" (not the communications plan) required to be "similar in all respects" to the "advance information" provided by the pursuer to the defenders in its letter dated 6 September 2016.

[55] The defenders maintained that what would have constituted each, and what the parties well understood as at the date of the AGS would have constituted each, was what was ultimately submitted on 15 February 2017 (the traffic management proposal) and 12 January 2017 (the communications plan). The material provided by the pursuer prior to 21 October 2016 did not contain sufficient detail to allow any of the proposed works to be undertaken and was insufficient to put the defenders in the position of "approving" them in any way that would give meaning to the obligation in the AGS.

[56] When interpreting a written contract, the court should identify the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean. The relevant terms of paragraph B.1 did not lend themselves to an evident meaning on first consideration. The reasonable person would assume that the parties knew what they meant when they chose to refer to a traffic management proposal and a communications plan. Disagreement having arisen, the reasonable person would look to the circumstances known or assumed by both parties. Such circumstances would include: (i) that the purpose of the AGS was to achieve progress with the implementation of the motorway improvement works; (ii) the terms of the letter of 6 September 2016 and its enclosures; (iii) the terms of the DBFO agreement (including the provisions relating to Company Notices of Change and Certification Procedure); (iv) that closure of the M8/A8 at Baillieston was an extremely complex undertaking; (v) that

extensive and effective public communications would be required so as to minimise disruption to the many road users and others who would be affected by the diversion works; and (vi) that with regard to communications plans, the parties had got into a routine whereby the defenders told the pursuer the minimum required and the pursuer would work that up into a detailed coherent plan. Having regard to those factors, the reasonable person would search for the significance to be attached to the approvals sought. He or she would conclude that what was required was the provision of documentation that would put the defenders in a position to consider and give approval in the sense that it would allow the pursuer to proceed with the works. That person would conclude that the parties would not have intended to bind the defenders to approve a proposal or a plan when such approval did not achieve the furtherance of the works.

[57] In those circumstances, when considering the terms of the AGS, the reasonable person would have understood that "approval" of a proposal or scheme and a plan that (i) were "required to facilitate the tie-in" and (ii) could be submitted up to four weeks prior to the "implementation" of such traffic management scheme, would be a meaningful exercise. The reasonable person would have concluded that what was envisaged was approval that would allow the works to be implemented. The reasonable person would have noted that the defenders' obligations were "subject to the submission" of documentation and would conclude that the requirements of the documentation to be submitted would not just be what was already in the defenders' possession. The reasonable person would have noted that the letter of 5 September 2016 in its terms promised future additional material in the form of a traffic management proposal and communications package and would infer from that that what was already in the defenders' possession constituted neither. The reasonable person would have concluded that the content of less than four lines in the letter of

5 September 2016 would not constitute a communications plan for such a large-scale exercise which would be capable of approval in any meaningful way or which would allow the scheme to be put into effect.

[58] What was enclosed with CNC 24 was no more than had already been provided prior to entering into the AGS on 15 September 2016. Approval of the CNC itself had the major practical effect of amending the DBFO agreement and permitting the closure of the carriageway and the attendant diversions. The pursuer had averred (Article 18) that the approvals under paragraph B.1 were "necessary pre-requisites for the timely completion by the pursuer ... of the works required under the DBFO Agreement and the NWA." Since completion of the consultation process with stakeholders and acceptance of the CNC were necessary pre-requisites to the works proceeding, no practical effect of approval under the AGS of the material in the 5 September 2016 letter by 21 October 2016 has been identified by the pursuer. Although the defenders did not issue approvals of the material in the 5 September 2016 letter by 21 October 2016, the pursuer achieved practical completion on the agreed date of 31 May 2017 and PTU certificates were issued the following day.

[59] These points were further developed in the oral submissions by senior counsel for the defenders, which I briefly summarise as follows. Reference was made to *Arnold* v *Britton* and *Wood* v *Capita Insurance Services Ltd* [2017] AC 1173. The terms "traffic management proposal" and "communications plan" used in the provision in the AGS were not going to be understood properly simply by reference to dictionary definitions. To properly construe these words, one required to look at the surrounding circumstances and not just, as the pursuer submitted, the natural and ordinary meaning.

[60] It was common ground that the expression "traffic management proposal" did not feature as a defined term in the DBFO agreement. But the expression was used in the DBFO

agreement. There was also a need to understand the use of the word "approval": the word could only have any significance if it meant that the defenders were saying "we are content for the traffic management proposal to proceed". But in reality, before they could give that consent they had to know that stakeholders had been consulted and were content. So to interpret the word "plan" as simply a way of proceeding did not satisfy the need to attach a proper meaning to the words in the provision. The pursuer's contention as to the common objective was unfounded. "Approval" must mean something that was necessary to allow the tie-in works to take place. The pursuer's case relied on the proposition that as at 15 September 2016 the pursuer was in effect saying to the defenders "you have all the information that you need - the traffic management proposal and the communications plan. It's all in your possession already, but take until 21 October 2016 to get back to us".

[61] Objectively read, "approval" must mean more than mere rubber- stamping what was already communicated. If this was a time-critical issue, the pursuer would have said approve it now, on 15 September 2016 when the AGS was entered into, given that according to the pursuer it was already agreed. So "approval" meant approval to proceed with the works, which the pursuer accepted could not happen without the consultees having indicated that they were content. It was not clear, on the pursuer's approach, what commercial comfort could have been provided on 21 October 2016 which was not present on 15 September 2016. The pursuer's "Catch 22" point was unfounded. The pursuer would not expect the defenders to give permission for works unless they knew what the dates for the works were going to be.

[62] The words "similar in all respects" were simply a reference to the fact that the defenders did not want an alternative diversion route and did not mean "tell us what you have already told us before". It left open the question of the details of the traffic

management proposal, which had to be added. What were the fruits of waiting five weeks without developing this proposal – a letter of approval? That could not have been the intention of the parties. There was repeated reference in the pursuer's submissions to responsibility on the part of the defenders regarding communications. That matter was neither here nor there. It was clear from the AGS that the pursuer was responsible for submitting the communications plan.

[63] In relation to the minutes of the high level meeting on 18 October 2016, the day that CNC 24 was submitted, there was an entry stating that FLJV were to confirm the dates. So even at 18 October the contractors were still to confirm the start and finish dates of the works they were proposing. As to the high level meeting of 25 October, the dates were again still to be confirmed. The CNC had been submitted, with the expectation that it was going to be approved, but it could not be approved without the dates.

[64] In relation to Mr Leven's emails in August 2016 regarding the contents of the communications plan, he was commenting on information that had been provided and was not promising to approve anything. He was giving a broad indication of what should be included, but what was there was not enough for a communications plan for the closure of the M8. So, regarding the communications plan, he wasn't dictating all that was required and regarding the traffic management proposal he was saying it needed certification by consultees. It was also important to note that CNC 24 stated: "We would request a determination at your earliest convenience". That pointed very strongly to this not being material submitted in implementation of Appendix B.1 of AGS. The pursuer did not get in touch after sending in CNC 24 and ask what had happened regarding the approval needed to progress the works. It was also wrong to suggest that the letter of 6 February 2017 was decisive evidence that CNC 24 could have been accepted before 21 October 2016.

Decision and reasons on the substantive issues

Relevant legal principles

[65] In the various leading cases on contractual interpretation, the House of Lords and the Supreme Court have sought to articulate the principles and rules of construction of contracts. While it is no doubt true that when the language used in these judgments is subjected to a microscopic and meticulous analysis different nuances can be argued to exist, in two fairly recent judgments in the Supreme Court all of the judges in one case and the majority in another agreed that the previous judgments essentially make the same points. The various *dicta* on how the courts should approach the meaning of words in a contract have themselves been held to have the same meaning. It is therefore sufficient for me to refer to the following principles from these two leading cases.

[66] In *Arnold* v *Britton*, Lord Neuberger (with whom Lord Sumption and Lord Hughes agreed) set out the key principles. I need not rehearse these here and I simply note the following two points:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words...in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

Lord Neuberger went on to say that it was, for present purposes in that case, important to emphasise certain other factors, including:

"17. …The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it…"

[67] In *Wood* v *Capita Insurance Services Ltd*, Lord Hodge (with whom Lord Neuberger, Lord Mance, Lord Clarke and Lord Sumption agreed) said:

"10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971 1 WLR 1381 (1383H-1385D) and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, *A new thing under the sun? The interpretation of contracts and the ICS decision* Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

11. Lord Clarke elegantly summarised the approach to construction in *Rainy Sky* at para 21f. In *Arnold* all of the judgments confirmed the approach in *Rainy Sky* (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must

consider the quality of drafting of the clause (*Rainy Sky* para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: *Arnold* (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: *Arnold* para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance spoke in *Sigma Finance Corpn* (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

[68] In extrajudicial comments, Lord Sumption has said "[t]he parties are the masters of their own agreement, and anything which marginalises the role of words in the process of construction is a direct assault on their autonomy "(Lord Sumption, "A Question of Taste: The Supreme Court and the Interpretation of Contracts", Edinburgh Law School Centre for

Commercial Law Miller Lecture, 28 October 2016; Harris Society Annual Lecture, Keble College, Oxford, 8 May 2017). These words were echoed in the written submissions of the pursuer in the present case. They properly articulate one of the key principles, but it is to the whole of the principles as explained in the passages quoted above to which I require to have regard.

Application of these principles

[69] As noted earlier, in terms of stipulation eighth of clause 2 in the AGS the parties agreed to carry out the undertakings and conditions set out in Appendix B, which included:

> "The approval by the Scottish Ministers of:
> B.1 Traffic management proposal and communications plans on or before the 21st October 2016, which are required to facilitate the tie-in at Baillieston (new M8 Ch 0 to 600), subject to the submission of the following:
> (i) The traffic management proposal and communications plan for consideration no later than four weeks prior to implementation of such traffic management scheme and such proposal shall be similar in all respects to the advance information provided by [the pursuer] to the Scottish Ministers in its letter reference SRP/01/1.2/MRM/LB/6636, dated 6 September 2016.
>
> (ii) Company Notice of Change submitted in accordance with the DBFO Agreement."

[70] In applying the relevant legal principles to these provisions, I make the following initial observations. It was not submitted that there were other relevant terms of the AGS which shed any light on the interpretation of the provisions in question and having reviewed the remainder of the agreement I cannot find any that do so. Commercial or business common sense can be an important factor (see eg *Midlothian Council v Bracewell Stirling* [2018] PNLR 25). However, there were no submissions by the parties about how the criterion of commercial common sense might apply to the wording used. Having regard to the absence of any submissions on the matter and to the points made by Lord Neuberger in *Arnold v Britton* about the role of that concept, it is not an issue that arises here in any direct

way. There was a mention in the evidence that the parties did not wish the drafting of the AGS to be "over-lawyered" but it was not suggested that lawyers had not been involved in the drafting and indeed there was some evidence to the contrary. However, when I consider the nature, formality and quality of the drafting, there are undoubtedly expressions used in the provisions which are far from clear or perhaps not well drafted. Having regard to these difficulties, the interpretation of the terms in question requires me to take into account the wider context, including the overall purpose of the provisions in question and of the AGS, and the factual matrix, to the extent that is agreed or dealt with by the evidence which I have not excluded.

The relevant factual background

[71] Embarking on the iterative process explained by Lord Hodge in *Wood* v *Capita Insurance Services Ltd*, I begin by noting the relevant factual background. It can be summarised as follows. The DBFO agreement did not permit complete closure of part of the M8. However, the proposal for the Baillieston tie-in required a section of the motorway to close for that work to be done. This was a complex task, and the complete closure of a section of the motorway, with the resulting diversions and other works proposed by FLJV, were plainly matters of great importance in relation to traffic management and communications with the public. The terms of the DBFO agreement set out provisions relating to CNCs and a consultation and certification procedure for temporary traffic management schemes. A process of discussion and correspondence about FLJV's proposal took place, and the correspondence, including email exchanges, from 12 August 2016 until later that month, then gave rise to the letter dated 5 September 2016 from FLJV and the letter dated 6 September 2016, with enclosures, from the pursuer to the defenders. There are a

number of aspects of the correspondence which are of importance in relation to the factual background. I have set out the relevant terms of the correspondence above (in paragraphs [4] to [13]). Applying the test in *Mannai Investments Co Ltd* v *Eagle Star Life Assurance*, I require to determine how a reasonable recipient of the items of correspondence would have understood them, taking into account the relevant objective contextual scene.

[72] The correspondence makes the following facts clear. The parties intended that a letter would be referred to in the AGS and what might be described as a draft of that letter was sent by FLJV to the pursuer on 12 August 2016. It referred to a traffic management proposal for the Baillieston tie-in. Transport Scotland, through Mr Leven, stated that they required time to review the draft. Following the review, Mr Leven made comments on the letter. FLJV then addressed what it described as "the clarifications sought" and issued the letter dated 5 September 2016. Nothing further was heard about the revised letter prior to entering into the AGS. Put broadly, in the correspondence Transport Scotland had indicated the matters to be addressed before it could sign-up to, or agree to, something that had very significant implications. Unfortunately, the purpose of reaching agreement was not made clear in the terms of the correspondence or in the evidence. The principal possibilities are that the parties had by 5 September 2016 agreed either (i) the terms of advance information to be supplied by FLJV and the pursuer, or (ii) the final terms of a traffic management proposal and a communications plan. The defenders' position appears to be that nothing was agreed as such, but if anything was agreed it was simply the former, that is advance information. The pursuer contends that it was the latter.

[73] I conclude, for the following reasons, that it was indeed the former that was agreed. The letter of 12 August 2016 from FLJV refers to it comprising advanced information and then later refers to the intention to submit a traffic management proposal and a

communications plan and a contractor's notice of change. Those points are repeated in FLJV's letter dated 5 September 2016. From the language used and in the context of the correspondence, I do not find it possible to conclude that the expression of an intention to submit a traffic management proposal and a communications plan and a contractor's notice of change meant simply that the third of these submissions would also comprise the first two elements which had already been agreed. The pursuer's letter of 6 September 2016 listed the enclosures, including the letter dated 5 September from FLJV and the documents which had been sent with it. In its letter, the pursuer expressly referred to the letter of 5 September as "outlining advanced information relating to the proposed traffic management requirements at Baillieston tie in". The enclosures included two documents under the heading "Proposal", a programme of works, four detailed drawings under the heading "Traffic Management" and a "TM model" which included an evaluation report. The expression "TM" plainly means traffic management. So the proposed traffic management layout and diversions were shown in the traffic model and drawings. But the reference in the final two sentences in the letter of 5 September to "the proposal will include" and then "The traffic management proposal will also include" create difficulty for the pursuer's position. As the defenders submitted, these expressions indicate that further information will follow and that the traffic management proposal, when it came to be made, would contain that further information. The pursuer submits that the words refer to the actual contents of the current proposal. However, I was not taken to any feature of the details in the enclosures which showed that these already included what it was said the proposal will include. If one is seeking to convey that a traffic management proposal is actually contained within the letter and documents and that it does include certain features, it would be inappropriate and indeed confusing to say that it "will include" these features. If the

suggestion is that when it came to be implemented the actual process (rather than the proposal) for traffic management would include these features, it would make no sense to use the expressions "the proposal" and the "traffic management proposal". So, the pursuer's contention that references to the fact that the proposal "will include" and "will also include" means that the proposal actually or currently includes that information, is not a tenable understanding for the reasonable recipient to have reached. It is of course correct that the letter dated 5 September 2016 was prepared after an earlier draft had been reviewed and in the context of Transport Scotland saying that agreeing to it would be very significant. However, it is also clear that at that stage a letter was going to be formally issued and referred to in the AGS. That explains its significance.

[74] I therefore conclude that the parties had not by 6 September 2016, or at any other point prior to entering into the AGS, actually agreed the terms of the traffic management proposal or the communications plan, but they had agreed what would be in the letter from the pursuer to be referred to in the AGS.

The terms of the AGS

[75] The overall purpose of the AGS was not in dispute. It was a means of bringing to an end a number of disputes and difficulties that had hitherto arisen and allowing matters to move forward. As to the purpose of the provisions in question, one can readily glean from the language used that this was to be a mechanism whereby the defenders (through Transport Scotland) were to indicate that they were content with the traffic management proposal and the communications plan required to facilitate the Baillieston tie-in (if these were submitted) and to approve these within the limited timescale (some five weeks after the AGS was entered into). It is of course true that the references in paragraph B.1 (i) to a

traffic management proposal and a communications plan were not references to defined terms. Accordingly, regard must be had to the natural and ordinary meanings of these words, but for the reasons I have given the relevant context must also be taken into account.

[76] In construing the AGS, there are several features of the language which are of particular relevance to the issues. It is to be noted that the traffic management proposal and the communications plan are things "which are required to facilitate the tie-in at Baillieston". The natural meaning of "required" is that these items were necessary for that purpose. In order that these could "facilitate" the tie-in, they had to be in such form and detail that would properly allow that tie-in to take place.

[77] The traffic management proposal and the communications plan were to be submitted "for consideration". However, the reference to consideration must be read in the context of an overall obligation to approve the traffic management proposal and communications plan, if these were indeed submitted. Paragraph B.1 stipulated specific requirements as to what was to be submitted by the pursuer and when; if the pursuer complied with these requirements, there was an obligation on the defenders to approve. The expression "for consideration" is therefore of limited significance: there was no discretion on the part of the defenders as to whether or not to approve. The only matter for consideration was whether the material submitted constituted a traffic management proposal and a communications plan.

[78] Next, the words "such proposal" can only reasonably be taken to refer solely to the traffic management proposal and not to the communications plan. I reach that view for three reasons. Firstly, the word "proposal" is used earlier in the same sentence only in relation to the traffic management proposal and, in the absence of any other pointer to the contrary, one can reasonably infer that a later reference to "such proposal" is a reference to

that proposal. Secondly, the earlier words refer to two things, a proposal and a plan; the phrase "such proposal" with its use of the singular cannot sensibly be a reference to two items, especially when the whole thrust of the evidence is that these are two different, albeit related, things: one is about traffic management and the other is about communications. Thirdly, while there may be some circumstances in which the words "proposal" and "plan" can mean the same thing, there are many circumstances where they must mean different things. A proposal is something being proposed, or put forward. A plan is really an intended mode or means of carrying something out. Furthermore, in the present context, it must be the case that the communications plan could only come into play if the traffic management proposal was acceptable. This leads me to reject the pursuer's contention that as long as what was in the final submission was "similar in all respects" to the communications points covered in the previous letter, that would suffice. That criterion simply did not apply to a communications plan.

[79] The expression "similar in all respects to the advance information" requires to be understood. "Similar" is obviously different from "the same", so some deviations or differences were apparently anticipated, or at least allowable. One possibility is that "similar" meant comprising the same key features but dealt with in sufficiently more detail. The expression "advance information" suggests that this was all that the letter provided and what was to be submitted under the AGS was intended to be more than that advance information. It is of course also true that the similarity had to be "in all respects", but as it is not a reference to being the same in all respects, those words do not result in there being no room for any difference between the proposal and the terms of the letter. However, given the reference to "all respects", I reject the defenders' contention that "similar in all respects to the advance information" was only a reference to the route.

[80] Lastly, the provisions in question make clear that it was only the traffic management proposal and the communications plan (if these were submitted) that required to be approved by 21 October 2016. There was no deadline within the AGS for acceptance of the CNC. That matter remained governed by the terms of the DBFO agreement. The express references to a deadline for the approval of two of the items to be submitted, but the complete absence of any reference to a deadline for acceptance of the third, makes it clear that the parties had not agreed a deadline for acceptance of the CNC. I have no basis for concluding that somehow there was an implicit deadline of 21 October 2016 for acceptance of the CNC. In his witness statement, Mr Pascual states that "The approval of CNC 24 was delayed 108 calendar days (from the 21 October 2016 to 6 February 2017)…" He then goes on to say that Transport Scotland required no changes to the original version of CNC 24 prior to its approval on 6 February 2017 "which unmistakably demonstrates that the CNC could and should have been approved in October 2016". In his witness statement, Mr Sobrino observes that:

> "With respect to the approval process in the AGS and in particular Appendix B I, I anticipated or expected the form that approval would take of the traffic management proposal, communications plan and CNC 24 would in reality be written approval of CNC 24".

It is a recurring theme in his witness statement that he proceeds on the basis that CNC 24 required to be approved by 21 October 2016. These views conflict with the clear wording of paragraph B.1. In any event, the declarator sought by the pursuer is only in respect of the traffic management proposal and the communications plan.

[81] The absence of any deadline stated in the provisions of the AGS for the date of acceptance of the CNC raises the question of what was the point of approval of a traffic management proposal and communications plan by 21 October 2016, if acceptance of the

CNC could wait. It may be said that the CNC was really just the formal putting forward of the traffic management proposal and the communications plan and that those were the only constituent elements of the CNC. However, that raises the difficulty of why the provisions in the AGS separately specified the requirement of submission of a traffic management proposal and a communications plan and a CNC. The wording used and the absence of any stipulation requiring acceptance of the CNC by 21 October 2016 strongly suggests that the intention was to have the traffic management proposal and communications plan elements (if those elements were the subject of submission) approved by 21 October 2016. That would then provide comfort to the pursuer that it may be unlikely that there would be any further difficulty with CNC 24 itself being approved in due course. I reject the defenders' submission that the pursuer's case proceeds on "approval" in the provisions in question being an empty word. There was plainly some practical effect of approval. However, there is also a fundamental problem with the pursuer's position, which is that agreement had already been reached on the content of the traffic management proposal and communications plan, but the reason why approval was needed was because CNC 24, once accepted, had contractual effect. As I have already noted there was no obligation to accept the CNC by 21 October 2016, nor does the pursuer seek declarator to that effect. I have been shown no real basis as to why the provisions in paragraph B.1 of Appendix B were so worded if all that was truly needed was a CNC which contained the already agreed information. There would have been no need for the AGS to refer to a traffic management proposal and communications plan being submitted if those elements had already been agreed. On the pursuer's approach, already agreed material was being submitted for the purposes of a CNC which did not require to be approved by 21 October, but nonetheless the already agreed material had to be approved.

[82] Clause 36.5.1 of the DBFO agreement states that if the CNC is accepted:

> "the relevant Company Change shall thereafter be implemented by the Company in accordance with the programme for implementing the proposed change as set out in the Company Notice of Change"

Approval of the CNC would thus have the major practical effect of making the change and permitting the closure of the carriageway and the attendant diversions. The giving of that contractual effect in terms of the DBFO agreement, by acceptance of CNC 24, was necessary before the change could be implemented. I was not addressed in any detail on whether the DBFC required consultation and certification to be in place prior to CNC 24 being accepted. However, there are obvious reasons for concluding that the defenders, through Transport Scotland, would not wish to accept this very significant change, which had the consequences specified in the DBFO agreement including that it could be implemented, unless such consultation and certification had taken place.

[83] If it is truly the pursuer's position that CNC 24 also required to be accepted by 21 October 2016 (notwithstanding the absence of any declarator being sought to that effect and the absence of any such deadline in paragraph B.1 of Appendix B), there are a number of points which make that position untenable. Firstly, it is not supported by, and indeed runs counter to, the terms of paragraph B.1 of Appendix B. Secondly, the approval of certain material which on the pursuer's approach could be expressed in general terms would have the result that a CNC, with its significant contractual consequences, also required to be accepted. Thirdly, as noted above, the minutes of the high-level meetings make clear that on 18 October 2016 there were different dates and a different duration for the programme being put forward and FLJV was to confirm the dates. By 9 November 2016 that confirmation had not been given. Thus, at the date of the alleged breach by failure of the defenders to give approval, the contractors were still not able to confirm the start and finish dates of the works

they were proposing. Fourthly, the CNC was submitted some three days in advance of 21 October and it expressed a request for consultation with various interested parties. Fifthly, acceptance of the CNC would have the consequence that the change could then be implemented.

[84] In light of my views on the pre-contract correspondence and the meaning of the provisions in the AGS, I therefore reject the pursuer's contention as to the nature of the common objective of the relevant provisions of the AGS, insofar as the pursuer suggests that the approval was merely of already agreed matters. That position is not properly founded in the evidence or in the meaning of the terms of the correspondence, or on a true construction of the relevant provisions in the AGS. The reliance placed by the pursuer on the minutes of the high-level meetings is also misconceived. It is correct that the minutes record as an "action" that Transport Scotland was to approve CNC 24, but that is in the context of that document being a CNC, and it not being stipulated in the provisions of the AGS that it was to be approved by any specified point in time.

[85] In brief summary, my conclusions are that the provisions in questions, read against the relevant factual background, meant that the pursuer required to submit all three items at any point prior to 21 October 2016, the key elements of the traffic management proposal having been agreed and the further submission, in respect of that proposal, requiring to be similar in all respects to what had been agreed. The pursuer also had to submit a communications plan. (In passing, I record that parties were in agreement that the reference to "plans" in the first line of paragraph B.1 of Appendix B was of no significance and it should be taken as singular rather than plural.) The defenders required to approve the traffic management proposal and the communications plan, if submitted, by 21 October 2016, but there was no requirement to accept or approve the CNC by then. The purpose of this

somewhat complex set of provisions was that the pursuer would then, if what it submitted was a traffic management and communications plan, have the comfort of knowing that the key components of the CNC were likely to be accepted.

[86] In reaching these conclusions, I do not accept the defenders' position that a traffic management proposal itself required to include certification following upon consultation with stakeholders. The simple point is that there was no mention in the AGS of consultation certificates having to be submitted as part of a traffic management proposal and the parties had not used the defined terms from the existing contracts which would include the need for certification. Clearly, however, the requirements of the DBFO agreement remained so far as CNC 24 was concerned.

Did the pursuer submit a traffic management proposal and a communications plan?

[87] It is noteworthy that the letter dated 18 October 2016 did not make any reference at all to the fact that it was submitting a traffic management proposal and a communications plan: it referred only to the CNC and supporting documentation. The letter also stated that:

> "In accordance with clause 36.4 of the DBFO Agreement we are available to meet should you consider it necessary to discuss the content of this submission".

As noted earlier, CNC 24 also requested that the defenders enter into a period of consultation with the pursuer and other interested parties "such as the Designer, New Works Contractor and Operations & Maintenance Contractor to fully evaluate this change". Enclosed with the letter dated 18 October was the letter dated 3 October from FLJV which stated that:

> "It is our intention to submit a traffic management proposal and communication package prior to the implementation of the Works".

That was similar to what was said in the letter of 5 September about such an intention. I was given no basis on which I could conclude that the use of exactly the same words, "traffic management proposal", in those letters as were used in paragraph B.1 of the AGS actually meant two quite different things. The letter dated 3 October also used the same expressions as noted in the letter of 5 September, that the traffic management proposal "will include" and "will also include" certain matters.

[88] These matters can only mean that what was submitted in and enclosed with the pursuer's letter of 18 October was not itself a traffic management proposal or a communications plan. It is simply not possible to conclude that a letter and enclosures which did not refer to the contents being a traffic management proposal and communications plan, which actually referred to an intention to submit (at some later point in time) a traffic management proposal and communications package, and said that the traffic management proposal "will include" certain matters, constituted the relevant proposal and plan. I take into account that the word "package" is used in the letter dated 3 October from FJLV, but having regard to the fact that in the same sentence the letter also refers to the intention to submit "a traffic management proposal", the use of the word "package" makes no real difference.

[89] In addition, while it is true that the enclosures with CNC 24 identified dates for the programme, as mentioned above, it is also clear that at the meeting on 18 October 2016 (three days before the deadline for approval) new dates had been suggested or proposed but were still to be confirmed. The actual dates and duration were still under discussion as at 21 October 2016 and these must be extremely relevant to traffic management and communications. It is not possible to conclude that a traffic management proposal and communications plan, in relation to the complete closure of a section of carriageway on the

M8 for a period of two months or more, could have been approved if the dates for the works remained unclear. From the evidence, that is an obvious result. Further, there is some specific evidence which illustrates the point. The commencement date stated in the document enclosed with the letter of 18 October was 5 January 2017. As Andrew Leven explained in his witness statement, traffic flows vary depending upon the times of the year, and weekends in early January would be substantially busier with shoppers going to January sales at the shopping centre near Baillieston. He added that North Lanarkshire Council "precluded such diversions in the first two weeks of January". In written and oral submissions, the pursuer invited the court to have regard to the detail of the objections as set forth in the note of objections. As I have indicated, the objections have been sustained only to the extent of the precise terms in which they were articulated. The fact that part of a statement is objected to in relation to the use of that evidence for a particular purpose does not justify the exclusion of that evidence for other purposes. Thus, while the pursuer quite properly objected to this piece of evidence as not concerning matters averred as known to both parties at the time when the contract was entered into, that evidence dealt with a discrete relevant fact: the importance of knowing the dates and duration of any complete closure of a section of the M8. The same can be said for that part of the evidence of Graeme Reid which makes a similar point.

[90] The pursuer submitted that Mr Leven of Transport Scotland accepted, in cross-examination, that a traffic management proposal was submitted on 18 October 2016 and was "similar in all respects" to the proposal made in the pursuer's letter of 6 September 2016. The problem with that submission is that it founds on a subjective view. In any event, it does not have proper regard to his evidence as a whole. As to the defenders' contention that what would have constituted each, and what the parties well understood as at the date of

the AGS would have constituted each, was what was ultimately submitted on 15 February 2017 (traffic management proposal) and 12 January 2017 (communications plan), this is an attempt to use post-contractual facts and events to assist in the meaning of the language used at the time of entering into the contract. I place no reliance on that material.

[91] I therefore conclude, for these reasons, that a traffic management proposal and a communications plan had not been submitted prior to 21 October 2016.

[92] There are further reasons for concluding that a communications plan had not been submitted. The first relates to the generality of the information relied upon by the pursuer as constituting that plan, expressed in a few lines of the letter dated 5 September 2016, and the absence of detail as to what the plan would comprise. Like the traffic management proposal, the communications plan was required to facilitate the Baillieston tie-in. That is an indication of the serious importance of the communications plan. It is tenuous for the pursuer to suggest that what was produced was a plan in any real sense, when one has regard to the nature and circumstances of the tie-in and what must be the function and purpose of any communications plan. As to the suggestion that Mr Leven had accepted that what was set out in the letter of 5 September 2016 was FLJV's "plan" in relation to communications, I find that subjective comment of no assistance. In any event, viewing his evidence as a whole that was not his position. It is correct that in relation to the "communications strategy" Mr Leven, in his emails, set out what was described as the "minimum requirement" in order for the letter to be finalised and accepted. That was the purpose of inclusion of the minimum requirement: acceptance of the letter which would come to be referred to in the AGS. However, I am not persuaded that Mr Leven was somehow dictating or stipulating the contents of what would come to be a requirement in the AGS regarding a communications plan for the Baillieston tie-in. The fact that he was in

his emails truly referring to a plan, argued the pursuer, was vouched by Mr Leven's reference in his email of 24 August 2016 to the word "proposals" regarding communications. I do not regard it as appropriate to use pre-contract correspondence where there is a particular usage ("proposals"), to construe the meaning of a term in the contract which uses a different word ("plan"). Similarly, the suggestion that the danger for the pursuer was that if they deviated from what Mr Leven had said was a minimum then Transport Scotland could turn round and say that the condition precedent was not met, is without substance. That argument is based on the words "similar in all respects" being a condition precedent for both the traffic management proposal and the communications plan, which I have already rejected for the reasons given earlier.

[93] The pursuer contended that a plan is a way of proceeding: as such, it could be stated in high-level terms or in detail, but a high-level plan was still a plan. I accept the defenders' submissions that the reasonable person would have concluded that the content of the four lines or so in the letter of 5 September 2016 would not constitute a communications plan for such a large-scale exercise as the Baillieston tie-in. As the pursuer's witness Mr Miller explained, this was the closure of an extremely busy part of the M8 motorway and the diversion of, say, 100,000 vehicles per day. As such, it was a major undertaking and everyone involved would know that to be the case. Mr Leven said that the information given in the letters and CNC 24 would not ensure that the public were adequately informed: to do that, a communications plan would have to be much more involved and have much more detail. I accept that evidence. It is not necessary for me to identify from the evidence any definitive list of the required constituent elements or details of a communications plan. On the contrary, it suffices that the four lines put forward by the pursuer, expressed in general terms, did not comprise such a plan. I therefore accept that to interpret the word

"plan" as simply a way of proceeding capable of expression in very general terms does not satisfy the need to attach a proper meaning to the words in the provision in the context in which they were used. I also accept the defenders' point that the repeated reference in the pursuer's submissions to responsibility on the part of the defenders regarding communications is neither here nor there given that under the AGS the pursuer was responsible for submitting the communications plan. Accordingly, for that first additional reason, I conclude that what was submitted by the pursuer did not constitute a communications plan within the meaning of that term in paragraph B.1 of Appendix B.

[94] Secondly, it is noteworthy that there was no objection made in the pursuer's note of objections to what Laurence Campbell said in his supplementary witness statement (at para 38). This may have been because Mr Campbell was at that point responding directly to what the pursuer's witness Mr Pascual had said in his witness statement about the reasons for a communications plan being referred to in paragraph B.1. Mr Campbell's response was as follows:

> "A communications plan approved by [the pursuer] and FLJV was, at that time (and since April 2015), the document that [the defenders] relied upon to confirm the content and detail of all communications planned for the works that were subject to the communications plan. This document confirmed the detail and format of all communications and removed the potential for disputes regarding what was to be provided by [the pursuer] which may have impacted the progress of the planned works."

He was plainly referring here to communications plans provided by the defenders, but the issue of who was the provider is not directly relevant. Rather, it is what the parties knew was to be included in a communications plan that is of importance: the content and detail and format of all communications planned for the works. Having regard to the fact that this evidence was not the subject of objection and was not persuasively contradicted by any other evidence or criticised on grounds of credibility or reliability, I accept it. This passage

provides a distinct reason for the conclusion that what was submitted did not constitute a communications plan for the purposes of paragraph B.1 of Appendix B of the AGS.

Conclusion

[95] For these reasons, the pursuer's motion for decree of declarator is refused. I shall sustain the second and third pleas-in-law for the defenders and repel the second and third pleas-in-law for the pursuer, reserving in the meantime all questions of expenses.