OUTER HOUSE, COURT OF SESSION

[2020] CSOH 43

CA82/19

OPINION OF LORD CLARK

in the cause

PATERSONS OF GREENOAKHILL LIMITED

Pursuer

against

GLASGOW CITY COUNCIL

Defender

Pursuer: Richardson QC, Young; Pinsent Masons LLP
Defender: Dunlop QC, Byrne; Morton Fraser LLP

14 May 2020

Introduction

[1] The pursuer and the defender were parties to a contract in terms of which the pursuer carried out processing of waste material collected by the defender. Disputes arose between the parties and in due course the defender gave notice of termination of the contract. The pursuer claims that the defender committed a material and repudiatory breach of the contract, by purporting to terminate it without a proper basis, as a result of which the pursuer rescinded the contract. The pursuer seeks declarator that its rescission of the contract was valid. The pursuer also seeks the award of various heads of damages for alleged breaches of contract by the defender, as well as a claim for recompense. The defender contends that it validly terminated the contract, as a result of material breach of

contract on the part of the pursuer. In its counterclaim, the defender seeks damages from the pursuer for breach of contract. Each party took issue with the relevancy of the other party's pleadings and the case called for a debate on those matters.

Background

[2] The pursuer's business activities include the treatment of waste collected by local authorities. The local government sector in Scotland carries out public procurement through the organisation Scotland Excel. There was a framework agreement between Scotland Excel and various service providers (including the pursuer) through which local authorities could procure services. One means of doing so was by a competitive bid procedure (known as a mini-competition) amongst the service providers. In early 2015, a mini-competition took place under the framework agreement for the award of a contract by the defender relating to the reception, collection and treatment of "bulky waste". An invitation to tender ("the ITT") was issued. The ITT formed part of a wider exercise being run by the defender for the award of numerous contracts concerning the collection and treatment of various forms of waste. The contracts which formed part of this exercise were split into twenty-three lots. The mini-competition in relation to bulky waste was in respect of Lot 2.

[3] The ITT required the pursuer to take a trial load of bulky waste from the defender. On 20 March 2015, the pursuer did so and it also made a detailed assessment of the composition and quality of the trial load. The pursuer recorded that it had been able to recycle 75.43% of the trial load. The pursuer participated in the mini-competition and was awarded the contract for Lot 2 by the defender on or around 9 June 2015. On or around 21 August 2015, the pursuer signed and returned a copy of the defender's letter of award to signify its acceptance. The contract was governed by the terms and conditions contained

within: (a) the ITT; (b) the pursuer's tender; (c) the General Terms and Conditions and Standard Terms of Appointment ("the general terms"); and (d) the Special Terms and Conditions and Schedule of Requirements ("the special conditions"). The key terms of the contract are set out below. One of the central aims of the contract was to maximise recycling or re-use of material and to achieve a target of recycling 60% of the waste.

[4] Disputes arose between the pursuer and the defender about the pursuer's treatment of the waste. The pursuer's position was that the waste delivered by the defender materially deviated from the composition and quality of bulky waste and that significant amounts were not bulky waste. In or around April 2016, the pursuer suspended performance of the contract. Between April and August 2016, the parties entered into discussions about the composition and quality of the waste. Among other things, the defender arranged for the pursuer to take some further trial loads of bulky waste that the defender intended to deliver for processing in the future. The pursuer recommenced the acceptance of waste in early August 2016, while the dispute was continuing. The parties continued to correspond about the matter. The defender maintained that it was delivering bulky waste in conformity with the contract and that such waste was reasonably capable of achieving the minimum recycling target of 60% required under the contract. Eventually, in or around November 2016, the parties agreed to a joint instruction of waste analysts Albion Environmental Limited ("Albion"). Both parties agreed to be bound by the results and the contractual consequences of Albion's compositional analysis.

[5] On 6 July 2017, the defender alleged that the pursuer was in material breach of the contract. Between 6 July and 19 September 2017, the parties continued to correspond about the dispute. By letter dated 19 September 2017, the defender gave notice (in terms of

clause 18 of the general terms) to the pursuer that the contract would terminate, unless the pursuer remedied the alleged breach within sixty days. The letter stated *inter alia*:

> "The Council considers the arguments advanced by Patersons in your letter of 30 August 2017, in relation to the *"Relevance of the Standard Terms of Appointment"*, to be very weak and without merit.
>
> Further, the Council consider that Patersons have continued to blatantly disregard the requirements of Section 2.2.11 of the Special Terms and Conditions of this contract. That is, the rejection of a load or even part of a load is *"subject to the approval of the Council's Authorised officer"*. No such approvals have been provided, yet Patersons continue to reject loads of bulk waste which are contractually compliant. The effect of the unilateral rejections by Patersons means that the Council is not receiving the service that Patersons are required to provide in terms of this contract.
>
> The Council considers the reasons that have been provided by Patersons for embarking on this course of action in the letter 30 August 2017 to be spurious and do not provide, in any way, a reasonable justification for this course of action.
>
> In addition to the above, the Council considers that [*sic*] fact that Patersons have adopted this approach whilst there is a live dispute resolution process taking place - which is seeking to professionally and independently provide an objective assessment of the disputed bulky waste stream - to be a breach of the contractual duty to act in good faith as per Clause 50.1 of the Standard Terms of Appointment."

In response, the pursuer advised the defender that it was acting in good faith and that the defender's interpretation and reliance on clause 2.2.11 was misconceived. The pursuer said it was not rejecting loads because they contained contaminated material within the meaning of the contract. Rather, the pursuer was rejecting the loads as being disconform to the contract. The loads were not physically rejected in the sense of being turned away from the pursuer's site, but they were sent to landfill.

[6] Following upon the correspondence from the pursuer, on 5 December 2017 the defender issued a notice terminating the contract under clause 18. The pursuer treated the termination notice as a repudiatory breach of contract and on that basis intimated its acceptance of the repudiation. Albion issued its report on 15 March 2018 and issued a

supplementary report on 15 June 2018. Among other things, Albion concluded that the pursuer was operating at the standard of good industry practice, as defined in the contract.

The key contractual terms

[7] The contractual documents extend to over 160 pages. The ITT, the general terms and the standard conditions were designed to deal with all of the twenty-three lots. A number of matters contained in these documents are directed at specific lots or classes of lots and have no relevance to Lot 2 and hence to the contract between the parties. Nonetheless, there are also contract terms within each of these documents which do apply to Lot 2 and to the contract. For present purposes, I shall set out only the key terms relied upon by the parties.

The ITT

> **"4.1 Introduction**
>
> Glasgow City Council is inviting a suitable Contractor to bid for the reception/collection/treatment of bulky waste from Glasgow City Council.
>
> The Contractor will be required to:
>
> - Receive bulky waste delivered by the Council to the Contractor's site (As Model A on the main Framework)
> - Collect bulky waste from the Council's waste transfer stations (As Model B on the main Framework)
> - Recover/treat bulky waste for recycling/re-use."
>
> …
>
> ***4.2.2 Bulky Waste***
>
> Land and Environmental Services (LES) provides a special uplift service for bulky items of domestic waste. In 2013/14 approximately 24,000 tonnes of bulky household waste was uplifted by Glasgow City Council refuse compression vehicles and taken to one of our transfer stations for onward processing. The bulky waste will be

delivered by GCC using bulk ejection trailers and multilift vehicles **or** collected by the Contractor from one of Glasgow City Council's waste transfer station sites.

The Council is committed to diverting waste from landfill and to increase the level of recycling in the city. This contract will contribute towards this commitment.
…

4.3 Technical Specification

4.3.1 Reception/Collection/Treatment of Bulky Waste From the City's Waste Transfer Stations

4.3.1.1 Bulky wastes are any household items that cannot fit into the normal collection bin and are requested for special uplift by Glasgow City Council residents. A full list of items requested for uplift from 1/9/13 to 31/8/14 can be viewed in Appendix C.

4.3.1.2 As a guide the approximate quantity of bulky waste uplifted by Glasgow City Council in 2013/14 was 24,000 tonnes. Estimated tonnage per annum for this Contract can be viewed in Section 4.3.3.

…

4.3.1.4 The Contract requires bulky waste to be delivered by GCC or collected by the Contractor from one of the waste transfer stations. This Mini Competition is estimated that 75% of materials will be delivered by GCC and 25% of materials will be collected by the Contractor however these levels may vary. Please refer to the Pricing section, Section 8, for further details.

…

4.3.2 Trial Loads

4.3.2.1 **It is a strongly recommended that interested parties should arrange to take a trial load, or loads. It is also strongly recommended that bidders view the current bulking areas at each transfer station.** Arrangements should be made with Glasgow City Council Procurement via the online messaging service within Public Contracts Scotland Tenders. Any visits for inspection must be conducted no later than five working days before the close of the Mini Competition and any request to visit Glasgow City Council premises must be made via the messaging portal on Public Contracts Scotland.

4.3.3 Bulky Waste Tonnages, Volumes, Composition and Outputs

4.3.3.1 Table 1 below provides **indicative** tonnages to be delivered/collected.

….

Appendix C provides details of the composition and volumes of Bulky Waste items requested for uplift from 1/9/13 to 31/8/14. This is provided as an indication of composition and volumes and will be subject to variation. **It is a requirement of this mini competition that trial load(s) are taken for process and inspection by the Tenderer.**

…

4.3.3.2 The quantities stated in Appendix C and Section 4.3.3.1 are estimated and for guidance only.

4.3.3.3 The Council reserves the right to increase or decrease the amount of bulky waste in line with operational requirements without having a detrimental effect on the Contract or incurring additional charges.

4.3.3.4 In providing this information, the Council does not offer any commitment that the Contract will realise similar values and /or volumes of requirement.

4.3.3.5 Table 2 below provides indicative bulky waste recycling materials recovered and unrecovered outputs from 2013/14.

…

4.3.3.6 **It is a minimum requirement of this mini competition that 60% of the bulky waste material received will be recycled by the Contractor or a nominated subcontractor.**

4.3.4 Storage, Assessment, and Recycling / Re-use or Disposal of Bulky Waste Delivered/Collected

4.3.4.1 The Contractor will have premises that are adequately sized for the receipt and storage of bulky waste.

4.3.4.2 Assessment of bulky waste will be carried out at the Contractor premises or at a nominated sub-contractor of the Contractor.

4.3.4.3 Materials that are suitable for recycling / reuse will be recovered by the Contractor or a nominated sub-contractor.

4.3.4.4 The Contractor will be responsible for recovering materials to meet all relevant standards and legislation for the intended use of the materials.

4.3.4.5 Materials that are not suitable for recovery will be properly disposed of by the Contractor, in accordance with waste regulations.

4.3.4.6 A record of materials assessed will be forwarded to Glasgow City Council on a monthly basis showing separately the quantity / items that have been recovered and the quantity /items that have been disposed of.

4.4 Key Performance Indicators

It should be clearly understood that during the course of the contract, the winning Tenderers performance will be monitored and evaluated.

The Tenderer's evaluation submission will be regarded as binding on the supplier and failure to maintain the final agreed KPI's (targets set by the council which will be monitored and must be maintained by the supplier) will be deemed to be a major breach of the contract and could result in the contract being terminated.

The successful Tenderer as a minimum will be expected to carry out the contract in accordance with the following Key Performance Indicators (KPIs) and their relevant timescales as stated in the summary box below. The successful Tenderer will be required to meet and will be measured against the KPIs detailed below or as stated in the Tenderer's submission.

KPI No	Core KPI	Requirement	Target
1	Service (Recycling)	Meet (and exceed) recycling target of a minimum of 60% on a monthly basis	100%

…

General terms

1.49 Performance of Service

The Service Provider and any sub-contractors shall perform its obligations:

a) in accordance with the terms of the Contract and each Purchase Order;

b) with appropriately experienced, qualified and trained personnel and with all due skill, care and diligence;

c) in accordance with Good Industry Practice;

d) in complete and continuous compliance with the obligations relating to insurance;

e) in compliance with all applicable laws; and

f) where applicable, with materials conforming to all terms of the Contract.

APPENDIX 1 - Standard Terms of Appointment

1 - Definitions and Interpretation

…

k) 'Good Industry Practice' means standards, practices, methods and procedures conforming to the Law and industry codes of practice and the degree of skill and care, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced person or body engaged in a similar type of undertaking under the same or similar circumstances.

Special conditions

S1.1 Treatment Requirements (Method Statement (MS), Section 1)

The Service required includes the provision of capacity to handle materials which will be reused or recycled, to treat materials not suitable for those outcomes and, finally, to dispose, or arrange for disposal of those treated materials.

…

S1.4 Contract Arrangements – Service and Charging

…

4. Where residual waste treatment and disposal for Lots 1 - 3 results in landfill tax being incurred in final disposal (the volume of such disposal requiring to be evidenced by the Service Provider) the costs of that landfill tax will be reimbursed to the Service Provider by the Council.

...

S1.6 Disposal of Contaminated Materials (MS, Section 1)

Service Providers shall treat and dispose of Contaminated Materials in incoming material as specified and as further described in S2.2.

S2.1 Ownership of Waste and Transfer (MS, Section 4)

In the case of direct delivery by a refuse collection vehicle, or similar vehicle, after collection from households or other premises, or for bulk deliveries by Councils, the

waste shall be the responsibility of the Council and in its ownership until delivery to the Service Provider.

After delivery to the Service Provider's nominated treatment plant or Reception Point and completion of necessary acceptance procedures the waste is deemed to be in the ownership of the Service Provider.

In the case of any bulk collection by the Service Provider, ownership and responsibility shall be deemed to have transferred from the Council to the Service Provider at the point of collection from the Council's Reception Point on completion of any necessary despatch procedures at that site.

…

S2.2 Waste Composition and Contamination Levels (MS, Section 1)

2.2.1 It is recognised that high quality of Recyclable Materials collected from the point of arising is crucial in releasing maximum value from these materials, but that some contamination may occur.

The Council shall endeavour to minimise contamination by:

- working with householders and others to educate and inform them as to the types of waste that are acceptable and not acceptable for different types of collection, and;

- working with the Council's directly employed waste collection staff or staff employed by a sub-contractor or third party on behalf of the Council in training them to recognise and reject any waste containers that have Contaminated Material in them at the time of collection.

2.2.2 Service Providers should be aware that Councils provide guidance on dry mixed recyclable and other collections to householders and others for collection services operated by them or on their behalf. Service Providers may wish, as part of their tender submission or during a call-off period, to suggest additional information which could be made available.

2.2.3 The Council gives no guarantee of the composition or content of Recyclable Materials or Residual Waste beyond the general provision on contamination levels – see 2.2.4 below. Compositional percentage of individual materials in co-mingled or mixed recyclables is likely to vary from Council to Council and Service Providers should make their own assumptions on this in their tender process. Should Service Providers wish, at their own cost, to carry out representative samples of the material mix of any Lot over a period of time, for example in a mini-competition process, then such samples will be made available, at agreed rates, by the Council. The presence of a Council Officer is to be allowed at all stages in any such sampling process, as it will

be in any sampling carried out in connection with any dispute over Contamination levels.

…

2.2.4 For the purposes of this Contract the Service Provider shall accept percentages of material up to the level of weight or volume (whichever is the greater) of Contaminated Material allowed in any individual load received at the Reception Point and/or Treatment Facility from the Contract Lots outlined in Clause S1.2 and further explained in Column 4 of Appendix 3 of these Special Terms and Conditions and Schedule of Requirements. Any Contaminated Materials found in individual loads up to this level shall be disposed of by the Service Provider in compliance with the necessary Consent and as part of the inclusive rate quoted for the specific Contract Lot.

2.2.5 A load shall not be rejected in its entirety by the Service Provider at the Reception Point and/or Treatment Facility where Contaminated Material can be removed or where the level of contamination can be brought to an acceptable level by their minimal and safe hand sorting or picking of that Contaminated Material.

S2.3 Treatment Methods and Outputs – Recyclable Materials (MS, Section 1)

The way in which Recyclable Materials are treated will be dependent on their degree of comingling and end value and it is for the Service Provider to determine the best option for that treatment in a way which maximises the quality of material and volume recovery.

…

Appendix 3 – Contract Lotting – Materials Specification

1 **Lot No**	**2** **Waste Materials**	**3** **Specification and/ or Description**	**4** **Contamination level/s allowed**
…	…	…	…

Lot 2	Treatment and Disposal of Residual Waste – Bulky Collection	Material collected by a Council's bulky collection service or aggregated at a HWRC or other bulking point in a mixed form and likely to include large household or commercial items such as furniture, mattresses, mixed garden waste and items from DIY-type construction operations and skip collections.	None stipulated – Service Providers will require to satisfy themselves that a Council's material is capable of treatment and disposal at the facility or facilities specified in their Tender and rates quoted in this section shall include all costs of handling such material in compliance with the necessary Consent/s…".

The pursuer's averments

[8] The pursuer averred, *inter alia*, that:

"7. Bulky Waste is, in essence, waste that does not fit into normal household collection bins and that has been requested for special uplift. It is to be distinguished from residual or household waste or commercial waste, which was the subject of separate Lots as part of the exercise hereinbefore condescended upon. This distinction is, also, reflected in the underlying distinction between normal household waste and household waste for which a Council may charge for collections in terms of sec. 45 (3) of the Environmental Protection Act 1990 (cap. 43) and Regulation 5 and Schedule 2 of the Controlled Waste Regulations 1992 (SI 1992/588). In general terms, Bulky Waste is substantially less contaminated and, therefore, is far easier to recycle. This would have been the general understanding of both parties as to the meaning of Bulky Waste at the time of the Contract hereinafter condescended upon. The ITT, also, contained various (at times conflicting) specifications of the likely nature, composition, and tonnages of Bulky Waste to be provided by the Defender. Reference is made to Paras. 4.2.2, 4.3.1.1, 4.3.3, and Appendix C. Further, the ITT strongly recommended that interested parties take Trial Loads...

…

14. The Contract contains no express terms or guarantees on the precise composition and quality of the Bulky Waste to be delivered by the Defender to the

> Pursuer. However, the term 'Bulky Waste' requires to be construed in accordance with its generally understood meaning, the various specifications provided in the ITT, the Special Conditions, and the Trial Load. Further, and in any event, it was an implied term of the Contract that any Bulky Waste delivered to the Pursuer would not materially deviate from the composition and quality of Bulky Waste indicated by the ITT, the Special Conditions, and the Trial Load. The term 'materially' here meaning, and being synonymous with, the term 'substantially'. Further, and in any event, it was an implied term of the Contract that the specifications of the volumes, compositions and quality of Bulky Waste indicated by the ITT, the Special Conditions, and the Trial Load were warranted to be true and accurate to the best of the Defender's knowledge. These terms were necessary to give the Contract business efficacy. The Defender was in complete control of the waste it chose to deliver to the Pursuer. The Pursuer had no control. The Pursuer was, however, obliged to meet the Minimum Recycling Target in respect of any waste the Defender delivered.
>
> Further, the Pursuer's pricing structure was entirely premised on the general composition and quality indicated as part of the ITT, the Special Conditions, and the Trial Load. In the absence of the implied terms, the Defender could unilaterally place the Pursuer in breach of the Contract by delivering waste to the Defender that was materially different from the Bulky Waste parties had envisaged at the time of the Contract. Further, in the absence of the implied terms, there would be no point in taking Trial Loads or the provision of information in the ITT and the Special Conditions. On the Defender's construction of the Contract (and irrespective of what these indicated about the nature and composition of the Bulky Waste to be delivered) the Pursuer would be obliged to take any waste of almost any nature and whether or not it bore any relation to the nature or composition of the waste shown to the Pursuer in advance of the Contract. The Pursuer would be unable to 'satisfy itself' from these matters that it had the ability to meet the Minimum Recycling Target."

[9] In relation to the alleged breaches of contract, the pursuer averred that between June 2015 and December 2015 the contract appeared to be operating satisfactorily. However, from around December 2015, the pursuer became increasingly aware of a substantial deviation in the composition and quality of the waste being delivered by the defender from that indicated by the ITT, the special conditions, and the trial load. This was said to manifest itself in two ways. First, some of the waste being delivered was plainly not bulky waste within the meaning of the contract. Instead, it was mixed household or residual commercial waste (such as would have been understood to be comprehended in lots 1 and 3 referred to in the special conditions). It included substantial quantities of waste that were perfectly

capable of being fitted into a normal household collection bin. Further, it was often heavily soiled and contaminated in the manner of normal household and/or commercial waste. The pursuer claimed that between June 2015 and March 2016 in particular, the level of waste that was being delivered to the pursuer far exceeded the quantities of waste that had been indicated in the ITT or that was delivered by the defender in any previous or subsequent years. In total, between June 2015 and December 2017, the defender delivered 46,779.53 tonnes of waste to the pursuer. The pursuer estimated that 19,872.76 tonnes of that total (ie 43%) was not bulky waste within the meaning of the contract. The pursuer only noticed the inclusion of such material in around March 2016 following a substantial spike in the volume of waste being delivered. Secondly, the waste that was actually being delivered materially deviated from the composition and quality that had been indicated by the ITT, the special conditions, and the trial load. It appeared to have had much of the recyclable content removed. It contained "materially less recyclable materials such as wood, rubble, and soils". In delivering waste that was not bulky waste and in delivering waste that materially deviated from the composition and quality that had been indicated, the defender was alleged to be in breach of the contract.

[10] The pursuer went on to aver that in an effort to mitigate its continuing losses and also to operate the contract according to its terms, the pursuer began to more rigorously assess and, where appropriate, exercise its right to reject waste that did not fall within the scope of and/or materially deviated from the contract. This was done in good faith. It was part of an endeavour to operate the procedure specified in clauses 2.2.7 – 2.2.12 of the special conditions (albeit these provisions did not strictly apply to the situation) in the face of the fact that the defender was continuing to deliver waste that was not bulky waste or that

materially deviated from the composition and quality of bulky waste indicated by the ITT, the special conditions, and the trial load.

The defender's averments

[11] The defender's averments referred to the use of the trial load, that the ITT dealt with only indicative tonnages, volumes, composition and outputs of waste, and that these were subject to variation. Appendix 3 described the sort of waste to be processed under the contract. Reference was also made to the absence of any guarantee of the nature or volume or composition of bulky waste streams. The pursuer bore the risk of achieving the key performance indicator of 60% being recycled ("the KPI"). No maximum level of contamination was stipulated. The implied terms had no proper basis and they contradicted and were entirely inimical to the express terms of the contract. Other elements of the requirements for implied terms were not met. The pursuer could only reject waste delivered to it by the defender under special condition S2. From about June 2017 the pursuer began to reject whole bulky waste loads and disposed of these in a landfill site. The defender wrote to the pursuer in July 2017 stating that this was unacceptable. The bulky waste which was rejected was capable of meeting the KPI. The rejection of an entire load was a unilateral act contrary to clauses 2.2.5 to 2.2.11 of the special conditions. The pursuer was therefore in breach of contract, including the provisions of the ITT at 4.1 and 4.3.4.3. The defender was entitled to terminate the contract. In its counterclaim, the defender sought damages alleging that the pursuer had repeatedly failed to achieve 60% recyclability and had rejected whole loads without any proper basis in the contract for so doing. Various losses were said to have been sustained.

Submissions

[12] Each party lodged a Note of Argument in advance of the debate and, in oral submissions, adopted the contents. I have taken the detailed written and oral arguments into account. What follows is a brief summary of the parties' respective positions.

Submissions for the defender

Issue 1: relevancy of the parties' averments on breach of contract

[13] The pursuer's averments did not identify any express term of the contract in respect of which the defender was said to be in material breach. The only sensible reading of the pursuer's case was that the allegation of breach was in respect of the implied terms set out in the pursuer's pleadings. But if there was also an issue about the construction of the express terms, that was effectively another side of the same coin: it was an allegation that the contract envisaged a particular composition and quality of waste to be processed by the pursuer, such that if it did not correspond to that composition and quality the pursuer was entitled to reject it. However, any reference to the express terms was not carried into an allegation that a particular express term of the contract was breached. Thus, the pursuer's complaint was based on the implied terms. In any event, whether looked at as a definitional question of an express term or as concerning an implied term, the case failed because of what was contained in the rest of the contract. In answer to the pursuer's case, however put, it was impossible to take from this contract, whether by construing the words "bulky waste" or by implying the terms suggested, any term setting out a minimum standard for composition or quality of waste to be processed under the contract. Thus, the pursuer's contentions based on express or implied terms failed for exactly the same reasons.

[14] Reference was made to the terms of the ITT. The dispute turned on the pursuer having landfilled entire loads of waste with no suggestion made that the entirety was not suitable for recycling or re-use. The procedure was that a council refuse truck would uplift the bulky items and these would be put into single containers and taken to the pursuer's processing plant. What began to happen was that on a visual inspection the load would be rejected by the pursuer and just taken to landfill, with no attempt to take out recyclable or reusable material. The provisions of the ITT made it clear that the pursuer's obligation was to recycle that which could be recycled unless the pursuer could point to a provision within the contract entitling it to reject the waste. Reference was then made to the special conditions. The contract expressly dealt with contamination of a load. There was no guarantee of any sort beyond the general provision on contamination of materials. Rather, the contract left it entirely to the tenderer to make its own assumptions and projections as to the sort of waste it would be addressing. For Lot 2 there was no specified maximum level of contamination. It was a matter of agreement between the parties that clauses 2.2.4 – 2.2.11 of the special conditions were not engaged. This was the only aspect of the contract dealing with rejection and in any event it provided for means of rejection that were not followed by the pursuer. The pursuer had been simply tipping entire loads to landfill if 60% or more of the load was not recyclable.

[15] In relation to the implied terms, reference was made to *Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2016] AC 742 and the five principles expounded in *BP Refinery (Westernport) Pty Ltd* v *Shire of Hastings* (1977) 180 CLR 266. The first implied term plainly failed on all five of those principles. In relation to the fifth principle, this implied term involved overriding a number of contractual terms. If it existed then it did, contrary to the express terms, give a guarantee as to composition or

guarantee that it would not materially deviate from the various yardsticks that the pursuer put forward. The second implied term failed for similar reasons. It would not be reasonable to impose such a warranty by the back door. It was not necessary to do so, as the contract worked without it. It was not at all obvious. There were difficulties in expression of the implied terms and these were in plain contradiction of the express terms. So the implied terms failed to meet the test for implication. The action was irrelevant and fell to be dismissed.

Issue 2: relevancy of the parties' averments on termination or repudiation of the contract

[16] For the reasons given, there was no guarantee as to the composition or quality of waste; this was entirely at the pursuer's risk. Against a backdrop of the aim to reach a carbon-zero level, the primary aim was to recycle or re-use. Part of the background was a council commitment to divert waste from landfill. Accordingly in rejecting loads and in purporting to invoke clauses 2.2.5 onwards, despite their non-applicability, the pursuer was in material breach of contract. Thus, termination by the defender was not unlawful. In response, the pursuer advanced a technical argument to the effect that the defender's termination was unfounded because of the basis stated in the notice. This contention was misconceived for two reasons. Firstly, the basis for termination was very clearly termination under clause 18, as was made clear in the letter dated 19 September 2017. The clause dealt with and defined material breach, which entitled a notice of termination. That mechanism was invoked and the material breach was identified. The reason why the letter went on to refer to clause 2.2.11 of the special conditions was in response to what the pursuer had said in its letter of 30 August 2017. The defender's letter was stating, on the basis that these clauses applied, rejection was subject to the approval of the authorised officer, which was

not obtained. But that was in addition to the core breach, which was the pursuer's unilateral decisions to reject entire loads. Accordingly, this was a correct and lawful invocation of clause 18 of the contract and a requirement that there be remediation of the breach within 60 days, which did not happen.

[17] The defender was not asserting an ability to rescind at common law. The pursuer's reliance upon *Shell Egypt West Manzala GmbH* v *Dana Gas Egypt Limited* [2010] EWHC 465 (Comm) was misconceived. The defender made its election under clause 18, because the pursuer was unilaterally rejecting loads. There was no question of bar or waiver. It could not be said that a bad reason was advanced for termination. The action was irrelevant and there was no defence to the counterclaim.

Submissions for the pursuer

Issue 1: relevancy of the parties' averments on breach of contract

[18] In relation to the relevant legal principles, reference was made to: *Wyman Gordon* v *Proclad International Limited* 2011 SC 338; *Woodar Investment Development Ltd* v *Wimpey Construction UK Ltd* [1980] 1 WLR 277; *Dalkia Utilities Services Plc* v *Celtech International Limited* [2006] EWHC 63 (Comm); *Shell Egypt West Manzala GmbH* v *Dana Gas Egypt Limited*; *Attorney General of Belize* v *Belize Telecom Limited* [2009] 1 WLR 1988; *Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd and another*; *BP Refinery (Westernport) Pty Ltd* v *Shire of Hastings* (1977); Lewison *The Interpretation of Contracts* (6th ed., at para. 6.06); *Tarmac Trading Limited* v *Network Rail Infrastructure Limited* [2018] CSOH 33; *Heather Capital Limited (In Liquidation)* v *Levy & McRae* 2017 SLT 376; *Barque Quilpué Ltd* v *Brown* [1904] 2 KB 264; and *Ramsay & Son* v *Brand* (1898) 25 R 1212.

[19] The defender had fundamentally misapprehended the pursuer's case. The primary case was that the defender breached the contract by seeking to supply waste which was not bulky waste in terms of the contract. The pursuer's secondary position was that the defender breached the implied terms. The pursuer's case on the implied terms was that they gave business efficacy to the contract and far from contradicting the express terms they were supportive and entirely consistent with those terms. Leaving the implied terms to one side, there remained a sufficiently specific case based on express terms, which should be allowed to proceed to a proof before answer. It was also important to note that there was a specific provision allowing the pursuer reimbursement of landfill tax. The pursuer's case was that when one has regard to all the provisions relating to bulky waste, these enabled one to say whether or not something was bulky waste. It was quite wrong, as had been suggested for the defender, that having signed up to a contract for bulky waste the defender could turn up with, say, thirty lorries of raw sewage and contend that the pursuer could reject nothing. Such a construction would be nonsensical and unworkable and would deny the contract any commercial efficacy. The implied terms followed on from the express provisions as to bulky waste. The express provisions also tied in with there being a right of rejection, or as the pursuer would put it, a right to send to landfill. The pursuer averred that substantial quantities of the waste were not bulky waste and that was the pursuer's key point. The figures given by the defender in the ITT as to the bulky waste processed during the previous years were very significantly lower than what was delivered by the defender to the pursuer. On the defender's own figures, what they were delivering to the pursuer was not bulky waste. That position was met in the defences with a simple denial. This was therefore a matter for proof. The second conclusion was based upon breach of this express term.

[20] Lot 2 was about bulky waste and that is what the pursuer was agreeing to deal with, as reflected in the contractual documents. Rather surprisingly, the term "bulky waste" did not have a specific definition, although the meaning of the term was clear. The terms in the contractual documents applied to many different lots and it was not entirely clear how the provisions of those documents operated together. The situation was very far from that in the *Marks and Spencer* case where there were detailed leases. In the present case, there was much more room for the court to consider that the terms did require to be implied. Reference was made to the ITT and how it defined the services the pursuer had agreed to undertake. These did not involve an obligation to treat anything the defender might dump on the pursuer, but rather were for the treatment of bulky waste. The general approach of both parties, as the pursuer averred, was that bulky waste would be understood, by reference to the underlying statutory framework, to be those items of waste which the defender was entitled to charge for uplifting. Reference was made to section 45 of the Environmental Protection Act 1990. This was part of the background and this would be at least part of the reason why it would be premature to dismiss the implied terms argument. Quite clearly, on the pursuer's case there was a factual question as to what the parties meant by the key issue of what was bulky waste. The pursuer's case in short was that the defender did not provide things which fell within the definition in column 3 for Lot 2 in Appendix 3. The KPI, that is the 60% minimum, did not require the pursuer to recycle 60% of every individual load. Rather, it required that over the currency of the contract 60% was recycled. This was clear when one looked at the way the KPI was policed by the contract, which was by a review from time to time and not on a load by load basis.

[21] Assessment of bulky waste was to be carried out by the contractor. This was a contract for the reception, collection and treatment of bulky waste. Treatment meant either

recycling or re-use and where these were not appropriate, sending to landfill. There was no suggestion made by the defender of any breach of any of these terms or of the KPI. The defender was suggesting that recycling had to be of at least 60% and if the pursuer landfilled a single item which could have been recycled then there was a breach, but that is not what the contract stated. The question about recyclability was squarely one on which evidence would be needed because the parties do not agree on recyclability. The pursuer's position was that the waste had to be assessed in accordance with the contract and with good industry practice (which is a defined term). Critically, there was no provision to which the defender could point to stating that landfilling a load, or any number of loads, constituted a breach of contract. The general obligation which the pursuer undertook was to deal with the bulky waste and achieve the KPI requirement of recycling 60%. There was not some more onerous micro-managed standard that individual loads would be policed by the defender and that it would be a breach of contract to landfill an entire load. Sending waste to landfill is not rejection. The concept of a trial load was consistent with noting that what was going to be produced would not be materially different in quality or composition from what was provided at the outset, again supporting the implied terms. The contract plainly envisaged that up to 40% of the waste could be landfilled.

[22] Turning to the defender's criticisms of the implied terms, the court had to first consider the express terms of the contract. The averments dealt with the express term upon which the primary case was based and that case was pled as both a breach of contract and as a *quantum meruit* claim. The averments set out the factual matrix, including that trial loads were of great importance in providing content to what is meant by bulky waste. If the waste was bulky waste, then the pursuer had to recycle 60% of it. The pursuer had no contractual responsibility to deal with anything that was not bulky waste. Nonetheless, at no point did

the pursuer shut the gates. The pursuer took in the waste and insofar as it was not bulky waste, it was taken out into landfill. The defender's contention that this was a breach of contract was wrong. The first implied term gave additional precision to the express provisions. It involved an application of the very normal and well recognised ability to imply a term against prevention; that one party will not prevent the other party from performing the contract: *Barque Quilpué Ltd* v *Brown.* The waste steam was not to be materially different from what the pursuer had been shown; that is, that the defender would not send waste that would make all of the provisions regarding how waste was to be dealt with unworkable. The first implied term fitted entirely with the contractual provisions regarding bulky waste and enabled those terms to operate in a way which, without the implied term, would be commercially and practically incoherent. The requirement of necessity was not an absolute test, but simply something to be considered. The implied term was clear. It was not contradicted by express terms of contract, but was entirely consistent. The test in the case law was satisfied. The second implied term is not taken forward as a basis for a damages claim: rather, it was there in support of the first implied term and fell to be implied largely for the same reasons.

Issue 2: relevancy of the parties' averments on termination or repudiation of the contract

[23] In relation to repudiation, there was no disagreement between the parties as to the relevant legal principles. It was understood that the defender accepted that either the letters purporting to give notice of termination were justified in terms of contract or, if not, then they constituted repudiation. On a fair construction of the document, there was only one ground put forward for termination: breach of clause 2.2.11. But the defender accepted that this provision has no application. This was therefore a repudiatory breach. However, if the

court did not accept that approach, termination was still unjustified. Insofar as rejection was to be taken as meaning sending the material to landfill, that was not a material breach. It would be, if tied-in with a breach of the KPI. Accordingly, even if the letter could be construed as the defender contends, it did not found upon a material breach of contract. Further, there were a number of aspects of the defender's claim that made it inspecific and irrelevant. Among other things, the defender seeks to recover the additional cost of landfilling waste which ought to have been recycled. However, the defender did not aver that all of the waste was capable of being recycled and, as the contract only required 60% recyclability, it was unclear on what basis the defender could recover all costs of landfilling of waste sent to the pursuer. There was a lack of causation. Also, the defender's second conclusion refers to actings of the pursuer in 2017 to February 2018, which was plainly inconsistent with the defender's case that the contract was brought to an end in December 2017. In addition, there was no specification in respect of the claim for various transport costs.

Reply for the defender

[24] It was no part of the defender's position that the KPI was measured on a load by load basis. Also the defender quite accepted that the contract envisaged waste being landfilled; this was obvious from the fact that 60% was to be recycled and the rest could go to landfill. The defender's point was that rejection of the entire load and sending it to landfill was not part of the contract. The obligation was to recycle what was recyclable. It was not suggested in the pursuer's pleaded case that what was produced was anything other than household items. There was provision allowing landfill, but only of materials not suitable for recovery. There is no offer by the pursuer to prove that entire loads were not suitable for recovery.

The contract required the target of 60% to be met on a monthly basis, but that was not the only requirement. The pursuer had failed to establish how, under the contract, it could output entire loads to landfill when there were tons of recyclable material. This was a plain breach. The pursuer's case appeared to be that the household items produced were not of the requisite composition or quality. This took one back to the implied terms. Ultimately the pursuer's position was that if material was not bulky waste then the pursuer did not need to deal with it under the contract. The defender agreed, but the pursuer could not accept a load, take the waste, and then not do what it had undertaken to do, that is to separate out the recyclables from the landfill. As to the points made by the pursuer about technical specification, if anything these should be dealt with by an order for further specification, not by dismissal.

Decision and reasons

Issue 1: relevancy of the parties' averments on breach of contract

[25] The parties' submissions raise two lines of question. First, in view of the fact that the contract was about the treatment of bulky waste, how did the contract deal with the situation of the pursuer receiving waste that was not bulky waste (if indeed that occurred); in particular, in that situation, if the pursuer accepted the waste did the pursuer require to deal with the waste in terms of the contract, and if so, how was that to be done? Secondly, when the pursuer received bulky waste, was it required to recycle those parts of the waste which could be recycled (and hence not permitted to send recyclable material to landfill even if otherwise the 60% level stated in the KPI had been met); or in the alternative, so long as the 60% level of recycling had been or would be reached could the pursuer landfill entire loads which included recyclable material?

[26] In deciding these fundamental questions about the pursuer's central obligations under the contract, there is a need to construe a significant number of contractual terms set forth in the various documents. These do not admit of a plain collective meaning. As is very well-known, the key principles in relation to construction, as set out in *Rainy Sky* v *Kookmin Bank Co Ltd* [2011] 1 WLR 2900, *Arnold* v *Britton* [2015] UKSC 36 and *Wood* v *Capita Insurance Services Ltd* [2017] UKSC 24, and endorsed by the Inner House (see eg *HOE International Ltd* v *Andersen* 2017 SC 313 *and Ashtead Plant Hire Company Limited* v *Granton Central Developments Limited* [2020] CSIH 2) allow use of the background and context when these are relevant. This raises the critical point of whether it is appropriate in this case to seek to construe these terms at this stage, in circumstances in which the pursuer makes averments about the background and the parties' pre-contractual understanding of what constitutes bulky waste. Having reflected at some length on the parties' submissions, I conclude that where the interpretation of any of the contractual terms depends upon or relates to the meaning of the expression "bulky waste", those terms cannot properly be construed at this stage. The factual background may be relevant to the construction of those terms and it is therefore not appropriate to deal with this issue simply on the basis of legal arguments.

[27] By way of example, it is clear from clause 4.1 of the ITT that the scope of what was involved under the contract was to receive or collect bulky waste, and to recover or treat it for recycling or re-use. The ITT (at 4.3.1.1) refers to bulky waste as being "any household items that cannot fit into a normal collection bin and are requested for special uplift" by residents in the city. However, it then refers to a full list of items, in Appendix C, requested for uplift in 2013-2014 many of which could be well able to fit into a normal collection bin. To give another example, paragraph 4.3.3.6 of the ITT refers to the KPI that 60% of the

material received will be recycled and clause 4.4 refers to that KPI as being to meet and exceed the recycling target of a minimum of 60% on a monthly basis. As noted, the pursuer's position is that this provision allowed for up to 40% of the waste received to be sent to landfill, even if recyclable. In contrast, the defender relied heavily on paragraphs 4.3.4.2 to 4.3.4.5 of the ITT, saying these made clear that the pursuer required to recycle that which could be recycled. They provide that the assessment of bulky waste is to be carried out at the premises of the contractor or a nominated sub-contractor (4.3.4.2), materials suitable for recycling or re-use will be recovered (4.3.4.3), materials not suitable for recovery will be properly disposed of (4.3 4.5) and a record of materials assessed will be forwarded to the defender on a monthly basis showing what was recovered and what was disposed of (4.3.4.6). This requirement for monthly records ties in with the monthly period for the 60% target to be met. On the central question which underpins these arguments, of whether, on the one hand, the obligation was limited to recovery of 60% of recyclable material from the waste received, or, on the other hand, there was a straightforward contractual obligation to recover all materials suitable for recycling or re-use, the meaning of the term "bulky waste" may well be relevant. For example, it may be relevant to know whether it has a meaning which results in significant amounts of the waste to be received not being likely to be recyclable. Evidence on recyclability may also be relevant: as part of the contractual context, the definition of "contamination" in the general terms recognises that if there is unintentional mixing of streams of waste, the treatment of recyclables for recycling may become more expensive, more difficult or impossible. These points might provide ammunition for either side in support of their respective constructions. They may assist in informing the key decision on whether repeated non-compliance with paragraph 4.3.4.3 of the ITT could of itself amount to a material breach of contract, or whether, in the alternative,

the KPI provides the yardstick and allows 40% of the bulky waste (including recyclables) always to be landfilled.

[28] It is of course open to me at this stage to reach a view on the contractual terms that do not appear to depend in any way upon the meaning of the expression "bulky waste", applying the principles in the case law, including the natural and ordinary meaning of the words used. At first sight, there may be some terms which fall into that category. However, it is not inconceivable that the meaning of that expression could impact even on such other terms. Out of caution, the true interpretation must await the hearing of any relevant evidence. Accordingly, I conclude that it is not possible to reach a decision at this stage on each party's criticisms of the relevancy of the other party's averments on the meaning of the express terms in the contract.

[29] Turning to the implied terms, each side made careful and cogent submissions on whether these formed part of the contract. While the court can in some circumstances deal with such an issue at debate, in the present case it is not possible to reach a firm and concluded view on the implication of terms into the contract when the fundamental issue of the nature and scope of the express obligations under the contract to deal with bulky waste has not yet been determined. The key principles expressed in the case law on implied terms (*Marks and Spencer plc* v *BNP Paribas Securities Services Trust Co (Jersey) Ltd and another*; *BP Refinery (Westernport) Pty Ltd* v *Shire of Hasting*) are, in this case, properly capable of application only when the meaning of the express terms has been reached. In short, the questions of whether it is reasonable or equitable to imply either of the two implied terms, or whether either term is necessary, or so obvious that it goes without saying, or capable of clear expression or whether either of them contradicts an express term, are best left to be determined once the evidence has been led and the meaning of the expression "bulky

waste" for the purposes of this contract has been ascertained. As I have said, only then can the express terms which refer to or relate to that concept be fully and properly understood. I therefore reach no conclusions on the implied terms issue at this stage.

Issue 2: relevancy of the parties' averments on termination or repudiation of the contract

[30] In my view, two major points arise which make a decision on this second issue also inappropriate at this stage. Firstly, the parties' respective motions are founded upon the other side's averments being irrelevant. But before being able to determine whether the notice of termination is valid, it will be necessary to understand the meaning of the key terms of the contract and to answer the fundamental questions noted above. Secondly, while the question of the meaning of the notice of termination can be addressed on its own, doing so in the abstract, purely on the pleadings and the terms of the document, is inappropriate. I was not addressed in any substantial detail on the proper approach to interpretation of the notice of termination issued on 19 September 2017. However, the relevant legal principles are clear and were summarised thus by Popplewell J in *QOGT Inc* v *International Oil & Gas Technology Limited* [2014] EWHC 1628 (Comm), 2014 WL 2116867:

> "109 In *Mannai* v *Eagle Star Assurance Ltd* [1997] AC 749, the House of Lords considered the efficacy of notices to determine two leases which gave the date of termination a day too early. Lord Steyn said at p767G that:
>
> > 'the approach to construction of the notices was to determine how a reasonable recipient would have understood them; and in considering this question the notices must be construed taking into account the relevant objective contextual scene.'
>
> 110. In this respect the process of construction is the same as that for any contractual term. It is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time: *Investors Compensation Scheme* v *West Bromwich Building Society* [1988] 1 WLR 896 at 912H; *Chartbrook* v *Persimmon Homes* [2009] 1 AC 1190 at [14]; *Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900 at [14].

111. In *Mannai* Lord Steyn went on to observe at p768F-H that:

> 'notices under break clauses in a lease were not in a unique category; and that all notices exercising rights reserved under a contract should be construed in the same way: they must be sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to the contractual right being invoked; and as to how and when the notice is intended to operate. See also per Lord Hoffmann at p776D; and *Geys* v *Societe General* [2013] 1 AC 523 per Baroness Hale at [52]'

112. The present case is concerned with a contractual right to give notice of persistent or material breach, failure to remedy which gives rise to a right to terminate the contract. Its purpose is to enable the recipient to understand what contractual right is being relied upon, and what he is alleged to have done wrong, with sufficient clarity that he can assess the validity of the notice and take such steps as are open to him to remedy the alleged breach. The level of detail which is necessary for these purposes will differ from case to case, and may be affected by the express terms of the relevant clause. It will not generally be necessary for the notice giver to identify the steps necessary to remedy the breach, if they can sufficiently clearly be understood from the details given of the breach itself; but where the notice does so, the steps identified as necessary to remedy the breach will usually help the recipient to understand the nature of the breach being alleged. The notice must be interpreted as a whole.

113. Accordingly in the current context I would formulate the general principle as being that the notice must be sufficiently clear and unambiguous to enable a reasonable recipient (that is to say one having all the background knowledge reasonably available to the recipient at the time of the notice) to understand the contractual basis for the notice and the nature of the breach which is alleged to have occurred, so as to be able to assess the validity of the notice and take such steps as are open to him to remedy the alleged breach."

[31] In the present case, the question of the meaning of the notice of termination dated 19 September 2017 is sharply in contention. The notice is not expressed in simple terms. In ascertaining its true meaning, the notice requires to be construed against the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time. It would be wholly inappropriate and indeed dangerous to seek to reach a concluded view on the meaning of the notice in the absence of evidence as to

that background. For example, I note that there was correspondence between the parties leading up to the notice, in which numerous points were expressed. Thus, it is not possible at this stage to reach a concluded view on either party's submissions on the relevancy of the other's pleadings on the matter of termination or repudiation.

[32] In relation to the pursuer's contentions about aspects of the defender's claim which were said to make it inspecific and irrelevant, I conclude that these issues of specification do not, if correct, themselves result in the claims being irrelevant. In commercial actions there are recognised means of dealing with an alleged lack of specification of the type claimed here. In that regard I adopt the approach taken in *Symphony Equity Investments Ltd* v *Shakeshaft* [2013] CSOH 102 (*per* Lord Hodge at [29]):

> "I think 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."

A similar approach was taken by Lord Hodge in S*occer Savings (Scotland) Ltd* v *Scottish Building Society Ltd* [2012] CSOH 104. Having regard to the nature and content of the pursuer's points about lack of specification, whether further specification should be provided in witness statements or by further averments is a matter to be dealt with in case management.

Disposal

[33] For the reasons given, I shall not at this stage sustain or repel any pleas-in-law of either party. I shall fix a by-order hearing to determine the nature and scope of the proof before answer and to deal with any other outstanding matters.