OUTER HOUSE, COURT OF SESSION

[2021] CSOH 98

CA11/21

OPINION OF LORD CLARK

In the cause

SCOTTISHPOWER ENERGY RETAIL LIMITED

Pursuer

against

EQUORIUM PROPERTY COMPANY LIMITED

Defender

Pursuer: Ower; Womble Bond Dickinson
Defender: MacGregor QC; Dentons UK and Middle East LLP

1 October 2021

Introduction

[1] The pursuer is a supplier of electricity. The defender and three other companies, all within the same corporate group, entered into a contract with the pursuer. Under the contract, those four companies had joint and several liability to pay for electricity supplied by the pursuer to certain defined premises. The contract was subsequently altered by a Letter of Variation. The pursuer seeks recovery of sums from the defender based upon joint and several liability. The defender argues that the terms of the Letter of Variation resulted in the defender no longer having joint and several liability. The issue between the parties is therefore one of construction of the contract, as amended. The case called before me for a

debate on that issue, with the pursuer seeking decree *de plano* and the defender seeking dismissal of the action.

Background

[2] On 21 January 2018, the pursuer entered into a Flexible Electricity Supply Agreement ("the Agreement") with the four related companies: (i) The Edinburgh Woollen Mill Limited; ("EWML"); (ii) Duvetco Limited ("Duvetco"); (iii) the defender; and (iv) Peacocks Stores Limited ("PSL"). The Agreement provided for the supply of electricity to these four companies for the period from 1 October 2019 to 30 September 2020. In terms of Clause 4.1 of the Agreement, EWML, Duvetco, the defender and PSL are jointly and severally liable for their obligations, duties and liabilities under and/or pursuant to the Agreement. This joint and several liability also covers sums due for the supply of electricity to any "Related Party", that term being defined as including Jaegar Retail Limited ("JRL") and Days Department Stores Limited ("DDSL"). JRL and DDSL and the other four companies were part of the EWM Group.

[3] By May 2020, a number of the invoices issued by the pursuer in terms of the Agreement were overdue for payment. Certain members of the group were in financial difficulty. The defender was not in financial difficulty. Discussions took place between the pursuer and the EWM Group, including with a view to allowing additional time for payment of the outstanding invoices. Following those discussions, on 17 July 2020, the pursuer and each of the members of the EWM Group entered into a Letter of Variation which made certain amendments to the Agreement, to allow additional time to pay the sum outstanding as at 8 July 2020, which was £2,500,609.63 ("the Outstanding Sum").

[4] On 10 July, 31 July, 31 August and 30 September 2020 members of the EWM Group paid the instalments due to the pursuer. Three further instalments, in each case of £325,275.92, were due to be paid at the end of October, November and December 2020. EWML and Duvetco entered into administration on 5 November 2020. PSL entered into administration on 19 November 2020. Following upon the service of a statutory demand by the pursuer to the defender for payment of the £325,275.92 due on 30 October 2020, the defender denied liability for the full sum outstanding. The defender stated that it is liable only for payment of a *pro rata* share (namely one sixth) of each of the instalments due to the pursuer. It has made payment of one sixth of each of the outstanding instalments. The pursuer sues for the remainder of the outstanding sums, on the basis that the defender is jointly and severally liable.

The Agreement

[5] The Agreement includes the following terms:

> "1.1 The terms and conditions on which we have agreed to supply electricity to the Premises are set out in:
>
> (a) this agreement between you and us (the "Agreement"); and
>
> (b) our electricity general terms and conditions for business customers (Large I&C Version) set out in Appendix 1 to the Agreement (the "General Conditions");
>
> and…
>
> The Appendices listed above form part of the Agreement.
>
> 1.2 In the event of any conflict between the provisions of any of the documents referred to in clause 1.1, the provisions of the document which appears earliest in the list in clause 1.1 will have precedence…
>
> …
>
> 4..1 The Edinburgh Woollen Mill Limited, Duvetco Limited, Equorium Property Limited and Peacocks Stores Limited (together referred to in this clause 4 as the "Customer Parties", and the term "Customer Party" shall be construed accordingly) shall be jointly and severally liable for their obligations, duties and liabilities under and/or pursuant to this Agreement."

Appendix 1 to the Agreement sets out general terms and conditions, including the following:

> "18.7. Without prejudice to our rights under General Condition 4.6 and General Condition 15, no addition or amendment to or modification of the Agreement that is proposed by you will be binding on us unless it is evidenced in writing and signed by our authorised signatories.
>
> 18.8. Where the Customer comprises more than person or is a partnership, the Parties acknowledge and agree that the obligations owed by the Customer under the Agreement are owed, on a joint and several liability basis, by all of the persons that comprise the Customer or, if applicable, by all of the partners in the partnership (as well as, in the case of a Scottish partnership, by the partnership itself)."

The Letter of Variation

[6] The Letter defines the EWM Group as including the six companies referred to above. The Letter then includes the following terms:

> "4. [The pursuer] and each of the EWM Group each a Party and together, the Parties.
>
> 5. As a result of the Covid-19 outbreak (and the effect which this has had on the EWM Group's business), [the pursuer] and the EWM Group have by this Letter agreed to make certain amendments to the Agreement to allow the EWM Group additional time to pay the sums which are agreed and acknowledged as undisputed and outstanding from the EWM Group to [the pursuer] as at 8th July 2020 and set out at Appendix 1 to this Letter (being £2,500,609.63, the "Outstanding Sum"); together with sums which will continue to become due from EWM group to [the pursuer] in respect of the supply of electricity to the EWM Group by [the pursuer].
>
> 6. Save as otherwise provided in this Letter, all terms defined in the Agreement have the same meaning in this Letter.
>
> 7. [The pursuer] and the EWM Group hereby agree that the Agreement will be amended as follows with effect from the date when this letter has been signed by the Parties (the "Amendment Date").
>
> 8. SPERL and the EWM Group agree to amend the Agreement from the Amendment Date as follows:
>
> 8.1 The EWM Group will pay the sum of £548,954.10 to [the pursuer] by 4pm on 10th July 2020 in part payment of the Outstanding Sum. Thereafter, the EWM Group will pay six monthly instalments of £325,275.92 to [the pursuer], the first instalment

commencing 31 July 2020, and each instalment to be received by [the pursuer] in cleared funds by 4pm on the last working day of each month.
…
8.3 Any invoices that are issued for energy supplied by SPERL to the EWM Group for the period 1 July 2020 thereafter (pursuant to the Agreement or otherwise) must be paid by the EWM Group in full by their respective Due Date.
…
10. In consideration for entering into this Letter each of The Edinburgh Woollen Mill Limited and Peacocks Stores Limited companies agree that they are jointly and severally liable for (i) the Outstanding Balance and (ii) any and all invoices which are issued to any member of the EWM Group in respect of the continued supply of electricity to all members of the EWM Group.

11. This Letter is supplemental to the Agreement and, subject to the amendments expressly set out in this Letter, the Agreement shall remain in full force and effect."

Submissions for the defender

[7] The relevant legal principles on contractual interpretation were summarised in *Arnold* v *Britton* [2015] AC 1619. In dealing with professionally drafted contracts the exercise will often start and finish with a consideration of the words themselves (*Bank of Scotland* v *Dunedin Property Investment Co Ltd* 1998 SC 657, at p 661 F-H), although a purely textual analysis may not be appropriate in every case (*Wood* v *Capita Services* [2017] AC 1173, at para [10]). In the event that there were two possible constructions, the court is entitled to prefer one which is consistent with business common sense (*Midlothian Council* v *Bracewell Stirling Architects* [2018] CSIH 21, at para [19]), but business common sense is not to be invoked retrospectively and should be approached with due caution. It has little utility as a tool of interpretation if several possible constructions would accord with business common sense.

[8] There is a presumption against superfluous terms being included in contracts (*Secretary of State for Defence* v *Turner Estate Solutions Ltd* [2015] B.L.R. 448, at para [62]). While this presumption may be of limited use in relation to standard form contracts where

there is significant scope for overlapping provisions and duplication (*Beauford Developments Ltd* v *Gilbert-Ash Ltd* 1999 1 AC 266, at 274), it has significant force in the context of a bespoke contract carefully drafted by the parties (*Secretary of State for Defence* v *Turner Estate Solutions Ltd*, at para [62]; *Interserve Construction Ltd* v *Hitachi Zosen Inova AG* [2017] EWHC 2633, at para [21]). In situations where there is a conflict between a specific term in a contract and a provision in a set of standard terms and conditions, the specific term will generally prevail (*Homburg Houtimport BV* v *Agrosin Private Ltd* 2004 1 AC 715).

[9] Both the Agreement and the Letter of Variation had all the hallmarks of being professionally drafted. Therefore, the starting point in construing the amended contract was a consideration of the meaning of the language used by the parties. While clause 4.1 in the Agreement and clause 18.8 in Appendix 1 imposed joint and several liability on all four of the contracting parties, the language used by the parties in clauses 4, 5, 8 and 10 of the Letter of Variation demonstrated an intention to depart from the position on joint and several liability. JRL and DDSL were added as parties to the contract and were to have a liability for payment, in respect of each of their premises, of both the Outstanding Sum and sums that would become due under the amended contract.

[10] If the intention had been for the parties set out in clause 4.1 of the Agreement to continue to have joint and several liability for the new payment obligations, this could have been simply stated in the Letter of Variation. Indeed, no statement in this regard would have been required. However, the parties to the Agreement gave specific consideration to the issue of who would have joint and several liability for the new payment obligations. Clause 10 of the Letter of Variation superseded clause 4.1 of the Agreement. The fact that a bespoke provision is included that specifies the parties that will have joint and several

liability demonstrated an intention to depart from the Agreement where all of the contracting parties had joint and several liability for the original payment obligations.

[11] This left a situation where there is a conflict between clause 10 of the Letter of Variation, which imposes joint and several liability on only two contracting parties, and clause 18.8 of the general terms which seeks to impose joint and several liability on all contracting parties. The Agreement made specific provision for such a scenario, in clause 1.2. Accordingly, clause 10 of the Letter of Variation took precedence over the general terms. Clause 1.2 merely reflected the underlying common law position that greater weight should attach to terms which the particular contracting parties have chosen to include in the contract than to pre-printed terms (*Homburg Houtimport BV* v *Agrosin Private Ltd*, at paras [11] and [183]-[184]).

[12] The clear purpose of clause 10 in the Letter of Variation was to record the specific parties that would have joint and several liability. The pursuer's contrary argument proceeded on the basis that clause 10 is either a mistake or it should be treated as redundant or merely superfluous. While such arguments have a degree of force in relation to standard form contracts, where unnecessary repetition and obvious conflicts are not uncommon, the Letter of Variation was a bespoke agreement. The fact that specific parties were being named as having joint and several liability, indicated that the parties applied their minds to which parties would have joint and several liability. The parties to the letter must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision (*Arnold* v *Britton*, at para [17]).

[13] While commercial common sense was a factor to take into account when interpreting a contract, the court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have

agreed. When interpreting a contract a judge should avoid rewriting it in an attempt to assist an unwise party or to penalise an astute party (*Arnold* v *Britton, per* Lord Neuberger at para [20]). Business common sense was a secondary factor in a case such as the present (see *AWG Business Centres Ltd* v *Regus Caledonia Ltd & others* [2017] CSIH 22, at para [22]). It equally accorded with commercial common sense for other contracting parties to wish to move to a position of joint liability as opposed to joint and several liability. That is particularly so in a situation where certain group companies were experiencing financial difficulties. Such an interpretation complied with commercial common sense when viewed from the perspective of the defender given the challenging economic circumstances created by Covid-19. The relevant factual matrix had no material impact on the exercise of contractual interpretation in this particular case. Ultimately, the change to the contract may well, with the benefit of hindsight, have been a poor commercial deal for the pursuer. However, the court could not intervene in such circumstances.

Submissions for the pursuer

[14] The parties were broadly in agreement as to the relevant law on the general principles of contractual interpretation. Guidance could be obtained from the recent decision of the Inner House in *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Limited* 2020 SC 244, *Bank of Scotland* v *Dunedin Property Investment Co Ltd,* at 661 F-H, and *Wood* v *Capita,* at para [10].

[15] The Letter of Variation was not negotiated and prepared with the assistance of skilled professionals. It was negotiated for the pursuer "in house", by its "credit risk" team, without the assistance of solicitors. Analysis of its terms required to be carried out in that context. The pursuer was bound to accept that it is not as well drafted as it might have been.

The court should adopt a purposive approach. The substance of the Agreement, as amended, construed objectively, should prevail over the niceties of the wording and, in particular, over clauses that have not been well drafted.

[16] The wording of the Letter of Variation and, in particular, its clause 10, did not remove joint and several liability from the defender. The factual context was not in dispute: certain members of the EWM Group were in financial difficulty, and the provisions of the Letter were intended to allow the EWM Group additional time to make payment of the sums due, as was expressly stated in clause 5 of the Letter. Importantly, The Letter did not expressly state an intention to depart from the position on joint and several liability. In contrast with clause 8 of the Letter, clause 10 contains no such express statement that the parties agree to amend the provisions as to joint and several liability. It was accepted that the Letter altered the parties to the contract, adding JRL and DDSL to those with a liability to the pursuer for payment of the "Outstanding Sum", and sums which will continue to become due from the EWM group in respect of the supply of electricity to the EWM Group by the pursuer. It followed that it was also accepted that the Letter of Variation created new payment obligations.

[17] Other than the express alterations made by clause 8 of the Letter, the Agreement continued in full force and effect. None of clauses 8.1 to 8.5 in the Letter effected an express alteration to the terms of clause 4.1 of the Agreement. If the intention had been for that liability to be removed, express provision could have been made but was not. It followed that clause 4.1 continues in full force and effect and the joint and several liability imposed on the defender by that clause remains. The defender's argument left out of account the terms of clause 11. The defender's point that clause 10 of the Letter supersedes clause 4.1 of the Agreement ignored the terms of Clause 11.

[18] The defender's submissions that the clear purpose of clause 10 was to record the specific parties that would have joint and several liability, and that the pursuer's contrary argument proceeded on the basis that clause 10 is either a mistake, or should be treated as redundant or merely superfluous, was incorrect. EWM and PSL were jointly and severally liable for all sums due under the Agreement. Clause 10 of the letter merely confirmed that to be the case, underlining their existing liability.

[19] The interpretation contended for by the pursuer was one which made good sense for both parties, taking into account the circumstances in which the Agreement was amended by the entering into of the Letter, with the intention of the parties being to allow the members of the EWM Group more time to pay the sums outstanding. The pursuer's interpretation was therefore one which accords with business common sense. In circumstances where the Letter came into being as a result of financial difficulties encountered by certain members of the EWM Group, it would make no sense for the parties to agree that fewer, rather than more, of the members of the EWM Group would be jointly and severally liable for the sums outstanding.

Decision and reasons

The key issue

[20] As noted, I was referred to several leading cases on contractual interpretation, including *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Limited*, *Bank of Scotland* v *Dunedin Property Investment Co Ltd*, *Arnold* v *Britton, Wood* v *Capita* and *Midlothian Council* v *Bracewell Stirling Architects*. The well-known principles are set out in these and other authorities and I need not repeat them here. As is common, counsel for each side referred to what could have been stated in the Letter, if the intention had been what the other party

contended, but I require to interpret the language used rather than what it is argued could have been used.

[21] The key issue in the present case is to determine, based on the relevant legal principles, what is to be taken from clause 10. The words of the clause have a clear meaning and I am not being asked to prefer one of two different meanings. Rather, I am being asked to conclude that either: (i) these words have the effect of amending the wording in the Agreement (in clause 4.1 and as a result, in Appendix 1, clause 18.8); or alternatively (ii) they restate obligations of two of the parties to the Agreement which, along with the obligations of two other parties not referred to in clause 10, in any event remained in place. The dispute is therefore more about the purpose and effect of the clause. That matter falls to be determined by viewing clause 10 in the context of the Letter of Variation as a whole, and having regard to the factual background, including the Agreement.

Factual background

[22] The pursuer avers that certain members of the EWM Group were in financial difficulty and consequently the pursuer and the EWM Group entered into discussions with a view to allowing the EWM Group additional time for payment of the outstanding invoices. In response to the defender's averments, the pursuer admits that Duvetco, EWML, PSL and JRL experienced financial difficulties and have subsequently entered into administration and accepts that the defender is not experiencing, and has never experienced, any financial difficulty. From the pleadings, the shared knowledge at the material time could be read as knowledge that certain, but unidentified, companies in the group were in financial difficulty. I have however taken a liberal approach to the pursuer's pleadings and proceeded upon the basis that the pursuer offers to prove that the two companies identified

in clause 10 of the Letter were among the four known to be in financial difficulty at the material time. However, the nature and extent of the financial difficulty is not pled as a matter falling within the parties' shared knowledge at that time. As clause 5 in the Letter narrates, it was as a result of the Covid-19 outbreak (and the effect which this has had on the EWM Group's business) that the parties had agreed in the Letter to make amendments to the Agreement to allow the EWM Group additional time to pay the sums. Put short, there was no material put before me as part of the factual background that the effect on the business of the EWM Group would create any real likelihood that a particular company would become insolvent, let alone be unable in the future to pay its dues. The pursuer's suggestion that on the defender's interpretation the Letter, at the time it was entered into, gave the defender a windfall is not made out.

Liabilities of JRL and DDSL

[23] As noted earlier, the Agreement bound four companies as jointly and severally liable for the supply of electricity to certain premises, which included the premises of JRL and DDSL, although these other two companies were not of course parties to the Agreement. It is expressly acknowledged in the Letter of Variation (clause 2) that JRL and DDSL had received the benefit of the supply of electricity under the Agreement. The Letter identifies JRL and DDSL, and each of the four other group members, as a "Party" and "together, the Parties" for the purposes of the Letter (clauses 3 and 4) and the Letter is signed on behalf of all six members of the EWM Group. In clause 8 the Letter goes on to state in a number of passages that "the EWM Group will pay" sums due. The EWM Group is defined as comprising, together, the six individual companies and there was of course no suggestion that the EWM Group was a separate entity.

[24] Given that JRL and DDSL are parties to the Letter of Variation, but were not parties to the Agreement (albeit they had received the benefit of electricity suppled under the Agreement) one question which arises is what liability, if any, those companies now undertook by virtue of the Letter. It is of course relevant that they each signed up as a party to the Letter. Applying the relevant principles and taking the purposive approach to interpretation (*Ashtead Plant Hire Co Ltd* v *Granton Central Developments Limited,* at para [11]), JRL and DDSL have each agreed, severally, to pay for the supply of electricity to their premises. Otherwise, there would be no reason for having them as parties to the Letter. The payments they have agreed to meet are firstly in respect of the parts of the Outstanding Sum that relate to their premises and secondly for the future supply. The former conclusion arises from the fact that clause 4 defines the EWM Group as including JRL and DDSL and clause 5 explains the Outstanding Sum as being the sums which are agreed and acknowledged as undisputed and outstanding from the EWM Group to the pursuer. The pursuer's contention that clause 5 really concerned allowing additional time for the payment to be made does not take into account that aspect of the clause.

[25] It is impossible to understand why clause 5 would refer to the EWM Group as liable if the intention was that only the four companies with joint and several liability under the Agreement were to remain liable, either for only the Outstanding Sum or also for future payments. Indeed, it was accepted on behalf of the pursuer that JRL and DDSL had undertaken liability, although in response to a question from the court as to whether that was said to be a joint and several liability, counsel for the pursuer felt unable to offer a concluded view on that matter. In my opinion, there is no proper basis in the language used for concluding that JRL and DDSL have undertaken joint and several liability for the Outstanding Sum or for further sums due.

Quality of drafting

[26] In relation to the quality of drafting, the authorities make clear that where there is an issue with the nature, formality or quality of drafting of a particular clause, the court may have to give greater weight or emphasis to the wider context and factual matrix in reaching its view as to the objective meaning (*Wood* v *Capita*, at paras [10] and [13]). I am in no doubt that parts of the Letter were not well drafted. One indication is that the Letter fails to make explicit its impact, if any, on clause 4.1 of the Agreement and clause 18.8 of Appendix 1 to the Agreement and their imposition of joint and several liability. Other elements of the Letter raise some questions on drafting, including the reference in clause 8.3 to "pursuant to the Agreement or otherwise" and the supply of "energy", when "electricity" is used elsewhere in the Letter (and there is another reference to "energy" in clause 8.2).

[27] Clause 10 then states that "In consideration for entering into this Letter" EWML and PSL agree to joint and several liability for, put short, the Outstanding Sum and future sums due from any member of the EWM Group for electricity supplied. As argued for the pursuer, on a literal meaning of clause 8, the amendments to the Agreement made by the Letter could be viewed as restricted to the parts of clause 8. But that of itself then renders clause 10 meaningless. If it is meaningless, its inclusion is another clear indicator of poor drafting. Equally, if (as the defender has argued) it is a material change to the Agreement, then the wording of clause 8 is not as well-expressed as one might expect. In my view, the Letter is poorly drafted and in accordance with the principles expressed in the authorities, I take that factor into account. I should make clear that I do not do so on the factual basis asserted on behalf of the pursuer: that it was not professionally drafted. That point is not pled and in any event was not admitted by the defender and I leave it out of account. Lack of clarity, or to put it another way poor drafting, might allow the court to depart from the

natural meaning (*Arnold* v *Britton* at [18]), but I am not persuaded that I need to go that far in this case. Rather than departing from any natural meaning, I am interpreting provisions which do not make it absolutely clear whether or not clause 10 constitutes an amendment to the Agreement.

Commercial common sense

[28] If there are conflicting interpretations, commercial common sense can of course play a part. One can see that reasonable persons in the position of each of the parties might want different outcomes. Continuing joint and several liability of all four original parties would assist the pursuer and result in a party not in financial difficulty meeting the liability, for substantial sums, of a party who it turns out could not pay. On the other hand, financial difficulty of others would increase the exposure of the party not in difficulty, which might therefore want out of the frame on joint and several liability. I require to view commercial common sense objectively rather than on the basis that the construction said to comply with that test benefited one party but not the other. Where commercial common sense can be invoked to support either construction it is a secondary consideration (*AWG Business Centres Ltd* v *Regus Caledonia Ltd & others* [2017] CSIH 22, *per* Lord President (Carloway), at para [22]). I also require to take the Letter as recording the parties' intentions and it may well be the case that the inclusion of JRL and DDSL as becoming liable for previous and future supply of electricity to their premises counterbalances, at least to some extent, the removal of the defender and Duvetco from the frame of joint and several liability. Commercial common sense does not mean that I should reject the natural meaning and effect of clause 10, construed in context, as being correct simply because it appears (at least with hindsight) to be an imprudent position for one of the parties to have agreed (*Arnold* v

Britton at [20]). The proper approach to commercial common sense is usefully explored in *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Limited* (at [12]-[17]) but ultimately I reach the view that here the concept does not assist in supporting one side rather than the other.

Interpretation

[29] Clause 7 refers to the Agreement being amended "as follows", as do the opening words in clause 8. Clause 11 states that "subject to the amendments expressly set out in this Letter, the Agreement shall remain in full force and effect." If it were to be concluded from those terms that the only amendments to the Agreement were those specified in the sub-paragraphs in clause 8, that would exclude clause 10 from being an amendment. However, it would also exclude clause 5 as having the result of adding JRL and DDSL as parties liable for the costs of supply to them, which parties agree has happened.

[30] For the reasons stated, clause 5 plainly amended the Agreement. That leaves the question of whether clause 10 does or does not fall within "the amendments expressly set out in this Letter". The parties must have been specifically focussing on the issue covered by clause 10 when agreeing the wording of that provision (*Arnold* v *Britton,* at para [17]). The substance of the parties' agreement should prevail over the niceties of wording, particularly in clauses that are not well-drafted *(Ashtead Plant Hire Co Ltd* v *Granton Central Developments Limited,* at para [11]).

[31] In my view, clause 10 must be an amendment expressly set out in the Letter. I reach that conclusion for the following reasons. Firstly, clauses 7 and 8 cannot be taken as limiting the amendments to the sub-paragraphs in clause 8, because clause 5 must also constitute an amendment; it is "expressly set out" and so is clause 10. Secondly, in making amendments

to the Agreement, the Letter does not identify specific provisions in the Agreement that are being altered; instead, the Letter proceeds on the basis that its wording will prevail. Thirdly, it makes no sense that clause 10 is there as a restatement of the joint and several liability of two of the four companies who undertook such liability under the Agreement. No reason of any kind was given or suggested as to why any such restatement was necessary or even appropriate or sensible, let alone why it was restricted to two of the four companies, when on the pursuer's approach at least the other two also remained jointly and severally liable. Fourthly, clause 10 identifies two sets of payments for which joint and several liability is undertaken, one being the "Outstanding Balance" and the other being for the continued supply of electricity to members of the EWM Group. The specific reference by those drafting the Letter to both payments shows that this detail was perceived as requiring to be clearly stated, and in respect of EWML and PSL. If the same joint and several liability as existed under the Agreement was intended by the parties to continue, not only would clause 10 be superfluous (and indeed, confusing) but the articulation of liability for both sets of payments would be entirely unnecessary. Fifthly, in light of the inclusion of JRL and DDSL in the Letter, and their liability for their parts of the Outstanding Sum and future sums in relation to their premises, there was a need to clarify the position on who had, or retained, joint and several liability. That course of action appears to have been taken and to be the purpose of clause 10.

[32] I therefore conclude that while there is no plainly expressed exclusion of, or amendment to, clause 4.1 of the Agreement or clause 18.8 of its Appendix 1, that is consistent with other altered terms not being identified. Under clause 1.2 of the Agreement, if there is a conflict between one of the clauses in the Agreement (which must include the Agreement as amended) and a clause (such as clause 18.8) of Appendix 1, the former will

take precedence. This is a bespoke Letter, varying the Agreement, and although not carefully drafted in respect of every clause, clause 10 must not be treated as inoperative or surplus; rather, I view it as part of a revision of the contract intended to meet the exigencies of the position as it had transpired and as referred to in clause 5 (*Secretary of State for Defence* v *Turner Estate Solutions Ltd,* at para [62]); *Interserve Construction Ltd* v *Hitachi Zosen Inova AG*, at para [21]). The clause formed part of an agreement reached by commercially experienced parties who had entered into discussions and, one must assume, given careful consideration to the terms of the Letter. Clause 10 is there on purpose and it would make no sense (commercial or otherwise) that its purpose is a mere restatement of liability, with the restatement restricted to two specified parties, notwithstanding that two others were also to remain liable. In passing, I should say that I reject the defender's further point that this case involved a conflict between a specific term in the Letter and a provision in a set of standard terms and conditions, as it was not demonstrated that clause 4.1 formed part of the latter.

Conclusion and disposal

[33] For the reasons given, I conclude that the pursuer's case is irrelevant and bound to fail. I shall therefore sustain the first plea-in-law for the defender and dismiss the action, reserving in the meantime all questions of expenses.