SHERIFF APPEAL COURT

[2017] SAC (Civ) 21
PER-A79-12

Sheriff Principal M M Stephen QC
Sheriff N Stewart
Sheriff Principal B. A. Lockhart

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL MHAIRI M STEPHEN QC

in appeal by

WILLIAM LOW
t/a THE FOUR SEASONS HOTEL, St Fillans, Perthshire

Defender and Appellant:

in the cause

NPOWER DIRECT LIMITED

Pursuers and Respondents:

against

WILLIAM LOW

Defender and Appellant:

Appellant: McKenzie, Harper MacLeod
Respondent: Bell, advocate, Yuill & Kyle

31 May 2017

[1] This case is about a contract for supply of electricity to the appellant's commercial premises, namely The Four Seasons Hotel, in St Fillans. The pursuers and respondents are Npower Direct Limited, part of a major energy supply organisation. In reality, the contract

is little different from domestic electricity supply which most householders require to deal with and if necessary renegotiate on a fairly regular basis.

[2] This action relates to the operation of a contract (ND1043757) which the parties entered into in 10 December 2001. (Tab 1 of the Appendix). The contract was formed by the appellant offering to enter into a contract for electricity to be supplied by the respondents' company. The contract is a pre-printed standard contract in the name of the respondents with terms and conditions appended. The contract is available only for sites which consume more than 12,000 KWH (kilowatt hours) of electricity per year and are not half hourly metered. The contract term is for five years with that fixed period terminating on 10 December 2006. The standing charge and cost of day units and other units are hand written. These charges are to be fixed for the term of the contract.

[3] No issue arises relating to the fixed five year term of this contract. The dispute between the parties arises from the supply of electricity by the respondent to the appellant's premises following the expiry of that initial term between 10 July 2007 and 10 January 2012.

[4] Provision is made in the contract for either party to bring the contract to an end on termination of the fixed price period by giving notice in writing of not less than 30 days expiring on the termination date. Neither party gave notice to terminate the contract and in that event the contract is to continue from year to year thereafter subject to the following:

> "2.7 If no notice is given the contract will continue for successive periods of 12 months. The contract price during such periods may at our discretion be changed to those for new contracts let by us for premises similar to the premises supplied under this contract applicable at the end of the initial term or at the relevant anniversary of the end of the initial term (as the case requires). The contract shall otherwise continue on the same terms and conditions."

Accordingly, the contract continues on a year to year basis if neither party gives notice of termination. Allowance is made for the charges changing at the discretion of the supplier

(respondents) to the applicable charges for new contracts let by the supplier for similar premises.

[5] The action is for payment of outstanding sums due to the respondents in terms of the invoices rendered by them for the electricity supplied to the appellant's hotel. It is not disputed that the respondents continued to supply electricity to the appellant's premises after the expiry of the fixed term. They did so on a different tariff basis following the expiry of the fixed term. The pleadings refer to invoices rendered during the period from 10 July 2007 until 10 January 2012. Accordingly, the parties are in agreement about a number of matters as follows:- neither party terminated the contract at the end of the fixed period and certain of the invoices rendered by the respondents during the period in dispute at a different tariff rate were paid by the appellant.

[6] The craves of the initial writ are in the alternative – Crave 1 is for £89,521.21 being the balance said to be outstanding on the unpaid invoices. Crave 2 is an alternative crave and is for the sum of £38,102.89 calculated on the basis of the lowest rate or tariff which the respondents applied to new contracts for hotel premises similar to the appellant's hotel during the relevant period (bench mark index minus 10%). The appellant's defence is that no sums are due by him to Npower. Instead, as Npower did not vary the tariff effectively by reference to Clause 2.7 they are not entitled to vary the original fixed term tariff at all and can only charge for electricity at the original rates fixed between 2001 and 2006 leading to an overpayment by the appellant of £23,722.70 being the sum craved in the counterclaim.

The Appeal

[7] The appellant appeals the interlocutor of the sheriff dated 14 October 2016

pronounced after debate on the parties respective preliminary pleas. The interlocutor is in the following terms:

> "Perth, 14 October 2016, the sheriff having resumed consideration of the cause, sustains the pursuers' preliminary plea to the extent that the defender's averments in the record number 28 of process in answer 3 at page 8 commencing in line 6 at the word "from" as far as the word "them" in line 15 are excluded from probation; *quoad ultra* allows parties a proof before answer in respect of the parties' respective preliminary pleas in the principal action; sustains the pursuers' preliminary plea to the relevancy of the counterclaim and dismisses the counterclaim; reserves the question of expenses arising from the debate which took place on 29 September 2016 meantime."

[8] The general proposition advanced on behalf of the appellant is that the respondents' case is irrelevant and ought to have been dismissed. The solicitor for the appellant asked us to sustain the appellant's first plea in law in the principal action; dismiss the action and grant summary decree in terms of the counterclaim. He argued that Clause 2.7 limits the respondents' discretion when setting a variation of the tariff after the fixed period came to an end. In order for a variation of the tariff to be effective it must comply with the control mechanism referred to in 2.7 that is:

> "the charges during such period may at the discretion of the supplier be changed to those for new contracts let by the supplier for premises similar to the premises supplied under this contract applicable at the termination date or at the relevant anniversary of the termination date (as the case requires)".

The respondents have failed to comply with this control and in any event are now not in a position to prove that the new tariff meets that requirement. In these circumstances the original contractual conditions apply and no increase may be charged. In other words if the tariff increase is not effectively changed in compliance with Clause 2.7 no increase may be charged at all as the original conditions must apply.

[9] The appellant presented the appeal under these heads:

1. The sheriff erred in excluding the appellant's averments in Answer 3.
2. The sheriff erred in allowing proof before answer as the respondents' pleadings are fundamentally irrelevant.
3. *Esto* the respondents' averments are relevant those in respect of personal bar are irrelevant and ought not to be allowed to proceed to probation.
4. *Esto* the respondents' pleadings are relevant the sheriff erred in allowing the alternative case to proceed to proof as it is fundamentally irrelevant. It advances two conflicting hypotheses of fact.
5. The sheriff erred in law repelling the counterclaim. He did so by sustaining the respondents' preliminary plea (5) in the counterclaim which was not supported by a note as required by OCR 18.8.

[10] The respondents' motion is that the appeal should be refused and we should adhere to the sheriff's interlocutor. In the event of the principal action being dismissed a proof before answer on the counterclaim would be required (in the event that the counterclaim was deemed to be relevant). Counsel for the respondents pointed out that we should not grant summary decree. A motion for summary decree had been lodged by the appellant prior to the debate but not insisted upon. There was no motion for summary decree before this court.

[11] We now turn to the grounds of appeal:-

In support of the first ground of appeal the solicitor for the appellant pointed out that the averments in answer excluded by the sheriff were introduced in response to the following

averment by the respondents (Article 3 of Condescendence page 6 of the print) "the defender made no response to the pursuers' various renewal notices". The averments were thus relevant for enquiry. It was also submitted to us that they were "plainly sufficiently specific for inquiry". They relate to communications between the parties which must be within the knowledge of the respondents. There is therefore no question of prejudice.

[12] Counsel for the respondents pointed out that the respondents would be unable to meet these averments at proof due to a complete lack of specification. The respondents' position is as set out in the pleadings, namely, that there had been no response from the defender and appellant to the invoices. The pursuers are a large organisation and the lack of specification would materially prejudice them as they cannot know what type of communication they require to investigate or when it was made. In any event, the averments are of questionable relevance. There is no indication what the communications were about or what they were querying. The averments do not seek to elucidate whether the contract was terminated or not.

[13] The averments in question are as follows:-

> "From 2007 onwards, the defender regularly queried the pursuers' charges and rates. The defender, and his agents, Brantwood Grange Energy Consultants, intimated to the pursuers on various occasions beginning in 2007 that the defender wished to terminate the contract due to the level of the pursuers' charges. The pursuers' staff incorrectly told the defender and Mr Philip Allen of Brantwood Grange on numerous occasions that the defender was not allowed to terminate without paying the debt the pursuers contended to be due to them."

[14] In our opinion this passage gives wholly inadequate specification. The appellant does not suggest that the contract was terminated or that he tried to terminate the contract by some means. It does not refer to a notice or purported notice of termination. Exactly how the respondents are expected to investigate and meet such inspecific information about

communication is difficult to understand. There is no specification of time, date, mode of communication or with whom the inquiry was made or answered. The contract terms make clear the manner in which the contract may be terminated. The lack of specification means, that the respondents would be unable to identify staff far less precognosce them. There would be real and material prejudice to the respondents. We detect no error whatsoever in the sheriff's approach to these averments and we agree that they are wholly inspecific. We reject this ground of appeal.

[15] We turn at this stage to the fifth ground of appeal relating to the counterclaim as it follows logically from the discussion of the averments to which we have just referred. The sheriff considers the counterclaim at paragraph 45 of his judgment concluding that the only passage in the defences that could be said to support the counterclaim are the averments already excluded for lack of relevancy and specification. He records that "there are, therefore, no relevant averments to support the claim in the counterclaim and I require to dismiss it. I will sustain the defender's first plea in law and grant decree of dismissal in respect of the counterclaim."

[16] The appellant argued that the sheriff erred in sustaining the respondents' preliminary plea (5) in the counterclaim and dismissing the counterclaim. Recognising his difficulty with regard to the legal basis on which the counterclaim had been advanced the solicitor for the appellant offered to amend his plea in law in the counterclaim by deleting the words "in error" and substituting the words "without legal justification". In any event, he argued that the sheriff ought to have repelled the respondents' preliminary plea unsupported as it was by a note on the basis of the preliminary plea. Accordingly, in terms of Ordinary Cause Rule 18.8 the plea is deemed not to be insisted upon and should have been repelled.

[17] Counsel for the respondents had also appeared at the debate before the sheriff. He considered the sheriff was correct to dismiss the counterclaim as there are no averments supporting a counterclaim based on error. No motion had been made to the sheriff to repel the preliminary plea in the counterclaim on the basis that it was unsupported by a rule 22 note. The sheriff makes no mention of it in his judgment as it was not raised before him. It should therefore not be entertained before an appeal court. We were referred to the note on the basis of the preliminary plea for the pursuers. Paragraph 3 of that note alerts the appellant to the inconsistency between the excluded averments and the counterclaim which proceeds on the basis that payment was made in error.

[18] Counsel for the respondents argued that the proposed amendment made at the bar, during the appeal, gives no notice to the respondents; changes the basis of the counterclaim; introduces complications and may be met by a plea of prescription. The amendment should be refused as it comes too late and seeks to introduce a new basis in law for the counterclaim.

[19] First of all we require to consider the pleadings as presented to the sheriff at debate. The sheriff excluded the relevant averments in answer 3 correctly in our view. He was asked to consider the counterclaim. The counterclaim is based on error and is supported by wholly inadequate averments in the statement of facts for the defender. We observe that the excluded averments are the only pleadings capable of providing support to the counterclaim. However, they do not give any clue as to what the error might be and the relevance of the averments is difficult to recognise when construing a contract which makes provision for either party to terminate.

[20] The proposed amendment falls to be refused. We do so not only because it comes late with no notice to the respondents but also for more substantial reasons. The

abandonment of error in favour of "without legal justification" does not solve the difficulties for the appellant. It is necessary to point to the factors or grounds which make the pursuers' enrichment unjust. As presently pled it is difficult to understand the basis of the counterclaim and where the mistake or error lies. Is it a mistake as to legal liability invoking the *condictio indebiti* or is it some other mistake or error as to his own status or the supply of electricity or how to terminate the contract? The appellant requires to point to a particular factor or ground of action which makes the enrichment unjust and there must be relevant averments in support of that claim.

[21] The remaining point relating to the counterclaim is problematic for the appellant. There is no mention in the sheriff's judgment that a motion had been made to repel the preliminary plea in the counterclaim based on OCR 18.8. In these circumstances we must proceed on the basis that no motion was made. In any event the appropriate stage to address the question of whether the preliminary plea ought to be repelled is when the pleadings are amended in terms of the minute of amendment and answers. In this action the relevant interlocutor is that of 17 June 2015. If *per incuriam* the issue of the preliminary plea was not dealt with at the correct stage it ought to have been raised prior to debate. It is simply unfair and wrong in principle to seek to raise such a technical matter before an appellate court when it appears that the appellant failed to raise it either before or during debate. Had the appellant made a motion at the amendment stage in terms of OCR 18.8 to have the plea repelled the respondents then had various options including that of lodging a note at that stage and asking the court to invoke its dispensing power. Accordingly, at debate the sheriff required to consider the counterclaim on the pleadings before him. In the absence of relevant averments which support the counterclaim the sheriff was correct to dismiss the counterclaim rather than allow an irrelevant claim to proceed to proof. The

purpose of the rules of court is to ensure that actions proceed in accordance with orderly and regular procedure to achieve a just outcome. The purpose of a note in support of the preliminary plea is to give notice, albeit brief, of the objections to the opponent's case. The note does not limit the argument which may be deployed in support of the preliminary plea. The note lodged for the pursuers brings to the attention of the appellant the inconsistency between the averments in Answer 3 of the principal action and the basis upon which the counterclaim proceeds. Accordingly, we consider that the sheriff was entitled to dismiss the counterclaim for substantial reasons and we see no basis upon which we should interfere with that decision.

[22] The remaining grounds of appeal attack the sheriff's decision to allow proof before answer on the respondents' averments in the principal action.

[23] Firstly, the appellant contends for a particular interpretation of the continuation clause in the contract (2.7). The action is for payment of sums which the respondents have charged the appellant for the supply of electricity following the expiry of the fixed term. Their entitlement to charge these amounts is predicated on the respondents establishing that they have varied the tariff in accordance with the terms of the contract. In other words, any variation is subject to the limit on their discretion or control which is to the rate charged on new contracts for similar premises. However, the respondents do not offer to prove that the variations made to the tariff charged to the appellant are equivalent to "those for new contracts let by the supplier for premises similar to the premises supplied under this contract". On the contrary the respondents positively aver that they cannot do so. If they require to establish that they varied the tariffs in accordance with the contract they cannot succeed if they cannot prove this. If they do not prove that they varied the tariff in

accordance with the contractual terms then they cannot establish their entitlement to any increase. The original contractual terms for the fixed term of the contract would then apply.

[24] The respondents argue that the terms of the contract do not support the highly artificial interpretation contended for by the appellant. The provision (Clause 2.7) must be construed in accordance with commercial reality. The contract provides for termination. The appellant could terminate but did not do so. The contract allowed the respondents to vary the tariff by increasing it. The respondents had a wide discretion to set the tariff. The appellant's argument, if correct, suggests that a consumer can utilise electricity supplied to him; make no complaint; take no steps to terminate and yet make an assertion years later that the supplier cannot legitimately charge at the new rates which the consumer by making payments has accepted. Put simply that is an untenable argument.

[25] A straightforward reading of the continuation clause does not, in our view, support the appellant's interpretation of that clause. It appears to us that the clause provides the supplier with a wide discretion to vary the tariff after the fixed period has elapsed. The guideline of the rate charged on new contracts for similar premises is imprecise. Similar premises are not defined nor is it clear whether that means "similar premises" in the commercial sense or premises which consume similar levels of electricity. More importantly, the contract provides for either party terminating thus allowing the consumer or customer a readily available exit rate to move to a different supplier. There is no specific sanction in the event that the supplier exceeds the ambit of discretion. It is open to the appellant to terminate the contract. It is important to emphasise that this is a straightforward contract for supply of electricity. It is a situation encountered daily not only in commercial premises but in most households. Commercial considerations apply. A written contract is interpreted with reference to a reasonable person having all the

background knowledge which would have been available to the parties. The meaning contended for by the appellant is the obverse of commercial common sense. However, the straightforward interpretation contended for by the respondents makes for entirely sound commercial sense namely at the end of a fixed period the supplier can vary his charges for electricity upwards and the customer can assess the new charges and if they are not acceptable or uncompetitive he may terminate. It cannot be argued that the sheriff erred in his approach. He rejected the appellant's approach to the interpretation of the operative clause as we do also. The clause does not impose a duty on the respondents to vouch each increase by reference to other comparable rates unless called upon to do so.

[26] Secondly, the appellant submits that *esto* the respondent's averments in the principal action are not irrelevant, the introduction of the alternative case renders the action irrelevant. Article 3 of Condescendence has been amended to introduce the alternative claim as follows:-

> "*Esto* the defender is entitled to object to the pursuers' charge (which is denied), the pursuers have revised their charges by reference to their tariff BMI-10. 'BMI' is a reference to the pursuers' 'benchmark index', which is a base rate from which tariffs are set for individual contracts depending upon variables such as the location and profile of the user. 'BMI-10' is a rate calculated by reference to the prevailing benchmark index less 10%, and is the lowest rate which the pursuers ever applied to new contracts for hotel premises similar to the Four Seasons Hotel in the period 2006 to 2012. The pursuers were entitled to increase their charges to that extent at least. On the foregoing hypothesis, the balance outstanding is £38,102.89 which is the sum sued for in the alternative. Detailed calculations have been intimated to the defender, and are produced."

[27] It was submitted by Mr McKenzie that the respondents are not entitled to alter a tariff retrospectively years after the event. The continuation clause does not provide for this. The sheriff erred in his approach to this alternative case when he considered that this basis of charging "is consistent with the terms of the continuation clause" (para 40). What the

respondents' lowest rate might have been is irrelevant. In any event, the second plea in law for the pursuers is not apt to support both the principal and the alternative claim. The amendment introducing the alternative case has been allowed and the pleadings therefore proceed on conflicting hypotheses of fact. The respondents cannot justify that they assert ignorance over which set of averments is correct. The respondents must choose which case they intend to proceed with otherwise the appellant does not know the case he has to meet and substantial injustice to the appellant arises. (See *RBS* v *Harper McLeod* 1999 SLT (Sh Ct) 99). The appellant should not require to prepare for proof on alternative and inconsistent averments of fact. The respondents know or ought to know whether they have revised their charges or not. They should not be allowed to proceed to proof on these pleadings.

[28] Counsel for the respondents argued that the point advanced on behalf of the appellant was simply wrong and placed a wholly artificial construction on the word "revised" in the passage referred to. The pleadings explain the respondents' position clearly. The factual averments in respect of rates and tariffs charged can be seen quite clearly in Article 3 of Condescendence (from line 9 of page 5 of the print to line 13 of page 6). The respondents offer to prove these averments as the variation to the rate in terms of Clause 2.7. Now, with the passage of time, the respondents cannot vouch the relevant terms for new contracts over the years. These were negotiated on an ad hoc basis. Clause 2.7 entitles the supplier to vary the tariff annually. That much is clear. The averments complained of simply provide another measure or guide to charging by reference to the lowest rate the respondents would ever charge for new contracts. Accordingly, this is neither an alternative case nor inconsistent with the respondents' principal position. It is designed to provide a guide or measure of quantum. There is nothing inconsistent about saying that the energy supplier increased charges over the years by reference to similar new contracts however we

can no longer prove the ad hoc comparable rates and we offer to prove what the lowest possible rate would be in respect of such contracts (BMI-10%). *RBS* v *Harper McLeod* is not authority for the proposition that alternative and inconsistent facts cannot be pled in any event.

[29] We observe that in *RBS* v *Harper McLeod* (*supra)* the Sheriff Principal followed *Smart* v *Bargh* 1949 SC 57 in which case the Lord President (Cooper) affirmed that there is no general rule against a party being allowed to plead alternative and inconsistent cases. The true question is whether substantial justice between the parties requires a party to choose between alternative cases. In *RBS* the pursuers advanced two quite inconsistent hypotheses as to their willingness to lend on certain premises. In our opinion, the circumstances of this case are radically different to that pled in *RBS.* In any event the question is not whether alternative and inconsistent cases are pled but whether any substantial injustice would arise for the appellant.

[30] In our view the respondents' averments as to the lowest charge rate are not inconsistent with the primary averments as to the actual charges set in this contract. The respondents do not truly advance an alternative basis for their entitlement to payment but rather an alternative rational approach to quantification in the light of both Clause 2.7 and the respondents' inability to vouch retrospectively the actual rates charged for new contracts for similar premises. We consider that the appellant's argument misconstrues the word "revise" where it appears in the relevant passage. It cannot have the meaning contended for by the appellant. The respondents' averments as to actual charges are clearly set out in Article 3 of Condescendence. In the second *esto* case the respondents are offering to prove the lowest charge out rate for the relevant equivalent period. We heard no real submission that a substantial injustice would arise for the appellant due to this approach. It appears to

us that the suggestion that the appellant requires to meet two alternative bases of claim is flawed. The averments which the appellant chooses to categorise as an alternative case, are truly supplementary to the pursuers primary case. It is not inconsistent with the respondents primary case. It may be inconsistent with the meaning of Clause 2.7 as contended for by the appellant - the "all or nothing" approach. However, for the reasons we have already given we consider that contention to be incompatible with the terms of the contract, commercial sense and reality.

[31] In relation to the argument that the respondents' second plea in law cannot support the alternative basis of claim, we have the following observations. Firstly, we do not consider that the pleadings do truly advance alternative bases of claim for the reasons we give and secondly we do not consider that we should entertain any argument as to the merits of that submission as it was not advanced before the sheriff. If we are correct in our view that the second *esto* case set out in Article 3 of Condescendence is truly directed towards quantum then there would be no merit in the argument in any event.

Personal Bar

[32] This ground of appeal is set out at paragraph 2.2(g) in the Note of Appeal. The solicitor for the appellant adopted his note of argument (para 19 *et seq*) which in essence repeats the proposition that the respondents require to offer to prove that the tariffs were altered in accordance with the contract namely, with reference to the rates charged on new contracts for similar premises. If the respondents cannot do so, (as here) then the tariff must remain unaltered meaning that the respondents cannot charge any increase. That sets out the appellant's position as to the contractual provision and the basis for the counterclaim. Accordingly, the averment that the appellant is personally barred from "objecting to the

increased charges in respect of which payment is now claimed" is irrelevant. The sheriff therefore erred in law in deciding that the respondents' averments anent personal bar were relevant for inquiry.

[33] In reply the respondents referred to the averments on personal bar which may be found in Article 3 of Condescendence (page 6 of the print line 15). They are in the following terms:-

> "The defender made no response to the pursuers' various renewal notices. He continued to make payments to account of the pursuers' increased charges. The Pursuers therefore assumed that he accepted them, which, in the circumstances condescended upon, they were well entitled to do. On the faith of the Defender's acceptance of their increased charges, the Pursuers continued to supply electricity to the Defender. Had he declined to accept these charges, the Pursuers would have taken steps to terminate his supply. As a result the Pursuers suffered prejudice."

These averments are straightforward. The respondents continued to supply the appellant with electricity. They issued renewal notices to the appellant who continued to use electricity and pay certain invoices. He did not terminate the contract. These averments are entirely relevant to a case based on personal bar which necessarily involves questions of fact. These averments ought to go to proof. The prejudice to the respondents is obvious. The argument that the appellant acted in a manner which is inconsistent with his position on record is self-evident. At this stage the respondents' averments must be taken *pro veritate*. The law on personal bar is well settled (*Gatty* v *Maclaine* 1921 SC (HL) 1 as applied more recently in *Ben Cleuch Estates Limited* v *Scottish Enterprise* 2008 SC 252).

[34] The question for the sheriff is not whether personal bar is made out but whether there are sufficient averments to proceed to proof on personal bar. The respondents' case relies on the appellant's actings and his failure to terminate the contract. He continued to accept electricity from the respondents. This is sufficient for proof. The test for personal bar

is clear and set out in *Gatty* v *Maclaine* and *Ben Cleuch* (*supra*). The sheriff at paragraph 38 of his judgment correctly identifies the relevant pleadings and the relevant test. In *Ben Cleuch* the court applied *Gatty* v *Maclaine* in the context of a lease. One need only read the rubric to recognise that the sheriff applied the correct test. To found a plea of personal bar the representation must be interpreted objectively; "if it conveys to the reasonable man that it was seriously intended, and that the person to whom it was made was being invited to believe it and act upon it, it matters not that the party making the representation may not in fact have intended that it be relied upon, either generally or for a particular purpose; if, judged objectively, the representation is to be treated as one which its maker intended should be relied upon, the person to whom the representation is made is then justified in believing it, and if he is justified in believing it, he is entitled, in a question with the representor to rely on it, and no separate question arises as to whether a person, whose belief in the truth of the representation has been justified, would act reasonably in relying on the truth of the representation for a particular purpose". If one applies that test to the averments to which we have referred and which are substantially not in dispute it is entirely open to any court to find that the doctrine of personal bar applies. Nevertheless, as the sheriff correctly observes that was not his function at debate. That is for another day. Nevertheless, it is apt for us to observe that the averments made by the respondents fit naturally and logically with the proposition that they suffered prejudice in continuing to supply the appellant with electricity. We are satisfied that this ground of appeal is without merit.

[35] This is essentially a simple contract which after the fixed term expires continues on a year to year basis with the supplier allowed to vary his charges in line with what the rate of charge might be for new contracts for similar premises. There is no provision in the contract

which requires the supplier to specify what these new contracts are and what the rates might be. We have rejected the argument advanced by the appellant that Clause 2.7 of the contract requires the respondents to specify these contracts otherwise there has been no "effective" increase in the tariff. The construction of the clause contended for by the appellant appears to us, to be flawed. The word 'effective' does not appear nor is there any prohibition on the supplier charging an increase in the tariff unless it is strictly in compliance with the rates which apply to new contracts for similar premises over the relevant period. Accordingly, the appeal must fail. In accordance with the submissions at the conclusion of the hearing we will award the expenses of the appeal to the respondents and in terms of section 108 of the Courts Reform (Scotland) Act 2014 we sanction the cause as suitable for the employment of counsel.