Autolink Concessionaires (M6) Plc v Amey Construction Ltd [2007] ABC.L.R. 05/04

OPINION OF LORD CLARKE Outer House Court of Session. 4th May 2007

Introduction

[1] This commercial action concerns the contractual arrangements for *inter alia*, the extension of the M6 motorway.

[2] The defenders, Amey Construction Limited; Sir Robert McAlpine Limited; Taylor Woodrow Civil Engineering Limited and Barr Limited together trading in joint venture as "Amey-Robert McAlpine-Taylor Woodrow-Barr M6 Joint Venture" undertook to carry out Construction Works, on behalf of the pursuers as employer, in terms of a contract dated 30 April 1997 described as the Construction Contract M6 DBFO project (hereinafter referred to as "the Construction Contract") (6/1 of process). The pursuers, themselves, had by an agreement dated 24 April 1997, described as the "M6 DBFO Agreement" (hereinafter referred to as the "DBFO Agreement") (no. 6/2 of process) contracted with the then Secretary of State for Scotland to carry out operations including the works which were then made the subject of the Construction Contract between themselves and the defenders. By clause 10(a) of the DBFO Agreement, the operations which the pursuers undertook to carry out included the design, construction and completion of the New Scottish Motorway being a: *"special road to be constructed in Scotland ... in accordance with the New Works Requirements between Paddy's Rickle Bridge and Cleuchbrae, together with the junctions and slip roads relating thereto, being all the roads other than the Existing Scottish Motorway situated within the O & M site in Scotland for which the Secretary of State will become the roads authority following their completion"*. - (See Part 1 of Schedule 1 of the DBFO Agreement).

The obligations undertaken by the pursuers in terms of the DBFO Agreement were wider in scope than the "works" undertaken by the defenders in terms of the construction contract, as that expression, "works", is defined in that contract. In addition to the DBFO Agreement and the Construction Contract, there were certain other related agreements. The first of these is what was described as the *"Routine Operation and Maintenance Contract"* (hereinafter referred to as "the ROM contract") between the pursuers and the defenders (7/4 of process), a contract described as the Major Maintenance Call-Off Contract between the pursuers and the defenders (7/5 of process) and certain appointments on behalf of the defenders of designers and consultants (7/6 and 7/7 of process). Among others things, these contractual arrangements were to provide not only for the construction of a new section of roadway, but the maintenance thereof and the maintenance of an existing roadway of which it formed the extension. In terms of clause 9 of the DBFO Agreement, the pursuers' obligations (originally to the Secretary of State for Scotland and now to the Scottish Ministers) under that Agreement, relate to a project period of 30 years from the operations' commencement date as defined in that Agreement. On the other hand, by clause 51 of the Construction Contract, the defenders' maintenance obligations are for a period of 60 months from the completion of the works they have undertaken to carry out. In terms of the DBFO Agreement, the pursuers' obligations in respect of, *inter alia*, the design of the New Scottish Motorway are unqualified. On the other hand the defenders' obligations in respect of the design of the New Scottish Motorway are qualified by clause 6.1.2 of the Construction Contract in the following terms: *"In performing its obligations under Clause 6.1.1 the Contractor shall design the Works (including the specification of materials and Plant where required) with reasonable skill and care and in accordance with practice conventionally accepted as appropriate at the time of the execution of the Works having regard to the size, scope and complexity of the Works"*.

[3] In terms of clause 6 of the ROM contract (read with the definitions in clause 1 thereof) the ROM contractors were made responsible for carrying out routine maintenance to the New Scottish Motorway for an initial period of 5 years renewable thereafter. In terms of clause 45 and the schedule of the ROM contract, the pursuers stipulated for the right to instruct the ROM contractor to carry out works in terms of a "works order". In terms of the ROM contract moreover, the pursuers were obliged to pay for works carried out in terms of a "works order".

[4] Under the Major Maintenance Call-Off Contract, the pursuers stipulated, by virtue of clause 1.1.4 for the carrying out, on their behalf, of "Major Maintenance" (as defined) concurrently with the carrying out of the works undertaken by the defenders in terms of the Construction Contract. "Major Maintenance" in terms of the Major Maintenance Call-Off Contract was defined as meaning: *"all works of repair and maintenance and any improvements required in respect of the Project Facilities other than defects repairs under the Construction Contract or routine operation and maintenance to be performed under the Routine Operating (sic) and Maintenance Contract"*.

In terms of the Major Maintenance Call-Off Contract, the pursuers were obliged to pay for the carrying out of any Major Maintenance Works.

[5] The factual context of the dispute, now before the court, is averred by the pursuers in Article 4 of Condescendence in the following terms: *"Since the Final Completion of the Phases of the New Scottish Motorway, the pursuers have identified major and important Defects within the pavement of the road, namely the absence of a, et separatim the inadequacy of the, bond between the upper and lower roadbase courses. The performance, structural integrity and longevity of the pavement depends upon the stiffness of the roadbase within it"*.

The averments go on to provide more specification about the problem and its consequences. In particular, in Article 6 of Condescendence they aver: "*The Defects have to date caused visible problems in several areas of the New Scottish Motorway, necessitating repair works, and will continue to do so until such time as the Defects themselves are remedied in terms of Clause 51.1. The Defects have caused a very significant reduction in the residual life of the pavement."*

In the first conclusion of the summons, the pursuers seek a declarator in the following terms: *"For declarator that the defenders are liable in terms of Clause 51 of the contract between the parties dated 30 April 1997 ('Construction*

Contract M6 DBFO Project') to remedy the lack of et separatim inadequacy of, bond between the upper and lower roadbase courses in the New Scottish Motorway (as defined in the said Contract)".

They then, in the second conclusion seek the following order: *"For an order ordaining the defenders to remedy the lack of, et separatim inadequacy of, bond between the upper and lower roadbase courses in the New Scottish Motorway (as defined in the said Contract) at their own cost and to the pursuers' reasonable satisfaction, and that within the period of two years from the date of decree to follow hereon, or within such other reasonable period as the Court shall seem fit."*

The Dispute focuses, accordingly, in the first place, on the proper construction and effect of clause 51 of the Construction Contract which is in the following terms:

"51 MAINTENANCE PERIOD

51.1 ***Rectification of Defects***

The contractor shall complete the work, if any, outstanding on the date in the Permit to Use as soon as practicable after such date and remedy to the Employer's reasonable satisfaction, and within such reasonable time as the Employer may specify having regard to the nature of the Defect, all Defects (whenever arising or manifesting themselves) in the New Works insofar as notified to the Contractor by the Employer within 60 months of Final Completion of all Phases of the Scottish Works and of the English Works part of the New Works (each of which 60 month periods are referred to in this Contract as the 'Maintenance Period' for such part and in the case of the Ancillary Works and the Accommodation Works, subject to clause 17.1(b) of the M6 DBFO agreement).

51.2 ***Cost of Remedying Defects***

51.2.1 All work referred to in clause 51.1 shall be executed by the Contractor at its own cost unless the necessity thereof is a direct result of a wilful act or breach of this Contract by the Employer.

51.2.2 If in the opinion of the Employer's Agent such necessity is a direct result of a wilful act or breach of this Contract by the Employer, it shall determine an addition to the Contract Sum in accordance with Clause 54 and notify the Contractor accordingly."

In the definition clause of the Construction Contract "Defect" is defined as meaning: *"any defect howsoever arising including without limitation:*

(a) any defect that is the result of defective design or defective materials or defective workmanship;

(b) any failure of the New Works to meet, or to continue to meet (except to the extent permitted in the O & M Requirements), the New Works Requirements; or

(c) any damage, destruction or other effect consequential on any such defect;"

The defenders, relying on their general plea to the relevancy, plea-in-law 2, sought to have the action dismissed on the basis that the pursuers had failed to aver the cause of any defect upon which they rely, in particular, that any such defect arose as the result of a breach of contract by the defenders and more specifically, if so, whether any such breach arose in respect of the defenders' contractual obligations regarding workmanship, materials or design.

[6] The court allowed the defenders a debate in respect of their second plea-in-law. I was favoured with detailed and concise written submissions from both parties which were expanded upon in oral submission before me.

Discussion

[7] Both sides referred, not only to provisions in the Construction Contract in relation to the question as to what the meaning and purpose of clause 51 was, but also to provisions in the DBFO Agreement, the ROM contract and the Major Maintenance Call-Off Contract to support their respective stances on how clause 51 should be construed. The defenders also sought assistance in that respect from the two agreements between themselves and their designers, numbers 7/6 and 7/7 of process.

[8] It is appropriate that I refer to certain of the other provisions in these other contracts which formed part of the discussion before me. The defenders, in the first place, under reference to the DBFO Agreement, schedule 1, schedule 2 and schedule 4 submitted that the construction obligations undertaken by the pursuers to the Secretary of State, and now the Scottish Ministers, were much more extensive than those undertaken by the defenders to the pursuers under the Construction Contract. The pursuers undertook the design, building, financing and operating of the new roadway in question. Their obligations included not only the building of the new section of motorway but the maintenance and operation of it and the maintenance and operation of the existing section of road. The whole of the project period under the DBFO Agreement amounted to 30 years, - see clause 9 and clause 10(b). Clause 10(c) deals with the pursuers' obligations to remedy defects in the "New Works". It does so in the following terms: *"Without prejudice to Clause 10(b), the remedying to the Secretary of State's reasonable satisfaction, and within such reasonable times as the Secretary of State may specify having regard to the nature of the Defect, of all Defects (whenever arising or manifesting themselves) in the following parts of the New Works -*

(i) each part of the New Scottish APR which forms part of a Phase;

(ii) the New English APR if constructed under this Agreement;

(iii) the Ancillary Works;

(iv) the Accommodation Works; and

(v) all other parts (if any) of the New Works not covered by the Company's obligations under Clause 10(b) in respect of the O & M works,

insofar as notified to the Company by the Secretary of State within 12 months of Final Completion of such part of the New Works (each of which 12 month periods are referred to in this Agreement as the 'Defects Correction Period' for such part and in the case of the Ancillary Works and the Accommodation Works, subject to Clause 17.1(b)); ..."

In schedule 1 to the DBFO Agreement "Defect" is defined as meaning "any defect howsoever arising including without limitation -

(a) any defect that is the result of defective design or defective materials or defective workmanship;
(b) any failure of the New Works to meet, or to continue to meet (except to the extent permitted in the O & M Requirements), the New Works Requirements; or
(c) any damage, destruction or other effect consequential on any such defect."

Counsel for the defenders stressed, in their submissions, that the pursuers' obligations under clause 10(c) of the DBFO Agreement were not, in terms, transferred to the defenders under the Construction Contract. The period of maintenance in terms of clause 51 of the Construction Contract was 60 months whereas that in clause 10(c) of the DBFO Agreement was 12 months. The context of these provisions, it was submitted, made clear that the obligations undertaken by the pursuers, on the one hand, in terms of the DBFO Agreement and, on the other hand by the defenders in terms of the Construction Contract were quite different. The court's attention was drawn to paragraph (E) in the preamble to the Construction Contract where it is stated that: *"The Employer has reached agreement with the Contractor whereunder the Contractor undertakes and each member of the Contractor jointly and severally undertakes that it will design, construct, test, complete and maintain the Works in accordance with this Contract to enable the Employer to discharge its obligations to the Secretary of State for Scotland in respect of the Works in accordance with the terms of the M6 DBFO Agreement and the Employer undertakes to exercise any right or power granted to it under the M6 DBFO Agreement, on request by the Contractor, which may be necessary to enable the Contractor to discharge its obligations to the Employer in accordance with the terms of this Contract."*

In the definition clause contained in the Construction Contract 1.1 the "works" are defined as meaning:

"the New Works, the Maintenance and the Relevant O & M Works and any works which are a necessary or ancillary part of these works and, where the context requires, any works carried out as a Variation;"

"New Works" are defined as having "the meaning given in clause 10(a) of the M6 DBFO Agreement". The word "maintenance" is defined as meaning "all works to be carried out in accordance with Clause 51". The "Relevant O & M works" are defined as meaning "such of the O & M Works as are applicable to the obligations of the Contractor under this Contract and which are generally described in Schedule 17". Schedule 17 is in the following terms:

"RELEVANT O & M WORKS

Those elements of the Planned Maintenance Works described in the ROM Agreement which are on the line of the New Works".

The ROM contract was entered into between the parties. Under it the defenders undertook certain of the obligations of the pursuers, regarding maintenance of the roadway for an initial period of 5 years with the possibility of subsequent renewals. Counsel for the defenders commented that, in accordance with these contractual arrangements, it was only part of the pursuers' obligations in relation to operation and maintenance contained in the DBFO Agreement which were passed on contractually to the defenders.

[9] The defenders relied to a significant extent in their approach to matters, on the wording of the design obligations contained in the Construction Contract. Clause 6.1.1 provides: *"The Contractor shall be responsible for the design, construction, completion, commissioning and testing of the Works, which shall be carried out in strict accordance with the New Works Requirements, the Certification Procedure, the Review Procedure and all other requirements of this Contract".*

Clause 6.1.2, as has already been noted, provides that *"in performing its obligations under Clause 6.1.1 the Contractor shall design the Works (including the specification of materials and Plant where required) with reasonable skill and care and in accordance with practice conventionally accepted as appropriate at the time of the execution of the Works having regard to the size, scope and complexity of the Works."*

The expression "New Works Requirements" appearing in clause 6.1 is defined in clause 1.1 as meaning: *"the conditions, procedures, standards, specifications and requirements for design and construction set out or identified in Schedule 2 as amended from time to time in accordance with this Contract."*

Clause 9.1.3 also provides: *"the Works when constructed and the Maintenance when completed will comply in all respects with the New Works Requirements."*

Schedule 2 provides:

"NEW WORKS REQUIREMENTS

This Schedule shall be deemed to consist of the provisions of Schedule 2 of the M6 DBFO Agreement as if the same has been incorporated at length herein but declaring that:

(i) the provisions so incorporated shall be deemed applicable only to the scope of work under this Contract as set out in the Conditions and the Schedules and so far as relevant to the description of the Works;
(ii) the definitions used in the M6 DBFO Agreement shall apply to provisions incorporated herein as aforesaid;
(iii) Clause references contained in the provisions incorporated herein as aforesaid shall be taken to be to references to the applicable clauses within the M6 DBFO Agreement;

(iv) information contained in the provisions incorporated herein as aforesaid which, when read in conjunction with the M6 DBFO Agreement is relevant only to that Agreement, shall be treated as irrelevant to this Contract."

Under reference to these provisions, the defenders once again stressed that the pursuers' obligations under the DBFO Agreement were not transferred "wholesale" to the defenders. They particularly emphasised that clause 6.1 of the Construction Contract provided for design obligations which were qualified by reference to certain standards and requirements.

[10] In the Major Maintenance Call-Off Contract, paragraph E of the preamble provides: *"The Employer (i.e. the pursuers) has reached agreement with the Contractor (i.e. the defenders) in the terms set out below with regard to the works of Major Maintenance required for the Project so as to enable the Employer to discharge its obligations to the Secretary of State for Scotland in respect of the Project in accordance with the terms of the M6 DBFO Agreement and the Employer undertakes to exercise any right or power granted to it under the M6 DBFO Agreement, on request by the Contractor, which may be necessary to enable the Contractor to discharge its obligations to the Employer in accordance with the terms hereof."*

Clause 1.1.4 of the same agreement defines "Major Maintenance" as meaning: *"all works of repair and maintenance and any improvements required in respect of the Project Facilities other than defects repairs under the Construction Contract or routine operation and maintenance to be performed under the Routine Operating (sic) and Maintenance Contract"* (emphasis added).

Again clause 3 of the same contract sets out the procedure for instructing major maintenance works including machinery for agreeing the contract sums. Clause 4 provides for payment of the contractor.

[11] The ROM contract between the parties states in paragraph E of its preamble as follows: *"The Employer (i.e. the pursuers) has reached agreement with the Contractor (i.e. the defenders) whereunder the Contractor undertakes and each member of the Contractor jointly and severally undertakes that it will carry out the routine operation and maintenance of the Project Road in accordance with this Contract to enable the Employer to discharge its obligations to the Secretary of State for Scotland in respect of the Works in accordance with the terms of the M6 DBFO Agreement and the Employer undertakes to exercise any right or power granted to it under the M6 DBFO Agreement, on request by the Contractor, which may be necessary to enable the Contractor to discharge its obligations to the Employer in accordance with the terms of this Contract."*

As has been noted, the combined effects of clause 6 of the ROM contract and the definition of "contract period" contained in that contract is that the ROM contract was agreed to endure for 5 years with the possibility of renewals for a further 5 years up until the end of the project period which is 30 years. The "works" to be carried out under the ROM contract are defined in the definition clause as meaning: *"subject to the provisions of Clause 43.4 the Planned Maintenance Works, the Minor Call-Off Maintenance Works carried out under a Works Order and Defects Repairs and, where the context requires, any works carried out as a Variation."*

Clause 43 provides for the commencement of the carrying out of the works in respect of various areas according to various dates. In respect of the Existing Scottish Motorway, commencement date is said to be the: *"Operations Commencement Date" and in respect of 'each part of the New Scottish Motorway which forms part of a Phase from the date of issue from the Permit to Use for such Phase'".*

In schedule 4 of the ROM contract there are certain exceptions from the O & M work, undertaken by the pursuers under the DBFO Agreement, which the defenders are obliged to carry out as Planned Maintenance Works. The most significant of these exceptions, for present purposes, is that there is excepted "rectification of defects in road pavement". The responsibility for such defects remains with the pursuers under the DBFO Agreement. Counsel for the defenders pointed out that in terms of the DBFO Agreement, there was no express requirement of any bond to be part of the road pavement.

[12] Under the ROM agreement, the defenders agreed to carry out not only the planned maintenance works but also "Minor Call-Off Maintenance Works" which are defined as meaning: *"the works of Routine Operation and Maintenance (other than the Planned Maintenance Works) to be carried out by the Contractor as specified in a Works Order."*

In the definition of "Works Order" it is provided that it: *"means an order issued by the Employer's Agent in accordance with Clause 45 requiring the Contractor to carry out works other than Planned Maintenance Works and shall include those works expressly excluded from the scope of the Planned Maintenance Works in Schedule 4."*

Counsel for the defenders pointed out that the remedying of a defect in the road pavement could be covered by those provisions and, if those provisions were employed by the pursuers, then, the contractor, i.e. the defenders would require to be paid for any such work by virtue of the provisions of clause 45 of the ROM agreement.

[13] As shall be seen, clause 51 of the ROM contract played a significant part in the discussion before the court as to how clause 51 of the Construction Contract should be construed. The provisions of clause 51 of the ROM contract are as follows:

"DEFECTS CORRECTION

51.1 Duration of Defects Correction Period

In this Contract, 'Defects Correction Period' shall mean a period of 12 months from the issue of the Certificate of Completion and shall apply solely in respect of Works carried out under a Works Order.

51.2 ***Remedying Defects***

The contractor shall execute to the reasonable satisfaction of the Employer's Agent all such work of amendment, reconstruction, and remedying of defects, shrinkages or other faults as the Employer's Agent may instruct and at such times as the Employer's Agent may instruct the Contractor to execute either during the Defects Correction Period or within 14 days after its expiration, as a result of an inspection made by or on behalf of the Employer's Agent prior to its expiration and shall agree a programme for the Defects Repairs with the Employer's Agent.

51.3 ***Cost of Remedying Defects***

All work referred to in Clause 51.2 shall be executed by the Contractor at its own cost if the necessity thereof is in the opinion of the Employer's Agent, due to:

51.3.1 the use of materials Plant or workmanship not in accordance with this Contract or the specific requirements of any Works Order; or

51.3.2 any fault in design where such design has been exclusively prepared by the Contractor or where the design was not so prepared where the Contractor could reasonably have been expected to detect that fault; or

51.3.3 the neglect or failure on the part of the Contractor to comply with any obligation, express or implied, on the Contractor's part under this Contract; or

51.3.4 any breach of the Contractor's warranties.

If the remedial works are not required as a consequence of any of the reasons specified in Clauses 51.3.1 to 51.3.4 above then an addition to the Contract Sum shall be calculated in accordance with the provisions of Clause 54."

[14] Junior counsel for the defenders in his submissions ventured to suggest that the difference between the wording employed in clause 51.3 of the ROM contract, on the one hand, and the wording employed in clause 51.2 of the Construction Contract could be explained by reason of the fact that clause 51.2 of the ROM contract required not only remedying of defect *but* also "reconstruction and amendment works"

[15] The last of the "suite" of agreements I was invited to consider were the contracts previously referred to 7/6 of process and 7/7 of process whereby the consultants employed by the defenders in relation to design were obliged to exercise all reasonable skill, care and diligence in carrying out their services.

[16] It was submitted on the defenders' behalf, that in terms of the Construction Contract the defenders, had undertaken only part of the pursuers' responsibilities regarding the design and construction of the New Scottish Motorway. The pursuers' obligations relating to design under the DBFO Agreement were not qualified as were the defenders', by virtue of 6.1.2 of the Construction Contract. Thus, it was said, the whole design risk was retained by the pursuers and had not been passed on to the defenders.

[17] It was against all of that contractual background, and context, submitted the defenders, that, the provisions of clause 51 of the Construction Contract fell to be considered. It was a matter of agreement between the parties that the final completion of both phases of the New Scottish Motorway took place on 25 October 1999 and the Permits to Use the relevant phases were issued on 16 April 1999 and 30 April 1999.

In clause 50.1.1 of the Construction Contract, it is provided: *"Not later than 25 Working Days prior to the date upon which the Contractor expects the issues of a Substantial Completion Certificate for a Phase, the Contractor shall issue to the Employer a notice to that effect, and the Contractor shall deliver to the Employer such Substantial Completion Certificate as soon as it is available in the form required to enable the Employer to comply with clause 14.1(a) of the M6 DBFO Agreement. If the Substantial Completion Certificate is in the form required by the M6 DBFO Agreement the Employer shall forthwith deliver the Substantial Completion Certificate to the Secretary of State ..."*

50.1.2 provides:

"Following the decision of the Secretary of State under clause 14.1(b) of the M6 DBFO Agreement, and within five Working Days of such decision, the Employer shall either:

50.1.2.1 issue a notice to the Contractor acknowledging the issue of such Substantial Completion Certificate (a 'Permit to Use'); or

50.1.2.2 notify the Contractor that in the opinion of the Secretary of State notwithstanding issue of the Substantial Completion Certificate the Phase has not reached Substantial Completion. In that event the Employer shall state in such notice the respects in which the Secretary of State considers such Phase has not reached Substantial Completion."

Substantial completion is defined as follows in the definition clause: *"substantial completion" of a Phase means Final Completion of such Phase except for incomplete items which do not prejudice the operation, or safe use by Users of such Phase, and in the case of all Phases other than the Accommodation Works, shall not be earlier than the date of satisfactory completion of the Stage 3 Audit Procedure for such Phase and the date on which all Lanes are available to traffic."*

Final Completion is defined as: *"'Final Completion' of a Phase or of any part of the New Works means completion of such Phase or such part of the New Works fully in accordance with the New Works Requirements except for outstanding or incomplete works to a value not exceeding:*
(a) £200,000 in the case of the Paddy's Rickle Bridge to Beattock Phase;
(b) £200,000 in the case of the Beattock to Cleuchbrae Phase; and

(c) £200,000 in the case of the New English Motorway and the New English APR,
which do not materially affect Users or Third Parties."

The significance of these provisions, it was said, by junior counsel for the defenders, was that they indicated that the first part of clause 51.1 in the Construction Contract was concerned with completion of outstanding work. Moreover once a Permit to Use was issued, the provisions of the ROM contract were activated. As has been seen clause 51.1. provides that the maintenance period is 60 months from final completion of all phases of the "Scottish Works" and of the "English Works part of the New Works". Clause 50.5 of the Construction Contract provides as follows: *"Subject to the requirements of this Clause 50 and Clause 51 the Contractor's liability under this Contract for any failure to comply with this Contract which becomes apparent after the end of the Maintenance Period or for any defect in the Works which becomes apparent after the end of the Maintenance Period shall be in damages. Such liability shall be limited to:*
50.5.1 the direct Loss suffered by the Employer arising out of such failure or defect: and
50.5.2 any Consequential Loss suffered by the Employer but subject to Clause 69."

It was important, it was submitted on behalf of the defenders, to read clauses 50.5 and 51 together. In clause 51.1 the remedying of defects required was not linked to any technical standard. It was simply to be done to *"the reasonable satisfaction of the employer"*. The clause, it was submitted, should be read as imposing an obligation on the defenders to remedy any breach of contract on their part notified to them within the 60 month maintenance period. Junior counsel for the defenders submitted that the pursuers had failed to aver that the problem in the road arose from a defect as defined in either (a) or (b) or as the consequence of such, under (c) of the definition of "Defect" in the Construction Contract. In Article 4 of Condescendence, the pursuers make no reference at all as to the cause of the absence or inadequacy of the adhesive bond and, in particular, that it arose because of defective design, defective materials or workmanship or any combination of these. The only averment of the pursuers which connected the work of the defenders with the *"bond issue"* was the averment in Article 4, page 20, c-d to the following effect:

"Full bond between roadbase courses is implicitly assumed in specifying design and construction requirements for such pavements, and is expected to be a characteristic of completed pavements. The Design prepared for the New Scottish Motorway implicitly assumed full bond between roadbase courses. The absence, et separatim the inadequacy, of such a bond in the pavement of the New Scottish Motorway is a Defect in respect of clauses 1.1 and 51.1 of the contract."

The pursuers conspicuously, it was said, do not aver that the absence of bond itself represents non-compliance with the New Works Requirements. The word "bond" did not appear in any of the contract documents. For all the pursuers offered to prove, the defenders may have performed all their obligations in terms of the Construction Contract. The pursuers were contending, on the basis of a bare assertion, that the defenders should rectify the "problem" at their own cost.

[18] Junior counsel then proceeded to refer to various authorities relating to the construction of contracts including in particular ***Emcor Drake & Scull Ltd v Edinburgh Royal Joint Venture*** 2005 SLT 1233, ***Melville Dundas Ltd v Hotel Corporation of Edinburgh Ltd*** (2006) CSOH 136 and ***BCCI v Ali*** (2002) AC 251, particularly per Lord Bingham at page 259. In the present case there was no substantial dispute between the parties as regards the proper approach to interpretation of contractual provisions of the kind with which the present proceedings were concerned or what the relevant matrix of facts was. As well as the general rules set out in the above authorities, there was some textbook discussion to be found in relation to defects liabilities clauses in construction contracts. In this connection reference was made to *Hudson on Building Contracts* (8th edition), paragraphs 5-025 to 5-039. At paragraph 5.039 under the heading "Types of Maintenance and Defects Liability Clauses" the following passage appears: *"It should be made clear that in clauses of this kind the word 'defects' will today usually be held to indicate any deficiency in the quality of the work, whether structural on the one hand or merely decorative on the other and whether due to faulty materials or workmanship, or even in design or performance, if that is a part of the contractor's obligation. In some cases, the making good or repair obligation may be limited expressly to cases of breach of contract on the part of the contractor, but the modern tendency is to require making good or repair whatever the cause of the defect, but with full compensation to the contractor in cases where he is not in breach of contract. In other less usual cases, the repair obligation may be 'absolute', in the sense that the contractor may be obliged to make good without additional cost to the owner whether or not he is at fault."*

At paragraph 5.040 after having stated: *"In building contracts in England the defect, whatever its cause, is often defined as one which 'shall appear' within the maintenance or defects liability period."*

The writer continues: *"The word 'defect' in this particular context may in practice often mean the symptom rather than the cause, which may often be difficult to establish (and so any consequential questions of liability), until work has been demolished, removed or uncovered, or special investigations carried out.*

Despite the similarity of many modern clauses, there are in fact different types of wording which may occasionally be met within construction contracts and which may have very different consequences, particularly in those cases where the contractor's obligation is to arise independent of fault on his part, so that he is not entitled to extra payment whatever the cause of the defect. ..."

Junior counsel for the defenders submitted that before holding that a defects liability clause had the effect last described in the passage from *Hudson* one would be looking for very clear wording to that effect. The important point in the present case was that there was not a single mechanism open to the employer to have "maintenance"

work done. He had rights under the ROM and Major Maintenance Call-Off contracts in that regard which were concurrent with his rights under clause 51.1. In a nutshell, the defenders' contention was that the pursuers' construction of clause 51.1 would have the effect of imposing strict, no fault, liability on the defenders to rectify any problem arising during the maintenance period, and this was not tenable when one had regard to the other relevant provisions of the Construction Contract and the accompanying agreements.

[19] In expanding upon the submission just noted, junior counsel, in the first place focused on the wording of clause 51.1 itself. Contrary to what the pursuers appeared to contend (in their written submissions) the provision was not intended, in particular, to transfer the pursuers' obligations under the DBFO Agreement. It was concerned with the defenders' obligation to complete the defenders' works undertaken under the Construction Contract. It was inherent in the nature of the word "defect" that there had been a failure to achieve a required standard - that could be seen from the wording of clause 51.1 itself where "defect" was qualified by "in the New Works". The expression "New Works" as has been seen, carried with it another definition "the New Works Requirements". The standard which the defenders had to reach was that necessitated by the New Works requirements. When that standard was not achieved there would be a defect, and the pursuers would be entitled to instruct the defenders to put that right at no cost to the pursuers. In contrast to that approach of the defenders, the pursuers offered no standard against which any defect was to be measured and, in place of any such standard, they appeared to contend that the defect was constituted by a mere assertion on their behalf. However wide the qualifying words of the definition of "defect" in the Construction Contract, they could not be read to remove the requirement of some reference to a standard. The pursuers' construction of clause 50.1 really involved giving the pursuers power to instruct the defenders to do virtually anything in respect of the road. That appeared to reduce the significance of the provisions regarding employers' variations in terms of clause 53.4 of the Construction Contract. Junior counsel for the defenders then referred the court to the provision of clause 21.1 and 21.2 of the Construction Contract which deal with the care of the works until the issue of the Permit to Use. They are in the following terms:

> ***"21.1 Care***
>
> *Subject to Clause 21.4, the Contractor shall be responsible for and shall take the full risk in the care of the Works and materials and Plant for incorporation therein from the date of execution of this Contract or, if earlier, the date when it commences manufacture of materials or Plant until the date of issue of the Permit to Use when such risk and responsibility in the relevant part of the Works shall pass to the Employer or Local Person or the Secretary of State provided that the Contractor shall take full responsibility for the care of and risk in:*
>
> *21.1.1 any Maintenance and materials and Plant for incorporation therein during the Maintenance Period; and*
>
> *21.1.2 any Works to be carried out in respect of a Phase remaining to be completed between the issue of the respective Permit to Use for that Phase and the acknowledgement by the Secretary of State pursuant to clause 14.3 of the M6 DBFO Agreement and by the Employer pursuant to clause 50.3.2 of the corresponding Final Completion Certificate and any materials and Plant for incorporation therein until such Final Completion Certificate is issued;*
>
> ***21.2 Responsibility to Rectify Loss or Damage***
>
> *If any loss or damage happens to the Works, or any part thereof, or materials or Plant for incorporation therein, during the period for which the Contractor is responsible for the care thereof in accordance with clause 21.1, from any cause whatsoever, (subject to Clause 21.4) the Contractor shall, at its own cost, rectify such loss or damage so that the Works conform in every respect with the provisions of this Contract to the satisfaction of the Employer's Agent."*

These provisions, it was submitted, incorporated a clear and explicit imposition of absolute liability to be placed on the defenders which fell to be contrasted with the wording of clause 51.1. It was also important to note, it was said, that clause 21.4 removed from the defenders, liability under the clause for damage or loss to the works caused by force majeure as defined. If the pursuers' arguments were correct, regarding the construction of clause 51.1, the defenders would be bound to put right, at their own cost, defects which were caused by force majeure. The width of the obligations which the pursuers' contention involved, was added to by virtue of the provisions of clause 50.5. While the specific performance obligations of the defenders were restricted in time, there was under clause 50.5, a potential liability upon them for damages without limit of time.

[20] In reply, senior counsel for the pursuers stressed that, at this stage, the issue for the court was one of relevancy - had the pursuers averred a relevant case or not? The pursuers' position was that for the purposes of averring a relevant case under clause 51.1, the pursuers did not require to identify, in averment, the cause of any defect but simply the existence of a defect. As a result, the pursuers submitted that they were not required to aver that any complaint was attributable to a breach by the defenders in their obligations regarding workmanship, materials or design. As far as the Construction Contract itself was concerned, paragraph E of the preamble thereto made it clear that the parties were agreed that the defenders were to discharge their obligations to the pursuers in terms of that contract and not some other contract. Clause 70.2 of the Construction Contract provides: *"This Contract (including the Schedules) and the Construction Direct Agreement constitutes the whole agreement and understanding of the Parties as to the subject matter hereof and there are no prior or contemporaneous agreements between the Parties with respect thereto."*

This established the primacy of the provisions of the Construction Contract for the purposes of the present dispute. The defenders were not party to the DBFO Agreement which related to operations which went far beyond the

New Works which were the subject of the Construction Contract. The total length of the motorway was 92 kilometres. Of that total length, 29 kilometres constituted the New Motorway. The DBFO contract was not just concerned with building and maintaining a new road for 30 years, but was concerned with the pursuers taking over an existing motorway and maintaining it. From the commencement of the DBFO Agreement, the pursuers had an obligation to operate and maintain the existing motorway quite apart from the obligations regarding the construction and maintenance of the new motorway. The pursuers entered into the ROM and Major Maintenance Call-Off contracts which related to both the New and Old Motorway. In clause 3 of the DBFO Agreement, certain other agreements were referred to as 'the related documents'. These included the ROM contract but did not include the Major Maintenance Call-Off Contract. The last mentioned contract was concerned only with the existing motorway. Reference in that respect was made to paragraph E of the preamble to the last mentioned contract and clause 1.1.4 and clause 3 thereof. Any major maintenance which was to be instructed under that contract required to be the subject of a works contract. If there was a works contract then there required to be payment made for the works undertaken by the defenders under clause 4 of that contract. The provisions of the Major Maintenance Call-Off Contract, it was submitted, therefore advanced neither parties arguments, particularly because of the express exception of the defenders' defects responsibilities under the Construction Contract.

[21] As regards the ROM contract, it would fall to be renewed at 5 year intervals. It was, therefore, not to be assumed that the parties would remain contractually bound indefinitely by the ROM contract. It did, however, illustrate the various ways in which the parties might formulate a defects liability provision with different consequences. Clause 51 of the ROM contract, it was submitted, was truly an allocation of risk clause. The wording of its provisions, senior counsel for the pursuers submitted, showed that the parties were not using the word "defect" to cover both cause and effect. Clause 51.5 provides as follows:

> ***"Contractor to Search***
> *If any defect, shrinkage or other fault in the Works appears at any time during the Defects Correction Period, the Employer's Agent may instruct the Contractor to search for the cause thereof. The cost of the work carried out in searching as aforesaid shall be borne by the Contractor and it shall remedy such defect, shrinkage or other fault in accordance with the provisions of Clauses 51.2 to 51.4 inclusive."*

Clause 51.5 had a purpose when one turned back to look at clause 51.3. There was no equivalent provision in the Construction Contract. The reason for that was obvious. There was no intention, in that provision, to allocate the risk by reference to a cause.

[22] The pursuers' case, as pled in Article 4 of Condescendence was that, where as here, one requires to lay a road in a series of layers, it is essential that these layers are bonded together. The pursuers do not know why the two layers have not been bonded together. There may ultimately be a dispute to be resolved as to whether in fact there is a defect but the pursuers' contention was that, in the meantime, they need only offer to prove that there was a defect. If they have identified and notified to the defenders a defect during the maintenance period, the risk of dealing with it passes to the defenders. This, it was contended, made perfect sense in that a defect was a symptom not a cause. It may not be possible to discover the cause. Someone has to bear the cost, at least until the remedial work is performed. A provision which had such an effect, while onerous, was not entirely exceptional. There simply were a variety of ways in which parties to a Construction Contract might allocate this kind of risk. For example, they might approach matters as was done in clause 51 of the ROM contract, where the contractor only bore the risk of defects arising from breach of his own contractual obligations. Another type of provision might oblige the contractor to remedy on instruction, all defects, however arising, and only if he could show that he was not in breach of contract, would he be paid for the remedial works. Another possibility would be that the contractor was required to rectify defects during the maintenance period but would be paid the costs thereof if it was proved that the defects arose because of the employers' breach of contract. Lastly, it was perfectly possible for parties to agree that the contractor would remedy the defects at their own cost, whatever the cause thereof. The last type of agreement was the absolute liability example referred to in *Hudson*. Clause 51.1, in the present case, was not in that last mentioned category. It fell into the third kind of possibility, referred to above, because there was the right to recover the cost of remedying the defect if the defect had risen by reason of the employer's fault. While it was an onerous obligation, it was not an absolute one and simply arose from an agreed allocation of risk between the parties.

[23] The fact that the parties to the ROM contract, by clause 51, employed one means of allocating risk, and used a different formulation in clause 51 of the Construction Contract showed that they were discriminating in respect of allocation of risk. Clause 51 in the ROM contract set out the machinery whereby the employer's agent was to discover whether the defect arose from a breach of contract by the defenders or not. This prevented delay in addressing the question. The defenders' position in relation to clause 51.1 of the Construction Contract appeared to be that they had no obligation to rectify matters at all during the maintenance period, unless and until it could be shown that any reported defect had arisen because of their fault. Put another way, the defenders were putting in issue whether they needed to carry out work at all under clause 51 because they were contending, in effect, that unless the pursuers showed that the problem, whatever it was, arose from the defenders' fault, it could not be described as a "defect" in terms of the contract. If the pursuers' approach was correct, however, the defenders were bound to rectify defects and then claim the cost of doing so if the defect had been due to the employer's fault. This, it was submitted, made for perfect commercial sense when it may be impossible to identify the cause of the defect until the remedial work was carried out.

[24] Senior counsel for the pursuers referred to the definition of *"defect"* in the Construction Contract and emphasised the words "*howsoever arising"* which, he contended, showed that it required to be construed in the widest possible sense. It was not synonymous with the words *"loss or damage"*. A defect, it was said, was *"a failing or a flaw or imperfection - a lack or absence of a desired quality"*. If the parties had wished to limit the scope of the wording "defect", for the purposes of the contract, to problems arising from the contractor's breach of his contractual obligations, then the first line of the definition would have been written to the effect that "defect means any defect arising from any breach of the contractor's obligations". Instead of that the parties used the words *"any defect howsoever arising including without limitation"*. The use of the words "howsoever arising" clearly argued against the defenders' main contention that any defect must be something capable of being defined by reference to a specific standard. It was clear that the cost allocation process provided for by clause 51 of the ROM contract was different from that set out in clause 51 of the Construction Contract, yet the defenders were, in effect, arguing that the approach of the ROM contract provisions should be applied to the Construction Contract provision. It was highly unlikely that parties, like the present parties, contemporaneously sought to achieve exactly the same end in these contractual arrangements by using quite different language. Clauses 8 and 9 which set out the defenders' contractual obligations and clause 21 in the Construction Contract were not incompatible with the pursuers' construction of clause 51. The provisions of clauses 8 and 9 were addressing the question of the standard of performance which the defenders had to reach in carrying out their obligations. Clause 21 was really concerned with damage to the works arising out of an external event, not a defect in those works. The provisions in clause 53 regarding variations were not incompatible with the pursuers' construction of clause 51. Rather they supported it because there could be no variation after final completion. Clause 51.1 was addressing the situation after final completion.

[25] Senior counsel for the pursuers maintained that clause 50.5 did not support the defenders' approach to the construction of clause 51.1. It was to be noted that the word "defect" in clause 50.5 appeared in the lower case while in clause 51 it appeared in the upper case. In the definition clause it also appeared in the upper case. So, it was argued, it was not a defined term in clause 50.5. The clause was concerned with a defect which became apparent after the expiry of the maintenance period. A defect which became apparent after the expiry of the maintenance period was not one which the employer could have given notice under clause 51. Clause 50.5 was dealing with situations in which the contractor's liability had not been triggered under clause 51.1 at all. In that event, damages might be available. It was a non-specific implement clause and the damages may be limited as specified in the clause.

[26] Senior counsel for the pursuers invited the court to refuse the defenders' motion for dismissal and to put the case out By Order for discussion of further procedure.

[27] Senior counsel for the defenders, in reply, adopted the submissions of junior counsel. Senior counsel focused on the absence in the pursuers' pleading of any averment referring to any standard or contractual term which the defenders were alleged to have failed to comply with, in a situation where the Construction Contract contained highly elaborate and detailed requirements designed to ensure that the works were properly carried out. Reference in this respect was made, for example, to the definition of New Works requirements, schedule 2 of the Construction Contract and schedule 2 of the DBFO Agreement. There should, therefore, be no difficulty for the pursuers identifying any contractual standard which they claimed had not been met. The construction placed by the pursuers on clause 51.1, produced a very onerous burden on the defenders. Senior counsel, however, accepted that that construction could not be said to produce an absurdity and it did produce an intelligible and commercially sensible result for the pursuers. The pursuers' approach, however, was misconceived because it had conflated cause of the defect, with contractual standard. It was not necessary for the pursuers in order to make a claim, to investigate or establish the cause of the missing bond - they merely had to aver that it was not there and then point to what in the contractual provisions required that it should be there.

[28] Senior counsel for the defenders faced up to the point, put to him by the court, that the defenders' approach to the construction of clause 51.1 meant that there was no scope for a defect in terms of that clause which arose from neither the defenders' breach of contractual obligations nor the pursuers' fault. For any such eventuality, the parties' intentions had been, it was suggested, that it would be dealt with under the Major Maintenance Call-Off Contract or the ROM contract.

[29] Senior counsel for the defenders submitted that the practical matters about identifying by whose fault the defect had arisen could be dealt with by virtue of the provisions of clause 39 of the Construction Contract which provided for inspection and testing on behalf of the employer. In addition, clause 41 provided also for the removal of improper work materials or plant. The argument made by the pursuers that the provision was designed to prevent protracted disputes during the maintenance period was reduced in its effect at least, by virtue of the provisions of clause 66 of the Construction Contract which provided for an expedited dispute resolution procedure.

[30] Senior counsel for the defenders turned to address the difference in wording between clause 51 in the ROM contract and clause 51 in the Construction Contract. It was pointed out that clause 51 of the ROM contract had a defects correction period of 12 months from certification of completion and was to apply only to works carried out under a works order. Senior counsel submitted that, at the time the ROM contract was entered into, the nature and extent of work that might be carried out under that agreement and, in particular, under a works order would not be known. On the other hand, the defects to be corrected under the Construction Contract would only be those

arising in the works which were contracted for. These differences were enough to show that the scope and purpose of clause 51 in the ROM contract was different from the scope and purpose of clause 51 in the Construction Contract. In any event, it was contended, one should simply not attach too much significance to different words in different contracts.

[31] The argument for the pursuers had, it was said, relied strongly on the suggestion that the critical question was, who was going to pay for the remedial works. But, senior counsel for the defenders argued, it was important not to evade the prior question under clause 51.1 as to whose breach of contract had resulted in the particular problem because otherwise one might be led to the conclusion that the allocation of cost had been addressed under the Construction Contract alone, rather than by resort to one or other of the other contracts. Senior counsel, however, accepted that there was no complete contradiction between the pursuers' approach to the construction of the provisions of clause 51 of the Construction Contract and the provisions of the other agreements. The Major Maintenance Call-Off Contract, in particular, it was submitted, was an important component in the contractual network. It was specifically recognised in the Construction Contract itself in the definition clause and clause 8.5. The fact that in clause 1.1.4 of the Major Maintenance Call-Off Contract, there was exclusion from the works to be carried out thereunder, defects repairs under the Construction Contract was entirely consistent with the defenders' approach, because it envisaged that there was a category of Major Maintenance which was not a defects repair. Senior counsel, however, was constrained to accept that the exclusion in clause 1.1.4 was equally consistent with the pursuers' approach to the construction of clause 51 in the Construction Contract. However, he contended, that if the pursuers were correct, it was difficult to see what was the purpose of the Major Maintenance Call-Off Contract during the 5 years maintenance period. His attention was, however, drawn to the fact that clause 1.1.4 in that contract referred to *"Major Maintenance"* as meaning *"all works of repair, and maintenance and any improvements",* whereas clause 51.1 is confined to the remedying of defects. That, he accepted, showed that there was no necessary complete overlap between the two contracts in relation to work which might be carried out in terms thereof.

[32] In a brief reply, senior counsel for the pursuers pointed out that it was not correct to state, as senior counsel for the defenders had done, that the machinery in the ROM contract for identifying defects had its equivalent in the provisions of clause 39 of the Construction Contract. The ROM contract had a clause 39 in exactly the same wording as that of clause 39 in the Construction Contract. So to clause 66 in the ROM contract had its equivalent in clause 66 of the Construction Contract. Clause 51 in the ROM contract, on the other hand, was a very different piece of drafting from clause 51 in the Construction Contract. There was indeed, contrary to what was suggested by senior counsel for the defenders, content for the Major Maintenance Call-Off Contract which was different from what was provided for in the Construction Contract, because the former contract was to apply to the entire motorway and not just the New Works. It would apply to defects appearing after the maintenance period in the Construction Contract had expired. The Construction Contract was a phased contract and completion of it was determined according to phases with maintenance periods applied to each phase, which expired at different dates. The Major Maintenance Call-Off contract was also to deal with *"improvements"*. It had no express duration but could be terminated by reasonable notice given by either party to it. It could not be said, therefore, that the pursuers' approach to the construction of clause 51 of the Construction Contract rendered the Major Maintenance Call-Off Contract redundant. If the defenders' position was that the putting right of the problem with bonding amounted to a variation or an improvement then it was for them to aver that. They chose not to do so. In the light of that, they were simply seeking to invert the wording of clause 51.2.1.

Decision

[33] The discussion in this case has, as has been seen, involved both sides, in different ways, seeking to justify their interpretation of clause 51 in the Construction Contract by reference to other agreements. Neither party suggested that such an exercise was illegitimate. Two of the agreements, the ROM contract and the Major Maintenance Call-Off Contract, were entered into between the same parties contemporaneously within the Construction Contract and clearly related, in part, at least to the construction project which was the subject of the Construction Contract. The other contracts, the DBFO Agreement and design contracts also related to the project. They all undoubtedly form part of the factual matrix in which the Construction Contract was concluded. But, ultimately, it appears to me that the wording of the Construction Contract must be construed according to its own language unless one is clearly, by that language itself, directed to construe any of its provisions by reference to the provisions in the other agreements, and, if there is no ambiguity in the language in question, it should be construed according to its plain meaning and any other guidance contained in the agreement itself. In this connection, I think it is significant that in the Construction Contract, clause 70.2 is in the terms which I have stated above. I consider also that it is significant that it was not contended, by counsel for the defenders, that the wording of clause 51 is ambiguous. Moreover, it was accepted, on behalf of the defenders, that the construction put forward on behalf of the pursuers did not produce a commercial absurdity nor was it a construction which was clearly contradicted, either by other wording of the Construction Contract itself, or by wording in any of the other related contracts. Ultimately the defenders' position was very much to the effect that the construction favoured by the pursuers imposed a very onerous burden on the defenders and that, at least, in relation to the remedying of defects which could not be shown to be caused by the fault of the defenders, these might be addressed by pursuers instructing them to carry out works under other contracts whereby they would be remunerated for that work. I am not satisfied that either of these points come to be sufficient to overcome what might otherwise be considered the plain meaning of the clause in question as supplemented by the definition clause.

[34] In the present case, the parties themselves have provided their own definition of the word "*Defect*". It is expressed in the widest terms i.e. "any defect howsoever arising." The rest of the definition provides three examples of what would be embraced in the definition but does so with the preliminary words "*including without limitation*". The words *"howsoever arising*" in my judgement, clearly argue against any restrictive, narrow or limiting approach to the content of the term (compare ***American Telegraph Ltd v Western Union Telegraph Co*** (1950) TR 45 at page 49 per Lord Simmonds). The construction of clause 51 advanced by the defenders, appears to me ultimately to do some violence to the definition clause by imposing a more restrictive approach to the definition of "Defect" than it provided for. In a nutshell, the defenders' approach, in effect, involves the re-writing of the definition clause and restricting it to examples (a) and (b) given therein. Counsel for the defenders' position was that clause 51 did not admit of a third category of defect other than one arising from the defenders' breach of contractual obligations or the fault of the pursuers. I do not agree that the plain wording of the clause carries with it such a qualification particularly having regard to the definition of "defect" provided in the contract itself.

[35] The defenders' submissions were very much rested on the proposition that the word "*defect",* to have sense and meaning, must have reference to a standard or a condition which has not been met. That may well be the case - the standard may be perfection - but it begs the question, in my judgment, as to whether the alleged "*defect"* in the roadway for the purposes of this case, must be a matter which involves breach of the contractual obligations imposed on the defenders. While the question as to whether or not they have performed their obligations will, *ex hypothesi*, have to be determined according to what they have promised to perform it is, in my view, a *non-sequitur* to say that the word "defect" in the specific performance clause, which is clause 51, must be a matter which involves a failure on their part to meet their contractual obligations or, alternatively, has been caused by the pursuers' fault. It seems to me that the plain meaning of the wording of clause 51, taken together with the parties' chosen definition *"Defect"* means that it was intended to impose an obligation upon the defenders to remedy, at their cost, during the maintenance period, any notified defects howsoever they arose, with the exception of those which arose as a direct result of a wilful act or breach of contract by the pursuers, and that meaning and purpose are supported by the way in which the same parties chose, contemporaneously, to address the question of remedying defects in clause 51 in the ROM contract. The parties entered into sophisticated contractual arrangements and I agree with senior counsel for the pursuers that the parties can be seen to have been careful and discriminatory in the use of the language to record what was agreed. Had the parties' intention been to restrict the scope of clause 51 of the Construction Contract in the way that is argued for on behalf of the defenders, then, it seems to me, they would not have chosen the wording they did in that clause, but that something more or less on the lines of what appears in clause 51 of the ROM contract would have been employed.

[36] I consider that resort to the other agreements cannot be employed to displace, qualify or contradict what is, otherwise, the plain meaning of clause 51 of the Construction Contract. While the ROM and Major Maintenance Call-Off contracts overlap to some extent with the Construction Contract, they were designed for different and additional purposes and for different periods of time. For that reason, and standing the concession that there is no contradiction between their provisions and the pursuers' approach to construction of clause 51 of the Construction Contract, I do not consider it legitimate to put glosses on the provisions of clause 51 by reference to them.

[37] The construction of clause 51, to include an obligation on the defenders to remedy defects during the maintenance period, not shown to have arisen from breach of their obligations, can be seen, from the discussion in *Hudson* cited above, not to be unique in construction contracts. The practical purpose for having such a provision is well explained in the passages cited above from *Hudson*. The context of the discussion, as was pointed out, is a maintenance or defects liability period. In that context the word "defect" may indeed involve a symptom rather than the cause *"which may often be difficult to establish (and so any consequential questions of liability), until work has been demolished, removed or uncovered, or special investigations carried out"*.

Seen in that light, the ordinary meaning of the words employed in clause 51 does not produce any commercial absurdity. Ultimately, the pursuers' construction of clause 51 appears to me to be more in accordance with the rules of construction as set out in such cases as ***BCC Iv Ali*** (2002) 1 AC 251 per Lord Bingham at page 259G, paragraph 8, ***Melanesiam Mission Trust Board v Australian Mutual Provident Society*** (1997) 74 PNCR 297 per Lord Hope at page 301 and ***City Wall Properties (Scotland) Ltd v Pearl Assurance Plc*** 2004 SC 214 at page 229. The defenders' approach, on the other hand, seems to me to involve an illegitimate re-wording of the provision itself to save them from, what is accepted is, an onerous obligation.

[38] Both sides were agreed that the question at this stage was one of relevancy. I do not accept for the reasons given that the pursuers' case is irrelevant because it lacks certain averments which would be needed if the defenders' construction of clause 51 as discussed, was correct. There may well remain difficult questions to be answered at proof as to whether or not what is complained of is a defect but that, in my view, is another matter for another day.

[39] I shall, in the circumstances, have the case put out By Order for discussion of further procedure.

Pursuers: Keen, Q.C., Mure; Fyfe Ireland LLP
Defenders: Cullen, Q.C., Richardson; Pinsent Masons