OUTER HOUSE, COURT OF SESSION

[2024] CSOH 55

CA67/23

OPINION OF LORD RICHARDSON

In the cause

ROCHE DIAGNOSTICS LIMITED

Pursuer

against

GREATER GLASGOW HEALTH BOARD

First Defender

and

ABBOTT LABORATORIES LIMITED

Second Defender

Pursuer: Lord Keen of Elie KC, Breen; Addleshaw Goddard
First Defender: Lindsay KC, Blair; NHS Central Legal Office
Second Defender: Lord Davidson of Glen Clova KC, Campbell; CMS Cameron McKenna LLP

5 June 2024

Introduction

[1] This case involves a dispute about public procurement.

[2] On 1 August 2022, the first defender published an Invitation to Tender for a contract to provide:

> "… a Laboratory Managed Service, incorporating Biochemistry, Haematology, Genetics, Pathology, Microbiology Virology, Collection Devices and Additional

> Equipment, including centrifuges, incubators, medical gases, ultra-low freezers and temperature monitoring equipment"

to NHS Greater Glasgow and Clyde. This procurement was an open procedure in terms of Regulation 28 of the Public Contracts (Scotland) Regulations 2015. The ITT specified that the duration of the contract was to be 7 years beginning in September 2023. The first defender's existing contract for the provision of these services was due to expire on 12 September 2023.

[3] The pursuer submitted a bid in response to the ITT on 3 October 2022. The only other bidder was the second defender. The second defender was the incumbent provider to the first defender of the services that form the subject of the procurement.

[4] By letter dated 24 March 2023, the first defender notified the pursuer that its bid had been successful and that, subject to satisfactory contract finalisation and the completion of due diligence, the pursuer would be awarded the contract. On the same date, the first defender notified the second defender that its bid had been unsuccessful.

[5] Towards the end of April 2023, following further correspondence from the first defender, the second defender's solicitors raised concerns in respect of the procurement process. In these circumstances, the first defender reviewed its evaluation of both bids. Thereafter, on 15 May 2023 the first defender wrote again to the pursuer reiterating that the pursuer's bid had been successful and that the pursuer had been selected as the first defender's preferred bidder.

[6] On 23 May 2023, the second defender commenced proceedings in the Court of Session against the first defender. The second defender sought to challenge the first defender's decision to select the pursuer as its preferred bidder. As a result of the allegations made by the second defender in its court proceedings, the first defender carried out a further assurance review of the procurement process on June 2023. By letter dated

28 June 2023, the first defender notified the pursuer that it intended to abandon the procurement.

[7] On or around the date of this letter, the first and second defenders agreed in principle that they would extend the existing contract by a period of 44 months. On 22 August 2023, the first defender issued a "Modification notice" in respect of its contract with the second defender disclosing the extension of the second defender's contract.

[8] At the end of July 2023, the pursuer raised the current proceedings. The pursuer's principal contentions are: first, that the first defender's decision to abandon the procurement procedure on 28 June 2023 was unlawful; and, secondly, that the first defender's decision to extend the term of the existing contract with the second defender was also unlawful. On this basis, in the present proceedings, the pursuer seeks declarator and various orders under the 2015 Regulations. In the alternative, the pursuer seeks an award of damages from the first defender on the basis of its alleged breaches of the 2015 Regulations.

[9] In addition, in these proceedings, the pursuer avers that an unlawful means conspiracy was participated in by both defenders. The pursuer also seeks damages from the second defender on the grounds that the second defender caused the pursuer loss by unlawful means. Both defenders challenge the relevancy of these aspects of the pursuer's averments and I heard these arguments at debate.

[10] The procedural background to the hearing before me was an ongoing document recovery process whereby the pursuer sought documents relating to the procurement process from the defenders. The disclosure to the pursuer of certain documents was resisted by the defenders on grounds including that the documents concerned: were protected by legal privilege; had been issued on a "without prejudice" basis; or, were otherwise commercially confidential. In response, the pursuer sought to challenge those grounds on

the basis of its cases that the defenders were involved in an unlawful means conspiracy and that the second defender had caused it loss by unlawful means. Accordingly, the parties sought and I fixed a hearing in order to debate the relevancy of the pursuer's pleadings in respect of unlawful means conspiracy and causing loss by unlawful means.

The pursuer's averments

[11] The pursuer makes the following averments as to unlawful means:

> "56. As hereinbefore condescended upon, on or around 28 June 2023 the first and second defenders reached an agreement to extend the term of their existing contract for the provision of a Laboratory Managed Service by a period of 44 months (the Defenders' Agreement). The first defender took the Abandonment Decision in reliance on the Defenders' Agreement. For the reasons hereinbefore condescended upon, the first defender was not permitted to extend the term of its contract with the second defender under Regulation 72(1)(b) of the 2015 Regulations. The purported modification of the defenders' contract is unlawful. An object of the Defenders' Agreement was to actuate an unlawful purpose, namely to unlawfully extend the term of the defenders' existing contract. It was clear to both defenders that by agreeing to act in the manner hereinbefore condescended on they would deprive the pursuer of the award of the Laboratory Managed Service contract in terms of the Procurement. It was clear to both defenders that by agreeing to act in such a manner they would cause the pursuer to suffer loss. As a result of the Defenders' Agreement, the pursuer has suffered loss. The defenders' averments in answer are denied except insofar as coinciding herewith.
>
> 57. As hereinbefore condescended upon, prior to the Abandonment Decision the second defender informed the first defender that it would not comply with its obligation under Clause 18.9.1(g) of the defenders' contract to continue to provide services after 12 September 2023, at the first defender's request. Believed and averred that the second defender additionally informed the first defender that it would not comply with its obligation under Clause 18.9.1(f) of the defenders' contract to continue to provide services after 12 September 2023 to facilitate a mobilisation period for a new contractor. In so doing, the second defender acted in anticipatory breach of contract. Said anticipatory breach was actionable by the first defender. As hereinbefore condescended upon, all parties to the Procurement envisaged that there would be a mobilisation period during which the new contractor would 'wind up' its services while the second defender 'wound down' its services (in the event that the second defender was not awarded the contract pursuant to the Procurement). An inevitable consequence of the second defender's anticipated breach of contract was that there would be a gap in service provision from 13 September 2023 if the pursuer were awarded the Laboratory Managed

> Service contract because the pursuer required time to 'wind up' its services. In such circumstances, the first defender considered itself required to abandon the Procurement and to extend the term of the second defender's contract (notwithstanding that such decisions were unlawful) in order to ensure continued provision of an essential health service. The first defender relied upon the second defender's agreement to extend the term of its existing contract in order to take the Abandonment Decision. But for the second defender's anticipatory breaches of contract, the first defender would probably have entered into a contract with the pursuer, as its preferred bidder, for the provision of a Laboratory Managed Service. In refusing to comply with its contractual obligations to the first defender, the second defender intended to cause economic harm to the pursuer by obstructing the first defender from awarding the Procurement contract to the pursuer. As a result of the second defender unlawfully refusing to comply with its contractual obligations to the first defender, the pursuer has suffered loss. With reference to the second defender's averments in answer, Schedule Part 12 of the defenders' contract is referred to for its whole terms beyond which no admission is made. Not known and not admitted that the second defender was not requested to provide transfer arrangements or services during a mobilisation period pursuant to Schedule Part 12. *Quoad ultra*, the first defenders' averments in answer are denied except insofar as coinciding herewith."

The first defender's arguments

[12] Senior counsel for the first defender moved me to refuse to admit the pursuer's averments in Article 56 of condescendence (above) relating to unlawful means conspiracy to probation. Senior counsel also drew my attention to the fact that, if the first defender were successful in its motion, there were also some additional averments in Article 62 of condescendence which also related to unlawful means conspiracy and which would require to be deleted.

[13] Senior counsel advised that he had had the opportunity to consider the Note of Argument submitted on behalf of the second defender and adopted the arguments made on behalf of the second defender in respect of unlawful means conspiracy.

Unlawful means conspiracy

[14] The first defender submitted that the pursuer's averments in respect of unlawful means conspiracy were wholly irrelevant.

[15] The essential ingredients of the delict of unlawful means conspiracy are: (1) an agreement between the defenders; (2) an intention to injure the pursuer; (3) unlawful acts carried out pursuant to the combination or agreement as a means of injuring the pursuer; and (4) loss to the pursuer suffered as a consequence of those acts (see *Kuwait Oil Tanker Company SAK* v *Al-Bader* [2000] 2 All ER (Comm) 271 at paragraph 108; and *Moray Offshore Renewable Power Ltd* v *Bluefloat Energy UK Holdings Ltd* 2023 SLT 623 at paragraphs 71 to 73).

[16] The first defender submitted that the pursuer's averments failed, in two principal respects, relevantly to aver a case of unlawful means conspiracy.

The first defender's intention

[17] First, the pursuer had failed relevantly to aver that there was any intention on the part of the first defender to injure the pursuer. The pursuer had not averred that there was any subjective intention on the part of the first defender to cause harm to the pursuer. That was, so the first defender submitted, hardly surprising. The first defender is a public body which had the primary intention of ensuring a continuity of healthcare (including lab services) for patients within its locale.

[18] Senior counsel highlighted the fact that in this respect the illegality upon which the pursuer's case focussed was the decision to extend the second defender's contract as opposed to the decision by the first defender to abandon the procurement process – referred to by the pursuer as the "Abandonment Decision". The pursuer averred that the first defender had required to extend the second defender's contract "in order to ensure

continued provision of an essential health service" (Article 57). According to the pursuer, the first defender had been put in this position as a result of the second defender's anticipated breach of contract in refusing to comply with its obligations in terms of clause 18.9.1(g) and clause 18.9.1(f) of the second defender's contract (Article 46). The pursuer averred that but for the second defender's anticipatory breaches of contract, the first defender would "probably have entered into a contract with the pursuer, as its preferred bidder" (Article 57).

[19] Even if proved, these averments did not establish an intention on the part of the first defender to injure the pursuer. Notably, the pursuer did not criticise the first defender in Article 57. Senior counsel submitted that the first defender could not be both the victim of the second defender's breaches of contract and, at the same time, an active conspirator. The averments made by the pursuer in relation to intention on the part of the second defender were irrelevant standing the pursuer's averred position that the first defender had essentially been put in a position in which it had to agree to the extension of the second defender's contract in order to ensure continued provision of an essential service.

[20] The first defender accepted that the case law recognised that:

> "One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions." (*OBG Ltd* v *Allan* [2008] 1 AC 1 at paragraph 62 per Lord Hoffman)

[21] Senior counsel also drew attention to the fact that in *OBG*, Lord Hoffman had emphasised, in relation to the tort of causing loss by unlawful means, that the common law has been traditionally reluctant to become involved in devising rules of fair competition, and had warned against the danger of the law being extended to provide a cause of action based

on acts "which are wrongful only in the irrelevant sense that a third party has a right to complain if he chooses to do so" (at paragraph 56).

[22] In the present case, the first defender had not intended to enrich itself – on the pursuer's own averments, its intention had been to ensure the continued provision of an essential service. Senior counsel submitted that the final sentence of paragraph 62 in *OBG* described the present case – the pursuer's loss was neither a desired end nor a means of attaining it but merely a foreseeable consequence. Once the procurement process had been abandoned, the pursuer had no rights as against the first defender in respect of the supply of the lab services. The only extant contract at that point was the one between the first and second defenders. Accordingly, causing the pursuer loss was not the means by which the first defender hoped to achieve its end.

[23] The averred actions of the first defender could not be described as having the "high degree of blameworthiness" referred to by Lord Nicholls in *OBG* (at paragraph 166) or as "sufficiently reprehensible to justify imposing on those who have brought about the harm liability in damages for having done so" (see *Revenue and Customs Commrs* v *Total Network* [2008] 1 AC 1174 at paragraph 56 per Lord Scott of Foscote).

[24] In relation specifically to the question of what makes unlawful means conspiracy actionable, senior counsel made reference to the joint judgment of Lord Sumption and Lord Lloyd-Jones in *JSC BTA Bank* v *Ablyazov (No 14)* [2020] AC 727 at paragraphs 6, 10, 11 and 15. The concept identified in *JSC* was the absence of a just cause or excuse:

> "A person has a right to advance his own interests by lawful means even if the foreseeable consequence is to damage the interests of others. The existence of that right affords a just cause or excuse. Where, on the other hand, he seeks to advance his interests by unlawful means he has no such right. …
>
> Conspiracy being a tort of primary liability, the question what constitute unlawful means cannot depend on whether their use would give rise to a different cause of

> action independent of conspiracy. The real test is whether there is a just cause or excuse for combining to use unlawful means. That depends on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant. This was the position reached by the House of Lords in … *Total Network SL* [above]…. The Appellate Committee held that a criminal offence could be a sufficient unlawful means for the purpose of the law of conspiracy, provided that it was objectively directed against the claimant, even if the predominant purpose was not to injure him." (at paragraphs 10 and 11)

[25] Senior counsel relied upon *JSC.* Applying the absence of just cause or excuse approach formulated in that case, it was important to recognise, in relation to the nature of the alleged unlawfulness, that it had been brought about by the second defender's breaches. Equally, it was the second defender's breaches which the pursuer averred had caused it harm. The first defender submitted that it was precisely the averred involvement of the second defender that provided the first defender with the just cause or excuse for its actions.

[26] Finally, senior counsel drew attention to paragraph 15 of the judgment in *JSC* in which their Lordships noted that consideration of unlawfulness in cases which, like the present, involved a breach of a civil statutory duty gave rise to more complex problems than those which arose when criminal acts were involved. Senior counsel did not seek to argue that a breach of the 2015 Regulations could never constitute "unlawful conduct" for these purposes. However, the first defender submitted that it was necessary to consider the duties imposed by the 2015 Regulation in the context of those regulations as a whole taking into account the other remedies provided. In that context, it was not necessary for the court to seek to innovate. The pursuer had a remedy in terms of the 2015 Regulations for the alleged breach of Regulation 72(1)(b).

The lawfulness of the first defender's actions

[27] The first defender's second argument was that the pursuer's averments in respect of the alleged unlawfulness of its decision to extend the first defender's contract were not relevant. Senior counsel recognised that, although the pursuer challenged the lawfulness of the Abandonment Decision, the pursuer did not found on that in respect of its unlawful means conspiracy case (see above at [18]).

[28] In respect of the decision to extend the existing contract, the pursuer's averments alleging a breach of Regulation 19, in reliance on Regulation 72(1)(b), were irrelevant because they were immaterial. It was implicit in the pursuer's averments that it accepted that the existing contract would require to be extended beyond 12 September 2023. The pursuer's position was that such an extension should have been achieved in accordance with clause 18.9(1)(g) of the existing contract. Accordingly, as the pursuer accepted that, on any view, it was necessary for the existing contract to be extended, it was immaterial whether the extension was achieved by reliance on clause 18.9(1)(g) or Regulation 19. The dispute between the parties was not whether an extension was lawful but the duration of that extension.

[29] In this regard, the first defender submitted that the pursuer had failed to give fair notice of its case as it had failed to aver what duration of extension of the existing contract would have been lawful. The pursuer's case was that a 44 month extension was too long but the pursuer had made no averments as to what length of extension ought to have been granted. The first defender made the same criticisms of the pursuer's averments in respect of an "interim procurement competition" (see Article 54). These averments ought not to be admitted to probation. It followed from this that the pursuer also made no averments as to

what losses arose as a result of the difference between the extension that had been granted and what the pursuer contended ought to have happened.

The second defender's arguments

[30] The second defender challenged the relevancy of the pursuer's averments in relation to both the alleged unlawful means conspiracy and causing loss by unlawful means.

Unlawful means conspiracy

[31] Senior counsel for the second defender adopted both of the arguments advanced on behalf of the first defender in respect of this part of the pursuer's case. With regard to the first argument, senior counsel maintained that if the first defender were correct, it would follow that the pursuer's case based on unlawful means conspiracy must fail. It was not possible to have a conspiracy on one's own. This result would also follow in the event that the first defender's second argument were to be upheld.

[32] As a starting point to his own submissions, senior counsel submitted that economic torts such as those which were the subject of discussion before me, had been the subject of extensive judicial discussion in recent years. However, the tide of authority had been to restrict rather than extend the scope of these torts (*Racing Partnership Ltd & Ors* v *Done Bros (Cash Betting) Ltd & Ors* [2021] Ch 233 (Ct of Appeal) at paragraph 246; *Secretary of State for Health* v *Servier Laboratories Ltd* [2020] AC 959 (UKSC) at paragraph 62).

[33] In relation to the requirements for unlawful means conspiracy, senior counsel accepted the four elements as identified by Lord Justice Leggatt in *Cuadrilla Bowland Limited and others* v *Persons unknown* [2020] EWCA Civ 9 at paragraph 18: (1) an unlawful act by the defendant, (2) done with the intention of injuring the claimant, (3) pursuant to an agreement

(whether express or tacit) with one or more other persons, and (4) which actually does injure the claimant. Senior counsel also adopted the approach of Lords Sumption and Lloyd-Jones in *JSC* that the "real test" is whether there is an absence of just cause or excuse for combining to use unlawful means (see above at [24]).

[34] The second defender noted that, in respect of the extension of the term of the existing contract, the pursuer did not aver that it was unlawful for the second defender to agree to that extension. The pursuer averred that the first defender had acted in breach of its obligations under the 2015 Regulations. However, the second defender owed no duties under those regulations.

[35] A conspiracy was an agreement between two or more persons to effect an unlawful purpose which results in damage (*Crofter Hand Woven Harris Tweed Co Lt* v *Veitch* [1942] AC 435 at 440). Accordingly, on the pursuer's averments, any purported unlawfulness could only be in the actions of the first defender arising from its duties under the 2015 Regulations. In the present case, the pursuer did not aver that there was a combination of unlawful means. The alleged unlawfulness was one-sided. Moreover, following on from the first defender's submissions, the first defender had sought to extend the second defender's contract in order to maintain the provision of an essential service and the second defender acceded to this. Just as the first defender had just cause to ask, so the second defender had just cause to agree to provide the services. The second defender was not a party to the first defender's decision to abandon the procurement process.

[36] Senior counsel submitted that the authorities relied upon by the pursuer to establish the proposition that, in the context of an unlawful means conspiracy, there was no requirement for the defender to be the one who takes the unlawful action provided that he or she is a party to the agreement did not, in fact, go so far. Otherwise, entirely innocent

parties could be sued on this basis. The pursuer relied on what was said by Dame Elizabeth Gloster in *Barclay Pharmaceuticals* v *Waypharm LP* [2012] EWHC 306 (Comm) at paragraph 222. However, it was submitted that the facts of that case which involved the interaction of a series of companies all controlled by a single individual were quite different and distinguishable from the present case. The pursuer also relied on *Kuwait Oil Tanker Company SAK* (see above at [15]) but what was said in this case too had to be considered in the context of its particular facts: an alleged scheme of fraud and embezzlement perpetrated against companies by their directors. Lord Justice Nourse was careful, when giving the opinion of the Court of Appeal, to stress the requirement, as a starting point, for the claimant to prove the existence and nature of agreement upon which it founded (at paragraphs 132, 133 and 136). By contrast, the present case did not involve allegations of fraud, theft or embezzlement by the defenders. An innocent party entering into a contract did not, by that fact alone, become party to an unlawful means conspiracy. The pursuer's averments, it was contended, were artificial. The pursuer sought to draw an inference of conspiracy from a wholly innocent set of circumstances.

[37] Senior counsel also highlighted what he characterised as being an inconsistency in the pursuer's pleadings. The starting point for the alleged unlawful means conspiracy averred in Article 56 (see [11] above) was the first defender's decision to abandon the procurement process. This decision was said by the pursuer to have been made in reliance upon an agreement in principle between the defenders to extend the second defender's contract. The pursuer averred that the first defender had notified its intention to abandon the procurement process by letter dated 28 June 2023 (Article 20). Thereafter the pursuer averred that the first defender indicated its intention to extend the second defender's contract in a letter dated 4 July 2023 (Article 50). This sequence of events was not consistent

with the fact that the pursuer also averred, at Article 49, that the defenders agreed the extension to the second defender's contract on 22 August 2023. The logic of the pursuer's averments was that there was not an enforceable agreement between the defenders until several months after the date on which the first defender abandoned the procurement process. However that decision to abandon was said by the pursuer to have been taken in reliance on the agreement.

Knowledge of unlawfulness

[38] The pursuer required to aver that the second defender had knowledge of all the facts which made that extension unlawful, which it had failed to do (*cf Moray Offshore*, as above at [15], at paragraph 72). In the present case, the bases upon which the pursuer relied, in terms of Regulation 72(1(b), for the unlawfulness of the decision to extend the contract were not matters within the knowledge of the second defender.

[39] Senior counsel submitted further that, as a matter of law, the pursuer ought to have averred that the second defender knew that the extension was unlawful. Senior counsel urged me to adopt the reasoning of Lord Justice Lewison's dissenting opinion in *Racing Partnership* (as above at [32]) at paragraphs 213 to 266. This was a policy decision. There was no clear policy reason why the second defender should be held to be liable to compensate the pursuer for a breach of duty by the first defender. Senior counsel highlighted what was said at paragraph 247 by Lord Justice Lewison in his assessment of the case law:

> "Ninth, a number of the cases stress the need for blameworthiness on the part of the conspirators. In *OBG* [2008] AC 1, para 166 Lord Nicholls said that a 'high degree of blameworthiness is called for'. In *Total* [2008] AC 1174, para 56 Lord Scott of Foscote said that the circumstances must be such as to make the conduct 'sufficiently reprehensible' to justify imposing on those who have brought about the harm

> liability in damages for having done so. It is not immediately obvious why making a mistake about one's legal rights is blameworthy or reprehensible. In *Meretz Investments NV v ACP Ltd* [2008] Ch 244 Toulson LJ said of one alleged conspirator at para 170: 'By ordinary standards of commercial probity [he] had a perfectly legitimate reason for acting as he did. It would therefore be wrong to classify such conduct as founding an action for an unlawful means conspiracy.'"

Intention to injure

[40] The second defender also submitted that the pursuer had failed relevantly to aver that the second defender had the necessary degree of intention to injure the pursuer. Senior counsel did so essentially by emphasising similar points to those made on behalf of the first defender. In this regard, senior counsel referred again to Lord Justice Lewison's dissenting judgment in *Racing Partnership* (at paragraphs 232 and 233). A predominant intention to injure was not required but, equally, causation was not, in itself, sufficient (*OBG* at paragraph 62 per Lord Hoffman). The second defender drew attention to what was said in *Total Network* by Lord Scott of Foscote that although the intent to cause harm does not require to be the predominant purpose of the conspiracy, the circumstances must be such as to make the conduct sufficient reprehensible to justify imposing liability on those who have brought about harm (above at [23] at paragraph 56). The second defender also highlighted what was said by Lord Walker of Gestingthorpe in *Total Network* as to the importance, when considering unlawful means in the context of breach of statutory duty, of stressing the part played by "means". It was not sufficient merely that there was an element of unlawfulness somewhere in the story (at paragraph 96).

[41] In the present case, the alleged unlawful means were not directed at the pursuer. Further, it was not an inevitable consequence of the contract extension that the pursuer would be harmed. This was not a case where the "obverse side of the coin" referred to by Lord Nicholls in *OBG* (at paragraph 167) was present. In this regard, the second defender

also referred to what was said by Mr Justice Newey (as he then was) in *Constantin Medien AG* v *Ecclestone and others* [2014] EWHC 387 (Ch) at paragraph 336.

[42] Against the background of these authorities, senior counsel submitted that the pursuer's case, as averred, was very far from what was required: a contract was concluded between the defenders which, it transpires, is in breach of a statutory duty incumbent on the first defender. That breach of duty, it was submitted, provided no justification for categorising the second defender's intention as carrying the necessary intention to injure the pursuer or for classifying the actions of the second defender as part of a conspiracy to injure the pursuer.

Irrelevancy of averments of loss

[43] Finally, the second defender submitted that the pursuer had entirely failed to give notice of the basis on which the contract extension would deprive the pursuer of the award of the Laboratory Managed Service contract in terms of the procurement exercise. The pursuer had also failed to give notice of when it contends such a contract would have been awarded. The averments of causation and loss were thus irrelevant and ought not to be admitted to probation.

Causing loss by unlawful means

[44] The second defender challenged the relevance of the pursuer's averments in Article 57 for a number of reasons.

Anticipatory breach of contract – clauses 18.9(1)(g) and (f)

[45] Senior counsel noted that in Article 57, the unlawful means which the pursuer founded upon was said to be an alleged anticipatory breach of contract by the second defender. This breach was said to consist of both: first, the second defender informing the first defender that the second defender would not comply with its obligations in terms of clause 18.9.1(g) to continue to provide services after 12 September 2023; and, second, the second defender informing the first defender that it would not continue to provide services after 12 September 2023 in order to facilitate a mobilisation period for a new contractor, in breach of clause 18.9.1(f).

[46] Senior counsel noted that, in respect of the alleged breach of clause 18.9.1(f), the pursuer relied upon the formulation "believed and averred". However, senior counsel submitted that there was no averred basis which entitled the pursuer to draw this inference. Whatever might be the position in respect of undisclosed documentation, the pursuer was not entitled to guess. In any event, the circumstances provided for by clause 18.9.1(f) had simply not arisen and therefore, in that regard, the pursuer's averments were irrelevant.

[47] In respect of the alleged breach of clause 18.9.1(g), senior counsel noted that the pursuer admitted, in Article 52, that the second defender had maintained to the first defender that clause 18.9.1(g) was not apt to allow for a further extension of the contract between the first and second defender. By the logic of the pursuer's position, the first defender as the creditor in respect of the obligation, was entitled to accept the second defender's breach or it could await the appointed time and insist on performance. The pursuer made no averments about either option. In these circumstances, the pursuer not having averred that the first defender insisted on performance, it followed that the pursuer had not established that any breach by the second defender was actionable at the instance of

the first defender and, therefore, there was no relevant averment of unlawfulness on the part of the second defender. The pursuer had also not addressed the provisions of Schedule Part 12 of the contract which made provision for transition services.

[48] For these reasons, the pursuer's case of causing loss by unlawful means lacked the critical foundation of relevant averments of unlawfulness on the part of the second defender.

Interference with the liberty of the first defender to deal with the pursuer

[49] Senior counsel noted that it was clear from both the majority in *OBG* (at paragraph 51 per Lord Hoffman) and the subsequent decision of the UK Supreme Court in *Servier* (as above at [32]), that it was a necessary element of the tort of causing loss by unlawful means that the unlawful means used by the defendant against a third party should have affected the third party's freedom to deal with the claimant.

[50] Applying this approach to the present case, the second defender submitted the pursuer's case did not disclose any interference with the first defender's liberty to deal with the pursuer. This was particularly so when one considered Schedule Part 12 of the defenders' contract. Senior counsel submitted that this schedule provided a distinct contractual mechanism whereby the second defender was obliged to provide services to the first defender. Schedule 12 provided a means for the first defender to have continued to receive services from the second defender whilst dealing with the pursuer, if that is what the first defender had wanted. Of course, in the event, the first defender had not in fact sought to make use of Schedule 12.

Absence of necessary intention

[51] The second defender submitted that the pursuer had failed to aver that it had the required intention to cause loss to the pursuer. Causation was not enough to infer loss (*OBG* at paragraph 62 per Lord Hoffman). The pursuer's averments relating to the second defender's view of clause 18.9 were not sufficient to entitle the pursuer to infer intention. The second defender also drew attention to the fact that the defenders' contract contained a dispute resolution provision – clause 21.

[52] For loss to flow from the position of the second defender, even on the hypothesis of the pursuer, it would be necessary (i) for the first defender to take the view that it would not or could not timeously dispute the construction of clause 18.9.1(g); (ii) for the first defender to then take the decision to abandon the existing procurement due to this view rather than the view that the procurement was unlawful; and (iii) for it to be the case that, but for (i) and (ii), the first defender would probably have entered into a contract with the pursuer. The convoluted chain of causation pointed away from the circumstances being those in which there could exist the necessary intention to take unlawful means to cause injury to the pursuer.

Averments of loss

[53] Finally, the second defender submitted that the arguments advanced in respect of the relevancy of the pursuer's averments of loss made in respect of unlawful means conspiracy (see [43] above) were equally applicable to the pursuer's claim for causing loss by unlawful means.

The pursuer's arguments

[54] Senior counsel for the pursuer formally moved me to repel each of the defender's motions but to reserve all parties' pleas as to relevancy.

The pursuer's case

[55] At the outset, senior counsel sought to place the present hearing in the broader procedural context of the parties' dispute (see [10] above). There was, he contended, presently an asymmetry of information between the parties and the pursuer's pleadings required to be seen through that lens. Notwithstanding that, he was content that his pleadings be tested against what he described as "the hard edge of relevancy", however he submitted that it was appropriate to consider any questions of specification in the light of the ongoing disclosure issues between the parties.

[56] The starting point for the pursuer's case was that, as the preferred bidder in the procurement exercise run by the first defender, had that exercise been completed, the pursuer would have been awarded the contract. However, instead, the second defender had challenged the first defender's procurement exercise. During the course of the second defender's challenge, the defenders had engaged in discussions. The pursuer's case was that, in those discussions, the second defender had essentially threatened not to perform its obligations in terms of clause 18.9(1) of the parties' contract. That had led to the defenders entering into an agreement in terms of which the contract was extended for 44 months. In reliance on that agreement, the first defender took the decision to abandon its procurement exercise and the second defender did not persist in its challenges. In this regard, senior counsel submitted that the fact that the notice to extend the defenders' contract was not issued until sometime later was nothing to the point.

[57] Senior counsel was also keen to stress, in response to the suggestion that the first defender had been placed in a difficult position, that, so far as the pursuer was concerned, there had been no requirement for the first defender to agree to the extension of the pre-existing contract. That was not the only option available to the first defender. It was open to the first defender to counter the second defender's threat and require the second defender to perform its obligations under clause 18.9(1)(f) to co-operate in the transfer or, if necessary, clause 18.9(1)(g) for an extension. The pursuer submitted that there was certainly no justification for the 44 month extension granted by the first defender to the second defender.

[58] In respect of the pursuer's cases based on unlawful means conspiracy (Article 56) and, separately, on causing loss by unlawful means (Article 57), senior counsel emphasised that these were two discrete grounds of action. As to the first, the pursuer founded upon the agreement between the defenders and the subsequent extension of the defenders' contract. The pursuer did not rely upon the decision to abandon the procurement process as part of the unlawful means conspiracy. As to the second, the pursuer founded upon the second defender's threat not to perform its obligations under its contract with the first defender.

Unlawful means conspiracy

Intention

[59] In response to the arguments made by both defenders in respect of the pursuer's averments of intention, senior counsel accepted that there was no suggestion that the predominant intention of the defenders had been to harm the pursuer or that they had acted maliciously. However, that was not necessary in order relevantly to plead a case of this kind. Senior counsel submitted that it was clear from the judgment of Lord Sumption and

Lord Lloyd-Jones in *JSC* that in an unlawful means conspiracy which is directed towards the claimant, it was sufficient for there to be a constructive intent derived from the fact that the defendants should have known that injury to the claimant would ensue (see *JSC* at paragraph 13 and the reference to the Canadian Supreme Court case of *Cement LaFarge Ltd* v *BC Lightweight Aggregate Ltd* [1983] 1 SCR 452). Senior counsel submitted that the nature of the necessary constructive intention was explained in Lord Nicholls' speech in *OBG* albeit in the context of the tort of causing loss by unlawful means:

> "164. I turn next, and more shortly, to the other key ingredient of this tort: the defendant's intention to harm the claimant. A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge against the claimant. More usually a defendant intentionally inflicts harm on a claimant's business as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests.
>
> 165. Intentional harm inflicted against a claimant in either of these circumstances satisfies the mental ingredient of this tort. This is so even if the defendant does not wish to harm the claimant, in the sense that he would prefer that the claimant were not standing in his way.
>
> …
>
> 167. I add one explanatory gloss to the above. Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort."

Senior counsel submitted that the test of intention in *OBG* has subsequently been held to be authoritative in respect of unlawful means conspiracy claims (see *ED&F Man Capital Markets Limited* v *Come Harvest Holdings Limited and others* [2022] EWHC 229 (Comm) at paragraph 484 and the authorities cited there).

[60] Senior counsel submitted that, on the pursuer's pleadings, the present case was precisely the type of "obverse side of the coin" case in which constructive intent was to be inferred. There were only two horses in the procurement race – the pursuer and the second defender. The pursuer had been selected as the preferred bidder by the first defender. In these circumstances, the unlawful extension of the second defender's contract was necessarily going to exclude the pursuer. "Gain" as referred to by Lord Nicholls came in many forms. In the present case, the first defender sought to maintain the provision of services by taking what it perceived to be the path of least resistance in agreeing to extend the second defender's contract. As to the second defender, its gain in the extension of the contract was clear.

[61] Senior counsel also rejected the second defender's characterisation of its pleadings as inconsistent. The pursuer had averred a clear sequence of events in which the defenders had reached an agreement in principle to extend the second defender's contract on or around 28 June 2023. There was no inconsistency between this averment and the subsequent averments relating to the execution of the 44 month extension on 22 August 2023. The pursuer's position was that the formal extension was in implement of the agreement in principle.

Unlawful means

[62] Senior counsel noted that the first defender accepted that breach of Regulations 19 and 72 of the 2015 Regulations could constitute "unlawful means" albeit he submitted that the contrary view was not stateable. The issue was whether what was alleged by the pursuer in this case was capable of constituting "unlawful means" for the purposes of a

claim based on unlawful means conspiracy as that concept has been developed in the case law.

[63] In relation to the first defender's argument that any breach of Regulation 72(1)(b) was immaterial, senior counsel argued that this was misconceived. The pursuer did not concede that any extension of the second defender's contract was either necessary or lawful. The pursuer averred that extending the contract as the first defender had purported to do was a breach of Regulation 72(1)(b) and was unlawful. Senior counsel submitted that this raised a mixed issue of fact and law.

[64] As to the second defender's argument that the unlawfulness upon which the pursuer relied, being a breach of the 2015 Regulations, could not represent unlawfulness on the part of the second defender, senior counsel submitted that this was based on a fundamental misunderstanding of the law. Dame Elizabeth Gloster in *Barclay Pharmaceuticals* had made quite clear that in a case of conspiracy there was no requirement that a defendant has to be the one who takes the unlawful action provided that they are a party to the agreement (as above at [36], at paragraph 222). In this regard, the pursuer also relied on the judgment of Lord Justice Nourse in *Kuwait Oil Tanker* (at paragraphs 129 and 130).

Knowledge of unlawful means

[65] The second defender also challenged the relevancy of the pursuer's pleadings on the basis that the pursuer did not offer to prove that the second defender was aware that the first defender's decision to extend its contract by 44 months was unlawful. The second defender founded this part of its argument on the dissenting judgment of Lord Justice Lewison in *Racing Partnership.*

[66] The pursuer's response to this argument was straightforward. The court should follow the majority decision in *Racing Partnership.* Lord Justice Arnold, having carefully reviewed the authorities, had reached the conclusion that knowledge of the unlawfulness of the means employed was not required for unlawful means conspiracy (at paragraph 139). Lord Justice Phillips had agreed with this analysis of the authorities (at paragraph 171).

[67] Senior counsel for the pursuer noted that, in this area of law which is so heavily influenced by English law, the second defender was not arguing that the reasoning of the majority should be rejected because it conflicted with an aspect of Scottish law. Instead the second defender simply asserted that for "policy reasons" an economic operator in its position should not be made liable for entering into a contract with a public authority which a court later held had acted unlawfully. The pursuer submitted that there were good policy reasons why liability should attach. Senior counsel submitted that there was no good reason why conspirators ought to be able to thwart the 2015 Regulations: the second defender might not be able to breach the regulations itself but there was no policy reason why its conspiracy with the authority to do so ought not to be actionable.

[68] Senior counsel also submitted that the question of the second defender's knowledge had to be seen from the perspective that it was the incumbent operator. The second defender was to be taken to be aware of the terms of its own contract. It was aware of what it had said to the first defender as to its obligations under clause 18.9.1 of the contract. Accordingly, it was aware of the primary facts upon which the pursuer relied to enable the conclusion to be drawn that there was an agreement between the defenders and that acts were carried out – the extension of the second defender's contract – as a means of injuring the pursuer.

Averments of loss

[69] The pursuer's case was that no extension of the second defender's contract was either necessary or lawful in terms of Regulation 72(1)(b) of the 2015 Regulations. The pursuer also averred that "but for" the second defender's anticipatory breach of contract, the first defender would probably have entered into a contract with the pursuer (see Article 57). In Articles 61 and 62, the pursuer then set out detailed averments as to the basis upon which the losses it claimed were estimated. These averments proceeded on the basis that the pursuer had been denied the opportunity of concluding a contract with the first defender. These averments were relevant and ought to be admitted to probation.

Causing loss by unlawful means

Anticipatory breach of contract

[70] In response to the second defender's criticisms of the pursuer's pleadings in respect of anticipatory breach of contract, the pursuer's position was clear. The pursuer made averments, in Article 46, that, prior to the end of June, the second defender had informed the first defender that it, the second defender, would not comply with its obligations under clause 18.9.1(g). The pursuer inferred also that the second defender had informed the first defender that the second defender would not comply with its obligations to assist in a transfer to a new contractor under clause 18.9.1(f). It was on this basis that the pursuer averred, in Article 57, that as an inevitable consequence of the second defender's actions, the first defender would suffer a gap in service provision from 13 September 2023, which led to the first defender considering that it required to abandon the procurement exercise and extend the second defender's contract.

[71] The flaw in the second defender's argument in relation to actionability was that it over-looked the fact that declaring that you are not going to perform your contract is a free-standing wrong. In such circumstances, the wronged party had a number of contractual remedies. In this case, the first defender had elected instead of exercising those remedies to reach an agreement with the second defender to extend the contract. However, the first defender's subsequent choice did not take away from the second defender's wrongful act.

[72] In relation to Schedule Part 12, the precise status of this document was not admitted by the pursuer. It was an unsigned schedule which had been produced as part of the bundle for the hearing.

Interference with the liberty of the first defender to deal with the pursuer

[73] Senior counsel submitted that the second defender's argument on this point simply did not take into account the pursuer's averments. The pursuer averred in Article 57 that but for the second defender's anticipatory breaches of contract "the first defender would probably have entered into a contract with the pursuer, as its preferred bidder". This averment followed the passage of averments in which the pursuer set out its case to the effect that, in light of the second defender's anticipatory breach, the first defender considered itself required to abandon the procurement exercise and extend the second defender's contract in order to avoid a gap in service provision. Accordingly, the pursuer had clearly set out in averment that the liberty of the first defender to deal with the pursuer had been interfered with as a consequence of the second defender's unlawful action.

Intention

[74] The pursuer's response to this part of the second defender's argument was again to point to its averments in Article 57 and, specifically:

> "In refusing to comply with its contractual obligations to the first defender, the second defender intended to cause economic harm to the pursuer by obstructing the first defender from awarding the Procurement contract to the pursuer. As a result of the second defender unlawfully refusing to comply with its contractual obligations to the first defender, the pursuer has suffered loss."

[75] As with the pursuer's case in relation to unlawful means conspiracy (see [59] and [60] above), senior counsel submitted that the pursuer had relevantly pled a case in which constructive intention was to be inferred: the pursuer's loss was the obverse side of the second defender's gain.

Decision

[76] There are two preliminary issues to address.

[77] First, it was notable that, during the course of submissions, all three parties proceeded on the basis that the law in Scotland in respect of both unlawful means conspiracy and causing loss by unlawful means was as set out in the series of recent English authorities to which reference was made during the course of submissions. None of the parties suggested that there was any aspect of the present case, whether factual or legal, which meant that the law as articulated in those authorities could not be applied to the present case. Accordingly, I proceed on that basis. In this regard, I note that the same approach has been taken in two recent Scottish cases (*Moray Offshore* (above at [15]) and *Kidd* v *Lime Rock Management LLP* (Outer House) 2024 SLT 347 at paragraph 57).

[78] Second, although senior counsel for the pursuer made something of the procedural background to the debate I heard and to what senior counsel described as the "asymmetry

of information" between the parties, he accepted that it was appropriate that the pursuer's pleadings be tested against "the hard edge of relevancy" as would be normal at a debate.

Unlawful means conspiracy

Intention

[79] The pursuer's case does not rely on predominant intention; rather it is that the necessary requirement of intent on the part of the defenders is one of constructive intent, to be derived from the fact that the defenders should have known that the means selected – the allegedly unlawful extension of the second defender's contract – would cause the pursuer to suffer loss (see Article 57). The pursuer submits that, in the particular context of a procurement exercise in which there were only two bidders and the pursuer was the preferred bidder, the present case was one in which the gain to the defenders was the "obverse side of the coin" described by Lord Nicholls in *OBG* (at paragraph 167) of the pursuer's loss.

[80] The first defender challenged the relevancy of the pursuer's position on the basis that the pursuer's averments even if proved did not establish an intention on the part of the first defender to injure the pursuer. The pursuer's own averments – particularly those in Article 57 concerning causing loss by unlawful means – did not expressly criticise the first defender but rather recognised that it had acted in order to ensure the continued provision of an essential health service. In essence, the first defender's argument was that what was averred did not have the "high degree of blameworthiness" referred to by Lord Nicholls in *OBG* (at paragraph 166).

[81] I am not persuaded by the first defender's arguments.

[82] First, I consider that the pursuer has pled a relevant case of constructive intent on the basis that, in the circumstances of the procurement exercise involving the three parties, both defenders should have known that injury to the pursuer would ensue from the allegedly unlawful extension of the second defender's contract (*JSC* at paragraph 13). As such, on the pursuer's averments, the infliction of harm on the pursuer can properly be said to have been the means by which the defenders intended to achieve their respective ends of the extension of the second defender's contract. On the pursuer's averments, the pursuer's loss was more than merely a foreseeable outcome of the extension of the second defender's contract. The pursuer's averments thus satisfy the criterion detailed in *OBG* by Lord Hoffman (at paragraph 62).

[83] Equally, the relevancy of the pursuer's averments in respect of intention can also be tested by reference to the approach described by Lord Nicholls in *OBG* (at paragraphs 164 to 167). On the basis of the pursuer's averments, the pursuer's alleged loss in being deprived of the award of the contract is the other side of the coin to both defenders' respective gain in the second defender's contract being extended.

[84] The first defender argues that because the pursuer avers that the first defender sought to extend the term of the second defender's contract "in order to ensure continued provision of an essential health service" (Article 57), the pursuer's case on the first defender's intention is rendered irrelevant. I do not agree. Such an approach would, I consider, involve imposing a narrower meaning on the way in which the requirement of intent is described in *OBG* than was intended. In particular, although, on the pursuer's averments, the first defender may not have been motivated by seeking to enrich itself, I am not prepared to conclude, as a matter of relevancy, that the first defender's objective of

seeking to maintain the continued provision of laboratory services could not fall within the "economic interests" described by Lord Nicholls (at paragraph 164).

[85] Second, I do not find the first defender's arguments based on blameworthiness or reprehensibility to be of great assistance in this regard. As I read the references cited by the first defender, the reference to the degree of blameworthiness is made to stress the importance of the requirement of intent as an ingredient of unlawful means conspiracy as opposed to establishing an additional requirement. This would seem particularly true of Lord Nicholls' reference to the "high degree of blameworthiness" at paragraph 166 of *OBG*. In any event, I consider that the assessment of the degree of blameworthiness involved can only properly be carried out after proof. Certainly, I am not prepared to conclude, at this stage, that, were the pursuer to establish its averments to the effect that, following an anticipatory breach of contract by the first defender, the defenders had reached an agreement whereby the first defender unlawfully extended the term of the second defender's contract in breach of the 2015 Regulations, it would not be possible to characterise the actions of the first defender as sufficiently reprehensible to justify the imposition of liability.

[86] Finally, I also do not consider that the first defender's position is advanced by reference to the absence of just cause or excuse analysis articulated by Lord Sumption and Lord Lloyd-Jones in *JSC* (see, in particular, paragraph 10). The first defender argued that it was the pursuer's averments about the relationship between the second defender's anticipatory breaches of contract and the position in which those placed the first defender which provided the just cause or excuse for its actions.

[87] As a starting point, I do not understand Lord Sumption and Lord Lloyd-Jones in identifying the concept of the absence of just cause or excuse to be seeking to alter or replace

the four ingredients of unlawful means conspiracy being (1) an unlawful act by the defendant, (2) done with the intention of injuring the claimant, (3) pursuant to an agreement (whether express or tacit) with one or more other persons, and (4) which actually does injure the claimant. Certainly that is not how their judgment has been regarded by the Court of Appeal (see *Cuadrilla Bowland*, above at [33], paragraph 18). Rather, I understand their Lordships to be seeking to identify, overall, a touchstone for the actionability of the tort of conspiracy.

[88] In any event, I am not prepared to hold, applying the approach articulated in *JSC*, that the pursuer's averments are irrelevant. That is because considering both the nature of the alleged unlawfulness – the extension of the term of the second defender's contract – together with its relationship to the resultant damage to the pursuer as set out in Article 57, I do not consider the pursuer is bound to fail. This part of the first defender's argument depends upon the first defender being characterised as having no alternative but to extend the second defender's contract in order to ensure the continued provision of laboratory services. I do not consider that, read fairly, the pursuer's averments go so far.

[89] The material part of the pursuer's averments in Article 57 are as follows:

> "An inevitable consequence of the second defender's anticipated breach of contract was that there would be a gap in service provision from 13 September 2023 if the pursuer were awarded the Laboratory Managed Service contract because the pursuer required time to 'wind up' its services. In such circumstances, the first defender considered itself required to abandon the Procurement and to extend the term of the second defender's contract (notwithstanding that such decisions were unlawful) in order to ensure continued provision of an essential health service."

It is notable that what is said by the pursuer to inevitably arise from the second defender's *anticipated* breach of contract is that there *would* be a gap in service provision if the pursuer were awarded the contract. The pursuer then avers that "the first defender considered itself" required to abandon the procurement and to extend the term of the second defender's

contract. I do not consider that, if proved, these averments will necessarily provide the first defender with a just excuse for the allegedly unlawful act of extending the term of second defender's contract. The pursuer, notably, does not aver that the first defender had no alternative but taking the decision to extend the term of the second defender's contract. Rather, it avers that this is what the first defender considered itself required to do. In the circumstances, I consider that assessing the unlawfulness of that act (if any) together with its relationship with the damage caused to the pursuer (if any) is a matter properly to be dealt with after proof.

[90] Essentially for the same reasons, I also reject the arguments advanced on behalf of the second defender in respect of intention (see [40] to [42] above).

Unlawfulness

[91] Under this heading, the first defender challenged the relevancy of the pursuer's averments on the basis that they were "immaterial". As I understood this aspect of the first defender's argument, it was premised on the basis that the pursuer accepted that some extension of the pre-existing contract between the defenders would be required. Accordingly, so argued the first defender, the pursuer's case was not about whether there should have been an extension but only about how long that extension should have been. On this basis, the first defender also challenged the specification of the pursuer's pleadings (see [29] above).

[92] I consider that the short answer to this part of the first defender's argument is that it proceeds on a false premise and, therefore, falls to be rejected. The pursuer avers, in Article 52, in relation to the first defender's decision to extend the second defender's contract that there were "no economic or technical reasons which would prevent a change of

contractor". Similar averments are made in Article 55. Based on the pleadings together with the submissions of senior counsel, I did not understand that any concession was made by the pursuer that any extension of the second defender's contract was either necessary or lawful.

[93] The second defender advanced two related arguments in respect of this part of the pursuer's case.

[94] First, the second defender criticised what senior counsel characterised as the inconsistency in the pursuer's pleadings. This was said to be the fact that the pursuer founded on an alleged agreement between the defenders on or around June 2023 but also averred that the extension of the contract was not actually executed until 22 August 2023. Read fairly, I do not consider that there is any inconsistency in the pursuer's position. In Article 46, the pursuer avers that on or around 28 June 2023, the defenders "agreed in principle" that they would extend the second defender's contract. There is no inconsistency in the fact that the pursuer avers that the defenders did not actually execute the extension until 22 August 2023. Also, standing what was said in *Kuwait Oil* by Lord Justice Nourse (at paragraph 111), I do not consider that anything turns on the fact that the pursuer founds its case of conspiracy on an agreement in principle as opposed to an express, formal agreement.

[95] Secondly, the second defender challenges the pursuer's case on the basis that the unlawfulness relied on by the pursuer – the alleged breach of the 2015 Regulations in extending the second defender's contract – was one-sided in that those regulations imposed no obligations on the second defender.

[96] I do not consider that the "one-sided" unlawfulness pled by the pursuer renders its case of unlawful means conspiracy irrelevant. In *JSC,* Lords Sumption and Lloyd-Jones emphasised that, in English law, the unlawful means conspiracy was, in itself, actionable as

a distinct tort – it was not merely a form of secondary liability (at paragraph 9). By reference to the speech of Lord Wright in *Crofter Hand Woven Harris Tweed Co Ltd* v *Veitch* [1942] AC 435 at 462, their Lordships made the point that it is in the fact of the conspiracy that the unlawfulness resides. When analysed in this way, it is apparent why Dame Elizabeth Gloster emphasised in *Barclay Pharmaceuticals* that, provided a claimant can establish a combination or agreement between the defendants, it is not necessary for each defendant to have taken the allegedly unlawful action provided that they were parties to the agreement (at paragraph 222). The same point is made by Lord Justice Nourse in *Kuwait Oil* (at paragraph 133).

[97] I am not persuaded by the second defender's argument that these statements made in *Barclay Pharmaceuticals* and *Kuwait Oil* are in some way inapplicable to the present case because of the different factual circumstances in those cases. To begin with, it seems to me that these statements are based on the nature of the tort as opposed to the particular facts of the cases concerned. Furthermore, the second defender's argument conflates two separate elements of the tort, namely: first, the nature of the agreement founded upon; and secondly, the unlawful means alleged. Although it is clear that in order successfully to prove a case of unlawful means conspiracy, it is necessary to establish that each of the defenders was a party to the agreement founded upon, it does not follow that each of the defenders requires to have taken part in the unlawful acts carried out pursuant to that agreement.

[98] Finally, I do not accept the second defender's characterisation of the set of circumstances in the present case, certainly as pled by the pursuer, as being "wholly innocent". As I have noted above (at [85], in the context of the pursuer's averments of intention), I am not prepared to conclude, as a matter of relevancy, that the pursuer is bound

to fail at this stage. Rather, I consider that after evidence has been heard it will be necessary to see what part, if any, each of the defenders played in the circumstances then established.

Knowledge of unlawfulness

[99] The second defender makes two arguments under this heading.

[100] First, the second defender argues that the pursuer has not averred the second defender had knowledge of all the facts which rendered the extension of the contract allegedly unlawful. Secondly, more fundamentally, the second defender argues, as a matter of law, that the pursuer's claim is irrelevant because the pursuer has not averred that the second defender was aware that the extension of the contract was unlawful.

[101] I reject both of these arguments.

[102] In respect of the first, the pursuer's case in Article 46 is:

> "On or around 27 June and 28 June 2023, the first and second defender engaged in negotiations about the prospect of extending their existing contract should the first defender elect to abandon the Procurement. Prior to said negotiations, the second defender had informed the first defender that it would not comply with its obligation under Clause 18.9.1(g)…. The second defender was contractually obliged to comply with Clause 18.9.1(g). Believed and averred that the second defender was also contractually obliged to provide services to the first defender at the first defender's request after the expiry of the defenders' contract under Clause 18.9.1(f). Believed and averred that the second defender informed the first defender that it would not comply with that provision. On or around 28 June 2023, the first defender and the second defender agreed in principle that they would extend their existing contract by a period of 44 months notwithstanding that such an extension was not permitted by the 2015 Regulations."

In essence, it is the pursuer's averred case that the reason that the extension was not lawful in terms of Regulation 72(1)(b) was precisely because that extension was made in the context of what the pursuer avers took place in the negotiations towards the end of June 2023. As the second defender was a party to these discussions, I consider that the pursuer has made averments, which if proved, would entitle the court to conclude that the second defender

knew or ought to have known all the facts which rendered the decision to extend the contract unlawful.

[103] As senior counsel frankly acknowledged, in order to succeed with its second argument under this head, I required to be persuaded that the majority, Lords Justice Arnold and Phillips, had erred in *Racing Partnership.* In short, I am not so persuaded. I reach this conclusion principally because, although it is apparent that the delimitation of the so-called four economic torts is one which raises difficult issues of policy, the difference in opinion between Lord Justice Lewison and the majority in *Racing Partnership* was decisively informed by a detailed analysis of prior precedent. In particular, the learned Lords Justice reached differing views on what was to be taken from *British Industrial Plastics Limited* v *Ferguson* [1938] 4 All ER 504, on the one hand, and *Belmont Finance Corpn* v *Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, on the other. In these circumstances, absent any issue of Scots law or factual circumstance in the present case which would point to another conclusion, I see no reason not to follow the majority in its decision that:

> "Accordingly, the conclusion I draw from the authorities is that, having regard both to the general statements of the ingredients of the tort which do not include any requirement of knowledge of unlawfulness, and to the persuasive force, even if not binding status, of *Churchill v Walton* and *Belmont v Williams*, knowledge of the unlawfulness of the means employed is not required for unlawful means conspiracy." (at paragraph 139 per Arnold LJ – see also paragraph 171 per Phillips LJ)

[104] For completeness, I note that it is not clear to me that even if, contrary to the views of the majority, Lord Justice Lewison were to be taken to have correctly stated the law of England and Wales as to the requirement for knowledge of unlawfulness in a claim based on unlawful means conspiracy, it would necessarily assist the second defender's argument. This is because the alleged unlawfulness which the pursuer's case of unlawful means

conspiracy founds upon is breach of the 2015 Regulations not breach of private right.

Lord Justice Lewison's conclusion is that:

> "… where the unlawful means consist of a violation of some private right, knowledge of unlawfulness is an ingredient of the tort of intention to injure by unlawful means; and of conspiracy to commit that tort." (at paragraph 265, emphasis added)

As this conclusion illustrates, in his reasoning Lord Justice Lewison is careful to distinguish between situations in which the alleged unlawfulness concerns a breach of private right as opposed to breaches of, for example, criminal law or other types of statutory duty (see, for example, paragraph 234, 235, 239 and 240).

Averments of loss

[105] The final argument advanced by the second defender in respect of the pursuer's case of unlawful means conspiracy was to criticise the pursuer's averments of causation and, as a result, loss. The pursuer had failed, it was contended, to give notice of the basis upon which it was said that the extension of the second defender's contract had deprived the pursuer of the award of the Laboratory Managed Service contract. The second defender also raised this point in the context of the pursuer's case of causing loss by unlawful means.

[106] As raising an issue of relevancy, I struggled to understand this part of the second defender's argument. The pursuer's averred case is that, but for the second defender's anticipatory breaches of contract, the first defender would probably have entered into a contract with the pursuer as the preferred bidder for the provision of the Laboratory Managed Service (Article 57). Also in Article 57, the pursuer avers that the basis for this conclusion is that it arose because, as a result of the second defender's alleged anticipatory breaches of contract, the first defender considered itself required both to abandon the

procurement exercise and to extend the second defender's contract. The pursuer then pleads the loss it contends arose from being deprived of the Laboratory Managed Service contract in Articles 61 and 62 of condescendence.

[107] On this basis, I consider that the pursuer has set out a relevant case on causation and loss and I reject the second defender's argument.

Causing loss by unlawful means

Anticipatory breach of contract

[108] The second defender challenged the relevancy of the pursuer's case in two respects.

[109] First, as a matter of pleading, the second defender maintained that, in respect of the pursuer's case regarding the alleged anticipatory breach of clause 18.9.1(f), there was no proper basis for the use of the formulation "believed and averred". Further and in any event, the circumstances provided for in clause 18.9.1(f) had simply not arisen and, therefore, these averments were irrelevant.

[110] The second argument was more fundamental. The second defender contended that the pursuer had not averred an actionable wrong in respect of the alleged breach of clause 18.9.1(g). This argument was advanced on the basis that, following on from an anticipatory breach of contract, a creditor in the position of the first defender could either accept the breach or it could wait for the appointed time and insist on performance. The pursuer had not made averments about either of these options. Accordingly, as I understood it, the second defender's point was that the pursuer had not set up the actionability of the alleged unlawfulness upon which it founded.

[111] I am not persuaded by either of these arguments.

[112] In respect of the first, the pursuer's averred case is that the actions of the second defender's anticipatory breaches of contract were communicated to the first defender prior to the defenders engaging in negotiations about the prospect of extending the second defender's contract at the end of June 2023 (Article 46). The pursuer goes on to aver that the defenders concluded an agreement in principle to extend the second defender's contract and that the first defender abandoned the procurement process in reliance on that agreement. The pursuer then avers, in Article 57, that:

> "An inevitable consequence of the second defender's anticipated breach of contract was that there would be a gap in service provision from 13 September 2023 if the pursuer were awarded the Laboratory Managed Service contract because the pursuer required time to 'wind up' its services. In such circumstances, the first defender considered itself required to abandon the Procurement and to extend the term of the second defender's contract (notwithstanding that such decisions were unlawful) in order to ensure continued provision of an essential health service."

On the basis of these averments, I consider that the pursuer has established a reasonable basis for inferring that, at or before the negotiations, the second defender had informed the first defender that it would not comply with its obligations in terms of clause 18.9.1(f) because that is what led the first defender to consider that it required to abandon the procurement and extend the second defender's contract.

[113] In respect of the second argument, the second defender's argument takes an unjustifiably restrictive approach to the concept of actionability in this context. In *OBG*, the majority of their Lordships were of the view that acts against a third party counted as unlawful means only if they were actionable by that third party if he or she suffered loss. In developing the concept of actionability, Lord Hoffman said:

> "In my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss. In the case of intimidation, for example, the threat will usually give rise to no cause of action by the third party

> because he will have suffered no loss. If he submits to the threat, then, as the defendant intended, the claimant will have suffered loss instead. It is nevertheless unlawful means. But the threat must be to do something which *would* have been actionable if the third party had suffered loss." (at paragraph 49)

I consider that the pursuer's case, as averred, sets out unlawfulness falling within the qualification described by Lord Hoffman. The alleged anticipatory breach of contract was, on the pursuer's case, a threat by the second defender that it would not perform its obligations under the contract. The pursuer contends that, in the face of the second defender's actions, the first defender submitted to the threat and the defenders concluded an agreement.

[114] I do not consider that the second defender's argument is assisted by its reference to Schedule Part 12. This is for two reasons. First, the precise status of this document is not clear. The second defender pleads that the defenders agreed to add this schedule to the contract in April 2016 (Answer 46). However, these averments are not admitted by the pursuer and thus remain matters for proof. Second, and in any event, I am not prepared to conclude that the provisions of Schedule Part 12 represented obligations which were so distinct from those contained in clause 18.9.1 as to render the pursuer's averments concerning the second defender's anticipatory breach of clause 18.9.1(f) irrelevant.

[115] Accordingly, I do not consider that the pursuer's averments in respect of the alleged anticipatory breach of contract by the second defender are irrelevant.

Interference

[116] As I understood it, the second defender's argument under this heading was essentially a re-statement of its argument concerning the pursuer's averments in respect of anticipatory breach. The second defender's contention is that the pursuer has failed to aver

that the alleged unlawful means used by the second defender affected the first defender's freedom to deal with the pursuer. This was because the pursuer had made no averment to the effect that the first defender's freedom to contract with the pursuer had been interfered with. The second defender again referred to and relied upon Schedule Part 12 in this regard. As such, the second defender contends that the pursuer has failed to aver one of the necessary elements of a claim based upon an allegation of causing loss by unlawful means as explained by the UK Supreme Court in *Servier*.

[117] I consider that the passage from Lord Hoffman's speech in *OBG* which I have quoted above (at [113]) demonstrates that the second defender's argument is not, in fact, supported by *Servier*.

[118] In that case, Lord Hamblen, effectively giving the judgment of the court, refers to the "dealing requirement" as being the requirement that, in a claim for causing loss by unlawful means, the unlawful means "should have affected the third party's freedom to deal with the claimant" (at paragraph 2). In his judgment, Lord Hamblen principally considered two questions: first, whether the dealing requirement formed part of the ratio of the earlier case of *OBG;* and, second, whether *OBG* ought to be departed from. Lord Hamblen's answer to the first question involved a detailed analysis of the relevant parts of Lord Hoffman's speech in *OBG* (which included paragraph 49 quoted above). Lord Hamblen concluded that Lord Hoffman did incorporate the dealing requirement as an essential requirement of a claim for causing loss by unlawful means (at paragraph 63 of *Servier* and following). Thereafter, Lord Hamblen concluded that there was no good or sufficient reason for departing from *OBG* (at paragraph 100).

[119] Accordingly, I do not consider that Lord Hamblen's judgment in *Servier* can be read as suggesting that the example given in paragraph 49 of Lord Hoffman's speech of a

relevant claim of causing loss by unlawful means through the making of threats was, in some way, insufficient.

[120] In any event, the second defender's argument depends upon glossing the requirement that the third party's freedom to deal with the claimant is "affected" such that the interference which is averred by the pursuer is not sufficient. The second defender appears to contend that because, on the pursuer's case, the first defender was not formally prevented from contracting with the pursuer, the dealing requirement was not satisfied. I do not consider that the second defender's approach is consistent with Lord Hoffman's judgment in *OBG.* Applying the second defender's approach it is difficult to see on what basis the cases of fraudulent inducement referred to by Lord Hoffman as examples (at paragraphs 49 and 50) would satisfy the dealing requirement. On the second defender's logic, merely being induced to act in a particular way does not restrict one's freedom to ignore the inducement. Yet Lord Hoffman clearly considers that these examples, together with the use of threats referred to in paragraph 49 of his speech, do constitute unlawful means for this purpose.

[121] Insofar as the second defender relied upon Schedule Part 12 in support of this part of its argument, I have dealt with this above at [114] and consider that the same reasoning applies here *mutatis mutandis.*

Intention

[122] Finally, the second defender sought to challenge the pursuer's averments in respect of causing loss by unlawful means on the basis that they did not disclose the necessary intention on the part of the second defender. Essentially, the argument was that the causal chain relied upon by the pursuer to link the alleged unlawfulness to the purported loss to

the pursuer was so convoluted as to make it impossible to infer the necessary intention on the part of the second defender.

[123] I have addressed the question of intention in the context of the pursuer's claim of unlawful means conspiracy (above at [79] to [90]). In particular, I concluded that, on the pursuer's averments, in the circumstances of the procurement exercise involving the three parties, the infliction of harm on the pursuer could properly be said to have been the means by which the defenders intended to achieve their respective ends (at [82]).

[124] For similar reasons, I consider that the pursuer has pled a relevant case of intention in respect of its claim of causing loss by unlawful means. In the context of the first defender's procurement exercise which involved only the pursuer and the second defender, the pursuer has averred that the second defender pursued a course of action – informing the first defender that it did not intend to comply with its obligations in respect of continuing provision of services after 12 September 2023 – which was intended to cause harm to the pursuer by obstructing the award of a contract by the first defender to the pursuer. I consider these averments establish a situation in which the pursuer's loss is, in Lord Nicholl's words, "the obverse side" of the second defender's gain (*OBG* at paragraph 167).

[125] In argument, the second defender raised questions which, it was contended, undermined the pursuer's case: why had the first defender not challenged the second defender's alleged breach of contract? How was the pursuer's case in respect of the abandonment of the procurement exercise consistent with the first defender's view that that exercise was unlawful? On what basis could it be said that the first defender would probably otherwise have entered into a contract with the pursuer? I do not gainsay these questions but I am not persuaded that they can be resolved without the hearing of evidence.

Disposal

[126] In light of the foregoing, I will repel the defenders' motions.

[127] At debate, the parties were agreed that, following my decision on the arguments which I heard, the case should be put out by order so that I could be addressed on further procedure in light of my decision. Accordingly, I will proceed on this basis.

[128] I will reserve all questions of expenses meantime.