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Case No: CL-2014-000823

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/06/2017

Before :

MR JUSTICE KNOWLES CBE

- -

Between :

IPM ENERGY TRADING LTD	**Claimant**
- and -	
CARILLION ENERGY SERVICES LTD	**Defendant**

- -
- -

Stephen Tromans QC and Philip Riches (instructed by **Walker Morris**) for the **Claimant**
Daniel Jowell QC and Robert Clay (instructed by **Clyde & Co**) for the **Defendant**

Hearing dates: 6, 7, 8, 9, 13, 15 and 16 March 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE KNOWLES

Mr Justice Knowles :

Introduction

1. The Electricity and Gas (Community Energy Saving Programme) Order 2009 ("the CESP Order") introduced the Community Energy Saving Programme ("CESP") requiring generators of electricity to achieve specified energy-saving measures.

2. The Claimant is a generator. It engaged the Defendant, by a contract dated 26 May 2010 ("the Contract"), to provide services for the purposes of the Claimant's meeting its obligations under the CESP Order.

3. It is common ground that the Claimant ultimately failed to meet its obligations under the CESP Order, and that the Defendant failed to meet its obligations to the Claimant under the Contract. This trial has been concerned with the amount of the Defendant's liability to the Claimant.

CESP

4. CESP followed a statutory consultation in early 2009. It added to obligations imposed by the Electricity and Gas (Carbon Emissions Reduction) Order 2008 ("the CERT Order"). An Explanatory Memorandum to the CESP Order summarised its purpose as follows:

> "The Order places an obligation on electricity and gas suppliers who have 50,000 or more domestic customers and on electricity generators who have generated 10TWh/yr or more of electricity in specified years to achieve a carbon emissions reduction obligation. The obligation must be achieved by promoting particular types of (energy efficiency) actions to domestic energy users in areas of low income. The Order is administered and enforced by the Office for Gas and Electricity Markets (Ofgem)."

5. By Article 3(1) of the CESP Order an overall carbon emissions reduction target was set for the period 1st October 2009 to 31st December 2012 of 19.25 million lifetime tonnes of carbon dioxide. This included a carbon emissions reduction target for generators of 9.625 million lifetime tonnes of carbon dioxide.

6. Paragraph 8 of the CESP Order specified an obligation period for a generator, except a new generator, commencing on 1st October 2009 and ending on 31st December 2012. By paragraph 9 the Authority was required to determine and notify a generator's carbon emissions reduction obligation.

7. Part 3 of the CESP Order addressed the achievement of carbon emissions reduction obligations. By paragraph 14 and 15:

> "14.—(1) Generators and suppliers must achieve their carbon emissions reduction obligation by promoting qualifying actions to domestic energy users in areas of low income.

(2) A qualifying action must be approved by the Authority.

…

15.—(1) An action is a qualifying action only if it is promoted for the purpose of—

(a)achieving improvements in energy efficiency;

(b)increasing the amount of electricity generated or heat produced by microgeneration;

(c)increasing the amount of heat produced by any plant which relies wholly or mainly on wood; or

(d)reducing energy consumption.

…

16.—(1) An action which a generator or supplier intends to be a qualifying action must be notified to the Authority within one month of the action being commenced.

(2) A notification must—

(a)include a written confirmation from a local authority in whose area any qualifying actions will be promoted that it has been consulted on the qualifying actions which a generator or a supplier intends to promote in its area;

(b)include sufficient information to show how the generator or supplier intends the action to be a qualifying action.

17.—(1) The Authority must determine whether or not it approves an action as a qualifying action.

(2) Where the Authority approves an action, it must be satisfied that the action is promoted—

(a)in an area of low income; and

(b)in accordance with article 15.

(3) The Authority must notify generators or suppliers of its determination under this article and give reasons for it."

8. Transfers and trading were the subject of Part 5 of the CESP Order. By paragraph 20:

"20.—(1) The carbon emissions reduction obligation of one generator or supplier ("person A") may be treated as achieved in whole or part by qualifying action completed by a generator or a supplier ("person B") ("a transfer").

(2) A transfer only has effect if approved by the Authority

(3) To obtain approval, persons A and B must—

(a)apply for approval in writing to the Authority by 31st December 2012; and

(b)provide to the Authority such information, including the number and type of qualifying actions in question, as the Authority may reasonably require.

(4) The Authority must not approve a transfer where it has reasonable grounds to believe that, if the transfer were approved, the carbon emissions reduction obligation placed on person B will not be achieved.

(5) If the Authority decides not to approve a transfer under paragraph (4) it must notify persons A and B of the reasons for that decision.

(6) The completed qualifying action under a transfer does not count towards the carbon emissions reduction obligation of person B."

9. Paragraph 21 provided:

"21.—(1) A generator or a supplier ("transferor") may trade up to 100% of its carbon emissions reduction obligation with any generator or supplier ("transferee") ("a trade").

(2) A trade only has effect if—

(a)approved by the Authority; and

(b)made between 1st March 2010 and 30th September 2012.

(3) To obtain approval, a transferor and transferee must—

(a)apply for approval in writing; and

(b)provide to the Authority such information, including the amount of the carbon emissions reduction obligation to be traded, as the Authority may reasonably require.

(4) Upon receiving an application under paragraph (3), the Authority must determine whether or not it approves a trade.

…"

10. By paragraph 22 of the CESP Order:

"22.—(1) Generators and suppliers must notify the Authority not later than 31st January 2013 of—

(a)the overall number and type of qualifying actions which they have completed;

(b)the number and type of qualifying actions provided at particular premises;

(c)the number of qualifying actions provided in a particular area of low income.

(2) On receipt of that notification, the Authority must determine the reduction in carbon emissions to be attributed to those actions."

11. By paragraph 26:

"26.—(1) The Authority must determine whether generators and suppliers have achieved their carbon emissions reduction obligation and notify them of that determination not later than 30th April 2013.

(2) Not later than 1st May 2013 the Authority must submit to the Secretary of State a final report setting out whether—

(a)each generator and supplier has complied with its carbon emissions reduction obligation;

(b)generators and suppliers have achieved the carbon emissions reduction targets in article 3(2); and

(c)the overall carbon emissions reduction target under this Order was achieved."

12. Enforcement was addressed in these terms:

"27. A requirement placed on generators and suppliers under this Order is a relevant requirement for the purpose of—

(a)Part I of the Electricity Act 1989; and

(b)Part I of the Gas Act 1986."

13. Schedule 2 listed the provision of the following as qualifying actions: cavity wall insulation; a connection to a district heating scheme; a district heating meter for individual house billing; draught-proofing; external solid wall insulation; flat roof insulation; fuel switching; glazing; heating controls when provided with a new heating system; a heat pump; a home energy advice package; internal solid wall insulation; loft insulation; microgeneration measures other than a heat pump; a replacement boiler; under-floor insulation; or an upgrade of a district heating system.

14. The Consultation Paper drew attention to the following point:

"59 The overall target for the CESP obligation will be specified in the legislation in terms of a carbon points score of a proposed 19.25 million lifetime tonnes of CO2 (equivalent to 12.5% of the original CERT target). The overall carbon points target will be split between supply and generation companies, giving each obligated company an individual carbon points target. It is important to note that 19.25m will be a notional carbon savings figures. The real carbon savings delivered are likely to be around 2.9MtCO2."

15. The following definitions were amongst those engaged:

""area of low income" means an area which appears in the document approved by the Secretary of State entitled "Communities: Areas of Low Income" which is published on 30th June 2009 and the ISBN of which is 9780108508417(1);

"carbon emissions reduction obligation" means the reduction in carbon emissions that a generator or a supplier must achieve under this Order in its obligation period;

"lifetime tonnes of carbon dioxide" means the amount of carbon dioxide that is expected to be saved over the lifetime of the measures to be promoted under this Order;

"overall carbon emissions reduction target" means the target for the promotion of reduction in carbon emissions stated in article 3(1) and referred to in section 103(1) and (1A) of the Utilities Act 2000"

16. The Consultation Paper had included an explanation of the approach to charging for measures:

"Targeting low-income households: the cost of measures

4.84 While it is important that CESP offers measures to those who are unable to pay for them, the scheme should not be inflexible or designed in a way that prevents the cost-effective delivery of measures. The Government therefore proposes (in line with CERT) not to prescribe what suppliers and generators can charge for measures. It will not insist that measures are offered free of charge. Nor will it penalise companies who are able to leverage in other sources of finance to help with the cost of measures although, as noted earlier, this is expected to be rare.

4.85 This approach seems to strike the right balance between reaching those households most in need and allowing suppliers and generators to deliver schemes in the most cost-effective way. The design of the programme, however, will mean that suppliers and generators are likely to offer the vast majority of measures free, or at very low cost. This is because:

** CESP targets areas in the lowest decile of the income domain, so the majority of people targeted are likely to be unable to contribute to the cost of measures

** The scoring incentives for working on an intensive basis in these areas means that it will not be in the suppliers' and generators' interest to 'cherry pick' people who are able to pay for measures.

** The whole-house approach will mean that most measures offered will be relatively costly, making it less likely that people would be able to contribute to the cost."

…

Size and number of projects

> 4.92 The Government estimates that CESP will consist of 50 to 100 projects, delivering energy efficiency measures to roughly 90,000 homes across Great Britain. The Energy Efficiency Partnership for Homes (EEPH) has conducted research into the spread of energy efficiency community schemes."

The Contract

17. The more material provisions of the Contract are set out at Appendix 1 to this judgment.

Teesside

18. The Claimant contends that in exercise of its rights under Clause 5.2 of the Contract it entered into an agreement with GDF Suez Teesside Limited ("Teesside") under which Teesside "effectively assumed or provided savings equating to 118,414 t/CO2 for a consideration of £6,808,805". This sum it contends is recoverable from the Defendant.

19. In my judgment this claim fails on the facts.

20. The Claimant alleged in its Particulars of Claim an "agreement reached orally in or around September 2012, [by which] [the Claimant] agreed to pay to Teesside the market rate". In fact, as I find, the transfer was intended and agreed not at a "market rate" as alleged but at the price Teesside had paid in obtaining the CESP Points. That was well below market rate, and in fact below the rate that the Claimant was to pay the Defendant.

21. This was possible because Teesside had a contract with BG that obliged BG to deliver CESP Points at a rate of £15.50 per tonne. In addition, Teesside also had the opportunity at around this time to enter into a further contract with Cofely to obtain CESP Points at £14.70 per tonne. An internal slide presentation dated 14 February 2011 identified that Teesside would receive CESP Points from BG in an amount that would be surplus to Teesside's requirements and noted the opportunity for "synergies" if the surplus volumes (and potentially further volumes from BG) could be used to satisfy the CESP obligations of the Claimant. The reference to "synergies" reflected the fact that the Claimant and Teesside were associated.

22. In July 2011 Mr Kevin Dibble, who that month became Head of Valuation and Analysis within the Claimant's corporate group, had a series of email exchanges referring to the possibility of the "long position" at Teesside. An email dated 2 August 2011 from Mr Dibble recommended paying BG "at the contract price (assuming Ofgem are happy we can trade it to IPM)" noting that: "We will still make a saving …, and help ensure compliance for the group of course".

23. On 18 August 2011, Mr Phil Broom, Policy and Registration Officer for Retail and Gas at the Claimant, emailed Mr Dibble proposing a draft email about CESP:

> "Kevin and I met with Ofgem today to explain the … combination [that included Teesside and the Claimant] and to discuss with them our thoughts on how best to combine the joint obligations. The meeting was positive and I'm more upbeat after the meeting than I would otherwise have been.
>
> Ofgem have confirmed that we can capture synergy benefits from joining the obligations, we can effect these through inter-book trades between the licensed entities, this position was uncertain previously.
>
> As a result of this ability to true up internally, on a very rough rule of thumb basis I estimate that the potential delivery risk resulting from [the Contract, ie the contract with the Defendant] can be reduced from -200k t/CO2 to -100k t/CO2. …"

24. The reference to "potential delivery risk" was to the risk, then already perceived, that the Defendant might not meet its obligations under the Contract. It was put to Mr Dibble in cross examination that it was his clear plan at this stage to make an interbook trade to ensure that the 100,000 or so tonnes of CO2 surplus was effectively transferred from Teesside at cost price. He accepted "clearly we were considering that as an option". He suggested it was a "contingency option" in the event that the Defendant did not deliver.

25. A briefing paper in October 2011 from Mr Broom of the Claimant showed a "synergy benefit" from an "open net position" of £1.55. That was the difference between the price payable under the Contract and the price payable to BG. The briefing noted:

> "13 Assuming that we are able to proceed as planned with BG, there is a straightforward notification process required to turn-down the delivered volumes from [the Defendant]. [The Defendant has] indicated that there is no commercial incentive to them to deliver volumes at the current contract price; hence a reduction would be mutually beneficial."

26. I accept the submission of the Defendant that going into 2012 the group of which the Claimant was part was managing its CESP liability on a consolidated basis and already had an established plan (going beyond a mere contingency) to allocate the surplus from Teesside to the Claimant at cost price. In accordance with this, on 11 January 2012, Mr Dibble wrote that "Given [the Defendant] have not been delivering much, we have a plan to change providers, in fact to trade with British Gas for the rest of our obligation.". Mr Dibble acknowledged in evidence that in this plan he was envisaging Teesside would not be paid at the market price, which he knew to be about £40 per CESP Point at the time. Asked in cross examination about a draft plan prepared for senior management in February 2012 Mr Dibble accepted that no-one at a senior executive meeting was "at this time" planning for a transaction with Teesside at market price.

27. In October 2012 Mr Dibble supplied a table to Mr Broom. This was consistent with pricing for the internal trades of the surplus volumes from Teesside being at cost price (£15.50 and £14.70) not market price. Later in October the Claimant was informed Ofgem had approved the first tranche of trades. This was described internally as"lock[ing] in the synergy benefit from Teesside".

28. As mentioned, the case alleged by the Claimant is that there was an "agreement reached orally in or around September 2012, [by which] [the Claimant] agreed to pay to Teesside the market rate". Further information served alleged that Ms Hillary Berger and Mr Kevin Dibble reached the agreement and "were the main individuals involved in the discussions". I do not accept Mr Dibble's evidence that market rate was agreed and no evidence was given by Ms Berger (general counsel to the Claimant's group of companies).

29. The Claimant included argument to the effect that for reasons of corporate governance or process or practice or for regulatory reasons an agreement was required to be on an arms' length basis. This argument does not help the Claimant because that is not what happened in this case. But nor does it follow that an agreement would have to have been at market price to be at arms' length. Agreement at the cost to Teesside rather than at market price was still in the interests of the Claimant's group, and that was how it was seen at the time.

30. Mr Dibble suggested in his witness statements that if anyone had asked him what the Claimant would pay for the excess volumes his response would have been market rate. I do not accept that evidence. It is not consistent with the entire development of the matter, some of which I have highlighted. He acknowledged in his oral evidence that in the 2012 accounts of Teesside earnings from the sale of the BG surplus CESP Points to the Claimant (or the IPM generator companies associated with the Claimant) would have been at their reimbursement cost and in the 2012 accounts of the IPM generator companies associated with the Claimant would have been at the cost price that Teesside had paid. A spreadsheet discussed with auditors showed the same, with some of the IPM generators making payments at £58, a then market price, but not those receiving from Teesside.

31. The position continued, and there are other examples making that absolutely clear. But then on 26 June 2013, Mr Dibble wrote a letter before action on behalf of the Claimant to the Defendant. This asserted that the Claimant had entered into two contracts, one of which was described in the following terms: "Contracted with a second alternative contractor (Contractor 2) for it to provide 118,414 tCO2 at a total contract price of £6,808,805." This equated to a price of £57.50.

32. In cross examination of Mr Dibble the following exchange occurred:

> "Q. This gives the impression, doesn't it, that there was a contract with an independent contractor to pay £57.50 per tonne, doesn't it?
> A. Yes.
> Q. There was no such contract, was there?
> A. At this time the contract had not been agreed and signed, that's true.
> Q. There was no contract, was there? It didn't exist.
> A. At this time the contract didn't exist, that's right.
> Q. Contractor 2 didn't exist. There was no contractor 2, was there? This gives a completely misleading impression, doesn't it?
> A. Well, timing-wise the contract was not in place, but clearly the company had set out its intention to go down that route, and that's presumably what the letter was intended to --
> Q. This is some sort of -- I'm not sure that one can even call it a reference, but

> some sort of distorted reference to the internal trade with Teesside at cost price, is it?
> A. It's a reference to the trades between Teesside and [the Claimant], that's right.
> Q. Because there was no written contract, you had to create one, didn't you?
> A. Sorry, please could you clarify?
> Q. Because there was no contract, as I think you have accepted, you had to create a contract.
> A. There was a contract put together soon after this, that's right."

33. A contract document was drafted. The draftsman was Ms Berger. In my judgment the document does not reflect the true cost to the Claimant by reason of the Defendant's breach. The true cost was the cost to Teesside.

Acrobat

34. The Claimant contends that in exercise of its rights under Clause 5.2 of the Contract it entered into an agreement with Acrobat Carbon Services Limited ("Acrobat") under which Acrobat "provided the outstanding balance of savings for a consideration of £10,407,500." This sum the Claimant contends is recoverable from the Defendant.

35. Clauses 5.1 to 5.3 of the Contract provide:

> "5.1 By no later than 31 March 2012 [the Claimant and the Defendant] shall review the CESP Points obtained by [the Defendant] on behalf of [the Claimant], and the Measures then being Delivered, each in relation to the likely Overall CESP target.
>
> 5.2 Following such review if [the Claimant] reasonably believes that [the Defendant] is unlikely meet the Overall CESP Target by 30 October 2012 [the Claimant] shall have the right to either trade, transfer to another CESP obligated party, or contract its outstanding CESP Points to a third party. Subject to Clause 5.4 the reasonable cost of trading, transferring or contracting away such CESP Points shall be met by [the Defendant] from its own funds.
>
> 5.3. Should the Budget be expended without the Overall CESP Target having been met [the Defendant] will meet, from its own funds, the reasonable cost of Delivering further Measures in accordance with the terms of this Agreement in order to ensure that the Overall CESP Target is achieved."

36. The sum was paid by the Claimant for measures delivering t/CO2 savings early in 2013, and not to trade, transfer or contract CESP Points. On the Claimant's own case the sums paid to Acrobat were "paid to secure the delivery of measures which it was hoped would be taken into account by Ofgem in mitigation when considering a fine or penalty, and which in the event were taken into account." The Claimant adds the submission that "It was clear that delivering measures, albeit after 31 December 2012 would be likely to be a strong mitigating factor which might reduce, or even avoid, … a fine"

37. Clause 25 of the Contract includes these provisions:

> "25.5. Subject to Clauses 25.1 and 25.2, and without prejudice to the Contractor's obligations to pay any amounts properly due to [the Claimant] under this Agreement, [the Defendant] will not be liable to [the Claimant] for:
>
> …
>
> 25.5.3 any fine or other financial penalty imposed upon or levied against [the Claimant] by any Regulatory Body.
>
> …
>
> 25.8 Subject to Clause 25.3 above [the Defendant] will not incur any liability in relation to any fine or charge incurred by or charged to [the Claimant] by Ofgem or the government as a result of the Overall CESP Target or any other target or requirement in respect of the number of CESP Points to be achieved by [the Claimant] not being met."

38. The agreement with Acrobat was on 19 December 2012, some 12 calendar days before the date for compliance with the "carbon emissions reduction obligation" by reason of Article 9 of the CESP Order and as confirmed by Ofgem. Measures delivered after 31 December 2012 would not count towards a carbon emissions reduction obligation. The services provided under the contract with Acrobat would be too late for compliance. Ofgem issued a guidance letter dated 20 December 2012 to indicate that its position would be inflexible:

> "Any company which does not deliver all the required measures by 31 December will be in breach of their obligations"
>
> "It is essential that there is a clear differentiation between activity which an obligated party is seeking to claim towards its…CESP obligation (i.e. completed by 31 December 2012 and submitted to Ofgem by 31 January 2013) and activity which the obligated party is seeking to claim as mitigation action (i.e. completed before or after 31 December 2012 and submitted to Ofgem after 31 December 2012".

39. In my judgment the Claimant's position is not improved by its framing its case alternatively as one for damages for breach of Clause 3.1.1 at common law. I accept the Defendant's submission that the Contract, read as a whole, allocates the risk of delivering CESP Points to the Defendant, with an opportunity to the Claimant under Clauses 5.1 and 5.2 to take steps to protect itself from a fine by purchasing CESP Points, whilst the costs of any fine are exclusively the responsibility of the Claimant.

40. Measures to mitigate the fine (save measures that involved purchasing the very thing that was supplied under the Contract i.e. CESP Points) were (as with a fine itself) the responsibility of the Claimant. If it were otherwise the exclusions in Clauses 25.5.3 and 25.8 would be undermined.

41. The Claimant argues that the Defendant remained obliged to provide "Services" until 26 May 2013 and this justified the engagement of Acrobat even at a point too late to

count towards a carbon emissions reduction obligation. This does not assist in my view. The purpose of the engagement was to mitigate.

42. The scale of fine by Ofgem could be huge, as much as 10% of turnover. That is part of the context in which the parties agreed to allocate the risk of a fine to the Claimant not the Defendant. It follows that steps to mitigate a fine could be huge too. It is perhaps a flaw in the arrangements that they made that they did not cap the cost to the Defendant under Clause 5.2 which could have seen the purchase of CESP points at a ransom cost. However, save where the parties had provided under Clause 5.2, it is not realistic to suggest that the parties would contemplate that they were allocating the cost of mitigation of the risk of a fine differently to where they had allocated the risk of a fine itself.

43. The Claimant also argued that this was a case in which there was deliberate refusal by the Defendant to perform the contracted services, thus engaging an exception in Clause 25.2 of the Contract. Clause 25.2 is in these terms so far as material:

> "Subject to Clause 25.1 the Contractor's total aggregate liability
>
> …
>
> 25.2.2 in the case of any liability arising directly from wilful or malicious damage caused by the Contractor or its Affiliates (or their respective employees, agents or any Sub-contractors), any wilful or malicious act of the Contractor constituting material breach of this Agreement or the deliberate refusal of the Contractor to perform the Services, shall be unlimited;
> …".

44. I accept the Defendant's submission that the short answer to this additional argument is that Clause 25.8 of the Contract, recently discussed above, is not subject to the exceptions in Clause 25.2. Clause 25.8 is in terms subject to Clause 25.3, which does not assist the Claimant's argument. It may be the case that (as the parties agree in this litigation) the intended cross reference in Clause 25.8 was to Clause 5.3 not Clause 25.3 but that too would not assist the Claimant's argument.

45. In any event in my judgment the allegation that the Defendant deliberately refused to perform the Services is not made out on the facts.

46. The language of deliberate refusal in the Contract contemplates a deliberate decision to refuse to perform in circumstances of full appreciation that performance is required. The allegation of such conduct is a serious allegation.

47. The Claimant invited me to make a finding that "despite knowing the importance of price, [the Defendant] intentionally adopted a strategy based on offering not market price, but what it believed to be other incentives, and paying rates well below the market price." The strategy is said to be set out in two documents in March and April 2011, a sales strategy document and a business plan. I do not consider these documents should be taken in isolation from a complex and dynamic factual situation, and I further consider the finding sought is not justified on the evidence overall.

48. CESP had its weaknesses, and I heard convincing evidence to that effect. Some of the theory behind its design was not readily achievable in practice, and not within the timeframes involved. It did not take account of the lead time that large social landlords and local authorities would need to take full advantage of the programme. It could have modelled more scenarios before it was introduced.

49. It would be possible to imagine the opportunity for a cynical decision on the part of the Defendant not to try, and to hide behind difficulties. But I am satisfied, having heard the evidence that that was not the case here.

50. True the Defendant did not throw money at the problem - Mr Dan Ludgate, an account manager with the Defendant, frankly accepted in his evidence that the Defendant had not been prepared up to October 2012 to increase the bidding rate for open tenders substantially above £20 (unless the Claimant contributed more). Mr Ludgate of the Defendant accepted that at one point the Defendant was not prepared to pay the going rate. But nor did the Defendant in my assessment disengage or run away from the problem. On the other hand the Claimant's efforts to make a profit from the Contract by not increasing at too early a point what it was prepared to pay to achieve CESP points are not to be criticised as it would have been in the contemplation of the parties that it should do so.

51. There was a deep shortage of opportunities to take measures that would earn CESP points. Even the impact of higher and higher market prices for CESP points, as were seen, did not generate enough further opportunities to take measures. There was not a fully developed market in CESP points.

52. I accept Mr Ludgate's evidence that "having been a practitioner in CESP at the time, it didn't perform as per its illustrations and it was fraught with difficulties and challenges which ultimately led to a lack of schemes being able to be procured within the market." Mr John Swinney, Group Strategy Director of the relevant part of the Defendant, who I found to be a person of real practical experience and who gave evidence which I accept in all respects, said "I have been involved in some very complicated and difficult things in my career. This was the hardest thing I have ever had to deal with. It was extraordinarily difficult." He spoke of one scheme in these terms:

> "[I]t is 2017 [now] and that Tower Hamlets scheme has still not been completed. And that is despite all the money that has been around through British Gas and other people. The schemes were incredibly difficult to make happen. It is not just about money."

53. The Defendant understandably points out that Mr Dibble told officials at the Government Department responsible of recognised problems to local authority funding and a range of technical and practical challenges.

54. Mr Dibble wrote in February 2012 that volume was not going to be found because "there is none out there" and shortly after that "we can't buy volume". A draft of a paper produced on CESP for the Claimant's senior management in April noted that the Defendant "ultimately may leave themselves open to redress under the delivery contract terms" and added in a footnote: "Where they have not delivered, we have the right to contract elsewhere and recharge them the additional cost. However it is

becoming clear that volume is simply not available, and we retain compliance exposure on the relevant generation licensees". A letter from an association of the large suppliers to the Government stated:

> "Over and above the legislation and administration of CESP there is also significant lack of demand for the programme, compounded by the absence of funds by local partners and in some cases the lengthy and bureaucratic processes, such as procurement rules required in order to agree and run projects."

55. It is correct that at one point the Defendant's documents refer to its spending up to £45 on "a small number of points" "to save accusations of wilful abandonment". At first impression this sounds cynical, and was described as a "charade" by Mr Tromans QC (appearing with Mr Philip Riches for the Claimant). But not for the first time in this case the first impression is not correct in my judgment, especially when seen in the context of the other measures also planned, other efforts made by the Defendant and the state of the "market".

56. I respectfully reject Mr Tromans QC's characterisation of "charade". There was however force in Mr Tromans QC's criticism of the Defendant for its decision not to adduce evidence from Investment Committee level within the Defendant to explain the approach taken by the Defendant, and to answer "the charge that they adopted a policy that they knew would mean [the Defendant] failing to perform". That said I do not consider it a reliable course in the present case for me to draw adverse inferences from this decision.

57. There is force in the Defendant's argument that in the market in question high bids will not result in more points for everyone, or stimulate supply. High bids will simply raise the prices for all the obligated parties. High bids will not mean that there will be enough points for parties which have fallen behind. The Defendant did not just work with the Claimant. Mr Swinney pointed out "if you look at what Scottish Power did, they increased the price up to potentially £45 and yet in terms of actually getting and completing schemes through Scottish Power … we still only managed to get three schemes completed by 31 December and they weren't huge schemes in any case."

58. Mr Swinney also observed "you were completely reliant on everyone else hitting their targets, whereas all the information we were being fed back from DECC and Ofgem was that very few people were reaching their targets … everybody was struggling to make it work across the board". On available figures in an official report from the relevant Government department, obligated parties spent £665 million to obtain points and even then obligated parties did not meet their obligations.

59. Bidding higher for open tenders was not the only option tried. The Defendant tried a move to large numbers of small schemes when they realised that there were too few large schemes, a move to boiler upgrades and other measures which could be installed quickly, investment in promising new technology known as EcoPod technology and investment in the number of sales staff and marketing.

60. Ecopod combined highly efficient cascade boilers with solar power. It was designed to be suitable for retrofitting to apartment blocks, hotels, schools, hospitals and office blocks and without the need for a long installation period or disruptions. It was quicker to deliver than solid wall insulation, and appeared to be able to generate a

large number of points. Mr Swinney said, and I accept, "internally [it was] seen as sort of our white knight, if you like. It didn't quite turn out to be that but is that the way it was seen." In the event Ofgem approval did not come quickly, and it was not awarded the level of CESP Points which the Defendant expected.

61. These alternative approaches to fulfilment of the Contract were not ultimately successful, but they contradict the suggestion that there was a deliberate refusal to perform. There was an auction by EoN, but the Defendant is not to be criticised for not getting involved; and in fact it was not open to the Defendant.

62. Criticisms by the Claimant that the Defendant did not try to work with Acrobat are not well founded in my judgment. Acrobat's Managing Director Mr Kevin Griffin accepted in cross examination that it was, in fact, Acrobat that made clear that it did not wish to work with the Defendant on CESP.

63. But should the Defendant have done itself what Acrobat did? Mr Griffin described what Acrobat did:

> "We initially tried the same tactics that everyone else was using, ie speaking to local authorities, to social housing and registered providers, and we fell into the same sort of issues, I think, that were faced by everyone else, where schemes were being outbid and schemes were falling away. That was our experience. So we decided that we couldn't deal with that particular audience, so we started to approach private landlords who owned multiples of houses, presenting them with the CESP offer, which gained some immediate traction, and subsequently we decided that you will of our activities would be at private landlords and private residents, who could make decisions for themselves without a long winded discussion process as to whether this work was going to go ahead.
>
> …
>
> Acrobat Carbon Services has significant direct market capability. It understands data sets very well and it understands how to communicate with domestic home owners. So we employed a series of direct marketing techniques, we mailed the houses, we set up local pop up shops in the locations that are mentioned, we created branding, radio campaigns, we operated on the streets, knocking on doors, we got involved with the communities, the churches, the public houses, the big superstores, that type of thing, and we effectively stayed on the location until we achieved the required number of signups."

64. That the Defendant did not undertake this approach, or use these techniques, does not means that it was guilty of deliberate refusal to perform. The Defendant was not Acrobat, and the Claimant well knew this. Where Acrobat offered strengths in some approaches and techniques, the Defendant did on others. The Defendant realistically accepts through its Leading Counsel Mr Daniel Jowell QC (appearing with Mr Robert Clay) that one explanation for its accepted breach of contract is that it did not, and probably could not, mimic the nimbleness or cleverness of Acrobat. But it is also right that that is very far from deliberate refusal. And even Acrobat did not obtain schemes easily or quickly enough to obtain CESP Points.

65. The Defendant's approach included focus on obtaining schemes from social housing. In the passage quoted above Mr Griffin said something of this, but he again brought home the challenge elsewhere in his evidence:

> "We delivered very limited social housing. We faced the same issues that I understand [the Defendant] faced, that we were being outbid or, you know, schemes were falling through, people were delaying for the next obligation. It was quite clear to me in the four or five months of 2012 where we were having these conversations, that this was not an answer to get this delivered, and we would have failed."

66. The Claimant describes a decision recorded in a draft position paper in September 2011 of the Defendant's, containing the line (under the heading "tactics") "We will no longer pursue open tenders or bids with inter-mediary organisations", as perhaps the most graphic illustration of what the Claimant's allege to be the Defendant's "intentional[] fail[ure] and refus[al] to change strategy" and "conscious decision to write off very significant opportunities". I do not consider the paper illustrates this at all, either in its own right or (more importantly) when considered in the moving context I have sought to illustrate.

67. I accept the submission of the Defendant that its failure in those circumstances was a breach of contract, but not a deliberate refusal to perform.

Conclusion

68. In my judgment, the Claimant does not succeed in showing that it suffered the losses it claimed by reason of the Defendant's admitted breach of the Contract.

Appendix 1

"WHEREAS:

(A) IPMETL is required, on behalf of its Affiliates Deeside Power Limited, First Hydro Company, Indian Queens Power Limited, Rugeley Power Generation Limited, and Saltend Cogeneration Company Limited (collectively the "IPMETL Generators') to undertake, or procure the undertaking of, certain qualifying actions in relation to Customers in order to reduce the amount or carbon dioxide generated by such Customers' use of energy, in accordance with the Electricity and Gas (Community Energy Saving Programme) Order 2009 ("CESP") targets set by Ofgem;

(B) the Contractor and IPMETL have agreed that the Contractor will provide certain services in relation to the design installation and completion of energy saving materials in residential properties in order to enable IPMETL to meet those CESP obligations and that the Contractor shall provide, or procure the provision of, sufficient qualifying actions for IPMETL in order that IPMETL Is able to meet those obligations; and

(C) IPMETL has selected the Contractor to provide the Services to IPMETL and the Contractor undertakes to supply and undertake the same on the terms set out in this Agreement.

…

"Budget" means IPMETL's budget for payment of the Charges to the Contractor under this Agreement, being in the aggregate £17.05 x the Overall CESP Target;

…

"Deliver" means take all and any steps and undertake such processes and provide such products as may be necessary to effect the implementation of Measures to [an "end use individual" in each "Lower Layer Super Ouput Area" who receives the Completed Measures under this Agreement] pursuant to this Agreement …"

…

"Measure" means a product or process that, when Delivered in accordance with the Regulatory requirements, will achieve CESP Points for IPMETL on behalf of the IPMETL Generators in accordance with the Regulatory Requirements, and "Measures" shall be construed accordingly;

…

"Overall CESP Target" means the total number of CESP Points that the Contractor is obliged to deliver on behalf of IPMETL and the IPMETL Generators in accordance with this Agreement in aggregate over the Term, being the total number of CESP Points which LPMETL and the IPMETL Generators are required to obtain under CESP, as confirmed by Ofgem by 14 March 2012, having been adjusted for any trading of its CESP obligation by IPMETL or the IPMETL Generators of up to 300,000 CESP Points;

"Regulatory Requirements" means the requirements, directions, practice notes, manuals and/or guidance Issued from time to time by Ofgem and/or DECC in connection with or relating to the Community Energy Saving Programme;

…

"Services" means all of the services that are to be performed by the Contractor in order to comply with the Contractor's obligations under this Agreement, including the Contractor's obligation to achieve for IPMETL sufficient CESP Points to meet the Overall CESP Target in accordance with this Agreement and the Regulatory Requirements;

…

1.5. The words in this Agreement shall bear their natural meanings. The parties have had the opportunity to take legal advice on this Agreement and no term shall, therefore be construed contra proferentum.

1.6. In construing this Agreement, neither the rule known as the ejusdem generis rule nor any similar rule or approach shall apply to the construction of this Agreement and accordingly general words introduced or followed, by the word "other" or "including" or "in particular" shall not be given a restrictive meaning because they are followed or preceded (as the case may be) by particular examples intended to fall within the meaning of the general words and accordingly where the words "include" or "including" appear in this Agreement they are construed as meaning without limitation.

…

2. THE CESP TARGET REQUIREMENTS

2.1. The Parties each acknowledge and agree that the provision of the Services is intended to meet the requirements of IPMETL in connection with meeting the Overall CESP Target and the Contractor agrees that it shall provide the Services in a manner which achieves the Overall CESP Target by 30 June 2012 and is consistent with the Regulatory Requirements.

2.2. The Parties each acknowledge and agree that the Services (and the provision thereof in accordance with the terms of this Agreement) reflect the requirements of IPMETL as at the Effective Date in connection with meeting its Overall CESP Target.

2.3. The Contractor undertakes that it shall provide sufficient Services to ensure that IPMETL meets the Overall CESP Target are in accordance with the terms of this Agreement and the Regulatory Requirements.

…

3.1 In consideration for IPMETL entering into this Agreement and undertaking to pay the Charges in accordance with the terms of this Agreement, the Contractor shall provide the Services to IPMETL in accordance with the terms of this Agreement. Without prejudice to the foregoing generality, the Contractor shall, on and subject to the terms of this Agreement:

3.1.1. Deliver (or procure the Delivery of) Completed Measures in order to meet the Overall CESP Target on or before 30 June 2012;

3.1.2. receive, manage and respond to enquiries, queries and/or complaints received from:

3.1.2.1. Customers; and/or

3.1.2.2. counterparties to any contracts entered into by the Contractor in connection with the provision of the Services.

In relation to the Services, Measures and/or Completed Measures;

…

3.1.5. contact and work with Ofgem as is appropriate to meet its obligations under this Agreement, including resolution of disputes over the ownership of Measures;

3.1.6. provide the Reports.

…

4. MEASURES

4.1. IPMETL acknowledges and agrees that the Contractor shall be entitled, in its discretion, to elect the Measures it Delivers in order to comply with its obligations under this Agreement, provided always that the Contractor shall in so doing act reasonably having regard to the Regulatory Requirements and the terms of this Agreement and shall give due consideration to any suggestions made by IPMETL in relation to the Measures it should adopt.

4.2. The Parties acknowledge that the system under which CESP Points are awarded weights different Measures with different numbers of CESP Points, and includes provisions for uplift of points, and the Parties agree that the Contractor will exercise its discretion in selecting the Measures Delivered pursuant to this Agreement so as to ensure the Overall CESP Target is met.

…

5. PROGRESS AGAINST BUDGET

5.1. By no later than 31 March 2012 the Parties shall review the CESP Points obtained by the Contractor on behalf of IPMETL, and the Measures then being Delivered, each in relation to the likely Overall CESP target.

5.2. Following such review if IPMETL reasonably believe that the Contractor is unlikely meet the Overall CESP Target by 30 October 2012 IPMETL shall have the right to either trade, transfer to another CESP obligated party, or contract its outstanding CESP Points to a third party. Subject to Clause 5.4 the reasonable cost of trading, transferring or contracting away such CESP Points shall be met by the Contractor from its own funds.

5.3. Should the Budget be expended without the Overall CESP Target having been met the Contractor will meet, from its own funds, the reasonable cost of Delivering further Measures in accordance with the terms of this Agreement in order to ensure that the Overall CESP Target is achieved.

5.4. The Contractor shall only be liable for the proportion of any costs reasonably incurred by IPMETL in accordance with this Clause 5 in so far as such additional costs exceeds the total aggregate Budget which would be payable to the Contractor under this Agreement had all parties performed their obligations in full.

6. CHARGES AND INVOICING

6.1. In consideration for the Contractor complying with its obligations under this Agreement IPMETL shall pay the Charges to the Contractor in accordance with the payment arrangements and the invoicing procedure specified in this Clause 6 and Schedule 1.

6.2. All invoices shall be submitted to IPMETL at the relevant address specified in Schedule 1.

…

10. SUPPLY CHAIN RIGHTS

10.1. The Contractor may sub-contract in order to Deliver the Measures to Customers to meet its obligations under this Agreement. IPMETL acknowledges that the Contractor will use a network of Sub-contractors, including installers and suppliers and subsidiary companies of the Contractor and that the use of such Sub-contractors is necessary in order to ensure the Contractor is able to meet its obligations under this Agreement.

10.2. Notwithstanding the Contractor's right to sub-contract pursuant to this Clause 10, the Contractor acknowledges and agrees that it shall remain responsible for all acts and omissions of its Sub-contractors and the acts and omissions of those employed or engaged by the Sub-contractors or such counterparties as if they were its own. An obligation on the Contractor to do, or to refrain from doing, any act or thing shall include an obligation upon the Contractor to procure that its employees, staff, agents and Sub-contractors' employees, staff and agents also do, or refrain from doing, such act or thing.

11. ONGOING OFGEM REQUIREMENTS

11.1. The Contractor warrants and undertakes that it will perform the Services at all times in a manner which is consistent with the Regulatory Requirements and this Agreement.

11.2. The Contractor acknowledges and agrees that it shall in a timely manner provide IPMETL with such assistance, information and documentation as IPMETL may reasonably require in order to meet the Regulatory Requirements and IPMETL shall provide the Contractor with such information and documentation as the Contractor may reasonably request in connection with the provision of the Services by the Contractor.

11.3. Without prejudice to the generality' of Clause 11.1, the Contractor shall comply with the Ofgem Monitoring Requirements and prepare all Reports which are for submission to Ofgem in accordance with the Regulatory Requirements, and provide such further documentation, information and/or assistance, and make such amendments to the relevant Reports, as IPMETL may reasonably require in order to comply with the Regulatory Requirements and/or in order to ensure that IPMETL receives the full benefit of the terms of this Agreement.

…

12. OFGEM AUDITS

12.1. The Contractor agrees that it shall provide IPMETL with such assistance, information and documentation as IPMETL may reasonably require in relation to any Ofgem Audit in respect of the Services.

12.2. In the event that an Ofgem Audit disclose a material failure by the Contractor to comply with its obligations Under this Agreement, such failure shall be deemed a Contractor Default and the provisions of Clause 30.1 and in particular Clause 30.1.4.1 shall apply.

…

21. GENERAL OBLIGATIONS OF THE PARTIES

Contractor's Obligations

21.1. The Contractor shall:

21.1.1. subject to the limitations herein contained (but without prejudice to any other of IPMETL's rights or remedies hereunder or at law), indemnify IPMETL and keep IPMETL indemnified against any injury (including death) to or of any persons or Foss of or damage to any property which arises out of the negligence, breach of contract or other act, omission or default of the Contractor (including the Contractor Personnel) in the performance or non-performance (as the case may be) of the Contractor's obligations under this Agreement and against all losses, liabilities, claims, actions, demands, proceedings, damages, costs, charges and expenses whatsoever made against or incurred by IPMETL in respect thereof or in relation thereto, provided that the Contractor shall not be liable for nor be required to indemnify IPMETL against any such items to the extent that the same result from any negligence on the part of IPMETL or its employees or its third party contractors;

21.1.2. at all times allocate sufficient resources to provide the Services in accordance with the terms of this Agreement;

21.1.3. obtain, and maintain throughout the duration of this Agreement, all the consents, licences and permissions (statutory, regulatory contractual or otherwise) it may require and which are necessary to enable it to provide the Services;

21.1.4 provide IPMETL with such assistance as it may reasonably require during the term of this Agreement in respect of the provision and/or receipt of the Services.

…

22. WARRANTIES AND UNDERTAKINGS

…

22.2. The Contractor warrants and undertakes to IPMETL that:

22.2.1. it has the know-how, qualifications, skills, experience and necessary ability to satisfy its obligations under the Agreement;

22.2.2. it shall (without prejudice to its specific obligations under this Agreement) perform the Services and shall procure that all Measures Delivered by or on behalf of the Contractor shall be performed:

22.2.2.1 in a proper and professional manner with all reasonable care, and skill and in accordance with Good Industry Practice; and

22.2.2.2 in accordance with all Regulatory Requirements.

…

25. LIMITATIONS ON LIABILITY

25.1. Neither Party limits its liability for:

25.1.1 death or personal injury caused by its negligence, or that of its employees, agents or Sub-contractors (as applicable); or

25.1.2 fraud by it or its employees; or

25.1.3 breach of any obligation as to title implied by statute.

Financial limits

25.2. Subject to Clause 25.1 the Contractor's total aggregate liability:

25.2.1 in respect of the indemnities in Clauses 13 (Quality and Technical and Health and Safety Requirements), 7 (Tax), or any breach of Clause 19 (Confidentiality) shall be unlimited;

25.2.2 in the case of any liability arising directly from wilful or malicious damage caused by the Contractor or its Affiliates (or their respective employees, agents or any Sub-contractors), any wilful or malicious act of the Contractor constituting material breach of this Agreement or the deliberate refusal of the Contractor to perform the Services, shall be unlimited;

25.2.3 for all loss of or damage to the premises, property or assets (including technical infrastructure, assets or equipment) of IPMETL caused by Contractor's Default shall in no event exceed TEN MILLION POUNDS (10,000,000) STERLING for any one event or series of connected events.

25.3. Subject to Clause 25.1, IPMETL's total aggregate Liability:

25.3.1. in respect of any breach of Clause 19 (Confidentiality) shall be unlimited;

25.3.2. for all Defaults by IPMETL resulting in loss of or damage to the property or assets (including technical infrastructure, assets or equipment): of the Contractor shall in no event exceed TEN MILLION POUNDS (£10,000,000) STERLING for any one event or series of connected events; and

25.4. Subject to Clause 25.1, and without prejudice to IPMETL's obligations to pay Charges properly due under this Agreement, IPMETL will not be liable to the Contractor for:

25.4.1. any indirect loss, special loss or consequential loss or damage; or

25.4.2. any indirect loss of profits, indirect loss of contracts, indirect loss of revenue, indirect loss of business opportunities, or indirect damage to goodwill.

25.5. Subject to Clauses 25.1 and 25.2, and without prejudice to the Contractor's obligations to pay any amounts properly due to IPMETL under this Agreement, the Contractor will not be liable to IPMETL for:

25.5.1. any indirect loss, special loss or consequential loss or damage; or

25.5.2. any indirect loss of profits, indirect loss of contracts, indirect loss of revenue, indirect loss of business opportunities, or indirect damage to goodwill; or

25.5.3. any fine or other financial penalty imposed upon or levied against IPMETL by any Regulatory Body.

25.6. The Parties expressly agree that if any limitation or provision contained or expressly referred to in this Clause 25 is held to be invalid under any law, it will be deemed omitted to that extent, and if any Party becomes liable for loss or damage to which that limitation or provision applied, that liability will be subject to the remaining limitations and provisions set out in this Clause 25.

25.7. Nothing in this Clause 25 shall act to reduce or affect a Party's general duty to mitigate its loss. The Parties further undertake that in the event that they invoke and/or enforce any of the indemnities granted to them in terms of this Agreement they shall use reasonable endeavours to mitigate any loss suffered or incurred by them, and the Parties acknowledge and agree that (i) (without imposing any specific obligation on a Party to incur any costs, expenses or other liability in taking steps to mitigate any loss) any costs, expenses and other liability suffered or incurred by a Party in taking in any steps to mitigate any loss shall (without prejudice to that Party's ability to recover any other costs, expenses and liability under the relevant indemnity) be recoverable by that Party pursuant to that Party's claim under the relevant indemnity and (ii) any mitigation of loss actually achieved by a Party in pursuance of this Clause 25.7 will be taken into account by that Party in any claim for the invocation and/or enforcement of the relevant indemnity or indemnities under this Agreement.

25.8. Subject to Clause 25.3 above the Contractor will not incur any liability in relation to any fine or charge incurred by or charged to IPMETL by Ofgem or the government as a result of the Overall CESP Target or any other target or requirement in respect of the number of CESP Points to be achieved by IPMETL not being met.

…

29 TERM

This Agreement shall commence on the Effective Date and end on the third anniversary thereof or, where Ofgem have confirmed that the Overall CESP Target has been met, such earlier date as the Parties may agree.

…

33 WAIVER AND CUMULATIVE REMEDIES

33.1. The rights and remedies provided by this Agreement may be waived only in writing by the relevant Representative in a manner that expressly states that a waiver is intended, and such waiver shall only be operative with regard to the specific circumstances referred to.

33.2. Unless a right or remedy a Party is expressed to be an exclusive right or remedy, the exercise of it by that Party is without prejudice to that Party's other rights and remedies. Any failure to exercise or any delay in exercising a right or remedy by either Party shall not constitute a waiver of that right or remedy or of any other rights or remedies.

33.3 The rights and remedies provided by this Agreement are cumulative and, unless otherwise provided in this Agreement, are not exclusive of any right or remedies provided at law or otherwise under this Agreement."