Neutral Citation Number: [2022] EWHC 1809 (Comm)

Case No: CL-2020-000686

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QBD)

Rolls Building
7 Fetter Lane,
London, EC4A 1NL

Date: 13 July 2022

Before:

MRS JUSTICE MOULDER

- -

Between:

URE ENERGY LIMITED	**Claimant**
- and -	
NOTTING HILL GENESIS	**Defendant**

- -
- -

HUGH SIMS QC and JAMES WIBBERLEY (instructed by **Burges Salmon LLP**) for the **Claimant**
JAMIE RILEY QC and CHINMAYI SHARMA (instructed by **Devonshires Solicitors LLP**) for the **Defendant**

Hearing dates: 29 June and 6 July 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mrs Justice Moulder :

1. This is an application for summary judgment (the "Application") brought by the claimant, URE Energy Limited ("URE" or the "Claimant") against the defendant, Notting Hill Genesis ("NHG" or the "Defendant").

2. The Application is supported by the evidence of:

   i) Mr Andrew Burnette, Partner/Member of Burges Salmon LLP ("Burges Salmon") on behalf of URE (second and third witness statements); and

   ii) Mr Gary Ensor who at the material time was the Chief Executive Officer of URE (first and second witness statements).

3. In resisting the Application NHG has filed evidence from:

   i) Mr Sandip Shergill, Director of Procurement at NHG;

   ii) Mr Nick Haines, founder of Orez Consulting, a renewable energy consultancy company; and

   iii) Mr Andrew Cowan, Partner at Devonshires Solicitors LLP ("Devonshires").

4. The Claimant has raised an objection in correspondence to the evidence of Mr Haines and Mr Cowan and this is discussed below.

<u>Background</u>

5. URE was at the relevant time an energy supplier. As well as being the Chief Executive Officer of URE at that time, Mr Ensor was a director of URE and his

evidence is that he was “at one time, a beneficial owner of URE”. His evidence is that he has no “material financial interest” in the claim succeeding.

6. NHG is a housing association formed as a result of a statutory amalgamation (the “Amalgamation”) of two registered societies, Genesis Housing Association Limited ("Genesis") and Notting Hill Housing Trust ("Notting Hill") pursuant to section 109 of the Co-operative and Community Benefit Societies Act 2014 (the "2014 Act").

7. In August/September 2017, the Claimant successfully tendered for the negotiation of a 25-year energy reduction and electricity supply agreement (the "Long-Term Contract") with Genesis.

8. On 29 September 2017 URE and Genesis signed a four year contract (the "Contract") for the supply of electricity with a start date of 1 October 2017 and a scheduled end date of 30 September 2021.

9. The Amalgamation involved a two stage process, a special resolution being initially passed at a Special General Meeting of members of Genesis in January 2018 and then confirmed at a subsequent Special General Meeting on 1 February 2018. The Amalgamation took effect once registered by the FCA on 3 April 2018. The resolution expressly stated that there was no dissolution of the two societies and that the property of each of the Societies would vest in the amalgamated society (i.e. NHG) without any form of conveyance.

10. URE was sent a notice by Genesis on 22 March 2018 of the "proposed merger" (the “First Notice”). [424]

11. A further notice (the "Second Notice") was sent on 4 April 2018 entitled "*Invoicing arrangements for Notting Hill Genesis"*. [426]

12. It appears to be common ground that in the succeeding six month period URE continued to deal with NHG just as it had dealt with Genesis including by continuing to supply electricity to NHG's customers and by continuing negotiations in relation to the Long Term Contract.

13. In September 2018 there was a change of personnel at NHG: Mr Jameson left NHG and Mr Carey became responsible for the Contract. [para 40 Shergill]

14. In October 2018 Mr Carey advised URE that invoices would be paid in arrear not, as previously, in advance.

15. On 29 October 2018, Mr Carey informed Mr Ensor that NHG no longer wished to proceed with the proposed Long-Term Contract.

16. On 31 October 2018 URE delivered a notice of termination and purported to terminate the Contract with immediate effect. [460]

17. On 2 November 2018 URE revoked (or purported to revoke) the notice of termination. The letter stated that URE maintained that NHG were in breach of Clause 6.3 of the Contract (reasonable access to allow meter readings and installation of smart meters) and gave NHG 10 days to remedy its breach.

18. On 7 November 2018 URE's solicitors, Burges Salmon, wrote to NHG that URE was entitled to terminate under Clause 10.2(b) of the Contract for a failure to pay the invoices in accordance with the payment terms. The letter also stated that the Amalgamation without approval in advance entitled URE to terminate

pursuant to Clause 10.2 (d) of the Contract. The letter gave a termination date of 14 November 2018 and demanded payment of the amount due under Clause 10.5. [468]

19. The parties agree that the Contract came to an end on 14 November 2018 but dispute the grounds on which it was terminated. URE's position is that it terminated the Contract under Clauses 10.2(d) and/or (b), whereas NHG contends that URE committed one or more repudiatory breaches by refusing to continue to perform the Contract, which repudiation NHG says it accepted on 14 November 2018. Although URE claims it was entitled to terminate by reason of NHG's breach, this alternative basis of claim does not form part of the Application.

20. URE claims, pursuant to Clause 10.5, 50% of the sums that URE would have received under the Contract between termination and 30 September 2021 as determined by URE.

21. URE therefore seeks judgment and an order for a termination payment of £3,999,457.38 plus interest and costs.

Application

22. By its Application the Claimant seeks summary judgment against the Defendant for a termination payment in a specified sum on the ground that the Defendant has no real prospect of defending the proceedings (and there is no other compelling reason for a trial).

23. The Application is made on the basis of the draft Amended Particulars of Claim and the draft Amended Defence before the Court.

24. The main issues on the Application at the hearing were:

i) whether the right to terminate under Clause 10.2(d) arose;

ii) whether the right to terminate was lost either through waiver or estoppel;

iii) the amount of the payment due under Clause 10.5.

25. A further issue as to whether payment is due on termination under Clause 10.5 no longer appears to be contested.

Expert evidence

26. In a letter of 20 June 2022 to the Court URE "*noted*" that:

> "contrary to Commercial Court Guide Section F8.6, the Defendant's evidence in answer dated 6 June 2022 includes expert evidence for which the Defendant has not obtained the permission of the Court, nor has it provided a justification or explained why expert evidence is reasonably required on the points on which its witnesses give opinion evidence"

27. In response by letter of 21 June 2022, NHG sent a letter to the Court in which it stated that the witness statement of Mr Cowan was not expert evidence but explained the Amalgamation between Genesis and Notting Hill and why it was effected in the way it was; the evidence of Mr Haines was to "*give notice*" to the Claimant and the Court of the basis for the Defendant's position with regard to the "*correct contractual construction*" of Clause 10.5 and to give the Court "*an idea of the sort of matters in relation to which expert evidence will be required*".

28. It was submitted for the Defendant that any expert evidence included within its evidence is limited to that which is reasonably required to resolve the

Application and that the Court should adopt a "*flexible approach*" in order to demonstrate a real prospect of success: *Pipia v Bgeo Group Ltd* [2019] EWHC 325 (Comm) at [23]; *Ross v Attanta Ltd* [2021] EWHC 503 (Comm) at [6].

29. The latest edition of the Commercial Court Guide states:

> "F8.6 Where a party wishes to rely on expert evidence at a hearing other than a trial, the permission of the Court should still be obtained to ensure that expert evidence is only placed before the Court when it is reasonably required to resolve the application, to enable the nature, scope and sequence of any expert evidence to be managed by the court, and to avoid the difficulties which can occur when one party to an application seeks to adduce expert evidence at a late stage or different parties identify different issues on which it may be relevant to consider expert opinion.
>
> F8.7 For the avoidance of doubt, a party relies on expert evidence whenever they put before the Court, so as to invite the Court to take its substance into account when judging the application, evidence of opinion on a matter calling for expertise, whether the opinion is given in writing or orally and whether directly (from the source) or indirectly (as where a solicitor's witness statement reports an opinion communicated to them).
>
> F8.8 In applications on notice, a party wishing to adduce expert evidence, or identifying that another party appears to be relying on expert evidence, should raise the issue with the Court as soon as possible after the application has been issued and served. The question should not be left to be dealt with only when the application is heard or determined on paper, as the case may be." [emphasis added]

30. I accept the submissions for NHG that Mr Cowan's evidence as to the factual background to the transaction is not expert evidence. His evidence as to the statutory framework concerning the amalgamation of housing associations is expert evidence but is not in dispute on this Application. Insofar as Mr Cowan goes beyond explaining the reasons why the transaction was structured in the way it was (to avoid crystallising pension liabilities) and expresses a view on the meaning of cessation of business for the purposes of the Contract, this is a

matter of construction to be determined by the Court and not for a matter for expert evidence.

31. As to the evidence of Mr Haines, given my findings below, it is not necessary for me to consider his evidence in order to resolve the Application.

32. I would note however that despite the authorities relied on by the Defendant, the recent version of the Commercial Court Guide (as set out above) makes it clear that the permission of the Court should be sought for expert evidence to be adduced on an application and that the question of permission should not be left to be dealt with at the hearing of the application.

Relevant law on summary judgment applications

33. The approach which the Court adopts on an application for summary judgment was common ground.

34. CPR 24.2 provides:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if-
>
> (a) it considers that-
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

35. PD 24 paragraph 1.3 states that:

> "An application for summary judgment under rule 24.2 may be based on-

(1) a point of law (including a question of construction of a document),

(2) the evidence which can reasonably be expected to be available at trial or the lack of it, or

(3) a combination of these."

36. The principles applicable to applications for summary judgment were formulated by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301 at [24]:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All E.R. 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for

summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No.5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] F.S.R. 3;

vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the

documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

37. It was not disputed that the burden of proof rests on the applicant but that if, however, the applicant adduces credible evidence in support of their application, the burden falls on the respondent to prove that they have some real prospect of success or there is some other reason for a trial. *ED&F Man Liquid Productions Limited v Patel* [2003] EWCA Civ 472; [2003] CP Rep 51 at [10].

38. I also note the following amplification of those principles as set out in the *White Book* at [24.2.5]:

i) The standard of proof required of the respondent is not high. It suffices merely to rebut the applicant's statement of belief.

ii) The court hearing a Part 24 application should be wary of trying issues of fact on evidence where the facts are apparently credible and are to be set against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on an interim application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it;

iii) When deciding whether the respondent has some real prospect of success the court should not apply the standard which would be applicable at the trial, namely the balance of probabilities on the evidence presented.

39. As to the legal principles to be adopted by the Court to issues of construction these were also common ground as summarised in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm) at [8]:

> "8. There is an abundance of recent high authority on the principles applicable to the construction of commercial documents, including *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101; *Re Sigma Finance Corp* [2010] 1 All ER 571; *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900; *Arnold v Britton* [2015] AC 1619; and *Wood v Capita Insurance Services Ltd* [2017] AC 1173. The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in

> the contract, so long as the court balances the indications given by each."

Issue 1: whether the right to terminate under Clause 10.2(d) arose

40. Clause 10.2 provided:

> "The Supplier may terminate this Contract at any time for all or any Supply Premises if:
>
> …
>
> (d) the Customer passes a resolution for its winding up which shall include amalgamation, reconstruction, reorganisation, administration, dissolution, liquidation, merger or consolidation (other than a solvent amalgamation, reorganisation, merger or consolidation approved in advance by the Supplier) or a petition is presented for, or a court of competent jurisdiction makes an order for, its winding up or dissolution, or an administration order is made in relation to it or a receiver is appointed over, or an encumbrancer takes possession of or sells, one or more of its assets or the Customer makes an arrangement or composition with its creditors generally or ceases to carry on business;" [emphasis added]

41. Two issues are raised: URE submit that it was entitled to terminate the Contract under Clause 10.2(d) on the ground that the Amalgamation was not "*approved in advance*" by URE or in the alternative that Genesis had ceased to carry on business.

42. NHG submitted that it has a real prospect of defending the allegations that the right to terminate under Clause 10.2(d) arose.

Cessation of business

43. The evidence of Mr Cowan was that:

> "21. Therefore, in order successfully to merge with Notting Hill without triggering an employment cessation event and, as a consequence, the substantial liabilities under the various pension schemes, it was necessary for Genesis to continue to be an

> employer. To that end, Genesis remains a registered society under the 2014 Act; it continues to discharge its objectives as a housing association; and does so within the 'wrapper' of NHG through which it continues to trade and employ staff. These factors mean that the pension liability does not crystallise…
>
> "23. For the reasons set out above, Genesis has not ceased to operate its business as a result of the Amalgamation. Instead, it continues to operate the business but as part of and within the amalgamated entity NHG…" [emphasis added]

44. The evidence of Mr Burnette (Burnette 3) was that no returns have been filed for Genesis as a separate entity since March 2018 and the annual report of NHG does not refer to the trading activities of Genesis.

45. It was submitted for NHG that:

i) URE has not pleaded that "*ceases to carry on business*" means carrying on business as a separate entity (paragraph 42.1 of NHG's skeleton);

ii) it is seriously arguable that Genesis still carries on business as part of or within an amalgamated society (paragraph 42.2): the Amalgamation was a statutory process which does not necessarily involve the dissolution of the amalgamating societies, the property of each society vests in the amalgamated society (paragraph 44); the "business" is the operation as a housing association and following the Amalgamation that business was "*continued by Genesis but via its amalgamation with Notting Hill*" (paragraph 50);

iii) it would make the exemption for an approved amalgamation devoid of significance: the definition of carrying on business must permit continuation of business whether via an amalgamation with another society or otherwise (paragraph 42.3).

46. It was submitted for URE that:

i) There was a cessation of business: the clause is widely drafted and "*on any sensible reading*" of Clause 10.2(d) a dissolution and a cessation of business are alternatives-the cessation of business is listed as a termination event because the Claimant wanted the option to terminate where Genesis was not dissolved and had not entered into any other form of insolvency process (paragraph 38 of URE's skeleton);

ii) The argument that Genesis is carrying on business "*as and within*" NHG does not make any sense: the effect of the Amalgamation was to deprive Genesis both of its assets and its purpose (paragraph 40);

iii) Whether (as described by Mr Cowan) there was an "employment cessation event" for the purposes of the pension regulations and whether Genesis ceased to trade within the meaning of Clause 10.2(d) are separate questions (paragraph 42).

47. Clause 10.2(d) has to be read as a whole in order to determine the meaning of the phrase "*ceases to carry on business*". Although the natural meaning of the words "*ceases to carry on business*" is capable of being read in a broad sense, the broad interpretation has to be considered in the context of the clause as a whole. If the phrase is given a broad interpretation such that it applies to a cessation of business where there has been an amalgamation, reorganisation, or merger, this would mean that an amalgamation, reorganisation or merger could be caught twice within the same clause both by the "winding up" and the cessation of business language. More significantly, whereas there is an exception for approved solvent amalgamations, a broad interpretation of the

phrase would have the effect that the trigger for a termination event having been disapplied for approved solvent amalgamations/mergers, it would then be triggered by the words "ceases to carry on business". This was a professionally drafted contract and there is no reason to infer that the parties failed to consider the consequences of the language or that they intended a broad interpretation of the phrase "ceases to carry on business" which would negate the clear and express exception to the termination events allowing for approved solvent transfers/amalgamations. A narrow interpretation which excluded cessation of business where an amalgamation or reorganisation had occurred would still give the Claimant the option to terminate where Genesis ceased to carry on business but had not entered into any reorganisation etc and remained a separate entity.

48. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. The commercial purpose of the termination event in Clause 10.2 I infer is to protect URE if the financial position of the customer changes adversely. That purpose is achieved by a narrow interpretation of the phrase whereas a broad interpretation would result in a termination event occurring even where there had been approval given for a solvent amalgamation. It was submitted for URE that the consequences of the broad interpretation for which it contends would be mitigated by the fact that URE had an option whether to exercise the right to terminate. In my view that optionality is not sufficient to lead to a conclusion that the objective meaning of the phrase "*ceases to carry on business"* read in context and against commercial common sense was to catch a cessation of business where there had been an amalgamation, reorganisation or merger.

49. If I were wrong on that it would be necessary to consider whether there was a cessation of business or whether, as NHG contends, Genesis continued to operate within the amalgamated entity. As to that there is conflicting evidence from Mr Cowan and Mr Burnette and where the facts are apparently credible, choosing between them is the function of the trial judge.

50. I am satisfied that there is a real prospect of success for NHG on the construction argument alone and if I am wrong on that, there is a real prospect of the Defendant establishing that there has not been a cessation of business within the amalgamated entity.

"Approved in advance"

51. There are two issues with regard to the defence based on the approval of URE having been given to the Amalgamation. The first is the timing of the approval as a matter of construction of Clause 10.2(d). The second issue is whether there is a real prospect of NHG establishing that consent was given.

52. It was submitted for NHG that:

i) "*approved in advance*" as a matter of construction means in advance of the winding up/amalgamation not in advance of the resolution (paragraph 33.1 of its skeleton); there is no reason for Genesis to seek approval from an external party before the resolution had been formally put to and approved internally by its members (paragraph 33.2); once the Supplier knows that a solvent amalgamation will happen, it can decide whether to approve it before it commences (paragraph 33.5);

ii) consent must refer to "*consent or acquiescence*" to continue with the Contract notwithstanding the decision of the customer to effect an amalgamation not the formal approval of the Amalgamation as the Supplier is not within the constituency of members who vote on a restructuring (paragraph 34.1);

iii) whether URE approved the Amalgamation needs to be determined at trial with the benefit of disclosure and cross examination (paragraph 35).

53. It was submitted for URE that:

i) as a matter of construction the exception for approved solvent reorganisations was an exception to the general rule which triggers on a resolution for a winding up; it was both logical and made commercial sense for the consent to be required before the vote took place on the resolution such that the vote could take place on an "*informed*" basis knowing that the supplier would continue to supply;

ii) there had been no request for consent and acquiescence was not sufficient to amount to consent;

iii) the conduct of URE was consistent with not knowing of the right to terminate and there is nothing consistent with approval.

Evidence

54. The First Notice sent by email to URE on 22 March 2018 (the "First Notice") stated that Genesis and Notting Hill proposed to merge and that the merger

would occur through an amalgamation under section 109 of the 2014 Act. The Notice further stated:

> "…The effect of the Amalgamation is that all of our properties and other assets, including our Contract(s) with you, will automatically vest in NHG. Consequently, there is no novation or assignment of any Contract required. NHG will assume responsibility for the performance of our obligations from the date of completion of the Amalgamation.
>
> Our amalgamation date is planned for early April 2018; when completed you will be dealing with Notting Hill Genesis (NHG), a new legal entity. We will contact you again in April, once the amalgamation is complete, to tell you about our new address and other legal identifiers, such as our new VAT number.
>
> For the moment it continues to be "business as usual" with respect to invoicing, payment terms, receipt of payment and contact details. Please continue to send all communications to the current address and individual/department with whom you deal at the moment.
>
> You can find more information on our websites at https://www.genesisha.org.uk/about-us/proposed-partnership, but please let me know if you have further questions or if you'd like to discuss in more detail how our plans might affect how we work with you. You can send any queries to me via GenesisSuppliers@genesisha.org.uk."

55. The Second Notice on 4 April 2018 [426] entitled "Invoicing arrangements for Notting Hill Genesis" stated that:

> "…Notting Hill Genesis is a new entity created on 4 April 2018 by the amalgamation of Genesis Housing Association Ltd and Notting Hill Housing Trust…Consequently if you previously dealt with [Notting Hill] or [Genesis] you will need to change our name in your records to [NHG].
>
> All other arrangements…remain unchanged…This change of name is the only action you need to take...
>
> …please let me know if you have further questions or if you'd like to discuss in more detail how our plans might affect how we work with you…"

56. The only communication from URE was that on 20 April 2018, Mr Ensor sent an email to Mr Jameson of NHG and asked for the email with "*details of the new organisation for invoicing purposes etc"* to be forwarded so URE could update its system.

57. Mr Jameson responded the same day to URE:

> "The only change in the Name to Notting Hill Genesis all other invoicing stays the same. Until further notice"

58. The evidence of Mr Ensor is that he did not know that he had a right to terminate the Contract under Clause 10.2(d) until November 2018 when he was told by Mr Burnette. His evidence in his witness statement was as follows:

> "I did not raise any objections to the contents of the [First] Notice. It was not presented to me as a matter capable of objection nor as one which required URE's consent…"
>
> "from [the Second Notice] I understood that the Amalgamation had completed…I had no reason to nor did I seek advice on whether the Amalgamation might enable URE to terminate the Contract…"
>
> "I first became aware of URE's right to terminate the Contract under clause 10.2(d) on 5 November 2018 during the course of a telephone call with Andrew Burnette…" (paragraph 19).

59. The evidence of Mr Shergill (paragraph 34) is that URE continued to deal with the new entity, NHG, just as they had done with Genesis.

60. In the letter of 31 October 2018 [222] from Mr Ensor to Mr Carey, URE purported to terminate the Contract and demanded payment pursuant to Clause 10.5. The material part of the letter in this context was as follows:

> "…<u>We were assured that the 'Amalgamation'</u> of Notting Hill and Genesis to create Notting Hill Genesis (NHG) under section 109 of the Co-operative and Community Benefit Societies Act 2014

> would have no impact on our ongoing interactions with you, it was merely a name change. Patently this is not true…
>
> We regret that the situation has reached this point but due to your total change in approach since the Amalgamation and your continued failure to act reasonably, we feel we are left with no alternative…" [emphasis added]

Discussion

61. I propose to deal first with the issue of construction and the timing of any approval.

62. It seems to me that the natural meaning of the words "*other than a solvent amalgamation, reorganisation, merger or consolidation approved in advance by the Supplier*" requires approval to be obtained prior to the event occurring and not prior to any resolution being passed for the event. If and to the extent there is ambiguity, I look in addition to the context:

i) If it had been intended to say that approval should be obtained "*prior to the resolution*", that was not stated and I have regard to the fact that this was a professionally drafted contract.

ii) It is clear that there are six "events" which are captured by Clause 10.2(d) as identified below:

> "(i) the Customer passes a resolution for its winding up… or (ii) a petition is presented for, or a court of competent jurisdiction makes an order for, its winding up or dissolution, or (iii) an administration order is made in relation to it or a receiver is appointed over, or (iv) an encumbrancer takes possession of or sells, one or more of its assets or (v) the Customer makes an arrangement or composition with its creditors generally or (iv) ceases to carry on business;" [numbering added]

Reading the subclause as a whole, it seems to me that the trigger event with which the Court is concerned is that "*a resolution [is passed] for*

winding up" and the term "*winding up*" is then defined within the subclause to include a broad range of events ("Winding up Equivalents") which can be viewed as a form of "winding up" but to exclude solvent Winding up Equivalents approved in advance. In my view the list of events clearly refers back to the term "winding up" and not to a resolution for the winding up.

63. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Whilst it was submitted for URE that commercial sense meant there should be an "*informed*" vote on the Amalgamation, it seems to me that it is more likely from a commercial perspective that consent from suppliers would not be obtained until it was clear that the amalgamation or reorganisation would go ahead. This is borne out by the evidence in this case of Mr Shergill (paragraph 27 of his witness statement) that the First Notice was sent by way of a pro forma notification given that both Genesis and Notting Hill had "*thousands of suppliers*". Whilst it may be said that Clause 10.2(d) was "*generic*" or "*boiler plate*" (as to which there is no evidence) it can be inferred that any entity carrying on a business is likely to have a number of suppliers which would have to be contacted for their approval to an amalgamation or reorganisation and it would not make commercial sense to devote time and expense contacting these suppliers for approval prior to the resolution being passed when there is no certainty as to whether it will go ahead and in what form.

64. I therefore find that as a matter of construction the time by which approval was to be obtained was prior to the Amalgamation taking effect on 3 April 2018.

65. The second issue is whether there is a real prospect of NHG showing that approval was given by URE prior to the Amalgamation taking effect on 3 April.

66. In response to the submission for URE that the consent had to be "*informed consent*", it was submitted for the Defendant (paragraph 36.3 of its skeleton) that the Claimant had sufficient information on which to make a decision as to whether to assent to the Amalgamation and continue the Contract. The Claimant relies on the evidence of Mr Ensor in his witness statement at paragraphs 10 and 12 from which I note the following:

> "In my experience it is not unusual for housing associations to amalgamate…"
>
> "I did not raise any objections to the contents of the Notice. It was not presented to me as a matter capable of objection nor as one which required URE's consent…In any event, I had no concerns about the proposal at that time and did not expect it to significantly impact the Contract…"

67. The Claimant submitted (paragraph 33 of its skeleton) that "*on their ordinary meaning*" the words "*approved in advance*" means an express communication of approval. In support of this it was submitted that allowing approval to be given by conduct would give rise to the risk of dispute.

68. It seems to me that in a professionally drafted contract if the parties wanted to confine the approval to express consent, they could have said that consent must be in writing. There is therefore a real prospect of the Defendant establishing that consent through conduct was sufficient for the purposes of Clause 10.2(d).

69. It is further submitted for the Claimant (paragraph 34) that even if approval by conduct would suffice, the Defendant would need to be able to show either that Genesis specifically asked the Claimant for its approval or that its actions can only have been synonymous with it approving the proposed merger as opposed to simply being ignorant as to what was planned or not realising that the Amalgamation was something he was required to approve or could object to.

70. I accept the submission for NHG that:

i) there was enough information in the First Notice about the Amalgamation that when taken with Mr Ensor's own knowledge of housing associations, URE could make an "*informed consent*".

ii) it is not a prerequisite for consent to be given that it should have been expressly requested.

71. Further in my view on a summary judgment application the Court does not have to conclude that the conduct was only synonymous with approving the proposed merger. The Court has to be satisfied that the respondent's case carries some degree of conviction but when deciding whether the respondent has some real prospect of success the Court does not apply the test of balance of probabilities which will apply at trial.

72. The Defendant's case is not that there was express consent, either written or oral, but that there was consent by conduct. I note that it is the evidence of Mr Shergill that no response was received in relation to the Second Notice (and I infer the First Notice) and that apart from the "*very brief email exchange*" on 20 April 2018:

> "…there was no other contemporaneous discussion of the Amalgamation between URE and NHG nor did URE raise any other concerns or queries in relation to the Amalgamation"

NHG therefore rely on consent having been given by conduct. Mr Shergill states (paragraph 33 of his witness statement) that:

> "It is clear from URE's conduct as described above that insofar as any approval was needed in relation to the Amalgamation, URE provided such approval by way of its conduct." [emphasis added]

73. However in my view one searches in vain for evidence of conduct which could realistically be said to amount to consent having been given prior to the Amalgamation. There is evidence in Mr Shergill's witness statement of conduct which occurred after the Amalgamation became effective but not in my view conduct prior to 3 April from which it could be said that there is a real prospect that the Court can infer that consent was given by conduct prior to the Amalgamation taking effect. The only evidence which it appears could be relied upon is the absence of questions and objections on the part of URE in response to the Notices. It was submitted for NHG that its case not based on a lack of objection but a positive decision on the part of URE. However it is difficult to see what other conduct can be relied upon. There is the reference in the letter of 31 October to URE having been "*assured*" that the Amalgamation would have no impact on the ongoing interactions between the parties but in light of Mr Shergill's evidence concerning the absence of any contemporaneous discussion (other than the exchange on 20 April), there is no evidence to support an inference that consent was given as part of this "*assurance*" and in any event the pleaded case (and the case advanced in oral submissions for NHG) is one of consent by conduct not express consent.

74. Mr Shergill says (paragraph 38) that it is "*disingenuous*" to suggest URE would have terminated had it known of its alleged right. However the issue is whether there was approval for the purposes of Clause 10.2 not whether there would have been approval.

75. Although it is arguable (as submitted in NHG's skeleton at paragraph 34) that "*consent*" could include "*acquiescence*", in my view the natural meaning of "*approved in advance*" in the context of Clause 10.2(d) implies some positive act and counsel for NHG in oral submissions stated that his case was based on a positive decision on the part of the Claimant and not a lack of objection.

76. In my view this is not a case where reasonable grounds exist for believing that a fuller investigation into the facts would add to or alter the evidence in this regard.

77. I find that the Claimant has established that there is no real prospect of the Defendant succeeding in its defence that there was no right to terminate under Clause 10.2(d) on the basis that the Amalgamation was approved in advance.

<u>Did the Claimant waive its right to terminate the Contract under Clause 10.2(d) through continuing to perform the same?</u>

78. Although there had been an issue between the parties as to the scope of the principle, I understood it now to be common ground that the Defendant's case is that this a case of waiver by election (URE's skeleton paragraph 53 footnote 4). Further it appeared to be common ground that in order to establish such a waiver, URE needed to know it had actual knowledge of the right to terminate.

79. In *Tele2 International Card Co SA v Post Office Ltd* [2009] EWCA Civ 9 Aikens LJ summarised the applicable principles for waiver by election at [53]:

> "… (1) if a contract gives a party a right to terminate upon the occurrence of defined actions or inactions of the other party and those actions or inactions occur, the innocent party is entitled to exercise that right. The innocent party has to decide whether or not to do so. Its decision is, in law, an election. (2) It is a prerequisite to the exercise of the election that the party concerned is aware of the facts giving rise to its right and the right itself. (3) The innocent party has to make a decision, because if it does not do so then " the time may come when the law takes the decision out if [its] hands, either by holding [it] to have elected not to exercise the right which has become available to [it], or sometimes by holding [it] to have elected to exercise it ". (4) Where, with knowledge of the relevant facts, the party that has the right to terminate the contract acts in a manner which is consistent only with it having chosen one or other of two alternative and inconsistent courses of action open to it (i.e. to terminate or affirm the contract), then it will be held to have made its election accordingly. (5) An election can be communicated to the other party by words or conduct. However, in cases where it is alleged that a party has elected not to exercise a right, such as a right to terminate a contract on the happening of defined events, it will only be held to have elected not to exercise that right if the party "has so communicated [its] election to the other party in clear and unequivocal terms." [emphasis added]

80. There are 3 issues which fall to be considered in relation to the alleged waiver:

i) The construction of Clauses 10.2, 13.1 and 12.1 and the extent to which, in light of the authorities, these clauses operate to limit or preclude the operation of the waiver by election;

ii) Whether any purported waiver amounted to a "*clear and unequivocal*" communication (as referred to in *Tele2* above);

iii) Whether URE had actual knowledge of the right to terminate.

The construction of Clauses 10.2, 13.1 and 12.1 and the extent to which, in light of the authorities, these clauses operate to limit or preclude the operation of the waiver by election

81. Clause 10.2 of the Contract provided that if any of the termination events set out therein occur then:

> "The Supplier may terminate this Contract at any time for all or any Supply Premises" [emphasis added].

82. Clause 13.1 provided:

> "No delay or omission by either party in exercising any right, power or remedy under this Contract shall be construed as a waiver of such right, power or remedy and any single or partial exercise shall not prevent any other or further exercise of the same of the exercise of any other right, power or remedy."

83. Clause 12.1 provided (so far as material):

> "Any notice, or other communication to be given by one party to the other party shall be in writing and addressed and sent to the recipient's address as shown on the Contract Particulars by hand or prepaid post or electronic mail and ..."

84. It was submitted for URE (paragraph 57 of its skeleton) that:

i) *Tele 2* must be read "s*ubject to*" (a) the clause in consideration in that case and (b) the approach adopted by the Supreme Court in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24;

ii) The decision in *Tele 2* concerned a party's ability to terminate a contract following an admitted breach whereas here an event occurred which allowed the Claimant to terminate "*at any time*";

iii) Clause 13.1 is drafted in wider terms than in *Tele 2* and does prevent delay in exercising a right from constituting an election. In so far as election is a question of fact, it was submitted that Clause 13.1 gives rise to a contractual estoppel preventing NHG from arguing that, as a matter of fact, URE has elected to treat the Contract as continuing by reason of delay in, or omission to, terminate the same.

iv) Its submissions are supported by the recent weight of authority "*reinforcing the primacy of specific contractual provisions over general rules of law concerning how parties' conduct is to be treated*"; *Rock Advertising* at [11] and [12].

85. In oral submissions counsel for URE appeared to go further than the written submissions in his skeleton when he submitted (in oral reply submissions) that there was a "tension" between *Tele 2* and the decision of the Supreme Court in *Rock Advertising Ltd* and that in the light of *Rock* it was difficult to see that the factual argument could "*get off the ground"*.

86. In the light of the oral submissions for the Claimant, the Court asked both counsel to prepare short written submission on this point and heard brief oral submissions at a further hearing.

87. At that further hearing the Claimant appeared to row back from its reliance on *Rock Advertising* as an absolute bar to the operation of the principle of waiver by estoppel in this case.

88. It was submitted for the Claimant that:

i) It was common ground that the parties may contractually cut down what might constitute a waiver and this was the principle expressed in *Rock Advertising* of party autonomy and certainty;

ii) The possibility of relying on waiver could therefore be cut down depending on the wording of the relevant provisions;

iii) The position in this case depends on the clauses of the Contract, the starting point being Clause 10.2 and the right to terminate "*at any time*" read in conjunction with Clause 13.1 which precludes reliance on delay or omission.

89. It was submitted for the Claimant that although Clause 13.1 might not be sufficient to preclude waiver through positive acts or conduct, it had to be read with Clause 10.2 that the right to terminate could be exercised "*at any time*".

90. In light of the further submissions for the Claimant it seems to me that the issue of waiver is one of construction of the relevant clauses and there is no absolute principle of law that bars out the operation of the doctrine of waiver by election in this case. However since the point was raised and responded to by the Defendant it is helpful to refer to the submissions made for the Defendant and the authorities to which the Court was referred in this regard.

91. It was submitted for the Defendant that:

i) *Rock Advertising* establishes that the parties can agree to restrict the effect of post contractual dealings;

ii) However the clause in this case is materially identical to that in *Tele 2* and does not restrict waiver by election: Aikens LJ at [55] and [56];

iii) *Rock Advertising* was concerned with a "*no oral variation*" clause not waiver by delay;

iv) Clause 13.1 is concerned with "*negative sin*" not a positive act: *Tele 2* and *Prakash Industries Ltd v Peter Beck Und Partner* [2022] EWHC 754 (Comm)*;*

v) The words "*at any time*" in Clause 10.2 do not forestall the operation of waiver by election such that there is an ongoing right to terminate.

92. The principle of "*party autonomy*" that parties can limit post contractual dealings through provisions in the contract was summarised by Butcher J in *Sumitomo Mitsui Banking Corp Europe Ltd v Euler Hermes Europe SA (NV)* [2019] EWHC 2250 (Comm) at [56]:

> "…As is made clear in *Rock Advertising*, the parties to a contract may, in that contract, make provisions which limit the effectiveness which their subsequent dealings might otherwise have had in altering their obligations under that contract. While I accept, as stated in *Crédit Agricole Indo-Suez* and in *RGI International*, that a non-waiver clause can itself be waived, it would appear to me to be inconsistent with the recognition in *Rock Advertising* that party autonomy operates up to the conclusion of the contract and thereafter only to the extent that the contract allows to find that any conduct which would amount to a waiver of the original right also amounts to a waiver of the non-waiver clause. In my judgment there would have to be something which showed that there was not only a waiver but a waiver of the non-waiver clause. An analogy may be drawn which what was said by Lord Sumption JSC in *Rock Advertising* about estoppels at paragraph 16. Applying that reasoning and language to an alleged waiver, it appears to me that if it is said that waiver prevents reliance on a no waiver clause there would have to be something which indicated that the waiver was effective notwithstanding its noncompliance with the non-

> waiver clause and something more would be required for this purpose than what might otherwise simply constitute a waiver of the original right itself. In my judgment, applying that test here, the terms of the Notice of Assignment did not meet it." [emphasis added]

93. However it is important to note that the particular clause in *Sumitomo* was different from the present in that it was concerned (in part) with the prescribed formalities of writing. The relevant clause was as follows:

> "12 Non-Waiver
>
> 12.1 No failure or delay by either party in exercising any right or remedy under this Bond shall operate as a waiver; nor shall any single or partial exercise or waiver of any right or remedy preclude the exercise of any other right or remedy, unless a waiver is given in writing by that party.
>
> 12.2 No waiver under clause 12.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Bond unless (and then only to the extent) expressly stated in that waiver." [emphasis added]

94. In this case the Defendant does not assert delay or omission as the basis for the waiver so unlike the position in *Sumitomo,* it cannot be said that there is "*non-compliance*" with the non-waiver clause in the sense that is meant where particular formalities for the waiver such as writing are prescribed. It was submitted for the Claimant that the effect of Clause 12.1 for all communications to be in writing would extend to matters which constitute a waiver. In my view the natural meaning of the words "*any communication to be given…*" suggests communications which are contemplated by, and sent pursuant to the Contract and thus "*to be given*". The natural meaning is then weighed against the other provisions of the Contract and in my view, there is no reason to extend the scope of Clause 12.1 to require waivers to be in writing when it was open to the parties

(in a professionally drafted contract) to have included this requirement in the provision dealing expressly with waivers (Clause 13.1).

95. The distinction between "no oral variation clauses" and "no waiver" clauses was referred to by Foxton J in *A v B* [2020] EWHC 2790 (Comm) at [41] where, having referred to *Rock Advertising* and in reliance on *Tele 2* he stated that "no waiver" clauses were not "*forestalled*" altogether:

> "41. There is no doubt as to the legal effect of entire agreement clauses (*Inntrepreneur Pub Co Ltd v East Crown Ltd* [2000] 2 Lloyd's Rep 611) and "no oral modification" clauses (MWB *Business Exchange Centres Ltd v Rock Advertising Limited* [2018] UKSC 24). "No waiver" clauses raise the bar for establishing the elements of a waiver plea, but they do not forestall the application of the doctrine altogether (*Tele2 International Card Co SA v Post Office Ltd* [2009] EWCA Civ 9, [56] and *CDV Software Entertainment AG v Gamecock Media Europe Ltd* [2009] EWHC 2965 (Ch) [91])." [emphasis added]

96. Miss Julia Dias QC (sitting as a Deputy High Court Judge) in *Prakash* at [107] recognised the distinction between clauses dealing with delay or omission and a positive waiver and was of the view that, applying *Tele 2*, a clause dealing with waiver by delay and omission did not prevent an affirmation by performance.

> "Ultimately, Mr Spink did not dissent from the proposition that Condition 12.6 (as appears from its wording) applied only to the negative sin of omission and did not exclude the possibility of waiver by positive acts. Thus in *Tele2 International Card Company SA v Post Office Ltd*, [2009] EWCA (Civ) 9, a similarly worded clause was held not to prevent an affirmation by performance. Likewise, it seems to me that a demand for contractual performance from the other party, such as a demand for payment of a subsequent interest instalment would go well beyond mere delay or omission and amount to a positive waiver of the right to rely on failure to pay an earlier instalment as an Event of Default."

97. The relevant clause to which the Deputy Judge was referring was in the following terms:

> "12.6 No delay or omission of the Bondholders or Holder of any Bond to exercise any right or remedy accruing upon any Event of Default shall impair any such right or remedy or constitute a waiver of any such Event of Default or an acquiescence therein. Every right and remedy given by these Conditions or by law to the Bondholders may be exercised from time to time, and as often as may be deemed expedient, by the Bondholders."

98. In my view:

i) There is no distinction of any significance to be drawn on the wording of the respective clauses by the different circumstances of termination between *Tele 2* and this case: see in particular the judgment in *Tele 2* at [49] referring to the provision that entitled the party to terminate "*at any time"*;

ii) The emphasis which the Claimant seeks to place on the words "*at any time*" in Clause 10.2 are not sufficient even when read with Clause 13.1 to preclude the operation of waiver which is not within the express scope of Clause 13.1: the words "*at any time*" have to be construed in the context of the other provisions of the Contract and Clause 13.1 deals expressly with waiver; the conclusion must be that waiver was dealt with specifically in Clause 13.1 and there is no indication in the language of Clause 10.2 that the words "*at any time*" had any relevance to waiver or were intended to broaden the scope of Clause 13.1.

iii) Whilst Clause 13.1 may prevent delay or omission in exercising a right from constituting an election, it is irrelevant for present purposes as the Defendant's case is that there was a positive waiver by the Claimant and

not a mere delay by the Claimant in, or omission by the Claimant to, terminate the Contract.

iv) There is a distinction to be drawn between a "no oral waiver" or "no waiver by conduct" which prescribe specific requirements in order to be effective and "no waiver" generally; however even if that is not a distinction which should be made, the judgments in *Rock Advertising* did not preclude the operation of estoppel and I infer waiver by election: see Lord Sumption JSC at [16] and Lord Briggs JSC at [25] and [31].

v) Further in my view, the clauses in this contract as a matter of construction operate to prevent waiver by delay or omission; they do not prevent waiver by a positive act as is alleged to have occurred in this case; had it been the intention of the parties to preclude all waivers this could have been spelt out (subject to the qualification in *Rock Advertising* referred to above as to equitable considerations) and there is no reason to give Clause 13.1 a broader interpretation than the express language which is clear and unambiguous.

99. Accordingly in my view there is no absolute principle which would operate to make the defence of NHG without any real prospect of success; further there is a real prospect that the Defendant will establish as a matter of construction, that Clauses 10.2 and 13.1 do not operate to prevent a waiver by positive action.

Whether any purported waiver amounted to a "clear and unequivocal" communication; whether URE had actual knowledge of the right to terminate.

Evidence

100. The evidence of Mr Shergill at [34] is that following the Amalgamation URE "*continued to deal with NHG just as they had dealt with Genesis*":

i) By continuing to supply electricity to NHG's customers;

ii) By invoicing the new entity NHG and receiving payments from NHG;

iii) By engaging with NHG in relation to the upgrading of meters;

iv) By continuing negotiations in relation to the Long Term Contract.

101. Concerning the knowledge of URE of its right to terminate, the evidence of Mr Burnette was as follows:

> "The Claimant was not aware of its right to terminate the Contract under clause 10.2(d) following the Amalgamation until I identified and alerted the point to the Claimant in November 2018…" (Burnette 2 para 27(c)
>
> "I was the person who identified and alerted the Claimant of its right to terminate the Contract under clause 10.2(d) during a telephone conversation on 5 November 2018 (privilege in that conversation is not waived). I recall Mr Ensor of the Claimant being pleased because I had identified an additional basis for terminating the Contract which he had previously not been aware of. I can recall having this conversation quite clearly because I was working at home – which was unusual for me at that time – ahead of an important personal appointment." (paragraph 65(a)) [emphasis added]

102. The relevant evidence from the witness statement of Mr Ensor is as follows:

i) He was the "*main contact*" at URE for the negotiation of the 4 year contract for the supply of electricity and the Long Term Contract (paragraph 2 of his witness statement);

ii) At the end of October 2018 he did not know or appreciate that URE had the option to terminate the Contract and he first became aware of the right to terminate on 5 November 2018.

103. In his witness statement Mr Ensor said:

> "At that time [end of October 2018] I did not know or appreciate that URE had the option to terminate the Contract as a result of the Amalgamation under clause 10.2(d) hence the Termination Letter does not refer to that right. If I had known then about Clause 10.2(d) and the fact that Genesis was required to seek URE's consent before resolving to amalgamate with Notting Hill (which it did not) then I would have referred to that clause in my Termination Letter.
>
> I first became aware of URE's right to terminate the Contract under clause 10.2 (d) on 5 November 2018 during the course of a telephone call with Andrew Burnette of Burges Salmon…" (paragraphs 18-19).

104. It was submitted for NHG that:

i) URE's conduct was consistent with a decision to continue the Contract (paragraph 62);

ii) Whether URE had knowledge of its right to terminate and armed with that knowledge intended to affirm the Contract is a question of fact to be determined in light of all the circumstances (paragraph 69).

105. It was submitted for URE that:

i) Clauses 10.2 and 13.1 must be relevant to the question of whether any action or inaction by the Claimant could be said to amount to "*a clear and unequivocal communication of an election*" (paragraph 58 of the Claimant's skeleton);

ii) the actions said by NHG to have constituted affirmation/election on the part of URE amount to no more than an assertion that URE continued as it had done before. There is nothing in that conduct which could be said to communicate that URE was aware of its rights and was electing to affirm rather than to terminate the Contract;

iii) the conduct alleged is equally consistent with URE being ignorant of its rights or with URE seeking to explore the relationship with its new contractual counter party before making an election, with URE relying upon its express contractual right to terminate "*at any time*" (paragraph 59).

106. As discussed above, in my view the provision in Clause 10.2 that the Claimant could terminate "*at any time*" does not preclude a waiver as a matter of fact and it is therefore a question for trial as to whether the conduct relied upon by the Defendant is sufficient in all the circumstances to establish a waiver. Further as discussed above, the Defendant's case is one of positive action not inaction and thus Clause 13.1 does not of itself have any relevance to the question whether the Defendant has a real prospect of establishing an unequivocal communication.

107. As to the submissions for URE that the conduct of URE merely continued as it had done before and "*is equally consistent*" with URE being ignorant of its

rights or with URE seeking to explore the relationship with its new contractual counter party before making an election, on this Application the task of the Court is not to conduct a mini trial and the Court must be wary of trying issues of fact on evidence where the facts are apparently credible and are to be set against the facts being advanced by the other side. In my view, for the reasons discussed above, it cannot be said that there is some "*inherent improbability*" in what is being asserted by NHG nor is it "*contradicted*" by the extraneous evidence (for the reasons discussed below). There are reasonable grounds for believing that a fuller investigation into the facts of the case will add to the evidence available and so affect the outcome of the case (*Doncaster Pharmaceuticals* above)

108. As to the issue of knowledge, whilst it is correct that there was nothing in the conduct identified by Mr Shergill which could be said that URE was aware of its rights, the Court on this Application has to determine having regard to the totality of the evidence whether NHG has a real prospect of establishing that URE was aware of its rights.

109. It was submitted for URE that:

i) The initial notice of termination sent by Mr Ensor on 31 October 2018 makes no reference to Clause 10.2 (d) and thus it can be inferred that URE was ignorant of its rights under the clause; the reference to Clause 10.2(d) was only included in the notice from Burges Salmon on 7 November 2018 (paragraph 49);

ii) Even if Mr Ensor was aware of the clause at the outset he could have forgotten about the same (paragraph 50).

110. It was submitted for URE that it was "*fanciful*" to conclude that the inference from the contemporaneous documents should be rejected, Mr Burnette's evidence should be rejected and Mr Ensor in fact knew.

111. It was submitted for NHG that:

i) Clause 10.2(d) was drafted by URE's own solicitors;

ii) The Long Term Contract had an identical termination clause;

iii) Mr Burnette cannot speak with any certainty as to what Mr Ensor knew before their meeting on 5 November 2018 (paragraph 71);

iv) It is to be inferred that URE was aware of its right but elected not to exercise it because it wished to continue the Contract with a view to achieving the "greater prize" of the 25 year Long Term Contract (paragraph 72).

112. It was submitted for URE that there is no basis for asserting actual knowledge on the part of Mr Ensor and even if Mr Ensor was aware of the clause at the outset, he could have forgotten about the clause. In my view there is clearly evidence from which it can be inferred that there is a real prospect of showing that Mr Ensor had knowledge of the clause in April 2018: Mr Ensor's role at URE at the time, his involvement in both the negotiation of the Contract (only 6 months before) and the Long Term Contract (containing a similar clause) and his knowledge of housing associations. There is no evidence to suggest that if he did know about the clause, he had forgotten about the clause by April 2018. His evidence as to what he knew must therefore be considered against that background and in light of the fact that at trial the Court is likely to have the

benefit of oral evidence and cross examination of Mr Ensor. Further when evaluating whether NHG has a real prospect of establishing knowledge of the right to terminate, I note that Mr Ensor only states that he did not "*know or appreciate*" that he could terminate in October 2018 (and only became aware of his right to terminate in November 2018) and Mr Burnette states that Mr Ensor was pleased that he identified an additional basis to terminate. These statements are equally consistent with Mr Ensor having been aware of the right to terminate in April but having decided not to terminate for the Amalgamation and therefore assuming that he had no right to terminate subsequently. For the same reason it does not follow from the fact that the notice of 31 October 2018 makes no reference to Clause 10.2(d) that Mr Ensor was ignorant of its rights in April 2018.

113. The test on a summary judgment application is not that of a balance of probabilities but a real prospect of success. Taking the evidence as a whole, for the reasons discussed, in my view URE has not established that the Defendant's case that URE knew of the right to terminate is hopeless or fanciful.

114. I therefore find that there is a real prospect of the Defendant establishing that URE waived its right to terminate under Clause 10.2(d).

Estoppel

115. The legal principles were common ground:

> "Equitable estoppel occurs where a person, having legal rights against another, unequivocally represents (by words or conduct) that he does not intend to enforce those legal rights; if in such circumstances the other party acts, or desists from acting, in reliance upon that representation, with the effect that it would be inequitable for the representor thereafter to enforce his legal

> rights inconsistently with his representation, he will to that extent be precluded from doing so." Lord Goff in *The Kachenjunga* at p.399

116. It was also common ground that (by contrast with waiver by election) in the case of waiver by estoppel, knowledge by URE of the right to terminate was not required.

117. The representation which is pleaded is that:

> "URE represented to NHG by conduct that it did not treat the Amalgamation as a termination event…" (paragraph 15(11) of the Amended Defence)."

118. It is further pleaded that:

> "NHG relied on the above representation and suffered detriment in that it continued to invest resources in the Contract …and/or in negotiating the Long-Term Contract, it did not seek an alternative supplier and/or did not continue its contract with Opus."

119. For URE similar submissions were made as in relation to waiver as to whether there was an unequivocal representation by virtue of the pleaded conduct and the "*prism*" of Clause 10.2 and 13.1. For the same reasons discussed in relation to the issue of waiver in my view there is a real prospect of the Defendant establishing that a representation was made.

120. However in my view the difficulty lies in the matters relied upon by NHG as detriment. I accept the submission for URE that the detriment which NHG alleges it has suffered as a result of the alleged representation would have happened in any event: the inability of NHG to negotiate a new contract in April (when electricity prices were lower) (paragraph 57-59 of Mr Shergill's statement) would have been present in any event as NHG had no right to terminate the Contract itself in April and thus would have been obliged to

continue to take supply at the prices in the Contract. The same in my view applies to the "*detriment*" that NHG continued to trade with a supplier that was facing financial difficulties (paragraph 53 of Mr Shergill's statement): it was not "*forced to continue to trade*" by reason of the fact URE did not terminate; rather NHG was obliged to continue with the Contract absent an event which entitled NHG to terminate the Contract.

121. As to the other detriments identified by Mr Shergill (failure to provide final invoices (paragraph 54-56) and the intermediate contracts which NHG entered into with Opus between December 2018 and March 2021 at higher rates (paragraph 60-62), these are detriments suffered because of the termination of the Contract and not as a result of the Contract continuing following a representation by URE that it would not terminate the Contract.

122. In my view, for the reasons discussed above, NHG has no real prospect of establishing that it acted in reliance on the representation such that it would be inequitable for URE to enforce its legal rights.

Meaning of Clause 10.5

123. Given my findings on the issue of waiver it is not necessary for the Court on this Application to make a finding on the meaning of Clause 10.5.

Addendum

After sending the judgment out to counsel in draft in the usual way, I received comments on paragraph 112 of the judgment. I have amended paragraph 112 to clarify the submission made for URE and my reasoning on the issue, but it does not affect the substance of my reasons or the conclusion already reached.