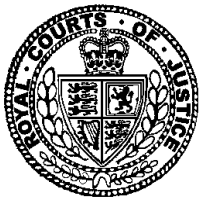

Neutral Citation Number: **[2020] EWHC 223 (TCC)**

HT-2017-000330

Case No: HT-2017-000330

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES (QBD)
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice,
Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: 7 February 2020

Before :

Mrs Justice Cockerill

- -

Between :

PBS ENERGO A.S	**Claimant**
- and -	
(1) BESTER GENERACION UK LTD	**Defendant**
(2) BESTER GENERACION S.L.U	
-and-	
PRVNI BRNENSKA STROJIRNA VELKÁ BÍTEŠ A.S	**Part 20 Defendant**

- -
- -

Ms Karen Gough, Ms Sarah Bousfield and Mr Daniel Kozelko (instructed by **Keystone Law LLP**) for the **Claimant**
Mr Steven Walker QC and Mr Tom Owen (instructed by **Watson, Farley and Williams LLP**) for the **First and Second Defendants**
Mr Luke Wygas instructed by **Keystone Law** for the **Part 20 Defendant**

Hearing dates: 9th, 10th, 11th, 15th, 16th, 17th, 18th, 23rd, 24th 25th July 2019, 21 October 2019
Draft Judgment sent to parties: 3 February 2020

- -

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.

.....

MRS JUSTICE COCKERILL DBE:

Introduction

1. This case concerns a biomass energy plant which was to be located at Kingmoor Park, Bryn Lane, Wrexham Industrial Estate, LL13 9UT, in North Wales ("the Site"). The plant was never built, and the dispute before me concerns the circumstances in which that happened.

2. In short, the parties to a contract for the construction of the plant - the Claimant ("PBS") a company incorporated in the Czech Republic, and the First Defendant ("Bester") a UK of subsidiary of the Second Defendant, a Spanish company - fell out. There were disagreements about (*inter alia*) who was responsible for the risk of the asbestos which was found under the surface and which had to be removed to get planning permission finalised and who was responsible for the permits which were necessary for the project to move forward. There were disagreements about whether payment milestones – in particular for the boiler – had been triggered.

3. Each party claimed to terminate the contract between them. PBS claimed to be entitled to terminate on the basis firstly of a failure to pay the fifth milestone payment instalment by the due date, and secondly on the basis of substantial failures by Bester to fulfil its contractual obligations. A number of such failures were particularised.

4. Bester in turn claimed to be entitled to terminate the contract firstly by reason of a failure to comply with a Notice to Correct as regards delay to the project, caused by delay in the detailed design and suspensions of works and by reason of failure to provide necessary permits and assistance. Secondly Bester relied on abandonment of the works or an intention not to perform.

5. The principal task of the Court in this trial has been to decide which (if either) of the parties is correct that they were entitled to, and did, terminate the contract. The subsidiary tasks are to consider (i) what the financial consequence of that termination are, in terms of the successful party's entitlement to damages and (ii) (if Bester is the successful party) whether it has another line of recovery against the Part 20 Defendant.

6. Those superficially simple issues were broken down by the parties into competing Lists of Issues running to a number of pages, but the core of the factual and expert dispute before me ranged round the validity of PBS's purported termination. The issues were in particular as to the soundness of PBS's claims to terminate the Contract pursuant to Clause 16.2 of the Contract for one or more of the following:

    i) Failure by Bester to determine a number of PBS's claims for Extension of Time and additional payment (most centrally those relating to asbestos/ground conditions and permits); and/or;

ii) Failure by Bester to pay Milestone 5 under the Contract which was due when (in very broad terms) the boiler was ready for delivery; and/or;

iii) Prevention by Bester of PBS's fulfilment of its obligations under the Contract.

7. I will deal with the issues under the following headings (by paragraph number):

8. I should add that PBS have at trial and in the closing submissions sought to interest me in Bester's financial situation. It was not suggested that this was relevant to any of the issues which I have to decide and therefore I do not deal with that topic in this judgment.

The Trial

9. The trial of the action has been conducted over three court weeks with a further half day of oral closings after the service of full written closing submissions. I have been greatly assisted in the preparation of this judgment by the detailed and helpful submissions by counsel on both sides. These ran to hundreds of pages of opening submissions

and further hundreds of pages of closing submissions - even leaving aside the lengthy chronologies which were also prepared (the Claimant's closing submissions, for example, were provided with 36 attachments).

10. Both parties then took issue with the accuracy of the factual summaries which each had advanced – a not inconsiderable part of the oral closings was occupied with such disputes. Given the length of the submissions served, and the range of disagreements between the parties this judgment cannot hope to reflect them in similar detail. It follows that the parties' contentions are summarised in somewhat skeletal form, and that I have not dealt with issues save where they were necessary to one view of the case or the other.

11. Each party called factual and expert evidence.

12. The factual evidence was given partly through translators. Although the parties had contracted in the English language, and communicated orally and in writing in English, none of the witnesses had English as their first language and all of them had available to them the services of a translator. Some of the Claimant's witnesses chose to give their evidence entirely through the translator, including asking for documents which they had themselves written in English to be translated to them. Other of the Claimant's witnesses and all of the Defendant's witnesses sought a lesser degree of assistance, or no assistance at all.

13. I should note however that it was my impression that most of the witnesses, whether giving evidence through a translator or not, listened to the questions given in English. At the same time, while all of the witnesses plainly spoke and understood English to an extent which might be said to be close to fluency, they were none of them truly fluent in English, and were understandably prone to a less than full understanding of complex questions, or communications which were made with an accent or a rhythm which was unfamiliar to them. The result was that witnesses (whether or not apparently relying on the translation) sometimes gave answers to those questions based on an incomplete understanding of that question. The overall result was that the factual evidence was considerably less helpful than would have been ideal and that answers at times had to be read in broader context than would be the case when dealing with a witness giving evidence in his or her first language.

14. Even with these limitations, I was able to form some impression of the way in which the witnesses gave their evidence. In the usual way, all of the witnesses were described in the opposing side's closings as being thoroughly unsatisfactory and unworthy of belief. Overall my impressions were as follows.

15. Mr Šipoš. He was the site manager for PBS and the only permanent presence there from PBS. Of the PBS witnesses, he sought the least assistance from the translator. While he was not a hostile or rude witness, he was not impressive. He seemed somewhat inexperienced for the job which he had to do, having no experience with asbestos and very little understanding of the significance of the planning notice. He gave the impression that he was not comfortable with a number of the questions he was asked. On occasion, for example, in relation to completion of site works by 11 April 2017, he gave a defensive answer when the point was one which he had accepted in his statement. He frequently referred to seeking guidance from "the company" or "management", or to them being responsible for aspects of the job (such as dealing with contractors), which conveyed the impression that he had been on the ground but not in control. This impression was reinforced by the evidence he gave which suggested that he had not read key documentation, or that if he had read it, he might not have understood it; and the evidence which suggested that his site diary was, in its latter stages, the product of directions from his superiors. Little reliance was placed on his evidence by PBS in their closing.

16. Mr Koníček. He did not give the impression that he was willing to assist the Court. His answers to a number of the questions posed to him did appear to be deliberately obstructive and brusque. While this may have been a result of the frustrations involved in giving evidence via an interpreter while inevitably hearing the question and reacting to it in some regard via his own (apparently fairly considerable) knowledge of English, the conclusion that he was in truth being obstructive seemed to cohere with some of the documents – for example his terse instructions to a colleague who was seeking assistance as to how to report progress on site. As a result, I did not find myself able to place much weight on his evidence.

17. Mr Bezrouk was the witness who dealt with the quantum of PBS' claim. He was a notably defensive and unhelpful witness. His grasp of the detail of the documents appeared to be shaky. He was dogmatic on details even where they were contradicted by contemporaneous documents or PBS's own case – for example in relation to the date of payment of Milestone 4.

18. Mr Báča was the person responsible for the "Detailed Design" for the project. He was a much less defensive witness, but his evidence as it progressed appeared to be somewhat dogmatic and combative, with the impression that he regarded the exercise of being cross-examined as annoying. He was, for example, unwilling to comment on some of the documents to which he was taken. He was also dismissive of questions regarding disabled access, which he plainly regarded as a ridiculous irrelevancy and the provision of an internal smoking room, which he considered would be permitted under British Standards, though he was unfamiliar with those standards himself.

19. Mr Jelínek was the Chairman of the PBS Board. He was a defensive and somewhat evasive witness. The impression which he conveyed was that he wanted to say what he wanted to say and was fearful of being led astray by questioning. This made him reluctant to address the questions as asked, necessitating the same questions being repeated a number of times. He was also somewhat reluctant to accept what appeared clear on the documents. In his case the possibility that this negative impression was to do with the difficulties of the language barrier seemed unlikely, given the fact that there was ample evidence that he regularly does business in the English language; and given the documentary evidence which revealed a similarly terse and dismissive attitude to those with whom he was dealing. I was therefore unable to place much reliance on his evidence.

20. Mr Macholán was not cross-examined.

21. Mr Romero, a director of Bester, gave evidence in English with no assistance from the interpreter. He was a careful and polite witness. On occasion despite his best efforts it was not clear that he had perfectly understood the question being asked and I was not therefore minded to construe his oral evidence as one would do the evidence of someone giving evidence in their first language. In any event his involvement was not central, at least so far as events on site were concerned.

22. Mr Prieto was the in-house lawyer for Bester. His evidence got off to an unfortunate start in that he sought to make a considerable change to his witness statement. As PBS submitted, this event raised a substantial question over his credibility as a witness and the unexpected change to a material part of Mr Prieto's evidence necessitated an adjournment of the hearing to enable PBS to prepare adequately. However careful consideration of Mr Prieto's evidence, which was given in a notably straightforward manner, persuaded me that this genuinely was an extremely unfortunate case of a statement having been signed off on with insufficient consideration and scrutiny, and better recollection having been prompted by full reading of the underlying materials shortly prior to trial. In the event, however, it transpired that his evidence was of limited impact on the main issues.

23. Mr Gutiérrez was the Bester representative for the project from August 2016. He gave evidence as to Bester's responses to the requests for extension of time and the state of play on Milestones 3 and 4 (design and site establishment). He also gave evidence as to the amount of asbestos ultimately found. His evidence was polite, though he gave the impression that at times he was not clear why certain questions were being asked of him.

24. Mr Otero was the Bester representative initially until August 2016. His evidence was that of someone who was involved at one remove from

the negotiation of the contract terms. As such he had a good deal of information, but was not directly involved in those negotiations. His evidence was that of someone trying to assist the Court, though again my impression was that his decision to give evidence in English meant that the full nuance of questions was not sometimes followed, and his replies were sometimes not pellucid – particularly to Ms Gough who had the difficulty of trying to pursue a cross examination while negotiating these difficulties. I therefore do not accept the submission, advanced by PBS, that his evidence was misleading.

25. In terms of expert evidence, there were two disciplines. On delay the Claimant called Mr. Richard Croxson BSc (Hons), Pg Dip Law, FRICS, FAIQS, MCIArb, a Chartered Quantity Surveyor and Barrister. The Defendants called Mr. Carlos Loayza, MSc. Management of Projects, University of Manchester, who is a director of Yendell Hunter's Construction Disputes and Advisory Practice. The principal issue between these two experts was as to the cause of delay in the latter part of 2016. This is a topic with which I deal in detail below, and I shall deal with the evidence of the experts there.

26. On quantum the Claimant relied on the evidence of Mr. David Daly, BSc. (Hons) Quantity Surveying, LLM Construction Law and Practice, MRICS, MCIArb. The Defendants relied on the evidence of Mr. Martin Hunter, B.Sc. Quantity Surveying; LLB (University of Glasgow), MRICS, Managing Director and co-head of Yendall Hunter's Construction Disputes and Advisory Practice.

27. There was not a great deal of dispute between the quantum experts and such as there was related to discrete items within the quantum of PBS's claim. Those items which did give rise to issues are dealt with in the final section below.

Essential Background

Contractual structure

28. On 7 July 2015 Green Plan Energy Limited was granted planning permission for the development of an Industrial Biomass Facility, including Wood Store, Pavilion, Substation, Landscaping and Associated Works at the Site. That permission was a decision fifteen pages long, and subject to thirty-seven conditions. For present purposes the most significant of those conditions were as follows:

> "12. No development shall commence until the following components of a scheme to deal with the risks associated with contamination of the site have each been submitted to and approved in writing by the Local Planning Authority:
>
> a. A preliminary risk assessment which has identified:

> - all previous uses;
>
> - potential contaminants associated with those uses;
>
> - A conceptual model of the site indicating sources, pathways and receptors;
>
> - Potentially unacceptable risks arising from contamination at the
>
> site.
>
> 13. No development shall commence until a verification report demonstrating completion of the works set out in the approved remediation strategy and the effectiveness of the remediation has been submitted ... and approved in writing ...
>
> 15. If during development, contamination not previously identified is found to be present at the site then no further development ... shall be carried out until the developer has submitted and obtained written approval for an amendment to the remediation strategy detailing how this unsuspected contamination shall be dealt with."

29. It should perhaps be added, since there was an element of dispute about this, that of the 37 conditions PBS suggested that 22 were pre-commencement conditions. In reality however I was satisfied that there were only 8 pre-commencement conditions which required discharge: 1, 8, 12, 25, 29, 30, 33 and 34.

30. On 29 April 2016 Bester signed a contract with Equitix ESI CHP (Wrexham) Limited ("Equitix") to design, construct, install and commission a biomass fired energy generating plant and associated works, and thereafter (by separate contractual arrangement) to operate the plant; ("the Equitix Contract").

31. Equitix is a single purpose/project company. It is part of the Equitix group of companies which are engaged in the business of the delivery and management of infrastructure projects from conception, through to construction and service provision. Equitix took the role of employer under the Equitix Contract. The Contract Price was (£18,061,853.27) (excluding VAT). The Equitix Contract was under the aegis of Conditions of Contract which were based on the FIDIC Silver Book 1999 with bespoke amendments.

32. Bester is a UK registered company and specialises in the provision of renewable energy projects both as a developer and a turnkey

contractor. The Second Defendant Bester Generacion S.L.U. ("Bester SLU") is the parent company and sole shareholder of Bester.

33. The dispute before me arises not under the Equitix Contract but under the contract entered into by Bester with PBS, a company registered in the Czech Republic, specialising in the design and manufacture of power plant equipment.

34. On 10 May 2016, PBS and Bester entered into a sub-contract ("the Contract") for the engineering, procurement and construction and commissioning of the biomass fired energy generating plant and associated works at Wrexham ("the works"). The Contract Price was £14,230,000.00 (excluding VAT). As is commonly the case, payment was to be made by reference to Milestones, which were set out in Schedule 4 to the Contract. The Contract for the Works was governed by terms and conditions which were based on an amended form of the FIDIC "Silver Book" conditions of contract for EPC/Turnkey Projects.

35. Until shortly before the Contract was signed the draft in play was essentially "*back to back*" with the Equitix Contract. However, over the period 28 April 2016 to 2 May 2016, PBS sought changes to the Contract which on any analysis ensured that the two contracts were not completely back to back. There is a significant issue as to the effect of these changes.

36. It is PBS's case that the changes were substantial and placed virtually the entirety of the risks of designing and constructing the Project on Bester. In particular, Clauses 17.3 and 17.4 of the standard FIDIC wording, which set out the Employer's risks and the consequences of them, were deleted and substituted with a new scheme suggested by PBS. PBS say that any other approach to risk allocation means that Bester were effectively "top-slicing" the profit for no role at all. Bester's case is that the changes were not so extensive and that Bester's role was a meaningful supervisory one, but well short of assuming the design and construction risks.

37. A number of amendments to the terms and conditions of the Contract ("Amendment No. 1 to the EPC Contract") were made and signed by the parties on 10 May 2016. The Contract was under seal. The Commencement Date was 10 May 2016.

38. The Contract was further amended by the parties on 14 July 2016 ("Amendment No. 2"). Amendment No. 2 replaced Schedule 4 to the Contract, namely the Milestone Payment provisions.

39. PBS's performance of its obligations under the Contract were secured by the "Performance Guarantees" in a form of a counter guarantee agreed by the parties and further secured by a parent company

guarantee from PBS's parent company, PBS Velká Bíteš ("VB"). It is this document which gives rise to the Part 20 Claim.

40. According to the Equitix Contract, Bester's works were scheduled to commence on 15 April 2016 and to be practically completed by 30 June 2017, and taken over on 2 October 2017. The basic design was due to be issued to Equitix by 9 May 2016 and the detailed design for civil works started by 30 May 2016. The civil works were scheduled to start on 1 June 2016.

41. Under the Contract the Site had to be handed over to PBS between 7-12 June 2016. Work was due to start immediately following the hand-over of the relevant permits from Bester, which were due by 2 June 2016. The basic design was due to be handed over by 13 June 2016, and detailed design, sufficient to start the civil works, by 27 June 2016.

42. This timeline reflected the fact that it was important to Equitix to secure ROC accreditation of the Project, which meant that it had to meet certain time limits and needed to achieve "First Spark" by 30 March 2017, which was the date when the Government closed the scheme to all new generating capacity. If this was achieved the Contractor would receive a bonus of £100,000. Under the closure provisions for the scheme, there was a grace period under which some projects could still gain entry to the scheme. After a point in time, "the ROC cut-off date" (here said to be 30 June 2017), or at some later date, the ROC accreditation would no longer be available for the Project, and in the event that it was no longer available, Clause 4.26 of the Contract contained a provision for a calculated discount to be given to Bester for the loss of that accreditation. There was a similar provision in the Equitix Contract, although there was in that contract no figure for the "Discount" to be offered for the delay or loss of ROC accreditation.

43. The project began on 10 May 2016 but the dates outlined above were not met. Disputes quickly arose, and both continued and escalated – in circumstances which will be discussed in detail below. By 12 April 2017 the contractors who were undertaking some civils works had stopped work.

44. By letter dated 24 May 2017, PBS gave notice of its intention to terminate the Contract. It relied on the three grounds already referred to above.

> "NOTICE OF TERMINATION"
>
> PBS hereby gives Bester 14 days' notice of its intention to terminate the Contract under:
>
> (a) Clause 16.2(a) of the Contract, due to a failure of Bester to pay by the Final Date for Payment, the

> payment for Milestone No 5 as set out in Section (B), below; and
>
> (b) Clause 16(b) of the Contract for substantial failures of Bester to fulfil its obligations under the Contract as set out in Sections (C) and (D), below.
>
> PBS reserves it rights in respect of termination under clauses16.2 (d) and (e),
>
> We regret that it has come to this but we feel your continued misbehaviour and complete failure to comply with the terms of the Contract has given us no alternative.
>
> Please note that the provisions of clauses 16.3 and 16.4 apply upon our termination of the Contract. We also reserve all our other rights."

45. That letter then set out in sections more detailed grounds for the termination. As well as the Sections A to D alluded to, it also included a Section E, entitled "Ability to pay and Consequences of Non-Payment" under which PBS said;

> "PBS is aware that Bester will not, and most probably cannot, make any payment in relation to the Contract from its own funds and relies solely on payments from Equitix to make payments to PBS, with no such consideration of its liabilities to PBS (such liabilities include Bester's liability to pay our claims in relation to extensions of time and additional costs (currently valued at £1.2 million) which are not Parallel Liabilities under the Contract and potential costs arising from termination of subcontracts of £3.6 million). Bester has refused to provide us evidence to show that it has sufficient financial resource to ensure continuation and completion of the project and to pay the sums due to PBS. It is clear from the actions of Bester in not paying any sum due on time or at all, and not confirming its ability to pay sums when they fall due, that Bester is or is likely to become insolvent. This situation has existed from the beginning of the Contract. Additionally, it is our considered view that, given Bester's failure to progress its obligations under the Contract, it is likely that Bester will be liable to Equitix for liquidated damages under…. its contact with Equitix. That being the case it is our view that Bester's liabilities will quickly be greater than its assets. Overall, it is

> our view that Bester is trading insolvently and/or is insolvent. PBS reserves its rights in respect of this issue".

46. By a further letter dated 14 June 2017, PBS confirmed its election to terminate the Contract, effective on 15 June 2017, "*on and from the date of this letter*". On 19 June 2017, PBS issued an interim account for payment on termination to Bester.

47. By letter dated 19 June 2017 from solicitors for Bester to PBS, Bester sought to affirm the Contract and requested that PBS retract the termination and comply with its contractual obligations. A further letter was sent on 23 June 2017 insisting that Bester was entitled to and was affirming the Contract, but that if PBS persisted, it would be forced to accept the repudiation by PBS. On 24 June 2017, Bester issued a notice of claims against PBS under Clause 2.5 of the Contract.

48. By letter dated 12 July 2017, Bester served a notice of termination under Clause 15.2 of the Contract. Its grounds were:

    i) PBS's failure to comply with Bester's Notice to Correct of 7 November 2016, which related to delays in the submission of PBS's civil work design; delay by PBS in procurement of documents required from it to discharge planning conditions, and required for environmental permits; failure to progress the works in accordance with the programme; failure to provide collateral warranties and sub-contracts from PBS's subcontractors.

    ii) Ongoing delay by PBS and failure to proceed diligently, and unlawful suspensions by PBS.

    iii) PBS's failure to provide permits and assistance to Bester.

    iv) PBS's abandonment of the Works and/or intention not to continue performance of PBS's obligations under the Contract.

49. By letter dated 7 August 2017, Bester wrote to PBS and confirmed its termination of the Contract with effect from midnight that day. On 4 September 2017, Bester in turn issued an interim account under Clause 15.7 of the Contract in the sum of £7,467,660.29. By letter on 6 September 2017, PBS disputed the validity Bester's termination and of the Interim Account.

50. Meanwhile, Equitix in turn issued a notice of intention to terminate the Equitix contract against Bester on 3 July 2017. Equitix relied on failures to:

    i) Proceed diligently with the works.

ii) Provide duly executed copies of collateral warranties.

iii) Provide certified copies of the sub-contracts.

51. Equitix confirmed this termination by notice dated 17 July 2017.

52. On 16 August 2017 Equitix issued Bester with an Interim Account under the Main Contract. It claimed £11,592,733.67 from Bester by 5 September 2017. That sum comprised approximately £8m in sums previously paid by Equitix to Bester and approximately £3m for other claims.

Procedural history

53. These main proceedings were begun by Claim Form issued and served by PBS against Bester on 14 November 2017 followed by Particulars of Claim served on 16 November 2017 and Re-Amended on 6 June 2019. Service was acknowledged by Bester on 29 November 2017. The Defence and Counterclaim was served 1 February 2018 and Re-Amended on 24 May 2019; the Reply and Defence to Counterclaim was served on 12 March 2018 and the Reply to Defence to Counterclaim was served on 26 March 2018.

54. By letter dated 9 February 2018, PBS made a call on the Parent Company Guarantee provided by Bester SLU and invited Bester SLU to consent to being joined as Second Defendant in the action. Bester SLU initially declined to consent to being joined in the main action but acceded to this invitation on 6 April 2018.

55. Having indicated it would amend by letter dated 18 December 2018, Bester, under cover of an email served late on Friday 12 April 2019, served a draft of a proposed Re-Amended Defence and Counterclaim including a new Part 20 Claim against VB. By an Order of 22 May 2019, Bester secured permission to add VB as a Third Party/Part 20 Defendant to the proceedings.

56. There have also been adjudication proceedings, which are relevant both to the evidence which has been in play before me and to the quantum of the claims in this action.

57. By notice dated 22 November 2017, Bester commenced adjudication against PBS claiming that PBS had unlawfully determined the Contract and claiming the sum of £7,467,660.29 which, after credit was given for the Performance Security moneys called by Bester in August and September 2017, gave a net sum claimed of £4,758,382.30. Bester also claimed the Adjudicator’s fees and expenses.

58. Bester lost the adjudication. PBS was held to have lawfully terminated the contract, Bester UK was ordered to return the Performance Security to PBS and to repay the sum of £2,709,277.99, and to pay

the Adjudicator's fees and expenses of £38,500 plus VAT by 13 February 2018. Bester failed to pay sums due as a result of the Adjudicator's Decision and on 16 February 2018 PBS issued an action to enforce the Decision ("the Enforcement Action"). Summary judgment was given in those proceedings on 13 April 2018. That judgment has now been paid in full. Thus, Bester's claim in these proceedings starts from a zero sum and the full amount notified is claimed.

59. In a second adjudication for a payment on account of its own interim account on termination, by a Decision dated 7 December 2018, PBS was awarded the sum of £1,701,289.22, plus interest in respect of its claim. Bester failed to pay the sum awarded and on enforcement alleged that it had been procured fraudulently in respect of equipment which was no longer available to Bester upon payment of the award. By a judgment of Pepperall J dated 17 April 2019 [2019] EWHC 996 (TCC), PBS's application was refused on the basis that there was a properly arguable defence that the Adjudicator's Decision was procured in part by fraud and that severance was not available.

60. Equitix has pursued two adjudications against Bester, the first for declarations that Bester was not entitled to any extension of time, or if it was, to what extension of time and what additional costs Bester was entitled. In his Decision dated 16 June 2017, the Adjudicator declared that Bester was not entitled to any extension of time. To date Bester has not pursued any challenge to the Adjudicator's Decision.

61. In the second adjudication, commenced in October 2017, Equitix sought confirmation that it had lawfully terminated the Equitix Contract and the determination and payment of its interim account. Bester challenged the validity of both Equitix's termination and the validity and quantum of Equitix's interim account. By the Adjudicator's Decision dated 22 November 2018, Equitix was held to be entitled to terminate the Equitix Contract and its interim account was determined in the sum of £9,905,968.18 plus interest, together with the fees and expenses of the Adjudicator. Bester failed to make payment of the sum awarded to Equitix.

62. In enforcement proceedings, judgment was given in favour of Equitix on 8 February 2018. By order dated 6 March 2018 Bester was ordered to pay Equitix the sum of £9,805,032.27, plus interest. To date Bester has not pursued any challenge to the Adjudicator's Decision. Bester challenged enforcement and sought a stay of execution. Coulson J granted summary judgment, but ordered Bester to pay £4.5m to Equitix, £1m into Court, and stayed the remaining amount (approximately £4.5m): [2018] EWHC 177 (TCC).

63. In this action therefore:

i) PBS seeks to recover from Bester, consequent upon what it says is its lawful termination of the Contract, the sum of £8,382,000.00 plus interest, which sum includes the £2,709,277.99 taken by Bester under the Performance Security, but now repaid as a result of the Judgment in the Enforcement Action. The costs associated with that call on the Performance Security remain part of PBS's Claim.

ii) Bester has counterclaimed, on the basis that it was entitled to elect to terminate the Contract, in the sum of £16,896,403.99, comprising the Bester Interim Account, the sum due under the Equitix Interim Account (to the extent not recovered by Equitix) and a variety of other amounts including the First Spark Target Date Discount and Delay Liquidated Damages, as well as loss of profit and adjudicator fees.–.

The structure of this judgment

64. Due to the multiplicity of issues, structuring this judgment is by no means a simple matter. In broad terms (and largely for the benefit of any hypothetical readers who are not parties to the litigation) it follows an approximately chronological trajectory. I will consider below each issue broadly as it arises on the timeline. Where two issues were in play at once, the first one to emerge is treated first. Accordingly, the issues are dealt with in a different order to that in the Lists of Issues which were before me.

65. The first issues for consideration are those of contractual construction and rectification. I then deal with the claims by PBS for extension of time. Here the factual issues are preceded by an "*umbrella issue*" as to the aptness of these claims to entitle PBS to terminate the Contract. Third come the issues relating to the Milestones, followed by termination issues on both sides. Finally, I will deal with quantum.

Contractual construction issues

Construction of the Contract: risk as regards ground conditions

66. There were two clauses in focus here: Clause 4.10 and Clauses 17.3-4. Clause 4.10 of the Contract provides:

> "**4.10 Site data**
> Subject to Clauses 4.18 (Protection of the Environment) and 4.25 (Lease), the Parties acknowledge and agree that the Employer has made available to the Contractor for his information, prior to the date of execution of this Contract, all relevant data in the Employer's possession on subsurface and hydrological conditions at the Site, including environmental aspects. The Employer shall similarly make available to the Contractor all such data which come into the Employer's

possession after the date of execution of this Contract. The Contractor shall be responsible for interpreting all such data. The Employer shall have no responsibility for the accuracy, sufficiency or completeness of such data.

The condition of the Site (including Sub-Surface Conditions) shall be the sole responsibility of the Contractor and the Contractor is deemed to have obtained for itself all necessary information as to risks, contingencies and all other circumstances which may affect the Works, the remedying of Defects and the selection of technology and (save where otherwise set out in this Contract) the Contractor accepts entire responsibility for investigating and ascertaining the conditions of the Site including, without limitation, ground, load-bearing and other structural parts, suitability of the utilities and incoming services, hydrological climatic, access, environmental, weather and other general conditions and the form and nature of the Site including both natural and man-made conditions."

67. Clause 17.3-4 of the Contract provides:

"17.3 The risks referred to in Sub-Clause 17.4 below are:
…
(d) occurrence of any event of Unforeseeable Difficulties;
…
(g) occurrence of any error, incorrectness or incompleteness or delay in obtaining all Employer's Permits and following Employer's documents, such Employer's Permits and Employer's documents shall be considered as full rely on information for the Contractor:
- results of Sub-Surface Survey;
- Planning Obligations and Planning Permission;
- Grid Connection Offer;
- permission to connect the Facility to local water (raw and sewage), electricity, gas etc.;
(h) - any and all Related Agreements (as specified in Schedule 11) and documents developed based on such Agreements; every event which is specifically addressed elsewhere in the Contract documents as being under the Employer's Risks.

17.4 If and to the extent that any of the risks listed in Sub-Clause 17.3 results in loss or damage or delay to the Works, Goods or Contractor's Documents, the Contractor shall promptly give notice to the Employer… If the Contractor suffers delay and/or incurs Cost (other than those for rectifying loss or damage in accordance with the previous sentence) from rectifying this loss or damage, the Contractor shall give further

> notice to the Employer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to: [EOT and payment]"".

68. There was also Clause 4.12 which provided:

> "Clause 4.12 Unforeseeable Difficulties [C2/1/42]
>
> Except for Unforeseeable Difficulties and except as otherwise stated in the Contract:
>
> (a) the Contractor shall be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Works;
>
> (b) by signing the Contract, the Contractor accepts total responsibility for having foreseen all difficulties and costs of successfully completing the Works; and
>
> (c) and subject to Clause 13 (Variations and Adjustments), the Contract Price shall not be adjusted to take account of any unforeseen difficulties or costs."

69. For completeness it should be noted there that Clause 1.1(f) defines "*Unforeseeable Difficulties*" as "*any and all difficulties and cost, which the Contractor acting with Good Industry Practice could not reasonably foresee, especially events of Force Majeure, occurrence of Employer's Risks and any other unforeseeable difficulties as expressly stated in the Contract.*"

70. The parties viewed these clauses as working in very different ways. It was PBS's case that the inclusion of the redrafted Clauses 17.3 and 17.4 of the Contract was to deal with the transfer of the risks associated with discharging planning conditions and obtaining permits, and in particular also for soil conditions which PBS had no opportunity to assess or quantify prior to entering into the Contract. PBS's case was that by these clauses, Bester expressly agreed to take on the task and therefore all the risks associated with ground conditions, and delays and issues in obtaining necessary development permits and the discharge of planning conditions attached to the Planning Consent.

71. Meanwhile, Bester submitted that there was no such major amendment. The effect of the change to Clauses 17.3 and 17.4 was simply that Clause 17.3 was concerned with very specific, defined risks of the Employer. Clause 17.3(g) was concerned in particular with any "*error, incorrectness or incompleteness or delay*" in obtaining particular documents, including the "*Sub-Surface Survey*".

From Bester's perspective they were in charge of the mechanics of the planning permission process; but the underlying documents they needed had to be provided by PBS, and the risk of the ground conditions, which were a key part of the issue, was PBS's.

72. The issue is one of contractual construction, on the usual principles. It is therefore necessary to set out (and so far as relevant to determine) the factual background against which this contract is to be construed.

Factual background

73. The Contract and the Equitix Contract did not emerge from an open sky in 2016. As far back as 2010 a geo-environmental desk study by Shepherd Gilmour ("the Shepherd Gilmour Report") was conducted. This was a preliminary risk assessment taking into account historic use of the site. This document was included in the planning documents on Wrexham Council's planning portal twice (pre-contract) from 18 August 2010 and 3 March 2016, with document reference 982921 / 2828121. In the report BT and underground services were recorded. It also mentioned asbestos. At Section 2.9 the report stated:

> "Various asbestos types may be potentially present as a result of decommissioning of former buildings, in addition to potential asbestos imported on site within fill materials and in use for manufacturing processes".

74. In July 2010 a further Shepherd Gilmour report was produced ("The Drainage Statement"). This stated at Section 4.0: *"The development will necessitate the diversion of an existing private foul sewer. A convenient diversion route is available"*. Drawing C602/406 dated 17 June 2010 indicated clearly a sewer crossing the site.

75. The decision to pursue the project was also preceded by a planning application. On 9 July 2015 Wrexham Council issued a planning decision notice, with numerous conditions as noted above. Those included conditions 12-15 which specifically had reference to the asbestos understood to be present on site.

76. On 9 November 2015 FIND Professional Mapping Intelligence report ("Utilities Search") showed BT cables running in and along the site.

77. On 18 December 2015, following a meeting between the parties, David Babak of PBS notified Daniel Otero, the Bester Project Director, that PBS had begun the basic design.

78. On 25 February 2016, PBS made an offer to Bester to carry out the Project for a sum of £14,230,000 which offer explicitly excluded various things including:

> "Excluded: - planning Permission, Renewables Obligation Certificates, Environmental Permit, Power Purchase Agreement and other documents necessary for realization.
>
> - any special laboratory systems;
>
> - negotiations with authorities, permissions and approval authorities procedures (PBS guarantee full technical support)…".

79. This was reflected in the draft contract which emerged. Schedule 16 of the Contract, Condition 9 noted discharge of these planning conditions as "*required before commencement of development*". It noted:

> "Current Status: Phase 1 GI study complete and in data room. Now newts cleared. Full SI [Site Investigation] after FC [Financial Close], Responsible Party/Owner: Bester (EPC)."

80. On 6 April 2016 PBS requested of Bester: "*what is the situation with geological analysis*". Bester emailed PBS trial pit preliminary results in the form of spreadsheets, together with some photos and the proposed testing methodology for a fuller test. The results noted at one place gravel "*including … possible asbestos fragments*" in a sample which it could be seen had been taken between 0.2-0.6m depth.

81. Under the Equitix Contract Bester assumed liability for sub-soil conditions and risk of contamination, as well as planning permission (in particular securing the discharge of the conditions attached to the planning permission). Clauses 17.3 and 17.4, dealing with Employer's Risks were "Not Used". In the original draft of the Contract a similar approach was adopted.

82. However just before the Equitix Contract was concluded (on 28 April 2016) Mr Jelínek for PBS proposed amended contractual terms to the Contract, which included (among other things) a new Clause 17.3 in relation to "*Employers Risks*". This appears to have followed a detailed review of the draft by PBS' lawyers, Randa Havel Legal. The amendments did not however include deletion of Clause 4.10.

83. Mr Prieto, who was unhappy with the idea that the two contracts should move out of sync, removed these proposed amendments. In response on 30 April, Mr Jelínek stated that the draft contract suggested by Bester was "*too risky*" for PBS to enter into.

84. On 30 April Bester, via its CEO, Mr Sanchez accepted most of the proposed amendments based on the "*great confidence in your company*" and a persuasion that the project would be a big success

for both companies. The amendments agreed included a version of Clauses 17.3 and 17.4 in which Clause 17.3(g) had space for (but did not list) any documents. It was suggested that Mr Prieto's evidence was that he was aware that there was an agreement made by Mr Sanchez on behalf of Bester to accept the risks proposed by PBS, and that these included the risks associated with ground conditions. I am not persuaded that that was the effect of Mr Prieto's evidence, which related to his understanding that an agreement had been reached, but not that the agreement was as PBS alleged.

85. Mr Jelínek then sent across another version of the draft with the accepted clauses in. There were still no documents listed, but Mr Jelínek's own annotations indicated that the documents to be listed were all "*official authorisations obtained or to be obtained [by Bester]*" and "*a list of documents and files that the customer has prepared himself or through other persons*". I should note that while this translation was agreed between the parties' lawyers before this hearing, Mr Jelínek was not happy with it. However, his issues with it did not appear to be material. That wording was consistent with what he said to Bester in the covering email: "*In the article 17.3 would be suitable add all documents under Employer (Equitix) responsibility and under Employer risk*".

86. There was a considerable lack of clarity in Bester's witness statements as to whether these changes did raise concerns about transfer of risk. Mr Romero's recollection was that they did not. Mr Prieto's evidence did appear to suggest that they did. However, during the course of the trial, he located in the disclosed documents a response he had sent near midnight on 1 May. While it was unfortunate that this document had not been included in the bundles, it was not in issue that this was a genuine disclosed document.

87. This email stated clearly that Mr Prieto's reading of the clause was that "*if they have presented matters and there is a longer than expected delay they have the right to an extension… worst case could prevent us from terminating a contract with the subcontractor when we terminate a contract from ownership*". While this was different to the Equitix contract, he considered that it could be considered for acceptance. He plainly did not read it as a fundamental or even significant change to the risk allocation in the Contract.

88. PBS then proceeded to work out which documents needed to be listed in (g). At around 9am on 2 May Mr Leos Zahradka said (internally): "*We need to define documents ace *Employer's risk 17.3. contract (f)*. We need this document defines ace for Employer's risk because this documents we plows not the authors and plows part of contract. We cannot take full responsibility for this*."

89. Prior to the telephone meeting Bester received Mr Havel's email of this date which included the draft of Clauses 17.3 and 17. 4 with

spaces for specified documents. Again, no amendment was proposed to Clause 4.10.

90. After this email was received, Mr Otero sent an email to Mr Romero on 2 May 2016, which was to the following effect:

> "As I understand it [what]...they say is that they must define in the contract as risk of the employer the documents they indicate in mail and proposes as risk of the employer (Bester) the connection electrical, the state of the land, the obligations of the schedule permission and the connection of the services in the parcel…"

91. On 2 May 2016 there was a conference call. That call took place between Mr Jelínek and Mr Romero. Mr Otero was not involved. Mr Prieto, whose wife was in intensive care following a traumatic birth of their second child, almost missed the call, arriving just towards the end. The telephone meeting appears to have been conducted in English, which was the first language of neither party.

92. It was PBS's case that the amendments, and in particular Clauses 17.3 and 17.4 were discussed and it was agreed PBS would not be responsible for the ground conditions or obtaining planning permission, but rather Bester was responsible for both. It was not suggested that Clause 4.10 was discussed.

Discussion: Construction

93. Having listened to the evidence of both sets of witnesses, and in the light of the contemporaneous notes, which support Bester's case, I conclude that no such agreement as was contended for by PBS did occur orally.

94. The witnesses called for Bester were, both in my hearing and re-reading of the evidence, clear that no such oral agreement occurred. It appeared from the context that the call was functional and directed to identifying the employers' documents to be listed in this clause, as well as to reaching a view on the force majeure provisions. PBS's own evidence on this was not consistent. Mr Jelínek's evidence was far from clear. The contemporaneous notes produced state: "*we accept the risks of the permits*". There is no note of a discussion of responsibility for adverse soil conditions.

95. I prefer the evidence of Mr Romero which seemed to fit far better into the run of correspondence to that of Mr Jelínek, whose evidence in this regard was not more satisfactory than it was generally. That conclusion is also supported by the evidence of PBS's legal advice which seemed to be focussed on making Bester responsible for the information it gave to PBS, and also by the drafting of the clause which is, even in the context of these discussions between parties

neither of whose first language was English, remarkably inapt to produce the result contended for.

96. The question is thus one of construction of the contract on the basis that no such oral agreement occurred.

97. So far as this question of construction is concerned I approach this, as the authorities require me to do, discounting the parties' subjective intentions and looking to discern their objective intentions judged against the relevant factual matrix and using an iterative process into which both linguistic analysis and commercial purpose have an input.

98. In this connection the evidence which was adduced and which PBS relied on heavily about Mr Prieto's unwillingness to agree that the contract should be amended so as to be no longer "*back to back*" with the Equitix Contract and the debate as to whether he subjectively thought the clause did place the responsibility for sub-soil conditions on Bester was ultimately neither here nor there; strictly indeed it was inadmissible save in relation to the rectification case. The same goes for Mr Otero's email of 2 May and his evidence as to what he understood the proposed terms to mean.

99. When I conduct this exercise, I have no difficulty in rejecting PBS's case on this issue. Clause 17.3(g) is not well or clearly drafted - as is perhaps not surprising given the drafting history set out above. Standing alone it can be read one of two ways: either as the transfer of risk for which PBS contends or as dealing only with delay consequences of specific permits.

100. Even read alone I would incline to the latter reading. The clause is unnecessarily complex and focusses too much on a range of specific documents to sit happily as meaning what PBS contends. If what was to be achieved was what PBS was intending to achieve, a much simpler, clearer way of doing this would be likely to be used – even allowing for the language issue.

101. The wording of the clause, with its reference to "*error, incorrectness or incompleteness or delay*" makes great sense if it is referable to the obtaining of particular documents. It does not make much sense as a way to assign risk of ground conditions. This point is reinforced by a consideration of the location in the contract of ground condition issues normally and the normal nature of employer's risks under the FIDIC standard form.

102. But as noted above, the exercise of construction is an iterative process. One iterative exercise to be performed is to look at the competing constructions in the context of the entire contract. When one does this one is faced with Clause 4.10. If PBS are correct, Clause 17.3 stands in flat contradiction to Clause 4.10 and Clause 4.10 would

have no effect. PBS did not seriously try to dispute this. It would be hard to do so. Their adoption at a late stage of a rectification case was a clear signal that this point was well understood. There is a range of authority which makes clear that in general clauses are to be read so as to avoid rendering a whole clause otiose. I need only mention the judgment of Moore-Bick LJ in *Dwr Cymru Cyfyngedig (Welsh Water) v Corus UK Ltd*, [2007] EWCA Civ 285:

> "In my view what points most strongly to the conclusion that they intended clause 17 to have contractual effect is the very fact that they chose to include it in the Agreement. Surplusage is by no means unknown in commercial contracts, of course, but it is unusual for parties to include in the operative part of a formal agreement of this kind a whole clause which is not intended to have contractual effect of any kind. One starts, therefore, from the presumption that it was intended to have some effect on the parties' rights and obligations."

103. That further indication is in my judgment entirely consistent with the (objective) commercial purpose of the clause, which so far as one is able to discern it, was to ensure that PBS were not stuck with the risk which flowed from certain documents which Bester had procured (such as the site survey and planning decision).

104. It follows that I accept Bester's case on construction. On the true construction of the Contract responsibility in respect of site conditions, including subsurface conditions, was allocated to PBS and PBS was required to obtain the Sub-Surface Surveys.

105. I should add here that PBS argued that this construction was inconsistent with the fact that Bester hired consultants to discharge some of the obligations which on this approach were obligations of PBS. PBS's case was that it was "unacceptable" for Bester to take this position. It was not entirely clear what the gravamen of this complaint was in legal terms. Plainly Bester's actions at a time after the Contract was signed are inadmissible as part of the exercise of construction. Nor was a case of estoppel by convention (which might piggyback off later actions) advanced. The point therefore remains: as a matter of construction of the Contract the responsibility for site conditions was that of PBS. What Clause 17.3(g) was intended to do, and did, was simply to except PBS for responsibility for errors, incorrectness or incompleteness in the particular specified documents.

Discussion: Rectification

106. Perhaps anticipating this analysis, PBS pleaded a case in rectification shortly before trial. That case was only sketchily touched on at the

hearing, though it has been maintained in closing. I have no hesitation in rejecting it.

107. The basis advanced for rectification is common mistake. There is no case of unilateral mistake. It is agreed that the law in relation to common mistake rectification is as stated in the judgment of Leggatt LJ in in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, which was handed down between the end of evidence and the submission of closings in this case. The critical passage states:

> "…. before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord" – meaning that, as a result of communication between them, the parties understood each other to share that intention."

108. I note in passing that the earlier authorities speak with one voice in saying that the case for rectification must be made clearly, because what is being done is to contradict a written instrument which gives a strong *prima facie* indication of the parties' intention. There is nothing in *FSHC* which suggests that this is no longer good law; indeed, the phraseology "*necessary to show*" "*not only … but also*" tacitly echo this approach.

109. In this case however nothing turns on the degree of clarity needed. The evidence comes nowhere near to establishing that the parties had a common intention as regards ground risks, or that there was the necessary outward expression of accord. The fact that the Contract and the Equitix Contract were not back to back is nothing to the point. There are any number of ways in which they could have diverged from back to back status; the fact that they did so tells one nothing about the ambit of the divergence.

110. PBS's own intention is somewhat cloudy given (i) the absence of any advice from its lawyers as to the need to remove Clause 4.10, which was a road block in the way of any argument as to transference of risk (ii) Mr Jelínek 's own evidence as to the lack of attention which he gave to the draft contract in advance of the meeting (iii) the absence of clear expression by PBS of its intention in any of the documentation

and (iv) the absence of clear witness evidence on how the accord was concluded or expressed in the meeting.

111. At best Bester was aware, as Mr Otero said in his statement, that PBS was "*reluctant to accept any responsibility*" in relation to planning conditions and ground risk and tendered amendments with that in mind. But that is at least as great a distance from the subjective intention needed for common mistake, as it is from the state of mind necessary for the (rightly not pursued) unilateral mistake argument.

112. What the evidence shows is that Bester was unhappy about the divergence from back to back status, and that Mr Prieto (perhaps unsurprisingly as a lawyer) perceived the possibility that the amendments might be used as a basis for just such an argument as has now emerged. Mr Otero did send an email which might on one reading suggest that this was his understanding, but in reality, it reflected both the confusing drafting of the document and a clear understanding that documents were at the heart of what was covered by the clause. In any event Mr Otero's understanding was not key because he was not closely involved in the contract negotiations, as the documentary chain showed and the oral evidence confirmed. What the evidence shows in my judgment is that despite these "wobbles", Bester as a whole considered the amendments and their ambit, and was ultimately content that the clause did not place ground risks on it. It decided it could live with bearing the risk of inaccurate documentation. Consequently, it agreed the amendments.

113. As for the outward expression of accord, there was no such expression. Nor indeed has the supposed accord ever been consistently stated; it appears nowhere in the PBS witness evidence, and the cases as to rectification advanced by PBS and VB were not consistent on the precise rectification sought. The only outward expression of accord was the Contract, which takes one back to construction arguments.

114. It follows that such matters as asbestos, the sewer and the BT lines are not per se risks of Bester.

115. I would add that a certain amount of cross-examination was directed to the understanding of Bester witnesses as to PBS's intent. This is not an issue which is relevant to the questions which I have to decide.

116. Some stress was also put on the fact that Bester argued in its Adjudication against Equitix that the asbestos at deeper levels was unforeseen and unforeseeable. It was suggested that either (i) it showed that this was true or (ii) that Mr Otero was lying in his evidence before me. I am not persuaded by this submission. The approach of Bester in the later adjudication cannot be relevant to the construction issues. As for the divergence of approach, it is entirely unsurprising that Bester, facing a claim from Equitix, should seek to

adopt the position that would be taken by PBS down the line. As Mr Otero said, within the structure of the adjudication, he was transferring the argument of PBS to Equitix. The adoption of inconsistent positions in two directions when there is a chain of contracts is naturally very far from attractive, but it is hardly unheard of in contractual chain disputes. Certainly, I was not persuaded that this fact was sufficient to discount Mr Otero's evidence.

Implied Terms

117. Technically PBS advanced a case also on implied terms. It was pleaded that there were implied terms of the Contract that Bester would not hinder PBS' completing works and "*Bester would not, at any time, make calls on the said performance bonds provided by PBS, other than in good faith and in accordance with its entitlement [if any] under the Contract.*". This argument was not pursued with any force by PBS.

118. So far as the first implied term was concerned, this appears not to be controversial – Bester accepted that it is a term normally implied in construction contracts.

119. As for the second term, I am not persuaded that any such term is to be found. Implication of terms is not a free for all. Serious hurdles have to be addressed and cleared, in particular as to necessity, and as to the interrelationship with existing terms of the contract. In circumstances where:

    i) There is a term of the Contract dealing with wrongfully calling on the security (Clause 4.2(h): "*Where it is agreed or determined that the Employer was not entitled to make a claim under a Performance Security, the Employer shall repay the amount that it was not entitled to claim together with the reasonable costs incurred by the Contractor in establishing the same (as agreed or determined) within twenty-one (21) days of the date of agreement or determination.*")

    ii) PBS's failure to address the question by reference to this term;

    iii) The existence of terms in the contract excluding implied terms and recording that the Contract is the parties' entire agreement, which are also not addressed by PBS;

    I conclude that the requirements for establishing an implied term have not been made out.

The Extension of Time claims: July to November 2016

120. The Extension of Time claims in question were as follows:

i) Claim dated 14 July 2016 for extension due to unforeseeable detection of underground sewage/drainage system;

ii) Claim dated 2 August 2016 for extension due to detection of asbestos at the Site;

iii) Claim dated 15 September 2016 for extension due to delay in provision of ROC and permits;

iv) Claim dated 5 October 2016 (submitted on 24 October 2016) for additional payment for a variation in respect of the electrical connection;

v) Claims in respect of additional asbestos discovered in November 2016;

vi) Claims dated 17 and 26 November 2016 in respect of BT cable lines.

The relevant terms and statutory backdrop

121. The relevance of the Extension of Time claims is primarily to the termination case. PBS contends that these claims were not determined by Bester, and that the failure to determine entitles PBS to terminate the Contract because Bester substantially failed to perform its obligations under the Contract.

122. However, Bester submits one never gets so far, because the notices were defective. If one were to get so far it submits that failures to determine the notices could never trigger the relevant clause.

123. On the question of the requirements of a notice, the second paragraph of Clause 20.1 of the Contract provides that:

> "Subject to the third paragraph of this Clause, if the Contractor fails to give notice of a claim within such period of twenty-eight (28) days, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this clause shall apply. The second paragraph shall not apply to any claim made by the Contractor to extend the Time for Completion under clause 8.4.2 (Extension of Time for Completion and the Longstop Date), provided that where the Contractor fails to give notice of a claim within the twenty-eight (28) day period referred to in the first paragraph of this Clause, such failure and adverse effect it has, if any, upon the Employer or the Project shall be taken into account when assessing the Contractor's claim."

124. The third paragraph provides:

> "The Contractor shall also submit any other notices which are required by this Contract, and supporting particulars for the claim, all as relevant to such event or circumstance."

125. There is also a relevant statutory background. As a construction contract the Contract is subject to Part II of the Housing Grants, Construction and Regeneration Act 1996 ("the Act"). This includes mandatory terms as to:

(1) Payments (sections 109-113), including requirements for interim or stage payments at ascertainable due dates, with defined final dates for payment; and

(2) Adjudication:

a. The default process is: no disclosure, no hearings, no cross-examination, and a very compressed timetable.

b. It is founded on the "*pay now, argue later*" principle. Regardless of errors of procedure, fact or law, an adjudication decision will be recognised as having interim contractually binding status until finally determined in court or arbitration, provided the adjudicator has not acted in excess of jurisdiction and there has been no serious breach of the principles of natural justice.

126. By section 105(2)(c), Part II (i.e. the provisions as to payment and adjudication) does not apply to contracts for the assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is power generation.

127. In contracts involving construction operations, and those involving excluded operations (e.g. subject to the exclusion under section 105), sometimes referred to hybrid contracts, i.e. such as the Contract, section 104(5) provides that Part II of the Act applies so far as the contract relates to construction operations.

128. A principal focus and purpose of the Act was to promote cashflow in the construction industry throughout the contractual chain, and to provide a quick and legally binding decision under the contract on an interim basis (enforceable by summary judgment).

129. Jackson LJ summarised the Act in *Grove v S&T* [2019] B.L.R. 1 at [7]:

> " [7] The payment regime and adjudication regime which that legislation introduced now play a critical role in the functioning of the construction industry. The payment rules lead to prompt interim payments by employers to main contractors and by main contractors to subcontractors. The adjudication regime leads to the early resolution of many disputes without the need for formal arbitration or litigation. Adjudications are swift. They are generally completed within 28 days. There is a limit to how much money people can spend on their disputes within that limited time frame. Overall the payment regime and the adjudication regime have been successful. At least fourteen overseas jurisdictions (including New Zealand, Malaysia, Singapore and most Australian states or territories) have adopted similar rules, with greater or lesser variations according to their local circumstances."

130. Against this background there are then specific terms of this Contract. Clause 3.5 of the Contract ("Determinations") provides:

> "Whenever these Conditions provide that the Employer shall proceed in accordance with this Clause to agree or determine any matter, the Employer shall consult with the Contractor in an endeavour to reach agreement. If agreement is not achieved, the Employer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.
>
> The Employer shall give notice to the Contractor of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination, unless the Contractor gives notice, to the Employer, of his dissatisfaction with a determination within fourteen (14) days of receiving it. Either Party may then refer the dispute for resolution in accordance with Clause 20 (Disputes). For the avoidance of doubt, nothing in this Contract will prevent the Parties from referring a matter to adjudication at any time."

131. Clause 20 of the Contract provides for a tiered dispute resolution procedure, including adjudication at any time (Clause 20.2).

132. The parties agree that the adjudication provisions of the statutory Scheme apply to construction operations under the Contract because the express adjudication terms of the Contract did not comply with

the minimum requirements for adjudication under section 108 of the Act, in that:

i) Contrary to section 108(2)(c) they require the Adjudicator to reach a decision within 28 days of the notice of adjudication, rather than (as required) 28 days of the referral notice (which follows the notice of adjudication);

ii) Contrary to section 108(3A) they do not provide for the Adjudicator to correct his decision to remove clerical or typographical errors.

Prelude: Extension of Time and termination

133. A preliminary point which arises out of this background is the question of whether PBS's allegation that Bester's rejection of its claims for extension of time was a "*material breach*" because it exposed PBS to liability to pay liquidated damages for delay, falls at the first fence.

134. Bester argues that even if PBS's claims to Extension of Time were sound, the rejection of those claims by Bester was not final and binding and hence was not a "*material breach*" because (as outlined above) the law provides parties to construction contracts with a right to refer any dispute to adjudication at any time.

135. It says that because PBS had ample opportunity to obtain such relief as it was entitled to from an adjudicator, the adverse consequence of any breach on the part of Bester could be rectified quickly and at limited expense, with no cost risk if it lost. Hence any such breach was not material.

136. I consider that this argument has force. The rejection of any claim was not final – it could not be said that Bester had definitively deprived PBS of an Extension of Time by rejecting its claims. To put it another way, it could not be said (absent an adjudication), that PBS was or would be liable in liquidated damages. True it is that PBS did not in fact refer any of these rejections to adjudication, but it could have done so. To find that there was a material breach when PBS elected not to get a determination via adjudication would cut across the scheme of adjudications and hence of the Act. If PBS were correct that a rejection of an extension of time such as these was a material breach contractors would be entitled to terminate a contract due to an employer's rejection of an extension of time claim at least in some cases. As Bester submitted, a dangerous game of Russian roulette would be likely to emerge, with parties trying to ascertain if a particular rejection was "material" while others were not. It might well lead to employers commencing adjudication proceedings whenever they rejected a claim, because of a lack of clarity as to where the line would fall and lest the mere rejection of a claim might be said to warrant termination.

137. It follows that insofar as the termination by PBS relied on the refusal by Bester of the Extensions of Time, it would fail. Strictly speaking therefore, the detail in relation to each Extension of Time is academic. However, for completeness, because it forms part of the narrative of the later aspects of the case and in case it were to become relevant, I reach conclusions on each one below.

Extension of Time: the backdrop

138. The backdrop to each claim is that Clause 8.4 states that PBS "*shall be entitled, subject to Clause 20.1, to an extension of the Time for Completion...if and to the extent that the Completion Date for the purposes of Clause 10.1 (Taking-Over of the Works) is or will be delayed by any of the following causes...*".

139. In order to show that it had entitlement to an Extension of Time PBS therefore had to establish that the Completion Date was or would be delayed by one of the causes identified in Clause 8.4 (a) to (h). There was therefore a need to establish (i) the facts falling within the relevant sub-paragraph and (ii) delay to the Completion Date (i.e. critical path delay) caused by those facts.

The asbestos claims – unforeseen circumstances or Clause 17.3 delay.

140. These Extensions of Time were amongst the key Extensions of Time relied upon by PBS. The factual background to these issues is as follows. The early part of the relevant background, prior to the conclusion of the Contract, is as set out above.

141. On 12 May 2016 there was a kick-off meeting at Bester's offices in Seville. PBS was told: "*There is small amount of asbestos from previous constructions. Only some small spots are contaminated."* This appears to be consistent with what Mr Otero said in his witness statement in the Equitix adjudication that the risk of finding significant contamination was seen as being very low.

142. On 17 May 2016 Bester emailed PBS the final results from the soil analyses, including recordings of asbestos e.g. from the draft Geotechnics report, the Utilities Search, the Drainage Statement and the Geotechnics draft Ground Investigation Report.

143. That report made clear its methodology, namely that it was

> "to obtain information on the ground and groundwater conditions relating to the design of the proposed works within the limitations posed by trial hole numbers, locations, depths, methods adopted and the scope of approved in situ and laboratory testing."

144. It set out the numbers of boreholes and trial pits dug and recorded the locations. It noted the site's history, in particular its "*major transformation*" between 1938 and 1964 due to the construction of the Royal Ordnance Factory (1941-1945). It stated in terms:

> "Asbestos (Chrysotile) was detected in five of the twenty-two samples screened for the presence of Asbestos. In two of these samples the Asbestos was identified as being Asbestos Cement or Asbestos Cement Debris. In the other three samples the Asbestos was identified as Fibre Bundles. Quantification of the Asbestos by the laboratory shows less than 0.001% present in the three samples where Fibre Bundles were identified. However, in the two samples where Asbestos Cement or Asbestos Cement Debris was identified the Quantification results show the presence of 6.913% and 0.007%, respectively."

145. Trial Pit 4 (as with the draft results) recorded at depths between 0.20m and 0.60m below ground level "*possible asbestos fragments*". Asbestos was also recorded in other locations up to 0.5m below the surface. There were a number of tests which revealed "*Asbestos fibre bundles*" or "*asbestos containing materials*".

146. The document specifically flagged the following (in two separate places): "*It is recommended that an appropriate Asbestos specialist is consulted for advice on Health and Safety implications with respect to the presence of Asbestos in the soils below this site….*"

147. On 18 May 2016 Mr Otero emailed Mr Romero (internal to Bester) indicating that PBS had confirmed that the information in Geotechnics' draft Ground Investigation Report was sufficient to prepare the detailed design for the civil works.

148. PBS placed emphasis on the fact that on 23 May 2016, Mr. Otero discussed the draft report with Mr Garcia and others at Bester. Mr. Garcia advised: "*What would be advisable is for the report to limit as much as possible the area of the contaminated area. since only 22 samples found just 1 sample with a content higher than 0.1%.*" The relevance of this exchange seems lacking however, against a background where PBS had already been sent the draft findings.

149. On 8 July 2016 Geotechnics emailed Bester Final Ground Investigation Report indicating that it would need to submit a formal Remediation Strategy and subsequent Validation Report to Wrexham Council. The final report added to what had previously been said. It stated:

> "Given the above contaminant issues, a formal Remediation Strategy will need to be produced for

> this site. With the presence of Asbestos having been identified, this will require the advice of an Asbestos specialist.
>
> In addition to the formal Remediation Strategy, a Validation Report will be required on completion of the remediation as documentary evidence of the works carried out."

150. Bester forwarded to PBS the Geotechnics Ground Investigation Report and noted that a specialist would need to be retained to provide an asbestos remediation strategy – and indicating that this needed to be dealt with quickly. This was backed up with a direct report to Mr Šipoš noting that the retention of a specialist was urgent and flagging the relevant page of the report. PBS confirmed the presence asbestos internally, noting "*as we thought, we have asbestos on the site"*.

151. On 19 July 2016 there was a meeting at Ramada Hotel regarding asbestos. There had been a suggestion from one contractor, Malrod, to remove 1 metre deep across the site– a project which would have been costly and taken 35 weeks. Mr Otero regarded this as excessive when there had been boreholes and trial pits in over twenty locations with no asbestos shown. He asked PBS to concentrate on confirmed spots of asbestos and "*recommended to do an alternative consult*".

152. On 26 July Mr Jelínek emailed Mr Otero communicating an offer from a contractor called DeeTech; again for removal of 1 metre of soil across the whole site costing almost £4m and with an estimated 35 weeks delivery time. Mr Otero responded "*this approach is not the right approach. Why to remove 1 meters of the whole area when only spots of asbestos have appeared in three points*". He suggested that another contractor be consulted or as he put it "*Please, made another consultants*".

153. On 28 July 2016 Mr Otero was chasing PBS for news as to whether a contract had been agreed for the asbestos removal and when an asbestos removal method statement would be forthcoming.

154. On 29 July Delta Simmons sent an email to Mr Otero commenting that as asbestos has been detected on Site "*there is a requirement to prepare a Remediation strategy… if programme is more important than cost then the most practical approach would be to remove the asbestos contaminated soils from site and dispose of as waste… if cost is more important then, it may be possible to redeposit asbestos containing soils on site as fill under a clean cover layer, typically 600mm of cover… a decision should be taken on which approach is to be taken prior to producing a remediation strategy*".

155. On the same day Bester sent a letter of concern to PBS. One of the subjects highlighted was asbestos: "*we continue waiting the Asbestos*

Method Statement which must be also approved by Council. The delay on your side is producing impact in the general schedule and Authorisations".

"First asbestos"

156. On 2 August PBS sent its first claim for an Extension of Time in relation to asbestos to Bester. It stated that the removal of asbestos would lead to an "*increase in contract price/ application for extension of time / extension of longstop date*". The basis for the claims asserted was an "Unforeseen Difficulty" under Clause 1.1, and Employer's Risk under Clauses 17.3(d) and 17.3(g). It stated:

> "On 8 July 2016, we were provided with the Ground Investigation Report. According to the Report, we have discovered that there is presence of quantifiable amounts of asbestos at two of the Site's locations with small quantities of fibre bundle at three other locations (see the page 14 of the Report). The Contractor, acting with Good Industry Practise, could not have reasonably foreseen the presence of asbestos as it does not follow from any of the Employer's Documents, in particular, from the Sub-Surface Survey provided by the Employer".

There was no particularisation of the delay said to be caused to the Completion Date.

157. On 4 August 2016 Bester determined and rejected PBS's claim of 2 August 2016. It said that PBS long knew of the asbestos from at least 6 April 2016 (when it was provided with preliminary trial pit analyses pre-contract by email). Reference was also made to the Kick Off meeting.

158. On 9 August 2016 Bester chased PBS for an update on the progress of the asbestos method statement, PBS's issue of an updated programme and PBS's appointment of a civils contractor. On that same date a contractor called Zeras provided PBS with a single page quotation offering "*to undertake the safe removal and disposal of contaminated soil from Wrexham Power Plant*" for £112,020 plus VAT.

159. On 10 August 2016 PBS emailed Bester a draft copy of an asbestos method statement and site-specific risk assessment (prepared by Zeras): "*The Asbestos Method of Statement*". That document was updated on 15 August 2016 and provided to Wrexham Council for comment by Mr Otero on 19 August 2016. It gave no detailed description of what work was to be done, in terms of the depth of land to be removed.

160. On 16 August the Method Statement for asbestos removal was sent to Phil Thompson and Michael Branch (for Equitix) by Mr Gutiérrez of

Bester requesting they review it (and the Site Investigation) with the land contamination officer at Wrexham Council.

161. On 22 August 2016, PBS wrote further to its first asbestos claim, that the "real extent" of asbestos was more than had been described in the Geotechnics report. PBS alleged that the presence of asbestos was an Unforeseeable Difficulty and that the information and documents provided by Bester were erroneous and incorrect within the meaning of Clause 17.3(g). PBS did not particularise where the additional asbestos was. PBS referred to the Zeras quotation which it attached to the letter. PBS did not particularise the delay alleged to result from the presence of the asbestos on the Site.

162. Pausing here, one can focus on the first asbestos claim. It can be noted that even before considering the underpinning of the claim, this claim (which was it will be recalled for an extension of time) could be dismissed, because the experts were *ad idem* that the ground works were not at this point on the critical path – a view echoed in PBS's own risk register of 16 July 2016 and its first detailed programme for the works. Indeed, it sometimes appeared to be the case that PBS did not pursue the first asbestos Extension of Time claim and the real focus as regards the asbestos Extension of Time claims is therefore on the second asbestos claim.

163. However, to the extent it matters, and since a claim in relation to this did seem to resurface at times:

    i) There could be no valid claim for an Extension of Time for the first asbestos, because no delay was caused thereby; further

    ii) In the light of the conclusion on the issues of construction and the matters set out above, this asbestos which was the subject of the first asbestos claim could not have amounted to an "unforeseeable difficulty" under Clause 17(3)(d) or "*error, incorrectness or incompleteness*" under Clause 17(3)(g). To be clear – the narrative shows that the asbestos which was under consideration at this point was entirely consistent with what PBS knew about pre-contract. The claim for "first asbestos" appears to have been triggered by Bester's expression of concern about delay by PBS in putting forward the remediation statement which they needed to procure.

"Second Asbestos"

164. On 31 August 2016 PBS appointed Zeras to carry out "*the issuing of methods of statement and remediation work of the soil contaminated by asbestos*" by a scrape of the site at a minimal depth of 10cm. What was sent to Bester in relation to this appointment was "*a cover sheet and the page with signatures*", which did not include the Appendix which described the work which Zeras were to do.

165. There was some debate before me about whether Bester had instructed the 10cm scrape rather than a more demanding solution; PBS's case being that Bester "*was proactive and firm in its intent to limit the scope of the remediation works undertaken by the specialist asbestos contractor*" – this being a reference back to the concerns about the 1 metre removal proposal. There was also an issue as to whether PBS had informed Bester of the limited nature of the work being done.

166. I conclude that there was no instruction by Bester to PBS or Zeras to perform the limited exercise ultimately performed; Mr Otero questioned the initial expensive plans involving removal of 1 metre depth site-wide; he and Bester did not seek any specific solution, just that PBS sought another quotation. A suggestion was made to tailor it to the "hot spots" – but this does not seem to have been pursued by PBS. I also conclude that based on the documents (which show no sign of Bester being so informed) and the witness evidence (which did not explain how such information was given), the very limited nature of the arrangement concluded between PBS and Zeras, which paid no regard to "hot spots" or the specific trial pit findings, was not disclosed to Bester.

167. On 8 September 2016 the council confirmed the Zeras plan and a permit was initially issued on 9 September 2016. However following concerns expressed on 12 September 2016, on 14 September 2016 Wrexham Council indicated that it could not accept the 15 August 2016 PBS/Zeras asbestos method statement, on grounds it was not sufficiently detailed. Their letter sought further clarity - for example as to the depth of material to be removed, and how removal was to be validated. As such the council said, it was not prepared to recommend discharge of condition 12 until this clarification was received.

168. On 23 September 2016 Bester instructed PBS to commence limited works. Mr Jelínek responded that he wanted confirmation that all extra costs incurred by reason of non-acceptance of the plan by the Council would be for Bester. This was not accepted, with Bester referring Mr Jelínek to the Contract and reiterating the instruction to start work. PBS then sought an indemnity for the costs, and refused to commence work on the grounds that Mr Gutiérrez, who had conveyed the instruction, was not the official Employer's representative under the Contract. On 30 September 2016 Bester orally told PBS that it had now received verbal approval for the works in relation to the removal of the asbestos to commence and that confirmation in writing would follow shortly.

169. On 8 October 2016 Mr Jelínek emailed Bester noting that the main reason for extension of delivery time was due to council approval delay. On 10 October 2016 there was a submission of documents by Zeras to PBS including risk assessments and method of works,

according to Zeras' verification report. Work commenced on 11 October 2016.

170. The work initially performed was a scrape of at least 10cm across the whole site and removal of all visible asbestos on site. This involved hand picking, and PBS raised concerns about the cost of this. On 28 October 2016 it was reported that asbestos hand removal had been completed.

171. On 20 October 2016 Zeras submitted a "Remediation strategy and verification plan" to PBS, which TerraConsult had carried out for D Morgan Limited. This was for "*localised remediation of hotspots of asbestos contamination identified in previous geo-environmental investigation*". TerraConsult's report proposed that there would be a "*watching brief*" to identify "*previously unrecorded hotspots of contaminants*".

172. On 31 October 2016 there was a Conference call between Bester and PBS, including a discussion about the main issue of "who pays" in respect of asbestos. Mr Jelinek took the position that it was for Bester to pay.

173. On 2 November 2016 Zeras completed its work on the scrape. On 3 November 2016 Zeras emailed PBS to confirm Zeras had not remediated all the asbestos on the site, but in broad terms just the 10cm layer of contaminated soil it was specifically contracted by PBS to remove.

> "...Due to the ground having contamination a lot further than what was in my scope of work unfortunately within the red barrier tape I will not be able to get a visual inspection until the ground has had a further dig to remove a lot more of the soil and there will need to have a lot more trial holes done throughout the site as from what we all have seen.
>
> The contamination will be outside of the barrier tape as well but a lot deeper than the 10cm I was contracted to (but I did go a lot deeper than I was contracted to hopefully help you out but it went a lot further) So as of the 05/11/16 Zeras will have finished all the work as specified within the contract...".

174. As for the work actually performed I see no reason to doubt the description of Zeras:

> "Following completion of the initial 10cm scape as agreed at the pre start meetings, it was identified that a number of areas needed further works due

> to further contamination identified. In various places, this included removing a further 20cm of contaminated spoil, leaving a total scrape depth of approximately 30cm in these locations.
>
> Northstar Environmental Ltd continued to inspect these areas as the project progressed. Following completion of the project, Zeras Industries offered the site to PBS Energo to gain approval that both parties were happy with the works completed. Once approval was gained, Northstar Environmental Ltd were then appointed to do a final visual inspection of the land.
>
> At the time of the inspection, it was confirmed that the land was clear of all visible asbestos and that Northstar Environmental Ltd have provided confirmation of this in the relevant report which has been previously issued to PBS Energo."

175. On 11 November 2016 a report by NorthStar stated that the site was visually clear but that asbestos could still be in the soil. On 15 November 2016 this report was handed to PBS.

176. The next day PBS issued a Notice of Unforeseeable Difficulty. PBS alleged an additional "*discovery*" of asbestos (and hidden BT lines – as to which see further below). The letter from PBS refers to greater quantities and greater depths than in Geotechnics' report.

177. On 18 November 2016 Bester responded to this letter. Bester asked PBS to submit drawings showing localization, depth and volume of asbestos, and a report on the findings; and proposed actions.

> "Bester herewith instruct PBS to start with the ground levelling dig… in addition to the above, in case of appears Asbestos, this works has to be done under the remediation strategy and verification plan that has been agreed with the council".

178. There was an initial site inspection on 18 November 2016 where "*a limited number of suspected ACMs (fragments of floor tile and asbestos cement sheeting) were observed in the vicinity of former buildings.*" On 22 November 2016 PBS asked D Morgan to submit a tender for the remediation works described in the TerraConsult strategy.

179. On 28 November 2016 PBS responded to Bester's request for further information regarding the second asbestos claim. It contained a high level drawing of the findings, but did not show detail of what additional asbestos had been found. It also noted that following heavy

rain on 21 November 2016 more asbestos had been exposed when topsoil had washed away.

180. Shortly after this PBS suspended work. Mr Jelínek said: "*without any payment it is not possible to continue*".

181. On 28 November 2016 Bester rejected the claim advanced by PBS. In response Mr Jelínek said "*without payment it is not possible to continue. This is a clear situation.*"

182. At this point Bester and PBS were in discussions about a number of issues including this one. Bester seems to have taken the view that as part of a commercial way forward it would take over the removal of asbestos. There was no formal determination of the claim at this stage.

183. By 5 December 2016 Bester were directly inviting D Morgan to tender for the remediation works. But there was no agreement to the extension of time, and Mr Jelínek continued to press for this in early January saying "*Please note that such delay on the side of Bester has been negatively affecting timely execution of the Works within the Programme agreed in the Contract as well as the Contract Price for the Works and the delay caused by the Soil Contamination up to date amounts to 46 days and is still increasing every day.*"

184. D Morgan commenced work on 17 January 2017, and were paid directly by Bester in mid February with works completing in mid March.

Conclusions on Asbestos Extension of Time

185. There are essentially three layers to this issue. The first is that which follows on from the point already determined. It is not open to PBS to say that the risk of ground conditions was on Bester. It must, if it is to succeed, bring itself within the contractual scheme as I have interpreted it above, or via some other provision.

186. The second layer is that the alleged first discovery of asbestos cannot avail PBS. The first discovery was not due to any error or incompleteness in the reports to date, which had only been intended as preliminary reports. Further as noted above no delay was caused to the critical path.

187. It would follow that the only route open to PBS would be if the second discovery of asbestos could be said to be an "*unforeseen circumstance*". Under the Contract, that would require PBS to show that it fell within the definition of: "*any and all difficulties and cost, which the Contractor acting with Good Industry Practice could not reasonably foresee, especially events of Force Majeure, occurrence of Employer's Risks and any other unforeseeable difficulties as expressly stated in the Contract.*"

188. The difficulty for PBS is that it had quite a lot of information prior to the Contract as to the presence of asbestos. It knew that there was asbestos disclosed by testing in just a few limited areas; and it knew from the trial pit results that this asbestos included bits which were deeper than 0.1metres. It cannot therefore be the case that PBS could say the asbestos fell within this wording just because there was asbestos which lay deeper than the initial scrape/pick had covered. It would need to say that the extent of the deeper asbestos was unforeseeable, even though the presence of some deeper asbestos was known about. This is an argument which was never fully expressed – and for which there was no supporting evidence.

189. Further, this is a wording on which there is some authority, which chimes with the approach which I have already indicated. Bester referred me to the decision of Coulson J in *Van Oord UK Limited v Allseas UK Limited* [2015] EWHC 3071 (TCC) at [145-146] where he referred to the decision of the Court of Appeal in *Obrascon Huarte Laine SA v Her Majesty's Attorney General for Gibraltar* [2015] EWCA Civ 712 and said:

> "In that case the Court of Appeal upheld the decision of Akenhead J, in which he refused a claim based on allegedly unforeseen ground conditions.
>
> 146. One of the disputes there centred on the contractor's case that, if the ground conditions were not expressly identified in the geotechnical information provided pre-Contract, they had a claim for unforeseen ground conditions. Akenhead J rejected that approach. At paragraph 215 of his judgment he said:
>
> > "I am wholly satisfied that an experienced contractor at tender stage would not simply limit itself to an analysis of the geotechnical information contained in the pre-contract site investigation report and sampling exercise. In so doing not only do I accept the approach adumbrated by Mr Hall [the defendant's geotechnical expert] in evidence but also I adopt what seems to me to be simple common sense by any contractor in this field."
>
> This approach was upheld by the Court of Appeal.
> 193. Every experienced contractor knows that ground investigations can only be 100% accurate in the precise locations in which they are carried out. It is for an experienced contractor to fill in the gaps and take an informed decision as to what the likely conditions would be overall."

190. This is a passage which expresses precisely the issue identified above, and says that reliance on ground investigations as being 100% accurate is not likely to be successful. While I understand the point

made by PBS, that the facts of *Obrascon* are at some distance from the facts of this case, in that in that case there was rather fuller documentation indicating that contaminants had been identified, a fairly precise estimate of the extent of the problem, and a back story for the site (previous military use) which raised a large flag to an incoming contractor, there was no real challenge to this statement as a matter of principle. While the decision in *Obrascon* was arrived at via expert evidence as to what a contractor should reasonably have foreseen, Coulson J's analysis in *Van Oord* takes that decision as background and makes a more general point, which leads to the conclusion that such information puts a contractor on inquiry such that he can then only complain if what emerges is unforeseeable – in the light of what he does have.

191. It is not enough therefore for PBS to point to the discovery of asbestos in more granular detail than previous reports had suggested. It must show that the asbestos discovered was unforeseeable.

192. This is a burden which it cannot discharge. That discovery of asbestos referred to was not – at least on the evidence before me - in any real respect different to what was referred to in the Geotechnics report. PBS would say that this cannot assist Bester since the report was not disclosed until after the Contract was concluded. However, that is in my judgment an entirely artificial way of looking at the matter. The Geotechnics report did not come out of the blue. Specifically, PBS were informed pre-contract of the trial pit results in April. Those trial pit results were important – although they were limited in number they represented a detailed investigation of ground conditions at various places across the site. Although more limited they were substantially similar to the picture painted by the later fuller Geotechnics report. In that sense there is an analogy to *Obrascon* – this was not a case of asbestos being a possibility – it was clear that asbestos contamination was a reality, and potentially at some depth in some places, though the extent of the problem was not clearly delineated.

193. Secondly, PBS had access to the earlier Shepherd Gilmour report of 2010. While it is perfectly correct to say, as PBS did, that it was not specifically provided to PBS, and did not come "with" the planning permission, it was available on the planning portal – it was, in essence, a public document. Since ground conditions were at PBS's risk, it was for PBS to satisfy itself as to the state of play as regards asbestos, and the perusal of such public documents is a step which they would be expected to take. Although the Shepherd Gilmour Report was not itself particularly detailed as to asbestos (though not, as PBS would suggest, "*so general as to be completely unhelpful*"), taken with the trial pit results, PBS had a good picture of the situation as regards the presence of asbestos on the site.

194. In particular PBS was aware that investigations so far had been only at specific sites – with an obvious inference as to the likelihood that the picture was incomplete. It was also aware from the trial pit results that asbestos might extend as deep as 0.6m.

195. Against this PBS did not call evidence which grappled with the detail of what was found. The picture which emerged from the documents and evidence did not include evidence which indicated what the difference was between the picture from the Shepherd Gilmour report as fleshed out by the trial pit results (as then further fleshed out early in the contract by the Geotechnics report). The PBS claim came following a very unspecific report on 15 November 2016, and even the 18 November 2016 site inspection report provided no information as to what was "additional" or new about this asbestos. The 28 November 2016 update did not progress matters. Nor was there evidence as to what would in accordance with "*Good Industry Practice*" have been foreseeable from the baseline of knowledge which PBS had.

196. The reality, on the basis of the evidence relied on, is that the asbestos discovered was not a new discovery, or different from what had been indicated by the previous findings, but simply a more detailed manifestation of what was shown by the earlier materials. It follows that PBS either had actual or constructive knowledge of the second asbestos, as well as the first asbestos, prior to the Contract.

197. Further at least to some extent what was found later originated from the initial decision to do a roughly 10cm scrape, when there was evidence that in places asbestos was up to 0.6 m deep. Although Zeras does seem to have gone deeper than 0.1m in some places, (i) they were not originally asked to do so by PBS and (ii) that still would not deal with asbestos at such levels as 0.6 m. PBS cannot therefore reasonably have thought that the work undertaken would have cleared this asbestos. Indeed, the contractor Zeras makes this plain in its "*sign-off report*".

198. PBS then concentrated some fire on the possibility of an incorrectness in the Geotechnics report, to bring itself within the clause on this basis. PBS argued that Bester's own witnesses had, in the context of the Equitix adjudication, said that there were errors in the report.

199. Ultimately however PBS struggled to actually identify any error in the Geotechnics report or any contamination on the site which was not broadly speaking to be expected in the light of what the report did say. This point emerged quite late – and does not reflect the way that the issue was advanced by PBS in the correspondence at the time – there was never a suggestion that the report was wrong, or otherwise erroneous. Nothing was specifically put to Bester's witnesses as to what the error might be said to be. In the end I conclude that Bester's witness evidence does have to be read in the context of an

adjudication in which its witnesses were in essence trying to pass on PBS's claim.

200. I conclude that as regards asbestos there was no or "*Unforeseeable Difficulty*" under Clause 17.(3)(d) and there was no "*error, incorrectness or incompleteness*" under Clause 17.(3)(g)

Sewerage/Drainage

201. This was essentially a subsidiary issue to the asbestos issue. On 14 July 2016 PBS claimed an Extension of Time for the "existence" of a "sewerage system".

202. However, the sewer was identified in the Shepherd Gilmour Drainage Statement dated July 2010 and further notified on 17 May 2016 and the plans dated 17 June 2010 which PBS had seen. On 21 June 2016 and 14 July 2016 PBS acknowledged it had to produce a design for re-routing the sewer.

203. This claim therefore falls with the claim in relation to ground conditions. There was no repudiatory breach or substantial failure to perform by Bester. To the extent relevant, this claim was correctly determined.

ROC and permits

204. Again, this issue had a heavy interrelationship with the asbestos issue, given that it was PBS's case that the issue as regards the permits was primarily one of asbestos remediation; and also because what underpinned this argument was PBS's assertion that the two sets of responsibilities fell together under the contractual scheme.

205. The first point to consider is the interrelationship between the contractual regime as to ground conditions and that regarding permits/planning conditions. Had it been the case that the risk of ground conditions lay with Bester these two matters would, as PBS submitted, necessarily march together. On the basis I have determined that PBS was responsible for the risk of ground conditions there then arises an issue as to how that affected the responsibility for obtaining permits, where the contract denoted that Bester were to be responsible, for example, for obtaining the discharge of the relevant planning conditions.

206. However, that obligation necessarily had an interplay with matters for which PBS was responsible – such as dealing with site conditions (and hence asbestos). Here I accept the submission that Clause 1.13 of the Contract must be relevant. That required PBS to co-operate and provide assistance. Given that it was PBS's responsibility to deal with the ground conditions, Bester could not discharge the planning condition without a remediation strategy, which it was for PBS to provide. It would be PBS who would need under Clause 1.13 to

provide information to Bester to enable the planning conditions to be discharged. The question is whether that obligation was fulfilled such that PBS could seek an extension of time when the planning conditions were not discharged.

207. In my judgment the chronology illustrates that this argument was not open to PBS, who did not co-operate to enable the speedy discharge of the condition. The chronology for this item proceeds as follows.

208. On 26 May 2016 Green Plan Energy informed Bester that its consultants would need to take a more active role in the preparation of documents for the discharge of the planning conditions.

209. On 2 June 2016 Mr Šipoš arrived. PBS had no prior site presence. Jiri Valián (PBS's Technical Manager) asked Bester for help with British Standards.

210. On 7 June 2016, Bester informed PBS that Bester required PBS to provide Bester with all the required design input and information for permit applications. That does not appear to have been disputed.

211. On a number of occasions, for example on 19 and 29 July 2016 , and 3 and 4 August 2016, Bester then made requests for material needed to satisfy the authorities and obtain discharge of the planning conditions and issue of the Environmental Permit. It did not seem to be in issue that PBS failed to satisfy these requests, although PBS pointed out that the Environmental Permit at least was not one which was of significance in terms of satisfying the pre-construction conditions.

212. The pre-commencement conditions, other than Condition 12, were ultimately discharged on 20 October 2016.

213. PBS also failed to promptly provide a method statement for dealing with contamination (principally asbestos) so that Bester could apply to discharge planning Condition 12. The Zeras method statement was not obtained until 15 August 2016 and did not constitute a remediation strategy. After this PBS seems to have done nothing further for some time to try to ensure that the materials were in place to send to the local authority. The condition was discharged only after the TerraConsult report was procured by D Morgan Limited on 20 October 2016.

214. It is against this background that on 16 September 2016 PBS made its claim. It said: "*Pursuant to Schedule 8 (Programme) to the Contract, you should have handed over the Permits to us on 2 June 2016 at the latest*". It denied that there had been any requests for documents prior to the contractual deadline, asserted any later requests "*were not sufficiently specified*" and attributed "*any delay*" "*solely*" to Bester. It alleged a 3 month delay in "*handing over the*

Permits", the latter term being defined as "*the permissions of the relevant authorities*".

215. This claim was determined by Bester on 29 September 2016. Bester's position was that PBS had failed to provide documents requested and required for discharge of planning conditions. The letter was short, but referred to and attached previous correspondence from 19 July 2016, 3 August 2016, 4 August 2016 setting out Bester's position.

216. So far as this allegation is concerned, on the evidence plainly there was a determination by Bester; the letter was a determination and gave sufficient reasons by reference to the other documents. Those reasons were not grappled with in evidence by PBS, and appear to be sound. It follows that there was no repudiatory breach or substantial failure by Bester to perform in relation to this item.

217. Equally plainly this request for a 3 month extension was without merit in circumstances where Bester was dependent on PBS to provide information which PBS was on the documents failing to provide. As noted above there were on the face of the documents delays in providing answers to requests for information prior to the discharge of the non-asbestos conditions. There was little exploration of this point with the witnesses. As regards asbestos, it was not until 20 October 2016 that a satisfactory remediation strategy which enabled discharge of the planning condition from TerraConsult was provided.

218. Nor could this extension be justified, or its rejection criticised, in circumstances where, as at 2 August 2016, PBS had stated that the failure to provide permits had not yet had a material impact and where the experts agreed that until 18 July 2016 the procurement of off-site equipment was critical to the completion of the works. Thus, as at the date when the 3 month extension was sought in mid-September, there logically could not have been such a delay caused by the permits issue. This point also deals with PBS's specific complaint in the Extension of Time request, revived *passim* during the trial, that requests for further information relating to the permits were late.

219. So far as concerns delay up until 31 October 2016, to the extent that it is relevant (given (i) my earlier determination on the question of responsibility for ground conditions and permits and (ii) the fact that a lesser extension than 3 months was not sought) I accept the evidence of Mr Loyaza, which echoed the experts' joint statement, that the critical path ran through off-site equipment until at least 31 October 2016 (the joint report suggested it was driven by off-site construction/manufacturing issues until January 2017).

220. While it is fair to say that Mr Loyaza's evidence was based on what appeared to be an extremely complex approach and that it involved the instinctively uncomfortable acceptance that a visible delay in the

progress of the on-site works is irrelevant, even though (i) the moment that the critical path moves from off-site to on-site there must be an effect and (ii) the extent of that effect relates to the extent of the earlier (*ex hypothesi* earlier irrelevant) delay, in the end his evidence appeared to be more robust.

221. In particular his methodology was plainly an acceptable and appropriate methodology which was transparent. Mr Croxson's approach was based in part on documents whose genesis was obscure (for example as to a 15 day float for permits which was not in the Contract and as to the native format of his workings which were not available to be interrogated) and on the work of another expert who had neither signed the report or been put before the Court to be questioned. He was himself unable to answer questions on that other expert's input.

222. Further the issue between the parties as to Mr Loyaza's evidence went more to the question of cause of Equitix's termination than this central issue. So far as this issue is concerned, relating to the justifiability of a claim for an extension of time (where the relevant clause, Clause 17.4 is couched in terms of "*if completion is or will be delayed*") it must be right that the matter must be looked at from the perspective of the time in question – it is not permissible to look backwards.

223. This also aligns with the relevant authority. In *Walter Lilly v Mackay* [2012] B.L.R. 503 Akenhead J said at [365]:

> "In the context of this contractual based approach to extension, one cannot therefore do a purely retrospective exercise. What one cannot do is to identify the last of a number of events which delayed completion and then say it was that last event at the end which caused the overall delay to the Works. One needs to consider what critically delayed the Works as they went along."

SPEN

224. This claim concerned alleged variations to the works required by Scottish Power Energy Networks ("SPEN"). These were PBS's responsibility under paragraph 9.1 of Schedule 3 of the Contract.

225. On 5 October 2016 PBS submitted a change order request in relation to alleged variations to the works required by SPEN not included in Schedule 3, Appendix C (grid connection agreement).

226. On 24 November 2016 PBS submitted an unparticularised claim in respect of the change order request of 5 October 2016. No particulars of the claim have ever been given and no quantified claim is now pursued.

227. It was responded to by Bester on 24 November 2016. It was PBS's case that Bester wrongly refused an extension. However, the reasons underpinning that allegation were never made clear. That case was not cross examined upon and was not addressed in PBS's closing – its only appearance was in a strikethrough passage at page 92 of the closing which says "*SPEN – to be dropped*". This was despite the fact that there had been specific confirmation (in response to a request from me to clarify which points were still live, following the evidence) that this was an issue pursued.

228. In oral closing PBS however did not persist with this point.

229. Had it been necessary for me to do so I would have concluded that I did not accept this argument. The alleged variations were within the scope of the SPEN requirements. Further the works were not performed, no costs were incurred, and PBS had abandoned any claim for payment in respect of it.

BT Cable Lines

230. This is a claim which was put skeletally in opening – by reference to the pleaded case and anticipated evidence. However, it was not cross-examined upon and no closing argument was addressed to it.

231. In oral closing it was, like the SPEN claim, abandoned.

232. My conclusion would in any event have been that this claim could not avail PBS. BT cables were identified in the Shepherd Gilmour Report and in the Utilities Search. PBS knew about these lines from mid May 2016. The claim was accordingly time-barred.

233. Further, the BT lines were not Employer's Risks and some at least of the delay involved was down to PBS damaging these cables. It was certainly not proved on the balance of probabilities that any delay resulted from this aspect.

Termination: Milestones

234. The backdrop to this issue is that payment under the Main Contract (Schedule 4) and Contract (Schedule 4) was by Milestones. The Contract Programme (Schedule 8) had the following dates:

    i) Milestone 1: "*Financial Close*" 6 May 2016.

    ii) Milestone 2: "*Steam turbine order placed and evidence of order presented to SPV*" 18 July 2016.

    iii) Milestone 3: "*Completion of Civil Engineering Design Drawings/Calculations Issued and Final layout section and views of the plant*" 27 June 2016.

iv) Milestone 4: "*Site Compound (Site Office/Boundary Fence/Facilities*) *Established*" 3 August 2016.

v) Milestone 5: "*Biomass Boiler Ready to Ship and all testing/manufacturing evidence presented to SPV*" 17 October 2016.

vi) Milestone 6: "*All foundation works (piling and slab) completed*" 16 September 2016.

vii) Milestone 7: "*Biomass Boiler Pressure Parts Delivered to site*" 17 October 2016.

viii) Milestone 8: "*Water Cooled Grate ready to ship and all testing/manufacturing evidence presented to SPV*" 27 September 2016.

ix) Milestone 9: "*Steam Turbine ready to ship and all testing/manufacturing evidence presented to SPV*" 30 January 2017.

x) There were further milestones, not relevant to these proceedings.

235. As always, there was a structure in place surrounding the payment of the milestones. It is common ground that under the Contract (in particular Clause 14.5 and 14.6) entitlement to any given milestone was conditional upon:

i) Submission by PBS of a valid "*Milestone Payment Application*".

ii) Certification as complete of all preceding Milestone Payments.

iii) Completion in fact of the Milestone Payment applied for in accordance with the requirements of the Contract.

iv) If any Milestone Payment included or related to Plant and Materials not yet on Site, such Milestone Payment would not be considered achieved unless:

a) the relevant Plant and Materials have been marked as Bester's property in accordance with Bester's instructions, or

b) PBS has delivered to Bester certificates, orders, receipts and/or other documentary evidence (which could be evidence of insurance of such materials to the extent they were not otherwise insured).

v) The issue by Bester of a "*Milestone Payment Certificate*", failing which, or in any event: submission by PBS of a valid

"Statement" within 14 days after receipt of the Milestone Payment Certificate, or in any event if Bester failed to issue a Milestone Payment Certificate.

236. It is also common ground that Bester paid PBS £4,537,786.00 as follows:

Milestone or claim	**Amount claimed by PBS (excl. VAT)**	**Amount paid by Bester (excl. VAT)**	**Date paid**
1	£2,561,400.00	£2,561,400.00	13 June 2016
2	£640,350.00	£640,350.00	15 August 2016
3	£640,350.00	£640,350.00	2 December 2016
claim (sewer)	£38,636.00	£38,636.00	2 December 2016
claim (asbestos)	£120,173.00	£120,173.00	2 December 2016
4	£640,350.00	£536,873.78	24 March 2017
5		£0.00	N/A
Total paid to PBS by Bester		**£4,537,785.78**	

237. Milestones 1 and 2 were therefore achieved and paid. They are not in issue in these proceedings. There is however an issue as to whether Milestones 3-5 inclusive were achieved, and as to Milestone 5 (which was not paid) if it was achieved, whether the notice served in relation to it was valid so as to trigger an entitlement to payment.

238. However, while Milestones 3 and 4 are technically relied on, the focus is very much on Milestone 5, as Milestones 3 and 4 were in fact paid. Bester says they were paid on a "without prejudice" basis – essentially to smooth the running of the project. PBS says that they were paid because they were acknowledged to be due, but they were paid late (or in the case of Milestone 4 paid short) and thus trigger a right of cancellation.

Milestone 3: achievement

239. Milestone 3 related to civil engineering design. The design comprised two elements: the Basic Design and Detailed Design. In broad terms it was not in issue that designs were required for both (with drawings, calculations and final layouts) which were complete and which complied with the local laws and requirements of the Project, i.e. England and Wales. However, PBS emphasised that design was an evolving process, affected by such matters as the asbestos and drainage issues, and also one which was intrinsically likely to be somewhat iterative – a perfect design would not necessarily be achieved without a degree of discussion.

240. On 1 July 2016 PBS provided what it said was its Basic Design consisting of a single plan drawing: 1613-COGD-201 Rev 0. On 19 July 2016 it emailed updates to the Basic Design as to foundations and site facilities.

241. Arup and Equitix rejected the Basic Design as insufficient. For example, in Arup's comments of 21 July 2016 they indicated that:

    i) PBS's drawings made various errors as to levels. PBS related the design to grade level of 0.00 (i.e. flat), but that "*we know that the site is not flat*".

    ii) PBS's design referred to excavations into the ground "*in (unspecified) places*".

    iii) PBS failed to "*get the correct levels onto the buildings/construction drawings*". The PBS design was not comprehensible and correction was required (as above) "*so that we can understand the relationship between the site and the plant*".

    iv) PBS's drawing 1613 COGD 301 Rev 0 was "*confusing because it does not easily relate to the actual site, nor does it help us to understand how you will construct it all*".

    v) Elements of the design could not be constructed to the constraints of the site and the design, e.g. "*Module 2, Membrane Tube Walls (0 – Kt – 02892 Rev 0) is not of a size that can be transported to site in one piece*".

vi) Drawings supplied by PBS failed to "*comply with the minimum contractual requirements*".

vii) There were instances of "*conflict*" in the design.

viii) There were failures in the drawings to consider "*safe access*" and "*safe maintenance*".

Arup said rather than attempting to list all the deficiencies a meeting would be preferable.

242. On 26 October 2016 Theresa Murray (PBS's principal designer) noted numerous deficiencies, saying "*There still seems to be some confusion about what is required in order to achieve an approved design incorporating the regulations of the UK*".

243. Ms Murray set out a series of steps which would need to be completed before PBS's civils design could be signed off for Milestone 3, and she concluded: "*All these steps above must take place and will ensure that PBS have complied fully with CDM and UK design regulations...*"

244. On 4 November 2016 PBS provided to Bester what it said was its Detailed Design and sought payment of Milestone 3.

245. On 7 November 2016 Arup held a design meeting with PBS and Bester in Sheffield to consider the Detailed Design. Although, in his evidence Mr Báča was reluctant to concede that Arup were critical of PBS's design, it was quite plain that this was the case. In fact, Arup (via Mr Branch – of whose abilities everyone seemed to speak well) rejected it. Mr Branch, who was one of the people at Arup specifically charged with reviewing the design, made a variety of detailed and telling criticisms of the design, including the fact that the design did not appear to have been co-ordinated, so sections did not interlink with each other and there was no consideration of how to construct a number of complex items in close proximity to each other. He noted that apparently "*No thought*" had been given to building regulations, fire escape distances and that even incorrect dimensions for delivery vehicles had been used. Speaking for Equitix he referred to "obvious" deficiencies.

246. It was only in cross-examination and after some considerable pressing that Mr Báča conceded the "Detailed Design" submitted by PBS on 4 November 2016, which PBS relied on at trial as the completed design, in fact contained "*a number of obvious deficiencies*". Ultimately Mr Báča said: "*I acknowledge that*".

247. As a result of the issues with the design submitted Bester issued to PBS a Notice to Correct, which cited PBS's delay in the submission of design documents.

248. On 9 and 10 November 2016 further design meetings were held on site considering such issues as the sewer diversion; retaining wall; stack foundations; dimensions of lorries; turning building regulations (for trucks entering the site); construction sequence; main entrance; waterproof foundations; partitions inside the fuel storage area. At these meetings Arup were still stating that there were deficiencies in the design.

249. On 14 November 2016 there was a without prejudice meeting at which the parties appear to have discussed the possibility for the payment of Milestone 3 in advance on a "without prejudice" basis to move the project forward.

250. On 22 November 2016, PBS again applied for payment of Milestone 3.

251. On 28 November 2016 Mr Romero emailed Messrs Jelínek and Macholán making clear that Bester regarded the design as incomplete: "*… you have to complete your work for Design immediately, to allow us to receive the payment from customer*".

252. Yet PBS appeared not to agree. On 29 November 2016 Mr Jelínek emailed Messrs Romero and Prieto: "*we are waiting for payment before any other action*".

253. Mr Romero's response harked back to the "payment without prejudice" possibility. He said (marking the email "without prejudice"):

> "We´ll pay you in advance the milestone number 3, after receive your letter or email (point before). We could do the payment today. Send us the invoice, not only the Pro-forma invoice. - We´ll take the Civil Work as a remedy to complete the project, as a solution for the Employer in our contract. We´ll use the amount of milestone 4, to contract the civil works. We´ll close the negotiation with some subcontractors to start the works. The final cost will be deducted of your contractual price, in next milestones, as the Contract say. - You will be responsible for the rest of the project, as described in our contract; design, manufacturing, erecting, electrical installation, commissioning,… - Pay you the extra cost accepted by us; Conduits underground (38.600 GBP) and Asbestos removal´s works (120.000 GBP) when the asbestos removal´s works will be finalised."

254. On 2 December 2016 Theresa Murray noted that Equitix had still not approved the Detailed Design and advised PBS to get on with bringing it up to the required standard.

255. On 2 December 2016 Bester paid Milestone 3 to PBS. Bester alleges and against this background I accept that it made an advanced payment of £640,350 without admission of liability and in good faith to obtain progress of Works.

256. On 12 December 2016, Arup continued to raise criticisms of the design. These included a lack of key technical information needed to assess the design, a continued lack of consistency and continuity. Some of the documents were submitted in Czech, with no translation. Arup also noted the unrectified failure to make provision for disabled access and toilets, and fire safety failings. Arup requested when the next version of the design would be provided: Mr Báča replied in the meeting "mid 01/2017". This suggests that he accepted that there was a need for a further iteration. This did not mean that nothing could be done – Arup were content that excavation and foundations could still proceed, but the detailed design remained unacceptable for the purpose of progressing the civils works generally.

257. On 20 December 2016 Toby Heysham for Equitix rejected Bester's application for payment for Milestone 3 as "*incomplete*".

258. On 22 December 2016 following a call between Equitix, Pinnacle, Arup and Bester, Arup confirmed there were still "*major issues*" with PBS's Detailed Design which required resolving by PBS, before Arup could approve it. On 3 January 2017 Equitix, on Arup's advice, still rejected PBS's Detailed Design, Arup's comments listed 11 "*Major*" issues with the Detailed Design including issues such as:

    i) Inadequate design report on ground levelling (only 1 page long);

    ii) The Project Health & Safety Plan referring to out of date CDM Regulations;

    iii) Inadequate fire resistance of the steel structures;

    iv) Several missing and incomplete documents (including documents required to establish whether the fuel hall structure and pipe bridge had been designed to withstand appropriate loads) and other errors.

259. On 18 January 2017 Equitix (and Arup) again rejected PBS's Detailed Design. It did not "*… reach the level that we deem acceptable in order to approve the application for payment of milestone 3*" and Bester "*did not provide suitable evidence for Equitix to satisfy itself that the Milestone had been achieved.*"

260. On 27 January 2017 PBS had "in play" a spreadsheet, listing Arup's still current criticisms. A number of these were highlighted A, to indicate that PBS accepted that criticism as valid.

261. PBS indicated that Arup's evidence was that the civil design was acceptable. However, the evidence of Mr Branch of Arup was not in my judgment to this effect. His evidence was that there were still issues with the detailed design but (i) he did not consider that these issues should have precluded progress being made with such matters as excavations and foundations and (ii) Equitix agreed the payment of Milestone 3 "on a commercial basis".

262. It was shortly after this that on 9 February 2017 the balance of Milestone 3 was paid. As just noted Mr Branch's evidence was that the payment by Equitix was commercial, not because Equitix was satisfied that the Milestone was completed. This was echoed by Mr Romero who was clear that "*we paid in advance after the meeting*" and that the payment was made at a time when there were still big issues with the design.

263. Nothing significant seems to have happened as regards improvement to the design either before or after this payment. Some queries were replied to, but numerous issues remained. On 3 March 2017 Bester's principal designer notified Bester of a foreseeable risk of death from PBS's civils design: "*the structure excavation is presently unsafe and must not be allowed to proceed as it is presently designed- it is foreseeable that it will kill site personnel.*"

264. On 28 April 2017 Mr Stein-Lear emailed Messrs Garcia, Medina, Otero recording his view that PBS could not proceed with the excavations for the boiler pit in circumstances where the Detailed Design was not satisfactory or safe – he described it as potentially "*a life or death issue*". The danger resulting from the design was flagged again on 8 May 2017.

265. Even in May 2017 the design remained contentious. Mr Báča attended a meeting on site on 27 May 2017, shortly after PBS's letter of intention to terminate of 24 May 2017. At that meeting the design was discussed. Although the design was noted by this stage as 80% complete Mr Báča conceded that in respect of design, even at that late stage, "*a host of issues remained outstanding in May 2017*". These included major items such as the excavation design for the boiler house which was not consistent with the geotechnical advice and a large number of other items such as continuing gaps in the interface between different parts of the design, the absence of evidence of compliance with EU and UK standards.

266. I conclude that the Detailed Design for the project was never completed, and that PBS were not entitled to payment. This is the strong impression which emerges from the chronological run of

documents. It is reinforced by the witness evidence. In particular Mr Branch, who Mr Báča of PBS said was one of the few people who knew what they were talking about, was extremely critical of the design. He raised issues with the fact that the designs were not co-ordinated and that, perhaps more seriously, they failed to grapple adequately with the complexities involved in the construction exercise, in particular as to how to construct such key items as the sub-structure, the boiler building foundations and the retaining wall. He was also very critical of what appeared to be a complete lack of engagement with building regulations.

267. This latter concern was one which I had an opportunity of evaluating in the course of the witness evidence. Based on the evidence of PBS's witnesses this concern appeared to be extremely well founded; none of the witnesses asked about building regulations and health and safety issues seemed to have given any serious thought to these. Mr Báča, for example, regarded it as "inconceivable" that a disabled person could be employed within the plant itself, as opposed to as office staff.

268. Further even Mr Báča conceded in cross examination as recorded above that the design as submitted had obvious deficiencies. The picture which emerges is a design which was some considerable way off being complete or acceptable for the purposes of progressing the project overall. Therefore, while I entirely accept that the design process would be, as PBS submitted, an iterative process, and that a design could be compliant for the purposes of this Milestone without being in an "as built" degree of finality, I conclude that the design did not progress to the stage where the Detailed Design was completed to the level required to trigger the Milestone.

269. PBS did contend that Milestone 3 was stalled by virtue of Bester's delay in providing information to PBS in order to progress the design. However, this complaint seemed to have no life independent of the Extension of Time issues which I have already addressed.

270. I should add that it was suggested by PBS that this conclusion, that the design was not achieved, could not be reached without expert evidence. I disagree with that assertion. The documents and the evidence of witnesses who were well placed to know was all pointing in the same direction. In any event, it was for PBS to prove completion of the Milestone.

271. The next question is how that conclusion is affected by the payment of this Milestone on 9 February 2017 and the documentation upon which PBS relied, in particular an email of Mr Romero of 14 February 2017 in which he said: "*Payment Certificate of milestone No. 3 and 4. You have completed the requirement of No.3 and No.4*". I do not consider that this affects the position. On the evidence the payment was made on a "without prejudice", or commercial basis. As for this

email, even on the basis of the documents this letter reads as a reference to the exchanges which were then ongoing regarding advance payment. This is supported by the email of 14 February 2017 which says (as Mr Romero said in his evidence): "*Payment of Milestone No.3. We paid in advance*". That impression was confirmed by Mr Romero's evidence that this email referred to: "*The requirements of the issuing but not the achievement of the milestones*".

272. This in turn reflected Mr Branch's witness statement in the Equitix adjudication in which he was clear that Equitix's payment to Bester was one made "*on a commercial basis*".

273. PBS also relied on the letter dated 17 February 2017 in which Mr Sanchez referred to PBS submitting an "acceptable" or "valid" submission and another which says: "*only on 8th February your company has succeeded in submitting an acceptable design.*" However, this *ex post facto* characterisation by Mr Sanchez (not writing in his first language) and against the background above and the situation at the time (trying to move the project forward) cannot change the essentials. The issue is whether the term was complied with at 9 February 2017 or at all so as to enable later Milestones to fall due.

274. I conclude that Milestone 3 was not completed by PBS as at 4 November 2016 or at any time before termination and Milestone 3 was thus never due for payment. It follows that PBS's complaint that Bester failed to make timely payment of Milestone 3 must fail.

Milestone 4 Site achievement

275. Milestone 4 required the boundary fence, and site office, and site facilities to be established by PBS. In the end there was little dispute that this was not achieved on 16 August 2016, when the application for payment was made – or at all. To the extent there was any dispute I have had no difficulty in concluding that PBS failed to complete the work necessary for payment of this milestone.

276. Works to erect the site fence first commenced on 15 July 2016. The fence was not fit for purpose and failed repeatedly. In August it was noted as having been dropped and driven over and simply left – despite warnings that this could result in the site being closed. Similar problems continued – in November 2016 Charlotte Sanderson of Delta Simons described the newt fence as "*not fit for purpose*", noted that this constituted a breach of the newt related licence issued by Natural Resources Wales, which could result in work being stopped on site. Her impression was that the site team "*simply don't care*".

277. As to the site office, PBS resisted providing a site office and facilities for Bester. When one was provided it was not compliant with Bester's

requirements. PBS in closing suggested that a relaxed approach should be taken to this requirement, pointing me to Schedule 3 of the Contract and asserting that a hut for PBS was all that was required. However, that was not the view of PBS's own advisers. On 22 July 2016 PBS's health and safety adviser emailed PBS: "*Yes the [client] is entitled to have cabins on site …they are entitled to [their] own welfare facilities separate to ours.*"

278. But even if one were to take the view that there was no specific requirement for facilities for Bester, there was a general failure to establish facilities, including PBS's own. The site lacked mains utilities, no drinking water, no hot water, one toilet, insufficient car parking, and, initially, no internet, and no external communications. Telephones were required contractually by Clause 8.1 of the Employer's Requirements Schedule 3 but it was Mr Šipoš' evidence that (despite the presence of BT lines nearby) that was "impossible", such that mobiles had to be used. The contemporaneous evidence suggested that the mobile signal was bad, though Mr Šipoš was reluctant to accept this.

279. In August 2016 PBS had claimed Milestone 4 was complete. Bester responded on 31 August 2016, refusing payment. I conclude that Bester was entitled so to do.

280. It is quite clear to me that nothing material had changed as regards the inadequacy of the site compound by the time that payment of the sum earmarked to that Milestone was again sought in December 2016 and was later made.

281. In practical terms the inadequacy of the facilities at this point is well illustrated by the note from Ms Murray (PBS's principal designer) on 30 November 2016 "*I still have in my possession 200+ drawings which I have marked up with comments sheets… The scanner isn't working, so I am unable to scan the A3 drawing sheets to send with the comment sheets.*"

282. But a number of other examples could be given. There was an email from Mr Šipoš on 30 January 2017 which indicated that the generator on which the site was reliant was unreliable. Or on 6 April 2017 Mr Šipoš conceded frankly to Mr Gutiérrez that the site facilities were not sufficient to hold a team design meeting.

283. As for the suggestion, made in passing, in PBS's closing, that on-site works were stalled "*as a result of Bester's failure to obtain compliance with the relevant planning obligations*", this assertion was never properly explained, and can hardly be relevant to many of these issues. Further it again can have no life independent of the Extension of Time points with which I have already dealt.

284. The background to the payment of the Milestone is similar to that for Milestone 3. Bester's justified rejection was met with repeated demands for payment, though no material change occurred in the site's readiness. At the meeting in November 2016 Bester seems to have indicated a willingness to pay in advance on a without prejudice basis. There was then a discussion over the form of the invoice, and what should accompany it. The question revived in February 2017, when Bester indicated its willingness to pay:

> "As soon as we receive the documents required by us from December in different Communications and Instructions we could receive the confirmation of payment.
>
> • Collaterals with your key-subcontractors as was instructed by Bester.
>
> • Contracts with your key-subcontractors…"

285. The remaining issues in relation to this milestone concern payment. The first was an allegation that a deduction made from the payment for Milestone 4 was wrongful. In the premises (that Milestone 4 was not achieved) this would not succeed, however for clarity the position is as follows. As noted above, following the dispute between the parties over the asbestos Extension of Time and Milestone 3 Bester had taken over the arrangements for getting the grounds cleared and had contracted direct with D Morgan, with the work being carried out between 17 January and 8 February 2016. On 24 February 2017 Bester proposed by email to cancel its contract with Morgan, allow Morgan to continue the Civil works (relating to removal of asbestos in deeper soil levels and ground levelling works) under the Contract between Morgan and PBS. Part of this proposal was that Bester would make payment directly to Morgan for those works from the payment for Milestone 4 and pay the balance of the Milestone 4 payment to PBS. PBS accepted this proposal, though disputing Bester's right to require this approach. In the light of this documentation the allegation made that the deduction of £103,476.22 from the payment made for Milestone 4 was wrongful and in breach of contract, was not sustainable, even had Milestone 4 fallen due. Doubtless sensibly reflecting this reality, this point was not pursued in closing.

286. Bester made payment of £536,873.78 concerning Milestone 4 to PBS (a portion of Milestone 4 having previously been paid to Morgan directly). Bester alleges it made advanced payment without admission and in spite of PBS's failure to comply with Clause 6.6. The balance was received on 27 March 2017. Although Mr Bezrouk suggested this payment was not made until April, the evidence on the documents was clear: the payment was authorised on 21 March, and cleared on 24 March.

287. Ultimately the argument advanced by PBS/VB in relation to this Milestone was a "bootstraps" argument – that because the payment had been made, therefore it must have been due. Against the background set out above, as to commercial payment to move matters forward, this is not a credible argument.

288. The argument on this payment related primarily to the fact that Bester required a "proper invoice". It is said that this type of "formal" invoice was required because Bester considered that Milestone 4 had been complied with. However, the form of the invoice cannot outweigh the evidence of the discussions and agreement between the parties, against the background of the absence of actual compliance with the terms of the contract. This appears to be tacitly acknowledged in Mr Bezrouk's evidence: "*Yes, Bester did require a classical invoice for achieving milestone 3. Nevertheless, with the wording of text in the invoice, which said that it was an advance payment for milestone 3*"

289. The reality is that the payment, against whatever form of invoice it was made, was an advance payment, and says nothing about whether the Milestone was actually achieved.

Milestone 5: relevance and sub-issues

290. It follows that, even before one arrives at the question of Milestone 5 itself, PBS's termination case fails. This is because pursuant to Clause 14.6 of the Contract, completion of Milestones 3 and 4 were pre-requisites for Milestone 5 becoming due.

291. It might be argued that this requirement was waived, but this is not the way the argument before me was put. It might have been argued that by virtue of the course of dealing, including the payment of these instalments in advance on a without prejudice basis, this clause was varied so as to permit Milestone 5 to accrue so long as payment had been made. However, that was not argued, and given the authority of *Rock Advertising v MWB* [2019] A.C. 119, this is perhaps unsurprising.

292. However, for the reasons given below, even if somehow the non-achievement of Milestones 3 and 4 did not stand as a roadblock in the way of PBS's arguments on termination, that termination case would nonetheless fail.

293. The arguments on Milestone 5 fall into three sub issues: achievement, requirements for payment and the statement issue. I will take the first two of these, which interrelate to some degree, together.

Milestone 5: Biomass Boiler achievement and requirements for payment

294. Under the Contract Programme, the Boiler was scheduled to arrive on site on 17 October 2016, with on-site assembly and installation

beginning on 18 October 2016. It was to be the first piece of equipment to be installed on site.

295. As a result of events in Wrexham – and the fact that matters were not progressing as fast as had been hoped there - it became likely that the site would not be ready for the boiler or its parts as soon as they were ready. As a result, the question of preservation came into focus.

296. Early in December 2016, PBS formed the view that the Boiler was ready for shipping. It invited Bester to inspect the Boiler. Bester requested further information including design drawings and test results and arranged to inspect the boiler. This inspection took place on 8 December, with Bester inspecting the testing and manufacturing evidence. Following feedback from that meeting, on 19 December 2016 PBS applied for payment of Milestone 5.

297. PBS asserted that the boiler components "*will be ready to ship tomorrow*". Bester rejected this payment application on 26 December 2016. Bester stated that further documents were required; this was effectively a repetition of requests made by Bester on 3 and 6 December 2016.

298. PBS disagreed that this was required, but on 20 January 2017 it provided documents relating to the boiler drum manufacture and testing.

299. On 27 January 2017 Bester asked PBS for documents for all remaining boiler components (not just the boiler drum). Bester also recorded its plan to visit PBS's facilities in Brno to inspect the equipment in the week commencing 6 February 2017 (this was later moved to the week commencing 6 March), and had invited Arup.

300. On 31 January 2017 PBS provided some further documents relating to the boiler house, though noting that some were missing owing to a scanner failure.

301. On 5 February 2017 Arup requested plans for preservation and storage, and in particular "*procedures for the treatment and storage of components once the tests are completed including allowances for climatic conditions and any maintenance work during storage.*"

302. On 9 February 2017 PBS responded, but without the documents requested, in particular without the preservation statements requested by Arup. PBS claimed that documentation had already been handed over and said that it would not respond other than to "*specific questions/comments to specific documents.*" It recommended a further factory visit.

303. On 16 February 2017 Bester stipulated that the boiler equipment manufacturing documents would need to be available on request and that "*… Arup want to check the solution proposed for keeping the*

equipment in proper condition before sending to site, we need details on this …", i.e. concerning preservation, maintenance and storage of the equipment.

304. On 17 February 2017 PBS insisted on an earlier visit. But Arup would not visit earlier than the week of 6 March 2017. The Arup inspections therefore went ahead on 8-10 March 2017.

305. On 8 March 2017 Mr Otero and Mr Branch for Arup inspected the LKH equipment (economisers 1-6, and superheater) at the factory where they had been constructed. There seems to have been no issue with the readiness of the parts but Arup again required details of the long-term preservation and storage plan for the equipment.

306. On 9 March 2017 Mr Otero and Arup inspected the PBS Industry elements (boiler drum), and BPP Energy equipment (evaporator, membrane walls (modules 1-4) and superheater (Pt1a, 2, 3)). Again, there was no issue with readiness for transport to the Site, but Arup required details of the long-term preservation and storage plan for the equipment. The minutes of the meeting indicate that PBS said that they would supply this within four weeks (i.e. by early April).

307. On 10 March 2017 PBS stated that these boiler parts were ready for transport to the Site and claimed payment for Milestone 5 payment. Bester refused to pay; and this refusal is probably the key fact relied upon to support termination.

308. There are four elements relied on by Bester as demonstrating that the Milestone was not due:

    i) Preservation: the minutes recorded the absence of "*long term preservation method statement*" for the equipment; these are said to be documents required for Clause 14.5(ii).

    ii) Marking: There was no evidence that the equipment was marked as the Bester's property as required under Clause 14.5(i).

    iii) Right to ship: Bester says that much of the boiler equipment had not been paid for by PBS, did not belong to PBS, and was not in PBS's possession and therefore it was not ready to ship.

309. On 13 March 2017 Arup rejected PBS's suggestions of compliant and comprehensive documentation.

310. Arup re-iterated the absence (and importance) of preservation and storage documentation:

> "… one of the most important issues to Equitix will be the preservation and storage of the manufactured equipment so that it remains in

> specification, warranty, and service life once it is installed. PBS Energo are preparing detailed method statements, procedures, location details, and associated commercial costs for this within the next 4 weeks, and will in addition prepare a list of the procedures/treatments applied to date, with confirmation of the date they were applied and durations, so that we can monitor treatments over the coming weeks/months …"

311. Meanwhile the wider correspondence, for example PBS's emails of 14 March 2017 made clear that PBS considered that it had real financial difficulty, and sought a change in milestone order to facilitate cash flow as it was being chased both by its parent company and its bankers.

312. On 20 March 2017 on account of PBS's financial difficulty, Bester approached Pinnacle Power, on behalf of Equitix, for payment of Milestone 5. Bester then told PBS on 21 March 2017 that it would pay Milestone 5 as soon as it received funding from Equitix. It was suggested in PBS's closing that this was "*clearly an acknowledgement that Milestone 5 had been achieved and was owing to PBS, and the refusal to pay "when/if paid" was unlawful and a breach of contract*". This argument was plainly unsustainable. The letter reads as an attempt to accommodate PBS's financial issues, in line with the "without prejudice" approach which had been taken to the earlier milestones.

313. On 27 March 2017 Pinnacle Power wrote to Bester, attaching a letter from Equitix in response to Bester's request. This stated that Bester (and thus PBS) had not achieved Milestone 5, due to its failure to provide Equitix with the evidence and documents required under Clause 14.5.

314. It referred to the need for: "*2. An acknowledgement from the manufacturer of the boiler that title has passed to the Employer. 3. A photographic inventory showing that each part of the boiler has been adequately marked as the Employer's property.*" refused to issue a Milestone Payment Certificate for Milestone 5 to Bester until "*the biomass boiler to be marked as the Employer's property in accordance with the Employer's instructions, together with relevant certificates, orders, receipts and other documentary evidence which could be evidence of insurance of the boiler."*

315. The letter re-iterated also the need for documentation of shipping and storage prior to installation on site.

316. On 29 March 2017 Bester passed these comments on to PBS. PBS says that this was "*contradicting all of its previous dealings with PBS*".

317. On 30 March 2017 Bester forwarded to PBS Equitix's letter of 27 March 2017 and requested the documents and evidence requested under Clause 14.5. PBS objected to this and the parties discussed the possibility of arranging for title in the items to pass directly to Equitix.

318. On 5 April 2017 Bester asked when it could expect to receive from PBS the full long-term preservation method statement for the boiler drum, boiler evaporator and membrane walls.

319. On 11 April 2017 Bester raised "*points to be solved before...payment...Waiting to solve these points as soon as possible, because we are waiting for payment also*". In response PBS stated that PBS had "*received description of preservation as agreed during equipment verification (please see the minutes of meeting)*".

320. On 12 April 2017 Mr Romero emailed Mr Jelínek requesting payment order and receipts, confirmation that the boiler is insured, "*an acknowledgement from the manufacturer of the boiler that title has passed to the Employer*" and "*A photographic inventory showing that each part of the boiler has been adequately marked as the Employer's property. You should put the identifications and I ask to put Equitix, because according to the point before, Bester will give to Equitix the property*".

321. On 18 April BPP refused to provide PBS with vesting certificates or evidence of title because 60% of the contract price remained unpaid by PBS Brno.

322. On 20 April 2017 Bester chased PBS for confirmation of the points raised in its letter of 29 March 2017.

323. On 21 April 2017 PBS sent some photos to Bester of some of the boiler equipment showing the property marked as Bester's; the photographs seemed to relate to the pressure part modules (i.e. BPP membrane walls), manholes in the membrane walls, the boiler drum, boiler steel supports and economisers. PBS did not send storage, preservation and maintenance method statements, nor acknowledgment from the sub-suppliers that title had passed.

324. On the same day PBS closed the site for safety reasons.

325. On 24 April 2017 Mr Romero emailed Mr Jelínek maintaining "*you have not completed the instruction that we sent, in relation to Milestone 5*". On the same day Mr Koníček replied, noting that Clause 14.5 gave PBS and Bester two options: either to mark the Plant and Materials as the Employer's property, or to provide certificates, orders, receipts and/or other documentary evidence. Mr Koníček told Bester that as Bester had chosen the former, they could not now require PBS to also do the latter and so "*there are no reasons to obstruct payment No.5, so we again kindly ask you for payment no.5*".

326. On 3 May 2017 Mr Jelínek provided to Mr Otero a draft statement concerning title to boiler equipment, upon which Mr Otero commented.

327. On 3 May 2017 PBS sent Bester an insurance certificate, the scope of which is "CAR/EAR incl. TPL". i.e. Contractor's All Risks/Employer's All Risks, including Third Party Liability. It was not insurance for the equipment off-site.

328. On 4 May 2017 Messrs Koníček, Bezrouk and Jelínek of PBS discussed the insurance position, concluding that there was no insurance in place for offsite boiler equipment.

329. On 8 May 2017 Mr Otero sent Mr Jelínek a letter with draft wording concerning ownership and transfer of title of boiler equipment. Mr Otero then sent Equitix approved drafts to PBS on 23 May 2017, asking for them to be filled in, signed and returned. He then chased on 26 May 2017. Mr Jelínek responded on 26 May 2017 asserting that payment of Milestone 5 was "*in delay*" and that PBS was checking whether the wording conformed to PBS's contractual obligations "if any" (PBS's Notice of Termination by now having been sent - on 24 May).

Milestone 5 achievement and requirements: discussion

330. The first issue here is whether Milestone 5 was achieved. The second is whether the requirements for calling for payment were complied with.

331. One key question in relation to achievement of the milestone is the question of definition: unhelpfully "*Biomass Boiler*" is not defined in the Contract.

332. As PBS pointed out in closing, in order to function within an operational biomass plant, a boiler requires many constituent and supportive elements (e.g. buckstays and economisers). Depending on one's perspective, these elements may be considered part of the boiler, or they may be considered separate elements which support the boiler's functioning. Likewise, the boiler itself is a constitutive element of an entire functioning biomass plant.

333. PBS submits that the answer is in broad terms that the parties themselves agreed the meaning. It points to the fact that on 23 January 2017, in the context of discussions surrounding Milestone 5, Mr Gutiérrez wrote to Mr Koníček requesting clarification as to "*what parts constitute 'the biomass boiler'*". PBS replied on 24 January 2017: "*The boiler consists of the following main parts: Steel structure under boiler, Buckstays, Boiler Drum, Modules (1-4) of boiler, ceiling of boiler, ECO 1-6, Grate*".

334. There are three problems with this tempting approach. The first is that it flies in the face of normal principles of contractual construction. The second is that on any analysis it cannot be what the parties meant when this term was included in the Contract, because the Grate appears to be a reference to the "*water cooled grate*" which was part of Milestone 8. The third is that in other ways it appears to have been incomplete in that Mr Koníček's reply excluded important key components of the boiler, e.g. flue gas equipment, SNCR equipment. It was also rejected by Arup, who gave their definition on 5 February 2017 **"***Steam Drum, Boiler Modules/Pressure Parts, Economiser/Superheater and DCS Rotograte, and boiler steel structure and boiler bondage*".

335. PBS then suggest that the definition should be taken to be a reference only to those items inspected in December 2016 and again on 8 and 9 March 2017. PBS relies on two facts here:

    i) The fact that on 10 March 2017 when Mr Jelínek emailed Mr Romero and Mr Macias the minutes from 8 and 9 March noting the aforementioned boiler parts were ready for transport to the Site, he also attached a further application for payment of Milestone 5, which provided that the minutes were evidence that "*the conditions of milestone No. 5, as stated in the contract, are fulfilled.*"

    ii) The fact that no objection was made to the suggestion that the conditions of Milestone 5 had been fulfilled by anyone from Bester at that time. Instead, on 20 March 2017, Mr Otero informed Equitix "*that EPC Contractor have fulfilled all the requirements necessary to achieve Milestone Payment No. 5 "Biomass Boiler Ready" to Ship and all testing/manufacturing evidence presented to SPV*". On 21 March 2017 Mr Romero emailed Mr Jelínek "*For milestone 5, we are waiting the payment from SPV. As soon as we receive we'll inform you and coordinate payment for you, of milestone 5.*"

336. As Ms Gough summarises the point: "*if you have engineers looking at equipment, saying, "This equipment is completed", what more evidence should you need?"*

337. As matters have transpired I do not consider that I need to decide this issue as such, because that is an issue which only goes to the first stage of whether all the elements of the boiler were ready, and even if all were ready there would have to be other requirements complied with.

338. The next issue is whether on the true construction of Clause 14.5 of the Contract, the conditions for the Milestone were satisfied, in particular whether Bester was entitled to insist on evidence that

either the Boiler had been marked as its property, or that the Boiler was insured. The relevant clause states:

> "If any Milestone Payments includes or relates to Plant and Materials which are not yet on the Site, such Milestone Payment shall not be considered to have been achieved, unless (i) the relevant Plant and Materials have been marked as the Employer's property in accordance with the Employer's instructions; or (ii) the Contractor has delivered, to the Employer, certificates, orders, receipts and/or other documentary evidence (which could be evidence of insurance of such materials to the extent not otherwise insured under this Contract)."

339. PBS contends that Bester had no contractual entitlement to withhold Milestone 5 pending an acknowledgment of any sort from the Boiler's manufacturer, nor to request that title in the Boiler passed to Equitix. PBS contended that there was no right to further documentation, given: (i) sufficient documentation had been provided under Clause 14.5 by, at least 8 or 9 March 2017, as agreed between the parties on that date, and (ii) that, on 21 March 2017, Bester confirmed that it would pay Milestone 5 (without further reservation) as soon as it was paid by Equitix.

340. The question of marking certainly segued into the question of ownership, with Bester contending that ownership by PBS or Bester was requisite, and with PBS's witnesses being cross-examined on the basis that "*PBS represented that PBS could legitimately mark the modules as Bester's property, in circumstances where those modules still belonged to BPP*".

341. PBS argues that I should reject the proposition that the Contract ever envisaged Clause 14.5 to operate such that title to the Boiler could vest in Bester prior to shipment and payment. In this connection it relies on a number of authorities to the effect that absent express vesting clauses, vesting of title will only occur upon the incorporation or affixation of the equipment to the site and its fixtures (see e.g. *Seath & Co v Moore* (1887) 11 App Cas 350, 381).

342. The leading authority on vesting clauses is *Clark (Administrator of Cosslett (Contractors) Ltd) v Mid Glamorgan CC* [1998] Ch 495. The clause in *Clark* provided "*all plant, goods and material owned by the contractor were, when on site, deemed to be the property of the council*". The Court of Appeal held that this was insufficient to vest property in the council. At page 506 of the judgment Millett LJ held:

> "(1) Does clause 53(2) transfer legal property in the plant to the council?

> This depends on the terms of the contract and is a pure question of construction: see In *Re Fox; Ex parte Oundle and Thrapston Rural District Council v. the Trustee* [1948] Ch. 407, 419. The authorities show that it may turn on fine distinctions. Where the contract provides that plant and materials brought onto the site "shall be and become" the property of the employer the words are given literal effect and the contract is treated as passing legal title to the employer: *Reeves v. Barlow*, 12 Q.B.D. 436, 442; *Bennett & White (Calgary) Ltd. v. Municipal District of Sugar City No. 5* [1951] A.C. 786. Where, however, as in the present case the contract provides only that the plant and materials "shall be deemed" or "shall be considered" to be the property of the employer, the words are regarded as ambiguous. In such a case other provisions of the contract may be taken into account in order to decide whether the contract has the effect of passing the legal property in the plant and materials to the employer or whether, as the *prima facie* meaning of the words suggests, it does not have this effect but merely entitles the employer to act as if the property in the plant and materials had passed to him."

343. *Clark* was considered and applied in *Alstom Power Limited v Somi Impianti* [2012] EWHC 2644 (TCC) which concerned one clause which used the language of "become" the property of the contractor, and another clause of it being "*deemed to be*" the property of the contractor. At paragraph 19 Akenhead J analysed both clauses and concluded that only the former clause would transfer ownership.

344. In light of those authorities, PBS submits that it is clear that Clause 7.7 vests title in Bester when equipment is delivered on site, because at that point it "*shall become*" the property of the Employer. Consistently with this: "*The risk of any loss or damage to the Plant, whether on or off Site, shall remain with the Contractor until the issue of the Taking-Over Certificate.*"

345. PBS notes that by contrast, Clause 14.5 provides only for the property to be "*marked as the Employer's property*" and argues that this reflects a decision on the part of the drafters which does not envisage the vesting of title. It is submitted that a requirement of marking the property as the Employer's is not sufficient to make such a radical change to the contractual structure.

346. Reference was also made to the case of *Bennett (Construction) Limited v CIMC* [2019] EWCA Civ 1515 [2019] B.L.R. 587. In that case the requirement was for payment on sign-off of units, and the Court

of Appeal held that the condition was met when the units objectively viewed were capable of being signed off, not when they were actually signed off by the employer. Ms Gough argued that this reflected a common-sense approach to the interpretation of the payment obligation, which I should also adopt here.

347. This was one area where Bester did not join issue very forcefully with the argument ranged against it. While it was asserted that the boiler was not ready to ship *inter alia* because PBS did not have title to the components and equipment and had not paid many of its sub-suppliers, and thus *"had no possession, no right to possession, no right to deliver or to require delivery, and no title to give"*, the question as to whether the clause actually required the passing of title was not strongly argued.

348. On this issue it appears to me that PBS are correct and that the distinction which Mr Jelínek made in evidence between readiness to ship and passing of title is a valid one. PBS is certainly correct that it is by no means a given as a matter of law that such a milestone cannot be triggered without passing of property. It is commonplace for goods to be shipped before property has passed. The conditions for the triggering of the obligation to pay the milestone are a matter for agreement between the parties.

349. Here the Contract says nothing in Clause 14.5 about passing of property to Bester or to Equitix. It gives two alternatives: marking of the property or delivery of documentation. That clause does not, as it so easily could, specify that the Milestone would be triggered by passing of property. It is true that the former part of the clause is more likely to be achieved if property has passed, but it is not (as the events of this case demonstrate) necessary. (In this regard it appears that some of the items which were in the end marked, were not the property of PBS).

350. As to the latter part of the clause, this seems most apt to cover documentation demonstrating readiness to ship – which might include shipping documentation or insurance to cover the voyage. Further Bester's approach would leave a conflict between Clause 14.5 and the regime under Clause 7, which seems unlikely to have been intended by the parties.

351. So thus far I can travel with PBS - but however no further than this. PBS may not have had to get ownership transferred before the Milestone was triggered, but it had to fulfil one or other part of the clause. As matters played out, in my judgment PBS did a bit of both, but did not properly fulfil the requirements of either.

352. So far as marking was concerned, not all of the elements of the boiler were marked as Bester's property. In particular there was no evidence that the steel structure or the buckstays (which on PBS's own

contemporaneous approach - and indeed their case in closing - were part of the boiler) were marked as Bester's property anywhere. Mr Jelínek accepted that there were no photos of them being so marked and suggested that the third party supplier might not have agreed to marking the steel as someone else's property – which seems entirely credible.

353. Although it was suggested in closing that some of the items listed by PBS should not be regarded as being part of the boiler (such as the grate, which was covered by Milestone 8) items such as the steel structure and buckstays would not seem to have been covered by any other milestone, and would therefore seem to be properly regarded as part of the Boiler and hence of Milestone 5. This is consistent with a business-like construction of the provision, as it is hard to see how the boiler could be constructed without them. Indeed elsewhere (as noted above) PBS positively averred that they were part of the Boiler contending that the 23 January 2017 list was an agreement as to the proper definition of "boiler" for the purposes of Milestone 5 during the life of the Contract. Equitix too saw the steel structure as part of the boiler.

354. Nor can the tentative agreement as to payment assist. While it is true that Bester did attempt to obtain payment from Equitix on a "back to back" basis with the PBS submission, this appears to have been a commercial approach, and I do not regard it as being helpful in determining which items had to be marked for the purposes of Milestone 5. I conclude that the steel structure and buckstays were properly to be regarded as part of the Boiler and that they were not properly marked.

355. An issue was raised about the pressure parts. BPP initially refused to mark these because they had not been paid; and while the parts were marked in due course, that marking was done in circumstances where BPP were not paid until long after the termination of the Contract (in July 2018). Bester argued that this marking was therefore a sham because under Clause 5.7 of BPP's contract BPP retained title in the goods until paid. Again, this is an issue which I need not decide, but would seem to stand or fall with the argument as to passing of property. The question is whether or not they were marked, not whether or not the marking reflected the actuality.

356. But the point is that not all of the parts were marked. Accordingly, since not all of the parts were marked, PBS would have to fulfil the latter part of the clause, namely to provide evidence of certificates, orders, receipts or insurance demonstrating that the relevant items were ready to ship. This it did not do – nor indeed did it attempt to bring itself within the clause on this basis.

357. Insofar as lack of insurance is relied on, PBS simply submits that liability to insure plant and equipment destined for the works located

within the EU was on Bester under Clause 18.1 and Schedule 5 of the Contract. However, that is not to the point. Insurance is here given as an alternative to marking – as a way of satisfying Bester that the parts can be relied on to arrive on site when needed. Insurance (by PBS) is effectively an alternative to persuading the sub-contractors to mark the goods. If the reference here were to the insurance under Clause 18.1 it would render the clause essentially meaningless.

358. Nor was the requisite certification provided – despite repeated requests. The documentation provided by 8-9 March 2017 was not what was required by Clause 14.5. Nothing which did comply was provided thereafter.

359. If, contrary to my conclusion above, the necessary parts of the Boiler were marked, PBS would still not have been entitled to Milestone 5 because it would be reliant on the marking which was only evidenced on 21 April 2017, and PBS did not issue any Milestone Payment Application and/or a Statement after that date. For this reason and also because time for payment (42 days) after accrual had not expired by the date of PBS's purported termination on 24 May 2017, it would not have been entitled to terminate the Contract when it purported to do so.

360. This is itself enough to dispose of PBS's purported termination on the basis of Milestone 5. However even were I wrong about these points I also conclude that PBS would not have been entitled to terminate on this basis for other reasons.

Milestone 5 – the Statement Issue

361. A further issue which does not in the circumstances arise relates to the fact that PBS did not issue a Statement pursuant to Clause 14.3. It is dealt with briefly below solely for completeness.

362. Bester submits that in the absence of a Statement there was therefore no Due Date and no Final Date for Payment as defined in the Contract, and thus even if Milestone 5 had been capable of accruing on the facts, there would be no breach of contract by Bester.

363. PBS and VB contended that this is an entirely artificial approach, given that the payment process in Clause 14.6 of the Contract was never followed and no Milestone Payment Certificate were ever issued by Bester. Instead Bester paid against invoices from PBS. In those circumstances they say Bester "*cannot therefore rely on the application of Clause 14.6 when its conduct is the reason that PBS was prevented from complying strictly with its terms.*"

364. While the position adopted by PBS has a surface attraction, in the end it goes nowhere. The point is only live here, in relation to Milestone 5, because the other Milestones were in the end paid.

365. But in order to progress, this argument would require that instead of a Statement, PBS issued an invoice. Yet in relation to Milestone 5 there was no invoice. PBS initially relied on having invoiced the Milestone. However, it became clear in cross-examination of Mr Bezrouk that Milestone 5 was never invoiced by PBS.

366. The letter which was sent on 10 March, on which PBS relied appended no invoice, simply minutes of a meeting. What it says is: "…*PBS notify that we have achieved Milestone No 5 … We enclose MoM, signed by Bester and SPV/ARUP representatives during the inspection visit, confirming that the conditions of milestone No 5, as stated in the Contract are fulfilled. Therefore, we kindly ask for issuing Milestone payment certificate …*".

367. As such PBS's arguments as to an "invoicing procedure" based on an agreed form and content of invoices, simply falls to the ground.

368. In the end in reality the case on this milestone became dependent on that letter and the attached minutes satisfying the requirements of Clause 14. However, this point was never actually addressed; it was not explained how such a variation was said to come about. And in the light of Clause 21.1 which states: "*No amendment or variation of this Contract shall be effective unless in writing and signed by or on behalf of the Parties to this Contract*" a written variation would have been required as *Rock Advertising v MWB* [2019] A.C. 119 now makes clear. No such written variation was contended for. While it is true that *Rock* is a case which arose against a somewhat unattractive background, there is no escaping the fact that the Supreme Court considered the principles extensively and set out a rule of general application – except where waiver or estoppel came into the equation.

369. Although in closing there was a suggestion that this authority could be eluded because it does not apply where there is a case of waiver or estoppel and while PBS have pleaded both waiver and estoppel, neither argument was made good. Waiver and estoppel are doctrines which are hedged about by strict legal requirements. PBS did not address these. I would add that while the basis for a waiver or estoppel might be imagined in the original scenario of an invoice having been presented (as had been previously done), that argument is not so apparent when the scenario in question is (i) unique and (ii) there is no case of a representation or agreement. In those circumstances there is nothing to stand in the way of the *Rock* principle applying.

370. Again, for this reason too, the case on Milestone 5 would fail.

Effective termination

371. I therefore accept the submission advanced by Bester that the question of the effectiveness of PBS's termination is academic.

However, for completeness I will consider whether, if the building blocks for a termination had been in place, the actions of PBS would have been effective to bring about that termination.

372. I should add that the parties both addressed at some length the question of what was the motivating reason for the decision to terminate. Bester argued that it was the receipt of quotes for the civils works on 23 May 2017, which persuaded PBS that the Contract made no financial sense for it. PBS argued that the motive or reason was PBS's concern that it was tied to an insolvent contracting partner. PBS in turn argued that Bester's cross examination of Mr Jelínek on this issue was based on erroneous reading of the documents.

373. I do not regard this question as being of any moment. What might have mattered, had I come to a different conclusion about the building blocks for termination, is the question I have identified above. The subjective reason for invoking the clause is in legal terms an irrelevancy.

374. The starting point for the question of the effectiveness of the purported termination (had there been a relevant breach by Bester) is that PBS's letter dated 24 May 2017 gave 14 days' notice of PBS's intention to terminate the Contract under Clause 16.2(a) and 16.2(b) of the Contract.

375. Clause 16.2(a) gives the Contractor a right to terminate the Contract if: "[PBS] *does not receive an amount due within 42 days after the expiry of the time stated in Clause 14.7 (Timing of Milestone Payments) within which payment is to be* [made] *except for deduction in accordance with Clause 2.4 (Employer's Claims)*".

376. This deceptively simple statement overlays a fairly complex contractual scheme. Thus:

    i) Clause 14.7 in turn requires the employer, by the "due date" of any statement, to specify how much it intends to pay and then requires payment to be made no later than the Final Date for Payment;

    ii) Clause 14.3 defines the "due date" for each statement:

> "The amount shown as due in a statement (other than the Final Works Statement) shall be due for payment ten (10) days after the date of issue of such Statement in accordance with this Clause 14.3 (Application for Milestone Payments) (the "Due Date") and the final date for payment shall be ten (10) days thereafter (the "Final Date for Payment")."

iii) The "Final Date for Payment" is then defined in Clause 1.1 by reference to Clause 14.6.

377. Thus, under Clause 16.2(a) the right to give notice of intention to terminate can only be given at the expiry of the period of 42 days from the Final Date for Payment. In order for there to be a Final Due Date there needs to have been a Due Date. For that date to materialise, there needs to have been either a valid Statement under Clause 14.3 or a valid Employer's Notice under Clause 14.7(a).

378. The point which Bester made, and which was not substantially disputed, was that although PBS's letter on its face invoked Clause 16.2(a) that clause cannot have been engaged. What is relied on by PBS is a failure to issue a Payment Certificate. But this has nothing to do with the running of time under this part of the clause. The letter does not explain how the clause is triggered. It does not mention a Statement under Clause 14.3, an Employer's Notice or the expiry of 42 days from the Final Date for Payment.

379. The focus of the argument as to effective termination was therefore on Clause 16.2(b).

380. Clause 16.2 (b) entitles the contractor to terminate if "*the Employer substantially fails to perform his obligations under the Contract*". This led into a dispute about whether "*substantial*" refers to a breach which is capable of being repudiatory.

381. Bester submitted that the adverb "*substantially*" together with the reference to "*his obligations*", rather than "*any obligation*", are intended to confine the application of the clause to breaches which the common law would regard as repudiatory.

382. VB took the lead in responding to this argument. It submitted that "*substantial breach*" cannot mean repudiatory breach. It also contended that "*substantial*" is equivalent to "*material*" in this case.

383. So far as the distinction between material and repudiatory is concerned, I would, if it had become relevant have found this point for VB. If the parties had wanted to provide for termination only for repudiatory breaches under this sub-clause, that would be a little odd, given the clause retaining common law remedies, but they could have done so. However, if they had done so one would expect to see more apt language used for this purpose. The word "*substantial*" is not a word which would naturally be used where the employer's failure is such that it has demonstrated that it has no intention of performing its obligations under the Contract.

384. This conclusion is consistent with this Court's approach in *Dalkia Utilities Services PLC v Celtech International Ltd* [2006] EWHC 63 (Comm) where the argument that "*material breach*" could be the

same as "*repudiatory breach*" was not only dealt with by agreement, but was quickly rejected by the Court.

385. That does not however mean that late payment will necessarily trigger the clause. As Bester pointed out, termination is a serious step and the parties should not be taken to have intended it lightly. Further the fact that the Contract provides express rights to interest, and to suspend working or reduce working rates as a response to late payment suggest a late payment, which does not trigger Clause 16.2(a) should not generally be taken to fall within Clause 16.2(b).

386. Whether the word "*substantial*" is to be equated with "*material*" was the next point of contention. VB submitted that it was, relying on the authority of *Fitzroy House (No. 1) Ltd v Financial Time Ltd* [2006] EWCA Civ 329 which dealt with a termination clause in the context of a 16 year commercial lease which allowed for termination in circumstances where the tenant had not "*materially complied with all its obligations under this lease*". In relation to interpreting that clause of the lease the Court of Appeal held that:

> "Nor is it, in my view, of any assistance to consider whether the word "*material*" permits more or different breaches than the commonly used alternatives "*substantial*" or "*reasonable*". The words "*substantial*" and "*material*" depending on the context, are interchangeable. The word "*reasonable*" connotes a different test".

387. Based on this, VB submitted that the same approach should be taken to interpretation of this contract, which it submitted was not very dissimilar to the lease in *Fitzroy*. I am not persuaded of the similarity. The context there was a break clause and repairing obligations under a lease. Here one is looking at the very different question of whether an employer has failed substantially to perform its obligations under the contract – a much wider focus, and the words are unlikely to mean exactly the same thing.

388. Therefore, nothing in this case causes me to depart from my conclusion that late payment *simpliciter* should not be seen as triggering a right to terminate. This view is only reinforced by a consideration of the structure of the payment obligations and the effect of failure to perform. If there is a failure to issue a Payment Certificate under Clause 14.6 the effect of that failure would be that the application for payment was deemed to be accepted so as to permit the service by PBS of the Statement under Clause 14.3 and then to trigger the payment mechanisms – after which the interest provisions or entitlement to suspend work would kick in.

389. It may be that if there were a payment obligation which was particularly large, that might be one which would be capable of falling

within Clause 16.2(b). Similarly, repeated failures to pay, which for some reason did not trigger Clause 16.2(a) might do so. However here we are dealing with one instalment representing only 5% of the Contract Price. I conclude that on the true construction of the Contract a failure to pay this sum would not constitute "*substantially failing to perform the obligations under the Contract*" so as to entitle termination under Clause 16.2(b).

Bester's termination

390. This leaves the question of Bester's termination, whose validity, independently of the validity of the PBS termination, has been put in issue by PBS and VB.

391. The backdrop to this issue is as follows.

392. As has already been discussed above, by the end of 2016 the relationship between PBS and Bester was difficult, with Mr Jelínek pressing for both extensions of time and payment of Milestones 3 and 4. In late November 2016 he had indicated that there would be no further work unless money was forthcoming. A work-around was achieved whereby Milestones 3 and 4 were paid on a commercial basis, and Bester took over the asbestos removal.

393. However, at the same time the issue as to Milestone 5 blew up. By the time that the asbestos was cleared and PBS were back on site in March 2017 the dispute about that Milestone had become acute. Although Bester attempted to get Equitix's agreement to pay the Milestone, that was rejected in late March.

394. By 11 April 2017 rough ground levelling works were completed, but the contractor D Morgan was about to suspend work because now that the site had been handed back to PBS, PBS had not paid it for its work. That was the last substantive work performed on site. As noted above the site was shut later that month.

395. In May debate continued on Milestone 5 and Arup continued to find fault with the PBS civils design. There was still no civils contract signed. On 23 May 2017, PBS received Knights' civils tender of £6,196,983.20. On the same day Bester continued to demand more documentation to support the claim for Milestone 5. On 24 May 2017 PBS sent its termination letter, leading to the purported termination on 15 June 2017, which I have concluded above was not a valid termination.

396. On 19 June 2017, Bester purported to affirm the Contract, and insisted that PBS complied with its contractual obligations.

397. On 23 June 2017, Bester asserted that PBS had repudiated the Contract, reiterated its affirmation of the Contract, and rejected PBS' claim for payment upon termination.

398. Despite PBS' primary position that it had already terminated the Contract, on 26 June 2017 PBS met with Bester on a "without prejudice" basis to discuss possible ways to continue the Project.

399. On 3 July 2017, Equitix served on Bester its 14-day notice of intention to terminate the Main Contract. Equitix relied on failures to:

i) Proceed diligently with the works.

ii) Provide duly executed copies of collateral warranties.

iii) Provide certified copies of the sub-contracts.

400. Bester issued to PBS its purported notice of termination pursuant to Clause 15.2 of the Contract on 12 July 2017 (the "Bester Notice"). The Bester Notice stated:

> "1. You have failed to comply with a Notice to Correct dated 7 November 2016. Your failure has led to a substantial breach of the Subcontract and has adversely affected the carrying out of the Works compared to the critical path of the Project. This is a ground for termination under clause 15.2(b) of the Subcontract. In particular:
>
> a. Ongoing delay in your detailed design for the civil works in breach of clause 8.1 of the Subcontract has caused significant delay to completion of the Project. This delay was exacerbated by your unlawful suspensions of the Works between (i) 29 November 2016 and 14 March 2017 and (ii) 18 April 2017 and 24 May 2017; and
>
> b. Your failure to provide all necessary permits and assistance required by clauses 1.13, 1.15, 1.16, Annex A of the Employer's Requirements and Schedule 16 of the Subcontract has caused significant delay to completion of the Project.
>
> 2. You have abandoned the Works and/or plainly demonstrated the intention not to continue performance of your obligations under the Subcontract. This is a ground for termination under clause 15.2(c) of the Subcontract. In particular, you have not performed any of the Works since before your purported Notice of Termination of 24 May 2017."

401. Under the Bester Notice, Bester purported to notify PBS of its intention to terminate the Contract within 14 days unless PBS remedied various alleged breaches.

402. On 17 July 2017 Equitix terminated the Main Contract with Bester.

403. On 18 July 2017, Equitix took over the Site and locked all other parties (including PBS) off the Site. PBS noted "*We are also informed by our client that Equitix has replaced the locks at the entrance to the Site. Our client has been maintaining the Site following termination of the Subcontract and in anticipation of Bester taking possession of the Site. Following the action of Equitix, our client is no longer in possession of the Site and has no right of access thereto*".

404. On 19 July 2017, Bester issued a Final Warning Notice to PBS (the "Bester Final Warning"), demanding that PBS remedy a number of alleged breaches within 20 days. The Bester Final Warning stated:

> "The following events and circumstances amounted to a Persistent Breach within the definition of the Subcontract in that they have continued for more than 10 days and/or they have occurred more than three times in the last six months. In particular:
>
> 1. In breach of clause 8.1 of the Subcontract, you have failed to diligently proceed with the Works in accordance with the programme throughout the course of the Works.
>
> 2. In breach of clauses 1.13, 1.15, 1.16 and Annex A of the Employer's Requirements of the Subcontract, you have failed to co-operate and provide assistance in connection with applications for Permits. In particular, you have failed to provide the following requested documentation, data or information in accordance with the Programme and Subcontract:
>
> a. BREEAM Interim Certificate "very good" (GPE Ref. 3), which should have been provided by 19 July 2016;
>
> b. S.278 agreement – highway and associated works (GPE Ref. 5), which should have been provided by 10 August 2016;
>
> c. Documents necessary to the design of the Biomass Plant (GPE Ref. 7), which should have been provided by 10 August 2016; and
>
> d. Environmental Permit, which should have been provided by end of August 2016.
>
> 3. In breach of clause 8.3 of the Subcontract, you have failed to provide a revised programmes detailing:
>
> a. the order in which you intend to carry out the Works, including the anticipated timing of each major stage of the Works;

> b. the periods for reviews of the Contractor's Document as required by clause 5.2 of the Subcontract;
>
> c. the sequence and timing of inspections and tests specified in the Subcontract; and
>
> d. (since changes have been required because of delays to the Programme) a general description of the methods which you intend to adopt for the execution of each major stage of the Works and the approximate number of each class of Contractor's Personnel and type of Contractor's Equipment for each major stage.
>
> By way of example, we have requested for revised programmes in our letters of 29 July 2016 [1], 7 November 2016 [2], 31 January 2017 [3], 17 February 2017 [4] and 8 March 2017 [5]. Regrettably, you ignored our letters and supplied none which complied with the requirements of clause 8.3 of the Subcontract. 4. In breach of clause 4.5A(a) of the Subcontract you have failed to deliver to us duly executed collateral warranties from the following Key Sub-Contractors: a. – u.[list of sub-contractors]
>
> [Notes]
>
> [1] Ref: Notice of Employer's concerns on project progress and site
>
> establishment.
>
> [2] Ref: Notice to Correct for delays and breach of obligations. [3] Ref: Pre-Termination Notice for serious breach of obligations. [4] Ref: Delay Notice and serious breach of obligations.
>
> [5] Ref Response to Mr Kadner's letter.
>
> 5. In breach of clause 4.5A(b) of the Subcontract you have failed to deliver to us certified copies of duly executed Key Sub-Contracts from the following Key Sub-Contractors:
>
> a. – u.
>
> If the above breaches continue for more than 20 days or recur in two or more months within the six month period after service of this Final Warning Notice the Subcontract may be terminated."

405. PBS proposed further meetings with Bester on 2, 8 or 9 August 2017, to discuss the possible continuation of the Project.

406. On 7 August 2017, Bester served a notice claiming to terminate the Contract.

> "Further to our notice dated 12 July 2017 (the "Notice") pursuant to clause 15.2 of the Subcontract received by you on 17 July 2017 timed at 9.37am, we hereby confirm the termination of the Subcontract at midnight today.
>
> This is due to your failure to remedy the specific events and circumstances within the 14-day period stated in the Notice. In particular, you have failed to: 1. comply with a Notice to Correct dated 7 November 2016 including the provision of (i) a detailed design for the civil works and (ii) all necessary permits and assistance as identified in the Notice;
>
> and
>
> 2. return to Site and/or plainly demonstrate the intention to continue performance of your obligations under the Subcontract.
>
> In light of the foregoing, Bester is entitled to terminate the Subcontract under
>
> clause 15.2."

Abandonment/demonstration of an intention not to perform

407. Bester relies upon two grounds of termination. The first is under Clause 15.2(c) – abandonment of the works, which is itself a ground for termination under Clause 15.2, or demonstration of an intention not to perform the Contract. The second is failure to comply with a notice to correct leading to (i) a material breach of the Contract and (ii) that breach adversely affecting the carrying out of the works.

408. As to the first of these, subject to the arguments which follow, it was clear that PBS did:

    i) Abandon the physical works in mid-April 2017;

    ii) Failed to progress the detailed design of the civil works – and the other documentary aspects of the project listed in the Notice to Correct despite repeated chasers;

    iii) Evince an intention not to perform the Contract by its purported termination.

409. VB suggested that overall one could not however say that PBS had abandoned the works or evinced an intention not to perform the contract because of without prejudice meetings, and ongoing site maintenance and storage of equipment.

410. The first of these points goes nowhere; the without prejudice discussions were without prejudice to PBS's contention that the Contract was at an end and that they were under no obligation to perform the Contract. This point also deals with the questions of site maintenance and storage of equipment – at this stage there were without prejudice discussions which might have led somewhere which required steps to be taken on site. But it does not affect the fact that PBS was making very clear to Bester (and indeed to Equitix) that in its view the Contract was over. Further as regards the last item, maintenance of off-site equipment, this would in any event be necessary as part either of any claim, or in order to deal with the duty to mitigate.

411. What has been put in issue is whether that repudiation was accepted. However, that is an issue only relevant to common law termination. The absence of any effective acceptance for the purpose of a common law termination cannot affect the validity of a contractual termination.

412. Unless there is force in the "prevention principle" argument which follows the facts outlined above would suffice to entitle Bester to terminate the Contract under Clause 15.2(c).

Substantial Breach, causing delay

413. In the circumstances I need not address the complex requirements for a Clause 15.2(b) termination, which were not strongly urged by Bester.

Prevention principle

414. VB relies on the prevention principle here. It says that under the Bester Notice and the Contract, PBS had a contractual obligation to remedy its breaches within 14 days of the notice. One of the stated breaches was PBS' supposed abandonment of the Site and failure to progress with the Project.

415. It says that PBS's failure to return to the Site should not count against it in this context given that it was impossible for PBS to return to the Site after 18 July 2017 because the Site was locked. VB initially said this locking was by Bester, but in closing said the locking was by Equitix but was caused by Bester, who failed to comply with its contractual obligations to Equitix.

416. VB contends that under Clause 2.1 of the Contract PBS had a contractual right to access to the Site. That was a contractual right which had to continue until at least:

    i) 8 August 2017, namely 20 days after the "*Bester Final Warning*", which gave PBS 20 days from 19 July 2017 to remedy its alleged breaches, or alternatively,

    ii) 26 July 2017, namely 14 days after Bester Notice (which was dated 12 July 2017).

417. VB argues that given that PBS was locked off Site before 26 July 2017 (the earlier of the two dates above), Bester sought to terminate on the basis of PBS' failure to comply with an obligation (returning to Site and recommencing the works) which Bester itself had rendered impossible (because it failed in its obligations to Equitix, causing the Site to be locked). To allow Bester to terminate in these circumstances would allow it to insist on performance of an obligation, namely attending Site, which Bester had rendered impossible.

418. This triggers VB's reliance on *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*, [2014] EWHC 1028 (TCC), which also involved termination under Clause 15 of a FIDIC Contract. VB submits that it was recognised (at paragraph 324) that an "*Employer who, following the service of Clause 15.1 notice, denies site access to the Contractor to enable it to put right the notified failure*" could not lawfully terminate on this basis.

419. VB submits that Bester's reliance on *North Midland Building v Cyden Homes Ltd* [2018] EWCA Civ 1744 is misplaced, because it deals with the prevention principle in very different circumstances; namely in relation to concurrent delay, a much more fact sensitive matter.

420. Bester's response to this is twofold. First it says that on the facts it did not lock the site. The PBS witnesses do not say Bester did lock the site. Nor indeed did Equitix. The evidence is that PBS locked the site. It points to Mr Gutiérrez's first statement "*Then extraordinarily, on 21 April 2017, PBS locked the site and refused access until further notice.*", on which evidence he was not challenged in cross-examination. It also points to Mr Gutiérrez's email to Mr Šipoš contemporaneously on 21 April 2017 "*Could you please explain the reason to close the access to the Working Area? Bester has not received any communication regarding this action.*"

421. Bester also says that PBS/VB's argument overlooks the fact that PBS had purported to terminate the Contract and wrongly maintained that its termination released it from its obligations to perform the Works at all material times. Further it contends that it cannot be said to be the case that PBS was actually prevented from resuming its

obligations in circumstances where PBS had been asked to withdraw its purported termination and had failed to do so.

422. Bester also submits that VB's reliance on the *Obrascon* decision is based on a selective reading of the relevant paragraph.

423. On this issue I have no hesitation in preferring the submissions advanced by Bester. This is, for a number of reasons, a classic example of the prevention principle being invoked in inapposite circumstances. In the first place, on the factual evidence as adduced at trial Bester appear to be correct that it was PBS and no-one else who locked the site. Secondly, as Mr Gutiérrez's evidence made clear and the PBS logbooks also indicated, work on site had been abandoned since 19 April 2017 and no attempt had been made or was made to resume it. It cannot then be open to PBS then to rely on the locking of the site as preventing their performance. The argument that works elsewhere were not prevented (in particular the offsite preparations) cannot assist when it is PBS/VB which is saying that the locking of the site was a prevention.

424. To the extent that matters might be said to change when Equitix changed the locks, there also appears to be force in the criticism of VB's argument insofar as it is based on *Obrascon*. Paragraph 324 of Akenhead J's judgment is as follows:

> "Clauses 15.1 and 15.2(c) must as a matter of common sense pre-suppose that the Contractor is given the opportunity by the Employer actually to remedy the failure of which it is given notice under Clause 15.1. In that context, termination could not legally occur if the Contractor has been prevented or hindered from remedying the failure within the specified reasonable time. This stems from a necessarily implied term that the Employer shall not prevent or hinder the Contractor from performing its contractual obligations; there is also almost invariably an implied term of mutual co-operation. If therefore the Engineer has served a Clause 15.1 notice to remedy a breach of contract, and to the extent that the Employer hinders or prevents the Contractor from remedying the breach, the Employer could not rely on the Contractor's failure in order to terminate the Contract. This is because the Employer should not be entitled to rely on its own breach to benefit by terminating (see for instance *Alghussein Establishment v Eton College* [1988] 1 WLR 587). An example might be the Employer who, following the service of Clause 15.1 notice, denies site access

> to the Contractor to enable it to put right the notified failure."

425. This full citation makes it quite clear that (fairly obviously) a key requirement of the prevention principle is prevention. There can be no prevention where the exclusion relied on is one which lies at PBS's own door. But this point also extends to the situation which would prevail if on the facts the locking of the site had been done by Equitix – or even Bester.

426. PBS had purported to terminate and PBS had stopped progress on site. That is one thing which led to termination by Equitix - it was not a breach of an obligation owed by Bester but not owed down the chain by PBS. The termination against Bester by Equitix was caused by the breaches by PBS. Further there could be no prevention when on the facts PBS did not try to return to the site in order to remedy their breaches. As far as PBS was concerned PBS had already terminated as at 14 June 2017 – the Contract was in their eyes dead from that time. The existence of without prejudice discussions between the parties does not derogate from the fact that they did nothing further towards performing the contract on site after that date.

427. This also links to the other obligations relied on for termination; Bester did not simply – or even principally - rely on a failure to progress on site. Its Notice to Correct and termination point rather to failures to progress the documentary sides of the project. The changing of the locks on site could not be causative of a lack of progress on these; and yet lack of progress there was.

428. In those circumstances I do not need to deal in greater detail with the issue of the prevention principle. I do however note that Coulson LJ in *Cyden v North Midland* [2018] EWCA Civ 1744 at [10]-[18] and [29]-[39] reiterates the warning that the prevention principle is not, as it is often argued to be, some broad and overarching principle or a general backstop to an existing extension of time regime, but rather a focussed principle of narrow application. He also endorses the analysis of Hamblen J (as he then was) in *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm) as to the need for actual causation to be established – a point he made both at [279] (cited in *Cyden*) and at [264] emphasising the need for "*prevention in fact; not prevention on some notional or hypothetical basis.*". However, this does resonate with the argument deployed by VB that there was no need for PBS to try to get back on site, because Equitix would have prevented it; that is a nice example of a hypothetical prevention.

429. In reality, it transpired that the argument being advanced was not so much an argument based on the prevention principle as an argument that a party should not be allowed to take advantage of its own wrong.

430. That however is predicated on an assumption that there was a wrong, which leads back into the asbestos argument, which I have determined above. It was also put in terms of causation of the Equitix termination; but to a large extent that amounts to the same thing – a point with which I shall deal further below. That termination I conclude was caused in part by the delay which led to civils works not being started considerably earlier (because of the asbestos issue) and then by the failure of PBS to proceed with the civils works from 12 April 2017 – at a time when permits had all been obtained and the asbestos had been removed. This was the case which Equitix advanced (against Bester) in the Equitix adjudication.

Common law repudiation

431. In relation to this aspect VB contends that Bester did not accept the alleged repudiation by PBS. However, in the light of the above, consideration of common law repudiation is unnecessary.

Quantum

432. In the light of my conclusions above, the only claim which I need to determine is that of Bester. On this in the end the quantum experts were able to agree in their Second Joint Statement on Quantum Matters dated 24 July 2019 that (arithmetically) this was £16,421,077.61 as at 24 July 2019 based on the Category G "Committed Cost of Capital" figures in Bester's Net Loss Statement as at 8 July 2019 and Category G "Committed Cost of Capital" figures in Equitix's Net Loss Statement as at 4 June 2019. This included agreement on such matters as the Liquidated damages. A claim for internal costs was not pursued.

433. However, whether that agreed sum is recoverable remained controversial because it was contended (principally by VB, but adopted by PBS) that all this loss was caused by the termination of the Equitix Contract and that this was a matter which lay at the door of Bester not PBS. It was also contended that some third party claims included within this were in principle irrecoverable and that the adjudication fees fall outside the contractual code. A number of other pleaded points (including liability for loss of profits) were not pursued in closing.

PBS liability for the Equitix termination

434. This was a point placed front and centre by VB. Its submission was that Equitix terminated the Main Contract due to matters which PBS was not responsible for. This is mainly because Equitix terminated the Main Contract on account of the delays to the Project, which were caused by:

i) Bester's delays in obtaining the Permits (Permits in this closing relates to "Employer's Permits" as defined in the Contract) to start works;

ii) Besters failure to supply collateral warranties and sub-contracts;

iii) The delays caused by the discovery and subsequent remediation of asbestos on Site.

435. Although a considerable amount of argument was addressed to the first two points, in closing VB submitted that in reality Equitix's termination really came down to the fact that the civil works were delayed by 2017 and that those delays were really caused by PBS not being allowed on Site from November 2016 to February 2017 when the additional asbestos removal works were being undertaken. VB accepted that:

> "it seems very unlikely that Equitix would have terminated the Main Contract if the works were not delayed by the asbestos and Permits and so were proceeding to achieve First Spark by 30 June 2017... If Equitix really thought that the Project would have achieved First Spark by the deadline for the ROC accreditation, then it seems very likely that Equitix would not have been worried about the subcontracts and the collateral warranties".

436. To the extent that this is the argument it is essentially a recapitulation of the argument on the Extension of Time for second asbestos, and fails for the same reasons. Ground conditions (including asbestos) were at PBS's risk, and "second asbestos" was not unforeseeable or related to any error or incompleteness in the survey. It follows that Bester's claim succeeds.

Liquidated damages and Clause 15.7

437. An issue arose as to the impact of Clause 15.7 (the Actual Net Loss clause) upon claims for Liquidated damages advanced by Bester. PBS/VB's case that Clauses 15 and 16 provide a complete code for compensation in the event of termination, by which Bester is well remunerated for all of the cost of capital that it would have expended on the Contract, with the result that Bester does not need additional clauses. PBS contends that while Clause 15.6 would have given Bester a right to claim delay damages if it had elected to continue the Contract, Clause 15.7 specifically does not give Bester that right. Effectively Clause 15.7 prevents Bester from claiming Liquidated damages. Bester claims two such items: £918,585.00 in respect of the "First Spark Discount" and £509,580.00 as delay Liquidated damages to termination.

438. VB and PBS rely on the case of *Triple Point Technology Inc v PTT Public Co Ltd* [2019] EWCA Civ 230 [2019] 1 WLR 3549. That case (which is under appeal) is authority for the proposition that when considering damages for delay which are included in contracts it is necessary to consider the drafting of the contract carefully to assess whether the clause allows that any Liquidated damages will survive termination and particularly whether they will survive termination in circumstances where the contract is terminated with the works incomplete. Sir Rupert Jackson at [110] said:

> "If a construction contract is abandoned or terminated, the employer is in new territory for which the liquidated damages clause may not have made provision. Although accrued rights must be protected, it may sometimes be artificial and inconsistent with the parties' agreement to categorise the employer's losses as £x per week up to a specified date and then general damages thereafter. It may be more logical and more consonant with the parties' bargain to assess the employer's total losses flowing from the abandonment or termination, applying the ordinary rules for assessing damages for breach of contract. In my view, the question whether the liquidated damages clause (a) ceases to apply or (b) continues to apply up to termination/abandonment, or even conceivably beyond that date, must depend upon the wording of the clause itself. There is no invariable rule that liquidated damages must be used as a formula for compensating the employer for part of its loss."

439. They say that both of the damages provisions in the contract between Bester and PBS supposed that the Contract would be completed and would be completed late, not that it would never be completed. They also submit that this point is strengthened by the fact that the Contract provides for a detailed calculation as to what should be recovered in the light of termination in Clause 15.7 and the Actual Net Loss and the Interim Account. The Actual Net Loss calculation includes:

i) At "G" - the amount calculated as ten percent (10%) per annum (pro rata for part thereof) on the full amount of the Contract Price from the date of signature of this Contract until the date that full and final payment is made under this Clause by way of compensation for the Employer's committed costs of capital, which compensates Bester for its cost of capital over the relevant period; and

ii) At "K" - is the amount of any liability of the Employer in respect of third party claims; which will then compensate it for any claims for liquidated damages it may suffer from Equitix.

440. Therefore, it is said that the damages allowed under Clause 15.7 fully compensate Bester – the more so since Bester had no real investment in the project.

441. Attractively as this was put, I am not persuaded that the result arrived at is correct. *Triple Point* was a case which was driven by the clause in question – so the Liquidated damages clause was not apt to cover a situation where there was no completion. However, the judgment makes clear that what is perhaps the orthodoxy is that the clause applies until the termination of the first contract – and also that in deciding which of three outcomes (no application, application up until termination, and application beyond termination) is correct in any given case will turn on the wording of the clause in each case.

442. In *Triple Point* the decision turned on the particular wording of the clause, with Sir Rupert Jackson at [113] concluding:

> "This clause, like clause 24 in the Glanzstoff case, seems to be focused specifically on delay between the contractual completion date and the date when *Triple Point* actually achieves completion. The phrase in article 5.3 "*up to the date PTT accepts such work*" means "*up to the date when PTT accepts completed work from Triple Point*". In my view article 5.3 in this case, like clause 24 in the Glanzstoff case, has no application in a situation where the contractor never hands over completed work to the employer."

443. There was therefore a fairly clear "marker" in that case that completion was key to the Liquidated damages being claimable.

444. The Liquidated damages clause in the present case is different. There was a provision for what was called a "First Spark Discount" up to a maximum of just over £900,000, which was to be Bester's only remedy for delay between 27 March 2017 and 30 June 2017. Yet if VB's argument were correct and this claim was only available if there was completion, Bester would have neither a contractual nor a common law right to compensation in relation to that period.

445. The question of accrued rights is than specifically addressed by Clause 21.9 of the Contract which states: "*save as otherwise provided in this Contract (a) termination of this Contract shall be without prejudice to any accrued rights and obligations as at the date of termination.*"

446. This makes it plain that termination operates without prejudice to accrued rights or obligations.

447. Then there is Clause 8.7 of the Contract. This provides:

> "Notwithstanding otherwise stated, The Delay Liquidated Damages shall…be the Employer's sole and exclusive remedy and the Contractor's sole and exclusive liability for such Contractor's delays…other than in the event of termination under Clause 15.2…. prior to completion of the Works. The payment of Delay Liquidated Damages shall not relieve the Contractor from his obligation to complete the Works…"

448. This clause is therefore looking at the time for completion, not the actual completion – and is therefore significantly different to the clause under consideration in *Triple Point.* It would appear to give an accrued right from the time at which the Works should have been completed. As such this was an accrued right under Clause 21.9 – which was therefore explicitly agreed to be unaffected by termination.

449. I conclude that there is nothing in Clause 15.7 which purports to override an accrued right to delay damages or First Spark Discount. Bester acquired a new additional right under Clause 15.7. The payment of 10% of the contract sum under this clause does not deal with the costs of delay – for example Bester's internal costs of delay, which do not form part of the contract sum.

The recoverability of third party claims

450. PBS contended that it ought not in principle to be liable for third party claims. This was addressed skeletally in closing: *"[Bester] seeks, erroneously to pass on to PBS sums claimed by Equitix in relation to third party agreements under the Main contract which are excluded by reason of Clause 17.3 and Schedule 11 of the Contract.*"

451. In oral closing I was directed to Clause 17.3 and in particular employer's risks at (h): "*Any and other Related Agreements (as specified in Schedule 11) and documents developed based on such Agreements; every event which is specifically addressed elsewhere in the Contract documents as being under the Employer's risks."* I was then referred to Schedule 11 and the submission was made (without specificity) that *"when you look at Bester's net loss statements, you will see that Bester is seeking to pass on these claims to PBS and it has no entitlement to do so"*.

452. It remains unclear to me on the basis of this submission (i) how Clause 17.3 (dealing with Extension of Time) is relevant to assessment of

quantum or (ii) to which items in the Net Loss Schedule objection was taken. Accordingly, I do not accept this contention.

Adjudication fees

453. There was also an issue as regards the adjudication fees (a sum of £49,620). PBS/VB argue that this claim fails given that Bester started the Adjudication before Mr. Tolson, against the express request of PBS. It lost and was ordered to pay those fees. Those adjudication proceedings were entirely voluntary and not precipitated by any action by PBS.

454. This appears to me to be a valid point. I am not attracted by the argument that these are fees which fall within the ambit of Clause 15.7K as "third party claims". That sub-clause gives examples of the kinds of claims which are envisaged to be covered as "*arising from the termination of the Agreement*": "*claims under the Lease, the Power Purchase Agreement Management Services Agreement, the Fuel Supply Agreement and the Project Development Agreement*".

455. Nor would it seem correct that Bester can recover the costs of the Enforcement action. Having opted for and lost the adjudication, Bester refused to pay and therefore brought about the issue of enforcement proceedings. Further it would seem very strange that costs which were awarded on the indemnity basis (only available if a party's behaviour has gone beyond the line of what is reasonable) should then be recoverable from the party who was awarded them.

Declaratory relief

456. Bester also seeks declaratory relief against PBS and VB, that:

i) PBS unlawfully sought to terminate the Contract on 14 June 2017, and thereby repudiated the Contract.

ii) PBS failed to progress diligently with the works, substantially failed to perform and was in repudiatory breach of Contract.

iii) PBS unlawfully suspended and abandoned the works and the Project.

iv) Bester lawfully terminated the Contract on 7 August 2017.

v) In the event of failure by PBS to pay Bester the sums ordered pursuant to sub-paragraph (3), and the on-account costs order of Pepperall J of 22 May 2019 of £70,000.00, within 14 days of the handing down of this judgment, PBS VB shall pay to Bester all of those sums, without further order of the Court, within 7 days after the expiry of that 14 day period.

Guarantee issues

457. This brings me to the claim against VB. Bester's submission is that this is straightforward: Bester seeks declaratory relief that PBS VB is liable to Bester and shall pay Bester under the guarantee any judgment sums not discharged and paid by PBS. PBS seeks similar relief as against Bester SLU in the event of judgment in PBS's favour.

458. The issue between Bester and VB concerns the existence of the Tolson adjudication. The short point made is that no valid claim has been made on the Guarantee and therefore VB cannot be liable under the Guarantee; VB's short point is that given adjudication decisions which are currently binding on Bester, PBS cannot be liable to Bester, so no valid claim can be made by Bester against VB.

459. The way in which this point arises is as follows. Clause 2.1.2 of the Guarantee states that:

> "The Guarantor [VB] irrevocably and unconditionally:…
>
> 2.1.2 undertakes with the Employer [Bester] that (i) whenever the Contractor [PBS] does not pay any amount or perform or discharge any obligation in respect of the Contractor's Obligations when due and (ii) such Contractor's failure is not remedied in an additional reasonable period given by the Employer, then it shall forthwith on written demand by the Employer specifying the Contractor's failure to remedy in additional period, pay that amount or perform or discharge such obligation as if it, instead of the Contractor, were expressed to be the principal obligor…".

460. That clause therefore imposes three preconditions:

i) PBS did not perform an obligation or pay a sum owing on demand to Bester,

ii) When PBS was given an additional reasonable period to remedy its position it still failed to perform the relevant obligation or to pay the sums due, and

iii) VB has received a written demand setting out PBS' failure.

461. Bester relies in this connection on:

i) Failure by PBS to pay Bester's Interim Account of 4 September 2017.

ii) A written demand on 13 March 2019 pursuant to Clause 2.1.2 of the guarantee in respect of the sum due to Bester from PBS in respect of Bester's Interim Account under Clause 15.7 of the Contract.

iii) The fact that on the hypothesis Bester's claim here succeeds, the sums counterclaimed, including the Interim Account, are in fact Contractor's Obligations, and are liabilities (actual or contingent), for the purposes of these proceedings and for the purposes of the guarantee.

iv) Failure by PBS and VB to pay; it is said that any failure to do so which seeks to use the adjudication decisions as justification is challenged in these final proceedings as wrongful and erroneous.

462. VB submits that considering the three preconditions it is clear that VB cannot be liable to pay any sum under the Guarantee on the basis of Bester's pleaded case:

i) Bester is bound by the decision of Mr Tolson unless and until it is overturned by a Court's judgment;

ii) Until this judgment therefore PBS will not owe Bester any sums; it follows that PBS cannot have failed to pay any sums to Bester and so no valid claim can be made by Bester against VB under the Guarantee.

463. So far as the declaration is concerned, it is predicated on a hypothetical situation that PBS does not pay sums due under this judgment (even after a reasonable period), a valid request is made by Bester to VB under the Guarantee to satisfy the judgment against PBS, and that request is not satisfied after a reasonable period.

464. As matters have transpired, it is clear that Bester accepts that it cannot at this stage seek more than a declaration. The issue is therefore confined to the granting of a declaration.

465. While I entirely understand the approach which VB takes, the Courts are not now so strict about the granting of declaratory relief as they were even ten years ago. The modern approach is to grant such relief even where there is in technical terms no active disputed right where it is considered that the declaration is likely to be of practical utility.

466. While the guarantee may not on its terms cover contingent liabilities, the parties find themselves here in a somewhat hybrid situation where a demand was made for a sum which I have now found was due, and PBS failed to pay it. A demand was then made on VB which was not paid. While up to now, because of the Tolson adjudication those demands have been effectively in stasis it would be artificial to

say that the relevant documents had not been sent, so as to trigger a liability on the part of VB if the judgment sum is not paid by PBS.

467. It would also seem to be contrary to the overriding objective in circumstances where no substantive defence to the claim under the guarantee has been indicated thus far, to require the guarantee issues to be decided entirely separately. It can only lead to unnecessary delay and increase of costs. I am therefore minded to grant a declaration in terms that VB is liable to Bester under the Guarantee in the event that PBS has not satisfied this judgment within a certain period.

The Quantum of PBS's claim

468. The quantum of PBS's claim obviously does not arise given the conclusions I have reached thus far. However, I will deal very briefly with the issues which arise in relation to PBS's quantum claim to enable the parties or another Court to reach a figure for this claim should it be of interest or relevance.

469. The live issues which remained at the hearing were:

i) What is the sum due under Clause 15.8 (i) for Works including Temporary Works performed as at termination on 15 June 2017?

ii) What sum is due under Clause 15.8 (ii) in respect of costs reasonably incurred due to or in connection with such termination?

iii) Is PBS entitled to legal fees and, if so, in what amount?

iv) Is PBS entitled to claim prolongation costs given that the termination was prior to the original completion date and, if so, on what basis and in what amount?

v) Is PBS entitled to disruption costs and, if so, on what basis and in what amount?

vi) What credit is Bester entitled to in respect of plant, equipment or materials for which payment is claimed under Clause 15.8(i) and which has been sold, transferred or monetized by PBS?

Clause 15.8(i) progress of works

470. The issue here is as to the percentage completeness of the Works. The competing figures were:

i) Mr Loayza's assessment that progress was approximately 34.91%.

ii) The figure of 43% in MPRs 13 and 14.

iii) The figure of 54% derived from PBS's Financial Report (or "CVR") dated 15 June 2016.

471. On balance had it been necessary to do so I would have concluded that the safest figures to adopt was the figure of 43% given in the contemporaneous MPRs. The CVR figure was not seriously advocated by PBS/VB. The 43% figure appeared to be that most strongly supported by the quantum experts with PBS's expert effectively supporting this figure, indicating that he had included the 54% figure because that was the pleaded figure.

472. While Mr Loyaza's deconstruction of the 43% figure was interesting, this was not within his remit or his area of expertise, and there seems to be a danger of underestimating progress on his approach. Although there are plainly some issues with Mr Koníček 's approach, the downgrading of the progress figure between reports 11/12 and 13/14 appears to indicate that a genuine estimate was being performed and reviewed. The 43% figure is if not reliable, the least worst of the options and likely to be, as PBS put it, "about right".

Clause 15.8(ii): Other costs

473. There were a number of sub-headings within this topic. As to the sub-headings of this item:

i) B1 (Expenditure and commitments not recovered): I am not persuaded that these are costs incurred in connection with termination. There also appears to be an element of double counting which is contrary to the nature of the claim for "other" costs.

ii) B3 (Site staff and equipment): There is insufficient evidence to verify this claim as it is unclear what work these staff were performing.

iii) B4 (Offsite wages and operating costs): I prefer Mr Hunter's figure of £81,556. The larger figure sought lacks evidence to substantiate it, and indeed appears to conflict with some of the base evidence as to numbers actually working.

iv) B5 (Offsite wages and equipment costs): I am unable, given the paucity of actual evidence, to conclude that any particular figure is supported and therefore this item fails.

v) B6 (Equipment storage charges): I prefer Mr Hunter's figure of £48,922.72. The disputed item appears to date to before termination;

vi) B8 (Exchange rate losses): There is no evidence to support a loss.

vii) B9 (Interest on late payment): There is no evidence that Milestones 6 and 7 were achieved and so Milestones 8 and 9 could not have been achieved.

viii) B10 (Interest on loans): There is no evidence to support the claim for interest on loans to meet other liabilities.

ix) B13 (Other damages and penalties): The penalties claimed do not appear to be linked to the termination, but rather to late payment. It follows that this item fails.

x) B16 (Overheads on termination costs): There is insufficient evidence to verify this claim. As Mr Daly accepted there was insufficient material to determine a rate.

Is PBS entitled to legal fees and, if so, in what amount?

474. Adjudication costs and costs of this litigation are irrecoverable under Clause 15.8 and pursuant to 108A(2)(b) of the Housing Grants, Construction and Regeneration Act 1996. Mr Hunter says that he has been unable to split these out from the information given. Had the matter arisen I would have ordered an account to be taken of costs (aside from costs of the litigation and costs of the adjudications).

Prolongation costs

475. This claim lacks evidence to substantiate the sums claimed. It appeared that at least some of the staff would be considered as labour and fall out of the assessment. Little attempt was made by PBS to justify the claim.

Disruption costs

476. This claim is insufficiently supported: there is no evidence linking items of cost with events for which Bester would be liable.

Bester credit in respect of plant, equipment or materials for which payment is claimed under Clause 15.8(i) and which has been sold, transferred or monetized by PBS?

477. This relates to a figure of CZK-12,778,697.55 in the settlement between PBS and PBS Brno. The experts convert this to a Sterling amount of £431,386.15. The question is whether it is a fair reflection of equipment which has been redeployed. The experts agree that the figure is unsubstantiated.

478. The figure appears to be based on evidence from Mr Bezrouk as to which elements of the boiler were not redeployed. It was Bester's

case that this assessment could not be accepted, in the context of a conflict between Mr Bezrouk's evidence and that offered in the adjudication and an absence of disclosure by PBS on this subject – in particular of a breakdown of the settlement sum agreed, which he suggested was in existence.

479. I accept that submission. The experts' own hesitancy about this figure is clear from their notation that it is *"included on-account pending provision of further and better particulars"*. No such particulars have been provided. This item was not addressed in closing for PBS.

Conclusion

480. It follows from the above that PBS's claim fails, and Bester's counterclaim succeeds. Had PBS's claim succeeded, the issues as to quantum, save as to the degree of progress at the time of termination, would have been resolved in Bester's favour.