



Neutral Citation Number: [2022] EWHC 1467 (Ch)

Case No: BL-2021-001940

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Date: 14 June 2022

Before :

Joanne Wicks QC
Sitting as a Deputy Judge of the High Court

Between :

**PRETORIA ENERGY COMPANY
(CHITTERING) LIMITED**

Claimant

- and -

BLANKNEY ESTATES LIMITED

Defendant

Ms Sally Anne Blackmore (instructed by Jackamans solicitors) for the **Claimant**
Mr Dov Ohrenstein (instructed by Roythornes Limited) for the **Defendant**

APPROVED JUDGMENT

JOANNE WICKS QC sitting as a Deputy Judge of the High Court:

Introduction

1. These proceedings concern a claim for breach of contract. The Claimant is a company in the business of operating anaerobic digestion (“AD”) plants, producing biogas and electricity from organic matter. The Defendant is a farming business. The Claimant contends that the parties entered into an agreement in November 2013 under which the Defendant agreed to grant the Claimant a 25-year lease of a site in Lincolnshire for the purpose of an AD plant. This agreement is to be found in a document called “*Heads of Terms of Proposed Agreement between Blankney Estates, Lincolnshire and Pretoria Energy Company Limited Subject to Full Planning Approval and appropriate consents and easements*” (“**the HoT**”). I include a copy of this document in an appendix to this judgment. The Claimant’s case is that the Defendant repudiated that contract, and became liable for damages, in September 2014. The Defendant contends that there was never a binding contract by which it agreed to grant the Claimant a lease. Its case is that the only enforceable contract between it and the Claimant to be found in the HoT was an exclusivity or “lockout” arrangement (“**the Lockout Provision**”), by which the parties agreed, until 31 July 2014, not to enter into negotiations with third parties.

2. By an order dated 1 December 2021, Master Clark ordered that the following issue be tried as a preliminary issue:

“Is the document titled “Heads of Terms of Proposed Agreement” (identified in paragraph 7 of the Particulars of Claim) a binding and enforceable

agreement between the parties other than in respect of the Lockout provision referred to in paragraph 2 of the Defence?”.

3. Evidence on the preliminary issue was given by way of witness statements from Steven Ripley, a director of the Claimant, on the Claimant’s behalf and from Timothy Banks, a director of the Defendant, on its behalf. Counsel, Ms Sally Anne Blackmore for the Claimant and Mr Dov Ohrenstein for the Defendant, agreed that it was unnecessary for either of them to cross-examine the other’s witness: although there are differences of evidence between the witnesses, particularly as to their subjective intentions or understandings, it is agreed that these are irrelevant to the determination of the preliminary issue.
4. I am grateful to both Counsel for their clear, helpful and comprehensive submissions.

Events prior to the HoT

5. In 2012, the Defendant had some unused land at Heath Farm, Metheringham Heath, Lincolnshire, comprising a former flax factory and adjoining field, registered under title number LL302872 (“**the Site**”). It was put in touch with the Claimant, which was looking for a site for an AD plant. Mr Ripley explains that it was his intention to develop three AD plants: one, at Chittering, Cambridgeshire, obtained planning permission in 2012 and was in the course of being constructed in 2013. A second opportunity was identified at Mepal, Cambridgeshire, for which planning permission was obtained in 2013. The Heath Farm site would have been the third.

6. Following some initial discussions, by email of 9 July 2013 Mr Ripley sent Tim Harper, the Defendant's Farm Manager, a written proposal ("**the Proposal**"). This had five headings: "Lease"; "Contract Maize Growing"; "Digestate"; "Gas Supply" and "Energy Connection". These headings reflected the fact that, in addition to the grant of a lease of the Site, the parties had been discussing various other commercial arrangements. "Contract Maize Growing" referred to a proposal that the Defendant would grow maize to be sold to the Claimant as fuel for the AD plant. "Digestate" is an organic fertiliser, a byproduct of the production of biogas through AD; the discussions included the prospect that the Claimant would supply solid and liquid digestate to the Defendant from the AD plant. "Gas supply" related to the potential that the Claimant would supply electricity and/or biomethane generated by the AD plant to the Defendant. Under the heading "Energy connection", the Claimant confirmed that it had energy connection sites available to it (I understand for the supply of methane to the National Gas Grid) and was negotiating exact connection points and methods; it asked the Defendant to assist and co-operate in regards to any wayleaves required. Under the heading "Lease", the proposal was for a rent of £150,000 per annum, based upon a "bare land site" and for a 25-year period. The Proposal concluded

"As discussed, this is a framework proposal in how we see this project moving forward...The offer is subject to a planning permission being granted..."

7. On 15 July 2013, Mr Banks wrote an email to various colleagues attaching the Proposal and referring to the discussions he and Mr Harper had been having

with the Claimant, about seeking board consent to continue with negotiations. He described the discussions as being “*at an early stage*” and there being “*much more work to be done should this proceed*”. He explained that he had asked the Claimant for its proposal and had requested 3 key points to be included:

- “1. *There is no expectation of financial partnership with Blankney as far as the investment goes.*
2. *The proposal is in the form of a lease which is independent [of] any agreement to supply feedstock, receive digestate or solids and purchase energy.*
3. *Any agreements to do the above are negotiated as entirely separate agreements and not of a term linked to the underlying lease.”*

He described the lease offered as “*for the flax site (assuming demolition at our expense of the factory) and the adjoining field, MH15, which amounts to some 27 acres.*”

8. On 7 October 2013, Mr Banks sent Mr Ripley a survey and quotes for demolition of the existing building on the Site, which the Defendant intended to carry out regardless of whether the proposal – which he referred to as an “option agreement” – with the Claimant bore fruit. By email of 11 October, Mr Banks followed this up with confirmation that he had the consent of others “*to proceed with the preparation towards planning and the preparation of a contract between ourselves...Accordingly please accept this email as our*

consent to now work rapidly towards the preparation of a document to reflect the Heads of Terms which we can ultimately incorporate into an agreement.”

9. Andrew Shaw, the Claimant’s Finance Director, responded with the first draft of the HoT. In his covering email of 1 November 2013 he said

“Should you be happy with the Heads of Terms, I would suggest we sign those off. The agreement is subject to planning and, with your agreement, I will start work on the draft lease with the lawyers as this will be the key element as we move forward.”

This first draft – “**Draft A**” - included a cover sheet in the form of the HoT as eventually signed. It started with the following

“The Proposed Agreement is to encompass the provision of a leased site to Pretoria Energy Company Limited. The site will be for an anaerobic digestion plant for the production of gas & electricity.

The agreement will consist of four constituent parts, the core element being the lease. The three other elements are available and negotiable, but any or all elements may be terminated by agreement between the parties and the giving of six months notice one to the other.”

The four “constituent parts” of the agreement were then numbered: 1. Lease; 2. Contract Maize Growing; 3. Digestate and 4. Gas Supply. A fifth heading was “Energy connection”, in line with the Proposal. There was then a paragraph headed “Acceptance”. This said

“These Heads of Terms of Agreement are agreed and signed on the understanding that the formal agreement will be drawn up within 1 month from planning consent being achieved and subject to the consents and easements being obtained.”

There were signature boxes for signature on behalf of the Claimant and Defendant.

10. There appear to have been discussions on the HoT and on 7 November 2013 Mr Shaw produced a second draft, **Draft B**, of the HoT. Again, his email suggested to Mr Banks that if he were happy with the document, he should sign and return it for signature by Steven Ripley. In Draft B, both the opening and the closing sections had been amended from those in Draft A. In the opening section, there was an additional sentence confirming that the Claimant would be responsible for *“all costs of these Heads of Terms, Planning, the Lease and the final Agreement.”* There was also an addition to the paragraph under the heading “Acceptance” which said

“It is also understood that both parties, on signature, agree to be bound by complete confidentiality and adherence to all the terms, pricing and conditions of these Heads of Terms until the Final Agreement is accepted and signed.”

I shall refer to this as the “**Adherence Amendment**”.

11. There appear to have been further discussions about the drafting of the HoT later that day and it seems likely that there was a further draft produced which has not made its way into the trial bundle. I say this because at 21:57 that

evening, Mr Shaw wrote to Mr Banks commenting on various drafting points, saying

“I thank you for your addition to the final paragraph regarding exclusivity. I feel this addition demonstrates the total commitment of both parties to work together on this exciting project.”

This must be a reference to the Lockout Provision which appears in subsequent drafts of the HoT.

12. On 14 November 2013, Mr Shaw chased Mr Banks asking if the Defendant was any further forward towards completing the HoT. He said that Mr Ripley *“now has everything prepared for planning to be submitted, but I asked him to hold pending your acceptance.”* The “everything” which was prepared for planning to be submitted appears to have included the cheque for the planning application fee, which is dated 8 November 2013.
13. The next draft of the HoT, **Draft C**, was sent to Mr Ripley and Mr Shaw by Mr Banks on 22 November 2013. In returning it, Mr Banks said that he had *“now had a chat with the solicitor”*. In this draft, amendments are shown tracked. Such tracking appears in the section of the draft dealing with the lease. In that section, there is one addition – “Outside the 1954 Act” – but also a couple of queries, one relating to discussing alternative methods of reviewing the rent and another about what was to happen with decommissioning the plant at the end of the lease term, suggesting that the Defendant would wish to see a bond or escrow account with the amount reviewed. In the “Acceptance” section, the Adherence Amendment has been

deleted and the Lockout Provision, which was previously open-ended, has been confined to a period of six months.

14. On 26 November 2013, Mr Banks emailed the Defendant's solicitors, Roythornes, enclosing a further revision of the draft HoT ("**Draft D**"). He copied his email to Mr Ripley and Mr Shaw of the Claimant and asked if "everybody" was happy that he sign the HoT in this form. In Draft D, the Lockout Provision read:

"Furthermore it is agreed that Blankney Estates and Pretoria Energy recognise that the arrangements being negotiated are exclusive for a period of six months from the date that planning permission is granted to both parties and thereby agree not to enter into negotiations with third parties to the detriment of the terms contained herein."

15. Edward Johnson of Roythornes reverted, again copying in Mr Ripley and Mr Shaw, making one suggestion, namely that the words "*the date that planning permission is granted to both parties*" were replaced with "*the date of these heads of agreement*". He continued:

"My concern is that the wording amounts to an exclusivity period and it is important that such periods are restricted so that both parties are not bound indefinitely but have a reasonable time frame in which to put the other documentation in place. If planning permission is never granted then arguably the exclusivity period would never end."

This was followed by an email exchange in which the parties agreed exclusivity until a fixed date, namely 31 July 2014.

The HoT were then signed by Mr Ripley and Mr Banks on 27 November 2013 in the form which appears in the appendix to this judgment.

Events after the HoT

16. Following signature of the HoT, the Claimant applied for planning permission for the AD plant (this was treated as “received in valid form” by the local authority on 21 January 2014).
17. The Defendant granted the Claimant a licence dated 21 February 2014 for the growing, harvesting and carting away of a single crop of maize on neighbouring fields, at a licence fee of £568.33/ha and Mr Ripley explains that the Claimant took a lease of other land, bringing the total to 350 acres. The Claimant’s case is that the maize was intended as fuel for the AD plant and the total expenditure incurred for the 350 acres was £234,885.
18. Planning permission was granted for the AD plant on 11 June 2014. The Defendant, however, was unhappy that the Claimant had told the planning committee that 40-60% of the feedstock for the plant would come from the Defendant, and Mr Harper wrote to Mr Ripley to express concern on that front.
19. Following the grant of planning permission, the Defendant instructed Roythornes to progress the drafting of a lease.
20. Steps were also taken by the Defendant to demolish the former flax factory on the Site. On 23 July 2014 Mr Banks emailed Mr Ripley saying

*“Demolition team are making good progress. At the moment they are expecting to rip up the slab and foundations to a depth of 1.2m. This may have arisen as a result of some confusion because I initially thought that we had asked them to quote to demolish to slab level only. I believe we have agreed to lease the site to you complete with slab. Do you want it ripped up and are you happy to contribute to the demolition costs if you do? Getting **urgent** as they are about to start!”* (emphasis in original)

He chased for an answer to this and other queries by email of 25 July 2014, in which he also explained that Roythornes needed a fee undertaking before progressing the draft lease, adding *“I take it you are reasonably relaxed about exclusivity period ending?”*.

21. The demolition works proceeded but were temporarily halted when the local authority complained that they amounted to commencement of development under the planning permission, without compliance with certain planning conditions. Mr Banks explained to the local authority that the Defendant had understood the demolition to be a distinct activity to the development of the AD plant and were also unaware that notice of demolition was required.
22. On 19 August 2014 Mr Banks emailed Mr Ripley and Mr Shaw and others. He referred to the exclusivity period having ended and expressed himself keen to replace it with a new one so that there was focus to the discussions. He raised the issue of the fee undertaking and asked the Claimant to confirm who its solicitors were. This prompted some correspondence between Roythornes and Ashton KCJ for the Defendant, but by early September 2014 Roythornes were still without the requested fee undertaking.

23. Matters came to a head in mid-September 2014. Mr Banks emailed the Defendant's representatives on 10 September insisting that they find a time to meet so that the parties could progress the matter. Following a meeting later that month, Mr Banks wrote to say that the Defendant had grave concerns about the Claimant's commitment and ability to deliver the project in a timely fashion. He said that the Defendant had concluded that its interests were now best met by ensuring that the opportunity to acquire the Site became a competitive process and that they could no longer offer the Claimant the exclusivity that had previously been in place. The Claimant responded protesting its commitment to the project; its own professionalism and the Defendant's lack of understanding of the depth of workload undertaken by the Claimant. Focusing on the lease in particular, the letter said

"...we have never been concerned that we would not enter in to one with you due to the following reasons:

- a) We have assumed we are working with genuine and honest people of which shared the same aim of success in providing renewable energy.*
- b) [The Defendant] are growing and storing maize for the purposes of our AD once build.*
- c) The understanding of exclusivity between us and yourselves.*
- d) A draft has been produced and solicitors are in possession of this.*

- e) *Five hundred thousand pounds worth of investment in to growing and planning commitments has already been spent.”*

24. The parties were unable to resolve their differences and on 24 November 2014 the Defendant informed the Claimant that it had concluded arrangements with a third party. Pre-action protocol letters followed in August/September 2015. These proceedings were not commenced until 2 September 2020.

Legal Principles

25. As the Supreme Court said in *RTS Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14, [2010] 1 WLR 753 at [45], the general principles applicable to the issues raised by this case are not in doubt:

“Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

26. The issues of contractual intention and of certainty, both of which are mentioned by Lord Clarke in this passage, give rise to two distinct questions: *Joanne Properties Ltd v Moneything Capital Ltd* [2020] EWCA Civ 1541; [2022] 1 P & CR 1 at [33]. Nevertheless, one issue may inform the other: the more vague and uncertain an agreement is, the less likely it is that the parties intended it to be legally binding: *MacInnes v Gross* [2017] EWHC 46 at [77]. However, as the passage from *RTS* above indicates, it is in most cases for the parties to choose which terms they regard as essential for the formation of

legally binding relations. They can agree to be bound contractually, even if there are further terms to be agreed between them: *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2012] EWCA Civ 548 at [32].

27. Counsel were agreed that, in order to decide whether a contract has been made, it is necessary to look at the whole course of dealing between the parties: *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37, [2017] 4 WLR 163 at [28]-[39]. Events which occur after the making of the alleged contract may be relevant to understanding whether, objectively, the parties intended their dealings to be contractually binding even though they would be irrelevant to the question of how any contract so made should be interpreted.

28. In a commercial context, the onus of demonstrating that there was a lack of intention to create legal relations lies on the party asserting it, and it is a heavy one: *Barbudev*, above, at [30]. Parties may expressly negative contractual intention, which they often do by using the phrase “subject to contract”. But the use of such words is not essential: *Cheverny Consulting v Whitehead Mann Ltd* [2006] EWCA Civ 1303, [2007] 1 All ER (Comm) 124 at [42]. Nor is the label “heads of terms” conclusive: a document referred to as “heads of terms” may be intended to be a non-binding record of the broad principles of an agreement to be made in formal written documents subsequently negotiated, or may be intended, in whole or part, to be a binding contract governing the parties’ relations until a more detailed agreement is drawn up, as in *Green Deal Marketing Southern Ltd v Economy Energy Trading Ltd* [2019] EWHC

507, [2019] 2 All ER (Comm) 191 and *Mahmood v The Big Bus Company* [2021] EWHC 3395.

29. Where the parties intend to be contractually bound, the courts are reluctant to find an agreement is too vague to be enforced: *Wells v Devani* [2019] UKSC 4, [2020] AC 129 at [18]. The court may be able to imply terms to fill apparent gaps, particularly in commercial dealings between parties familiar with the trade in question or where the parties have acted in the belief that they have a binding contract: *Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406 at [69]. I bear in mind that business people may record important agreements in a summary way: *Hillas & Co Ltd v Arcos Ltd* [1932] All ER Rep 494 at 503.
30. Contracts for the disposition of interests in land, including agreements for lease, are subject to the additional requirements of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989. An agreement for a lease (other than short leases within s.54(2) of the Law of Property Act 1925) can be made only in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each; that document or those documents must be signed by or on behalf of each party to the contract.

Contractual Intention

31. It was common ground between the parties that the Lockout Provision was intended to be, and was, legally binding. It was also common ground (at least by the time of the hearing) that the parts of the HoT numbered 2, 3 and 4, relating to maize growing, digestate and gas supply, and the unnumbered part

headed “Energy Connection” (“**the Ancillary Proposals**”), were not intended to be legally binding. The issue for the court is whether the section numbered 1 and headed “Lease” was a binding agreement for the grant of a lease of the Site for a term of 25 years at a rent of £150,000 p.a., subject to an annual review based on RPI. In my judgment, it was not. The parties did not objectively intend to bind themselves to a contract by the HoT, other than in respect of the Lockout Provision. I say that for the following reasons.

32. First, I agree with Mr Ohrenstein that the proposition that the parties had agreed a binding contract for the grant of a lease is incompatible with the Lockout Provision. The Lockout Provision provides that the parties recognise that

“the arrangements being negotiated are exclusive to both parties until the 31st July 2014 and thereby agree not to enter into negotiations with third parties to the detriment of the terms contained herein.”

This clearly implies that after 31 July 2014 the Defendant will be free to enter into negotiations with third parties, including for the grant of a lease of the Site. This would not be possible if the Defendant had already agreed, in binding terms, to grant a lease of the Site to the Claimant.

33. Ms Blackmore argued that the Lockout Provision should be read as confined to the Ancillary Proposals, these being the “*arrangements being negotiated*”, in contrast to the lease, in respect of which there was nothing to negotiate. I do not consider this is right. There were matters still to be negotiated in respect of the lease, not least the question as to whether the AD plant should be decommissioned at the end of the 25-year term, which was an issue which the

parties expressly recognised that the lease would need to make “*suitable arrangements*” for. They also contemplated that the lease “*will require the appropriate consents and easements*” in order to be “*filed with the Land Registry*”. In my judgment, as a matter of language, the terms of the lease and the consents and easements to be granted with it (or to which it was to be subject) were “*arrangements being negotiated*”. Moreover, the lease was clearly the most important element of the discussions: the HoT describes it as the “*core element*” of the agreement. It was the part of the arrangements which was most in need of protection from negotiations with third parties. In my view, both as a matter of language and as a matter of commercial common sense, the Lockout Provision covered the agreement for lease as much as the Ancillary Proposals.

34. Secondly, the initial inclusion of the Adherence Amendment in Draft B and its subsequent removal in Draft C, following the involvement of solicitors for the Defendant, is in my view significant. The Adherence Amendment, with its reference to the parties adhering “*to all the terms, pricing and conditions of these Heads of Terms until the Final Agreement is accepted and signed*” would have been a strong signal of an intention to be bound by the HoT pending the agreement of final terms. Roythornes no doubt appreciated that such a provision was not consistent with the agreement of the Lockout Provision and suggested removing it (as shown by the tracking on Draft C). By accepting that suggestion, the parties objectively agreed to a period of exclusivity, to enable negotiations to take place between them without the risk of competition from third parties, rather than giving contractual force to the HoT themselves.

35. Thirdly, and again on the intervention of Roythornes, it was agreed that the lease should be contracted out of the Landlord and Tenant Act 1954 (“**the 1954 Act**”). This agreement would be ineffective if the HoT created a binding agreement for lease, because by s.38A(1), (3) of the 1954 Act and Schedule 2 of the Regulatory Reform (Business Tenancies)(England and Wales) Order 2003, the process by which business tenancies are contracted out of the 1954 Act (the giving of a notice by the landlord and a declaration, or statutory declaration, from the tenant) must be carried out before the tenant becomes contractually bound to enter into the relevant tenancy. Thus if the agreement for lease were effective as a contract, a major term of that agreement would be void. Ms Blackmore reminded me that her clients did not have solicitors acting and submitted that I should not impute to them an understanding of the mechanics of the 1954 Act and the contracting-out procedure. Whilst that is true, it seems to me that an intention to be bound in contract must be mutual: if one party, objectively, intends to be bound and the other does not, there can be no contract. By inserting the words “*It is agreed that the lease will be outside of the 1954 Act*” into the HoT on solicitors’ advice, the Defendant was in my judgment signalling that it did not intend to enter into a binding contract before the necessary processes to contract the lease out had been entered into, and the Claimant agreed to proceed on that basis.

36. Fourthly, I do not consider that the parties had agreed all of the terms of the lease which they regarded as essential for the creation of legally-binding relations. Ms Blackmore submitted that the HoT contained all that was needed for an agreement to grant a lease: the premises (“*a bare land site, known as the Flax Factory*”), the term (25 years); the rent (£150,000 p.a.) and the

mechanism and timing for its review (by reference to RPI, annually). As to this, Mr Ohrenstein submitted that the extent of the premises was not clearly defined as the HoT could refer merely to the area of land on which the former factory buildings had been located, rather than the whole Site. I disagree with Mr Ohrenstein in this respect: on the evidence, the lease was clearly intended to be granted over the whole Site, which was the subject of the planning application and was referred to as including the adjoining field in Mr Banks' email of 15 July 2013. I also accept Ms Blackmore's submission that courts have been willing to find enforceable contracts for the sale of land where the parties have agreed only the barest essentials: Chitty on Contracts 34th edn 4-151. However, it seems to me that there is a significant difference between the sale of an existing property and the creation of a new property interest in the form of a commercial lease. Terms may be readily implied into a contract for the former: in relation to the latter, it is much more difficult to know what the provisions of the lease – which the parties will have anticipated would run to many pages – must be, without express agreement. An AD plant is a relatively new form of technology and may give rise to different issues from other forms of commercial property (such as shops or offices) which are routinely the subject of leases. For example, the issue which the parties expressly “parked” in the HoT, namely the question whether the AD plant should stay or be removed at the end of the lease, was one of commercial importance and without an obvious single answer. Both parties recognised in the HoT that this was an issue which would need to be addressed, before the lease was granted, and in my view they did not intend to be bound until it had been resolved.

37. These four points are, to my mind, the most significant in indicating that the parties did not intend to create legal relations between them, except in relation to the Lockout Provision. There are two other points which are less strong and would not be conclusive on their own but which, taken together with the factors I have mentioned, add further weight to that conclusion.
38. The first of those subsidiary points is the fact that the HoT are described as “Heads of Terms of Proposed Agreement” and both the opening section and the part headed “Acceptance” envisage a future, formal, agreement. This is consistent with Mr Banks’ email of 11 October 2013, which requested the drafting of “*a document to reflect the Heads of Terms which we can ultimately incorporate into an agreement.*” This tends to suggest that the parties contemplated that they would not be bound until a future document had been signed.
39. The second subsidiary point is the tentative and provisional nature of the arrangements in relation to energy connection to the AD plant. At the time of the HoT the “*exact connection points and methods*” for connecting the AD plant to the National Gas Grid were still to be decided and it was contemplated that the Claimant would or might need easements over the Defendant’s land. The routes of those easements could be of commercial significance to the Defendant and that is recognised by the references in the HoT to the Claimant covering crop losses, grants and subsidies, income or costs and to the expectation that the Claimant would pay for the grant of an easement, if agreement on a formula to write off that cost through arrangements for the supply of gas to the Defendant could not be reached. That the parties were a

long way off reaching agreement on these matters is apparent from the language used in the HoT: the Defendant is “*asked*” to “*assist and cooperate*”; the Claimant is “*more than happy*” to pay costs and “*expecting*” to pay for an easement. Ms Blackmore accepted that this part of the HoT was not legally binding and it seems to me that, at the very least, there is considerable doubt as to whether the parties intended the part of the HoT relating to the lease to be contractually binding prior to a final agreement being reached on these matters.

40. Mr Ohrenstein relied on a number of further points in support of his submission that the HoT do not create a contractually-binding agreement for lease. Some of these were not, in my view, of any consequence; others were equivocal and do not particularly assist either side.
41. For the Claimant, Ms Blackmore relied in particular on three points:
 - (1) the absence of the words “subject to contract”, in circumstances where a solicitor had been involved in the negotiations about the HoT for the Defendant and would be expected to know the importance of the phrase for negating contractual intention;
 - (2) the clarity with which the lease provisions were expressed in the HoT and the contrast of this language and the language used in the other sections of the HoT, which is much more tentative and indicative of mere proposals;
and
 - (3) the substantial time spent and expenditure incurred by the Claimant in making the planning application and growing maize pursuant to the licence

and the cost incurred by the Defendant in demolishing the buildings on the Site.

42. As to the first point, although use of the phrase “subject to contract” is an easy way in which parties may expressly show that their agreement is an agreement in principle only and not contractually binding, its absence is not conclusive. When the terms of the HoT and the whole of the dealings between the parties are considered in context, it is apparent that the parties did not, objectively, intend to enter into a contract and the absence of the “subject to contract” label does not matter.
43. As to the second point, I accept that the language in the section of the HoT dealing with the lease is redolent of agreement having been reached on the core terms of the lease: the premises, term, rent and review, and that this is to be contrasted with the language used elsewhere in the HoT which may be said to be more suggestive of a proposal made by the Claimant rather than a final binding agreement between the parties. Nevertheless I do not consider this factor outweighs the factors I have considered above.
44. The apparent reliance placed on the HoT by the Claimant is in my view Ms Blackmore’s strongest point. Mr Shaw’s email of 14 November 2013 makes clear that the submission of the planning application was contingent on acceptance of the HoT. If the HoT had no contractual effect, it is difficult to see why their agreement should hold up the planning application. Moreover, the Claimant spent substantial amounts of money on a maize crop intended to be biofuel for the AD plant. As to the latter point, Mr Ohrenstein pointed out that although the sums involved were substantial, they pale into insignificance

compared with the anticipated returns from the AD plant and that the Claimant obtained the benefit of a sellable crop: he therefore submits that it made commercial sense for the Claimant to incur this expenditure in the hope that the lease negotiations would eventually bear fruit and to take the risk that they would not. In the absence of cross-examination it is difficult for me to reach any conclusion on the Claimant's subjective beliefs but it may well be that the Claimant did understand the HoT to be binding. That, however, is irrelevant and in all the circumstances it does not seem to me that the evidence that the Claimant relied on the HoT is sufficient to displace the clear indicators, set out above, that the parties did not objectively intend the HoT to be binding.

45. As to the Defendant's demolition of the buildings on the Site, in my view little can be drawn from this since it is apparent that the Defendant intended to proceed with the demolition regardless of the arrangements with the Claimant. The timing of the demolition project may have been driven by an expectation that a lease would shortly be granted to the Claimant, but I do not consider I can draw the inference that it was carried out in the belief that the HoT were binding. Ms Blackmore submitted that the reference in Mr Bank's email of 23 July 2014 to the Defendant having "*agreed to lease the site to you complete with slab*" showed that the Defendant believed that there was a binding agreement in existence, but in my view that places a weight on the word "agreed" which it cannot bear. Mr Banks could be speaking of an agreement in principle, subject to contract, as much as a binding final agreement to grant a lease.

46. I therefore conclude that the parties did not intend the HoT to have contractual effect, except in relation to the Lockout Provision.

Contractual Certainty and s.2

47. Giving my findings above, it is unnecessary for me to consider whether, if the HoT had been intended to be a contractually binding agreement for lease, they would have been sufficiently certain.
48. No particular point arises on s.2 of the Law of Property (Miscellaneous Provisions) Act 1989, since the HoT are contained in a single document, signed by both parties, and appear to encompass all the terms expressly agreed between the parties.

Conclusion

49. For the reasons given above, my answer to the preliminary issue:

“Is the document titled “Heads of Terms of Proposed Agreement” (identified in paragraph 7 of the Particulars of Claim) a binding and enforceable agreement between the parties other than in respect of the Lockout provision referred to in paragraph 2 of the Defence?”

is “no”.

APPENDIX: THE HoT