Neutral Citation Number: [2018] EWHC 2866 (Comm)

Claim No LM-2016-000101

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

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

Date: Wednesday 7 November 2018

BEFORE:

MR RICHARD SALTER QC
Sitting as a Deputy Judge of the High Court

- -

BETWEEN:

(1) GPP BIG FIELD LLP
(2) GPP LANGSTONE LLP

Claimants

- and -

SOLAR EPC SOLUTIONS SL
(formerly known as **PROSOLIA SIGLIO XXI**)

Defendant

- -
- -

Mr Matthew Parker and Ms Pia Dutton
(instructed by *NewLawsLegal*)
appeared for the Claimants

Mr Richard Walford
(instructed by *James Burkett Solicitor*)
appeared for the Defendant

Hearing dates: 11, 12, 13, 14, 18, 25, 26 June 2018

- -

Judgment Approved

Contents

(1) Introduction 5
(2) Background 6
(2.1) The parties 6
(2.2) The people involved 7
(2.3) The witnesses 7
(2.4) The tariffs 9
(2.5) The insolvency of the Contractor 11
(3) The Hamptworth contract 11
(3.1) The claims, the defences and the counterclaim 11
(3.2) The claim under clause 21.5 14
(3.2.1) The relevant provisions of the Hamptworth contract 14
(3.2.2) Is clause 21.5 an unenforceable penalty? 24
(3.2.3) Was any part of the relevant delay caused by force majeure? 28
(3.2.4) Conclusion 39
(3.3) Actual loss 39
(3.4) Guarantee defences 41
(3.4.1) The terms of the guarantee 41
(3.4.2) Is clause 6.2 a guarantee or indemnity? 42
(3.4.3) Does the doctrine of "unusual features" and/or the rule in *Holme v Brunskill* apply to contracts of indemnity 44
(3.4.4) Unusual features 52
(3.4.5) Discharge by variation 55
(3.5) Counterclaim 58
(4) The Beaford Brook contract 61
(4.1) The claims, the defences and the counterclaim 61
(4.2) The claim under clause 21.5 62
(4.2.1) Is clause 21.5 an unenforceable penalty? 62
(4.2.2) Was the project delivered on time? 62
(4.2.3) Has the second claimant waived its right to claim Delay Damages? 64
(4.2.4) Conclusion 67
(4.3) Actual Loss 67
(4.4) SDLT 69
(4.4) Counterclaim 69

(5) The Rookery Farm contract 70
(5.1) The claims, the defences and the counterclaim 70
(5.2) The claim under clause 21.5 71
(5.2.1) Is clause 21.5 an unenforceable penalty? 71
(5.2.2) Has the second claimant waived its right to claim Delay Damages? 71
(5.2.3) Conclusion 72
(5.3) Actual loss 72
(5.4) The claim in relation to the ROCs 73
(5.4.1) The ROCs obligation 73
(5.4.2) The claim 73
(5.4.3) Clause 28.1 75
(5.4.4) The overlap with clause 21.5 81
(5.4.5) Conclusion 83
(5.5) SDLT and cost to complete 83
(5.6) Counterclaim 83
(6) The Bidwell contract 84
(6.1) The claims, the defences and the counterclaim 84
(6.2) The claim under clause 21.5 86
(6.2.1) Is clause 21.5 an unenforceable penalty? 86
(6.2.2) The correct period 86
(6.2.3) Conclusion 91
(6.3) Actual loss 91
(6.4) The claim in relation to the ROCs 91
(6.5) SDLT 93
(6.6) Costs to complete 93
(6.6.1) The claim and the defences 93
(6.6.2) The second claimant's loss results from its own breach of contract 96
(6.6.3) Was an agreement reached in August 2014? 98
(6.6.4) Were lower prices available 98
(6.6.5) Power inverters (Item 1) 99
(6.6.6) Fencing (Item 2) and the security system (Item 6) 100
(6.6.7) Switchgear (Item 3) 103
(6.6.8) Planting (Item 7) 104
(6.6.9) Rent (Item 8) 105

(6.6.10) Project management 106
(6.6.11) Conclusions 106
(6.7) Counterclaim 107
(7) The Lower Marsh Farm contract 109
(7.1) The contract 109
(7.2) The relevant dates 109
(7.3) The claim and set off 110
(7.4) Decisions 111
(7.3.1) The amount of the counterclaim 111
(7.3.2) Delay Damages 111
(7.3.2) Responsibility for the Contractor's failure to complete the work 111
(7.3.3) Security Guards and CCTV 112
(7.3.4) Planting 113
(7.3.5) Electrical works etc 113
(7.3.6) Conclusion as to set off 113
(8) Overall conclusions 114
(8.1) The 5 EPC contracts 114
(8.1.1) Hamptworth 114
(8.1.2) Beaford Brook 114
(8.1.3) Rookery Farm 114
(8.1.4) Bidwell 114
(8.1.5) Lower Marsh Farm 115
(8.2) Solar's liability 115
(8.3) The final accounting 115
(8.3.1) The first claimant 115
(8.3.2) The second claimant 115
(8.4) Judgment 116

MR SALTER QC:

(1) Introduction

1. The disputes which have given rise to this action concern five Engineering, Procurement and Construction ("EPC") contracts relating to solar power generation plants in the United Kingdom. Those EPC contracts were made between one or other of the claimants ("GPP") as employer, and Prosolia UK Ltd ("the Contractor") as contractor. The Contractor is now insolvent. The defendant in this action ("Solar") was the parent company of the Contractor, and is sued as guarantor and/or indemnifier of the Contractor's obligations under four of the EPC contracts. The claim, in broad terms, is for damages (both liquidated and unliquidated) for late and/or non-completion of the works required by those four EPC contracts. Solar, in turn, counterclaims against GPP (under an assignment from the administrator of the Contractor) for the balance of the sums which it asserts remain due under all five of the EPC contracts.

2. The five EPC contracts with which this action is concerned are as follows:

   2.1 The "Hamptworth" contract dated 14 May 2012 between the first claimant and the Contractor, for the construction of a solar plant at Big Field, Hamptworth Estate, Salisbury SP5 2DS for a total price of £7,849,161.

   2.2 The "Beaford Brook" contract dated 7 February 2013 (as amended by a deed of variation dated 2 October 2013) between the second claimant and the Contractor, for the construction of a solar plant at Upcott Barton, Beaford, Winkleigh, Devon for a total price of £5,925,607.49.

   2.3 The "Rookery Farm" contract dated 1 March 2013 (as amended by deeds of variation dated December 2013 and 11 March 2014) between the second claimant and the Contractor, for the construction of a solar plant at Kimbolton Road, Stow Longa, Huntingdon PE28 0TR for a total price of £6,644,954.

   2.4 The "Lower Marsh Farm" contract dated 9 August 2013 between the second claimant and the Contractor, for the construction of a solar plant at Kingston St Mary, Somerset for a total price of £6,258,364.

   2.5 The "Bidwell" contract dated 11 October 2013 between the second claimant and the Contractor, for the construction of a solar plant at South Downs, Dartington, Totnes, Devon for a total price of £5,492,180.72.

3. GPP was represented at trial by Mr Matthew Parker and Ms Pia Dutton. Solar was represented by Mr Richard Walford. I am grateful to all of the advocates, and to the

teams behind them, for the clarity and economy with which they have presented their cases.

(2) Background

4. Although the claims, defences, and counterclaims in relation to these five EPC contracts involve a number of common legal issues, each has its own particular facts, and the terms of each contract, although often materially the same, are not always identical in all respects. It is therefore necessary for me to take each contract in turn, and to consider the claims, defences, and counterclaims in relation to each of them separately, referring back where a decision that I have reached in relation to one contract also decides a similar issue in relation to another. Before I do that, however, it may be helpful for me to set out some of the common background to these disputes.

(2.1) The parties

5. The claimants are special purpose limited liability partnerships incorporated in England. The first claimant is owned by two Danish kommanditselskab (usually abbreviated as "K/S"), Green Power Partners K/S ("GPP K/S") and Solar Rooftops III K/S. (The K/S is the Danish equivalent of the English limited liability partnership.) The second claimant is owned by GPP II UK K/S and Green Power Partners II K/S. These Danish entities are all investment vehicles for funds managed by Mr Lars Christian Gaarn-Larsen.

6. Solar (formerly known as Prosolia Siglo XXI Sociedad Limitada Unipersonal) is a Spanish company which is the parent company of a group specialising in the construction of solar power plants. From about 2009, Solar's group had collaborated with the funds managed by Mr Gaarn-Larsen on solar projects in Spain and elsewhere in continental Europe. In about 2011, seeing an opportunity created by the favourable renewable energy tariffs in the United Kingdom, Solar and Mr Gaarn-Larsen decided to work together on a number of projects in the United Kingdom.

7. For that purpose, the Contractor was incorporated on 20 July 2011. The first director of the Contractor was Mr Francisco Garcia Hernandez (known as "Paco", but to whom I shall refer as "Mr Garcia"). It was Mr Garcia, in particular, who was responsible for seeking out and identifying the opportunity to construct a solar power plant at a particular site. In doing so he was acting on behalf of the Contractor and on behalf of another company associated with Solar, Comprasolar UK Limited ("Comprasolar"), of which he was also the only director. In each case, Mr Garcia (or someone working under him) was the person who initially secured a lease or other rights over the land and any necessary planning permissions, before the projects were sold to Mr Gaarn-Larsen's funds. Indeed, in relation to the Hamptworth project, the

first claimant itself was originally set up, owned and run by the Contractor and Comprasolar. The Contractor and Comprasolar then sold the first claimant to Mr Gaarn-Larsen's funds on 14 May 2012, at the same time as the first claimant, the Contractor and Solar entered into the Hamptworth contract.

(2.2) The people involved

8. The people involved on behalf of Solar at the relevant time were Mr José Maria Delgado and Mr José Luis Gandia. Mr Delgado who was based in Valencia, was a director of Solar and was the Chief Executive of the Solar group. From 1 May 2012, Mr Delgado was also a director of the Contractor.

9. Also involved was Mr Borja Andreu, who acted as financial adviser to the companies in the Solar group.

10. The Contractor was managed by Mr Garcia, who remained a director of the Contractor until 28 November 2013. Mr Garcia mainly worked from the Contactor's office in the UK. However, at the relevant time, he was also studying in Madrid for his MBA, and would travel to Madrid every couple of weeks. The day to day management of the Contractor was in the hands of a senior employee, Mr Peter Collins, who had helped Mr Garcia to identify and to set up the Hamptworth project. When Mr Garcia was not in the UK, Mr Collins would report to him from time to time by telephone: and, from time to time, Mr Garcia would report, in turn, to Mr Delgado, again usually by telephone. The Contractor's technical manager was Mr Sergio Casanova.

(2.3) The witnesses

11. Mr Gaarn-Larsen was the sole witness for GPP. Mr Garcia and Mr Delgado gave evidence on behalf of Solar. Mr Gaarn-Larsen and Mr Garcia gave their evidence in English, though English is not the native language of either of them. Mr Delgado plainly had a reasonable command of English, but gave his evidence in Spanish, through an interpreter.

12. Mr Gaarn-Larsen produced 3 witness statements dealing with the facts of the case. When cross-examined, Mr Gaarn-Larsen appeared to weigh his answers carefully before giving them, and sometimes gave me the impression that he was considering the effect on GPP's case of a variety of answers before choosing which one to proffer to the court.

13. Mr Garcia produced a single, long witness statement. Mr Garcia's approach to giving his evidence in response to cross-examination was more relaxed than that of Mr Gaarn-Larsen. When Mr Garcia was pressed to defend some of the passages in

his witness statement, he sometimes became defensive and appeared concerned to stick to his script. However, on other occasions, he readily conceded that significant parts of his witness statement were either simply wrong, or at least overstated the position.

14. One particularly striking example of this related to Mr Garcia's evidence concerning the allegation (pleaded in paragraph 5C of the Amended Defence and Counterclaim) that Mr Garcia had reached an oral agreement with Mr Gaarn-Larsen to the effect that, notwithstanding the express terms of the Hamptworth contract relating to time, the Contractor's obligation would be simply to complete the works as soon as practicable, on the understanding that the price payable to the Contractor would be recalculated depending upon the tariff actually achieved. Mr Garcia's written evidence, in paragraphs 4.2.6, 4.2.15-16, and 4.3 of his witness statement, was to the effect that he and Mr Gaarn-Larsen had made that oral agreement at some point between 3 and 7 May 2012, in order to avoid the delay of "an extensive re-drafting exercise", and against the background that both sides knew from the outset that the timetable specified in the Hamptworth contract was unachievable. However, in cross examination, Mr Garcia accepted that the terms of the Hamptworth contract did in fact fully reflect the terms of the agreement that the Contractor had made with the first claimant, and that that written contract was a complete and accurate reflection of what had been agreed.

15. Mr Garcia also volunteered in cross-examination that he had little or no personal knowledge of some of the important events that he had dealt with in his witness statement, as he was in Spain at some of the material times, and so was relying for his evidence on what he had been told by Mr Collins. Mr Garcia had not explained this in his witness statement, despite saying in that witness statement that "where I refer to information supplied by others, the source of the information is identified".

16. As for Mr Delgado, he also produced only a single witness statement. He was defensive in the way that he gave his evidence under cross-examination, taking pains to minimise the extent of his knowledge of and involvement in the Contractor's activities. On occasions, his answers were so evasive that it was necessary for me to intervene and to direct him to answer the question.

17. In forming my views on the limited areas of factual dispute to which the oral evidence of these witnesses is relevant, I have of course paid close attention to the demeanour of the witnesses in the witness box as they gave their evidence to me. I have, however, also borne in mind the period of time that has passed since the events with which this trial is concerned. It is inevitable that memories have faded or been changed by the passage of years. In those circumstances, I must take into account the likelihood that the contemporary documents, the admitted or incontrovertible facts,

and the overall probabilities will now provide a more reliable guide to the truth of what happened than the memories of the witnesses[1].

(2.4) The tariffs

18. Among the factors that were attractive to Solar and Mr Gaarn-Larsen's funds about the UK was the statutory regime of incentives and subsidies for the production of "green" energy that was in force from 2010. What follows is a very broad outline (which is all that is required for the purposes of the present case) of the relevant aspects of that regime, as it was in force at the times material for this action.

19. The Utilities Act 2000 (and subsequently the Energy Act 2008) amended the Electricity Act 1989 to give the Secretary of State the power to require electricity suppliers to supply a certain proportion of their total sales in the United Kingdom from electricity generated from renewable sources. From 2002, a "Renewables Obligation" was prescribed annually by statutory instrument, detailing the precise level of the obligation for the coming year, and the level of the buy-out price. The Renewables Obligation was closed to all new generating capacity on 31 March 2017.

20. The Renewables Obligation scheme is managed on behalf of HM Government by the Office of Gas and Electricity Markets ("Ofgem"). Generators of renewable energy that wish to participate in the scheme are required to apply to Ofgem for accreditation. Ofgem's accreditation specifies the total installed capacity and an effective date (which is also the date upon which the plant can begin commercial operation) for a specified tariff, which is fixed for the next 20 years.

21. Accredited generators which fulfil the prescribed criteria receive Renewables Obligation Certificates (or "ROCs") in return for the electricity which they generate, and can sell these to the electricity suppliers that buy that electricity from them under power purchase agreements ("PPAs") for a premium in addition to the wholesale electricity price. The electricity suppliers can then present these ROCs to Ofgem to demonstrate their compliance with the Renewables Obligation. (In practice, ROCs are issued and transferred through Ofgem's computerised registry, rather than in paper form).

22. Under the Renewables Obligation Order 2009[2] Art 58 (in force of the material time), Ofgem could only grant final accreditation to a generating station if that station had been "commissioned". That expression was defined in Article 2(1) as follows:

> **"commissioned", in relation to a generating station, means the completion of such procedures and tests in relation to that station as**

---

1. See eg *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2018] UKSC 3, [2018] 1 WLR 973 at [100]-[103], per Lord Kerr JSC.

2. SI 2009 No 785 (as amended at the relevant time by SI 2010 No 1107, SI 2011 No 985 and SI 2011 No 988).

> **constitute, at the time they are undertaken, the usual industry standards and practices for commissioning that type of generating station in order to demonstrate that that generating station is capable of commercial operation.**

23. Among the relevant commissioning tests were those required by Engineering Recommendation G59 "Recommendations for the Connection of Generating Plant to the Distribution Systems of Licensed Distribution Network Operators". Ofgem required the G59 test certificate either to be signed by the witnessing Distribution Network Operator (ie the relevant regional electricity company), or to be accompanied by a letter from the DNO stating that it did not wish to witness the test.

24. The Energy Act 2008 also gave the Secretary of State the power to amend the Standard Conditions of Electricity Supplier Licences for the purposes of "establishing, or making arrangements for the administration of, a scheme of financial incentives to encourage small-scale low-carbon generation of electricity". This scheme, known as the Renewables Obligations Order Feed-In Tariff ("ROO-FIT") was introduced in April 2010 by amendment to Standard Condition 33. Only systems that are less than 5MW in size are eligible.

25. Under the Feed-in Tariffs (Specified Maximum Capacity and Functions) Order 2010[3] Ofgem was required to accredit qualifying generators of renewable energy that wished to participate in the scheme. As with the ROCs scheme, that accreditation would specify the total installed capacity and an effective date for the specified tariff.

26. The scheme requires participating licensed electricity suppliers, as a condition of their Electricity Supplier Licence, to make a prescribed level of payments to eligible generators. In the case of solar power (or "photo-voltaic") generation stations, if the Eligibility Date (as defined in Standard Condition 33) was before 1 August 2012, the level of payment under the ROO-FIT tariff was fixed for 25 years. If not, it is fixed for 20 years.

27. The Eligibility Date is defined (relevantly) as the later of the date of application for accreditation and the date on which the installation is "commissioned". For these purposes, "commissioned" is defined to mean:

> **.. in relation to an Eligible Installation, that:**
>
> **(a) such procedures and tests have been completed as constitute, at the time they are undertaken, the usual industry standards and practices for commissioning that type of installation such that it is capable of operating at its Declared Net Capacity (assuming that the relevant**

[3] SI 2010 No 678 (as amended at the relevant time by SI 2011 No 1181, SI 2011 No 1655, SI 2011 No 2364 and SI 2012 No 671). This (as further amended) was repealed and replaced, with effect from 1 December 2012 by the Feed-in Tariffs Order 2012, SI 2012 No 2782.

> **Eligible Low-Carbon Energy Source was available to it without interruption or limitation); and**
>
> **(b) the installation is connected to Plant such that the whole of its maximum output could be used in a permitted way ..**

Again, those tests include the commissioning tests required by Engineering Recommendation G59 prior to connection to the network.

28. The ROO-FIT tariff, when introduced, was a particularly generous one, and steps (including the reduction of the fixed period from 25 to 20 years) have subsequently been taken to reduce the level of subsidy paid to eligible generators.

(2.5) The insolvency of the Contractor

29. Unfortunately, for reasons which I shall discuss later in this judgment, these contracts did not prove profitable for the Contractor, and by March 2014 it had become insolvent. On 31 March 2014, a creditors' meeting approved a company voluntary arrangement, to be supervised by two insolvency practitioners from Ernst & Young LLP. On 11 August 2014, the company voluntary arrangement was brought to an end and the Contractor was placed into administration. Asher Miller and David Rubin, of David Rubin & Partners, were appointed administrators. On 11 August 2015, that administration was converted into a creditors' voluntary winding up, in which Mr Miller and Mr Rubin were appointed liquidators.

(3) The Hamptworth contract

(3.1) The claims, the defences and the counterclaim

30. The first of the five EPC contracts that I need to consider is the Hamptworth contract, the contracting party in relation to which was the first claimant. The first claimant's primary claim under the Hamptworth contract is for the sum of £631,759, which it says is due from the Contractor under clause 21.5 by way of liquidated damages for the Contractor's failure to achieve the commissioning of the plant by the date specified in the contract. The first claimant's case is that the due date for commissioning of the Hamptworth plant was 24 June 2012 (ie shortly before the tariff cut-off date referred to in paragraph 26 above), but the actual date of commissioning was 26 March 2013, resulting in a delay (allowing for the 15 days grace provided for in the contract) of 254 days.

31. Solar raises two defences to this claim which (it asserts) the Contractor would have been entitled to raise:

    31.1 First, it argues that clause 21.5 is a penalty clause, and so unenforceable in law.

31.2 Secondly, it argues that under clause 21.3 the Contractor was in any event relieved of its obligation to achieve "commissioning" by the contractual date because a substantial part of any relevant delay was caused by *force majeure*.

32. The first claimant's alternative claim is for damages at common law if, contrary to its primary case, clause 21.5 cannot be enforced. Solar's answer to this is repeat its *force majeure* defence to the claim under clause 21.5, and additionally to assert that the first claimant has not adequately pleaded or proved any relevant loss caused by this particular breach.

33. Solar also raises two defences which are particular to its liability as guarantor:

33.1 First, it says that it has been discharged from its liability by the first claimant's failure to disclose, prior to Solar entering into the guarantee in clause 6 of the contract, the following "unusual features":

33.1.1 That "all permits, licenses, information other rights necessary to build and/or operate the PV Plant" had not in fact (contrary to Recital IV to the contract) already been obtained; and/or

33.1.2 That the Contractor and the first claimant had differing views as to whether the Ready Date and/or the Commissioning Date could realistically be achieved; and

33.1.3 That, given the probability that the Ready Date and/or the Commissioning Date would not be achieved, the Contractor believed that Mr Gaarn-Larsen (on behalf of the first claimant) intended to negotiate a price reduction in lieu of damages for delay, as he had in the past: but, unknown to the Contractor, Mr Gaarn-Larsen on this occasion intended to hold the Contractor to the letter of its bargain.

33.2 Secondly, it says that it has been discharged from its liability by the significant change to the agreed route of the cabling from the plant to the connection point with the grid, which was proposed by the Contractor and assented to by the first claimant.

34. The first claimant takes issue with Solar in relation to these specific defences. It also takes the logically prior point that Solar's obligation under clause 6.2 is that of an indemnifier, not a guarantor, and that the doctrines of guarantee law relied upon by Solar do not apply to contracts of indemnity.

35. In what follows, I shall deal with these claims and defences broadly in the order set out above. Before doing so, I should mention two further defences pleaded by Solar, which have not been pressed in closing submissions.

35.1 First, in paragraph 5C.5 of the Amended Defence and Counterclaim, Solar alleged that there had been an agreement made orally in discussions between Mr Gaarn-Larsen and Mr Garcia before the Hamptworth contract was signed:

> **.. that as 30 June 2012 could not be achieved or lawfully achieved, the Contractor would seek to complete the Works under the Hamptworth EPC Contract as soon as practical on the basis that, rather than spending time and expense in renegotiating the Hamptworth EPC Contract, the best available tariff at the time of actual connection would it be acceptable to the first claimant, with an adjustment to be made to the final price payable if necessary ..**

35.2 This allegation was based on the evidence given by Mr Garcia in his witness statement, particularly in paragraphs 4.2.6, 4.2.15-16, and 4.3. In his opening submissions, Mr Walford acknowledged that, in the light of the recent decision of the Supreme Court in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*[4] and of the "whole agreement" provisions in clause 41 of the Hamptworth contract, he could not rely upon this as a legally binding arrangement taking precedence over the express terms of the Hamptworth contract. By the time closing submissions were made, Mr Garcia had been cross-examined, and (as recorded in paragraph 14 above) had admitted that no such express agreement had actually been made (though he still maintained that that was his and Mr Gaarn-Larsen's common understanding). In the circumstances, Mr Walford realistically accepted in his closing submissions that "it plainly cannot be argued, given the oral evidence, that there was a formal contractual agreement to this effect". He nevertheless still relied upon Mr Garcia's evidence concerning his "understanding" as part of his case concerning Solar's "unusual features" defence, which I consider later in this judgment.

35.3 Secondly, in paragraph 9 of the Amended Defence and Counterclaim, Solar alleged that the price adjustment mechanism in clause 28.1 of the Hamptworth contract had been operated by "an agreement made between the first claimant and the Contractor on or about 6 November 2014", under which the price payable by the first claimant had been reduced: and that, in consequence, the first claimant had lost its right to claim damages for delay and/or had had its loss eliminated.

[4] [2018] UKSC 24, [2018] 2 WLR 1603

35.4 This allegation was also based upon the evidence given by Mr Garcia in his witness statement, in particular (on this occasion) in paragraphs 4.12 to 4.14.8. It was not, however, pressed, either in Mr Walford's opening submissions or in those that he made in closing. That, again, was a realistic approach. It was common ground that a meeting had taken place on 28 October 2014 in Valencia between Mr Gaarn-Larsen, Mr Delgado and Mr Garcia. Both Mr Garcia and Mr Delgado accepted in cross-examination that no concluded agreement had been reached at that meeting. Following that meeting, Mr Garcia sent an email dated 28 October 2014 which sought to summarise what had been discussed at the meeting, and to put forward proposals. Mr Gaarn-Larsen responded by email dated 6 November 2014, disagreeing with part of those proposals, and stating that "GPP will insist in the payment of the delay penalties": and negotiations went no further. Mr Garcia continued to assert, when cross-examined, that the points in his 28 October 2014 email to which Mr Gaarn-Larsen had not specifically responded on 6 November 2014 should be treated as having been agreed. In my judgment, however, that assertion is unsustainable, and it is plain from an analysis of all the evidence that no concluded agreement of the kind pleaded by Solar was ever reached.

36. Finally, Solar counterclaims for the sum of £430,628.48, which it says is the balance due to the Contractor under the Hamptworth contract, and which has been assigned to it by an agreement dated 12 September 2016. To the extent that Solar has any liability to the first claimant, it claims that it is entitled to set-off that sum in reduction or extinction of that liability.

(3.2) The claim under clause 21.5

(3.2.1) The relevant provisions of the Hamptworth contract

37. I begin by considering the first claimant's claim under clause 21.5 of the Hamptworth contract, and will start that consideration by setting out the relevant contractual provisions, many of which appear in materially similar terms in the other EPC contacts.

38. It was common ground that the wording of the EPC contracts with which this case is concerned (including the Hamptworth contract) was based on the wording of contracts, governed by Spanish law, which had been used in relation to earlier solar power projects in Spain. That wording is, in many respects, more prolix and repetitive than the wording typically found in standard-form construction contracts governed by English law. The syntax and grammar of the drafting are sometimes imperfect. The structure of the EPC contracts also has some distinctive features,

mentioned below, which are not typically found in standard-form construction contracts.

39. The Hamptworth contract was made between (1) the Contractor, (2) the first claimant, (3) the Guarantor, and (4) GPP K/S. Its recitals stated:

Whereas

I. The Contractor owned 99% of the partnership interest in [the first claimant] and as part of the transfer of such partnership interest pursuant to the transfer agreement executed today .. the [first claimant] agreed to grant the Contractor right to enter into the EPC contract and the O&M Agreement (as hereinafter defined).

II. The Contractor and the [first claimant] have agreed to execute this EPC contract for the photovoltaic project, rights to which are owned by the [first claimant] ("the PV Project") with respect to the turnkey delivery of the PV Project to the [first claimant], together with all permits and agreed ROO-FIT (tariffs) of £0.089/kWh for 25 years (Tariff), fully built, connected, commissioned and operative, and benefiting from a power purchase agreement (hereinafter referred to as the "PPA"), against payment under the EPC-contract and the execution of an agreement for the operation and maintenance of the PV Project (the O&M Contract).

III. The PV Project is the PV project "Hamptworth" with an installed capacity (name plate capacity) of 4,974.48 kWp that is going to be installed on the ground at Big Field, Hampton Estate, Salisbury, SP5 2DS, UK (hereinafter the "Project Site").

IV. The Contractor and [the first claimant] have received the information relating to the permits and licenses of the PV Project achieved at the date hereof listed in Annexure 1 hereto and the technical due diligence report issued by Ostenergy Limited, included as Annexure 2, and [the first claimant] has or is aware that there exist all permits, licenses, information and other rights necessary to build and/or operate the PV Plant.

V. The Parties are interested in formalising the EPC contract (hereinafter the "Agreement" or the "Contract"), in order to agree on the execution by the Contractor of all works and services necessary in order to build, connect, commission and commercially operate the PV Project (hereinafter the "Works") and both Parties confirm that they hold sufficient powers to enter into the Agreement in accordance with the following provisions.

VI. The Guarantor is a party to this Agreement for the purpose of guaranteeing the obligations of the Contractor under this

Agreement. [GPP K/S] is a party to this Agreement for the purpose of guaranteeing the obligations of [the first claimant] under this Agreement.

40. Under clause 2.1 of the Hamptworth contract, the first claimant engaged the Contractor to provide "the Works for the engineering, procurement and construction of the PV Project on the Project Site". The expression "Works" was defined in clause 1.1 to mean:

.. all or part of the works (including Component Parts), documents or services to be planned, designed, procured, constructed, erected, installed, completed, tested, commissioned or carried out by or on behalf of the Contractor in accordance with the Contract for the provision of a fully operating and operable PV Project with a nominal power output (according to the flash testing protocols for the photovoltaic modules provided or to be provided as part of the Works) of 4.97448 MW and including any work which is the subject of a Variation Order or any defects under any warranty pursuant to this Contract, all in accordance with the Contract.

41. Clause 2.2 then went on to state:

For the avoidance of doubt the PV Project is a land-based installation that generates electrical energy through the usage of the solar voltaic technology with an installed capacity (name plate capacity) of 4,974.48 kWp with its own low tension/medium tension transformer, its own AC/DC inverter, fully connected to the Grid, including all evacuation installations, especially the evacuation line (Grid connection) from the PV Project to the connection point assigned to the PV Project by Scottish and Southern Energy plc, in compliance with all technical and commercial instructions given in this respect by Scottish and Southern Energy plc, and in compliance with all agreements entered into with Scottish and Southern Energy plc on the interconnection of the PV Project to its distribution Grid as is more specifically defined and described, for the purposes of the Agreement, in Annexure 2. In the event of any conflict between the Grid offer from Scottish and Southern Energy plc and the technical due diligence report at Annexure 2, the Grid offer will prevail.

42. Clause 3 of the Hamptworth contract set out the obligations of the Contractor in the following terms:

3.1 The Contractor hereby accepts the commitment to carry out the Works, in the time specified in the Agreement and the timetable attached hereto as Annexure 3, at his own risk, delivering the PV Project fully completed, started-up and commissioned and ready for commercial operation, pursuant to the terms of the Agreement and its Annexures,

3.2 The Agreement is considered as a turnkey construction contract, understanding that a turnkey construction contract is one that includes the completion of the engineering, design, planning, construction work, the supply of materials, their assembly and installation, the connection and commissioning of the PV Project, all services required for the start of Commercial Operation as defined hereinafter of the PV Project so that the PV Project will be eligible for the Tariffs on or before June 30, 2012, and in general all services, labour, temporary installations, organisational materials, obtaining all licences and other rights that are necessary for achieving the object of this Agreement and completing the PV Project in full, even if these are, in part, not expressly specified in the Agreement or its Annexures. The term "Commercial Operation" shall, for the purposes of the Agreement, be understood as the producing and injecting of electricity to the Grid, the execution of actions requested for the signing of the PPA, and the payment for the electricity produced at the corresponding Tariff.

3.3 The Contractor undertakes to provide materials specified in Annexure 2, including the transport and the delivery to the Project Site and the insurance of materials until the Provisional Acceptance as defined by Clause 25. All and any elements that are not currently defined will be fully specified under the finalisation of the engineering file.

3.4 Any equipment necessary to properly execute the turnkey construction work is considered as included, even if it is not expressly mentioned in the Agreement or in its Annexures.

3.5 The contractor shall be in charge of obtaining all Project Rights[5], including, without limitation, the approvals, permits and licenses - either private or public - required by the applicable law (applicable until the Provisional Acceptance) to the construction, the starting-up, the commissioning, connection and the start of Commercial Operation of the PV Project by [the first claimant] (particularly, but not limited to, the signing of the Grid access agreement with Scottish and Southern Energy plc, the signing of the PPA, the right to a Tariff of £0.089/kWh for the period of 25 years from the start of commissioning, the signature of the contract on the provision of a GSM (or other technology) switched lined for the remote data monitoring system).

43. Under clause 3.6 of the Hamptworth contract, the Contractor undertook to ensure compliance (a) with the terms of lease from the site owner, (b) with the terms of the Planning Permissions, and (c) with all requirements relating to each of the Grid connections. It also undertook to ensure that the substation lease between Scottish

[5] These are defined in clause 1.1 as meaning "all rights and permits and licenses whatsoever required in order to allow the construction and commissioning and operation of the PV's Site, including, but not limited to, costs for obtaining the Lease (including costs and legal fees), costs for connection to the Grid and any other private or public costs".

and Southern Energy plc ("SSE") and the site owner was signed "expeditiously and in any event in ample time to build the substation and enable connectivity to the Grid by the 15 June 2012", and to ensure the provision of documentation to the first claimant at regular intervals.

44. Further obligations of the Contractor were set out in clause 4 of the Hamptworth contract. This stated:

> **4.1 The Contractor shall carry out and complete the Works in accordance with the Agreement.**
>
> **4.2 The contractor shall:**
> **(a) carry out the Works in accordance with the Specification and otherwise in accordance with Good and Prudent Practice;**
> **(b) provide all required Constructional Plant and staff for the planning, design, procurement, construction, erection, installation, completion, testing and commissioning of the PV Project;**
> **(c) carry out its obligations under the Contract in compliance with, and so as not to cause any breach by [the first claimant] of, any Project Documents;**
> **(d) see that the Specification and all engineering documentation shall fulfil the requirements of this Agreement;**
> **(e) procure that, upon the issue of the Provisional Acceptance Certificate, the Works shall have been constructed in accordance with the Specification ..;**
> **(f) take full responsibility for the stability and safety of all its operations and methods necessary for the performance of the Works; and**
> **(g) assign to [the first claimant] (to the extent capable of assignment) and ensure the delivery to [the first claimant] of all rights necessary to operate the PV Project for the period of the Tariff (Project Rights) at Provisional Acceptance ..**

45. The "Specification" referred to in clause 4.2(a) was defined in clause 1.1 to mean:

> **.. The specification for the Works set out in the Technical Due Diligence Report annexed at Annexure 2 as they are amended or updated as agreed between the parties from time to time.**

46. This was not a typical kind of specification, but rather a draft "Independent Engineer Technical Report" dated May 2012 prepared by OST Energy. Its nature may be gleaned from the first three paragraphs of the "Executive Summary" with which that report began:

> **OST Energy has been appointed by GPP as Independent Engineer to review the technical arrangements surrounding the Hamptworth Estate project in the form of this technical due diligence report. OST Energy is undertaking the review based on representing the interests of the purchaser of the project following issue of the Provisional Acceptance Certificate, to which a primary duty of care is assumed.**

> **This review has been undertaken based on documentation contained within a data room, a site visit and discussions with the site developer, key-subcontractors and [the Contractor]. The Project initially proposed consisted of an installed capacity of 6 MW, however this is now understood to be 5 MW.**
>
> **OST has approached the due diligence from the point of view of highlighting the potential technical risks of the project post-construction at which point GPP will be taking ownership of the projects. Where mitigation measures are in place these have been explained, and where issues remain open we will expect to close these out in due course.**
>
> **.. [The Contractor] is undertaking overall EPC responsibility for the project, with construction activities being undertaken by Lark Energy and design activities by Enerparc.**

47. Modifications to the project and/or services to be rendered were dealt with in clause 22 of the Hamptworth contract, which provided that:

> **Any other work or provision of services to be rendered by the Contractor not foreseen in the object of the Agreement and not necessary to complete the Works in accordance with the specifications set forth in the Agreement and the Annexures, must be expressly agreed between the Parties, by amendment to be attached to the present, and which amendment shall specify the additional remuneration if any and its form and time of payment.**

That clause was reinforced by the terms of clause 41 which provided:

> **This Contract and any agreement executed by the Parties on the date of this Contract contain the whole agreement between the Parties relating to the transactions.**

48. The terms of the Hamptworth contract reflected the fact that the parties intended to make the initial connection between the plant and the grid via a Temporary Connection, in order to achieve connection in sufficient time to qualify (if possible) for the FIT tariff. That Temporary Connection would then, in due course be replaced by a Permanent Connection.

49. The "Temporary Connection" was defined in clause 1.1 of the Hamptworth contract by reference to Annexure 12. Paragraph 7.2.5 of the Specification described this as follows:

> **.. Due to the potential for delays to the cable trenching works, and the DNO sourcing of circuit breaker equipment, an alternative POC was sought to guarantee a grid connection prior to the 30 June 2012 Feed In Tariff (FIT) deadline.**

> **An alternative temporary POC has been proposed to tee into a MV pole on Black Lane .. This second option is approximately 2km from the site and should be possible to connect into before the FIT deadline. However, the export capacity of the temporary connection is only 1000 kVA, which will complicate the Plant commissioning procedure. Full Plant commissioning prior to 30 June 2012 is necessary for FIT eligibility under OFGEM regulations. Should the intention be to achieve FIT registration, we recommend that prior approval gained from OFGEM allowing for the commissioning of the 5 MW plant on a 1 MW connection ..**

50. The "Permanent Connection" was defined in clause 1.1 of the Hamptworth contract as "the permanent connection to the Grid at the interconnection point shown on the plan annexed at Annexure 11". That plan showed the "preferred grid connection point" at Redlynch Primary Substation. As described in paragraph 7.2.5 of the Specification, this lies approximately 5km to the north-west of the site.

51. OST Energy's somewhat sceptical view of this two-stage connection process, as set out in paragraph 7.2.6 of the Specification, was as follows:

> **We consider that the grid connection is on the critical path for Plant commissioning and current evidence suggests that the Plant will not be commissioned before the 30 June 2012 FIT deadline. Should the 1 MW temporary connection option be pursued, confirmation should be acquired from OFGEM that the entire Plant capacity will be eligible for FIT payments during operation. We consider the grid connection to be the biggest risk to the Plant not achieving FIT registration before 30th June.**
>
> **POC Option 1 (Permanent) .. The new connection point is approximately 1.1 km further away from the site and approximately 4.1 km away from Redlynch substation. Based on the verbal agreements between the DNO and the ICP, we consider this an acceptable permanent solution, however the new connection designs by the ICP must be submitted and approved by SSE prior to commencement of construction. Additionally we expect an amendment to the planning permission will be required for the new positioning of the substation cabin ..**
>
> **POC Option 2 (Temporary) .. The timing for allowing connection will be primarily determined by: offer from SSE, approval of the highways agency for the works along the road, the physical works, the connection notices and commissioning of the connection. We consider the following commercial consideration should be taken into account in the event of the temporary connection being pursued: that the connection will not occur with insufficient time to commission prior to the end of June 2012 FIT deadline; that the staged commissioning of the project is not appropriate for the legislative conditions of the feed in tariff; that a ROC project and a FIT project are not allowed on the same site.**

> **We consider that in the event that either the Plant fails to be commissioned or only achieves partial commissioning prior to 30 June 2012, the project cannot be partially or fully registered on the Feed in Tariff to receive the current FIT rate. We would expect therefore that a ROC tariff or a new Feed in Tariff rate should be factored into the financial model is a commercially likely outcome ..**

52. Clause 25 of the Hamptworth contract dealt with Provisional Acceptance and Final Acceptance. Clauses 25.1 to 25.5 provided for "Provisional Acceptance Tests" to start within 15 business days of connection to the Grid via the "Permanent Connection". These, if successfully completed, would lead to the issue (under clauses 25.6 to 25.9) of a "Provisional Acceptance Certificate". After a 12-month warranty period, Final Acceptance Tests under clauses 25.10 and following should then lead to the issue of a Final Acceptance Certificate.

53. The price of the works was dealt with at length in clauses 18 and 19 of the Hamptworth contract. Clause 18.1 specified a lump sum price of £7,849,161 plus VAT. Detailed provisions in clause 18.2 stated (in summary) that that price was to be inclusive of all costs "until start of injection to the Grid", but indicated that "from the date of start of connection to the Grid [the first claimant] shall assume the costs of the operation and functioning of the photovoltaic installation, including taxes". Clauses 18.3 to 18.5 then contained a mechanism for adjusting the price in the event that the as-built generating capacity of the plant differed from the figures used in calculating the price. Clause 18.6 provided for the first claimant to set off any proven financial loss under the Transfer Agreement against the price.

54. Under clause 19.1 and Schedule 1, the price payable under the Hamptworth contract was to be paid in accordance with certain "Milestones". Of that price, 35% was to be paid upon signature of the contract, which was the first "Milestone". A further 32% was to be paid upon occurrence of the second "Milestone", which was completion of main component procurement. The remaining 33% of the price was to be paid in instalments on the achievement of three further "Milestones", reflecting the intended steps in the two-stage process for connection to the grid: (3) "Tariff Secured", demonstrated by "Confirmation of Temporary Connection and a secured tariff as evidenced by Ofgem"; (4) "Provisional Acceptance", demonstrated by "Signed Provisional Acceptance Certificate"; and (5) "Tariff secured on Permanent Connection", demonstrated by "Correspondence from Ofgem confirming the final tariff".

55. Clause 19.2 of the Hamptworth contract provided that:

> **When the Contractor considers that he has achieved the Third or Fourth or Fifth payment instalments, it shall give written notice to [the first claimant] with a copy to the technical adviser, who shall be an independent engineering company located in United Kingdom such as**

> **Ostenergy Ltd (hereinafter referred to as "The Technical Adviser"). The notice shall be submitted together with the documentation that is necessary to evidence that the milestone has been completed in accordance with the Agreement.**
>
> **(a) If the tariff obtained for the project upon temporary connection is 0.089/kWh or more, then the Third Instalment shall be 28%.**
>
> **(b) If the tariff obtained for the project upon temporary connection is less than 0.089/kWh then the Third Instalment shall be reduced on a ratio to the shortfall below 0.089/kWh, down to a floor of 0.049/kWh at which the Third Instalment shall be zero.**
>
> **(c) The Fifth Instalment shall be adjusted accordingly, such that the instalments total 100%**

56. The period within which the Contractor was obliged to complete the works was specified in clause 21 of the Hamptworth contract. Clause 21.1 provided that:

> **The Parties have established the calendar for the execution of the Works attached hereto as Annexure 3 (the "Calendar of Works"), in order to get the PV Project ready for its connection, commissioning and Commercial Operation on the 30 June 2012 at the latest.**

The "Calendar of Works" at Annexure 3 to the Hamptworth contract was a bar chart showing the intended stages of the works, week by week, from the week commencing 26 March 2012 to the week commencing 25 June 2012. These stages were variously colour-coded as "Pre-construction activity", "Construction", and "Post connection works". "DNO Connection works" were shown as "Construction" occurring in the week commencing 11 June 2012. The "DNO commissioning/G59 test" works were shown as "Construction" taking place in the week commencing 18 June 2012. That week was also shown as the start of the "Construction" work sections "Close trenches", and "Construct DNO substation and other bases", both of which were shown as continuing into the week commencing 25 June 2012 and finishing at the end of that week. The week commencing 25 June 2012 also included the "Post connection works" of "clear site". It was followed by a three-month period of "Post-construction optimisation", again colour-coded as "Post connection works".

57. Unfortunately, the bar chart in Annexure 3 did not refer in terms to the intended two-stage connection process. As indicated in paragraph 56 above, the works shown on that chart included "DNO Connection works" and "DNO commissioning/G59 test" works: but the descriptions given in the chart did not specify whether these were for the "Temporary Connection" or for the "Permanent Connection". The timing suggests that these must be the works for the "Temporary Connection": but, if so, the chart has no specific entry for the further and later works required for the "Permanent Connection", leading to Provisional Acceptance and so to the fourth and fifth payment "Milestones".

58. Clause 21.2 of the Hamptworth contract required the contractor to provide a weekly progress report. Clauses 21.3 and 21.4 then contained *force majeure* provisions, as follows:

> **[21.3] The Parties shall be temporarily exempted of the obligations accepted under the Agreement as long as the compliance with said Agreement is made impossible for fortuitous case or Force Majeure, provided that:**
>
> **(a) the circumstances of a fortuitous case or Force Majeure have not arisen, wholly or in part, from any breach, omission or serious negligence of the Party claiming exoneration or, in the case of the Contractor, from any of his sub- Contractors; and**
>
> **(b) the Party claiming exoneration notifies the other Party of the circumstances of a fortuitous case or Force Majeure without unjustified delays; and**
>
> **(c) the Party claiming exoneration makes and continues to make every reasonable effort to reduce the effects of said fortuitous case or Force Majeure. Force Majeure means an exceptional event or circumstance which is beyond a Party's control, which such party could not reasonably have provided against before entry into the Agreement, which, having arisen, such Party could not reasonably have avoided or overcome, and which is not substantially attributable to the other Party. For the purposes of this Agreement, a fortuitous case or Force Majeure will be understood as any of the following:**
>
> **(i) Torrential rains, snows, winds or ice in the area of the PV that makes access to the PV or the execution or preparation of works on the PV impossible or substantially dangerous.**
>
> **(ii) Mutiny, disturbance, commotion or civil disorder.**
>
> **(iii) Landslides, floods, fires, electrical discharges, overloads induced by electrical discharges, earthquakes, abnormal storms, explosions and any extraordinary operation of the forces of nature.**
>
> **(iv) Acts of terrorism or sabotage.**
>
> **[21.4] The parties expressly agree that only those days shall compute as a suspension of works justified by the existence of fortuitous reasons or Force Majeure that have been duly communicated by the Contractor to [the first claimant] without unjustified delay, in the terms of this paragraph.**

59. Finally, clause 21.5 of the Hamptworth contract contained the provision for "Delay Damages" which is relied on by the first claimant as giving rise to this aspect of its claim. It provides that:

> **In the event of the delay of more than fifteen (15) calendar days for the date of the commissioning, the Contractor shall pay to the [first claimant] a penalty, which shall be paid in the way that the amount of the penalty, as accrued up to the date of the next invoice of the Contractor to the [first claimant], shall be deducted from said invoice. The amount of the penalty is hereby established as the amount of £500 per day per MWp installed and per day that the construction works suffer a delay (Delay Damages). Delays of fifteen (15) calendar days or less shall not generate any penalty, being the 15 calendar days understood as an integral grace period over the whole Calendar of Works, not for each event of fortuitous reasons or Event of Force Majeure. The maximum of the penalty for delays of the Works shall be two hundred and fifty thousand pounds sterling per MWp (£250,000/MWp).**
>
> **In case of loss of production of the PV Project as of 1 July 2012 the Contractor shall pay to the [first claimant] a penalty equal to the loss of monthly expected production (in accordance with the Technical Due Diligence and the table below) multiplied by the tariff applicable to the Project (Loss of Production Penalty). This loss of Production Penalty shall NOT be in addition to the Delay Damages penalty established above. In any case, in the event the Parties agree to modify the Price due to a change in tariff applicable to the Project, they shall off-set this Loss of Production Penalty with the new price conditions, to be negotiated between the parties in good faith.**

(3.2.2) Is clause 21.5 an unenforceable penalty?

60. Solar's first defence to the claim under clause 21.5 of the Hamptworth contract is its argument that that clause would have been unenforceable against the Contractor as a penalty.

61. The law in this area has recently been clarified by the Supreme Court in its decision in the conjoined appeals of *Cavendish Square Holding BV v El Makdessi* and *ParkingEye Ltd v Beavis*[6]. I gratefully adopt the concise summary of those decisions given by Lionel Persey QC (sitting as a Judge of the High Court) in *ZCCM Investments Holdings plc v Konkola Copper Mines plc*[7]:

---

[6] [2015] UKSC 67, [2016] AC 1172. The parties also cited, and I have also considered, the following earlier cases: *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castanedo* [1905] AC 6; *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79; *Robert Stewart & Sons Ltd v Carapanayoti* [1962] 1 WLR 34; *Philips Hong Kong Ltd v Attorney General of Hong Kong* (1993) 61 BLR 41; *BNP Paribas v Wockhardt* [2009] EWHC 3116 (Comm), (2009) 132 Con LR 177; and *Videocon Global Ltd v Goldman Sachs International* [2016] EWCA Civ 130, [2017] 2 All ER (Comm) 800.

[7] [2017] EWHC 3288 (Comm) at [32]. See also Beale et al, *Chitty on Contract* (33rd edn, Sweet & Maxwell 2018) at [26-190] and following.

(1) The question of whether a damages clause is a penalty falls to be decided as a matter of construction as at the time that it is agreed: see Lords Neuberger and Sumption at [9] and [87]; Lord Hodge at [243];

(2) The test for a penalty was variously described by their Lordships as follows

"...The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation…", per Lords Neuberger and Sumption at [32];

"...What is necessary in each case is to consider, first, whether any (and if so what) legitimate business interest is served and protected by the clause, and, second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable ...", per Lord Mance at [152];

"...I therefore conclude that the correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract...", per Lord Hodge at [293].

62. It was common ground that the obligation under clause 21.5 to pay "Delay Damages" is a secondary obligation arising on non-performance of the primary obligations (contained in clauses 3.1, 3.2 and 21.1) to carry out the works in accordance with the contractual timetable, and that clause 21.5 therefore potentially falls within the scope of the penalty doctrine.

63. Mr Walford submitted on behalf of Solar that the following factors show that clause 21.5 is a penal provision within the test set out in paragraph 61 above. First, the clause is worded as a penal provision, and expressly describes the sum payable as "the penalty". This, while not conclusive, is (he submitted) a powerful indicator of the parties' intentions in including this provision. Secondly, the extent of the loss likely to be suffered would be dependent upon the output of the plant and the prevailing electricity price. Yet each of the EPC contracts provides for the same penalty of £500 per day per MWp, even though each of the plants had a different output, and there was a difference of over 30% in the expected electricity prices recorded in the various contracts. This, Mr Walford submitted, showed that, even in the case of the first EPC contract, the Hamptworth contract, the sum chosen was not based on any genuine pre-estimate of the losses likely to be suffered, but was "lifted without discussion from the Spanish contract" on which the wording of the EPC contracts was based.

64. There was a conflict of evidence between Mr Gaarn-Larsen and Mr Garcia about whether the sum of £500 per day per MWp was discussed during the negotiations for the Hamptworth contract. Mr Garcia's evidence was that there were no such discussions: and Mr Walford invited me to reject Mr Gaarn-Larsen's contrary evidence, on the basis that it was unspecific and unconvincing, and was unsupported by the disclosure of any relevant documents, even though Mr Gaarn-Larsen had claimed that spreadsheets had been used in order to make the necessary calculations.

65. Mr Parker, for the first claimant, invited me to accept the evidence of Mr Gaarn-Larsen as showing that the payment provided for in clause 21.5 was negotiated and agreed as a reasonable estimate of the first claimant's potential loss. He drew attention, inter-alia, to Mr Gaarn-Larsen's other evidence that the loss of revenue on the plant such as Hamptworth could be as much as £731 per day per MWp, and pointed out that the Fifth Section (Term and Execution of the Works) of the example Spanish contracts in the trial bundle provided for a penalty of €1500 per day (not £500) in the event of a delay lasting for more than 30 days (rather than the 15 days provided for in the Hamptworth contract). He also submitted that delay damages provisions of this kind are common in construction contracts, and that the first claimant and the Contractor were experienced and sophisticated commercial parties, of equal bargaining power, who were well able to assess the commercial implications of such provisions. In Mr Parker's submission, the first claimant had a legitimate business interest in ensuring that the plant was commissioned and in operation on time, since it was acquiring the plant as a long-term investment on the basis of financial modelling using the contractual start dates. In those circumstances, Mr Parker submitted, the figure of £500 per day per MWp could not sensibly be described as "out of proportion" or "exorbitant or unconscionable".

66. I am not persuaded by Mr Gaarn-Larsen's evidence that there was in fact any detailed discussion of the "Delay Damages" amount included in clause 21.5, and on that issue prefer the evidence of Mr Garcia. Had there been any such discussions on the basis of spreadsheet calculations (as Mr Gaarn-Larsen recollected), the probability is that some computerised record or record on paper of those calculations would remain. Yet no such records have been disclosed: and Mr Gaarn-Larsen's evidence about these discussions was, as Mr Walford submitted, very unspecific and vague. In my judgment, Mr Gaarn-Larsen has probably mis-remembered this detail of the negotiations, confusing in his mind the spreadsheet calculations that were undoubtedly carried out to assess the rate of return and the price with calculations for the purposes of clause 21.5.

67. Nevertheless, in my judgment, clause 21.5 of the Hamptworth contract does not constitute an unenforceable penalty. As Mr Parker correctly submitted, delay damages provisions of this kind are common in construction contracts, and the first

claimant and the Contractor were experienced and sophisticated commercial parties, of equal bargaining power, who were well able to assess the commercial implications of clause 21.5. I am satisfied that the sum specified in clause 21.5 does not exceed a genuine attempt to estimate in advance the loss which the first claimant would be likely to suffer from a breach, and that that sum is not in any way extravagant or unconscionable in comparison with the legitimate interest of the first claimant in ensuring timely performance.

68. The Hamptworth contract was executed on 14 May 2012. It envisaged a construction period starting on 7 May 2012 and lasting for only eight weeks, until the end of June 2012. With the 15-day grace period provided for in clause 21.5, the "Delay Damages" period would therefore have been expected to begin in mid-July, at the height of the peak generation period for photovoltaic installations. In those circumstances, the figure of £500 per day per MWp would not strike me as an exorbitant or unconscionable estimate of the likely loss caused by any delay in commissioning the plant, even were I to discount significantly the loss calculation figures put forward after the event by Mr Gaarn-Larsen.

69. Mr Walford correctly points out that the £500 figure is a round sum to be paid irrespective of the effect of the delay in question. However, it is in the nature of liquidated damages clauses that they are often used (as here) in cases where precise prediction of the likely loss is difficult, and are therefore often expressed in round figures. The sum provided for in clause 21.5 is payable only on a single type of breach – failure to achieve commissioning of the plant by 15 days after the specified date - and the fact that the loss resulting from that breach may vary in amount depending on the actual circumstances at the time does not of itself give rise to any inference that the sum agreed to be paid is a penalty, provided that it is not extravagant and unconscionable in amount in comparison with the greatest loss that might have been expected when the contract was made to be likely to follow from the breach[8].

70. As Mr Parker pointed out, the figure of £500 has not been "lifted without discussion from the Spanish contract", which used a figure of €1500 (about £1,200, at the then current exchange rate). As for the use by the parties of the word "penalty" to describe the payment required by clause 21.5, the parties also used the words "Delay Damages" to define the sum. This reference to the sum as a "penalty" is therefore an equivocal indication. I must look at the substance of the matter.

---

8 See Beale et al, *Chitty on Contract* (33rd edn, Sweet & Maxwell 2018) at [26-206].

(3.2.3) Was any part of the relevant delay caused by force majeure?

71. Solar's second defence to the clause 21.5 claim is that the Contractor was relieved from its obligation to achieve "commissioning" by the contractual date by circumstances of *force majeure*.

72. The "Permanent Connection" shown in the plan at Annexure 11 and described in paragraphs 7.2.5 and 7.2.6 of the Specification required more than 5km of cable to be laid from the plant to the Redlynch Primary Substation. The Specification envisaged that the majority of this cabling would be laid in trenches under public roads, along Black Lane following School Road, the Ridge and Slab Lane. In evidence this was referred to as the "Northern Route".

73. Solar's case (as pleaded in paragraphs 14 to 17 of its Amended Defence and Counterclaim) is that protests by local residents, amounting to "disturbance, commotion or civil disorder" or "acts of .. sabotage" within the meaning of clause 21.3 of the Hamptworth contract, prevented the Contractor from progressing with the works along the Northern Route and compelled the Contractor (with the agreement of the first claimant, and at considerably increased cost) to abandon the already partially built Northern Route for the cabling in favour of a longer and more southerly one, in order to make reasonable progress. In his closing submissions, Mr Walford identified the period of *force majeure* as stretching from 1 August 2012 (when, in his words, "the Villagers' Revolt began") and 10 December 2012.

74. Works of this kind require a street works licence under the New Roads and Street Works Act 1991 s 50. It was intended that the actual work of connection would be carried out by a sub-contractor of the Contractor, G2 Energy: and Mr Gay of G2 Energy explained the process in an email dated 3 May 2012 to Mr Collins, as follows:

> **We require to apply for the s 50 license and this should be granted within 1-2 weeks. Once we have a licence, we present a programme of works giving 3 months' notice. What will then happen is that we will seek a meeting with the Highways department and look to agree the works programme, plus request an early start, this is quite normal and an early start is normally granted. However, due to the length of the cable route proposed, we have already held initial discussions with the Highway Authority prior to the s 50 application; the Highways have indicated that due to the length and complexity of the route, and possible restrictions due to the Olympics, we should not expect an early start and something approaching the 3 months' notice is likely to be the outcome from agreements. ..**

75. According to Mr Garcia, the required street works licence for the cabling was not in place when the Hamptworth contract was signed on 14 May 2012. The evidence does

not disclose when the necessary licence was given, nor when cabling works in fact began. However Mr Garcia's evidence was that, in late July or early August 2012, "after some 2 miles of cabling had been laid, local villagers objected to the cable being laid on the planned [ie Northern] route".

76. According to Mr Garcia, as the "sub-contractors were trenching the roads, there were public demonstrations and human barriers, which were jumping into and occupying the trenches creating serious and present risk to the health and safety of the public and the contractor's staff and visitors .. Due to the wilful determination of the public to prevent the trenching and cable-laying and the attendant risks involved, the protest was completely beyond the parties' control and took some 6 months to resolve. There was nothing that could be done to prevent the consequential delays caused by the demands other than to abandon the cable and start again by running the cables over a different and more arduous route. The disturbances were duly notified by me to the First Claimant and they were provided with updates of the disturbances from time to time .. It was never discussed, or I believe in the contemplation of the parties, that the villagers would cause a human-physical barrier to the trenching and cable laying ..".

77. In cross-examination Mr Garcia accepted that he had not seen these "public demonstrations and human barriers" himself, because he was in Spain at the relevant time. His description of what happened derived, he said, from what he had been told at the time by Mr Collins, who was in charge on site on behalf of the Contractor. According to Mr Garcia, Mr Collins "was telling me that people were stopping people working on site .. sitting in front of the works". "For us to stop, we just need someone sitting in front of the machine. He told me people were doing that".

78. In support of his account of these events, Mr Garcia produced an extract from the *Salisbury Journal* dated 2 August 2012, and headlined "Villagers' fury over solar electricity substation". It stated:

> **Villagers in Lover and Redlynch are up in arms over the construction of a solar electricity substation close to their homes which they say is being carried out in "flagrant disregard" to planning regulations.**
>
> **With "hundreds" of trees having already been removed from woodland by Black Lane in Lover, the substation installed, work due to begin any day on digging up the lane and put down a high-voltage cable, residents living nearby are furious ..**
>
> **While the solar farm received planning approval last year, the proposed site of the substation was changed and a planning application submitted to the New Forest National Park Authority .. in June .. The application states "My clients apologise for pre-empting the determination and do not mean any disrespect to the NPA but feel that without an early commencement, completion by the deadline may not be achievable and the entire project would be threatened". Last week the application was amended to become a retrospective planning application.**

A decision is due to be made by the NF NPA by September 3 but residents fear by then the infrastructure will all be in place and it will be impossible to reverse.

The strength of feeling in the village has led to a petition being started and people are also talking of blockading Black Lane or taking out an injunction to prevent contractors from digging up the road ,..

79. The contemporary documents show that a meeting took place between the Contractor and its sub- contractors and Redlynch Parish Council on Tuesday, 14 August 2012 to discuss how to make the infrastructure associated with the plant "more acceptable to the local community". On 22 August 2012 Mr Collins sent an email to Mr Gaarn-Larsen, which was copied to Mr Garcia, and which said:

We have minor problems at Hamptworth, mainly with the local residents, but we also have a solution to the issues they raise. If I may I will give you more details tomorrow but to put your mind at ease we will make the connection in time to claim the current FIT.

80. In his witness statement, Mr Garcia asserted that "in August 2012 Mr Gaarn-Larsen accepted that the cable route would have to be diverted and the existing cable abandoned. He knew this because we had a number of conversations about it". Mr Gaarn-Larsen accepted that he and Mr Garcia did in fact speak on the telephone in about mid-August 2012 and that, during that conversation, Mr Garcia "mentioned that some residents with houses on the public road where the cabling was being laid were unhappy". However, Mr Gaarn-Larsen's recollection was that he was told this simply for information purposes, and was not (at least at this point) asked to agree to any changes of any kind.

81. The contemporary documents clearly show that that no decision to change the cable route had in fact been made at this time. Mr Garcia also accepted, in cross examination, that he "did not think that we had to tell GPP [the details of what was going on] until we have the full picture". It follows that Mr Gaarn-Larsen's recollection about the content of his discussions with Mr Garcia in August 2012 is to be preferred to that of Mr Garcia.

82. This telephone conversation was followed by an email dated 29 August 2012 from Mr Garcia to Mr Gaarn-Larsen. This forwarded an email from SSE confirming their agreement to the Contractor's revised plans for the grid connection, and said:

As I promised you here you have the confirmation from SSE to put back the substation where original was planned so we can put away the issue with the local residents and move forward with the works.

So now we have to fulfil the details you see below then we will progress finishing the connection.

83. The contemporary documents, however, show that the "issue with the local residents" was not in fact finished at this point. A briefing note for a "Substation/Connection route Meeting" with the Parish Council and local residents on 3 September 2012 identified the "key objectives of [that] meeting" as including determining the correct location for the substation, deciding the route for the cabling, and deciding the timing of works around the intended new planning application.

84. Two things are plain from this briefing note. First, the Contractor had by then already decided to move the location of the substation back to the main site area:

> **Substation location. It was agreed by all parties that the substation be relocated back to the main site area. Neil [Osbourn, from DLP]'s advice is that a new planning application would be required for this and all agreed that the cable installation should wait until the new application was approved ..**
>
> **.. It was subsequently agreed with DLP that we allow the [retrospective planning] application for the existing substation to continue concurrently (and if necessary lodge an appeal if denied consent)**

Secondly, the Contractor at that point was still intending to use the Northern Route for the cable from the new substation to the Redlynch Primary Substation where the plant would connect to the grid:

> **Cable route was discussed as this is the primary concern of the local residents. Three routes were considered. One route was discounted due to the length of cable being in excess of the 5.5 km allowable by SSE. Of the two viable routes it was agreed that the existing route to the north was the best alternative and is therefore the route we will seek to pursue ..**
>
> **.. the best route for connection remains the route on the original planning application via Black Lane. Whilst we recognise that a number of the residents are not content with this route selection, it is the route we will [be] using for the connection ...**

85. That briefing note also records that it was intended to make a planning application for the new substation location by 14 September 2012, and that it was expected that the application should take about 8 weeks to determine.

> **The cable laying is anticipated to take about 9 weeks in total. Once the bond with Highways is in place we will be seeking a start date for the road opening licence to start laying the cable ducts from the Redlynch Primary Substation. As there is a section which is common to all connection routes (around 1.4 km) this will be opened first (in advance of determination of the planning application for the new substation). We anticipate that all works will be completed and the site connected to the National Grid before Christmas 2012.**

86. A further article dated 25 September 2012 in the *Salisbury Journal* headed "Solar farm fears" recorded that:

> **People battling a retrospective planning application for an electricity solar farm substation on the Hamptworth Estate fear it could be the precursor for a second solar farm in the area.**

It quoted a "worried resident" as saying:

> **.. Residents fear that a Pimlico Firs solar site might spring up around the unauthorised substation; it is something quite clearly the applicants have anticipated because of the same time as the application for Big Field and Cloven Hill, there was an application for Pimlico Firs, which was later withdrawn ..**

The article also recorded Mr Anderson, the owner of the Hamptworth Estate, as dismissing the residents' fears as "pure speculation", and the chairman of Redlynch Parish Council as saying "we don't really know what's happening at the moment. We are waiting to hear".

87. At some point between the end of September and the end of November 2012, the Contractor decided to abandon its preferred Northern route for the cable, and to use the Southern route instead. On 27 November 2012, Mr Gaarn-Larsen asked the Contractor for a report. Mr Garcia replied by email on 28 November 2012, inviting Mr Gaarn-Larsen to telephone him, and saying:

> **I would like me personally to explain you where we are and which are the solutions, I am the one I have been conducting all this in the last 3 months and I have been very close to the local residents. I have a meeting this afternoon to close the contract with the ICP for the works on the new route we are going to take and I already have the program for finishing the works towards the new route ..**

88. Mr Gaarn-Larsen's recollection of the subsequent telephone call was that it was "to have a chat about Hamptworth and to update me regarding the cabling and ongoing issues with local residents. The reason for the call was to tell me about the new route to try and secure connection to the grid. The discussion revolved around all of the work he was doing to satisfy the local residents and I vaguely recall being told that there had been a meeting with planners and the residents on a way forward agreed along a Southern route in order to connect".

89. This telephone conversation was followed, a couple of weeks later, by an email dated 10 December 2012 from Mr Garcia to Mr Gaarn-Larsen, which was copied to Mr Gandia and Mr Delgado of Solar. This stated:

> **I would like to update you with the situation on Hamptworth after our conversation a couple of weeks ago.**
>
> **How I told you we already have the quotations and the program to go through the southern route avoiding this local issue with the local**

> **residents. I had an early program from the ICP contractor where they were giving us a deadline first week of Mars** [sic] **and I told you we were going to meet them again on Thursday to discuss this program and try to squeeze the schedule.**
>
> **G2 has charged us £374,000 for extra work but we have agreed everything with them and the work starts today Monday 10th December. As you can imagine this is a big problem for [the Contractor] in terms of cost but we don't want for any reason to put the project in risk and we accept this smoothly for the sake of the project ..**
>
> **.. We are sure that even having everything in place in the northern route (through the black lane) there was a highly potential risk not to connect before April delaying this process eternally and that was unacceptable. I was advised by the lawyers that finally we would have free way to go through this route but there was no reassurance on dates so I took the personal decision to move everything quickly to the southern route (through the forest road) ..**
>
> **I am more than sure that we have caused a problem to you with this situation and I am absolutely aware of it but how I told you this was impossible to find out before as I have explained you last time, this was a force majeure problem but as usual we assume our responsibility to make this happen and keep going with our partnership.**
>
> **Going back to the route there are bits of the work that we are going to be able to make on parallel so one way or another we will be able to reduce the scope of the works**
>
> **.. Everything is ready to start the works today and all the actors (local residents, the 2 councils Hampshire and Wiltshire, G2, ICP main contractor, RCD, the ICP subcontractors and SSE) are alligne** [sic] **with all this. It is important to understand that ever in my life I have seen sitting in the same table all these actors working altogether to make this connection happen, and we were all sat down in the Village Hall Redlinch** [sic] **discussing how to progress in the southern route and avoid the big public concern with the northern route through the black Lane ..**
>
> **We already have the answer from the local residents in response to my letter where I stated our intention to go through the southern route ..**

90. Attached to this email was an email dated 7 December 2012 from Mr Garcia to the Redlynch Parish Council, saying that the Contractor had "issued instructions to our contractors to proceed with the Southern Route" having "agreed contractual terms, program and costs on this route at the end of last week", together with the Parish Council's reply which said:

> **It was with the greatest of pleasure that I received your letter, formally confirming that you have committed to lay the cable via the southern**

> **route (through the landfill site). I know the whole of the village will be delighted and very appreciative of all the trouble and cost that you and your associates have willingly accepted to make this happen. It is so refreshing to work with the developer that are shown integrity and a willingness to take account of community views.**

91. In cross-examination, Mr Garcia explained that he sent his email of 10 December 2012 to Mr Gaarn-Larsen because he wanted Mr Gaarn-Larsen to understand that the delay was not within the Contractor's control. According to Mr Garcia "we [ie Mr Garcia and Mr Gaarn-Larsen] had a very informal way to work". "I was accepting that the Contractor would have to bear the £374,000". However, "The way we were working [Mr Gaarn-Larsen] had never charged delay damages. I was thinking that he should not do so this time as it was not our fault. I was really concentrated on finishing the work".

92. On 12 December 2012 Mr Garcia sent an email to Mr Gaarn-Larsen recording that "the works finally started on Monday on Hamptworth", and suggesting that they should "catch up about the whole situation".

93. The decision to change to the Southern route was recorded in another article in the Salisbury Journal, this time dated 13 December 2012 and headlined "Uproar sees solar farm cable moved".

> **The developer of a solar farm on the Hamptworth Estate has agreed to use an alternative cabling route following an "overwhelming" public backlash to the original plans.**
>
> **[The Contractor] has been working closely with protesters over the last few weeks in an attempt to find a solution that would enable the company to connect the solar farm at Big Fields to the National Grid.**
>
> **Residents in Redlynch and Lover have spent the last 6 months battling against the installation of a high-voltage cable past their homes, pointing out that a viable alternative route through the estate to Pound Bottom and up Forest Road before going into The Ridge and Slab Lane ..**
>
> **A planning application for the relocation of a substation, which had been illegally constructed on a site by Black Lane to Big Field, along with security fencing, service access and the retention of the cabling route installed between Big Field and Black Lane is to be considered by the New Forest National Park Authority on Tuesday. More than 100 people have objected.**

94. On 12 March 2013 Mr Garcia sent a progress report by email to Mr Gaarn-Larsen. This said "Everything is going as planned and we haven't found major problems, all

the works will be finished on the 18th as I mentioned to you in the last email therefore SSE could start to work and commissioned the plant".

95. Ofgem's letter dated 28 April 2014 confirms that the Hamptworth plant was actually "accredited" for generation, after connection to the grid, with effect from 11 April 2013. However, a letter dated 13 June 2013 from SSE confirms that the delay from 26 March 2013 was caused by SSE itself. In the light of that evidence, GPP has limited its claim to the period ending on 26 March 2013.

96. On behalf of the first claimant, Mr Parker put forward two arguments in answer to Solar's reliance upon clause 21.3. First, he submitted that the evidence summarised above did not establish that there were any *force majeure* events falling within the scope of clause 21.3 which made timely compliance with the Hamptworth contract impossible. Secondly he argued that no sufficient notice complying with clauses 21.3(b), 21.4 and 34 was ever given, thus precluding reliance upon any Force Majeure events (if any) that may in fact have occurred. In my judgment, both of these submissions are well-founded.

97. As for the first, Mr Garcia accepted in cross-examination (as I have already mentioned) that he could give no first-hand evidence that anyone had physically prevented the Contractor's work from continuing. However, Mr Garcia's account of what he said that he was told by Mr Collins does provide some admissible evidence about those matters, despite Mr Garcia's failure to explain the source of his evidence on this point in his witness statement, and despite the unexplained failure by Solar to tender any evidence from Mr Collins himself. Moreover, the overall probabilities do suggest that *something* must have prevented the Contractor from continuing its work to connect the plant to the grid between early August and early December 2012. It is inherently unlikely that the Contractor would have abandoned two miles of cabling, and incurred additional costs of £374,000, unless constrained to do so.

98. However, in my judgment, the evidence does not establish that the cause of that delay was "disturbance, commotion or civil disorder" or "acts of .. sabotage" within the meaning of clause 21.3. Instead, it shows that the delay was caused by the Contractor's (no doubt realistic) assessment that, given the strength of the local opposition, it was unlikely to get the necessary planning permissions and other consents for its originally intended substation location and cable route. Under the terms of Hamptworth contract[9] it was the Contractor's responsibility to obtain these. The risk that they could not be obtained was therefore the Contractor's.

99. The contemporary documents referred to above, when properly analysed, show the following. The original plan was for the substation to be built on the Hamptworth site itself. However, that plan was changed and a new substation was built outside

[9] See, in particular, clauses 3.2 and 3.5, quoted in paragraph 42 above.

the Hamptworth site. Planning permission for that new substation was not applied for until June 2012, and the application was for retrospective permission. As recorded in the *Salisbury Journal* for 2 August 2012, this application was vigorously opposed by local residents. Fearing that planning permission would not be granted, the Contractor (on advice) took a decision later in August 2012 to relocate the substation back to the Hamptworth site. That required another new planning application to be made, which was unlikely to be determined until November 2012. If that application were refused, the consequent delay to the works would be very substantial indeed. At that point, in August 2012, the Contractor still intended to press ahead with the Northern route for the cabling, for which it was required to agree a programme of works with the Highways Authority under its street works licence. However (as recorded by Mr Garcia in his email dated 10 December 2012) the Contractor was subsequently advised (by its lawyers, among others) that, although it was likely eventually to get a "free way to go through" the Northern route, that could involve considerable delay. Mr Garcia therefore decided, in the interests of speed, to change to the Southern route, so as to minimise the extent of local opposition to the Contractor's applications for the necessary planning permission.

100. The 2 August 2012 article in the *Salisbury Journal* mentions that people were "*talking* of blockading Black Lane"[10]. However, at that point (as also recorded in the *Salisbury Journal*) the Contractor had not yet begun to dig up Black Lane. There is no other reference in any of the contemporary documents to any physical obstruction of the works by local residents. I accept Mr Parker's submission that the *Salisbury Journal* would have been likely to refer to newsworthy activities of that kind, if any had in fact occurred. On the contrary, the *Salisbury Journal* articles concentrate on the planning permission issues. None of the contemporary documents produced by the Contractor refer to physical obstruction. Had that actually been a problem, it seems to me that it would probably have been referred to in the 3 September 2012 Briefing Note. Moreover, had that actually been a problem, it is unlikely that the Contractor would have been content to record in that Briefing Note its intention to press ahead with the Northern Route, without identifying some means of preventing those sorts of protests from obstructing the works.

101. For these reasons, I reject Mr Garcia's evidence that the progress of the works was prevented by any physical obstruction by local residents. I therefore reject, as a conclusion of fact, Solar's case that its delay in completing the works under the Hamptworth contract was caused by an event or events amounting to *force Majeure* under clause 21.3.

---

[10] Emphasis added

102. I can deal more shortly with Mr Parker' second point, which concerns the absence of notice. The proviso to clause 21.3 and the specific terms of clause 21.4 both make it a condition that "the Party claiming exoneration notifies the other Party of the circumstances of a fortuitous case or Force Majeure without unjustified delays". Mr Parker submits that, to comply with this requirement, the notification must be given in accordance with clause 34, which provides that:

> **In the absence of any legal provision to the contrary, all notices and communications between the Parties arising out of the Agreement shall be given by fax or certified letter with acknowledgement of receipt, or by any other means in writing evidencing receipt by the addressee, with a copy to the following lawyers .. In the event of urgency, however, the said notices may be given by any other means, whether by telephone or email, but in this case must be confirmed by any of the above-mentioned means within the five (5) following calendar days.**

103. Mr Garcia's evidence was that the "disturbances were duly notified by me to the first claimant and they were provided with updates of the disturbances from time to time". Mr Walford, on behalf of Solar, points out that this evidence was not challenged in cross-examination, and that paragraph 14(2) of the Re-Amended Reply and Defence to Counterclaim admits that "the Contractor provided some information to the first claimant from time to time about the alleged objections of the local community to the cable route". In Mr Walford's submission, this evidence demonstrates sufficient notification to enable the Contractor to rely upon clauses 21.3 and 21.4. If, contrary to his primary submission, written notification was required, Mr Walford relies upon Mr Garcia's emails of 28 November and 10 December 2012[11].

104. In my judgment, no sufficient notification to entitle the Contractor to rely upon clause 21.3 was given.

104.1 First of all, I accept Mr Parker's submission that, to be effective for the purposes of clause 21.3, a notification would have to comply with clause 34 and would therefore have either to be in writing or to be confirmed in writing within the following five calendar days. It seems to me that the notifications required under clause 21.3 fall within the ordinary and natural meaning of the wide words used in clause 34 - "all notices and communications between the Parties arising out of the Agreement". It also seems to me that there is nothing in the commercial context of the Hamptworth contract to suggest that those words should be given a narrower meaning, so as to exclude such notifications. On the contrary, the invocation of *Force Majeure* is a formal step, and it makes perfect commercial sense for the parties to require that indication to be attended by the formality of written notification.

---

11 See paragraphs 87 and 89 above.

104.2 Secondly, even were it possible (contrary to my view) to comply with the requirement of clauses 21.3 and 21.4 by giving oral notice, the evidence does not establish that any sufficient oral notification was in fact given. Mr Collins' email dated 22 August 2012 mentioned only "minor problems at Hamptworth, mainly with the local residents", and indicated that the Contractor had a solution which would permit the desired tariff to be claimed. Mr Gaarn-Larsen's evidence that, in his conversation with Mr Garcia following that email, he was told that that some residents were unhappy simply as a matter of information is consistent with the terms of that email and of Mr Garcia's subsequent email dated 29 August 2012, which indicated that "we can put away the issue with the local residents and move forward with the works". I also accept Mr Gaarn-Larsen's evidence that, thereafter, there was a period of about 3 months during which he was not made aware of what was going on. As recorded in paragraph 80 above, Mr Garcia accepted that he did not consider it necessary at that point to give Mr Gaarn-Larsen details of what was going on. None of these communications, in my judgment, amounted to a sufficient notification of circumstances within the detailed definition in clause 21.3(c) that were making compliance with the Hamptworth contract "impossible". The provision of "some information about the alleged objections of the local community to the cable route" (which is all that GPP has admitted was provided, and all that in my judgment was in fact provided) did not amount to compliance with notification requirements of clauses 21.3 and 21.4.

104.3 As for Mr Garcia's emails of 28 November and 10 December 2012, they were not in my judgment given "without unjustified delays". The purpose of the notification requirements in clauses 21.3 and 21.4 is not merely to ensure that both parties know where they stand, but also to enable the first claimant to monitor the situation and, where possible, to take action with the Contractor to bring an end to the period of delay. That purpose cannot be fulfilled by notice given only at the very end of what (on Solar's case) was a prolonged period of delay which began at the start of August 2012. Mr Garcia's admission that he did not consider it necessary to inform Mr Gaarn-Larsen of the details of what was going on makes it difficult for Solar to give any realistic justification for the delay, and it has not done so.

105. For all these reasons, I do not accept Solar's claim that the Contractor was excused for any part of the relevant delay by circumstances of *Force Majeure* within clause 21.3.

(3.2.4) Conclusion

106. The actual date of commissioning of the Hamptworth project was confirmed in a letter dated 28 April 2014 from Ofgem as 11 April 2013. By concession, the first claimant has calculated the period for Delay Damages from 30 June 2012 until 26 March 2013, a period (less the contractual 15 days grace) of 254 days.

107. It follows that, in my judgment, the Contractor would have been liable under clause 21.5 (and subject to any available set-off) to pay liquidated Delay Damages to the first claimant in the sum of £631,759, and that sum must be brought into account in determining the sum (if any) due from Solar under its guarantee.

(3.3) Actual loss

108. My conclusion in relation to the claim under clause 21.5 means that it is unnecessary for me to deal at length with the first claimant's alternative claim for its actual loss. However, I shall do so briefly, in case this case should go further and my decision in relation to clause 21.5 should be reversed.

109. The first claimant's alternative claim for damages at common law is pleaded in paragraph 14 of the Particulars of Claim, as an allegation that the first claimant has:

> **.. suffered loss and damage as a result of the Contractor's breaches of contract [in failing to complete the commissioning of the plant by the date upon which the "DNO commissioning/G59 test" due to be completed, alternatively by the date on which the plant was due to be ready to start Commercial Operation] and, in particular, [has] suffered the loss of the revenue that [the first claimant] would have received had each plant been commissioned on the due date.**

110. In the Schedule of Losses, the damages claimed are not quantified by reference to loss of revenue during the period of delay. Instead, the first claimant relies upon the fact that the delay in commissioning the Hamptworth plant meant that it was not eligible for the ROO-FIT tariff of £0.089/kWh for 25 years contemplated in recital II and clause 3.5 of the Hamptworth contract, but instead only qualified for a ROO tariff of £0.088/kWh for 20 years. The first claimant then puts forward alternative ways of calculating the resulting loss suffered by it: first, by calculating the reduction in the initial capital expenditure cost of the plant (£772,000) which would be required, given the projected reduction in income, to achieve the same Internal Rate of Return ("IRR") of 8.4% per annum as it was originally projecting; secondly by calculating the total difference in net revenue (EBITDA) (£4,694,400) that would be earned over the originally contemplated 25-year period, accepting that that sum would need to be discounted for early receipt (though offering no calculation of the discounted amount).

111. Mr Walford, for Solar, argues that this claim is misconceived. In his submissions, it is not properly pleaded, since the facts relating to the tariff were not set out in the Particulars of Claim. Nor has it been properly evidenced, since the detailed calculations should have been the subject of expert accountancy evidence and, in any event, involve a significant degree of speculation. To the extent that the calculation is based upon the projected IRR, the calculation is (he submits) misconceived because the contract did not guarantee any particular IRR. To the extent that the calculation is based upon projected loss of EBITDA, he submits that the calculation is misconceived because only the net loss *after* interest, tax, depreciation and amortisation is recoverable, and because the court cannot be expected to speculate in the absence of expert evidence as to the appropriate discount for early receipt.

112. In my judgment, the facts pleaded in the Particulars of Claim and in the Schedule of Loss sufficiently plead the first claimant's claim for damages at common law for damages consequent upon the different tariff. Those facts were also made out by the evidence, which established (and it was not seriously in issue) that the delay in the commissioning of the Hamptworth plant resulted in it qualifying for a different tariff. The financial effect on the first claimant of that different tariff was therefore caused by the delay.

113. However, I have some sympathy for Mr Walford's argument that the calculations of loss put forward by the first claimant involve a significant degree of speculation, and that the factual basis of those calculations was not fully explored in the evidence. In particular, the court could not properly base an assessment of damages on the second way of calculating its loss put forward by the first claimant. The court cannot itself calculate a loss figure simply on the basis of the figure put forward by the first claimant for the total projected difference in net revenue.

114. The first claimant's first approach to the calculation of its loss does, however, seem to me to be sound in principle. I of course accept, as Mr Walford submits, that there is no term in the Hamptworth contract which guarantees any particular IRR to the first claimant. However, damages in contract are intended to place the claimant in the same position as he would have been in if the contract had been performed[12]: and it does not seem to me to be an unreasonable approach to assessing the first claimant's loss - when comparing the position that it should have been in to its present one - to use (as the first claimant has done) a spreadsheet financial model similar to that from which the original price was calculated, and to see what reduction in the initial capital expenditure cost of the plant would be required to produce the same projected IRR from the new projected income figures.

---

12 See eg *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2018] 2 WLR 1352 at [31], per Lord Reed JSC (with whom Baroness Hale of Richmond PSC, Lord Wilson and Lord Carnwath JJSC agreed).

115. In that connection, I note that it is plain from Mr Gandia's email dated 3 May 2012 to Mr Gaarn-Larsen (in which Mr Gandia stated that "we agree in the position that your model cannot be affected by [a variation on the dates of commissioning and final connection] and that you should receive 25 years of FIT incomes) that Mr Gandia was aware when the terms of the Hamptworth contract were being negotiated that Mr Gaarn-Larsen was using a financial model to calculate the price. Mr Garcia's email dated 23 August 2013 in relation to Bidwell (discussed in paragraph 315 below) suggests that this was how both sides (and not just Mr Gaarn-Larsen) approached the calculation of the price under the EPC contracts.

116. Even so, those projected income figures involve speculation over a period of 25 years. In approaching a calculation of damages of this kind, it is necessary to discount the results of such a purely mathematical calculation for the chance that events that cannot now be predicted will mean that the calculated figures overstate the likely loss. Given the inevitable element of speculation involved, the court has no choice but to approach matters on a fairly broad-brush basis. Doing the best that I can, it seems to me that a discount of about 20% is required to take account of those eventualities. Discounting the calculated figure of £772,000 by about 20% produces a figure of just under £620,000. That is the sum which I would have awarded as damages at common law, had I not upheld the first claimant's claim for liquidated Delay Damages in the sum of £631,759.

(3.4) Guarantee defences

(3.4.1) The terms of the guarantee

117. I now turn to the defences that are put forward by Solar in reliance on its position as guarantor. The primary liability to pay liquidated Delay Damages or damages at common law is, of course, that of the Contractor. The first claimant's claim against Solar is as guarantor and/or indemnifier under clauses 6.1 and/or 6.2 of the Hamptworth contract.

118. Those clauses provide as follows:

> **6.1 [Solar] guarantees the due and punctual performance by the Contractor of the Contractor's duties and obligations to [the first claimant] under this Agreement**
>
> **6.2 If the Contractor fails to observe and perform any of its duties or obligations to [the first claimant], [Solar] (as a separate and independent obligation and liability from its obligations and liabilities under this Agreement) shall indemnify [the first claimant] against all loss, debt, damage, interest, cost and expense incurred by [the first claimant] by reason of such failure or breach and shall pay to the [first**

claimant], without any deduction or set-off, the amount of that loss, debt, damage, interest, cost and expense.

119. Solar asserts that it has been discharged from any liability it might have had under these provisions:

119.1 First, by the first claimant's failure to disclose a number of "unusual features" before Solar entered into its guarantee; and/or

119.2 Secondly, by the agreement between the Contractor and the first claimant to change the route the cabling from the Northern route to the Southern route.

120. The first claimant takes issue with those assertions, both as a matter of fact and of law. However, its first answer to those assertions is to say that Solar's liability under clause 6.2 is that of an indemnifier, and that the doctrines of guarantee law relied on by Solar as discharging it from liability do not apply to contracts of indemnity.

(3.4.2) Is clause 6.2 a guarantee or indemnity?

121. I therefore begin by considering whether Solar's obligations under clause 6 of the Hamptworth contract are properly to be characterised in law as those of a guarantor or those of an indemnifier. In *Associated British Ports v Ferryways NV*[13] Maurice Kay LJ described the problem of distinguishing a guarantee from an indemnity as an "old chestnut". The problem is often most acute when the promise has been made orally, and a decision that it is properly to be classified as a guarantee would render the promise unenforceable under the Statute of Frauds (1677) s 4[14]. However, it may also arise even where, as in the present case, the promise is in writing[15].

122. Whether any particular contractual promise is to be classified as a guarantee so as to attract the full range of the doctrines evolved in equity for the protection of guarantors[16] depends upon the nature of the obligations thereby created. That, in

13 [2009] EWCA Civ 189, [2009] 1 Lloyd's Rep. 595

14 See eg *Pitts v Jones* [2007] EWCA Civ 1301, [2008] 1 All ER (Comm) 548.

15 See eg *Stadium Finance Co Ltd v Helm* (1965) 109 Sol Jo 471; *Vossloh AG v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch), [2011] 2 All ER (Comm) 307; *Sofaer v Anglo Irish Asset Finance plc* [2011] EWHC 1480 (Ch), [2011] BPIR 1736; and *Deutsche Bank AG v Unitech Global Ltd* [2016] EWCA Civ 119, [2016] 2 All ER (Comm) 689

16 '[I]t is important to distinguish between three kinds of case to which the principles of the law of guarantees may apply: (1) those in which there is an agreement to constitute, for a particular purpose, the relation of principal debtor and guarantor, to which agreement the creditor secured by it is a party; (2) those in which there is a similar agreement between the principal debtor and guarantor only, to which the creditor is a stranger; and (3) those in which, without any such contract of guarantee, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid': *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas

turn, depends upon the correct interpretation of the particular words in which the parties have expressed the promise[17].

123. One touchstone which distinguishes contracts of guarantee, properly so called, from other contracts serving the same economic function is that, under a guarantee, the guarantor's liability is secondary and ancillary to that of the principal debtor[18]. As Donaldson J said in *General Surety and Guarantee Co Ltd v Francis Parker Ltd*[19] "If this is a contract of guarantee, the background must be one in which there is a principal debtor and a secondary debtor". By contrast, an indemnity is a form of independent and primary obligation and so is not secondary to, nor dependent upon, the liability of any other obligor[20].

124. There are at least two forms that a contract of guarantee can take. One is a contract that creates a 'conditional obligation', ie a promise by the guarantor to pay or perform if the principal debtor fails to do so. The other is a contract which creates a 'see to it' obligation, ie an undertaking by the guarantor that the principal debtor will perform its contract with the creditor[21]. In the present case, Mr Walford argues that either clause 6.1 is a "see to it" guarantee and clause 6.2 is a "conditional obligation" guarantee, or that the two clauses must be read together to make one single "conditional obligation" guarantee. Mr Parker, by contrast, submits that clause 6.2 is "a separate and independent obligation" from clause 6.1, and is a primary obligation in the nature of an indemnity.

125. It seems to me that clause 6 of the Hamptworth contract contains some pointers in each direction. Just as it is clear that the use of the word "guarantee" is not in itself conclusive, the use of the word "indemnity" is similarly no more than a pointer. In one sense all contracts of guarantee (strictly so called) are contracts of indemnity (as indeed are many contracts of insurance)[22]: and it would be possible to read clause 6.2 as merely describing the consequences of the "see to it" guarantee promise given in

---

1 (HL) at 10–11, per Lord Selborne LC. It is only to the first of these classes that the doctrines evolved in equity for the protection of guarantors apply in their full extent: ibid.

17 See *Moschi v Lep Air Services Ltd* [1973] AC 331 at 349C, per Lord Diplock

18 "A guarantee is essentially a contract of an accessory nature, being always ancillary and subsidiary to some other contract or liability on which it is founded, without the support of which it must fail": *Mountstephen v Lakeman* (1871) LR 7 QB 196 at 202, Ex Ch, per Willes J; affd sub nom *Lakeman v Mountstephen* (1874) LR 7 HL 17.

19 (1977) 6 BLR 16, at 21

20 See eg *Yeoman Credit Ltd v Latter* [1961] 1 WLR 828; and *Goulston Discount Co Ltd v Clark* [1967] 2 QB 493.

21 *Moschi v Lep Air Services Ltd* [1973] AC 331 (HL) at 344, per Lord Reid; *Norwich and Peterborough Building Society v McGuinness* [2011] EWCA Civ 1286, [2012] 2 All ER (Comm) 265 (CA) at [7], per Patten LJ.

22 *Vossloh AG v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch), [2011] 2 All ER (Comm) 307 at [25], per Sir William Blackburne.

clause 6.1. Clause 6.2 does not expressly state that Solar's liability is to be as primary obligor and not merely as guarantor[23].

126. On balance, however, clause 6.2 is in my judgment correctly to be characterised as an indemnity rather than as a guarantee properly so called. That seems to me to be the characterisation which best gives effect to the words in which the parties have expressed the promise in that clause. The promise given in clause 6.2 is described as "a separate and independent obligation and liability". It is expressed as a promise to "indemnify"; and it is written in the language characteristic of indemnities, focusing on the "loss, debt, damage, interest, cost and expense incurred" by the first claimant, and promising to pay that amount without set-off or deduction. It also does not include any of the "boilerplate" provisions which would normally be found as part of a guarantee clause in a formal contract. (The Spanish law precedents from which other parts of the wording of the Hamptworth contract were derived were bilateral contracts between the Investor and the Constructor, and did not contain parent company guarantees. This is not therefore a wording carried over from those Spanish law precedents.)

(3.4.3) Does the doctrine of "unusual features" and/or the rule in *Holme v Brunskill* apply to contracts of indemnity?

127. Solar's defences which are particular to its liability as guarantor rely upon two principles of the law of guarantees: first, the rule (recently re-stated in the cases of *Royal Bank of Scotland v Etridge (No 2)*[24] and *North Shore Ventures Ltd v Anstead Holdings Inc*[25]) that a creditor is obliged to disclose to a surety any contract or other dealing between creditor and debtor which changes the position of the debtor from what the surety might naturally have expected; and, secondly, the rule in *Holme v Brunskill*[26], by virtue of which any variation of the underlying contract which is not manifestly insubstantial or incapable of prejudicing the guarantor will discharge the guarantee. Logically, the next question which I must decide is whether, in view of my decision that clause 6.2 creates a promise which is properly characterised as an indemnity rather than as a guarantee, those defences are still open to Solar.

128. There are long-standing and authoritative dicta in support of the view that they are not, and that these principles do not apply to contracts of indemnity, properly so

23 In any event, a mere statement in what would otherwise be a guarantee that the guarantor will be liable as primary obligor and not merely as a surety will not convert a guarantee into an indemnity: see *Heald v O'Connor* [1971] 1 WLR 497 at 503, per Fisher J.

24 [2001] UKHL 44, [2002] 2 AC 773 at [81] and [188]

25 [2011] EWCA Civ 230, [2012] Ch 31

26 (1878) 3 QBD 495. For a modern summary of the rule, its origins and its scope, see *Hackney Empire Ltd v Aviva Insurance Ltd* [2012] EWCA Civ 1716, [2013] 1 WLR 3400 at [56] to [79], per Jackson LJ.

called. For example, in *Duncan, Fox & Co v North and South Wales Bank*[27], Lord Selborne LC observed that:

> **If, so far as the creditor is concerned, there is no contract for suretyship, if the person who has (in fact) made himself answerable for another man's debt is, towards the creditor, no surety, but a principal, then I think that the creditor would not be subject to those special obligations which were described by Lord Truro in *Owen v Homan* ..**

129. *Owen v Homan*[28] was an application to discharge an order appointing a receiver to enforce promissory notes given by the defendant as security for the sums due to the plaintiff on the bank account of a series of trading partnerships in which her nephew was interested. The defences put forward on behalf of Ms Homan, and considered by Lord Truro LC (who discharged the receivership order) included that her liability as a guarantor had been discharged (1) by the creditor's pre-contractual failure to disclose all material circumstances, in breach of the principle that "the creditor must make a full and fair and honest communication of every circumstance calculated to influence the discretion of the surety in entering into the required obligation" and/or (2) by the creditor's acts in re-scheduling the principal debtor's indebtedness, in breach of the principle that "a creditor discharges a surety by any dealing or arrangement with the principal debtor without the surety's assent which at all varies the situation, rights or remedies of the surety".

130. It therefore appears that Lord Selborne LC, in the passage cited, was expressing the view that neither of the principles of the law of guarantees relied on by Solar in the present case will apply in circumstances where the party sought to be made liable is "towards the creditor, no surety, but a principal".

131. In relation to the rule in *Holme v Brunskill.* Mr Walford, for Solar, relied upon the following passage in O'Donovan and Phillips, *The Modern Contract of Guarantee*[29]:

> **Whether the rule in *Holme v Brunskill* applies to indemnities is not clearly settled. Support can be found for affirmative and negative positions, with the balance of more recent opinion against it.**
>
> **This position has been reached without close analysis, and much of the support for it is to be found in dicta or assumed bases for argument ..**
>
> **In the authors' view it goes too far to say that the scope for variations under indemnities is unlimited. The primary/secondary distinction alone is not a sufficient reason for treating guarantees differently from indemnities. It suggests that all "primary" liabilities must be treated alike. It also fails to explain a line of decisions on variations under**

---

27 (1880) 6 App Cas 1 (HL)

28 (1851) 3 Mac & G 378

29 O'Donovan and Phillips, *The Modern Contract of Guarantee* (3rd English Edition, by W Courtney and JC Phillips, 2016) at 7-070

> **contracts of reinsurance, which endorse an approach analogous to the rule ..**

132. The only authority cited by the editors of *The Modern Contract of Guarantee* for the application of the rule in *Holme v Brunskill* to indemnities is the 1879 decision of Pollock B in *Webster v Petre*[30]. That case concerned what is described in the report as a "contract to indemnify the plaintiff" against liability under a bond, given by him to the Crown, for the completion of a railway. After the bond was given, the Railways Companies Act 1867 permitted the plaintiff to apply to the Board of Trade to authorise the abandonment of the railway and the cancellation of the bond. The plaintiff paid, under an order of the court, a part of the money secured by the bond, which was then cancelled. He then brought an action to recover the amount so paid from the defendants under their indemnity.

133. Pollock B held that the words of what he referred to as "the defendant's undertaking on the indemnity" were sufficiently wide to encompass the sum paid, even though the relevant Act had not been passed when the indemnity was given. He accordingly gave judgment for the plaintiff, but in doing appeared to accept that the rule in *Holme v Brunskill* would otherwise have applied to that contract:

> **.. if I am to treat this which occurred and which led to the payment of this sum of money as an alteration or variation of that liability which the defendant originally came under by reason of the contract declared upon, then, there having been no consent by the defendant, there not having been even any notice of the steps that were being taken, the defendant was discharged, and cannot be made liable for that which the plaintiff has done; and for that the recent case in the Court of Appeal of *Holme v Brunskill* is an amply sufficient authority.**

134. Unfortunately, the wording of the contract of "indemnity" is not given in the report: but it does record the argument of counsel for the defendant that "in the cases cited [by counsel for the plaintiff] there was a primary liability, and *not as here a liability as surety only*"[31]. The case is therefore, at best, equivocal authority for the proposition that the rule in *Holme v Brunskill* applies to contracts of indemnity, properly so called.

135. The authorities cited by the editors of *The Modern Contract of Guarantee* as containing the "more recent opinion" that the rule does not apply to indemnities begin with *Associated British Ports v Ferryways NV*[32]. At first instance, Field J had held that the letter agreement which was the subject of the action was a guarantee rather than an indemnity, and that it had been discharged by the making of a binding

---

30 (1879) 4 Ex D 127.
31 Emphasis added
32 [2009] EWCA Civ 189, [2009] 1 Lloyd's Rep. 595 at [1]

agreement between the creditor and the principal debtor rescheduling the principal debtor's indebtedness. The sole issue on appeal to the Court of Appeal was whether Field J's conclusion that the agreement was a guarantee rather than an indemnity was correct. However, Maurice Kay LJ (with whom the other members of the Court agreed) began his judgment dismissing the creditor's appeal by explaining the significance of that issue to the outcome of the case. Having made reference to the Statute of Frauds, he continued:

> **The obligation in issue in this appeal raises no question as to form. It was in writing. However, it illustrates another difference between a guarantee and an indemnity. Because the liability of a guarantor is secondary, it is usually discharged by a bilateral variation of the contract between the creditor and the debtor. In the absence of an express provision to the contrary in the contract of guarantee, the giving of time by the creditor to the debtor will generally discharge the guarantor. However, it will not have that effect if the suretyship is one of indemnity: the liability of the surety, being a primary liability, survives.**

136. The next authority mentioned in *The Modern Contract of Guarantee* is *Vossloh AG v Alpha Trains (UK) Ltd*[33]. The issue in that case was whether the relevant contract was a true guarantee, liability under which was triggered by proof of breach by the primary obligor, or was in the nature of a performance bond, liability under which could be triggered by demand alone. In the course of holding that the agreement was a true guarantee, Sir William Blackburne observed.

> **The fact that the obligation to indemnify is primary and independent has the effect that the principle of co-extensiveness does not apply to a contract of indemnity. The indemnity not only shifts the burden of the principal's insolvency on to the indemnifier but it also safeguards the creditor against the possibility that his underlying transaction with the principal is void or unenforceable. It also prevents the discharge of the principal or any variation or compromise of the creditor's claims against the principal from necessarily affecting the liability of the indemnifier under his contract with the creditor. Otherwise, the rights and duties of the parties to a contract of indemnity are generally the same as those of the parties to a contract of guarantee.**

137. The dicta in these two cases clearly support the view that the rule in *Holme v Brunskill* does not apply to indemnities. Somewhat more equivocal views were, however, expressed in the next two cases cited. The central issue in *Marubeni Hong Kong and South China Ltd v Mongolian Government* once was again whether the instrument was a true guarantee or a performance bond. Cresswell J held that that

[33] [2010] EWHC 2443 (Ch), [2011] 2 All ER (Comm) 307 at [26], [27]. Cf *WS Tankship II BV v Kwangju Bank Ltd* [2011] EWHC 3010 at [145], where Blair J held that "The rules as to discharge of a surety on the basis of material variation or forbearance have no application to demand guarantees".

the relevant instrument was a guarantee, and had therefore been discharged by the making of refinancing agreements between the creditor and the principal debtor[34]. In doing so, however, he observed in passing that:

> **If, contrary to the above, the defendant undertook a primary liability (joint and/or several) to the claimant, it does not follow that the principles underlying the rule in *Holme v Brunskill* have no application.**

The Court of Appeal dismissed the creditor's appeal without specifically addressing this comment. It seems, however, implicitly to have accepted the creditor's argument that only in the case of a true guarantee would "the guarantor [have] all the defences available to the debtor, and [be] discharged automatically (under the rule in *Holme v Brunskill* ..) if there is any variation of the arrangements with the principal debtor without his consent which might prejudice his interests[35].

138. The next case cited is *CIMC Raffles Offshore (Singapore) Limited v Schahin Holdings SA*. As is noted in Andrews & Millett, *Law of Guarantees*[36], the procedural complexities and the fact that it was an appeal from a summary judgment application make this a difficult case from which to distil any clear point of principle. At first instance[37], Blair J had held that the relevant instrument imposed a primary liability, and had not been discharged by subsequent amendments to the principal contract which increased the liability of the principal debtor, even though (in his view) "I do not think that it is clearly established on the authorities that the fact that an instrument imposes primary as well as secondary liability in itself negatives the rule in *Holme v. Brunskill*". He therefore gave summary judgment in respect of the amounts originally covered, but gave leave to defend in relation to the increased amounts on the basis that it was unclear whether these were covered by the terms of the instrument

139. The Court of Appeal[38] reversed that decision and held that the entirety of the action should go to trial, on the basis that "the various questions of construction which arise on both appeal and cross-appeal, and the closely allied question of the purview of the guarantee, will have to be considered as a whole, in the light of the evidence which will be forthcoming at trial. Moreover, this is not a case where the issues of law which arise on the appeal are straightforward: each of them presents difficulties of analysis, and the jurisprudence is somewhat opaque". The case therefore contains no final ruling on any point of law.

---

34 [2004] EWHC 472 (Comm), [2004] 2 Lloyd's Rep 198 at [142].

35 [2005] EWCA Civ 395, [2005] 1 WLR 2497 at [9]. See also at [35], where the Court of Appeal recorded, without comment, an alternative submission "hinted at" but not in fact pursued by the creditor that "if not a demand bond, the instrument should be construed as creating some form of primary liability, sufficient to displace the rule in *Holme v Brunskill*".

36 7th ed, 2015, at 9-025

37 [2012] EWHC 1758 (Comm) at [27]

38 [2013] EWCA Civ 644, 1. [2013] 2 All ER (Comm) 760 at [65]

140. However, it does contain an important discussion of the limitations which the "purview principle" may place on ability of the parties to a guarantee to consent in advance to changes to the principal contract. In the course of that discussion, Sir Bernard Rix (with whom Arden and McCombe LJJ simply agreed) cited with apparent approval:

> **.. A case comment on *Marubeni*'s case in (2005) JIBLR 488 [which] suggests that in this context an important distinction is to be made between first demand guarantees or performance bonds issued by banks and other forms of guarantee: but that even so, the *Holme v Brunskill* doctrine is not necessarily ousted by provisions for primary liability (at 493):**
>
> > **'Equity prevents two parties to a triangular relationship altering their arrangements behind the back of the third … If anything the justification for the rule in *Holme v Brunskill* is heightened in the case of a primary liability instrument, given the more onerous nature of such an instrument on the part of the guarantor …'**
>
> **The authors submit, citing textbook and Commonwealth authority, that any ousting of the *Holme v Brunskill* doctrine must be clear and unequivocal and that there is no clear decision to support the view that it can be achieved merely by a primary obligor clause.**

141. In my judgment, Sir Bernard Rix was there discussing the well-known conceptual problem of the effect of a principal debtor clause in what, overall, would otherwise be characterised as a guarantee[39]. He was not casting doubt on the proposition that the rule in *Holme v Brunskill* does not apply to contacts of indemnity, properly so called.

142. *The Modern Contract of Guarantee* says that it states the law as at 1 May 2016. However, it does not mention the May 2014 decision of Flaux J in *ABN Amro Commercial Finance plc v McGinn*[40]. In that case, the defendants were directors of a company that had entered into a receivables financing agreement with the claimant factoring company, in support of which they had provided deeds of indemnity to the claimant. Their defence to the claim was (inter alia) that their liability was secondary and not primary and had been discharged by material variations to the receivables financing agreement. Flaux J held that

> .. **on the true construction of the deeds of indemnity, the defendants' liability in each case is primary, so that the defence based upon the rule in *Holme v Brunskill* is not available to the defendants. It follows that, irrespective of the factual position .. the defendants' case that they were discharged from liability under the deeds of indemnity by virtue of**

[39] Simply stating that a guarantor should be treated as a primary obligor and not merely as a surety will be insufficient in itself to make the contract one of indemnity: *Heald v O'Connor* [1971] 1 WLR 497.

[40] [2014] EWHC 1674 (Comm), [2014] 2 CLC 184

> **those variations has no real prospect of success at trial and is, bluntly, completely hopeless.**

This case is the nearest that there is to a decision directly on point. However, the contrary proposition does not seem to have been argued[41].

143. With regard to the limited duty of disclosure imposed upon a guarantor, the decision of the Court of Appeal in the recent case of *Deutsche Bank AG v Unitech Global Ltd*[42] proceeds on the basis that it does not apply in the case of an indemnity (although again the contrary does not seem to have been argued). In that case the defendant, Unitech, had given a parent company guarantee to the claimant, Deutsche Bank, in respect of its subsidiary's liabilities under various loan and swap agreements which used LIBOR as a reference rate. One of the defences which Unitech sought to put forward by amendment was that the bank had failed to disclose to it, before it had entered into the guarantee, that the bank was engaged in the wrongful manipulation of LIBOR. Teare J refused permission to make that amendment, and his decision was upheld by the Court of Appeal. The Court of Appeal held that "it is arguable that manipulation by the Bank of a rate by reference to which interest was calculated would be a most unusual feature". The alleged non-disclosure nevertheless provided no defence for Unitech as it had undertaken liability, not merely as guarantor under clauses 15.1(a) and (b) of the relevant credit facility agreement, but also as an indemnifier under clause 15.1(c). Longmore LJ, giving the judgment of the court, stated:

> **[19] .. It is therefore necessary to consider whether clause 15.1(c) precludes the application of the doctrine.**
>
> **20 We consider that it does. A mere statement in what would otherwise be a guarantee that the guarantor will be liable as primary obligor and not merely as a surety will not convert a guarantee into an indemnity: see *Heald v O'Connor* [1971] 1 WLR 497, 503 per Fisher J. But clause 15.1 in the present case goes much further. It is in three parts; the first two sub-clauses are guarantee obligations but the third sub-clause is on its face (and pursuant to the title of the clause) an obligation to indemnify if any amount is not recoverable on the basis of a guarantee "for any reason". The wide words "for any reason" must encompass any irrecoverability by reason of non-disclosure of features which ought to have been disclosed.**

41 In a case comment on this decision, Rafal Zakrzewski has argued that a rule that all indemnities are, as such, outside the scope of surety protection doctrines would not sit comfortably with the rule applied by the House of Lords in *Rouse v Bradford Banking Co Ltd* [1894] AC 586 that suretyship can even arise in the case of joint and several liability, provided that the creditor is aware that one of the parties is acting as a surety or is informed of that fact after the event: see Zakrzewski 'Indemnities and suretyship' (2015) 4 JIBFL 197.

42 [2016] EWCA Civ 119, [2016] 1 WLR 3598

144. It is also the law that, in the case of a true guarantee, a binding agreement by the creditor to extend the time for the performance by the principal of the principal's obligation under the main contract releases the guarantor from liability[43]. The only modern authority on the issue of whether this protection applies also in the case of contracts of indemnity seems to be the decision of HHJ Richard Seymour QC, sitting as a judge of the High Court, in *Walker Crips Stockbrokers Ltd v Savill*[44], where again the contrary does not appear to have been argued. There is however an old authority (referred to by HHJ Seymour) which appears directly in point[45], and which seems to support his view that the giving of time by the creditor to the principal will not discharge an indemnifier, unless it can be shown that it is an express or implied term of the contract of indemnity that time shall not be given.

145. Drawing these various threads together, it seems to me that the overwhelming preponderance of view in the cases and textbooks which have been cited to me is that the rule in *Holme v Brunskill* does not apply to contracts of indemnity, properly so called. As for the limited duty of disclosure, the decision of the Court of Appeal in *Deutsche Bank AG v Unitech Global Ltd*[46] is authority binding on me that that duty does not apply to indemnities worded as widely as the particular contract considered in that case.

146. In my judgment, the correct course for me as a first instance judge is to follow the trend of the dicta, assumptions and decisions in these more modern cases, and to hold that the equitable protections relied on by Solar in the present case apply only to contracts that are properly characterised as contracts of guarantee, and do not apply to contracts of indemnity, any more than they apply to on-demand bonds or to standby letters of credit.

147. There are, in my judgment, sound reasons of policy to support that conclusion, and for not extending the ambit of the rule in *Holme v Brunskill* beyond that established by binding authority. It is generally acknowledged that the rule in *Holme v Brunskill* unduly favours the guarantor, in that it discharges the guarantee completely upon the occurrence of any variation which is not "obviously unsubstantial" or clearly for the benefit of the guarantor. It represents a trap for the unwary creditor. Yet it is plainly not regarded as a fundamental right of the guarantor, since the law (subject to any relevant statutory control of unfair terms) permits the creditor to contract out of it by the terms of the guarantee. All well-advised creditors therefore do so: but that, in turn, leads to the uncertainties of the "purview doctrine" which, in reliance on the historical origins of the rule, limits the extent to which such clauses can be effective.

---

43 See eg *Polak v Everett* (1876) 1 QBD 669 at 673-4.
44 [2007] EWHC 2598 (QB) at [76]
45 See *Way v Hearn* (1862) 11 CB(NS) 774
46 [2016] EWCA Civ 119, [2016] 1 WLR 3598

Declining to extend the ambit of the rule in *Holme v Brunskill* to contracts of indemnity, properly so called, therefore promotes legal certainty.

148. As for the limited duty of disclosure which the law imposes upon creditors for the benefit of guarantors, this in modern conditions is anomalous and difficult to justify. It seems to me that extending it beyond the scope already established by authority would undermine, rather than help, legal certainty. The law already provides adequate remedies for misrepresentation (including misrepresentation by half-truth or omission) which apply to contracts generally. There is no need for any special rule applicable to contracts of indemnity.

149. For these reasons, I reject Solar's defences based upon the rule in *Holme v Brunskill* and/or the doctrine of "unusual features".

(3.4.4) Unusual features

150. Even so, because these issues of law are not clearly settled, it is right that I should go on to consider Solar's defences on the assumption that I am wrong, and that (contrary to my decisions above) Solar would in principle be entitled to rely upon these doctrines of guarantee law, if on the facts it could bring itself within them, by way of defence to the claim of the first claimant under clause 6 of the Hamptworth contract.

151. I begin with Solar's reliance upon the doctrine of "unusual features": the rule that a creditor is obliged to disclose to a surety any contract or other dealing between creditor and debtor which changes the position of the debtor from what the surety might naturally have expected.

152. As pleaded in paragraphs 5C.7 to 5C.9 of the Amended Defence and Counterclaim, Solar's complaint, in substance, is that the first claimant had failed to disclose its view (and the information available to it to support that view) that the works were unlikely to be completed by the completion date stated in the Hamptworth contract. In particular, Solar alleges that the first claimant failed to disclose two matters: first, that the first claimant had been advised by an email from Gary Gay of G2 Energy dated 3 May 2012 that the time needed to obtain a street works licence meant that the cabling works could not begin until after the contractual completion date of 30 June 2012 (paragraph 5C.7): and, second, that "whilst the advice from Ostenergy dated 2 May 2012 was attached to the Hamptworth EPC Contract, it was added to the documentation seen by [Solar] only on 13 May 2012, one day before the contract signing, and [Solar] had insufficient time to absorb its content before the Hamptworth EPC Contract was presented to it for signature" (paragraph 5C.8).

153. In my judgment, these pleaded allegations do not even come close to establishing a case of breach by the first claimant of the limited duty of disclosure imposed by law upon a creditor before taking a guarantee.

153.1 First of all, the evidence establishes that both of these matters were in fact disclosed to Solar before it gave its guarantee.

153.1.1 As for Mr Gay's 3 May 2012 email, it was originally sent to Mr Collins "further to our discussion of yesterday" and was then forwarded to Mr Andreu, who then forwarded it to (among others) Mr Gaarn-Larsen, Mr Garcia and Mr Gandia. Mr Gay's email was therefore in the hands of Solar on the day it was sent, both through Solar's financial adviser Mr Andreu and through Mr Gandia, who was the person who signed the Hamptworth contract on behalf of Solar.

153.1.2 As for the Ostenergy "advice", the document referred to is the "Independent Engineer Technical Report", which formed the Specification at Annexure 2 to the Hamptworth contract. Solar's pleading admits in terms that that document was seen by Solar a day prior to signing the Hamptworth contract.

On the facts, therefore, there has been no relevant non-disclosure.

153.2 Secondly, even if there had in fact been any non-disclosure of these documents, neither of them, in my judgment, would fall within the scope of the limited matters - "any contract or other dealing between creditor and debtor" - which the law requires to be disclosed. The matters about which Solar complains are not contracts or dealings between the first claimant and the Contractor. They are merely documents received from third parties which express opinions.

154. Faced with these difficulties, Mr Walford sought to refine and extend this aspect of Solar's case. As developed by Mr Walford in his closing submissions, the "unusual features" which it is alleged that the first claimant should have disclosed to Solar were that:

154.1 Despite the information contained in these documents (which indicated that the contract works were unlikely to be completed by 30 June 2012), Mr Gaarn-Larsen expected that the works would be completed by that date, and intended to hold the contractor to its contractual obligations to achieve completion by that date, including its obligation to pay Delay Damages if it did not do so.

154.2 The Contractor also hoped to achieve completion by that date: but expected that if it did not do so, Mr Gaarn-Larsen would not claim Delay Damages,

but would instead operate the contractual machinery for negotiating a reduction in the price.

155. According to Mr Walford, these matters engage the "unusual features" doctrine because "The surety would not expect a situation where GPP and the Contractor had such differing views as to the realistic achieve ability of the completion of the Project by a particular date. The effect of those differing views was that Mr Gaarn-Larsen did not regard himself as under any obligation to negotiate a price reduction. The situation was thus that, given the advice that the Project in reality could not be completed by 30 June 2012, there was bound to be a breach of contract by the Contractor even before the ink was dry on the guarantee". In Mr Walford's submission, these matters are unusual aspects of the "contractual relationship" between the first claimant and the Contractor, and so should have been disclosed.

156. In my judgment, these re-formulated allegations equally provide no proper grounds of defence under this principle of guarantee law. To begin with, Mr Walford's submission that GPP and the Contractor had "such different views" as to the achievability of the contractual completion date is inconsistent with Mr Garcia's evidence. When cross-examined, Mr Garcia indicated that he had been quite hopeful of achieving the contractual date, despite the information provided by G2 and Ostenergy about the difficulties of doing so. He accepted that "the risk that we could not perform is our risk", but added that "It was not a particular problem".

157. The heart of Mr Walford's submission was really this: that Mr Garcia expected that, if the Contractor failed to achieve the due date, Mr Gaarn-Laarsen would not insist on the Contractor paying Delay Damages, but would negotiate a commercial compromise. Mr Gaarn-Larsen by contrast intended, contrary to the Contractor's expectations, to insist upon the first claimant's legal rights. In my judgment, that submission was simply not supported by the evidence. While I accept that Mr Garcia clearly expected that he and Mr Gaarn-Larssen would sort matters out commercially if the deadline was missed, I do not accept that Mr Gaarn-Larssen had a settled intention at the relevant time not to reach a commercial deal if the deadline was missed. On the contrary, the contract itself contained provisions for price adjustment: and Mr Gaarn-Larssen in fact participated in negotiations for a compromise at a meeting on 26 October 2014, and put forward a compromise proposal by letter dated 28 November. Moreover, even if Solar's case on this point had been made out on the facts, an intention to abide by the strict terms of the principal contract would not be an "unusual feature" of the kind which the law requires a creditor (save in exceptional circumstances not present here) to disclose.

158. Before leaving this aspect of the case I should perhaps deal with one further related issue. In paragraphs 5C.1 and 5C.2 of the Amended Defence and Counterclaim, Solar relied upon the statement in Recital IV to the Hamptworth contract that the first

claimant "has or is aware that there exist all permits licences, information other rights necessary to build and/or operate the PV Plant" as a representation by the first claimant that the street works licence necessary for the cabling work to be carried out was in place, and avers that the first claimant "was aware that it did not have such a licence". For the reasons given in paragraph 153 above, this allegation cannot, on the facts, support a defence of non-disclosure, because Mr Gay's 3 May 2012 email to the Contractor was passed on via Mr Andreu to Mr Gandia, the person who signed the Hamptworth contract on behalf of Solar.

159. Paragraph 5C.7 then goes on to allege that it was "misrepresented to Solar that the dates set out in the Hamptworth EPC Contract were legally and practically achievable". In closing, Mr Walford rightly did not press that line of argument, given that the pleaded representation is not itself a statement of present fact (and, insofar as it was intended as a pleading of the making of a representation by Mr Gaarn-Larsen as to his then opinion, was not false). His opening submissions did, however, rely upon the statement in recital IV as a representation of fact by the first claimant, and accordingly as a misrepresentation. It is right, therefore, that I should record my rejection of that submission.

160. Until completion of the transaction on 14 May 2012, the first claimant was owned by Solar: and the entire project had been conceived and put together by Mr Garcia. The terms of the Hamptworth contract place the responsibility for obtaining permits and licenses on the Contractor. Against that background, it seems to me improbable that the parties can have intended Recital IV as some sort of promise by the first claimant to the Contractor about the position so far achieved by the contractor with regard to licences and permits. It is much more probable that the statements in Recital IV were intended as comfort from the Contractor and/or Solar to the first claimant, which was about to invest in the project: and that seems to me to be the natural meaning of the words used in Recital IV.

161. In my judgment, therefore, the words in Recital IV that are relied upon by Solar were not a representation by the first claimant. In any event Solar, being aware of the true position from Mr Gay's email, cannot plausibly argue that it relied upon those words as any sort of representation as to the true position. Mr Walford's related argument (in reliance upon *Greer v Kettle*[47]) that Recital IV gives rise to an estoppel binding only the first claimant does not take matters any farther.

(3.4.5) Discharge by variation

162. Solar's alternative case is that its guarantee has been discharged because the Hamptworth contract was varied without its consent. As pleaded in paragraph 7 of the Amended Defence and Counterclaim, the variation relied on is an alleged oral

47 [1938] AC 156 at 170, per Lord Maugham.

agreement "made in or about August 2012" to vary the cable route and in consequence (on the part of the first claimant) not to claim Delay Damages. In closing, Mr Walford accepted in the light of the evidence set out in paragraphs 71 to 93 above that this dating was plainly wrong, and instead relied upon an agreement to change the cable route which he said was made orally between Mr Garcia and Mr Gaarn-Larsen in November or December 2012. In view of the fact that Mr Garcia had accepted in cross-examination that there had been no express agreement by Mr Gaarn-Larsen not to claim Delay Damages, Mr Walford also did not press that aspect of the variation agreement in closing. Finally, Mr Walford acknowledged that, in view of the provisions of clauses 22 and 41[48] and in the light of the recent decision of the Supreme Court in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*[49] he could not rely upon this alleged oral agreement as a contractually binding variation of the Hamptworth contract.

163. Mr Walford submitted that there was, nevertheless, clearly a "departure" from the original terms of the Hamptworth contract, which was agreed between the first claimant and the Contractor, to which Solar had not consented (or even been asked to consent), and that that was sufficient to bring into operation the rule in *Holme v Brunskill*.

164. In answer to this, Mr Parker first submitted that, even if Solar could make out such a case on the facts, that would not be sufficient in law to bring the rule into operation. He relied upon the case of *Egbert v National Crown Bank*[50] as authority for the proposition that, in order to bring the rule in *Holme v Brunskill* into operation, the variation must be legally binding.

165. There are undoubtedly authorities which suggest, as Mr Parker submits, that the same principle which applies in relation to the giving of time also applies to other variations, and that only a legally binding change to the principal contract will suffice. There are also, however, authorities which point in the opposite direction: and the editors of *The Modern Contract of Guarantee*[51] have expressed the view that:

> **.. as the law now stands, provided that there is a consensual agreement to alter the principal contract, it is thought the guarantor should be discharged, whether or not the alteration is contractually binding ..**

166. For the purposes of this case, I am prepared to assume (without deciding) that that view is correct. In my judgment, Mr Walford's contention that there was a "departure" from the terms of the Hamptworth contract fails to take into account the

---

48 Which are set out in paragraph 47 above.
49 [2018] UKSC 24, [2018] 2 WLR 1603
50 [1918] AC 903
51 O'Donovan and Phillips, *The Modern Contract of Guarantee* (3rd English Edition, by W Courtney and JC Phillips, 2016) at 7-023

fact that the Hamptworth contract was a "turnkey construction contract" (clause 3.2) requiring the contractor to do everything "necessary for achieving the object of this Play agreement and completing the PV Project in full, even if these are, in part, not expressly specified in the Agreement or its Annexures".

167. By clause 3.1 the Contractor committed to carry out the "Works" and, by clause 4.2(a) undertook to carry out the "Works" in accordance with the Specification. However, as noted in paragraph 45 above, the "Specification" was not the kind of specification typically to be found in construction contracts, but was instead Ost Energy's draft "Independent Engineer Technical Report". This contained a report on a "Site Visit", a description of the "Project Participants, an "Energy Yield Assessment", a "Technology Discussion", a "Permitting Review" and a "Financial Model Review". It was not prescriptive but evaluative, and described a number of problems likely to be encountered which it was to be the duty of the Contractor to overcome. As summarised in paragraphs 48 to 51 above, these problems included obtaining a suitable grid connection, for which two Point Of Connection options were described, one temporary, and one permanent. These, however, were described simply as proposals. That is consistent with the definition of "Specification" in clause 1.1, which expressly contemplates that the Specification itself might be "amended or updated as agreed between the parties from time to time".

168. Against that background, I accept Mr Gaarn-Larsen's evidence that the discussions which took place between him and Mr Garcia which led to Mr Garcia's email dated 10 December 2012 did not involve the negotiation of some oral agreement of variation or "departure" from the Hamptworth contract but were, instead, more properly characterised as Mr Garcia (on behalf of the Contractor) informing Mr Gaarn-Larsen (on behalf of the first claimant) of how the Contractor proposed to fulfil its obligations to achieve the grid connection which it was the Contractor's duty to achieve. That is consistent with Mr Garcia's observation in his 10 December 2012 email that "I took the personal decision to move everything quickly to the Southern route".

169. This therefore was not a change in the Contractor's contractual obligations under the agreement, but a change in the way that the Contractor had decided to fulfil those obligations. Had I concluded, contrary to that view, that this was a change in the Contractor's contractual obligations, I would instead have held that this was a change that was expressly contemplated by the principal contract: and it is clear that variations which are expressly contemplated by the principal contract will not discharge a surety[52].

[52] See eg *Stewart v McKean* (1855) 10 Ex 675.

170. In my judgment, the change to the cable route which took place in about December 2012 was therefore not the kind of "consensual agreement to alter the principal contract" such as would attract the operation of the doctrine in *Holme v Brunskill*.

171. Mr Parker also submitted that, to the extent that this was a consensual "departure" from the original terms of the Hamptworth contract, it was consented to by Solar. He points out that Mr Garcia's 10 December 2012 email was copied to Mr Gandia and Mr Delgado, and that Mr Delgado said in cross-examination that, when he received the email, he called Mr Garcia "and I shouted a lot". According to Mr Delgado, he told Mr Garcia that Solar would not be responsible as guarantor for any increased costs. Mr Delgado, however, accepted that he never said anything to that effect to Mr Gaarn-Larsen.

172. Given that the position of the first claimant and of Solar appears to have been the same, in that both appear simply to have been told by Mr Garcia what the Contractor had done and was about to do, there would be some justice in holding, as Mr Parker urges, that they should both be treated alike and that, if the first claimant is to be taken to have agreed to the variation, then Solar should likewise be taken to have agreed.

173. However, the rule in *Holme v Brunskill* exists for the protection of guarantors, not for the protection of creditors: and the law is clear that mere knowledge of a proposed variation on the part of a guarantor is not the same as his consent to it[53]. It follows that the consent of the surety must generally be communicated to the creditor in order to be effective[54]: and that did not happen in the present case.

174. It follows that, had I held that the change in the cable route amounted to the kind of "consensual agreement to alter the principal contract" that would attract the operation of the doctrine in *Holme v Brunskill*, I would not have held that Solar had consented to that variation so as to preclude it from relying upon that rule.

175. For each and all of these reasons, I therefore reject Solar's defence that it was discharged from its obligations under clause 6 of the Hamptworth contract.

(3.5) Counterclaim

176. In paragraphs 7.5, 9, 46.2 and 46A.1 of the Amended Defence and Counterclaim, Solar counterclaims for the sum of £430,628.48. Solar asserts that this is the balance owing to the Contractor under the Hamptworth contract, and that that balance has been assigned to Solar pursuant to a written assignment agreement dated 12 September 2016. On the face of the pleadings, this assignment is not admitted, and so is in issue: but the assignment agreement and the notice given thereunder to the

---

[53] See eg *Credit Suisse v Allerdale BC* [1995] 1 Lloyd's Rep 315 at 361-2.
[54] See *Witmann UK Ltd v Willdav Engineering SA* [2007] EWCA Civ 834, (2007) BLR 509 at [27]

claimants were both in evidence, and their authenticity was not challenged. In my judgment, Solar is entitled to claim as assignee from the Contractor, and to set off against its liability (if any) to the first claimant any sum that was due to the Contractor under the Hamptworth contract (and against its liability (if any) to the second claimant any sum that was due to the Contractor under any of the other 4 EPC contracts).

177. Solar's calculation of the balance which it claims was due to the Contractor under the Hamptworth contract is set out in paragraph 9.3 of the Amended Defence and Counterclaim. The premise of that calculation is that the first claimant and the Contractor agreed on or about 6 November 2014 (and in settlement of the first claimant's claims for delay) on a price reduction to compensate the first claimant for the fact that the contractual tariff had been missed, with the result that the total price as so reduced became payable in full. However, as I have already held in paragraphs 35.3 and 35.4 above, there was no such agreement.

178. It was, nevertheless, common ground that not all of the amounts falling due under the Hamptworth contract[55] on the occurrence of the third, fourth and fifth payment milestones were paid. Those milestones were: (3) "Tariff Secured", demonstrated by "Confirmation of Temporary Connection and a secured tariff as evidenced by Ofgem"; (4) "Provisional Acceptance", demonstrated by "Signed Provisional Acceptance Certificate"; and (5) "Tariff secured on Permanent Connection", demonstrated by "Correspondence from Ofgem confirming the final tariff".

179. Solar accepted that the contractual "Tariff" (defined in clause 1.1 of the Hamptworth contract as no less than £0.089/kWh) was never secured. The third milestone was therefore never reached. Nevertheless, the first claimant paid £300,000 on 25 November 2013, £295,000 on 30 April 2014, £67,000 on 6 May 2014, £266,965.26 on 12 May 2014 and £200,000 on 20 May 2014 in relation to this third milestone.

180. The fourth milestone - "Provisional Acceptance"[56] required a "signed Provisional Acceptance Certificate". The evidence (including a letter dated 28 April 2014 from Ofgem) shows that the Hamptworth plant was "accredited" for generation after connection to the grid, with effect from 11 April 2013. Under clause 25.1 the Provisional Acceptance Tests" should have started within 15 business days thereafter. Clause 25.5 requires the Provisional Acceptance Tests "to be performed to the satisfaction of the Technical Adviser", OST Energy.

181. OST Energy issued an "Independent Engineering Report" dated 21 February 2014 on the Provisional Acceptance Testing and handover of the Hamptworth plant. This indicated that the data provided failed to demonstrate compliance because "the PR

55 The terms of the Hamptworth contract as to payment are set out in paragraphs 53 and 54 above.
56 See clauses 25.1 to 25.5 of the Hamptworth contract, summarised in paragraph 52 above.

values provided by the Contractor have not been calculated according to the formula stated in the EPC contract .. Due to the pyranometers being installed in a shaded location, this data is unacceptable for long-term performance assessment". That February 2014 report also noted a number of "Punch List" items that remained outstanding, of which four groups of items were "considered material", together with a quantity of documentation that was also outstanding. OST Energy's conclusion was that "We consider the material items sufficiently significant to usually prevent PAC being issued".

182. On 17 June 2014 OST Energy issued a further "Independent Engineering Report". That report confirmed that "the plant has demonstrated sufficient performance to pass the PAC Performance test". OST Energy nevertheless drew attention to a number of outstanding items on the "Punch List" which they considered "to be sufficiently significant to usually prevent PAC being issued". As a result, no PAC had in fact been issued at the time that the Contractor went into administration on 11 August 2014. The Administrators did not adopt or progress the Hamptworth contract because (as they later stated in their Report and Statement of Formal Proposals) the claim by the first claimant for Delay Damages meant that "there is a substantial negative equity on this contract". Instead, on 14 October 2014 the first claimant exercised its right to terminate the Hamptworth contract.

183. Solar argues that, on their true interpretation, the provisions of clauses 25.5 and 25.6 of the Hamptworth contract, when read together with the provisions of Annex 6 ("Provisional Acceptance Test Procedure") required the first claimant to sign a Provisional Acceptance Certificate within three business days of confirmation that the plant had passed the Provisional Acceptance Test (as confirmed by the June 2014 report), irrespective of the materiality of the outstanding items referred to by OST Energy. In my judgment, however, this argument does not provide Solar with a proper basis for claiming that the fourth milestone was achieved.

184. First, clause 25.7 appears to contemplate that a Provisional Acceptance Certificate may be issued where "minor matters" are outstanding, but not where the outstanding matters are matters which "affect the production or security of the photovoltaic installations and/or the integrity or security of persons". It is not clear from the June 2014 report how the outstanding matters ought properly to be categorised, but the probability must be that those stated to be "significant" were not regarded by OST Energy as "minor matters" within the meaning of clause 25.7.

185. Secondly, and in any event clause, 25.8 provides a mechanism which the Contractor may operate if it considers that the refusal to sign a Provisional Acceptance Certificate is wrongful. If that mechanism is justifiably and correctly operated, then the fourth milestone is deemed to have been achieved. In the present case however, there was no attempt by the Contractor to operate that mechanism. In the circumstances, it would not be open to Solar (even if it had the evidence to justify the

submission) now to argue that the fourth milestone should be deemed to have been achieved because the Provisional Acceptance Certificate was wrongly withheld.

186. For these reasons, Solar's counterclaim for outstanding payments under the Hamptworth contract in my judgment fails in its entirety.

(4) The Beaford Brook contract

(4.1) The claims, the defences and the counterclaim

187. The contracting party in relation to the Beaford Brook contract was the second claimant. The second claimant's primary claim under the Beaford Brook contract is for the sum of £113,794, which it says is due from the Contractor under clause 21.5 of the Beaford Brook contract by way of liquidated damages for the Contractor's failure to achieve the "commissioning of the plant by the date specified in the contract". The second claimant's case is that the due date for commissioning of the Beaford Brook plant was 31 March 2013, but the actual date of commissioning was 29 May 2013, resulting in a delay (allowing for the 15 days grace provided for in the contract) of 44 days.

188. Solar raises 3 defences to this claim which (it asserts) the Contractor would have been entitled to raise:

188.1 First, it argues (as it argued in relation to the Hamptworth contract) that clause 21.5 is a penalty clause, and so unenforceable against the Contractor;

188.2 Secondly, it argues that the Beaford Brook project was in fact delivered on time, so that there was no relevant period of delay; and

188.3 Thirdly, it argues that the second claimant has elected to waive any right to liquidated damages which it might otherwise have had, by making no deductions from the Contractor's invoices and/or by entering into a Deed of Amendment dated 2 October 2013.

189. The second claimant's alternative claim is for damages at common law if, contrary to its primary case, clause 21.5 cannot be enforced. Solar's answer to this is to assert that the second claimant has not adequately pleaded or proved what loss (if any) was caused by this particular breach and/or has waived or compromised its right to claim any such loss by entering into the Deed of Amendment.

190. The second claimant also claims reimbursement of £5,025 under clause 3.10 or alternatively as damages for breach of clauses 3.2 and/or 3.5 and/or 18.2 of the

Beaford Brook contract in respect of Stamp Duty Land Tax ("SDLT") incurred by the second claimant in connection with this project.

191. Solar counterclaims for the sum of £138,489.47 as the balance due under the Beaford Brook contract

(4.2) The claim under clause 21.5

(4.2.1) Is clause 21.5 an unenforceable penalty?

192. The provisions of the Beaford Brook contract that are relevant to Solar's argument that clause 21.5 is a penalty are materially similar to those in the Hamptworth contract. The project of course is a different one, with a different Specification. There are also potentially relevant differences between the 2 contracts in relation to price and price adjustment (clause 18, which (inter-alia) specified a price of £5,926,344), payment milestones (clause 19, which (inter-alia) provided for only 4 milestones and for additional requirements for Provisional Acceptance) and term and execution of the works (clause 21, which (inter-alia) specified a date of 31 March 2013).

193. Even so, the considerations which led me to conclude that clause 21.5 of the Hamptworth contract was not a penalty seem to me to apply with equal force to the Beaford Brook contract. It is true that the period covered by the Delay Damages provision in the Beaford Brook contract was due to begin in mid-April, rather than in mid-July. However, that also (albeit to a lesser extent) was coming into the peak generation period for photovoltaic installations: and the difference between the output of the two plants was dealt with by relating the damages figure per day to the MWp of each of the plants. Mr Walford did not in his submissions suggest any factors which might make clause 21.5 of the Beaford Brook contract penal in circumstances where clause 21.5 of the Hamptworth contract was not.

194. I therefore reject Solar's defence based on the argument that clause 21.5 would have been unenforceable as a penalty as against the Contractor.

(4.2.2) Was the project delivered on time?

195. Solar's argument (pleaded in paragraphs 18 to 21 of the Amended Defence and Counterclaim) is that the Contractor had done all that it was required to do prior to the contractual completion date, in that the construction works on the project were completed on 25 March 2013, 6 days ahead of schedule. The subsequent delay in connecting and energising the plant was caused, not by the Contractor, but by the failure of Western Power Distribution (South West) plc ("WPD") to keep to its original agreement to connect the plant on 26 March 2013.

196. In this connection, Solar relies upon a letter dated 26 July 2013 from WPD, which states:

> **We refer to the offer for electrical connection works by [WPD] .. for a new 33 KV generating station at Beaford Brook Farm ..**
>
> **We hereby confirm the following:**
>
> **1. That WPD originally agreed with [the Contractor] to connect and energise the above generating station on 26 March 2013 (the "original connection date") and that it was finally connected and energised on 24 May 2013 (the "actual connection date").**
>
> **2. That WPD re-scheduled the original connection date as a consequence of being unable to proceed with a planned system outage. This was due to a 33 KV cable fault on a main circuit that was required as a back-feed. The system outage was postponed until a cable repair could be undertaken.**
>
> **3. That in WPD's opinion, the failure to energise the connection on the original connection date was not due to any delay or breach of the Connection Agreement by the operator of the generating station, or the person who arranged for its construction.**
>
> **Whilst the operator confirmed the readiness to commission the generating station on the original connection date, WPD did not undertake an examination or inspection at that time and is therefore unable to comment on the authenticity of this statement**

197. Solar contends that the terms of the Beaford Brook contract do not impose an absolute and unconditional obligation on the Contractor to ensure that the work of third parties not within the Contractor's control (such as WPD) was also completed by the date specified in clause 21.1. It points out that clause 3.1 required the Contractor to deliver the project "*ready* for commercial operation" (emphasis added), not "in" commercial operation, that clause 3.2 required the provision of "all services required for the start of Commercial Operation" rather than the actual beginning of Commercial Operation. That distinction, Solar points out, is echoed in the words of clause 21.1 which refer to establishing a calendar for the execution of the Works "in order to get the PV Project *ready* for its connection commissioning and Commercial Operation on the 31 March 2013 at the latest" (emphasis added). That, in Solar's submission, falls short of an unconditional obligation to ensure that the plant was actually connected, commissioned and in commercial operation by that date. Readiness is sufficient.

198. I see the force of these submissions and entirely accept that the words "a delay of more than 15 calendar days for the date of the commissioning" in clause 21.5 must be read in the context of the Contractor's obligations as specified elsewhere in the contract. However, Recital II and clause 3.2 both make clear that the contract is a

"turnkey construction contract" that expressly "includes .. the connection and commissioning of the PV Project": and clause 3.1 recites the Contractor's commitment "to carry out the Works in the time specified in the Agreement and the timetable attached hereto as Annexure 2, at his own risk, delivering the PV Project fully completed, started-up *and commissioned*" (emphasis added). In that context, there does not seem to me to be anything inconsistent in requiring the payment of Delay Damages in the event that actual commissioning is delayed, whatever the reason for that delay. The situation where the relevant delay results from circumstances beyond the Contractor's control may be dealt with (where applicable) by the *force majeure* provisions of clause 21.3: but Mr Walford has (in my judgment, wisely) not argued on behalf of Solar that those provisions apply here to excuse the Contractor from performance.

199. It is common ground (as confirmed by a letter dated 18 November 2013 from Ofgem) that commissioning did not actually take place until 29 May 2013, 5 days after connection. In the circumstances, I accept the argument of Mr Parker on behalf of the second claimant that the relevant period for calculating Delay Damages under clause 21.5 runs from 15 April until 29 May 2013, producing a 44-day delay.

(4.2.3) Has the second claimant waived its right to claim Delay Damages?

200. Solar's argument on this issue (pleaded in paragraphs 23 and 24 of the Amended Defence and Counterclaim) is in 2 parts.

200.1 First, Solar argues that clause 21.5 provides a "mandatory mechanism" for claiming Delay Damages. By failing to operate that mechanism, the second claimant has elected to waive its right to those damages;

200.2 Alternatively, Solar argues that the second claimant has elected to waive its right to delay damages by entering into a Deed of Amendment dated 2 October 2013, after the date of actual commissioning (and therefore at a point at which those Delay Damages had accrued due), because the terms of that Deed "were inconsistent with a claim for Delay Damages".

(4.2.3.1) Is deduction the only way in which Delay Damages may be recovered?

201. Clause 21.5 states that the Contractor shall pay a sum, which it describes as a "penalty":

> **.. which shall be paid in the way that the amount of the penalty, as accrued up to the date of the next invoice of the Contractor to the [second claimant], shall be deducted from said invoice**

202. The apparently mandatory terms of this provision ("*shall* be paid" and "*shall* be deducted") might be thought to lend some support to the first part of Solar's arguments on this point. However, in my judgment, this provision on its true construction confers a right and not a duty on the second claimant. Taken together with the provisions of clause 19.4(ii), it entitles the second claimant to withhold the Delay Damages to which it is entitled from the payments which it would otherwise be obliged (clause 19.1 also uses the word "shall") to make to the Contractor. It does not prescribe the only and exclusive method by which Delay Damages may be recovered.

203. I am reinforced in the view that the second claimant's failure to deduct its Delay Damages did not amount to a waiver of its right to those sums by three further considerations.

203.1 First, clause 19.6 obliges the Contractor to show (among other items) the amount of Delay Damages as a deduction on the invoice which it renders. In the present case, the Contractor did not do so. Neither side has therefore properly operated the contractual machinery, probably because neither side turned its mind to it. In those circumstances, it is impossible to say that the second claimant's act in not making any deduction was sufficiently unequivocal to amount to an election to abandon its right to claim the sum which it could have deducted.

203.2 Secondly, clause 19.9 specifically provides that:

> **The payment of any instalment does not implicit that the [second claimant] accepts that the works have been duly executed by the Contractor or that the [second claimant] waives any right against the Contractor. As a consequence, the [second claimant] expressly reserves the right to bring a claim against the Contractor, without prejudice to the payment made ..**

In my judgment, the word "implicit" in the first line of this clause means "imply". The terms of this clause therefore also make it impossible to regard the second claimants' failure to make a deduction from its payments as an unequivocal election to abandon its right to those sums.

203.3 Thirdly, clause 44.1 states in terms that contractual rights (such as the right to Delay Damages) "may be waived only in writing and specifically". By analogy with the decision of the Supreme Court in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*[57] that "no oral variation" clauses are enforceable and effective, it seems to me that this "no oral waiver or waiver by conduct" provision is also enforceable and effective according to its

[57] [2018] UKSC 24, [2018] 2 WLR 1603

terms, and (even if I were wrong about the proper construction of clause 21.5 and/or about the effect of clause 19.9) would preclude this first part of Solar's waiver argument.

(4.2.3.2) The effect of the Deed of Amendment

204. The facts on which Solar relies for the second part of its waiver argument are these. On 2 September 2013 Mr Garcia on behalf of the Contractor and Mr Gaarn-Larsen on behalf of the second claimant signed a Provisional Acceptance Certificate in relation to the Beaford Brook project. On 2 December 2013, the Contractor, the second claimant, Solar and Green Power Partners II K/S entered into a Deed of Amendment to the Beaford Brook contract. The purpose and content of that Deed of Amendment was described in its Recitals as follows:

> **II. The Parties have detected a mismatch between the actual installed capacity (name plate capacity) of the PV Project, which is 5,172,44 kWp and the agreed installed capacity (name plate capacity) stated in the [Beaford Brook contract] which is 5,169,01 kWp.**
>
> **III. The Parties have agreed a new payment profile, including the deletion of the requirement for the financial guarantee referred to in clause 24 of the contract.**
>
> **IV. The Parties have agreed the amendment of the [Beaford Brook contract] in relation to the actual Installed Capacity (name plate capacity) in the PV Project, and the related terms and conditions of the agreement, as well as the payment milestones set at Schedule 1**

205. Solar's case is that the second claimant's conduct in agreeing to this Deed of Amendment, which adjusted the price payable under the Beaford Brook contract and provided for a new payment schedule, amounted to an election to abandon any claim then accrued for Delay Damages. On behalf of Solar, Mr Walford argues that this contractual re-statement of the price and the date for payment under the Beaford Brook contract is inconsistent with the existence of a continuing right to deduct (or to claim) Delay Damages, which would go in reduction of that price and of the instalments agreed to be paid. The second claimant's conduct therefore amounts to an election to waive that right, on the basis described by Lord Scarman in *The 'Mihalios Xilas'*[58]:

> **The consequence of the election, if established, is the abandonment, i.e. the waiver, of a right. The principle of the common law is well settled. When a man, faced with two alternative and mutually exclusive courses of action, chooses one and has communicated his choice to the person concerned in such a way as to lead him to believe that he has made his choice, he has completed his election. Lord Blackburn so stated the**

[58] *China National Foreign Trade Transportation Corporation v Evlogia Shipping Co SA of Panama (The 'Mihalios Xilas')* [1979] 1 WLR 1018 at 1034-5

principle in *Scarf v Jardine* (1882) 7 AppCas. 345 and then added, at p 361:

> **".. whether he intended it or not, if he has done an unequivocal act .. the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election .."**

206. Given the terms of clause 19.9, it does not seem to me that the matters agreed to by the second claimant in the Deed of Amendment are inconsistent with its maintaining a continuing right to Delay Damages. There is no evidence that the parties ever discussed the issue of Delay Damages in the context of negotiating the Deed of Amendment: and there is nothing in the Deed of Amendment itself which specifically refers to them. In my judgment, Mr Walford is therefore wrong to say that, by entering into the Deed of Amendment, the second claimant has either unequivocally abandoned or compromised its right to those damages. I reach that conclusion independently of the effect of clause 44.1. That clause, however, requires the waiver of a right to be made "in writing *and specifically*". No such specific waiver is to be found anywhere in the Deed of Amendment. For that independent reason also, Solar's case on this second part of its waiver argument does not succeed.

(4.2.4) Conclusion

207. The actual date of commissioning of the Beaford Brook project was confirmed in a letter dated 18 November 2013 from Ofgem as 29 May 2013. From the contractual date for commissioning of 31 March 2013, that gives a period for Delay Damages (less the contractual 15 days' grace) of 44 days.

208. It follows that, in my judgment, the Contractor would have been liable under clause 21.5 (and subject to any available set-off) to pay liquidated Delay Damages to the second claimant in the sum of £113,794. That sum must therefore be brought into account in determining the amount (if any) due from Solar to the second claimant.

(4.3) Actual Loss

209. As in relation to the Hamptworth contract, my conclusion in relation to the claim under clause 21.5 means that it is unnecessary for me to deal at length with the second claimant's alternative claim for its actual loss. However, I shall do so briefly, in case this case should go further and my decision in relation to clause 21.5 should be reversed

210. The second claimant's alternative claim for damages at common law is pleaded in paragraph 14 of the Particulars of Claim, as an allegation that the first claimant has:

> **.. suffered loss and damage as a result of the Contractor's breaches of contract [in failing to complete the commissioning of the plant by the date upon which the "DNO commissioning/G59 test" due to be completed, alternatively by the date on which the plant was due to be ready to start Commercial Operation] and, in particular, [has] suffered the loss of the revenue that [the second claimant] would have received had each plant been commissioned on the due date**

211. In relation to the Beaford Brook project, the Schedule of Losses quantifies the second claimant's losses by reference to what is stated to be the net loss of revenue during the period of delay. This is put at £173,703.85.

212. Solar's first objection to this calculation is that the figures given are for loss of gross revenue, not for loss of profits. This objection seems to me to be well-founded in principle. An award of damages for breach of contract is designed to put the claimant in the position it would have been had the contract been properly performed. In the present case, had the contract been properly performed, the second claimant would have received revenue from the operation of the plant, but would have inevitably have incurred at least some expenses in the course of that operation in order to earn that gross revenue. Unfortunately, the schedule provided by the second claimant appears to calculate the figures for what it describes as "total incomes" over the relevant period. The second claimant may well have lost that amount of gross income. But it has made no attempt to calculate or to explain in evidence the effect that that loss of gross revenue would have had on its net position, after the expenses of operation had been taken into account

213. Solar's second objection to this claim is that it has been waived or compromised by the reduced price agreed in the Deed of Amendment referred to in paragraphs 204 to 206 above. For the reasons given there, I reject that second ground of defence.

214. However, in the absence of any pleaded case or reliable evidence as to the second claimant's net loss, it is not possible for the court to reach make any reliable assessment of the damages to which the second claimant would be entitled. It may perhaps be that the ongoing expenses of running a photovoltaic generation station (particularly one that has been newly constructed) are minimal. However, I cannot properly reach any conclusion about that in the absence of evidence. It follows that there is no reliable basis on which I could have made an award of damages at common law in relation to the delay in commissioning the Beaford Brook project, had I come to a different conclusion about the enforceability of clause 21.5.

(4.4) Stamp Duty Land Tax etc

215. According to Mr Gaarn-Larsen, on 7 February 2013 a share purchase was entered into between the contractor, the second claimant and Solar in connection with the Beaford Brook project, and a sum of £500,000 was paid by the second claimant to the Contractor. On entering into that agreement, SDLT of £5,200 was payable and was paid on 28 February 2012 by the second claimant.

216. The second claimant claims reimbursement of that sum under clause 3.10 of the Beaford Brook contract, which provides:

> **The Contractor shall indemnify and hold harmless [the second claimant] against and from all claims, damages, losses and expenses in respect of the execution of the Contractor's obligations under the Agreement**

217. In that connection, the second claimant relies on clause 18.1 of the Beaford Brook contract, which entitles the second claimant to deduct any stamp duty or stamp duty land tax paid by it in relation to the project; and clause 18.2, which states that the price "includes any costs and expenses, taxes, [and] costs for obtaining the Project Rights".

218. In the alternative, the second claimant claims a like sum by way of damages for what it alleges was the Contractor's breach of clauses 3.2, 3.5 and/or 18.2 of the Beaford Brook contract in failing to pay that sum itself.

219. Little or no time was devoted during the hearing, either in evidence or an argument, to the issue of SDLT in relation to Beaford Brook. In my judgment, the second claimant would in principle be entitled to recover from the Contractor any sum paid by it by way of SDLT in relation to the project. Mr Gaarn-Larsen's evidence in relation to this particular payment was not challenged, and I accept it.

220. In the circumstances, it follows that the second claimant would have been entitled (subject to any set-off) to recover the sum of £5,200 from the Contractor, and that sum must be brought into account in calculating the sum due from Solar to the second claimant.

(4.4) Counterclaim

221. Solar calculates its counterclaim on the basis of an invoiced price of £7,105,612.80 less payments received of £6,967,123.33, leaving a balance outstanding of £138,489.47.

222. That calculation is disputed by the second claimant. The second claimant points out that the revised price agreed in the Deed of Amendment was £5,925,607.00. Including VAT, that amounts to £7,110,728.40 (ie £5,115.60 more than claimed by Solar). However, the second claimant also asserts that it has paid £33,474.00 more than it has been given credit for by Solar, because Solar has failed to take into account an invoice for that amount (£27,895.00 plus VAT) which was paid on about 26 June 2015.

223. In my judgment, the evidence establishes that the second claimant's calculation is correct. In the final accounting, I must therefore bring the sum of £110,131.11 (ie £7,110,728.40 less £7,000,597.30) into account by way of credit to Solar.

(5) The Rookery Farm contract

(5.1) The claims, the defences and the counterclaim

224. The contracting party in relation to the Rookery Farm contract was the second claimant. The second claimant's primary claim under the Rookery Farm contract is for the sum of £447,068, which it says is due from the Contractor under clause 21.5 of the Rookery Farm contract by way of liquidated damages for the Contractor's failure to achieve the commissioning of the plant by the date specified in the contract. The second claimant's case is that the due date for commissioning of the Rookery Farm plant was 31 March 2013, but the actual date of commissioning was 30 September 2013, resulting in a delay (allowing for the 15 days grace provided for in the contract) of 168 days.

225. Solar raises 2 defences to this claim which (it asserts) the Contractor would have been entitled to raise:

225.1 First, it argues (as it argued in relation to the Hamptworth contract) that clause 21.5 is a penalty clause, and so unenforceable against the Contractor;

225.2 Secondly, it argues (as it argued in relation to Beaford Brook) that the second claimant has elected to waive any right to liquidated damages which it might otherwise have had, by making no deductions from the Contractor's invoices and/or by entering into a First Deed of Amendment dated December 2013 and/or a Second Deed of Amendment dated 11 March 2014.

226. The second claimant's alternative claim is for damages at common law if, contrary to its primary case, clause 21.5 cannot be enforced. Solar's answer to this is to assert that the second claimant has not adequately pleaded or proved what loss (if any) was caused by this particular breach and/or has waived or compromised its right to claim any such loss by entering into these Deeds of Amendment.

227. In addition to its basic claim for delay, the second claimant also claims damages to compensate it for the loss which it asserts was caused to it because the delay resulted in it securing a lower rate of ROCs[59] than that to which it had been contractually entitled. Solar's answer to this claim is to say that that clause 28.1 of the Rookery Farm contract made it mandatory for the parties in that event to negotiate in good faith a revised price for the contract. That mechanism was in fact operated and a reduced price for the Rookery Farm contract was agreed in the Second Deed of Amendment. It is therefore not open to the second claimant to claim further or additional compensation under this heading. Alternatively, if the clause 28.1 mechanism was not operated, the second claimant cannot rely upon its own wrong to claim more damages than the price reduction which would have been negotiated had the negotiation mechanism been operated in good faith.

228. The second claimant also claims reimbursement of £5,058 under clause 3.10 or alternatively as damages for breach of clauses 3.2 and/or 3.5 and/or 18.2 of the Rookery Farm contract in respect of SDLT incurred by the second claimant in connection with this project. It further claims £2,000 as the cost of completing works.

229. Solar counterclaims for the sum of £628,761 plus VAT = £754,513.51 as the balance due under the Rookery Farm contract.

(5.2) The claim under clause 21.5

(5.2.1) Is clause 21.5 an unenforceable penalty?

230. The provisions of the Rookery Farm contract that are relevant to Solar's argument that clause 21.5 is a penalty are materially similar to those in the Hamptworth and Beaford Brook contracts. I have fully taken into account the differences in the projects and the contract terms: but Mr Walford did not in his submissions suggest any factors which might make clause 21.5 of the Rookery Farm contract penal in circumstances where clause 21.5 of the Hamptworth and Beaford Brook contracts was not.

231. I therefore reject Solar's defence based on the argument that clause 21.5 would have been unenforceable as a penalty as against the Contractor.

(5.2.2) Has the second claimant waived its right to claim Delay Damages?

232. The first limb of Solar's waiver argument in relation to the claim for Delay Damages at Rookery Farm is identical to that put forward by it in relation to the Beaford Brook

[59] Renewables Obligation Certificates, which can be sold by qualifying generators to electricity suppliers: see paragraph 21 above.

contract: that clause 21.5 provides a "mandatory mechanism" for claiming Delay Damages, and that, by failing to operate that mechanism, the second claimant has elected to waive its right to those damages.

233. Since the facts and contract terms that are relevant to this argument are materially identical in relation to both contracts, I reject this part of Solar's waiver argument in relation to the Rookery Farm contract for the reasons given by me in paragraphs 201 to 203 above in relation to the Beaford Brook contract.

234. The facts on which Solar relies for the second part of its waiver argument in relation to Rookery Farm are also very similar to those which it relied on in relation to Beaford Brook. Mr Walford, on behalf of Solar, put forward no separate argument, either in relation to the facts or to the terms of the relevant Deeds of Amendment, to distinguish the position in relation to the two contracts.

235. I therefore reject this second part of Solar's waiver argument in relation to the Rookery Farm contract for the reasons given by me in paragraphs 205 and 206 above in relation to the Beaford Brook contract.

(5.2.3) Conclusion

236. The actual date of commissioning of the Rookery Farm project was confirmed in a letter dated 15 April 2014 from Ofgem as 30 September 2013. From the contractual date for commissioning of 31 March 2013, that gives a period for Delay Damages (less the contractual 15 days' grace) of 168 days.

237. It follows that, in my judgment, the Contractor would have been liable under clause 21.5 (and subject to any available set-off) to pay liquidated Delay Damages to the second claimant in the sum of £447,068, and that sum must be brought into account in determining the sum (if any) due from Solar under its guarantee.

(5.3) Actual loss

238. In relation to Rookery Farm, the actual loss pleaded by the second claimant in its Schedule of Loss is calculated on the basis of comparing the position had the plant qualified for 2 ROCs per mWh, instead of the 1.6 ROCs per mWh for which the plant in fact qualified.

239. What distinguishes this claim (and that in relation to Bidwell) from the claims for actual loss in relation to Hamptworth and Beaford Brook is that the second claimant seeks to recover damages in respect of its loss caused by the lower rate of ROCs in addition to its claim for Delay Damages, not by way of alternative claim in the event that clause 21.5 should prove unenforceable as a penalty.

240. On the basis of the material before me, I can make no findings as to the actual loss suffered by the second claimant which is not bound up with the second claimant's claim additionally to be compensated for its losses in relation to the ROCs. I therefore turn now to consider that claim.

(5.4) The claim in relation to the ROCs

(5.4.1) The ROCs obligation

241. Recital II to the Rookery Farm contract declared that the contract was for:

> **.. the turnkey delivery of the PV Project to the [first claimant] together with all permits and agreed ROCs (ROCs), fully built, connected commissioned and operative, and benefiting from a power purchase agreement ..**

242. Whereas clause 3.2 of the Hamptworth contract[60] required the Contractor to ensure that the project was completed so that it was eligible "for the Tariffs"", clause 3.2 of the Rookery Farm contract was aimed at eligibility "for the ROCs". It stated that it was "a turnkey construction contract", requiring the completion of all necessary works and services:

> **.. so that the PV Project be eligible for the ROCs on or before 31 March 2013 ..**

The definition provisions in clause 1.1 stated that:

> **'ROCs' has the meaning ascribed by the Department of Energy and Climate Change and shall for the purposes of this Agreement be no less than 2 Renewables Obligation Certificates/mWh for 20 years**

243. Under clause 19.1 and Schedule 1 of the Rookery Farm contract, the third payment milestone (on the occurrence of which 20% of the price was to be payable) was "ROCs Secured". This was defined as meaning "Confirmation from Ofgem or evidence from a third party that all documents necessarily for registration for the ROCs have been accurately compiled and submitted to Ofgem and no reason is known for the ROCs to be refused".

(5.4.2) The claim

244. It is common ground that the delay in completion of the Rookery Farm project meant that it became eligible for only 1.6 ROCs/mWh, and not the "no less than 2" ROCs/mWh specified in the Rookery Farm contract.

[60] Set out in paragraph 42

245. In addition to the claim for Delay Damages, the second claimant claims common-law damages to compensate it for this shortfall. As with the loss of the ROO-FITT Tariff at Hamptworth, the resulting loss has been calculated on alternative bases.

245.1 First, Mr Gaarn-Larsen has used a similar spreadsheet to that which he originally used to calculate the expected IRR for the project in order to calculate the reduction in initial capital expenditure required to produce the same IRR with the different income profile projected as a result of the different level of ROCs. This produces a figure of £806,454 and (Mr Gaarn-Larsen asserts) means that the plant was £806,454 less valuable as at the date of acquisition.

245.2 In the alternative, Mr Gaarn-Larsen has calculated the difference between the net revenue EBITDA projected on the basis of the contractual 2 ROCs/mWh and that projected on the basis of the actual 1.6 ROCs/mWh. This produces a figure of £2,054,360. Mr Gaarn-Larsen accepts that that figure would need to be discounted for early receipt, but has offered no calculation of the discounted amount.

On behalf of the second claimant, Mr Parker has only contended for the first, and lower, figure of £806,454, which is the one pleaded in paragraph 25 of the Particulars of Claim (although the alternative, higher, figure does also appear in the Claimants' Schedule of Losses).

246. Mr Walford, for Solar, argues that this claim, like the equivalent claim in relation to Hamptworth, is misconceived. In his submission, it has not been properly evidenced, since the detailed calculations should have been the subject of expert accountancy evidence. It in any event involves a significant degree of speculation. To the extent that the calculation is based upon the projected IRR, the calculation is (he submits) misconceived, because the contract did not guarantee any particular IRR.

247. As I have held in relation to Hamptworth, it seems to me that the second claimant's first approach to the calculation of its loss is sound in principle. It is true that there was no term in the Rookery Farm contract guaranteeing any particular IRR to the second claimant. However, it does not seem to me to be an unreasonable approach to assessing the second claimant's loss - when comparing the position that it should have been in to its present one - to use (as Mr Gaarn-Larsen has done) a similar spreadsheet to that from which the original price was calculated, and to see what reduction in the initial capital expenditure cost of the plant would be required to produce the same projected IRR from the new projected income figures. In that connection, I note that projected Annual Target Revenues for the first 10 years of operation of the Rookery Farm project were provided by Mr Gaarn-Larsen to Mr Gandia in an email dated 21 February 2013 while the Rookery Farm contract was being negotiated, and that Mr Gaarn-Larsen's evidence that "both parties were

running their own calculations on the expected returns of the project and knew what each other's drivers were" was not challenged.

248. Even so, those projected income figures involve speculation over a period of 25 years. As I have held in relation to Hamptworth, it is necessary to discount the results of such a purely mathematical calculation for the chance that events that cannot now be predicted will mean that the calculated figures overstate the likely loss. Given the inevitable element of speculation involved, the court has no choice but to approach matters on a fairly broad brush basis. Doing the best that I can, it seems to me that a discount of about 20% is required to take account of those eventualities. Discounting the calculated figure of £806,454 by about 20% produces a figure of about £645,000. That is the sum which, subject to Solar's other defences and to set off, I would award as damages at common law under this head of claim.

(5.4.3) Clause 28.1

249. The possibility that the Rookery Farm project might be eligible for less than 2 ROCs/mWh was expressly contemplated in the Rookery Farm contract. Clause 28.1(a)(vi) provided that the second claimant:

> **.. shall be entitled to terminate this Agreement in accordance with the law and in the circumstances foreseen in this Agreement, and upon the occurrence of any of the following:**
> **..**
> **(vi) in the case that the PV Project is not eligible for the ROCs**

250. Clause 28.1(b) then provided that;

> **(i) In the event that the Agreement may be terminated by the [second claimant] under clause 28.1(a)(vi) above, the [second claimant] and the Contractor shall negotiate in good faith, time being of the essence, to attempt to agree a revised Price For guidance in the negotiations only the parties' current intention is that if the project is finally eligible for 1.6 ROCs per mWh the Price will be reduced to £5,852,500.**
>
> **(ii) If the parties do not reach agreement, the [second claimant] shall have the right to terminate this Agreement and to claim damages from the Contractor in accordance with English law.**

251. Solar relies upon these provisions for two arguments by way of defence to the second claimant's claim for damages to compensate it for the shortfall in ROCs.

251.1 First, Solar asserts (in paragraphs 36(C)-(E) of the Amended Defence and Counterclaim) that this mechanism was in fact operated in relation to Rookery Farm and resulted in the Second Deed of Amendment. It was already known by 11 March 2014, the date of that deed, that the 31 March

2013 end date for the availability of 2 ROCs per mWh had passed, and therefore that only 1.6 ROCs per mWh would be obtainable. The revised (and reduced) price agreed in the Second Deed of Amendment took those facts in to account, and precludes the second claimant's claim because (a) the second claimant has already been compensated by the price reduction and/or (b) that is the contractual effect (by implication) of clause 28.1(b)(ii).

251.2 Alternatively, Solar submits (if, contrary to its primary case, the clause 28.1(b) mechanism was not operated by the second claimant, resulting in the Second Deed of Amendment), the second claimant was in breach of contract by failing to operate that mechanism, and cannot rely upon its own wrong to claim more damages than the price reduction which would have been negotiated had the negotiation mechanism been operated in good faith.

(5.4.3.1) The effect of the Second Deed of Amendment

252. I start by considering the effect of the Second Deed of Amendment. The background to that deed, as it appears from the contemporary documents, is as follows.

252.1 The Second Deed of Amendment dated 11 March 2014 was negotiated at a time when the Contractor was suffering from cash-flow difficulties, and in the period immediately prior to the Contractor's CVA (which was approved at a creditors' meeting on 31 March 2014, only three weeks after the execution of the Second Deed of Amendment).

252.2 On 16 December 2013 Mr Garcia sent to Mr Gaarn-Larsen the provisional Acceptance Supervision Report prepared by Enertis Solar in relation to Rookery Farm. This indicated that "The general status of the Project was good", but that "there are a number of issues that the IE [Enertis] recommends to be solved". This report was followed on 19 December 2013 by an invoice for the "1st 2% of the Third Milestone PAC". (Curiously, "Provisional Acceptance" was the fourth, rather than the third milestone provided for in the original Rookery Farm contract).

252.3 On 20 December 2013 Mr Garcia sent to Mr Gaarn-Larsen a draft of the First Deed of Amendment, saying "Find attached the amendments in the Rookery Farm EC contract as we did in Beaford" (a reference to the Deed of Amendment for Beaford Brook, which had been entered into on 2 October 2013). This draft bore Mr Andreu's signature on behalf of the Contractor and on behalf of Solar. The principal amendments put forward in this draft were a new payment profile, and a deletion of the requirement for a financial guarantee in return for payment of the instalment due on Final Acceptance. The draft stated that "the Parties have agreed a compensation to the [second

claimant] for the deletion of the Warranty Bond provision by reducing the EPC Price [by] GBP 5,000.00". The draft otherwise restated the price in the original Rookery Farm contract, less this £5,000 deduction.

252.4 On 21 December 2013 Mr Gaarn Larsen authorised payment of the invoice sent on 19 December 2013, which was eventually paid on 30 December 2013. It seems likely that the First Deed of Amendment was also executed by him at about that time.

252.5 On 17 January 2014 the second claimant executed three deeds, the effect of which was to novate the benefit and burden of the O&M contracts for the Hamptworth, Beaford Brook and Rookery Farm projects from the Contractor to an affiliated company, Prosolmed UK Limited ("Prosolmed"). The only other January 2014 document relating to Rookery Farm in the trial bundle is an email dated 29 January 2014 from Mr Garcia to Mr Gaarn-Larsen enclosing the connection agreement with UKPN for execution.

252.6 By email dated 26 February 2014 Mr Garcia sent to Mr Gaarn-Larsen (amongst other things) quotations for the Punch List works outstanding at Rookery Farm. Mr Garcia was seeking to persuade Mr Gaarn-Larsen to release funds to the Contractor in relation to the various projects, and concluded his email by saying "I hope we can close this by Friday and invoice the outstanding amounts as we have important commitments at the end of this week and it will be enormously helpful to count on that money". A chasing email the following day said "Please take a look this and see whether you can release some money in the short term they really needed for salaries etc".

252.7 By email dated 5 March 2014, Mr Garcia sent to Mr Gaarn-Larsen a draft of the Second Deed of Amendment. This draft was one which began with the document which I have referred to as the First Deed of Amendment, and which showed proposed revisions to that original in "track changes". Mr Garcia's email stated "Find attached the new amendment wording where have added what we were discussing yesterday. The price decreased in £9,000 as compensation for the new profile payment, as described in my previous email". Among other changes made in this draft was the addition as a party of Prosolmed as O&M Contractor, in order for Prosolmed to agree that the second claimant could withhold sums due under the O&M contract as security for performance of certain of the Contractor's obligations.

252.8 This draft was followed the same day by an invoice dated 5 March 2014 for the payment due in respect of "Third Milestone PAC", which was paid on 11 March 2014. A further invoice dated 11 March 2014 for "Fourth payment

third milestone" was also paid on 11 March 2014, on which date executed versions of the Second Deed of Amendment were exchanged by email.

253. Mr Gaarn-Larsen's evidence in relation to these deeds was as follows:

> **The PAC report was not issued until 14 December 2013 and the Punch List agreed on 16 December 2013. At or around the same time the [Rookery Farm contract] was varied by deed of variation. Again, this was signed by all parties to the EPC Contract, including [Solar] and payment of the first 2% of the third Milestone payment [was] made in the sum of £133,179.08. This amendment was proposed by the Contractor. Again, the Contractor needed liquidity and we agreed to revise the [Rookery Farm contract].**
>
> **A further variation was proposed by the Contractor on or about 5 March 24 and a second deed of variation [was] entered into on 11 March 24. The Price decreased as compensation to the second claimant for the acceleration of the payment profile and price amendment for the release of the financial guarantee and advance release of monies on FAC and reduction of retention monies in order to cash flow other projects was made in the sum of £265,798.16.**

254. Mr Garcia's evidence on this point was as follows:

> **On 1 December 2013 there was a first Deed of Amendment by which the price was reduced by £5,000 and the timetable for payment was adjusted. On 11 March 2014, almost one year on from the contracted for Ready Date and more than 5 months after the full extent of the delay period was known, the second [claimant] and the Contractor entered into a Second Deed of Variation in which a new price was agreed at £6,644,954. Despite the fact that the second claimant was well aware of the extent of the delay, it did not seek to make any reduction in the Price and save for the sum of £14,000 it waived any further claims that related to delay.**

255. The Second Deed of Variation, as executed, broadly followed the draft sent on 5 March 2014, though with some changes of wording and tidying up. The Recitals, after recording the execution of the Rookery Farm contract and its associated O&M contract, stated that:

> **III. The Contractor and the [second claimant] have agreed a new payment profile set out at Schedule 1.**
>
> **IV. The Contractor, [Prosolmed] and the [second claimant] have agreed additional guarantees.**

256. Clauses 1 and 4 provided for a new schedule of payments ("profile [of] payment"), which reduced the percentage payable on the third milestone (ROCs secured) from 20% to 19%, reduced the percentage payable on provisional acceptance from 5% to

2%, added a fifth milestone ("Budget acceptance") on which 4% less £10,000 would be payable, and provided for that final £10,000 to be paid upon the occurrence of a sixth milestone ("Final Acceptance").

257. Clause 2 agreed a new price of £6,644,954 plus VAT, which was £14,000 less than price of £6,658,950 plus VAT provided in clause 18.1 of the original Rookery Farm contract. As noted in paragraph 250 above, clause 28.1(b) anticipated that, following renegotiation pursuant to clause 28.1, "if the project is finally eligible for 1.6 ROCs per mWh the Price will be reduced to £5,852,500" - which would have been a reduction of £806,450 (ie about 12%), rather than just the £14,000 (roughly 0.2%) provided for in the Second Deed of Amendment.

258. Clause 3 provided for the second claimant to retain monies otherwise due to Prosolmed on account of certain liabilities of the Contractor.

259. Apart from these clauses, the Second Deed of Variation contained no operative provisions. There was no mention of the ROCs shortfall, either in the recitals or in the operative clauses. That is not surprising, as formal accreditation for the project (and therefore formal determination of the level of ROCs) was only given more than a month later, in Ofgem's letter dated 15 April 2014. The Second Deed of Variation therefore did not "specifically" waive the second claimant's right to damages in respect of the ROCs shortfall, as would have been required by clause 44.1 in order to make such a waiver effective.

260. Furthermore, on the basis of the evidence that I have summarised above, it seems to me to be plain that the Second Deed of Variation was not entered into as a result of the operation of the contractual machinery provided for by clause 28.1. I find that it was not intended to, and did not, compensate the second claimant for the ROCs shortfall. Its purpose and effect were entirely different - to vary the payment terms of the Rookery Farm contract so as to improve, in the events which had happened, the cash flow of the Contractor, and to provide a small amount of compensation and some additional security to the second claimant in return.

261. On both of these grounds, I therefore reject the first of Solar's arguments by way of defence to this aspect of the claim.

(5.4.3.2) Breach of clause 28.1

262. In his closing submissions, Mr Walford argued, in reliance on the decision of the Court of Appeal in *Petromec Inc v Petoleo Brasiliero SA Petrobas*[61] and the cases

[61] [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep 121.

which have followed that decision[62], that the requirement in clause 28.1 to "negotiate in good faith, time being of the essence, to attempt to agree a revised Price" was a binding contractual obligation, despite being on its face "an agreement [to attempt] to agree"[63]. Mr Parker, on behalf of the second claimant, did not seek to argue the contrary, and I am content to decide this case on that basis.

263. However, the wording of clause 28.1 makes it clear that that obligation is not one that is imposed only upon the second claimant, but also binds the Contractor. It takes two to negotiate: and the duty to do so is imposed equally upon both sides. Yet, in the present case, there is no indication anywhere in the evidence that the Contractor at any point attempted to negotiate with the second claimant a price reduction to compensate the second claimant for the shortfall in the rate of ROCs for which the Rookery Farm project eventually qualified. I have been shown no emails or letters calling on the second claimant to begin such negotiation, or making proposals for any such price reduction. Nor have I been told of any conversations with that aim in mind.

264. The commercial reason for that is obvious. At the material time, the Contractor was experiencing severe cash-flow difficulties. The last thing that it wanted to do was to agree an £800,000 plus price reduction with the second claimant, which is the kind of reduction contemplated by clause 28.1. On the contrary, the Contractor wanted the second claimant to make payments in full on (or, in the second claimant's view, before) the contractually due date, in order to ease the Contractor's cash flow position. It was to that end that its correspondence and negotiations with the second claimant - particularly the email correspondence and discussions between Mr Garcia and Mr Gaarn-Larsen - were directed at the material time[64].

265. In the circumstances, it is not open to the Contractor to rely upon the second claimant's omission to negotiate with it, in circumstances where it itself made no efforts to do so, did not call upon the second claimant to do so, and gave every impression that it was interested instead in varying the terms of the various EPC contracts in other ways more favourable to the Contractor.

266. For these reasons, I reject the second of Solar's grounds of defence to this aspect of the claim.

---

62 Including *BBC Worldwide Ltd v Bee Load Ltd* [2007] EWHC 124 (Comm); *Trustees of Edward Higgs Charity v SISU Capital Ltd* [2014] EWHC 1194 (Mer); and *Rosalina Investments Ltd v New Balance Athletic Shoes (UK) Ltd* [2018] EWHC 1014 (QB).

63 See *Walford v Miles* [1992] 2 AC 128.

64 Though Mr Garcia did subsequently, in his email dated 1 September 2014 (after the Contractor has gone into Administration) offer to trade "the full penalty from 2 ROCs to 1.6" of £805,622 in return for the second claimant's agreement to forgo any claim for Delay Damages.

(5.4.4) The overlap with clause 21.5

267. There is, however, one final issue that I must deal with in connection with this aspect of the claim: that is, whether it is open to the second claimant to claim these damages in relation to the ROCs shortfall caused by the contractor's failure to complete the project on time, having regard to the provisions of clause 21.5 which provide liquidated Delay Damages as pre-estimated and defined compensation.

268. This ground of defence was not specifically pleaded by Solar, and was not put forward by Mr Walford in his submissions. I did, however, raise it with Mr Parker in the course of his closing argument, as a matter which concerned me. In response, Mr Parker invited my attention to the decision of Coulson J in *Hall v Van Den Heiden* (No 2)[65], in which general damages for defective works and for inconvenience and stress were awarded in addition to liquidated damages for delay. Coulson J (as he then was) is, of course, a judge with very great experience in the field of construction contracts, in which liquidated damages provision are commonly to be found. His views on this topic would therefore be entitled to very great respect. Unfortunately, the decision cited by Mr Parker contains no discussion whatsoever of the principles, and it is therefore difficult for me to derive much assistance from it for the case presently before me.

269. *McGregor on Damages*[66] states the law as follows:

> **The courts implement the intention of the parties in the case of liquidated damages by holding the claimant entitled to recover the stipulated sum1 on breach, without requiring proof of the actual damage and irrespective of the amount, if provable, of the actual damage ..**
>
> **In most cases where the claimant has recovered his liquidated damages the stipulated sum has been greater than the actual, or at least the provable, damage. However, just as this cannot diminish his damages, so he cannot increase them by ignoring the liquidated damages clause in the rare case where the actual damage is demonstrably greater than the stipulated sum .. [T]he claimant can neither claim unliquidated damages in addition to the liquidated damages which are designed to deal with the loss that has occurred, nor elect to ignore the liquidated damages provision and sue only for unliquidated damages**
>
> **The claimant will, however, be entitled to sue for unliquidated damages in the ordinary way, in addition to suing for the liquidated damages, if other breaches have occurred outside those which fall within the ambit of the liquidated damages provision or, it seems, if only part of the loss**

65 [2010] EWHC 586 (TCC)

66 Edelman et al, *McGregor on Damages* (20th ednd, Sweet & Maxwell 2017) paras [16-022] to [16-044]

arising from a single breach is regarded as falling within the provision's ambit

270. The Delay Damages payable under clause 21.5 are payable in respect of the delay in commissioning the plant. For these purposes "commissioning" is in practice synonymous with the date of connection to the grid, which in turn is synonymous with the date of accreditation[67]. The second claimant cannot plausibly argue otherwise, in circumstances where it has relied upon the dates of accreditation given in the various Ofgem letters as the dates of commissioning[68]. In my judgment, the contractual provisions in the Rookery Farm contract relating to the ROC's[69] do not give rise to separate breaches "outside those which fall within the ambit of the liquidated damages provision" in clause 21.5. The breach is the failure to achieve final commissioning and handover by the stipulated date. The failure to achieve accreditation for the contractually stipulated level of ROCs is a consequence of that breach, not an independent breach of the terms of the contract.

271. Not without some misgivings I am, however, persuaded that the Rookery Farm contract treats that part of the loss that relates to the failure to achieve the contracted level of ROCs as falling outside the ambit of the Delay Damages provision in clause 21.5. One of the reasons for my misgivings is the all-inclusive approach taken by both claimants to the calculation of their common law damages for delay, which does not seek to separate out the loss of net revenue during the period of delay from the consequential loss caused by failure to achieve the contractually specified tariff or level of ROCs. Nevertheless, the contractual mechanism provided for in clause 28.1 shows that the parties contemplated that the second claimant might be entitled to compensation in the form of a reduction in the Price quite separately from its entitlement to Delay Damages under clause 25.1.

272. In the circumstances, the position in the present case seems to me to be analogous to that considered by the Court of Appeal in the shipping case of *Aktieselskabet Reidar v Arcos Ltd*[70]. As the summary in *McGregor* explains, in that case charterers, in breach of their obligation to load a full and complete cargo by a certain date, took so long to load that the time passed when the ship could carry a summer cargo and she was only able to carry a much smaller winter cargo. The charterparty contained the usual provision for demurrage as liquidated damages for the charterers' detention of the ship in loading, but the owners successfully claimed, in addition to the demurrage, unliquidated damages in the ordinary way for loss of freight caused by the charterers' failure to load a full and complete cargo. "The provisions as to demurrage", said Atkin LJ, "quantify the damages, not for the complete breach, but

67 See eg paragraph 26 above.
68 See eg paragraphs 106, 207 and 236 above.
69 See paragraphs 241 to 243, 249 and 250 above.
70 [1927] 1 KB 352. See also *a* [1985] 1 Lloyd's Rep. 423.

only such damages as arise from the detention of the vessel". So, here, the provisions of clause 21.5 are in my judgment intended to quantify the damages, not for all the consequences of delay in commissioning, but only for those that are not consequent upon a shortfall in the ROCs achieved.

(5.4.5) Conclusion

273. The second claimant's claim for damages in relation to the level of ROCs achieved therefore succeeds (subject to any set-off) to the extent of £645,000.

(5.5) SDLT and cost to complete

274. The second claimant claims for the £2,000 which it paid to Garcia's company, Ardenis, for his services in helping to achieve final approval for the Rookery Farm project. In my judgment, the evidence establishes that this sum was reasonably incurred, and was paid in consequence of the Contractor's breach of contract. The second claimant's claim for the sum therefore succeeds (subject to any set-off).

275. The second claimant also claims (on the same basis as its similar claim in relation to Beaford Brook[71]) the sum of £5,058 which it asserts that it paid by way of SDLT in connection with the Rookery Farm project.

276. The documentary evidence in relation to this payment was unsatisfactory. The relevant transaction took place in March 2013. The invoice from NewLawsLegal to the second claimant for this sum was inexplicably dated the year earlier, 13 March 2012: and it appeared from the transaction documents which were put to Mr Gaarn-Larsen by Mr Walford in cross examination that the nature of the transaction may well have been such that the liability to pay this tax actually fell on Brookvilla Limited and not on the second claimant.

277. Mr Gaarn-Larsen was eventually constrained to admit that it seemed likely that this liability was not one which ultimately fell on the Contractor. In the circumstances, I find that the second claimant has failed to make out its case to recover this sum from Solar.

(5.6) Counterclaim

278. In paragraph 25 of the Particulars of Claim they claimants accepted that the contractor was entitled to credit (subject to set off) for the sum of £628,761. Including VAT of £125,750.20, that makes a total of £754,513.51. In the final accounting, I must therefore bring that sum into account by way of credit to Solar.

279. After I made my draft judgment available to the parties, Mr Parker on behalf of the second claimant sought in written submissions to persuade me that this credit,

[71] See paragraphs 215 to 220 above.

admitted on the face of the pleadings, should be reduced to take into account a payment of £200,000 which he says was paid under clause 18.1 of the Rookery Farm contract. In Mr Parker's submission "it is true that a credit of £628,761 was recorded [in paragraph 25 of the Particulars of Claim] but this was superseded by the Schedule of Loss and should have been formally corrected".

280. This point was not addressed in the course of the trial: and no application was made to withdraw the concession in paragraph 25. As Mr Walford, responding to Mr Parker's submissions, has pointed out, the claim for credit in the sum of £754,513.51 was asserted in paragraph 46.7 of the Amended Defence and Counterclaim, and no positive case in relation to a payment of £200,000 was made in response in the Re-Amended Defence to Counterclaim.

281. It may well be that, had this point been raised on the pleadings and been properly explored in evidence and submissions at trial, Solar would have been able to make out the case now put forward by Mr Parker. The trial bundle includes an invoice in relation to a sum of £200,000 and Mr Garcia's witness statement claims a sum which could be interpreted as giving credit for such a payment. However, the fact remains that the issue was not raised on the pleadings and so was not explored at trial. It is not a matter of simple logic or arithmetic, but a matter for factual evidence: and, in my judgment, it is simply too late for such an issue to be raised now, long after evidence and submissions have been concluded. To do so would be unfair to Solar.

(6) The Bidwell contract

(6.1) The claims, the defences and the counterclaim

282. The contracting party in relation to the Bidwell contract was the second claimant. The second claimant's primary claim under the Rookery Farm contract is for the sum of £611,600, which it says is due from the Contractor under clause 21.5 of the Bidwell contract by way of liquidated damages for the Contractor's failure to achieve the commissioning of the plant by the date specified in the contract. The second claimant's case is that the due date for commissioning of the Bidwell plant was 3 February 2014, but the actual date of commissioning was 30 November 2014, resulting in a delay (allowing for the 15 days grace provided for in the contract) of 285 days.

283. Solar raises 2 defences to this claim which (it asserts) the Contractor would have been entitled to raise:

283.1 First, it argues (as it argued in relation to the Hamptworth contract) that clause 21.5 is a penalty clause, and so unenforceable against the Contractor;

283.2 Secondly, it argues that the second claimant has calculated its damages from the wrong date and that, on the true construction of the Bidwell contract, the date by which the Contractor was required to achieve commissioning was 31 March 2014 (and not 3 February 2014).

284. The second claimant's alternative claim is for damages at common law if, contrary to its primary case, clause 21.5 cannot be enforced. Solar's answer to this is to assert that the second claimant has not adequately pleaded or proved what loss (if any) was caused by this particular breach.

285. In addition to its basic claim for delay, the second claimant also claims damages to compensate it for the loss which it asserts was caused to it because the delay resulted in it securing a lower rate of ROCs[72] than that to which it had been contractually entitled. Solar's answer to this claim is to say (as it argued in relation to the Rookery Farm contract) that clause 28.1 of the Bidwell contract made it mandatory for the parties in that event to negotiate in good faith a revised price for the contract, and the second claimant cannot rely upon its own wrong to claim more damages than the price reduction which would have been negotiated had the negotiation mechanism been operated in good faith.

286. The second claimant also claims the sum of £1,061,055 as the cost of completing construction of the Bidwell plant. Solar disputes the Contractor's liability for that sum in principle, on the basis that the Contractor's failure to complete the works was caused by the second claimant's failure to pay the monies due to the Contractor. It also disputes various individual items making up the sum claimed, on the basis that those items were not included within the definition of "the Works" and/or that the sums claimed in relation to the are excessive and/or unnecessary and/or would not have been incurred had th second claimant acted reasonably in mitigation of its loss. In the further alternative, Solar relies upon an agreement which it says was made in August 2014 between the Administrators of the Contractor and the second claimant for the Contractor (in administration) to complete the works at Bidwell and at Lower Marsh Farm for the estimated sum of £500,000. Solar also says that various estimates obtained by Mr Garcia in pursuance of that agreement for sub-contracting various parts of the works demonstrate that the second claimant caused its own loss and/or failed to act reasonably in mitigation of that loss and/or is claiming excessive sums.

287. The second claimant finally claims reimbursement of £54,065 under clause 3.10 or alternatively as damages for breach of clauses 3.2 and/or 3.5 and/or 18.2 of the

[72] Renewables Obligation Certificates, which can be sold by qualifying generators to electricity suppliers: see paragraph 21 above.

Bidwell contract in respect of SDLT incurred by the second claimant in connection with this project.

288. Solar counterclaims for the sum of £816,826.97 alternatively £811,949.30 as the balance due to the Contractor under the Bidwell contract.

(6.2) The claim under clause 21.5

(6.2.1) Is clause 21.5 an unenforceable penalty?

289. The provisions of the Bidwell contract that are relevant to Solar's argument that clause 21.5 is a penalty are materially similar to those in the Hamptworth, Beaford Brook and Rookery Farm contracts. I have fully taken into account the differences in the projects and the contract terms: but Mr Walford did not in his submissions suggest any factors which might make clause 21.5 of the Bidwell contract penal in circumstances where clause 21.5 of the Hamptworth, Beaford Brook and Rookery Farm contracts was not.

290. I therefore reject Solar's defence based on the argument that clause 21.5 would have been unenforceable as a penalty as against the Contractor.

(6.2.2) The correct period

291. The second claimant's case is that there was 285 days' delay at Bidwell, from 3 February 2014 to 30 November 2014. Arithmetically, that would produce a claim of £871,530 (equivalent to £3,058.00 per day). However, clause 21.5 of the Bidwell contract provides that "The maximum of the penalty for delays of the works shall be £100,000 per mWp". It is common ground that the installed mWp at Bidwell was 6.11600. That means that the maximum amount that can be claimed for Delay Damages under the Bidwell contract is capped at £611,600.

292. Solar's case is that the relevant period did not begin until 31 March 2014 and ended on 30 September 2014, a delay period of only 168 days. At the rate of £3,058 per day, that would reduce the second claimant's claim below the cap, to £513,744. It is therefore necessary for me to decide the correct start and end date for the delay period at Bidwell.

(6.2.2.1) The start date for Delay Damages

293. Clause 21.5 of the Bidwell contract provided for Delay Damages to be paid:

> **.. In the event of a delay of more than fifteen (15) calendar days for the date of the commissioning (3 February 2014) ..**

In clause 3.1 of the Bidwell contract, the Contractor accepted the commitment "to carry out the Works, in the time specified in the Agreement and the timetable

attached hereto as Annexure 2". In "Annexure 2: Time Table of the PV Project" the date for "DNO commissioning. G59 Test & Grid Connection" is likewise given as 3 February 2014.

294. However, clause 3.2 of the Bidwell contract required the completion of the project "so that the PV Project be eligible for the ROCs on or before 31 March 2014": and clause 20.1 (Term and Execution of the Works) stated that:

> **The parties have established the calendar for the execution of the Works attached hereto as Annexure 2 (the "Timetable of the PV Project"), in order to get the PV Project ready for its connection, commissioning and Commercial Operation on the 31 March 2014 at the latest.**

The term "Commercial Operation" was defined in clause 3.2 of the Bidwell contract in materially identical words to those used in clause 3.2 of the Hamptworth contract quoted in paragraph 42 above.

295. Solar relies upon clause 3.2 in paragraphs 29 and 30 of its Amended Defence and Counterclaim in support of its allegation that the relevant period for Delay Damages did not begin until 31 March 2014. The second claimant's response in paragraph 26 of its Re-Amended Reply and Defence to Counterclaim is that it is clause 21.5 and Annexure 2 which specify the due date for commissioning, and that the date given in clause 3.2 "is the date by which the project was to be eligible for the ROCs and is irrelevant to the Delay Damages claim".

296. The second claimant is undoubtedly right that 3 February 2014 is the specific date given for commissioning, both in clause 21.5 and in Annexure 2, whereas clauses 3.2 and 20.1 also refer to other matters, such as eligibility for the ROCs and Commercial Operation. The second claimant also pray in aid Mr Garcia's 26 August 2014 email, in which he appears to accept that the relevant date for the start of Delay Damages is the date given in the annexed timetable. However, as explained in paragraphs 20 to 26 above, the date of "commissioning" (as determined by Ofgem) is also the date upon which the plant can begin commercial operation, and is the date on which its eligibility for a particular tariff or level of ROCs is determined. Only in the Rookery Farm and Lower Marsh Farm contracts did clause 21.5 specify a date.

297. In the case both of the Beaford Brook contract and of the Rookery Farm contract the date stated in clause 21.1 was 31 March 2013 and the week shown in the "Time Table of the PV Project" for "DNO commissioning/G59 test" was that beginning 25 March 2013 and ending on 31 March 2013. There was therefore no difference between the two dates. Only in the case of the Hamptworth contract was there a difference, clause 21.1 requiring the project be ready "on the 30 June 2012 at the latest", and Annexure 2 showing "DNO commissioning/G59 test" as occurring a week earlier, in the week commencing 18 June 2012 and ending 24 June 2012. In

the case of the Hamptworth contract, the first claimant has chosen to start its claim for Delay Damages from the later date of 30 June 2012 given in clause 21.1, and not from the date a week earlier shown in Annexure 2. There is nothing in the evidence to explain the much longer eight-week (56 day) discrepancy between the two dates given in the Bidwell contract.

298. In my judgment, despite the apparent clarity of clause 21.5 in the Bidwell contract, there is an ambiguity in the Bidwell contract, when looked at as a whole, as to the date by which "commissioning" (with all that entails) must be completed.

298.1 First of all, as a commercial matter, the timetable of the individual steps set out in the ""Time Table of the PV Project" was important only insofar as it ensured that the plant would (to use the words of Recital II) be "fully built, connected, commissioned and operative" by the specified date, so as (a) to qualify for the contractually agreed tariff and/or to be eligible for the contractually agreed level of ROCs, and (b) to begin producing revenue. That is made plain by the wording of clause 3.2 itself, which says in terms that the "Time Table of the PV Project" has been established "in order to get the PV Project ready for its connection, commissioning and Commercial Operation". To make the date shown in the "Time Table of the PV Project" for "DNO commissioning/G59 test" the start point for Delay Damages would give it an importance which it does not seem to me that the parties intended it intrinsically to have.

298.2 Secondly, "commissioning" is not specifically defined in any of the EPC contracts: but the matters explained in paragraphs 20 to 26 above would have been known to both parties at the time when they made those contracts, and so form part of the factual matrix from which that word, as used by them in these contracts, takes its meaning.

298.3 Against that background, there is no sensible commercial reason for this large discrepancy between the 3.2 and 20.1 dates, on the one hand, and the clause 21.5 and Annexure 2 dates on the other. None has been suggested, either in evidence or in argument. This is therefore a classic example of a case where something must have gone wrong with the language of the contract.

299. There is no application for rectification of clause 21.5 of the Bidwell contract: and the second claimant can forcibly argue that the words and numbers "3 February 2014" are capable of only one meaning[73]. However, the law does not require me to attribute to the parties an intention which, looking at the contract as a whole, they

---

[73] "The clearer the natural meaning the more difficult it is to justify departing from it": *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [18], per Lord Neiberger of Abbotsbury PSC.

plainly did not have[74]. In determining what the Bidwell contract means, the court is not engaged in a literalist exercise focused solely on a parsing of the wording of a particular clause, let alone of a date given in brackets within such a clause. It is necessary, instead, for me to consider the contract as a whole and, depending on its nature, formality and the quality of its drafting, to give more or less weight to elements of the wider context in reaching a view as to the contract's objective meaning[75]. Interpretation is a unitary exercise: and where there are rival meanings, the court can give weight to the implications of rival constructions in reaching its conclusions in reaching a view as to which construction is more consistent with business common sense[76].

300. In the present case, the EPC contracts (as I have explained in paragraph 38 above) were based on a Spanish original and were drafted in a more prolix and repetitive style than the wording typically found in standard-form construction contracts governed by English law. The Bidwell contract also bears the hallmarks of having been put together in a hurry as a required formality, rather than as a carefully drafted, coherent whole. (In fact, the contemporary documents, beginning with the email dated 16 September 2013 from NewLawsLegal, show that the documentation for the Bidwell project was based on the documents used in the Lower Marsh Farm transaction, which were thereafter hurriedly amended up in a rather piecemeal fashion.) In my judgment, it is therefore both appropriate and necessary for me to take into account elements of the wider context in determining the objective meaning to be given to clause 21.5. I must consider the meaning of that clause both in its contractual and in its commercial context. I must also look at the clause as a whole, and not just at the date in brackets.

301. The date given in brackets in clause 21.5 is an explanation of the previous words "date of the commissioning". Having regard to the matters discussed in paragraph 298 above, it seems to me to be clear that the parties in their final agreement intended that date to be the later date of 31 March 2014 prominently given in clauses 3.2 and 21.1, and not the earlier date given in brackets here.

302. In my judgment, therefore, the appropriate start date for Delay Damages under the Bidwell Contract is, as Solar says, 31 March 2014.

(6.2.2.1) The end date for Delay Damages

303. As for the end date, Solar argues (in paragraph 31 of its Amended Defence and Counterclaim) that it cannot be liable for Delay Damages after 30 September 2014,

---

74 *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, per Lord Hoffmann at 912-913.

75 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at [9] to [14], per Lord Hodge JSC.

76 *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900.

which is the date when the second claimant gave notice to determine the Bidwell contract.

304. In my judgment, the answer to this point is to be found in the judgment of Coulson J in *Hall v Van Den Heiden (No 2)*[77], which Mr Parker cited to me. In that case, Coulson J had to consider argument by the defendant builder that his liability under the building contract to pay liquidated damages for delay ceased when that contract was brought to an end because of his continuing failure to complete the works. Coulson J rejected that argument on grounds of principle in terms which, mutatis mutandis, seem to me equally applicable to the situation of the Contractor under the Bidwell contract:

> **[76] I reject the suggestion that the defendant's liability to pay liquidated damages somehow came to an end when his employment under the contract was terminated. There is no such provision in the contract. Any such term would reward the defendant for his own default. Take the example of a contractor who has wholly failed to comply with the contract, is in considerable delay, and is facing a notice of termination. The defendant's case would mean that such a contractor was only liable to pay liquidated damages for delay before the decision was taken to terminate, thereby penalising the employer for trying to get the works completed by another contractor, and rewarding the contractor for sitting on his hands and failing to carry out the works in accordance with the program. If the defendant was right, the contractor would be better off not coming back on site to carry out the works because, if he refused to do so, the contract would then be terminated and his liability to pay liquidated damages would automatically come to an end. That would not be a common-sense interpretation of this (or any) construction contract.**
>
> **[77] Accordingly, as a matter of principle, I reject the submission that the defendant's liability to pay liquidated damages came to an end when the employment was terminated**

305. In my judgment, therefore, the appropriate end date is (as the second claimant asserts) the date of actual commissioning, which (it was common ground) was 30 November 2014.

[77] [2010] EWHC 586 (TCC)

(6.2.3) Conclusion

306. My conclusions as to the appropriate start and end dates produce a period for Delay Damages (less the contractual 15 days' grace) of 229 days. Arithmetically, that would produce a figure for Delay Damages of £700,282, which is above the £611,600 cap.

307. It follows that, in my judgment, the Contractor would have been liable under clause 21.5 (and subject to any available set-off) to pay liquidated Delay Damages to the second claimant in the sum of £611,600, and that sum must be brought into account in determining the sum (if any) due from Solar under its guarantee.

(6.3) Actual loss

308. The actual loss pleaded by the second claimant in the Claimants' Schedule of Losses is calculated on the basis of comparing the position had the plant qualified for 1.6 ROCs per mWh, instead of the 1.4 ROCs per mWh for which the plant in fact qualified.

309. As stated in paragraph 239 above, what distinguishes this claim (and that in relation to Rookery Farm) from the claims for actual loss in relation to Hamptworth and Beaford Brook is that the second claimant seeks to recover damages in respect of its loss caused by the lower rate of ROCs in addition to its claim for Delay Damages, and not by way of alternative claim in the event that clause 21.5 should prove unenforceable as a penalty.

310. On the basis of the material before me, I can make no findings as to the actual loss suffered by the second claimant which is not bound up with the second claimant's claim additionally to be compensated for its losses in relation to the ROCs.

(6.4) The claim in relation to the ROCs

311. I can deal with this aspect of the case relatively briefly, since the relevant contractual provisions and the arguments of the parties are materially identical to those which I have already considered in relation to Rookery Farm in paragraphs 241 to 273 above.

312. The one relevant distinction is that, in the Bidwell contract, the definition provisions in clause 1.1 stated that:

> **'ROCs' has the meaning ascribed by the Department of Energy and Climate Change and shall for the purposes of this Agreement be no less than 1.6 Renewables Obligation Certificates/mWh for 20 years**

It is common ground that the level of ROCs actually achieved at Bidwell was 1.4 ROCs/mWh.

313. For the reasons which I have given in considering the equivalent arguments in relation to the Rookery Farm contract, I reject Solar's argument based on clause 28.1. Only the second limb of that argument could, in any event, be relevant to Bidwell, since (unlike at Rookery Farm) no Deed of Variation was executed by the parties in relation to that contract. In fact, there were negotiations between the second claimant and the contractor as to the compensation to be paid for its failure to secure the contractually agreed level of ROCs. By email dated 1 September 2014 Mr Garcia proposed a sum of 70% of the £515,000 figure mentioned in clause 28.1(b)(i) of the Bidwell contract, as part of its proposal for an overall settlement in relation to all of the outstanding contracts. There was then an email exchange between Mr Lan and Mr Gaarn-Larsen, and long telephone discussions between Mr Gaarn-Larsen, Mr Garcia and the Administrators on 17 and 18 September 2014 (and with Mr Garcia, Mr Delgado and Mr Gandia on 22 September 2014). Mr Lan followed these discussions with an email dated 25 September 2014, making further proposals. However, Mr Gaarn-Larsen did not consider these proposals acceptable (inter-alia because they required the claimants to surrender their rights to Delay Damages) and terminated the Bidwell contract on 30 September 2014, and the Hamptworth and Lower Marsh Farm contracts on 14 October 2014.

314. I similarly reject any arguments based on any overlap with clause 21.5.

315. As with the Rookery Farm contract the second claimant has assessed its losses resulting from the lower level of ROCs actually achieved by calculating the reduction in the initial capital expenditure cost for the plant necessary to produce the expected IRR, given the lower income profile now anticipated. For the reasons already given, that is a conceptually sound approach to the assessment of the second claimant's loss. Indeed, Mr Garcia's email dated 23 August 2013, in which he describes carrying out a similar process of adjusting the price to preserve the desired IRR in the event that only 1.4 ROCs per mWH were achieved shows that such an approach was actually in the minds of both parties at the time that the Bidwell contract was being negotiated.

316. Mr Walford for Solar made a number of detailed criticisms of the second claimant's calculation, including that it was not prepared "on a like for like basis e.g. different electricity price assumptions are used, different loan amounts, and different insurance figures". It is undoubtedly correct that the second claimant's calculations include a degree of speculation. However, the end figure of £515,000 is that given for "the parties' current intention" as to an agreed price reduction in clause 28.1(b)(i) of the Bidwell contract: and it seems to me that the most fair and just way of taking account of the element of speculation involved in the second claimant's calculation is to make a discount of about 20%, as I have done in relation to the other EPC contracts, to take account of these uncertainties.

317. Discounting the calculated figure of £515,000 by about 20% produces a figure of about £412,000. That is the sum for which the Contractor would have been liable as damages at common law under this head of claim, and which must therefore be brought into account in favour of the second claimant in the final accounting with Solar.

(6.5) SDLT

318. According to Mr Gaarn-Larsen, in connection with the Bidwell project:

> **Costs of £4,065 for SDLT were incurred on assignment of the leasehold interest or the acquisition of the company. We would not always know what the SDLT liability would be when the leases assigned and as the turnkey project was an all-inclusive Price contract, this figure was always added onto the Price was a liability of the Contractor to be deducted/reconciled so as not to affect cash flow subsequently"**

319. That evidence was not seriously challenged. In my judgment, the equivalent contractual provisions in the Bidwell contract to those in the contract for Beaford Brook which are referred to in paragraphs 216 to 218 above entitle the second claimant to bring that sum into account as against the Contractor as the Contractor's liability. That sum of £4,065 must therefore be brought into account in favour of the second claimant in the final accounting with Solar.

(6.6) Costs to complete

(6.6.1) The claim and the defences

320. The second claimant claims for total costs of £1,060,763 which it alleges that it incurred in completing the construction of the Bidwell plant.

321. That is the total sum pleaded in paragraph 10(4) of the Claimants' Schedule of Losses. It is also the total sum sought in Mr Parker's written Closing Submissions. However, the individual items listed in the Claimants' Schedule of Losses differ in three cases from the sums listed in the spreadsheet verified by Mr Gaarn-Larsen in evidence, which are itemised in footnote 144 of Mr Parker's Closing Submissions and in his annexed "Costs to Complete – Bidwell" schedule.. The following table (in which all amounts are given excluding VAT) sets out the relevant figures:

	Item	Payee	Schedule of Losses	Gaarn-Larsen spreadsheet	Difference
1	Repair of power inverters	Power Electronics	£94,575	£94,575	£0
2	Completion and remedial works	Padero Solaer	£527,257	£527,257	£0
3	Purchase and installation of switchgear	UCPC	£172,563	£172,564	+£1

4	Repair to module structures	MFV	£67,725	£41,614	
5	Repair to module structures	MFV		£26,111	£0
6	CCTV security system	Alarm Plus	£105,100	£84,916	(£20,184)
7	Planting and landscaping	RS Planting	£22,662	£22,662	£0
8	Rent	Foot Anstey	£50,882	£50,484	(£398)
9	Project management	Ardenis	£20,000	£20,000	£0
	TOTAL		£1,160,764	£1,040,183	(£20,581)

322. In paragraph 21 of the Particulars of Claim, this total was originally pleaded as £1,061,055, "comprising £935,930 in respect of various items of capital expenditure and £125,125 in respect of Switchgear".

323. On the basis of the invoices and other documentary evidence, the amounts actually paid by the second claimant are in my judgment accurately recorded in Mr Gaarn-Larsen's spreadsheet. I shall therefore use those figures for the amounts claimed by the second claimant in preference (where they differ) to the figures set out in the Claimants' Schedule of Losses.

324. In response to this claim, Solar says:

(6.6.1.1) In relation to all of the items listed in the table in paragraph 321 above

324.1 (In paragraphs 40.1 to 40.7 of the Amended Defence and Counterclaim) that the second claimant's alleged loss results from the second claimant's own breach of contract in failing to pay the Contractor the sums due to it;

324.2 (In paragraph 40B of the Amended Defence and Counterclaim) that agreement was reached in August 2014 for the Contractor, although in administration, to complete the works at the Bidwell and Lower Marsh Farm projects for an estimated sum of £500,000;

324.3 (In paragraphs 40B.4 to 40B.7 of the Amended Defence and Counterclaim) that estimates were obtained at the time from companies prepared to carry out the works at much lower prices than those claimed by the second claimant.

(6.6.1.2) In relation to Item 1 in the table in paragraph 321 above

324.4 (In paragraphs 10.3(a) and 10.4(iii) of the Counter Schedule) that the power inverters were undamaged at the time the Bidwell contract was determined. If damage thereafter occurred to the power inverters, the responsibility for

repairing that damage rests with the second claimant and not with the Contractor;

(6.6.1.3) In relation to Item 2 in the table in paragraph 321 above

324.5 (In paragraph 10.3(b) and 10.4(v) of the Counter Schedule), that the second claimant's claim for supply and installation of fencing is a claim for an item that fell within the O&M contract as an obligation of Prosolmed, and not within the Bidwell contract;

(6.6.1.4) In relation to Item 3 in the table in paragraph 321 above

324.6 (In paragraph 40A.3 of the Amended Defence and Counterclaim) that the second claimant's claim for purchase and installation of the switchgear is precluded by the definition of "Switchgear" in clause 1.2 of the Bidwell contract;

(6.6.1.5) In relation to Item 6 in the table in paragraph 321 above

324.7 (In paragraph 40A.1 of the Amended Defence and Counterclaim) that the second claimant's claim for supply and installation of a security and alarm system is a claim for an item that fell within the O&M contract as an obligation of Prosolmed, and not within the Bidwell contract;

(6.6.1.6) In relation to Item 7 in the table in paragraph 321 above

324.8 (In paragraph 10.4(v)(a) of the Counter Schedule) that the obligation to plant at Bidwell was owed under clause 6 of the lease of the Bidwell property, and so was not guaranteed by Solar;

(6.6.1.7) In relation to Item 8 in the table in paragraph 321 above

324.9 (In paragraph 10.4(vii) of the Counter Schedule) that the figure claim for rent is not based on any contract but is merely a charge for "extra two months of works". Such extra two months should not have been needed and are not, in any event, an obligation guaranteed by Solar; and

(6.6.1.8) In relation to Item 9 in the table in paragraph 321 above

324.10 (In paragraph 10.4(vi) of the Counter Schedule) that project management should have been provided for without being separately charged for.

325. Solar relies upon these arguments more generally as showing that the amounts claimed by the second claimant are excessive and/or were not caused by the claimed

breaches of contract by the Contractor and/or result from second claimant's failure to act reasonably in mitigation of its loss.

326. In what follows, I will deal with these various arguments, one by one.

(6.6.2) The second claimant's loss results from its own breach of contract

327. I begin by considering Solar's first argument, which is that the second claimant's alleged loss results from the second claimant's own breach of contract, and so cannot be recovered. In summary, Solar's case is that, as at 30 September 2014, the Contractor was owed by the second claimant the sum of £816,826.97 (including VAT) under the Bidwell contract and the sum of £840,630.36 under the Lower Marsh Farm, a total in excess of £1.66 million. According to Solar, the resulting cash flow difficulties meant that the Contractor was not in a position to complete the works under the Bidwell contract.

328. Mr Garcia, in his evidence, sought to put the blame for the Contractor's cash-flow difficulties primarily on Mr Gaarn-Larsen and the claimants. That was also Mr Delgado's evidence, repeating in his witness statement in relation to each of the EPC contracts the assertion that the claimants, by breaching their payment obligations "starved the Contractor of vital cashflow, causing the Contactor to struggle with the deadlines imposed".

329. In relation to the period after the Contractor went into Administration, Mr Garcia made the further assertion that Mr Gaarn-Larsen had gone back on the promise that he had given immediately prior to the administration that the claimants would "support the administrator's trading and continue to make contractually due payments if the [Contractor] enters administration and continue to perform the contract".

330. In my judgment, Solar has failed to make out the premise for this argument. I do not accept the evidence of Mr Garcia and Mr Delgado (which I have summarised above) on this aspect of the case. It is inconsistent with the facts as they appear from the contemporary documents, and (particularly in the case of Mr Garcia) starts from premises as to the Contactor's entitlements that are inconsistent with my findings.

331. Specifically in relation to Bidwell:

331.1 First of all (as I shall explain later in this judgment) , by 30 September 2014 the Contractor had not achieved the third milestone "ROCS secured". Bidwell did not achieve the contracted level of ROCs. Nor had the Contractor achieved the fourth milestone, "Provisional Acceptance", since the Bidwell project was not then complete and was not ready for the Provisional Acceptance Tests. Contrary to Mr Garcia's evidence, the

Contractor was therefore not entitled to the payments that would have become due on achieving those milestones.

331.2 Secondly, as I have already held, the Contractor was indebted to the second claimant for significant sums by way of Delay Damages in relation, not only to Bidwell itself, but also to Beaford Brook and Rookery Farm (in relation to which there was also a significant liability for common-law damages).

332. Mr Garcia accepted in cross-examination that, when he asserted in his witness statement that over £800,000 was due at that point to the Contractor in relation to Bidwell, he had not taken account of either of these matters but had simply carried out an "accounting exercise". Similarly (as I shall again explain later in this judgment), Mr Garcia's assertion in his evidence on behalf of Solar that a further sum in excess of £800,000 was due to the Contractor in relation to Lower Marsh Farm, fails to take into account the significant sums due by way of Delay Damages in relation to these other EPC contracts.

333. As will be apparent when I come to set out the final accounting between the parties in the light of the decisions that I have made, the true position was that a significant sum was due from the Contractor to the second claimant, and not vice versa.

334. That finding is, of itself, sufficient to dispose of this ground of defence. However, the evidence also clearly shows that the Contractor's cash flow problems were of much earlier origin. Far from being caused by any withholding of monies due in breach of contract by the second claimant, at the relevant time the second claimant was doing its best to assist the Contractor (in the second claimant's own commercial interest) to ensure the timely completion of the various projects.

335. The Administrators' Report of 3 October 2014 indicates that the Contractor started to experience financial problems as early as "towards the end of 2013". The Report attributes those problems to delays in obtaining Ofgem accreditation. It does not suggest that they were caused by late payment by either of the claimants. By March 2014, the Contractor had become insolvent: and a meeting of the Contractor's creditors on 31 March 2014 approved a CVA, in the hope that it could survive. The Contractor did not make the subsequent payments required by that CVA: and, as at 11 August 2014, the Contractor had a deficit of capital of over £5m, taking its assets at their book value, and of over £6.7m, taking those assets at their estimated realisable value. This deficit included a debt of over £4m due to HMRC in relation to VAT which (as Mr Garcia conceded in answer to a question from the bench) the Contractor had collected from customers and had been accumulating since late 2013.

336. All of this shows that even if (contrary to my finding) any sum had been withheld in breach of contract by the second claimant, that withholding was not the cause of the

Contractor's financial difficulties, and so not the cause of the Contractor's failure to achieve completion of the Bidwell project.

337. For both of these reasons, I therefore reject Solar's first argument in opposition to this head of claim.

(6.6.3) Was an agreement reached in August 2014?

338. Solar's argument on this point depends on its assertion that an agreement was reached between the second claimant and the Administrators, under which the Administrators agreed that they would cause the Contractor to complete the work both at Bidwell and Lower Marsh Farm for an estimated cost of £500,000.

339. In my judgment, however, the evidence establishes that there was no such agreement. Mr Garcia emailed Mr Gaarn-Larsen on 14 August 2014 to say that he hoped that the work to complete the plants could commence. One of the Administrators, Mr Lan, then sent an email on 22 August 2014 which was copied to Mr Gaarn-Larsen. That email attached a spreadsheet which estimated the cost of completing the two projects at £494,933. However, the contemporary documents show that no concluded agreement was thereafter reached. Mr Gaarn-Larsen was not willing to give up the second claimant's claim for Delay Damages: and, without that, completing projects would have brought no net return in the Administration, and so would have been pointless from the Administrator's point of view.

340. The evidence at trial also established that the figure of £494,933 was simply Mr Garcia's estimate of what he thought completion would be likely to cost - an estimate which he had obvious commercial reasons for keeping as low as practicable. Mr Garcia accepted in cross-examination that these cost estimates were presented in order to "try and make a deal", had already risen substantially from the estimate provided on 22 August 2014, and included only known and expected expenditure, disregarding any matters not then specifically anticipated.

341. I therefore reject Solar's argument on this aspect of the claim

(6.6.4) Were lower prices available

342. Solar's case is that Mr Gaarn-Larsen should have procured the second claimant to take up estimates obtained by Mr Garcia for the work required to complete the Bidwell project. These estimates included ones from UCPC for £213,438.66 for contestable electrical works and switchgear, and for £139,603 for civil work; and from Sistemas De Siguridad Carsol for £122,677 for the completion of the security system. Solar also takes issue with the general level of costs incurred by the second claimant in completing the Bidwell project, projecting that no "competitive quotes,

worksheets, specifications or costings" have been produced to justify the sums claimed.

343. The second claimant's answer is that the evidence demonstrates that the relevant costs were actually incurred: and that, in circumstances where the second claimant had no assurance that it would be reimbursed by the Contractor (which was insolvent) or Solar (whose financial position was unknown) for those costs, the second claimant had every incentive to obtain the best price reasonably achievable, and no reason not to do so. The commercial realities therefore suggest that the sums in fact occurred were reasonable. The second claimant also points out that it did in fact retain UCPC to deal with the switchgear.

344. In my judgment, the evidence establishes on the balance of probabilities that the sums expended by the second claimant were reasonable in amount, and that the second claimant did not (as alleged by Solar) fail to act reasonably in mitigation of its loss caused by the Contractor's failure to complete the work at Bidwell.

(6.6.5) Power inverters (Item 1)

345. Solar's pleaded argument was that the power inverters were undamaged at the date that the Bidwell Contract was determined, and that responsibility for any subsequent damage must therefore rest with the second claimant, not with the Contractor. Mr Garcia originally supported this in his evidence, saying that there had not been any visible damage or vandalism to the inverters or their housing at the date the Bidwell contract was terminated, and that he had been visiting the site regularly at that time and so would have known if any had occurred. Time was therefore devoted at trial, both during Mr Gaarn-Larsen's evidence and that of Mr Garcia, to the issue of when and how the damage to the inverters had occurred.

346. In my judgment, the evidence establishes on the balance of probabilities that the damage occurred prior to the determination of the Bidwell contract, at a point when security on site (including responsibility for "the proper fencing of all the Works on the Site as far as may be reasonably necessary for the Works" under clause 13 of the Bidwell contract). The best evidence is to be found in the documentary record. In particular, an email dated 26 September 2014 from Mr Garcia attached a report of an incident in which tools and a mixer had been stolen from the Bidwell site. That email gave instructions for the repositioning of the inverters "as I want to take the inverters out from the compound area so they will not suffer *any more* damages" (my emphasis). A site visit report dated 30 September 2014 (the date the Bidwell contract was determined) also reported "Power Inverters. They are stored out of the site in a bad way. This is the reason why *they have been robbed and damaged in some points*. Ones more than others have been teared into pieces and forced, but all of them miss components .. Clearly, with all these damages that the stations present,

it would be necessary an inspection and repair by Power Electronics" (again, my emphasis).

347. In those circumstances, I find that the proximate cause of the damage to the inverters was the failure of the Contractor to fence and secure the site. The proximate course was not, in my judgment, any failure by the second claimant to act reasonably following termination of the contract in providing fencing and/or security.

348. A further point emerged during the cross-examination of Mr Gaarn-Larsen. In the course of his evidence, Mr Gaarn-Larsen volunteered the information that the second claimant had made an insurance claim in relation to the damage to the inverters. He was unable to confirm whether or not the insurers had paid the claim, but accepted that, if they had, the second defendant would already have been compensated. Mr Walford at one point sought to rely upon this (although the argument was not pursued in his Written Closing Submissions), submitting that the second claimant, having been compensated by its insurers, no longer had any claim under this head.

349. I reject that argument. It is a well settled principle of the law that "no deduction of insurance monies is made from the damages where insurance has been taken out in advance to cover the eventuality of loss"[78]. In cases such as this, that is because the insurance is regarded as *res inter alios acta.* There is no possibility of double recovery, because the insurance contract is one of indemnity, so that the claimant is obliged to repay the insurer if, having been compensated under the insurance, he subsequently receives compensation from the wrongdoer[79].

350. As for the amount charged by Power Electronics for the repair, Mr Garcia gave evidence that, when he received the quotation from Power Electronics on 10 November 2014, he "did think it was a bit excessive", but did not go back to Power Electronics to negotiate any price reduction, or challenge the reasonableness of the quotation at the time. In my judgment, Solar's challenges to this item of loss all fail.

(6.6.6) Fencing (Item 2) and the security system (Item 6)

351. Solar's case in relation to this item is that the obligation to install fencing and a security system was not an obligation under the Bidwell contract itself, but an obligation of Prosolmed under clause 3.5 of the O&M contract for Bidwell.

352. That clause provided:

Security

[78] Edelman et al, *McGregor on Damages* (20th edn, Sweet & Maxwell 2017) para [9-168].

[79] Birds et al, *MacGillivray on Insurance Law* (14th edn, Sweet & Maxwell 2018) paras [24-067] to [24-075].

> **[Prosolmed] shall be responsible for the care and security of the PV Solar Project, and he shall provide the services in accordance with the requirements of the insurance coverage for the PV Solar Project.**
> **In order to ensure the security of the PV Solar Project [Prsolmed] shall:**
> **(a) Install an alarm system connected to a control central (*central de alarmas*) and a 24-hour surveillance system**
> **(b) Ensure that the alarm system can't be disconnected or interrupted**
> **(c) Ensure that the alarm system installations, especially the cables, can't be easily destroyed, interrupted or damaged by third persons**
> **(d) Establish a safe and compliant mechanism for the attendance of alarms**
> **(e) Ensure compliance with the requirements of the insurance company providing insurance for the PV Solar Project; and**
> **(f) Generally, take all necessary measures to ensure that the PV Solar Project is free from theft, vandalism, brake-ins, accidents et cetera**
>
> **In the event of a Failure in the security systems installed at the PV Solar Project, [Prosolmed] commits himself to treat such Failure as an emergency situation and to send the necessary maintenance equipment and personnel to the plant and undertake the necessary actions to repair such Failure. For as long as the Failure remains, [Prosolmed] must ensure that the PV Solar Project is secure, if necessary by hiring security guards being present at the Site.**

353. Prosolmed was the original party as "Contractor" to the Bidwell O&M contract. That contrasts with the position under the equivalent O&M contracts in relation to Hamptworth, Beaford Brook and Rookery Farm, where the initial contracting party was the Contractor itself, and the contract was not novated to Prosolmed until 17 January 2014[80].

354. In response, the second claimant relies on clause 4.2(i) of the Bidwell contract under which the Contractor agreed (inter alia) to "carry out the Works in accordance with the Specification". The "Specification" was defined in clause 1.1 to mean "the specification for the Works set out in the Technical Due Diligence Report annexed at Annexure 1". That was a report prepared by OST Energy dated September 2013, which stated:

> **4.10 Security System**
> **OST has not been provided with 'Security System Technical Specifications' which describes the security arrangements for the site. However from the documentation provided we can assume that the main security arrangements are**
> - **Perimeter fence with gates**
> - **Microphone cable perimeter on the fence**
> - **Dome cameras along the perimeter**
> - **Motion sensors in cabins**

[80] See paragraph

> - **Doors contact magnetic sensors**
> - **Security data rack with UPS**
> - **Security system communications will use FTP cable and Multimode Optical Fibre (50/125 µm)**
>
> **There will be an intruder alarm system which will ensure the full coverage of the perimeter, as complement to the alarm system, a video surveillance system will be installed, based on Dome cameras which are capable of automatically positioning themselves to the place where the alarm has been triggered. The intruder alarm system will also be present on the transformer centres and control centre ..**
> **.. We have been provided with a CCTV system design layout by [the Contractor] dated on the 13th August 2013, which includes 17 Dome cameras along the perimeter of the entire site as shown in the Figure below ..**
> **.. It is recommended to provide with a new design including the number and location of all security system equipment along with detailed drawings, such as camera poles, panels, CCTV Rack, control cabin, access gates et cetera**
> **OST would recommend that the insurance provider confirms the suitability of any security arrangements of the plant**

355. The second claimant's case, in summary, is that these provisions imposed "a clear obligation" on the Contractor to provide perimeter fence and CCTV security system, particularly having regard to the wide definition of "Works" in clause 1.1, and to the "turnkey" nature of the Contractor's undertaking under clause 3.2 of the Bidwell contract. Mr Parker also relied on the inclusion of a date for "CCTV Installation" in the "Time Table of the PV Project" in Annexure 2 to the Bidwell contract.

356. Mr Walford's response on behalf of Solar was that "comments in the OST Report" are just that, and cannot extend the scope of the Works. Given that the O&M contract (executed at the same time and as part of the same suite of documents as the Bidwell contract) specifically required Prosolmed to "install" the alarm and CCTV system, it would make no sense to interpret this mere comment in the OST Report as imposing a concurrent obligation on the Contractor to do the very same thing.

357. Mr Parker's answer is that the contracting party under the EPC Contracts and the O&M Contracts, when this documentation was first produced, was the same: and it would be wrong to impute to the parties an intention, by agreeing to the substitution of Prosolmed as O&M Contractor, that the Contractor should be relieved of part of its overarching obligation to build the project and to get it fully ready for commercial operation. That would necessarily include the provision of a suitable security system (including fencing and CCTV), as described by OST. The correctness this is shown, Mr Parker argues, by Mr Garcia's 19 September 2014 email, which stated that the Contractor needed funding to install (and therefore implicitly acknowledged that it

was obliged to install) "Alarm system CCTV £120,000, the perimeter is much longer and there are five fields to secure".

358. This is yet another issue of the correct interpretation of these not entirely happily worded contracts. As it is an issue of interpretation, I must disregard the implicit acknowledgement in Mr Garcia's 19 September 2014 email. I also accept Mr Walford's submission that the structure and wording of the Technical Due Diligence Reports required to perform the function of "Specification" in each of these EPC Contracts make it very difficult to tell what is "comment" and what is in the nature of an obligation being imposed on the Contractor.

359. In cases of difficulty such as this, it is necessary for the court to look at the specific contractual provisions that it is required to interpret, not in isolation, but in their contractual and commercial contexts. In the present case, it is that context that in my judgment provides the answer. The Bidwell contract, like each of the other EPC Contracts, was a contract for "the turnkey delivery of the PV Project to the Principal .. fully built, connected, commissioned and operative .." (Recital II). Such an operative project would necessarily have the sort of perimeter fence and other security arrangements described in the Specification. It therefore seems to me that it would necessarily be implicit in the overall terms of the Bidwell contract (even if it were not explicit in paragraph 4.10 of the Specification) that the Contractor was obliged to provide the sort of perimeter fence and other security arrangements described by OST in the Specification.

360. The contrary argument would be that the provision of such fencing and other security arrangements by the Contractor was known to be unnecessary, because they were being provided under the O&M contract. However, the Contractor was not a party to the Bidwell O&M contract. It therefore could not enforce that obligation against Prosolmed, it could not deliver a commissioned and operative project unless and until that obligation were performed. In the circumstances, it seems to me that the parties must be taken to have intended that this obligation should be an obligation of the Contractor, from which it would be relieved if and to the extent that Prosolmed did the work for it under the O&M contract.

361. On balance, I am therefore persuaded that the second claimant's contentions on this aspect of the claim are well-founded. In my judgment, Solar's challenges to these items of loss do not succeed.

(6.6.7) Switchgear (Item 3)

362. Solar relies upon the definition of "Switchgear" in clause 1.1 of the Bidwell contract. That provides that:

> **Switchgear means the switchgear equipment required to be installed at the Site by the DNO which was provided by EPDL having been**

purchased pursuant to the contract offer made by GW2 and accepted by Wessex Solar Energy Development Ltd on 12 October 2012, and subsequently novated in favour of WSE Bidwell Ltd.

363. Solar's case is that, since the switchgear had already been purchased, and was to be installed by the DNO (Western Power Distribution (South West) plc) rather than by the Contractor, the second claimant can have no valid claim against the Contractor the cost of purchasing and installing the switchgear.

364. In my judgment, this argument ignores the effect of clause 20.2 of the Bidwell contract, which required the Contractor to purchase the switchgear from WSE Bidwell Ltd prior to Provisional Acceptance for £150,162.54 (including VAT). It was therefore, quite expressly, an obligation of the Contractor to pay for the switchgear. It was also the Contractor's obligation under section 4.5 of the Specification to procure that the switchgear was installed by the DNO. Without the installation of the switchgear, the project could not be made ready for commercial operation.

365. I therefore reject Solar's argument on this aspect of the claim.

(6.6.8) Planting (Item 7)

366. It was common ground that clause 6.1 of the Bidwell lease required the second claimant "to resow those areas on which crops have been damaged and reinstate the Landlord's Property to its former state and condition to the Landlord's reasonable satisfaction". On that basis, Solar argues that this was an obligation imposed on the second claimant as tenant of the property, the discharge of which was not the Contractor's responsibility under the Bidwell contract.

367. In answer, the second claimant draws attention to clause 3.6 of the Bidwell contract, under which:

The Contractor hereby undertakes to ensure:

(a) Compliance with the Lease in relation to matters they are fulfilling connected to the works;

(b) Compliance with the Planning Permission and any mitigations or conditions required by or submitted in accordance with such Planning Permission ..

368. The invoices from RS Planting described the works under this head of claim as follows: "Supplying Materials to site"; "installed sheep proof fencing for enclosures with security cameras .. Fencing hedge banks where building contractors of rooted through and re-made"; and "Fence new hedgerow planted with native plants stop also

reinstate hedge gaps. Plant 15 trees and build fenced gardens around them. Plant 2 damp coppice and fence them".

369. In my judgment, all of these works were reasonably required to comply with the Lease in connection with the Works. They therefore fell squarely within the Contractor's obligations under clause 3.6. Since the Contractor did not fulfil those obligations, the reasonable cost of engaging RS Planting to do so is recoverable from the Contractor.

370. I therefore reject Solar's argument on this aspect of the claim

(6.6.9) Rent (Item 8)

371. Solar's pleaded objection to this item appears to be twofold: that the extra time for the works was not necessary, and that the sums paid were paid voluntarily and not under any contractual obligation.

372. Both of those objections are, in my judgment, misconceived. As to the first, nothing in the evidence gets close to establishing that the time taken by the second claimant to complete the work at Bidwell following termination of the contract was unreasonably long. As for the second, the rent was paid pursuant to the lease and supplemental agreements in relation to additional areas. The invoices clearly show that the sums claimed were in fact invoiced and paid. For, the reasons discussed in paragraphs 343 and 344 above, it is improbable that the second claimant would have made these payments unless it was necessary for it to do so.

373. There is, however, a conceptual difficulty in the way of this claim, which is that it is a claim for damages for delay, covering a period in relation to which the second claimant is entitled to (and has claimed) liquidated Delay Damages. The law in relation to this issue is discussed in paragraphs 267 to 272 above, in relation to the ROCs element of the claim in relation to the Rookery Farm contract.

374. Essentially, what the second claimant alleges under this head of claim in relation to Bidwell is that it has had to pay rent and additional rent in connection with the Bidwell project during the period from the contractual date for commissioning until the date of actual commissioning and commercial operation, during which time the second claimant was not receiving any income from the plant.

375. That loss results directly from the Contractor's failure to achieve commissioning by the contractually agreed date, and would form part of any calculation of the sum required to put the second claimant in the position it would have been had the contract been properly performed and the date for commissioning achieved. It does not result from any separate breach of contract other than the failure to achieve the contractual date for commissioning. Nor is it a loss of a different kind to that for

which the second claimant was intended to be compensated by the Delay Damages. It is not a part of the cost of completing the work. In my judgment, it therefore does not fall within either of the exceptions discussed in paragraphs 267 to 272 above.

376. It follows that clause 21.5 precludes the second claimant from recovering unliquidated damages under this head of loss.

(6.6.10) Project management

377. Mr Gaarn-Larsen's evidence was that, in order to get the Bidwell project finished in the period following termination of the Bidwell contract, the second claimant required the services of Mr Garcia. Mr Garcia charged and was paid for those services through his service company, Ardenis Ltd. The invoices which had been produced establish the amounts paid.

378. In my judgment, this was a reasonable course of action for the second claimant to take, given the situation in which it had been placed by the Contractor's breach. There is nothing in Solar's objection that this work ought to have been done without charge by the second claimant's management or by the management of the contractors employed by the second claimant complete the works. This work needed to be done, and someone had to be paid to do it.

379. I therefore reject Solar's arguments on this aspect the claim

(6.6.11) Conclusions

380. Having regard to my conclusions above, I find that the second claimant is entitled to recover the following sums in relation to the costs required to complete the Bidwell project:

	Item	**Amount**
1	Repair of power inverters	£94,575
2	Completion and remedial works	£527,257
3	Purchase and installation of switchgear	£172,564
4	Repair to module structures	£41,614
5	Repair to module structures	£26,111
6	CCTV security system	£84,916
7	Planting and landscaping	£22,662
8	Rent	£0
9	Project management	£20,000
	TOTAL	£989,699

381. Subject to the matters discussed in the following section of this judgment, that sum must therefore be brought into the final accounting between the second claimant and Solar.

(6.7) Counterclaim

382. In the table annexed to paragraph 25 of the Particulars of Claim, the second claimant pleads a "credit due to Contractor" in relation to Bidwell of £676,624.42. In the table annexed to paragraph 46A.1 of the Amended Defence and Counterclaim, Solar counterclaims for that sum plus VAT of £135,324.88 making a total of £811,949.30.

383. The Re-Amended Reply and Defence to Counterclaim denies that Solar is entitled to counterclaim for that credit. Paragraph 40(1A) points out that the Contractor had not achieved the third milestone by the date that the Bidwell contract was terminated. As a result, only the first two milestone payments totalling 80% of the adjusted contract price (including VAT) of £6,748,996.46 (ie £5,399,197.17) had by then fallen due. Since the second claimant had by then already paid £5,913,169.48 (including VAT), it had overpaid the sum of £532,972.31 to the Contractor, even disregarding the second claimant's cross-claims for Delay Damages and other items of loss.

384. In my judgment, the argument made in the Re-Amended Reply and Defence to Counterclaim is soundly based. By 30 September 2014 the Contractor had not achieved the third milestone "ROCS secured". The Bidwell project was not commissioned until 30 November 2014, and even then the "ROCS" (as that expression is defined in clause 1.1 of the Bidwell contract) were not secured, since the contractually agreed level was not achieved.

385. Solar can therefore have no counterclaim for that sum.

386. Even so, in my judgment Solar is entitled (as paragraph 25 of the Particulars of Claim rightly acknowledges) to require the second claimant to take the full outstanding balance of the price into account in assessing its loss in relation to the cost to complete. Had the contract been properly performed, the second claimant would have had the completed project, but would have had to pay the full outstanding balance of the price to the Contractor. Because the Contractor failed to complete the work, the second claimant has had to pay others to do so. However the amount required to put the second claimant into the position that it would have been in had the contract been properly performed is not the gross sum paid to those others. Instead, it is the amount by which that sum exceeds the amount that the second claimant would have had to have pay to the Contractor to achieve the same result - plus, of course, any consequential loss.

387. It follows that Solar is entitled to say that the £989,699 in paragraph 380 above should be reduced by the £676,642.42 balance of the total contract price, so as

produce a net damages claim for the cost to complete in favour of the second claimant of £313,074.58.

388. When I first made my judgment available to the parties in draft, the figure in paragraph 387 above for the balance of the contract price was the higher VAT-inclusive amount of £811,949.30, producing a net damages claim for the cost to complete in favour of the second claimant of £177,749.70. However, before I handed the judgment down in final form, Mr Parker (in written submissions) drew to my attention the fact that I was not comparing like with like, in that the figures making up the £989,699 cost to complete were (as demonstrated by the supporting invoices) VAT-exclusive.

389. I had been conscious when preparing my draft judgment that neither party had specifically addressed the issue of VAT in their written or oral submissions at trial. In the light of Mr Parker's submissions, I therefore deferred the formal hand down of my judgment and invited Mr Walford on behalf of Solar to respond to Mr Parker's submissions.

390. Mr Walford, in his response, objected to my entertaining this point at all, on the basis that it was contrary to the second claimant's pleading in paragraph 40(1A)(d) of the Re-Amended Reply and Defence to Counterclaim, had not been raised at trial and so would require the trial to be reopened, with an amendment to the pleadings, fresh evidence and disclosure, and therefore was now raised far too late to be taken into account.

391. I of course accept that the overriding objective and the interests of finality in litigation will usually mean that it is inappropriate for parties to make submissions to persuade a judge to change a view expressed in a draft judgment[81]. Nevertheless, if a draft judgment contains what the judge acknowledges is an error when it is pointed out, the requirement to deal with the case justly dictates that that error should be corrected[82]. In the present case, I am satisfied that my original inclusion of VAT on one side only of this calculation of the second claimant's loss was such an error. I have therefore corrected it in this final judgment. In doing so, I have taken fully into account Mr Walford's submissions: but, in my judgment, his reliance upon the second claimant's pleading is misconceived. The second claimant's case that any allowance against damages should be exclusive of VAT was made clear in paragraph 25 of the Particulars of Claim. Paragraph 40(1A)(d) of the Re-Amended Reply and Defence to Counterclaim was dealing with Solar's counterclaim, which would (had it succeeded) have included VAT. No amendment of the statements of case, or further disclosure or evidence is required. The point is simply one of law and of logic.

[81] See eg *Royal Brompton Hospital National Health Service Trust v Hammond* [2001] EWCA 778, [2001] BLR 317

[82] See eg *Re L and B (Children)* [2013] UKSC 8, [2013] 1 WLR 634 at [16]-[27]

(7) The Lower Marsh Farm contract

(7.1) The contract

392. The Lower Marsh Farm contract was entered into on 9 August 2013. The contracting party in relation to the Lower Marsh Farm contract was the second claimant.

393. The price stated in clause 18.1 was £6,258,364, 80% of which was fixed in euro the other 20% in sterling, the relation being fixed at GBP 1 = EUR 1.18. Clauses 18.3 and 18.4 provided for an Adjusted Price depending upon the final installed capacity of the project. Clause 19.1 provided for the price to be paid in accordance with the payment milestones set out in Schedule 1. These were: (1) commencement 50%; (2) main component procurement 30%; (3) "ROCs secured" 15%; (4) provisional acceptance 5%. Clause 1.1 defined "ROCs" as "no less than 1.6 Renewables Obligation Certificates/mWh for 20 years".

394. Clause 3.1 required the Contractor to carry out the works in accordance with the timetable at Annexure 2. This showed "DNO commissioning G59 Test & Grid Connection" as taking place by 6 December 2013, leading to the issue of a Provisional Acceptance Certificate by 17 December 2013. Clause 3.2 nevertheless required the project to "be eligible for the ROCs on or before 31 March 2014", and clause 21.1 stated that the Annexure 2 timetable had been established in order to get the project "ready for its connection, commissioning and Commercial Operation on the 31 March 2014 at the latest".

395. Clause 21.5 of the Lower Marsh Farm contract provided for the payment of Delay Damages at the rate of £500 per day per mWh installed:

> **.. in the event of a delay of more than fifteen (15) calendar days for the date of the commissioning (8 November 2013) ..**

396. The Lower Marsh Farm contract itself contains no clue as to why the date of 8 November 2013 given in clause 21.5 is four weeks earlier than the commissioning date shown in Annexure 2, or why that later date is itself 14 weeks before the date given for "connection, commissioning and Commercial Operation" in clauses 3.2 and 21.1. The evidence before the court similarly provided no explanation, and none was suggested in argument.

(7.2) The relevant dates

397. The relevant dates were not in dispute. As confirmed in Enertis Solar's Provisional Acceptance Supervision Report dated 2 July 2014, the plant was commissioned and commenced operation on 24 March 2014, although the Works required under the contract were still incomplete in a number of respects. The Provisional Acceptance

Certificate was signed on 2 July 2014 (albeit with a significant number of items still outstanding in the Punch List). Ofgem confirmed the accreditation for the plant on 20 August 2014.

398. The Contractor (which went into administration on 11 August 2014) did not complete the works in the Punch List, and the second claimant terminated the Lower Marsh Farm on 14 October 2014.

(7.3) The claim and set off

399. The second claimant makes no claim in relation to the Lower Marsh Farm contract. However, in paragraph 46 of the Amended Defence and Counterclaim, Solar counterclaims under that contract for £956,838.24 alternatively £843,630.36 alternatively £550,000.

400. The second claimant's response (in paragraph 40(2) of the Re-Amended Defence and Counterclaim) is to assert that, following adjustment for total installed capacity, the price was reduced to £6,128,020 plus VAT (£7,353,624 including VAT). On that basis the second claimant admits that £638,329 (which, with VAT of £127,665.80, makes £765,994.80) remains outstanding in respect of the third and fourth instalments of the price.

401. Against that sum, the second claimant asserts a right to set off Delay Damages under clause 21.5 calculated from 8 November 2013 alternatively from 6 December 2013 to 24 March 2014.

402. It also seeks (in paragraph 11 of the Claimants Schedule of Loss) to set off common law damages totalling £111,219, comprising:

402.1 £57,144 in respect of security guards between 27 September 2014 and 30 June 2015;

402.2 £88,358 for the installation of a close circuit television security system;

402.3 £44,973 for planting around the site; and

402.4 £38,646 in respect of electrical works and an auxiliary transformer.

403. In response, Solar pleads (in paragraph 11 of the Counter Schedule) that:

403.1 The Contractor's failure to complete at Lower Marsh Farm was caused by the second claimant's failure to pay the stage payment of £550,000 (including VAT) then due. "This enabled the second claimant to purport to

serve a termination notice, which was in fact merely an opportunistic means for it to avoid payment".

403.2 The provision of security guards in the period claimed was the responsibility of the second claimant are not of the Contractor. The second claimant should have constructed a fence and installed the security system as soon as the Lower Marsh Farm contract was terminated.

403.3 The obligation to install the CCTV security system was not an obligation of the Contractor under the Lower Marsh Farm contract, but was the obligation of Prosolmed under the related O&M contract;

403.4 Planting was not an obligation of the Contractor.

(7.4) Decisions

404. Since the issues raised in relation to the Lower Marsh Farm Contract are all very similar to issues which I have already dealt with in relation to one or more of the other EPC contracts, I can state my decisions comparatively briefly:

(7.3.1) The amount of the counterclaim

405. The table in Mr Garcia's witness statement in which he calculates the amount due to the Contractor under the Lower Marsh Farm contract puts the "capacity adjustment" at the end, rather than applying it to the price at the outset. This distorts the VAT effect. It also takes no account of the contractually required currency adjustment. In my judgment, the figures given in the Re-Amended Defence and Counterclaim are the correct ones. It follows that the sum of £765,994.80 must be brought into the final accounting in favour of Solar.

(7.3.2) Delay Damages

406. Consistently with my decision in relation to the start date at Bidwell[83], it seems to me that the correct start date for Delay Damages in relation to Lower Marsh Farm is 31 March 2014, and not either of the earlier dates put forward by the second claimant. Since the plant was commissioned and commenced operation on 24 March 2014, no Delay Damages are payable by the Contractor under the Lower Marsh Farm contract.

(7.3.2) Responsibility for the Contractor's failure to complete the work

407. I reject Solar's argument that the Contactor's failure to complete the work at Lower Marsh Farm was due to the second claimant's failure, in breach of contract, to pay

[83] See paragraphs 293 to 302 above.

sums due, thus starving the Administrators of funds to which they were entitled. I do so for similar reasons to those given by me in paragraphs 327 to 337 above in relation to Bidwell. In my judgment, the overall balance of indebtedness was significantly in favour of the second claimant, not of the Contractor.

408. What the Administrators and Mr Garcia were discussing with Mr Gaarn-Larsen was the possibility that the second claimant might waive some or all of the cross-claims and set-offs to which it was entitled in order to provide the cash flow necessary to enable the Administrators to complete the projects. The problem was that the costs and expenses of the Administration also had to be provided for, which increased the costs involved. Mr Gaarn-Larsen was entitled to judge, as he did, that agreeing to that proposal was not in the commercial interests of the claimants.

409. I therefore reject this ground of defence to the set-off claimed by the second claimant.

(7.3.3) Security Guards and CCTV

410. It is common ground that the site was not protected by the expected security system went the Lower Marsh Farm contract was terminated on 14 October 2014.

411. The relevant provisions of the Lower Marsh Farm contract and its related O&M contact are materially identical with those which I considered in paragraphs 351 to 361 above in relation to Bidwell. For the reasons which I gave there, it was the Contractor's obligation under those provisions to install the fencing and security system. Its failure to do so was a breach of the Lower Marsh Farm contract.

412. The documents show that the cost of installing the CCTV system was £88,358. In my judgment, that was a reasonable sum, and so should be brought into account by way of set-off.

413. The second claimant also seeks to set-off £57,144 in respect of the hire of security guards between 27 September 2014 and 30 June 2015. In my judgment, it was not unreasonable for the second claimant to provide this sort of security for the site, in the absence of the CCTV security for which it had contracted.

414. However, I accept to some extent Solar's argument that the second claimant should have acted more swiftly to complete the contractually agreed level security for the site following termination and could reasonably have been expected to do so well before the end of June 2015. After all, the period provided in the Lower Marsh Farm contact for completion of all the contract Works was only around 7 months, from August 2013 to March 2014.

415. The issue of what a reasonable period would have been was not a matter that was explored in evidence or in argument. However, doing the best that I can on a very broad brush basis, it seems to me that I should limit this item to approximately half of the 9-month period sought by the second claimant.

416. In my judgment, therefore, the second claimant is entitled to bring the sum of £28,572 into account by way of set-off.

(7.3.4) Planting

417. The relevant provisions of the Lower Marsh Farm contract that are relevant to planting are materially identical with those which I considered in paragraphs 363 to 370 above in relation to Bidwell. For the reasons which I gave there, any planting and landscaping required to comply with the Lease and the Planning Permission was the Contractor's obligation. Its failure to carry out that work was a breach of the Lower Marsh Farm contract.

418. The second claimant is therefore entitled to bring the reasonable costs of completing that work into account by way of set off. The invoices show that £44,973 was paid for that work, and that is therefore the sum to be brought into account under this head.

(7.3.5) Electrical works etc

419. The invoices show that £38,646 was paid in respect of electrical works and the provision of an auxiliary transformer. Solar has made no specific challenge to this item. In my judgment, the second claimant is entitled to bring it into account by way of set-off.

(7.3.6) Conclusion as to set off

420. In my judgment, therefore, the second claimant is entitled to set off against Solar's counterclaim the sums set out in the preceding paragraphs, resulting in a net counterclaim of £565,445.80, made up as follows:

	Item	**Counterclaim**	**Set-off**	**Net Balance**
1	The price	£765,994.80		
2	Delay Damages		£0.00	
3	CCTV		£88,358.00	
4	Security guards		£28,572.00	
5	Planting etc		£44,973.00	
6	Electrical works		£38,646.00	
Sub-total			£200,549.00	

Total				£565,445.80

(8) Overall conclusions

421. In summary, therefore, my overall conclusions are as follows.

(8.1) The 5 EPC contracts

422. The findings set out in the preceding sections of this judgment mean that the position in relation to the five EPC contracts with which this action has been concerned is as follows:

(8.1.1) Hamptworth

423. The first claimant is entitled to Delay Damages of £631,759 from the Contractor under clause 21.5 of the Hamptworth contract.

424. Solar's counterclaim for outstanding payments due under the Hamptworth contract fails.

(8.1.2) Beaford Brook

425. The second claimant is entitled to Delay Damages of £113,794 from the Contractor under clause 21.5 of the Beaford Brook contract. The second claimant is also entitled to recover the sum of £5,200 from the Contractor in relation to SDLT.

426. Solar is entitled (subject to set-off) to the sum of £110,131.11 on its counterclaim.

(8.1.3) Rookery Farm

427. The second claimant is entitled to Delay Damages of £447,068 from the Contractor under clause 21.5 of the Rookery Farm contract. The second claimant is also entitled to common-law damages of £645,000 because the plant did not achieve the contractually specified level of ROCs, and to the sum of £2,000 in relation to the costs of completion. Its claim in relation to SDLT fails.

428. Solar is entitled (subject to set-off) to the sum of £754,513.51 on its counterclaim.

(8.1.4) Bidwell

429. The second claimant is entitled to Delay Damages of £611,600 from the Contractor under clause 21.5 of the Bidwell contract. The second claimant is also entitled to

common-law damages of £412,000 because the plant did not achieve the contractually specified level of ROCs, and to the sum of £4,065 in relation SDLT.

430. The second claimant is entitled to damages of £313,074.58 in relation to the additional cost required to complete the Bidwell project. That sum is calculated by taking the recoverable costs of completion of £989,699 (exclusive of VAT) and setting off against that sum the £676,624.42 VAT-exclusive balance of the total contract price.

431. Solar's counterclaim for outstanding payments due under the Bidwell contract fails.

(8.1.5) Lower Marsh Farm

432. Solar is entitled (subject to set-off) to the sum of £565,445.80 on its counterclaim. That sum is calculated by taking the balance of £765,994.80 due as the price, and setting off against it a total of £200,549 by way of damages for the Contractor's failure to complete the work.

433. The second claimant is not entitled to set-off any Delay Damages in relation to this project.

(8.2) Solar's liability

434. I find that Solar is liable under the guarantee and indemnity provisions of these EPC contracts to discharge the liabilities of the Contractor to the claimants.

(8.3) The final accounting

435. In the result, the final position as between the claimants and Solar is as follows:

(8.3.1) The first claimant

436. The first claimant is entitled to the sum of £631,759 from Solar under the Hamptworth contract.

(8.3.2) The second claimant

437. The second claimant is entitled to the sum of £1,123,711.16 from Solar under the Beaford Brook, Rookery Farm and Bidwell contracts, taking into account the set off to which Solar is entitled in relation to the Lower Marsh Farm Contract. That sum is made up as follows:

	Contract	**Item**	**Due to the Claimant**	**Due to Solar**	**Net balance**

1	Beaford Brook	Price		£110,131.11	
2		Delay Damages	£113,794.00		
3		SDLT	£5,200.00		
					£8,862.89
4	Rookery Farm	Price		£754,513.51	
5		Delay Damages	£447,068.00		
6		ROCs damages	£645,000.00		
7		Completion damages	£2,000.00		
8					£339,554.49
9	Bidwell	Price		£0.00	
10		Delay Damages	£611,600.00		
11		ROCs damages	£412,000.00		
12		SDLT	£4,065.00		
13		Completion damages	£313,074.58		
14					£1,340,739.58
15	LM Farm	Price		£565,445.80	
16					(£565,445.80)
17					
18	**TOTAL**				**£1,123,711.16**

(8.4) Judgment

438. The first claimant and the second claimant are therefore entitled to judgment against Solar for those amounts. Since there is a net sum due to the first claimant, and a net sum due to the second claimant on 3 of the EPC contracts and overall, the first and second claimants are in addition entitled, in principle, to interest under the Senior Courts Act 1981 s 35A.

439. I invite the parties to seek to reach agreement on the appropriate period for and rate of interest and, more generally, on the terms of a Minute of Order giving effect to the findings set out above.

440. In the event that agreement cannot be reached, a short further hearing should be fixed through the usual channels as soon as possible in order for me to resolve any outstanding matters. Pursuant to CPR PD 52A 4.1(a), I adjourn all applications for permission to appeal to that further hearing, together with all other consequential applications. In the circumstances, there is no need for the parties to attend the formal handing down of this judgment.