Neutral Citation Number: [2020] EWHC 2537 (TCC)

Case No: HT-2019-000259

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

Rolls Building
London, EC4A 1NL

Date: 24/09/2020

Before:

MRS JUSTICE O'FARRELL DBE

- -

Between:

ENERGY WORKS (HULL) LIMITED	**Claimant**
- and -	
MW HIGH TECH PROJECTS UK LIMITED	**First Defendant** **Part 20 Claimant**
- and -	
M&W GROUP GmbH	**Second Defendant**
- and -	
OUTOTEC (USA) INC	**Part 20 Defendant**

- -
- -

Stephen Dennison QC & Mathias Cheung (instructed by Fenwick Elliott LLP) for the **Claimant**
Vincent Moran QC & William Webb (instructed by Clyde & Co LLP) for the **Defendants**
Adrian Williamson QC & Paul Bury (instructed by Walker Morris LLP) for the **Part 20 Defendant**

Hearing dates: 13th, 14th July 2020
Additional submissions in writing: 17th, 21st, 24th, 28th July; 21st, 22nd September 2020

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Approved Judgment

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

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 24th September at 10:30am"**

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Mrs Justice O'Farrell:

1. This is the hearing of preliminary issues to determine:

   i) the legal effect of an assignment by the First Defendant ("MW") to the Claimant ("EWHL") of MW's sub-contract with the Part 20 Defendant ("Outotec");

   and

   ii) whether MW can pursue its claims for contribution against Outotec as direct claims, in respect of accrued rights under the sub-contract, or based on its liability for "the same damage" pursuant to the Civil Liability (Contribution) Act 1978 ("the 1978 Act").

2. The claim arises out of a contract dated 20 November 2015 between EWHL and MW whereby MW was engaged as the main contractor under an EPC Contract to design, procure, construct, commission and test a fluidised bed gasification power plant, capable of processing refuse derived fuel ("RDF") produced by commercial, industrial and municipal solid waste ("the Main Contract").

3. The Second Defendant, MW Group, provided a parent company guarantee in respect of MW's performance of the works.

4. By a sub-contract dated 20 November 2015 MW engaged Outotec to supply key elements of the gasification plant ("the Sub-Contract").

5. On 18 February 2016 Outotec executed a deed of collateral warranty in favour of EWHL as the "Beneficiary" ("the Outotec Warranty").

6. On 4 March 2019 EWHL purported to terminate the Main Contract by reason of contractor default, namely, MW's delay in completing its works, including outstanding defects, with the result that delay damages exceeded the contractual cap.

7. MW disputed EWHL's entitlement to terminate for contractor default on the ground that it was entitled to an extension of time to the date of completion of its works for events including EWHL's failure to supply RDF when required or within specification to allow commissioning to proceed. MW accepted that there was an effective termination by EWHL but asserted that it took effect as a termination for convenience under the Main Contract.

8. By notices dated 20 June 2019 and 24 June 2019, MW assigned the Sub-Contract to EWHL.

9. On 26 July 2019 EWHL commenced proceedings against MW, claiming damages now estimated in the sum of £133 million in respect of:

   i) the costs of rectifying defects;

   ii) delay damages (under the Main Contract or as general damages);

iii) additional costs of completing the works and other losses arising from, or consequent on, termination (under the Main Contract or as damages for repudiatory breach).

10. MW disputes the claims and has a counterclaim for £46.7 million based on the contractual provisions for payment following a termination for convenience.

11. MW seeks to pass on any liability it might have in respect of EWHL's claims to Outotec through an Additional Claim in which MW claims:

i) liquidated damages under the Sub-Contract for delays in delivery of the plant;

ii) an indemnity in respect of MW's liability to EWHL for defects in the plant for which Outotec was responsible, including direct remedial costs and consequential delay and termination losses arising under or as a result of breach of the Main Contract.

12. MW's claim against Outotec is advanced on alternative legal bases:

i) MW's primary case is that the assignment of the Sub-Contract to EWHL only assigned the future right to performance and did not assign any accrued rights under the Sub-Contract. Accordingly, MW is entitled to pursue its claims against Outotec on the basis of those direct accrued contractual rights which existed prior to the assignment.

ii) Alternatively if, as alleged by Outotec and EWHL, the assignment transferred all past and future rights under the Sub-Contract to EWHL, MW submits that properly construed, the assignment also transferred all past and future liabilities and obligations under the Sub-Contract and took effect as a novation.

iii) MW's secondary case is that both Outotec and MW are, or would if sued be, liable to EWHL in respect of the same damage such that MW can claim a contribution from Outotec under the 1978 Act.

13. Outotec disputes MW's entitlement to bring the Additional Claim against it on the following grounds:

i) MW has no claim against Outotec in respect of the quality of its work because the assignment of the Sub-Contract was effective to transfer all benefits, including accrued rights and the right to sue in respect of the same, to EWHL.

ii) MW is not entitled to any contribution under the 1978 Act because MW and Outotec are not liable to EWHL in respect of the same damage for the purpose of the 1978 Act.

14. EWHL supports Outotec's position on the assignment issue. It is neutral on the contribution issue.

The Main Contract

15. The Main Contract incorporates the General Conditions of the IChemE Form of Contract for Lump Sum Contracts ("the Red Book"), 5th Edition, 2013, subject to bespoke amendments.

16. MW's obligations to perform are set out in clause 3, including the following:

> Clause 3.1
>
> "In consideration of payment by the Purchaser, the Contractor shall regularly and diligently carry out and complete the Works in accordance with the Contract and ensure that the Plant as constructed and completed shall comply with the Contract, including (without limitation) meeting any performance specifications set out in the Specification and/or the Schedules and/or the Contractor's Proposals."
>
> Clause 3.1A
>
> "The Contractor shall be responsible for the design of the whole of the Plant. Any design provided by or on behalf of the Purchaser (whether contained in a Contract Document or provided in a Variation Order or otherwise) shall be verified by the Contractor."
>
> Clause 3.2
>
> "All work carried out by the Contractor shall be carried out with sound workmanship and materials, safely and in accordance with good engineering practice and legislation and shall be to the reasonable satisfaction of the Project Manager."
>
> Clause 3.4
>
> "Without derogation from any other provision, and as a separate and independent obligation, the Contractor shall design the Works and every part of the Works:
>
> (a) using all the skill and care reasonably to be expected of duly qualified and experienced designers undertaking the design of works similar in scope, size, complexity and character to the Works or such part of the Works; and
>
> (b) in accordance with Good Industry Practice."

17. The time for completion of the works is defined in clause 13.1:

> "Subject to Clause 14 (Delays), the Contractor shall complete the construction of the Plant, carry out and complete the Take Over procedures and satisfy the requirements under Clause 33 and Schedule 15 to enable the Project Manager to issue the Take over Certificate on or before the date, or within the period,

> specified in Schedule 11 (Times of completion) and shall also complete the construction of any Section of the Plant and do any other thing in the performance of the Contract on or before the dates, within the periods, specified in Schedule 11."

18. The time for completion set out in Schedule 11 is 871 calendar days from the date of the Main Contract.

19. Clause 14 sets out the matters entitling MW to extensions of the time for completing the works.

20. Clause 15.1 provides for Delay Damages in respect of any failure by MW to complete within the time for completion:

> "If the Contractor fails to satisfy the requirements under Clause 33 and Schedule 15 in accordance with Schedule 11 (Times of completion) to enable the Project Manager to issue the Take Over Certificate or the Contractor fails to do any other thing in accordance with Schedule 11 (Times of completion), the Contractor shall pay the Purchaser liquidated damages as specified in Schedule 12 (Liquidated damages for delay), but (subject to Sub-clause 15A) shall have no liability to pay such liquidated damages in excess of the Delay Damages Cap."

21. Liquidated damages for delay are set out in Schedule 12 at a daily rate of £84,800, subject to an aggregate cap of 15% of the Contract Price.

22. Clause 44.1 permits EWHL to terminate MW's employment under the Main Contract for Contractor's default, defined as including at (c):

> "the Contractor having paid or allowed or becoming liable for a sum or sums in aggregate equal to or greater than the Delay Damages Cap."

23. Clause 44.3 provides that on termination under clause 44.1:

> "(a) except as the Project Manager may direct or permit, the Contractor shall forthwith leave the Site and shall have no right to re-enter the Site or to undertake any work, including the rectification of any Defect or to remove any Contractor's Equipment, Temporary Works or Materials;
>
> (b) the Purchaser may himself or through others complete the Works…
>
> …
>
> (d) the Contractor shall, if so required by the Purchaser and to the extent permitted by the subcontract, assign any subcontract to the Purchaser."

24. Clause 44.6 provides for termination accounts to be prepared:

> "Within 90 days after the later of (i) the termination of the Contractor's employment, and (ii) the completion of the Works under Sub-clause 44.3(b) (including the completion of testing and the remedying of defects, such that the total cost to be incurred by the Purchaser has been incurred) the Project Manager shall … issue to the Purchaser and the Contractor a certificate (a 'Default Certificate') which shall give a full statement of account including:
>
> (a) all sums due to the Purchaser from the Contractor including any cost incurred by the Purchaser in completing the Works in accordance with Sub-clause 44.3(b) which is in addition to that which the Purchaser would have incurred if the Contractor had completed the Works in accordance with the Contract; and
>
> (b) all sums due to the Contractor in respect of work completed by the Contractor prior to the termination of his employment other than any such work of a temporary nature necessitated by such termination and any sum due to the Contractor under Sub-clause 44.4(b).
>
> Having allowed for all previous payments made to the Contractor and any sum due to the Purchaser from the Contractor, the Default Certificate shall state the balance due to or from the Contractor."

The Sub-Contract

25. The Sub-Contract incorporates the IChemE Form of Subcontract ("the Yellow Book"), 4th Edition, 2013, subject to bespoke amendments.

26. Clause 3 contains the material obligations of Outotec:

> Clause 3.1
>
> "In consideration of payment by the Contractor, the Subcontractor shall regularly and diligently carry out and complete the Subcontract Works in accordance with the Subcontract."
>
> Clause 3.1A
>
> "The Subcontractor shall be responsible for the design of the whole of the Subcontract Plant. Any design provided by or on behalf of the Contractor (whether contained in a Subcontract Document or provided in a Variation Order or otherwise) shall be verified by the Subcontractor."
>
> Clause 3.2

> "All work carried out by the Subcontractor shall be carried out with sound workmanship and materials, safely and in accordance with good engineering practice and Legislation and shall be to the reasonable satisfaction of the Contract Manager."
>
> Clause 3.10
>
> "The Subcontractor acknowledges that the Subcontract Plant forms part of the Main Contract Plant and that the Subcontract Works form part of the Main Contract Works, and the Subcontractor acknowledges that any breach of its obligations under this Subcontract could result in the Contractor being in breach of its obligations under the Main Contract."

27. Clause 9.1 of the Sub-Contract contains the following provision in respect of assignment:

> "Neither the Contractor nor the Subcontractor shall without the previous consent of the other transfer any benefit or obligation under the Subcontract to any other person in whole or in part, except that:
>
> (a) the Subcontractor may without such consent transfer the right to receive any money which is or may become due to him under the Subcontract; and
>
> (b) if so required by the Purchaser under the Main Contract the Contractor may assign the Subcontract to the Purchaser."

28. Clause 13.1 contains provisions regarding the time for performance:

> "Subject to Clause 14 (Delays), the Subcontractor shall fulfil its obligations under this Subcontract on or before the date, or within the period, specified in Schedule 11 (Time of Completion)."

29. Schedule 11 sets out the delivery periods for key items in respect of the Sub-Contract works.

30. Clause 15.1 provides for liquidated damages in respect of delay:

> "If the Subcontractor fails to fulfil any of its obligations under this Subcontract and, to do any other thing in accordance with Schedule 11 (Times of completion), the Subcontractor shall pay the Contractor liquidated damages as specified in Schedule 12 (Liquidated damages for delay), but shall have no liability to pay damages in excess of the maximum (if any) stated in Schedule 12."

31. Schedule 12 sets out the rates for liquidated damages applicable in the event of delay in respect of the planned availability dates for different sections of the plant, subject to a maximum amount of 10% of the Subcontract sum.

32. Clause 35.2 and Schedule 16 set out Outotec's obligations to carry out reliability tests and performance tests in respect of the plant.

33. Clause 35.13 provides for Outotec to pay liquidated damages for any performance shortfall in accordance with Schedule 17 up to the value of the Performance Damages Cap.

34. Clause 37.2 states:

> "If at any time before the Subcontract Plant is Taken Over in accordance with Clause 33 (Taking Over) or during the Defects Liability Period, the Contract Manager:
>
> (a) decides that any matter is a Defect; and
>
> (b) as soon as reasonably practicable notifies the Subcontractor of the particulars of the Defect;
>
> the Subcontractor shall as soon as reasonably practicable make good the Defect so notified and the Contractor shall so far as may be necessary place the Subcontract Plant at the Subcontractor's disposal for this purpose. The Subcontractor shall, if so required by the Contract Manager, submit his proposals for making good any Defect to the Contract Manager for his approval which shall not be unreasonably withheld."

35. Clause 37.3 provides that if any defect arises from any breach of the Sub-Contract by Outotec, it shall bear its own cost of making good the defect.

36. If Outotec fails to make good within a reasonable time any such defect notified under clause 37, EWHL or MW are entitled to use a third party to carry out the remedial works at Outotec's cost (clauses 37.6, 37.7 and 37.8).

37. Clause 45 contains provisions limiting Outotec's liability:

> Clause 45.1
>
> "Notwithstanding any other provision of the Subcontract neither the Subcontractor nor the Contractor shall be liable to the other for:
>
> …
>
> (b) loss or deferment of anticipated or actual profit, loss of revenue, loss of use, loss of production, business interruption or any similar damage or for any consequential or indirect losses of any kind resulting from or arising out of or in connection with

the Subcontract Works or the performance of them or any act or omission relating the them however caused; except in respect of:

…

(ii) any sum included within the liquidated damages for delay under Sub-clause 15.1…"

Clause 45.2

"Except in the case of termination of the Subcontractor's employment under Clause 44 (Termination for Subcontractor's default) or a repudiation of the Subcontract by either party, the liability of either party to the other arising out of or in connection with the Subcontract or the Subcontract Works, whether by reason of any breach of contract or of statutory duty or tortious or negligent act or omission shall be limited to the damages, remedies and reimbursements expressly provided in the Subcontract… "

Clause 45.3

"The total aggregate liability of the Subcontractor to the Contractor arising out of or in connection with the Subcontract and the Subcontract Works shall not exceed the Subcontract Price (including but not limited to any liability arising under negligence, tort, common law or indemnity).

i) The Subcontractor's liability for liquidated damages for performance pursuant to clause 15 and Schedule 12 shall be limited to a sum equal to 10% of the Contract Price ("Delay Damages Cap")…"

The Outotec Warranty

38. The Outotec Warranty contains the following material provisions:

Clause 1.1

"The Sub-Contractor warrants that it:

(a) has carried out or will carry out and complete the Sub-Contract Works in accordance with and subject to the terms of the Sub-Contract; and

(b) has observed and performed and will observe and perform all of its duties and obligations expressed in or arising out of the Sub-Contract."

Clause 1.2

"The Sub-contractor warrants that all reasonable skill and care have been and will be exercised in the following, to the extent of the Sub-Contractor's responsibility for the same:

(a) the design of the Sub-Contract Works;

(b) the selection of goods, materials, equipment or plant for the Sub-Contract Works; and

(c) the satisfaction of any performance requirement or specification of or for the Sub-Contract Works …"

Clause 4

"4.1 If the employment of the Main Contractor under the Main Contract is terminated, the Beneficiary may within 28 days after the date of termination give notice requiring the Sub-Contractor to enter into a new contract (New Contract) with the Beneficiary or its appointee on the same terms as the Sub-Contract, executed as a deed, but with such revisions as the Beneficiary may reasonably require to reflect altered circumstances, for the continuation and completion of the Sub-Contract Works; and the Sub-Contractor shall comply with such notice.

4.2 Upon the execution of the New Contract the Beneficiary shall pay to the Sub-Contractor a sum equal to the amount due to the Sub-Contractor under the Sub-Contract (less any retention, which shall be payable under the New Contract as if the work or materials to which such retention relates had been supplied under the New Contract).

4.3 Upon the execution of the New Contract, the Beneficiary shall pay the Sub-Contractor (to the extent not included in the sum payable under clause 4.2) the amount of any:

(a) demobilisation costs incurred in consequence of the termination of the Main Contract; and

(b) remobilisation costs incurred in consequence of the Beneficiary's notice given under clause 4.1,

to the extent reasonably or necessarily incurred by the Sub-Contractor."

Clause 7

"The Sub-Contractor shall not have any liability under this Deed for any delay in carrying out the Sub-Contract Works."

Clause 8

"In any claim under this Deed for breach of clause 1 (Duty of care) there shall be available to the Sub-Contractor any defence that:

(a) arises from or in connection with the Sub-Contract; and

(b) would have been available if the claim had been brought by the Beneficiary had the Beneficiary been the contractor under the Sub-Contract,

excluding any set-off or counterclaim available against the Contractor."

Assumed Facts

39. The parties have agreed the following assumed facts for the purpose of the preliminary issues:

Key Dates

i) The Main Contract was dated 20 November 2015.

ii) The Sub-Contract was also dated 20 November 2015.

iii) The Outotec Warranty was provided shortly before 9 February 2016.

iv) The original completion date for the project was 9 April 2018. The project did not complete on that date.

v) The Main Contract contained a provision entitling EWHL to terminate for contractor default if the Delay Damage Cap was reached. The Delay Damages Cap equated to 273 days of culpable delay.

vi) EWHL says MW had no entitlement to an extension of time. As a result, it says that the Delay Damage Cap was reached on 7 January 2019 and it validly terminated the contract for contractor default on 4 March 2019.

vii) MW says that it was entitled to an extension of time of 39 weeks and in any event a sufficient extension that the Delay Damages Cap had not been reached as of that date such that EWHL was not entitled to terminate for contractor default.

First Preliminary Issue

viii) The facts, dates and background relevant to the first preliminary issue are evidenced by the contemporaneous documents contained in Bundle B / Sections C & D.

Defects

ix) It should be assumed for the preliminary issue that:

a) All defects in the Outotec plant alleged by EWHL against MW under the Main Contract and alleged by MW against Outotec under the Sub-Contract exist; and

b) No other defects exist.

Commissioning, Delay and Termination

x) The key stage of the project for the purposes of trial will be the commissioning and testing stage.

xi) MW's position is that the commissioning stage should have started in May 2018 when it obtained or should have obtained a Readiness to Receive RDF certificate. RDF is refuse derived fuel and following "polishing" in the MPT becomes the fuel used to power the waste to energy plant.

xii) At this point, the commissioning of the facility on the final fuel which it would be using could commence.

xiii) The programmed time for commissioning was 10 November 2017 to 20 February 2018 – approximately 3.5 months. Had everything gone smoothly with commissioning, the project could have been completed around the end of August 2018.

xiv) However, this did not happen. There are two key matters raised in the pleadings concerning why commissioning was delayed up to and beyond 4 March 2019 when the Main Contract was terminated:

a) Firstly, MW says that EWHL failed to provide RDF which was compliant with the contractual specification. This delayed commissioning when the RDF was rejected by MW and led to the failure of commissioning when Outotec's plant was damaged as a result of the non-compliant RDF.

b) Secondly, MW says that if it is wrong about this and the RDF was compliant then the reason for the failure of the commissioning was defects with the Outotec plant. In effect, it was not the RDF which damaged the Outotec plant, but rather some latent defect in the plant which manifested itself and caused the commissioning to fail.

xv) As to these allegations:

a) EWHL denies that it failed to deliver compliant RDF and denies that was a cause of critical delay in any event.

b) Outotec denies that its plant was defective under the Sub-Contract.

xvi) For the trial of the preliminary issue, the following should be assumed:

a) Compliant RDF was delivered by EWHL;

b) Commissioning failed because of defects with the Outotec plant;

c) Had the Outotec plant not been defective:

i) Commissioning would have successfully completed around the end of August 2018;

ii) Takeover would have occurred shortly thereafter;

iii) MW's liability to EWHL for liquidated damages would have ceased around August 2018;

iv) The Main Contract would not have been terminated.

d) Instead, as a result of defects in the Outotec plant, the project was substantially delayed beyond the end of August 2018 and the Main Contract was validly terminated by EWHL.

xvii) It is on this set of factual and legal findings (or some variant of them) that MW says Outotec would be directly liable to EWHL (under the Outotec Warranty and/or depending upon the outcome of preliminary issue 1, the assigned Outotec Sub-Contract) and therefore a contribution claim would arise.

Preliminary Issues

40. The preliminary issues for the Court have been formulated by the parties as follows:

Issue 1

Whether, in respect of the assignment of the Outotec Sub-Contract:

i) MW retains the benefit of rights under the Sub-Contract as alleged at paragraphs 26 and 27 of the Amended Part 20 Particulars of Claim; or

ii) if not, this takes effect as an assignment of both the benefit and the burden of the Sub-Contact (or a novation) as alleged at paragraphs 26A and 26B of the Amended Part 20 Particulars of Claim?

Issue 2

In respect of MW's contribution claim at paragraph 28 of the Amended Part 20 Particulars of Claim, whether:

i) any MW liability to EWHL for delay under the Main Contact is or is not the same damage as any Outotec liability under the Sub-Contract and/or the Deed of Warranty said to have been caused by late delivery of, or alleged defects within, the Outotec plant; and

ii) any MW liability to EWHL for losses flowing from termination of the Main Contract is or is not the same damage as any Outotec liability under the Sub-

Contract and/or the Deed of Warranty said to have been caused by late delivery of, or alleged defects within, the Outotec plant;

iii) any MW liability to EWHL for defects under the Main Contact is or is not the same damage as any Outotec liability under the Sub-Contract and/or the Deed of Warranty said to have been caused by alleged defects within the Outotec plant.

Issue 1 – assignment/novation

41. It is common ground that there was a valid assignment of the Sub-Contract by MW to EWHL. The dispute concerns the effect of such assignment, namely, whether it transferred all benefits, including accrued benefits, or merely future rights under the Sub-Contract; if it transferred all benefits, whether it also transferred all obligations so as to amount to a novation.

Background facts

42. Clause 44.3(d) of the Main Contract provides that upon termination for default:

> "the Contractor shall, if so required by the Purchaser and to the extent permitted by the subcontract, assign any subcontract to the Purchaser."

43. Clause 9.1 of the Sub-Contract permits MW to assign the Sub-Contract:

> "…
>
> (b) if so required by the Purchaser under the Main Contract the Contractor may assign the Subcontract to the Purchaser."

44. The Outotec Warranty contains provision for EWHL and Outotec to enter into a potential new contract in the event of the termination of the Main Contract:

> "4.1 If the employment of the Main Contractor under the Main Contract is terminated, the Beneficiary may within 28 days after the date of termination give notice requiring the Sub-Contractor to enter into a new contract (New Contract) with the Beneficiary or its appointee on the same terms as the Sub-Contract, executed as a deed, but with such revisions as the Beneficiary may reasonably require to reflect altered circumstances, for the continuation and completion of the Sub-Contract Works; and the Sub-Contractor shall comply with such notice."

45. On 4 March 2019 EWHL served on MW notice of termination of MW's employment under the Main Contract.

46. By letter dated 13 March 2019, EWHL gave notice to MW that it wished to exercise its right under clause 44.3(d) of the Contract and required the assignment of the Sub-Contract, together with other sub-contracts and purchase orders in respect of the works.

47. By letter dated 15 March 2019 MW informed Outotec that EWHL had requested the assignment of its Sub-Contract:

> "M+W and EWHL are in the process of agreeing the deed of assignment and notice of assignment, with the intention that the assignment of the subcontracts takes place within the next week…
>
> We understand that EWHL will be engaging in discussions directly with you in relation to arrangements for completion of the Works…"

48. EWHL and MW entered into discussions with a view to agreeing a deed of assignment in respect of the Sub-Contract (together with the other subcontracts and purchase orders) but no agreement was reached.

49. By letter dated 28 March 2019 EWHL gave notice to Outotec pursuant to clause 4.1 of the Outotec Warranty as follows:

> "…we require you, as the Sub-Contractor, to enter into a New Contract with us, the Beneficiary, subject to agreement on terms."

50. By letter dated 26 April 2019 MW notified Outotec as follows:

> "Further to the termination of the M&W Contract with Energy works (Hull) Ltd, and as instructed by Energy works (Hull) Ltd under clause 44.3(d) and/or clause 43.3(b) of the Contract, and in accordance with Clause 9.1(b) of the IChem E Forms of Subcontract
>
> we hereby give you notice that we assign the Subcontract with Outotec (USA) Inc. to Energy Works (Hull) Ltd … Energy Works (Hull) Ltd will be in communication regarding ongoing items in respect of your Subcontract…"

51. On the same date, MW sent to EWHL copies of the letters of assignment sent to its sub-contractors, including Outotec, stating:

> "... the responsibility for the subcontracts/purchase orders now rests with EWH for the completion of the Works. For the avoidance of doubt M+W shall not be liable for any costs incurred as a result of any delays to the completion of the Works or costs consequent on any acts of prevention, omissions or breach of any of these assigned subcontracts and purchase orders by EWH."

52. On 20 June 2019 MW wrote to EWHL, stating:

> "MW hereby assigns to EWH the Subcontracts/Purchase orders listed at Appendix A to this letter."

The subcontracts listed at Appendix A included the Sub-Contract.

53. By letter dated 24 June 2019, MW notified Outotec in writing of the assignment of its Sub-Contract to EWHL:

> "Further to the termination of the M+W Contract with Energy Works (Hull) Ltd, and as instructed by Energy Works (Hull) Ltd under clause 44.3(d) and/or clause 43.3(b) of the Contract, and in accordance with, as appropriate:
>
> Clause 9.1(b) of the IChemE Forms of Subcontract
>
> …
>
> we hereby give you notice that we assign the following Subcontracts/Purchase Orders with Outotec (Usa) Inc to Energy Works (Hull) Ltd, 1 Humber Quays, Wellington Street West, Hull, HU1 2BN:
>
> - 06 February 2015
>
> - 18 November 2015
>
> - 20 November 2015
>
> - 06 December 2015 …
>
> Energy Works (Hull) Ltd will be in communication regarding ongoing items in respect of your Subcontracts/Purchase Orders.
>
> It is M+W's position that the Subcontracts/Purchase Orders listed above with Outotec (USA) Inc were previously assigned by way of the letters between Clyde & Co and Fenwick Elliott of 8 April 2019 and 12 April 2019. However, this having been queried, this letter serves as a notice of assignment of those contracts listed above insofar as it has not previously occurred."

54. By a letter dated 5 July 2019 to EWHL, MW set out its understanding as to the effect of the assignments as follows:

> "On 13 March 2019, EWH requested that in accordance with clause 44.3(d) of the EPC Contract, that M+W assigned all subcontracts and purchase orders to EWH.
>
> M+W attempted to agree terms of the assignments with EWH but no such agreement was reached between the parties. As a consequence a "bare" assignment of subcontracts and purchase orders has taken place and no terms in relation to these assignments have been agreed.

> As a consequence of the above, it is unclear as to the effect of assignment due to the parties being unable to agree precise terms. However, it appears that M+W no longer has the benefit of these rights under these subcontracts, including the right to enforce performance of the subcontract and bringing claims.
>
> Having exercised its right to assign all subcontracts, EWH has deprived M+W of its ability to enforce performance of the subcontracts and to bring claims.
>
> EWH required the assignment of all subcontracts so that it can enforce the contractual rights discussed above. As M+W has detailed previously, M+W expects EWH to enforce its assigned rights against the assigned subcontractors as part of EWH's ongoing duty to mitigate its losses …"

55. EWHL and Outotec were unable to agree the terms of a new contract pursuant to the terms of the Outotec Warranty and no such new contract was executed.

Legal principles - assignment

56. A statutory assignment of contractual rights involves the transfer by A of its rights and remedies under a contract with B to a third party C (subject to equities).

57. Section 136 of the Law of Property Act 1925 provides:

> "(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice –
>
> (a) the legal right to such debt or thing in action;
>
> (b) all legal and other remedies for the same; and
>
> (c) the power to give a good discharge for the same without the concurrence of the assignor …"

58. Chitty on Contracts (33rd Edition, [19-008]) summarises the requirements for an effective statutory assignment as follows:

> "It will be seen that, in order that the section may apply, three conditions must be fulfilled:
>
> (1) the assignment must be absolute and not purport to be by way of charge only;
>
> (2) it must be in writing under the hand of the assignor;

> (3) express notice in writing thereof must be given to the debtor or trustee.
>
> The general effect of the section is to allow the assignee to sue the debtor in his own name instead of, as previously, having to sue in the name of the assignor and perhaps having to go to a court of equity to compel his joinder in the action."

59. In *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 the House of Lords was concerned with the effect of contractual provisions in two contracts that prohibited the assignment of each contract without the consent of the other party. In considering the effect of this prohibition, Lord Browne-Wilkinson stated at p.103B & E:

> "The argument runs as follows. On any basis, clause 17 is unhappily drafted in that it refers to an assignment of "the contract". It is trite law that it is, in any event, impossible to assign "the contract" as a whole, i.e. including both burden and benefit. The burden of a contract can never be assigned without the consent of the other party to the contract in which event such consent will give rise to a novation…
>
> Although it is true that the phrase "assign this contract" is not strictly accurate, lawyers frequently use those words inaccurately to describe an assignment of the benefit of a contract since every lawyer knows that the burden of a contract cannot be assigned."

60. Lord Browne-Wilkinson recognised that a distinction could be drawn between future rights and accrued rights for the purpose of an assignment but clear words would be required to separate them – see pp.103H and 105E:

> "The majority in the Court of Appeal drew a distinction between an assignment of the right to require future performance of a contract by the other party on the one hand and an assignment of the benefits arising under the contract (e.g. to receive payment due under it or to enforce accrued rights of action) on the other hand.
>
> …
>
> I accept that it is at least hypothetically possible that there might be a case in which the contractual prohibitory term is so expressed as to render invalid the assignment of rights to future performance but not so as to render invalid assignments of the fruits of performance. The question in each case must turn on the terms of the contract in question."

61. On the drafting of the contractual provisions in the cases before the House, Lord Browne-Wilkinson concluded that the prohibition on assignment of *"this contract"* did

not make such a distinction; the intention must have been to prohibit both an assignment of rights to future performance and accrued rights – see pp.105E and 106B-C:

> "The question is to what extent does clause 17 on its true construction restrict rights of assignment which would otherwise exist? In the context of a complicated building contract, I find it impossible to construe clause 17 as prohibiting only the assignment of rights to future performance, leaving each party free to assign the fruits of the contract.
>
> …
>
> … parties who have specifically contracted to prohibit the assignment of the contract cannot have intended to draw a distinction between the right to performance of the contract and the right to the fruits of the contract. In my view they cannot have contemplated a position in which the right to future performance and the right to benefits accrued under the contract should become vested in two separate people. I say again that that result could have been achieved by careful and intricate drafting, spelling out the parties' intentions if they had them. But in the absence of such a clearly expressed intention, it would be wrong to attribute such a perverse intention to the parties. In my judgment, clause 17 clearly prohibits the assignment of any benefit of or under the contract."

62. Although *Linden Gardens* was concerned with terms of prohibition rather than permission, the relevant principles for the purpose of this case can be summarised as follows:

    i) Subject to any express contractual restrictions, a party to a contract can assign the benefit of a contract, but not the burden, without the consent of the other party to the contract.

    ii) In the absence of any clear contrary intention, reference to assignment of the contract by the parties is understood to mean assignment of the benefit, that is, accrued and future rights.

    iii) It is possible to assign future rights under a contract without the accrued rights but clear words are needed to give effect to such intention.

Parties' submissions on assignment

63. Mr Williamson QC, leading counsel for Outotec, and Mr Dennison QC, leading counsel for EWHL, submit that the assignment of *"the Sub-Contract"* was effective to assign MW's accrued and future rights under the Sub-Contract to EWHL:

    i) the parties, who were sophisticated and well-advised, agreed that, on termination, there would be an assignment of the benefits of the Sub-Contract;

ii) the natural and ordinary meaning of the phrase *"assign any subcontract"* in clause 44.3(d) of the Main Contract and *"assign the Subcontract"* in clause 9.1(b) of the Sub-Contract is assignment of the benefit of the whole of the Sub-Contract;

iii) on termination, MW assigned the benefit of the whole of the Sub-Contract;

iv) the effect of the assignment was to transfer to EWHL both accrued and future rights under the Sub-Contract.

64. They submit that there is commercial justification for the assignment of accrued and future rights under the Sub-Contract in the circumstances of a termination; to enable EWHL to mitigate its losses by enforcing such rights against Outotec. In any event, MW would not be entitled to rely on business common sense arguments to displace the natural and ordinary meaning of the contractual provisions.

65. Mr Moran QC, leading counsel for MW, submits that the words *"assign the Sub-Contract"* are at least ambiguous since:

i) the Main Contract refers to the assignment of the Sub-Contract and does not specifically identify what element of the benefits under the same at the date of transfer are to be assigned;

ii) this is a case where a contractor is agreeing to assign its own sub-contract (rather than one where it is seeking to assign its benefit in the main contract, or being prohibited from doing so);

iii) the wording of the Sub-Contract distinguishes between the assignment of benefits under the Sub-Contract on the one hand and the assignment of the Sub-Contract as a whole (including all benefits and burdens) on the other; and

iv) it is made conditional upon permission for the transfer existing under the Sub-Contract.

66. MW's position is that on a proper interpretation of the Main Contract, having regard to the commercial purpose of the assignment provision, it provides for the assignment of the right to future performance only. The proper interpretation of the assignment is that it was limited to such rights/benefits.

Discussion and conclusion on assignment

67. The starting point is to consider the words used by the parties in the relevant contracts and notices. A natural and ordinary reading of the words used in the Main Contract and Sub-Contract leads to the conclusion that the agreement to *"assign the Sub-Contract"* was an agreement to assign all MW's benefits under the Sub-Contract to EWHL, both future rights and accrued rights. As stated by Lord Browne-Wilkinson in *Linden Gardens,* this is what parties usually mean when they refer to assigning a contract.

68. In correspondence giving notice of the assignment, MW used the same phrase *"assign the Sub-Contract(s)"*, referring to clause 44.3(d) of the Main Contract and clause 9.1(b) of the Sub-Contract. There is no indication in any of the contemporaneous documents that the parties had an understanding of the words *"assign the Sub-Contract"* that was

different to the contractual provisions and/or usual meaning, or that the parties intended to separate future and accrued rights for the purpose of the assignment.

69. It would have been possible for MW and Outotec to have limited the rights that could be assigned to EWHL. However, they did not do so. There is no careful drafting in the Main Contract or Sub-Contract, or in a bespoke assignment notice or deed, setting out the parties' intention to divide the accrued and future rights under the Sub-Contract as between MW and EWHL.

70. Mr Moran submits that such an intention can be discerned from the wording of clause 9.1 of the Sub-Contract, which distinguishes between an assignment of the Sub-Contract and an assignment of merely some of the benefits thereunder. At the very least, he submits that the words *"assign the Sub-Contract"* are ambiguous.

71. Clause 9.1 of the Sub-Contract contains a general prohibition on any assignment of the benefit or burden of the Sub-Contract with two exceptions, (a) and (b). The differences between the words used in (a) and (b) indicate that the parties intended to draw a distinction between the permission given to Outotec in (a) and that given to MW in (b). The permission in (a) is a limited exception permitting Outotec to assign *"the right to receive any money … due"* but does not extend to all of Outotec's rights under the Sub-Contract. In contrast, the permission in (b) is wider, permitting MW to assign *"the Sub-Contract"* if required under the Main Contract.

72. The difference in language used between (a) and (b) indicates that the parties intended *"the Sub-Contract"* to cover more than a mere right to receive money due to MW under the Sub-Contract. The permission in (b) does not state that it is limited to specific rights under the Sub-Contract. MW's argument is that it could refer to the Sub-Contract as a whole, including all benefits and all burdens. However, that would ignore the usual position as set out by Lord Browne-Wilkinson in *Linden Gardens*, that ordinarily this form of words would indicate a presumed intention to assign only the benefit of the Sub-Contract. In the absence of any contrary expressed intention, the inference is that the permission in (b) extends to all rights under the Sub-Contract, both future and accrued. The parties could have used clear words to indicate that the permitted assignment was limited to future rights but there are no such words.

73. The interpretation of the assignment provisions must include consideration of the words used against the factual and contractual matrix, including any common commercial purpose of the provisions: *Arnold v Britton* [2015] UKSC 36 per Lord Neuberger at [15]-[21]; Lord Hodge at [77].

74. MW's case is that Outotec is responsible for defects in the plant that caused, or contributed to the losses claimed by EWHL against MW. Mr Moran submits that it would be implausible and an uncommercial interpretation to find that the presumed contractual intention of the parties was that MW could be forced to give up its right to sue the very parties responsible for causing it such vast losses as might arise from a termination for contractor default.

75. The right to call for the assignment arises where there has been termination for contractor default. Following a termination under the Main Contract for contractor default, MW has no right or obligation to perform any further works, including any remedial works, and EWHL is entitled to complete the works using alternative

contractors. Following expiry of 90 days from the later of termination or completion of the works, a final account must be produced as between EWHL and MW, bringing into account sums due and costs incurred on both sides, including any increased cost of completion as a result of the termination. In those circumstances, the commercial purpose of assignment of the accrued and future rights under the Sub-Contract is not to enable EWHL to take over the sub-contract works; it already has an express right to complete the works using others. The commercial purpose of assignment of the Sub-Contract is to allow EWHL to enforce those sub-contract rights against Outotec to mitigate its losses by seeking rectification of the works, specific performance of particular obligations or compensation.

76. It is recognised that MW would assume a commercial risk in giving up its right under the Sub-Contract to pass on to Outotec claims for which MW retained responsibility to EWHL under the Main Contract. That would be an extension to the risk implicit in this form of contractual arrangement, whereby the main contractor could be held liable for matters for which a sub-contractor was responsible without the ability to pass on such liability, for example where the sub-contractor became insolvent or had the benefit of contractual exclusion or limitation terms. If and to the extent that EWHL enforced its rights as assignee against Outotec to obtain rectification or compensation, that could reduce the losses EWHL would seek to claim against MW but there would remain a residual risk as postulated by MW.

77. However, it is a matter for the parties to determine the basis on which they allocate risk within the contractual matrix. It is not for the Court to re-write the contractual arrangements entered into by the parties or to impose what it considers would be an equitable and fair commercial bargain by reference to the events that have unfolded.

78. MW raises potential difficulties that would arise on an assignment of its rights under the Sub-Contract to EWHL, namely, (i) responsibility for payment applications, (ii) the power to instruct additional works and (iii) the right to terminate the Sub-Contract. The position is not straightforward where mutual obligations survive under a continuing contract following the assignment of rights to a third party without creating any privity of contract between the assignee and the original parties to the contract.

79. As to (i) responsibility for payment applications, MW would remain liable for any outstanding payment obligations but would be entitled to bring such payments into account for the purpose of the final accounting exercise under the Main Contract.

80. As to (ii) the power to instruct additional works, following an assignment of its rights, MW would not have any power to instruct additional work or issue other directions under the Sub-Contract; further, it would have no incentive to do so, given that it would have no right or obligation to perform the works under the Main Contract. As recognised by Mr Dennison, EWHL would not be entitled as assignee to require further performance of any work by Outotec without putting in place an agreed mechanism for payment, whether by way of conditional benefit attaching to the right to instruct work (as explained in *Budana v Leeds Teaching Hospitals NHS Trust* [2017] WLR 1980 by Gloster LJ at [53]) or commercial reality.

81. As to (iii) the right to terminate the Sub-Contract, EWHL would not be a party to the Sub-Contract and, therefore, could not bring the Sub-Contract to an end but it could prevent further performance by Outotec. Following termination, Outotec would have

no right of access to the site. As against EWHL, any right of access depended on MW's right under the Main Contract and such right ended on termination.

82. These potential difficulties could have been avoided by MW exercising its right to terminate Outotec's employment under the Sub-Contract, for convenience or for default, as applicable. This would not have avoided the position in which MW has been required to give up its right to sue Outotec whilst retaining potential liability to EWHL under the Main Contract but it would have resolved at least some of the practical difficulties of administration under the subsisting Sub-Contract.

83. Regardless such difficulties, they do not justify any re-writing of the agreements to change the allocation of risk under the bargains entered into by the parties. Effect must be given to the clear provisions for assignment.

84. On a true construction of clause 44.3(d) of the Main Contract and clause 9.1 of the Sub-Contract, the parties agreed that on termination of MW's employment under the Main Contract for default, if required by EWHL, MW would assign all of its rights under the Sub-Contract to EWHL. MW gave notice that it assigned the Sub-Contract to EWHL. Notice of the assignment was given to Outotec. That was effective to assign all accrued and future rights under the Sub-Contract to EWHL.

Legal principles - novation

85. Novation can be summarised as an agreement or agreements between A, B and C pursuant to which B's rights and obligations under an existing contract with A are assumed by C under a new contract with A. The original contract between A and B is extinguished and a new contract is formed between A and C. All parties must consent to the novation.

86. The necessary consent may be given in advance of the novation provided that such consent is clearly expressed: *Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd* [2011] QB 943 per Moore-Bick LJ:

> "[19] … It is trite law that novation, which involves the addition or substitution of a new party to an existing contract, requires the consent of all existing parties as well as that of the new party himself…
>
> …
>
> [22] Although there has been some discussion in the authorities about the principles involved, there has hitherto been no real doubt that under English law a party to a contract may effectively give consent in the contract itself to a subsequent novation. The point was touched on in *The Argo Fund Ltd v Essar Steel Ltd* [2005] EWHC 600, also a case relating to a syndicated loan, in which it was common ground between the parties that terms similar to those of clause 26 in the present case were effective to achieve the parties' object. The analysis proposed in that case was that of unilateral contract (see paragraphs 51-52), which I find persuasive … The provisions of clause 26 in this case cannot

> possibly be described as nebulous and there is no uncertainty about the terms of the contract to which a novation gives rise."

87. The need for clarity if advance consent to novation is intended was explained in *Galliford Try Infrastructure Ltd v Mott MacDonald Ltd* (2008) 120 Con LR 1 by Akenhead J at [153]:

> "(i) … as novation does not as such involve a transfer of rights or obligations, the word 'transfer' is not apt to describe a requirement to novate. (ii) … If what was intended was a right to require MM to novate with MCL or the design and build contractor yet to be appointed, one would expect much clearer wording than simply, 'we shall be entitled to transfer this Appointment'. One would need wording which explained that the appointment would be extinguished and replaced by a new one. On balance, I consider that 'assign or transfer' were synonymous."

88. The differences between novation and assignment were summarised helpfully in *The Argo Fund Ltd v Essar Steel Ltd* [2005] EWHC 600 by Aiken J at [61]:

> "… there are four main differences. First, a novation requires the consent of all three parties involved … But (in the absence of restrictions) an assignor can assign without the consent of either assignee or the debtor. Secondly, a novation involves the termination of one contract and the creation of a new one in its place. In the case of an assignment the assignor's existing contractual rights are transferred to the assignee, but the contract remains the same and the assignor remains a party to it so far as obligations are concerned. Thirdly a novation involves the transfer of both rights and obligations to the new party, whereas an assignment concerns only the transfer of rights, although the transferred rights are always "subject to equities". Lastly a novation, involving the termination of a contract and the creation of a new one, requires consideration in relation to both those acts; but a legal assignment (at least), can be completed without the need for consideration."

89. MW relies on the principle of conditional benefits in support of its submission that the burden and benefit of the Sub-Contract were transferred to EWHL. This concept is addressed in *Chitty* at 19-079 &19-080:

> "The principle that the burden of a contract cannot be transferred so as to discharge the original contractor without the consent of the other party means that, as a general rule, the assignee of the benefit of a contract involving mutual rights and obligations does not acquire the assignor's contractual obligations…
>
> … However, where contractual rights are assigned, the extent of those rights will be defined by the original contract… The conditional benefit principle arises where the right assigned is

> conditional or qualified, the condition being that certain restrictions shall be observed or certain burdens assumed. The restrictions or qualifications are an intrinsic part of the right which the assignee has to take as it stands. The question whether a contract creates a conditional benefit is one of construction."

90. In *Budana v Leeds Teaching Hospitals NHS Trust* [2017] EWCA Civ 1980 the deed of assignment, whereby the claimant expressly agreed to transfer a conditional fee agreement ("CFA") from one firm of solicitors to another, involved the discharge of the original solicitors from all obligations under the CFA and the consent of the claimant to the new solicitors assuming such obligations. The Court of Appeal was in agreement that the success fee payable under the original CFA was valid but the contractual analysis differed, Gloster LJ and Beatson LJ favouring novation and Davis LJ favouring assignment of the CFA.

91. The principle of conditional benefit was explained by Gloster LJ at [26]:

> "… where a right under a contract was conditional upon, or qualified by, performance of some obligation in return for which the right has been granted, an assignee of the benefit of such right will only be entitled to exercise the right subject to performance of the burden: *Tito v Waddell (No.2)* [1977] Ch 106, 290, per Megarry V-C; *Rhone v Stephens* [1994] 2 AC 310, 322, per Lord Templeman; *Davies v Jones* [2010] 2 All ER (Comm) 755, para 27, per Sir Andrew Morritt C. That principle is referred to in the authorities as "the conditional benefit principle"."

92. However, Gloster LJ clarified at [62] that the conditional benefit principle did not involve any assignment of the burden of a contract:

> "Rather, it involves the imposition by law on a contractual assignee or successor in title of a positive obligation under the relevant contract or conveyance, notwithstanding the absence of any contractual or estate obligation to the third party beneficiary of the obligation."

93. On the facts of that case, although the deeds in question referred to assignment of the benefit and burden under the previous retainer, the majority of the Court of Appeal held that, on a proper analysis of the documents, there was a novation – per Gloster LJ at [65] and [66]; Beatson LJ at [117]-[119].

94. Davis LJ was prepared to consider this case as an incremental extension to the doctrine of conditional benefit but held that there was no obstacle as a matter of principle to the assignment of the burden of a contract where the tripartite contractual arrangements were clear:

> "[92] … the general principle, enunciated uncompromisingly by Lord Browne-Wilkinson, is not, in my view, wholly inflexible. Thus if the parties to an agreement expressly agree in it that one party may assign both the benefits and the obligations of performing the contract to another then in my opinion there can

> be no legal objection to the efficacy of such an assignment, as an assignment, if effected thereafter. For another thing, the doctrine of conditional benefit, as discussed by Gloster LJ and to which I will come, constitutes another potential modification to any so-called general principle.
>
> [93] Be that as it may, it seems to me important that the authorities in this field are clear that ultimately what is critical is the interpretation of the contractual arrangements in question."

95. The relevant principles that can be drawn from the above authorities for the purpose of this case are as follows:

    i) Novation occurs when the original contract between A and B is extinguished and replaced by the creation of a new contract between A and C.

    ii) Novation requires the consent of all parties to the original and new contract.

    iii) Such consent or authorisation can be given in the original contract but clear words are needed to express such intention and the terms of the new contract must be sufficiently certain to be enforceable.

    iv) The principle of conditional benefit can apply so as to impose on the contractual assignee a positive obligation where such obligation is inextricably linked to the benefit assigned.

    v) In every case the Court must construe the contractual arrangements to give effect to the expressed intentions of the parties.

    vi) The Court must not confine the interpretation exercise to a semantic analysis of the contractual provisions and other material documents; notwithstanding the descriptions or labels used by the parties, the established rules of construction apply, as set out in *Arnold v Britton* (above).

Parties' submissions on novation

96. Outotec and EWHL submit that:

    i) the terms "assignment" and "novation" are not interchangeable; they are very different legal concepts;

    ii) by using the word "assign", as opposed to novate, it would have been understood on all sides that it was only the benefits that were being transferred;

    iii) the notices served by MW constituted a statutory assignment under section 136(1) of the Law of Property Act 1925, which operates as an absolute transfer of MW's legal rights but not its obligations under the Sub-Contract;

    iv) the principle of conditional benefit does not arise in this case;

    v) there is nothing odd about an employer on termination of a Main Contract seeking to have a mechanism for transfer of the benefits of the Sub-Contracts

(so that, for example, the Sub-Contract is not terminated and the Sub-Contractors do not immediately walk off site) whilst leaving the burdens to be clarified in further new contracts, as anticipated in the Outotec Warranty.

97. MW submits that:

i) The wording of the relevant provisions purported to assign, without reservation, *"the Sub-Contract"* and not a limited body of rights under it;

ii) the language used in the contractual documents, *"assign the Sub-Contract"*, could and should be read as a reference to assignment of the benefit and burden under the Sub-Contract, alternatively, taking effect as a novation;

iii) clause 44.3 expressly required the consent of Outotec to any transfer;

iv) by reason of clause 9.1(b) of the Sub-Contract Outotec provided its consent (in advance) to any assignment of the Sub-Contract, including the burden of the Sub-Contract, to EWHL;

v) in those circumstances, the ordinary assumption that the assignment should be taken to be legal shorthand for a proposed assignment of only the *benefit* of the contact (as per Lord Brown-Wilkinson in *Linden Gardens*) does not necessarily arise.

Discussion and conclusion - novation

98. The use of the words *"assign the Sub-Contract"* in the Main Contract and in the Sub-Contract are very strong indications that the parties intended assignment and not novation. I accept Mr Moran's submission that the label given by the parties is not conclusive and that each contract must be construed against the relevant factual matrix. However, in this case, there are no words in any of the relevant documents that indicate an intention to extinguish the Sub-Contract and replace it with a new sub-contract. This can be contrasted with the position in *Budana* (above) where, although the words *"assignment"* and *"transfer"* were used, there was also express reference to assignment of *"the rights and liabilities, benefits and burdens"* of the retainer, the language of novation and fresh deeds were entered into by the parties.

99. The use of the term *"assign the Sub-Contract"* in MW's correspondence giving notice of the assignment, likewise, is a very strong indication that assignment rather than novation was intended and understood by the parties.

100. Novation and assignment are very different legal concepts and it must be assumed that the parties meant what they said in referring to assignment rather than novation.

101. MW relies on clause 9.1(b) of the Sub-Contract as advance consent by Outotec to any assignment of the Sub-Contract, including the burdens thereunder, to EWHL.

102. In theory, there could be advance consent to a novation, as explained in *Habibsons Bank* (above). The "standing offer" to terminate the existing sub-contract would be made by Outotec to MW in Clause 9.1 of the Sub-Contract and the offer to conclude a new sub-contract would be made to EWHL, named as the Purchaser under the Main Contract in clause 9.1(b) of the Sub-Contract. As to acceptance of the standing offer, in

the case of the existing sub-contract, Outotec's offer would be accepted by MW by service of notice of the assignment to Outotec. The necessary mutual consideration would be provided by MW and Outotec each agreeing to give up all its rights and obligations as against the other. The standing offer to EWHL would be accepted by its agreement to the assignment of the Sub-Contract from MW.

103. However, that analysis would require the Court to ignore the use of the word *"assign"* in clause 9.1(b) of the Sub-Contract, a positive indication of intent to assign, despite the absence of any words indicating that the parties in this case intended to effect a novation.

104. Further, in the cases where advance consent to novation was held to be valid, the terms of the new contract were identical in all material respects to the existing contract. In this case, the proposed terms of any new contract between EWHL and Outotec would not be identical to the terms of the Sub-Contract; the terms of any new contract were not identified, let alone agreed, at the date of the original contracts.

105. Clause 4.1 of the Outotec Warranty expressly provides for EWHL to require Outotec to enter into a substitute contract where a termination has occurred. Clause 4.2 provides for EWHL to pay Outotec sums due under the Sub-Contract (in respect of MW's outstanding obligations) if such a new contract is made. But the terms of any new sub-contract were not fixed; clause 4.1 provides for any new sub-contract to be on the same terms as the Sub-Contract but with such revisions as EWHL might reasonably require (to reflect the altered circumstances). That is not sufficiently certain to be enforceable. It is significant that, following the termination, EWHL and Outotec entered into discussions but were unable to reach agreement on the terms of a new sub-contract and no such contract has been executed. In those circumstances, the Court would be riding roughshod over the freedom of the parties to negotiate their own terms if it imposed on them the original Sub-Contract conditions by novation.

106. Therefore, even if the reference to assignment could be construed as consent to novation of the Sub-Contract, the parties did not reach agreement on the terms of the intended novation. It follows that there was no novation of the Sub-Contract.

107. The principle of conditional benefit does not assist MW. MW has not identified any obligations that are intrinsically linked to any of the accrued rights under the Sub-Contract to sue Outotec. In any event, as explained by Gloster LJ in *Budana*, even if the principle applied, it would not amount to a novation.

108. In summary, there was an effective assignment of MW's accrued and future rights under the Sub-Contract by the notices in writing given to EWHL and Outotec.

Issue 2 - Contribution

109. Having determined that MW assigned its accrued and future rights under the Sub-Contract to EWHL, MW has no right to seek any direct remedy from Outotec under the Sub-Contract. It follows that MW is not entitled to pursue its additional claim against Outotec for liquidated damages under the Sub-Contract. Any claim by MW for an indemnity or contribution against Outotec must arise, if at all, under the 1978 Act.

110. The dispute centres on whether the damage for which MW is potentially liable to EWHL can be characterised as the same damage for which Outotec is potentially liable to EWHL.

111. The pleaded case by EWHL against MW includes the following allegations in the Amended Particulars of Claim:

i) Delay

MW failed to complete the works and the plant within the time for completion stipulated in Schedule 11, by 9 April 2018. EWHL claims liquidated damages under the terms of the Main Contract; alternatively, general damages for delay.

ii) Termination losses

By 7 January 2019 the Delay Damages Cap was reached and MW had not completed the plant or satisfied the contractual requirements for take over; as a result, EWHL had a right of termination which it exercised on 4 March 2019 pursuant to clause 44.1(c) of the Main Contract or at common law. EWHL claims costs arising from, or consequent on, the termination pursuant to the terms of the Main Contract; alternatively as damages for repudiatory breach.

iii) Defects

In breach of contract, MW failed to carry out and complete the works in accordance with the terms of the contract. A list of defects, together with the nature of the defect, the remedial works required and costs incurred or estimated, is set out in Appendix 4.

112. The pleaded case by MW against Outotec includes the following allegations in the Amended Additional Claim:

i) Delay

Outotec failed to complete the plant and make it available for collection by the dates set out in the table in Schedule 11. MW claims liquidated damages under the terms of the Sub-Contract, calculated in accordance with Schedule 12.

ii) Defects

If, and to the extent that, EWHL establishes any defect in the plant, such defect constitutes or arises out of a breach of the Sub-Contract by Outotec. A list of the defects which MW seeks to pass on to Outotec, together with the nature of the relevant allegations against MW and the breaches of the Sub-Contract, is set out in Annex 1.

iii) Termination losses

MW seeks to pass on to Outotec any other liability under the Main Contract which MW would not have incurred but for the defects for which Outotec is responsible. This includes MW's increased liability for liquidated damages as a

result of the defects and any impact on MW's liability for the termination under the Main Contract.

Legal principles - contribution

113. The 1978 Act provides as follows:

> Section 1(1)
>
> "Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)."
>
> Section 2(1)
>
> "Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."
>
> Section 2(2)
>
> "Subject to subsection (3) below, the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity."
>
> Section 2(3)
>
> "Where the amount of the damages which have or might have been awarded in respect of the damage in question in any action brought in England and Wales by or on behalf of the person who suffered it against the person from whom the contribution is sought was or would have been subject to –
>
> (a) any limit imposed by or under any enactment or by any agreement made before the damage occurred …
>
> the person from whom the contribution is sought shall not by virtue of any contribution awarded under section 1 above be required to pay in respect of the damage a greater amount than the amount of those damages as so limited or reduced."

114. The meaning and effect of section 1 of the 1978 Act was considered in *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14 per Lord Bingham at [6]:

> "When any claim for contribution falls to be decided the following questions in my opinion arise:

> (1) What damage has A suffered?
>
> (2) Is B liable to A in respect of that damage?
>
> (3) Is C also liable to A in respect of that damage or some of it?
>
> … I do not think it matters greatly whether, in phrasing these questions, one speaks (as the 1978 Act does) of "damage" or of "loss" or "harm", provided it is borne in mind that "damage" does not mean "damages" (as pointed out by Roch LJ in *Birse Construction Ltd v Haiste Ltd* [1996] 1WLR 675, at p 682) and that B's right to contribution by C depends on the damage, loss or harm for which B is liable to A corresponding (even if in part only) with the damage, loss or harm for which C is liable to A. This seems to me to accord with the underlying equity of the situation: it is obviously fair that C contributes to B a fair share of what both B and C owe in law to A, but obviously unfair that C should contribute to B any share of what B may owe in law to A but C does not."

115. Per Lord Steyn at [27]:

> "… The critical words are "liable in respect of the same damage." Section 1(1) refers to "damage" and not to "damages": see *Birse Construction Ltd v Haiste* Ltd [1996] 1 WLR 675, 682 per Roch LJ. It was common ground that the closest synonym of damage is harm. The focus is, however, on the composite expression "the same damage". As my noble and learned friend Lord Bingham of Cornhill has convincingly shown by an historical examination the notion of a common liability, and of sharing that common liability, lies at the root of the principle of contribution: see also Current Law Statutes Annotated (1978), "Background to the Act" at p 47. The legislative technique of limiting the contribution principle under the 1978 Act to the same damage was a considered policy decision. The context does not therefore justify an expansive interpretation of the words "the same damage" so as to mean substantially or materially similar damage. Such solutions could have been adopted but considerations of unfairness to parties who did not in truth cause or contribute to the same damage would have militated against them. Moreover, the adoption of such solutions would have led to uncertainty in the application of the law. That is the context of section 1(1) and the phrase "the same damage". It must be interpreted and applied on a correct evaluation and comparison of claims alleged to qualify for contribution under section 1(1). No glosses, extensive or restrictive, are warranted. The natural and ordinary meaning of "the *same* damage" is controlling."

Parties' submissions on contribution

116. Mr Williamson submits that MW's potential liability to EWHL is in respect of damage that is different to the damage giving rise to Outotec's potential liability to EWHL:

i) MW is not liable with Outotec to EWHL in respect of the same damage for delay. EWHL's delay claim against MW is for liquidated damages under the Main Contract. The regime under the Sub-Contract is quite different. The relevant periods of delay are different, the applicable events giving rise to the damage or loss are completely different and the applicable damages are in different rates and currency.

ii) The termination losses for which MW would be liable under the Main Contract, or for damages for repudiatory breach, are not matters for which Outotec would be liable under the Sub-Contract.

iii) The defects alleged against MW arise in respect of different obligations under the Main Contract and are not back-to-back with the obligations under the Sub-Contract.

iv) Further, there is an express remedy in the Sub-Contract, namely, that Outotec should put right any defects at its own cost (clause 37.3). The remedies and liabilities under the Sub-Contract are exclusive (clause 45.2). Unless MW can bring the defects claim within this express and exclusive remedy, the same damage test cannot be satisfied.

117. Mr Moran submits that the same damage test is satisfied in this case. MW's additional claim against Outotec is that:

i) Outotec delivered its plant late;

ii) if EWHL is correct about the defects alleged in Appendix 4 of the claim, then some of these constituted defects in the plant supplied by Outotec; and

iii) if EWHL is successful in its termination case, Outotec's defective plant was a cause of critical delay to the project and therefore some or all of the delay and termination losses may be properly passed down by MW to Outotec.

118. Mr Moran submits that there are two relevant contractual routes whereby Outotec is potentially liable to EWHL:

i) The Main Contract provided that MW was obliged to assign its contracts with sub-contractors and suppliers in the event of termination of the Main Contract. MW complied with this clause by assigning the Sub-Contract. The assignment of rights under a contract includes a cause of action for any breach of contract, together with the right to claim damages by way of remedy for such breach: *Offer-Hoar v Larkstore Ltd* [2006] EWCA Civ 1079 per Mummery LJ at [41]. Therefore, if this assignment transferred MW's historic accrued rights to sue Outotec for breach of contract, then Outotec is liable to EWHL pursuant to those rights.

ii) Separately, Outotec provided a collateral warranty to and in favour of EWHL which warranted that it had not and would not breach the Sub-Contract. This

provides a separate route for liability to arise directly between Outotec and EWHL which is not dependent upon the outcome of the assignment point in relation to the Sub-Contract.

Discussion

119. Having determined that there was an effective assignment of all rights under the Sub-Contract to EWHL, it would be open to EWHL to choose whether to pursue any claim against Outotec, by way of a direct claim under the Outotec Warranty and/or through its assigned rights under the Sub-Contract. A claim under the Outotec Warranty would be based on any failure by Outotec to perform its obligations under the Sub-Contract and/or exercise care and skill. Any such claim in respect of delay would be excluded by clause 7 of the Outotec Warranty and Outotec would be entitled to rely on any defences available under the Sub-Contract.

120. It is clear that EWHL would have legal hooks on which it might hang claims against Outotec in addition to its claims against MW. But that still raises the pertinent question for the purposes of contribution, namely, whether EWHL has a right to seek a remedy against Outotec for the same damage that is claimed against MW.

121. One approach to that question involves consideration as to whether the parties' rights would be the same if EWHL had sued both MW and Outotec in these proceedings and they had exchanged contribution notices. The issue would be whether EWHL was advancing a claim for damage, loss or harm for which both MW and Outotec were liable, in which case (if the claim were established) the court would have to apportion the common liability between the two parties responsible, or whether EWHL was advancing separate claims for damage, loss or harm for which MW and Outotec were independently liable, in which case (if the claims were established) the court would have to assess the sum for which each party was liable but could not apportion a single liability between the two.

Issue 2(i) - delay

122. It is common ground that the liquidated damages claimed by MW against Outotec are not the same as the liquidated damages claimed by EWHL against MW. However, that is not the end of the matter because, as Lord Bingham explained in *Royal Brompton* (above), the question is whether there is liability for the same damage; not the same damages. MW submits that the damage suffered by EWHL, delay to the project, is the same in each case, at least in part.

123. EWHL's claim against MW is for failure to complete the works within the time for completion set out in Schedule 11 of the Main Contract. MW's liability for this failure is contractual liquidated damages or general damages for that delay.

124. EWHL's claim against Outotec, relying on the accrued rights assigned by MW, would be for failure to complete the sub-contract works within the time set out in Schedule 11 of the Sub-Contract. The dates set out in Schedule 11 are different from the time for completion set out in the Main Contract and relate to different elements of the plant. The liquidated damages payable under the Sub-Contract are based on specified rates for different parts of the works. As Mr Williamson submits, this is a very different regime to that under the Main Contract.

125. However, the compensation claimed by EWHL in each case would be for the same type of harm, that is, late completion of the project.

126. The extent of the harm or damage caused by each of MW and Outotec would be assessed against different contractual obligations as to dates for completion, and the component work or plant required to be complete by such dates. The relevant period of delay alleged against MW is 9 April 2018 to 7 January 2019, whereas the relevant period of delay alleged against Outotec is 21 October 2016 to 31 August 2018. Where there was no overlap in the periods of delay suffered by EWHL, the claims against MW and Outotec would concern the same type of harm but not the same harm; where the periods of delay for which each was responsible under their respective contracts overlapped, there would be a common liability to EWHL for the same harm.

127. The level of any damages recoverable against each party would be calculated differently and, in each case, there would be a different cap on the total liquidated damages recoverable by EWHL. But MW and Outotec would be liable to EWHL, at least in part, for the same damage.

128. It follows that, on the basis of the assumed facts, MW and Outotec are liable to EWHL for the same damage for the purpose of a contribution claim in respect of delay under the 1978 Act.

Concession in respect of Issue 2(i)

129. Following circulation of the draft judgment, Outotec drew to the Court's attention the omission of any reference to a concession made by MW during the course of its oral submissions. In a further short note MW did not dispute the fact that a concession was made but the parties disagree as to the extent of the concession made and its impact on the answer to issue 2(i).

130. I am grateful to the parties for their further submissions and deal with the concession below.

131. In its skeleton for the preliminary issues hearing, MW submitted that the answer to issue 2(i) was that any MW liability to EWHL for delay under the Main contract was <u>the same damage</u> as any Outotec liability under the Sub-Contract and/or the Outotec Warranty said to have been caused by late delivery of or alleged defects within, the Ouotec plant. The basis for that submission was that the relevant damage for the purpose of the 1978 Act was any loss suffered by EWHL as a result of the project overrun, for which loss both MW and Outotec would be liable to EWHL on the assumed facts.

132. During the hearing of the preliminary issues, Mr Moran made the following concession:

> "MW does not advance the case that its liability for LADs under the Main Contract and Outotec's liability for LADs under the Sub-Contract represent the same damage for the purposes of its contribution claim under the Act."

133. Mr Williamson stated his understanding of that concession in his submissions:

> "… we are dealing here with the liquidated damages claim which is sought to be passed on that in a sense 9.1 is a general application, it is denied that MW has any proper basis [in which] to claim liquidated damages pursuant clause 15.1 either as a contribution claim since the liquidated damages claimed by MW do not relate to the same damages [sic: damage as] any liability MW has to EWHL arising out of the particulars of claim. That, I think, in the light of Mr Moran's intervention this morning, is now conceded to be correct and/or (b) as a claim under the Sub-Contract itself since MW has assigned the Sub-Contract to EWHL and no longer has any rights to claim under the same…
>
> …
>
> Now in view of Mr Moran's concession this morning, I am not quite sure, subject to issue 1, how much of issue 2(i) remains live. I know that that will become clear during the course of his submissions, but just to set out our position briefly and I will not labour it in the light of the concession on the assumption which issue 2 assumes that MW have no contractual claim, we say it is perfectly clear that Outotec cannot under any circumstances be liable under the 78 Act for liquidated damages which arise under the Main Contract."

134. In his further note, Mr Williamson submits that MW's concession was acceptance that the answer to issue 2(i) should be that any MW liability to EWHL for delay under the Main contract was <u>not the same damage</u> as any Outotec liability under the Sub-Contract and/or the Outotec Warranty said to have been caused by late delivery of or alleged defects within, the Ouotec plant.

135. Mr Moran does not accept that the concession extended that far. He submits that the concession made on behalf of MW was limited to the parties' respective liabilities for liquidated damages under the Main Contract and the Sub-Contract in relation to issue 2(i); it did not affect general damages for delay or MW's increased liability for delay losses caused by defects.

136. I find that Mr Moran's concession on behalf of MW did not extend to capitulation on issue 2(i) as a whole. If it had done, there would have been no need for the parties to make any oral submissions on this issue in the two-day hearing. The concession was limited to an acceptance that there was no common liability between MW and Outotec for liquidated damages to EWHL; it did not extend to an acceptance that there could be no contribution claim in respect of any delay to the project.

Issue 2(ii) – termination losses

137. The harm suffered by EWHL as a result of termination of the Main Contract can be characterised as the additional costs, if any, of completing the works and associated losses.

138. The claim by EWHL against MW for termination losses arises out of its contractual entitlement to operate the termination provision in the Main Contract. The ground for

termination relied on by EWHL is MW's liability for delay exceeding the cap on liquidated damages. The claim for damages for repudiatory breach, likewise, is based on MW's failure to complete within the contractual time for completion, together with other actions on the part of MW evincing an intention not to be bound by the terms of the Main Contract, such as refusing access to EWHL for sampling purposes.

139. The assumed facts provide that commissioning failed because of defects within the Outotec plant; as a result, takeover of the project was substantially delayed beyond the end of August 2018 and the Main Contract was validly terminated by EWHL.

140. MW claims a contribution against Outotec in respect of the termination losses on the basis that those defects for which Outotec is responsible caused the delays which gave rise to EWHL's entitlement to terminate (under the Main Contract or at common law).

141. EWHL could rely on its assigned rights under the Sub-Contract to claim compensation against Outotec for defects in the plant, subject to the liquidated damages for performance failures and any contractual limitations or exclusions for remedial works. Likewise, EWHL could rely on its assigned rights under the Sub-Contract to claim compensation against Outotec for delay to the project, subject to the cap on liquidated damages, which would apply regardless whether the delay was caused by defects or slow progress. EWHL would have no right to claim under the Outotec Warranty for any delay to the works because such liability is expressly excluded. There is no apparent route by which EWHL could claim the additional costs of completing the Main Contract works, or other losses arising out of the termination, against Outotec. Outotec has no obligation to EWHL, under the Sub-Contract or the Outotec Warranty, to satisfy MW's time obligations under the Main Contract. Further, Outotec has no liability to EWHL for the Main Contract delay damages, which were the trigger for the termination once the cap was exceeded.

142. MW seeks to rely on clause 3.10 of the Sub-Contract, whereby Outotec acknowledges that a breach of its obligations under the Sub-Contract could result in MW being in breach of its obligations under the Main Contract. However, clause 3.10 does not amount to an assumption of liability for any breach of the Main Contract, even where such breach has been caused by Outotec's breach of its obligations under the Sub-Contract. Therefore, it could not be the basis for any claim by EWHL in respect of the termination losses.

143. The Sub-Contract is subsisting and the payment provisions on termination in the Sub-Contract would not be engaged so as to afford EWHL any claim for sub-contract termination losses.

144. MW has been unable to identify any ground on which EWHL could claim compensation against Outotec for its termination losses. MW relies on the assumed facts which provide that Outotec caused all the delay beyond August 2018 and led to termination under the Main Contract. That would establish culpability on the part of Outotec but does not explain the basis on which it would have liability to EWHL. A "but for" analysis is not sufficient to establish a claim.

145. Accordingly, on the basis of the assumed facts, any MW liability to EWHL for termination losses to EWHL is not in respect of the same damage as any Outotec liability to EWHL arising out of late delivery of, or alleged defects within the plant.

Issue 2(iii) - defects

146. EWHL's claim for defective works is common to both MW and Outotec. EWHL's claim against MW is based on MW's failure to perform its obligations under the Main Contract so as to satisfy the specification and/or carry out its work with skill and care, causing defects in the plant. EWHL's claim against Outotec would be based on Outotec's failure to perform its obligations under the Sub-Contract (or the Outotec Warranty) but would lead to the same damage or harm, that is defective plant.

147. By way of example, taking the key defects identified by Outotec:

    i) Item 7 – EWHL's allegation against MW is that steel ladders were used on site, contrary to the requirement to use them only in exceptional circumstances, and the design of the ladders failed to comply with BS 5395 (undersized or oversized safety hoops and/or missing or defective safety gates). The same allegation is made by MW against Outotec.

    ii) Item 9 – EWHL's allegation against MW is that it failed adequately to paint steel components, plant and members to ensure a minimum time to first maintenance of 15 years and/or to provide a protective paint system appropriate for the environmental conditions in accordance with BS EN ISO 12944. The same allegation is made by MW against Outotec.

    iii) Item 14 – EWHL's allegation against MW is that the location and depth of the urea injection nozzles caused impingement erosion on adjacent vapour space tubes, which will result in failure of the tubes before expiry of the minimum of 8,000 hours of operation. The same allegation is made by MW against Outotec.

    iv) Item 23 – EWHL's allegation against MW is that the design of the gasifier does not allow for stable combustion of fuel and has resulted in accumulation of slag, requiring manual cleaning before the minimum 8,000 hours of operation have been achieved. The same allegation is made by MW against Outotec.

148. It follows from the above analysis that, on the basis of the assumed facts, MW and Outotec would have a common liability to EWHL for defects in the plant.

Exclusive remedies clause

149. During the hearing of these preliminary issues, Outotec sought to rely on limitation, exclusion and exclusive remedy provisions in the Sub-Contract and the Outotec Warranty in support of its case that it could have no liability for the same damage for the purpose of the 1978 Act. MW objected to any reliance on such provisions on the ground that they fell outside the ambit of the agreed preliminary issues for determination by the Court at this stage.

150. The Court notes section 2(3) of the 1978 Act provides that limitation or exclusion provisions may be relied on to reduce or extinguish any contribution that would otherwise be required to be paid pursuant to section 2(1).

151. Having had the opportunity to read the careful submissions of the parties following the hearing, it is clear that the construction of the exclusive remedy provision raises a

substantial issue of principle, involving consideration of additional authorities and close study of other parts of the contracts, falling outside the scope of the agreed preliminary issues. It is not clear that all the relevant facts, or assumed facts, are before the Court on this issue. In those circumstances, the appropriate course is for the Court to leave determination of that issue to the full trial.

152. This leads me to make two final observations. Firstly, the misunderstandings that have arisen between the parties as to the scope of the agreed issues and the extent of the concession made serve to highlight the difficulties in dealing with preliminary issues in a complex case on assumed facts. Issues that may look crystal clear when formulated and ordered to be tried can become ambiguous when subjected to detailed scrutiny and argument. Secondly, it is emphasised that the Court has not considered or determined the merits of any of the contribution claims. Issue 2 raises three narrow questions as to whether the categories of damage identified in each agreed sub-issue are the same damage for the purpose of the 1978 Act. The Court has not been asked to, and does not, form any views as to the likely success of those claims at trial.

Conclusion

153. For the reasons set out above, the answers to the preliminary issues are as follows:

Issue 1

In respect of the assignment of the Sub-Contract:

i) MW does not retain the benefit of rights under the Sub-Contract as alleged at paragraphs 26 and 27 of the Amended Part 20 Particulars of Claim; and

ii) the assignment of the Sub-Contact by MW to EWHL did not transfer the benefit and burden so as to take effect as a novation as alleged at paragraphs 26A and 26B of the Amended Part 20 Particulars of Claim.

Issue 2

In respect of MW's contribution claim at paragraph 28 of the Amended Part 20 Particulars of Claim, on the assumed facts:

iii) at least part of any MW liability to EWHL for delay under the Main Contact is the same damage as any Outotec liability under the Sub-Contract and/or the Deed of Warranty said to have been caused by late delivery of, or alleged defects within, the Outotec plant;

iv) any MW liability to EWHL for losses flowing from termination of the Main Contract is not the same damage as any Outotec liability under the Sub-Contract and/or the Deed of Warranty said to have been caused by late delivery of, or alleged defects within, the Outotec plant;

v) at least part of any MW liability to EWHL for defects under the Main Contact is the same damage as any Outotec liability under the Sub-Contract and/or the Deed of Warranty said to have been caused by alleged defects within the Outotec plant.

154. Following hand down of this judgment, the hearing will be adjourned to a date to be fixed for the purpose of any consequential matters, including any applications for permission to appeal, and any time limits are extended until such hearing or further order.