Neutral Citation Number: [2022] EWHC 432 (Ch)

Case No: BL-2020-002001

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

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: 04/03/2022

Before :

MR JUSTICE FANCOURT

- -

Between :

Langage Energy Park Limited	**Claimant**
- and -	
EP Langage Limited	**Defendant**

- -
- -

Alexander Polley (instructed by **Gowling WLG (UK) LLP**) for the **Claimant**
Justin Mort QC (instructed by **Eversheds Sutherland (International) LLP**) for the **Defendant**

Hearing dates: 7-11 February 2022

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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.

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THE HON. MR JUSTICE FANCOURT

Mr Justice Fancourt :

Introduction

1. The principal issue in this trial is whether the Claimant, by written notice, triggered contingent obligations of the Defendant in a contract made in writing dated 8 January 2008 ("the Contract"). The Contract relates to the development of the Langage Energy Centre (a gas-fired power station) by the Defendant and the adjoining Langage Energy Park by the Claimant or its successors in title.

2. The Claimant asserts that by letter dated 27 June 2018 from Carlton Power Ltd, its parent company ("the Notice"), the Defendant was given notice in appropriate terms to trigger the obligation to build infrastructure. The Defendant does not dispute the formal validity of the Notice but contends that it was invalid in substance, because the circumstances in which the Claimant was entitled to give notice had not arisen at that time.

3. The relief sought by the Claimant is a series of declarations about the validity of the Notice and the consequential obligations of the Defendant to build infrastructure.

4. I heard evidence on behalf of the Claimant company from its director, Mr Michael Benson, who signed the Notice, and expert evidence from Mr Edwin Bergbaum, a chartered engineer with expertise in civil and structural engineering. The Defendant called Mr Mark Barrett, an employee of the Defendant company, and two expert witnesses: Mr William Duncan, a chartered engineer with particular expertise in gas engineering, and Mr David Stillman, a chartered engineer with expertise in mechanical, electrical and plumbing engineering.

Background

5. The development of the Energy Park was granted outline planning permission in 1999 and an agreement pursuant to s.106 of the Town and Country Planning Act 1990 was made between South Hams District Council ("the Council") as local planning authority and the Claimant to facilitate the development ("the Energy Park s.106"). The Energy Park s.106 contained planning obligations, including a requirement to pay for and build 30,000 sq ft of "starter units" as managed workspace and/or business start-up and expansion units for businesses in the South Hams District and then grant a 21-year lease of them to the Council at a peppercorn rent.

6. The development of the Energy Centre was also granted outline planning permission in 1999 and a s.106 agreement was made between the Council, the Defendant (by a former name) and the then owners of the land, which created planning obligations and was subsequently varied in 2005 and 2006. At that time, the Energy Centre land and the Energy Park land were in common control. It was envisaged that the Energy Park could make beneficial use of steam, heat, gas and electricity coming from the Energy Centre.

7. On 28 November 2000, outline planning permission was granted for 50,000 sq m (about 538,000 sq ft) of land at the Energy Park to be used for office, light

industrial, general industrial and warehousing use (B1, B2 and B8 Use Classes). In 2007, the Claimant provided the Defendant (which by that time had been acquired by Centrica) with its estimate of the service media that the Claimant would require for its development. The Defendant responded on 2 August 2007 setting out a short specification of what it was prepared to provide, including two 12MVA electrical circuits from the Energy Centre, a high-pressure gas pipe and pipes for 2MWt of thermal heat at 200degC.

8. On 9 November 2007, reserved matters approval was granted for 8,893 sq m (95,723 sq ft) of that land to be used for B1 "start up and move on" office accommodation.

9. Full planning permission for the Energy Centre was not granted until 26 June 2008 and was released by a new s.106 agreement made between the Council and the Defendant dated 26 June 2008 ("the Energy Centre s.106"). The Energy Centre was built and commissioned in about March 2010. The Energy Park did not proceed, doubtless because of the impact of the 2008 banking and financial crisis.

The Co-operation Agreement ("the Contract")

10. Shortly before the grant of full planning permission for the Energy Centre, the Claimant and the Defendant signed the Contract, by which they acknowledged and declared that it was intended to establish a framework to facilitate their respective developments and that, subject to the specific provisions of the Contract, each of them would co-operate with the other and act reasonably at all times to assist and facilitate the other's development (cl. 2.1). The Contract was doubtless a consequence of the separation of ownership of the two companies.

11. Although, by the date of the Contract, the Energy Centre s.106 had not been signed, Schedule 13 to the Contract comprises a draft of the Energy Centre s.106, as it had by then been negotiated ("the draft s.106"). Part 5 of Schedule 3 to the draft s.106 contains obligations on the Defendant to build specified infrastructure for particular services to be supplied to the Claimant's Energy Park. It is in this Part that the contingent obligations of the Defendant that are relevant to this claim are described.

12. By cl. 5.1 of the Contract, subject to immaterial exceptions, the Defendant agreed to perform:

    i) its obligations under the original s.106 agreement relating to the development of the Energy Centre, as subsequently varied; and

    ii) its obligations in Part 5 of Schedule 3 to the draft s.106 as if those obligations formed part of the Contract, regardless of whether the draft s.106 was ever executed by the Defendant and the Council.

13. Under the draft s.106, the Defendant would also be obliged to construct a spine road separating the Energy Centre from the Energy Park and to lay the Service Media (as defined) for the passage or transmission of services to the Energy Park. These obligations were repeated in the Contract, as between the Claimant and the

Defendant: Schedule 8 to the Contract is a detailed specification of the Service Media, which later became Schedule 5 to the Energy Centre s.106. This specification includes preliminary works (the provision of ducts) for the particular services in Part 5 of Schedule 3, media for surface water, potable water, sewerage and telecommunications systems and a 180mm pipe from a connection with the Wales and West Utilities medium pressure (MP) gas supply to within 1 metre of the boundary with the Energy Park, to provide up to 12MW of odorised gas at system pressure. By cl. 13.11 of the Contract, the Defendant agreed to build them and the Spine Road.

14. The Energy Centre s.106 Agreement, when executed, was is in substantially identical terms (so far as material) to the draft s.106.

15. The Claimant and the Defendant therefore knew at the time that the Contract was made the scope of the Service Media, including the MP gas supply, that the Defendant was going to be obliged to provide in any event.

16. Part 5 of Schedule 3 to the draft s.106 ("Part 5") is set out in full as an appendix to this judgment, for convenience. References to "the Applicant" in the draft s.106 are to the Defendant (who was applying for full planning permission for the Energy Centre). I will refer below to the most material provisions.

17. As to the operation of Part 5, it creates obligations (owed to the Claimant and in due course to the Council) for the Defendant to carry out works in three phases. Phase 1 (para 5.1 and the Service Media works) is the installation of flanges for the connection of hot water pipework on the Energy Centre and ductwork in the Defendant's land to accommodate pipes for hot water, high pressure un-odorised gas ("HP gas") and electricity cables. The work in Phase 1 is to be carried out prior to the commissioning of the Energy Centre, as part of the Service Media works that the Defendant was to carry out.

18. Phase 2 (para 5.2 and 5.6) is the installation of pipes for pressurised hot water at 200degC and for HP gas and electrical cables for supplies from the Energy Centre ("the Services") within the ductwork previously installed in Phase 1, and a heat exchanger on the Energy Centre. This work is contingent on written notice by the Claimant to the Defendant and the Council "that there is or will be a demand … from the occupier[s] of the Qualifying Buildings" for any of the Services. On receipt of notice, the Defendant must install that infrastructure as soon as reasonably practicable.

19. Phase 3 (para 5.3 and 5.7) is a contingent obligation to supply the Services at reasonable prices. This phase depends on the Defendant having performed the Phase 2 obligations, the Claimant or a developer or owner-occupier having connected the Qualifying Buildings to the Defendant's pipework and plant, and a "lawful occupier" of the Qualifying Buildings themselves notifying the Defendant that they wish to take a supply.

20. The Qualifying Buildings are defined as the first 50,000 sq m (gross external area) of floorspace constructed as part of the Business Park (which is part of the Energy Park).

21. Mr Mort QC, who represented the Defendant, argued that Part 5 was to be construed as creating in effect only two phases: the Service Media works to be done as part of the construction of the Energy Centre, and then the construction of the additional service infrastructure and the supply of Services to an actual occupier of the Qualifying Buildings.

22. For reasons that I will give below, I reject that interpretation. It is obvious that the Defendant's infrastructure works may well be requested by the Claimant at the time when it is about to carry out its own enabling and infrastructure works for the Energy Park development, when there will be no Qualifying Buildings in existence, much less an occupier of them. They may also be requested if the Claimant sells part of the relevant land to a developer, who intends to service the land and then sell off plots to owner-occupiers. Although a Phase 2 notice can be given later, when there is already lawful occupation of Qualifying Buildings, in which case Phases 2 and 3 are likely to be co-extensive, this is not the most probable outcome since it would involve retro-fitting the infrastructure for the Services.

23. The Defendant's obligations under Part 5 (including the contingent Phase 3 obligation to provides supplies) terminate 15 years after the date of commissioning of the Energy Centre (which – though the exact date was not agreed – will be around spring 2025). Depending on how soon after commissioning of the Energy Centre the Qualifying Buildings are built, this is a reason why an occupier might opt not to take a supply of the Services from the Defendant's Energy Centre. Set against that, the Services were to be supplied during that period at a discount of 5% from market price.

The Notice

24. The first issue to determine is what the Contract requires for a valid notice triggering the Phase 2 obligations of the Defendant.

25. Paragraph 5.2 of Part 5 of Schedule 3 provides:

> "In the event that the owner of the LEPL Land *notifies the Applicant and the Council that there is or will be a demand for hot water from the occupiers of the Qualifying Buildings*, the Applicant shall as soon as reasonably practicable install:
> 5.2.1 supply and return pipework for the passage of hot water within the ductwork installed pursuant to paragraph 5.1.2 above; and
> 5.2.2 a heat exchanger on the Energy Centre." (*emphasis added*)

Paragraph 5.4 provides a specification for the required supply and a maximum flow rate.

26. Paragraph 5.6 of Part 5 provides:

> "Subject to paragraph 5.8 in the event that the owner of the Energy Park *notifies the Applicant and the Council that there is or will be a demand from the occupier of the Qualifying Buildings for un-odorised gas and/or electricity to be supplied directly from the Power*

> *Station*, the Applicant shall as soon as reasonably practicable install (as appropriate):
> 5.6.1 pipework for the passage of high pressure un-odorised gas;
> 5.6.2 electrical cables
> within the ductwork installed for that purpose as part of the Service Media." (*emphasis added*)

No detail for the pipework and cables was specified in Part 5.

27. On 27 June 2018, the Claimant gave the Notice to the Defendant in writing, stating that:

> "Whilst the development of the Energy Park has been delayed due to the economic crisis of 2008/09 and subsequent difficult economic conditions, the market is now improving and *we now notify you that we expect to have occupiers in place, and consequently a demand for hot water, un-odorised gas and electricity supplied by the Power station, by mid-2019*. We therefore wish to remind you of the requirements contained in Part 5 of the Third Schedule of the s 106 Agreement for you to install the additional infrastructure to facilitate provision of the discounted services." (*emphasis added*)

The services in question were then spelt out as follows:

> " - The installation of a Heat Exchanger on the Power station site to facilitate the export of up to 2MWTh pressurized hot water at 200degC.
> - The installation of hot water supply and return pipework to the terminating point on the east of the Spine Road
> - The installation of electrical cables and gas supply pipework to the terminating point of the east of the Spine Road".

28. By the date of the Notice, over 10 years had passed since the date of the Contract. It is common ground that no development of any part of the Energy Park land granted outline planning permission in 2000 had taken place. Detailed planning permission only existed for about 8.900 sq m of start up offices. If any occupiers were in place by mid-2019, they could only have the benefit of the Services for a maximum of 6 years (depending on the willingness of the Defendant to continue to supply them after spring 2025), after which they might need to obtain supplies of HP gas, thermal energy and electricity from a different source.

The Claim

29. The Defendant's reaction was to inquire about the identity of the occupiers. It was immediately sceptical about the assertion of demand and believed that the Claimant had served the Notice for extraneous reasons. The Claimant responded by asserting confidentiality as to the future occupiers but said that it was in discussion with a number of parties who were potentially interested in developing and occupying parts of the Energy Park. The Defendant also said that the Claimant had not provided sufficient information to enable it to design the Phase 2 works.

30. A stalemate ensued. The Defendant did not do the Phase 2 works. There was no development carried on by the Claimant and no occupier materialised by mid-2019 or by 10 November 2020, when the Claimant issued the Part 8 claim form. There has still been no development of the Energy Park to date, although the Claimant is now in advanced negotiations with one potential occupier, Ribeye Ltd.

31. Following issue of the claim form, the Defendant served a Part 18 request for further information about the Claimant's case, in the following terms:

> "2.1 Please clarify whether it is the Claimant's case that any document purporting to be a notice is a valid notice, regardless of whether (at the time of serving the notice) the Claimant had any factual or evidential basis for giving such a notice, or otherwise clarify the Claimant's Case as to:
>
> 2.1.1 the factual circumstances in which it was entitled to serve such a notice;
>
> 2.1.2 what if any requirement there was that the Claimant believed and/or had some basis for believing that the matters set out in the notice were true, for the notice to be valid.
>
> 2.2 In other words, does the Claimant contends that:
>
> 2.2.1 it was entitled simply to serve a notice whenever it suited the Claimant's commercial interest, and regardless of the actual position vis-à-vis demand or future demand or occupier; or
>
> 2.2.2 it needed some basis for notifying the Defendant in these terms for such notice to be effective.
>
> 3.1 Please confirm whether it is the claimant's case that it had identified any specific occupier or future occupier (or particular category of occupier) as at the time of serving the 27 June Notice.
> ……."

32. By letter of the following day, the Claimant responded as follows:

> "2. As to paragraphs 2.1.1 and 2.1.2, the Claimant was entitled to serve a notice if it honestly believed that there was or would be a demand for the Utilities. The contract requires nothing further. In the premises, the answer to 2.2.2 is "yes, it had to believe honestly that there was or would be a demand"; and subject to that answer, the answer to 2.2.1 is "yes". For the avoidance of doubt, as explained in paragraph 36 of Mr Arben's witness statement and as stated in the 27 June notice itself, the Claimant did (and does) believe that there will be a demand.
>
> 3. With regard to the requests at paragraph 3:
>
> a. As to paragraphs 3.1 to 3.3 (and as explained in paragraphs 40, 41, 47 and 64 of Mr Arben's witness statement) the precise details of the likely future occupants of the Energy Park (and consequently the precise details of their demand for the Utilities) cannot yet be determined but any tenants or purchasers of units may include industrial users, including users of high pressure gas such as those who produce hydrogen. That was the Claimant's expectation and belief at the time of serving the 27

> June Notice, on the basis of the matters set out in paragraphs 28, 47 and 64(c) of Mr Arben's witness statement …. it is confirmed (if this is the intention of the request) that the Claimant had no specific individuals or entities in mind.
>
> …… Neither the construction nor the marketing of the Claimant's development had begun at the time when the 27 June Notice was served."

33. The meaning and effect of Part 5 is of course a question of interpretation of a contract and therefore a question of mixed fact and law, taking into account the facts known to the parties at the time (January 2008) when the Contract was made. In this regard, the evidence given by the three expert witnesses is of some relevance.

The expert evidence

34. The experts agreed that in 2008, when the Energy Centre was starting to be built and the parties contemplated that supplies of energy could be provided to the Energy Park, energy from a gas-fired power station was regarded as "clean energy", compared with energy generated from oil or coal. It was therefore encouraged, and attractive to developers and end-users, as a source of energy, particularly if it came at a discount from market rates. By 2018, when the Notice was served, the position was very different: the carbon profile of energy from a gas-fired power station was by then significantly higher than electricity from the National Grid, and occupiers were to greater or lesser extents starting to be concerned about their carbon footprints. What the position was in 2018 does not of course affect the true interpretation of the Contract, but it is relevant to what the Claimant believed about occupier demand when the Notice was served.

35. There was also agreement by the expert witnesses that a supply of HP gas to a business park was unusual: that it would only be wanted, as such, by a few, large-scale industrial manufacturers or by power stations; and that, although a high-pressure supply could in principle be stepped down and odorised for general use, by installing plant on the Energy Park to do so, that would involve considerable expense. Mr Duncan, who had expertise in gas engineering of this type, which Mr Bergbaum readily conceded that he did not have, said that the introduction onto the Energy Park of a high-pressure gas pipeline would also create a significant hazard, and with that a regulatory and design burden on the developer. That was the case in 2008 and the burden has now become significantly greater. Mr Bergbaum did not agree with Mr Duncan that the cost of stepping down and odorising the HP gas would necessarily be much higher than the cost of using the MP gas supply that the Defendant was already providing. In this regard, I prefer the expert view of Mr Duncan and find that it is most improbable that a developer of the Energy Park would have contemplated making use of the HP gas supply where the MP supply would suffice.

36. As for the pressurised hot water supply, it was agreed by the experts that an obvious use of such a closed supply of thermal heat would be a district heating system, and that individual occupiers with large demands for energy (such as a food storage company) might have a demand for thermal energy. Like gas-fired

power stations, district heating systems were favourably regarded by local planning authorities in the 2000s as a source of efficient and clean heating for a large developed area.

37. The position with the supply of electricity directly from the Energy Centre was that the supply was not guaranteed to be continuous. The Claimant conceded that the supply would inevitably be subject to stoppages and down time arising in the ordinary course of business, or for maintenance or repair. A supply directly from the Energy Centre could not therefore be relied upon by an occupier as a guaranteed 24-hour, 365 days a year supply of electricity. For most if not all occupiers there would therefore need to be a back-up supply, provided either by the developer on the Energy Park at its expense, or by the occupier at its expense. The alternative, of course, was for a supply of electricity to be taken from the National Grid. That would not be at a discount of 5%, which was otherwise attractive, but it would not be liable to end in 2025. An occupier with demand for very large quantities of additional electricity on an intermittent basis might be attracted to a supply from the Energy Centre. Otherwise, a developer or occupier would have to balance the benefit of the discount over however many years it was available against the increased cost of providing infrastructure and connections for the Energy Centre supply and a secondary supply. Of course, if a developer had already provided the Energy Centre electricity supply directly to the occupier's unit, as part of its development works, the occupier would be likely to use it.

The arguments on interpretation

38. Although Mr Polley in opening the Claimant's case suggested that the required wording of the notice was a "performative utterance" (see Sun Life Assurance plc v Thales Tracs Ltd [2001] 2 EGLR 56), meaning that the truth or otherwise of what is stated is irrelevant to the validity of a notice, that is not the case that had been identified in the Claimant's Part 18 Further Information. Nor did Mr Polley pursue the argument. He accepted that, by one of two means, a notice given under Part 5 could not be valid if the Claimant did not have an honest belief in what it stated. That, he suggested, was either because the Claimant could not rely on a fraudulent notice (see, e.g., Rous v Mitchell [1991] 1 WLR 469) or because it is an implied term of the Contract that the Claimant could not give a notice under Part 5 unless it believed genuinely that there was or would be a demand for the Services from the occupiers of the Qualifying Buildings. However, he submitted, the correctness or reasonableness of the Claimant's belief was irrelevant.

39. Further, Mr Polley submitted that there was no requirement to identify (or for there to be in existence) an actual or intending occupier or occupiers of the Qualifying Buildings. It was sufficient if the Claimant believed that when occupiers of the Qualifying Buildings were found they would then have a demand ("….is or will be a demand…") for the services in question. He accepted, however, that it was not sufficient if the Claimant only believed that a future occupier might have a demand for the services: the Claimant had to believe that an occupier will have a demand.

40. Mr Mort argued, as the Defendant's primary case, that the clue to the meaning of the paragraph in issue was the use of the word "occupier", which he said did not

necessarily mean someone in actual occupation of a Qualifying Building at the time but did mean someone who was (a) identified and (b) had at least a right to occupy or to exercise control over a building. He instanced the Occupiers' Liability Act 1957 as an example of a wider meaning being given to the word "occupier". He submitted that the element of futurity indicated by the words "is or will be" reflects the fact that there would in future be actual use of the Services by the identifiable occupier, once they had gone into actual occupation and the Services were connected and supplied. This was what the words "will be" referred to, not that an occupier was unidentified and the demand was future and hypothetical. Mr Mort argued that the sense of the Phase 2 obligation could be discerned from the Phase 3 obligations, which refer to a "lawful occupier", and he said that these two phases effectively went together, with one following directly from the other.

41. As a secondary argument, if future occupation by an unidentified occupier could suffice, Mr Mort submitted that paragraphs 5.2 and 5.6 effectively confer on the Claimant a judgement to be exercised as to whether such unidentified occupiers will have (not might have) a demand for any or all of the Services. It was not sufficient for the Claimant honestly to believe that there will be such a demand if the assertion of future demand was unfounded, irrational or capricious. In other words, the Contract gives the Claimant a contractual discretion:. Exercise of the rights conferred is not an unrestricted right; it involves a logically prior step of making a decision about the likely demand for the Services.

42. Mr Mort referred in this regard to the often-cited dictum of Leggatt LJ in The "Product Star" (No.2) [1993] 1 Lloyd's Rep 397 at 404:

> "Where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably. That entails a proper consideration of the matter after making any necessary inquiries."

43. In Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd [2013] EWCA Civ 22 at [83], Jackson LJ contrasted a case where a party has a discretion to exercise with a case where there is a simple choice whether to exercise a right granted by the contract:

> "An important feature of the above line of authorities is that in each case the discretion did not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In any contract under which one party is permitted to exercise such a discretion, there is an implied term.

And at [136], Lewison LJ explained that:

> "… the rationale for interpreting discretionary powers as subject to implicit limitations is that without such limitations the discretion would be unfettered; or, as Leggatt LJ put it …. the exercise of the power would be the decision maker's 'uninhibited whim'".

44. Accordingly, if on its true interpretation the Contract confers on the Claimant the exercise of a discretion or judgement as to current or future demand for the three Services from occupiers of the Qualifying Buildings and it is clear that the discretion is not to be unfettered, there will be an implied term limiting the ability of the Claimant to give notice under paragraph 5.2 and 5.6 of Part 5.

45. Mr Mort submits that the term to be implied is to the following effect: that the Claimant must give proper consideration to the question whether there will be occupier demand, having regard to the nature of the Services and the likelihood that an occupier would require a HP gas supply, pressurised hot water or electricity supplied from the Energy Centre rather than from the National Grid for the period for which the Defendant was obliged to provide them, and reach a conclusion that is not irrational or capricious in the light of that consideration.

46. Mr Polley submitted that this was not a case of a contractual discretion at all; and that the Defendant could only argue that it was by first implying a term as to honest belief and then turning the belief into a matter of judgement or discretion. Here, he said, the only judgement was as to whether to serve a notice, not as to the existence or not of a future demand. (In other words, as long as it was acting honestly, the Claimant had an absolute right to give a notice under Part 5.) He also referred to the Mid Essex Hospital case for the applicable principles and to another decision of the Court of Appeal, Curo Places Ltd v Pimlett [2020] EWCA Civ 1621, decided after the Supreme Court considered the nature of a contractual discretion in Braganza v BP Shipping Ltd [2015] UKSC 17; [2015] 1 WLR 1661.

47. The Curo Places case was concerned with service charge provisions in a tenancy agreement, under which a landlord agreed to provide identified services and, subject to consultation with tenants, extra services "if it believes this would be useful". The issue on the appeal was how the extra services were to be identified, but at [24] in the judgment of David Richards LJ, with whom Hickinbottom and Andrews LJJ agreed, the Court agreed with the Upper Tribunal that the belief formed by the landlord had to be genuine but also rational, and be made after consideration of all obviously relevant considerations and the exclusion of all irrelevant considerations. Mr Polley submitted that that decision depended on the fact that there was an express contractual discretion to be exercised, whereas in this case the Claimant only had to notify the Defendant that there "is or will be" demand for the services. There is nothing in the language of paragraph 5.2 and 5.6 of Part 5 on which the "Braganza" principle can bite, he submitted. In any event, he suggested, it adds very little to the inquiry that the Claimant accepted that the Court should make about the Claimant's belief and the honesty of that belief.

48. The Supreme Court in the Braganza case explained that the reason why a term as to the reasonableness (in public law terms) of the exercise of the discretion is implied in such circumstances is because the decision-maker otherwise has a conflict of interests, where the decision that they alone make will affect the rights

and obligations of both parties to a contract, and it therefore cannot have been intended that the decision could be made irrationally or capriciously. It follows that if a party to a contract is given sole power to make an evaluative decision (as distinct from exercising a right), in circumstances in which that party's self-interest may conflict with the other party's interests, there is likely to be an implied term that the decision must be made in a reasonable way (in a public law sense of having regard to relevant factors, disregarding irrelevant factors and coming to a rational conclusion), consistently with the commercial purpose of the contract. The exact formulation of the implied term will vary, depending on the individual circumstances of the case.

49. The question to which the argument on this issue gives rise is accordingly whether, on its true construction, paragraph 5.2 and 5.6 of Part 5 confers on the Claimant the power to make an evaluative judgment of that kind.

Analysis and conclusion

50. Neither Counsel referred in oral argument or at any length in writing to the well-known and recent decisions of the House of Lords and the Supreme Court on the principled approach to the interpretation of contracts (in particular Arnold v Britton [2015] AC 1619; Wood v Capita Insurance Services [2017]), nor to the decision of the Supreme Court on the implication of terms into a contract: Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742. The decisions on interpretation and the principles explained are by now too well-known to require rehearsal in this judgment and were summarised by Carr LJ in EMFC Loan Syndications LLP v The Resort Group plc [2021] EWCA Civ 844; [2022] 1 WLR 717 at [57], and in reaching my decision I have borne in mind in particular the passages at [15] to [23] of the judgment of Lord Neuberger of Abbotsbury PSC in Arnold v Britton; and [11] and [12] of the judgment of Lord Hodge JSC in the Wood case.

51. In the Marks and Spencer case, after reviewing previous decisions on the basis for implication of terms into a contract, Lord Neuberger of Abbotsbury PSC said at [21]:

> "In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in the *BP Refinery case* 180 CLR 266, 283 as extended by Bingham MR in the *Philips case* [1995] EMLR 472 and exemplified in *The APJ Priti* [1987] 2 Lloyd's Rep 37. First, in *Equitable Life Assurance Society v Hyman* [2002]1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties" when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one

> considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in *Attorney General of Beloize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care", to quote from Lewison, The Interpretation of Contracts 5th ed (2011), p 300, para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of "absolute necessity", not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

52. In Attorney-General for Belize v Belize Telecom Ltd [2009] 1 WLR 1988, Lord Hoffmann expressed the opinion that implying terms into a contract is an aspect of the broader exercise of interpretating its true meaning. The Supreme Court in the Marks and Spencer case disapproved that view. Lord Neuberger said:

> "[27] Of course, it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are ex hypothesi not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.
>
> [28] In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term. This appeal is just such a

> case. Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied."

53. In construing Part 5 of Schedule 3 to the Contract, it is therefore necessary to determine the meaning of the express words of paras 5.2 and 5.6 of Part 5, within the Contract as a whole, in its known factual context in January 2008, having regard to the commercial consequences of one or other interpretation, before considering whether any term as to honest belief or rational decision-making is implicit. The questions, first, of whether an occupier has to be identifiable and in occupation at the time of serving a notice, or whether they may be an unidentified, future occupier, and second, of whether the Claimant has an unfettered right to give a notice or is effectively certifying a fact or exercising a judgement about future demand for the Services, are issues of interpretation of the express terms of the Contract.

54. The Contract requires the Defendant to install limited infrastructure associated with the Services at the time of its development, regardless of progress with the Claimant's intended development of the Energy Park (which the Defendant is contractually obliged to assist and facilitate) and irrespective of whether they will be required. Other infrastructure is not to be installed by the Defendant at the outset, even though economies of scale would normally be achieved by doing both the Phase 1 and 2 infrastructure works as part of the Energy Centre project, rather than doing the Phase 2 works as a separate project later.

55. There are obvious reasons for the sequencing of the works. The Services are either specialist services or have particular characteristics that could affect demand for them. It is common ground that high pressure, un-odorised gas is unlikely to be required by an occupier, except certain large-scale industrial manufacturers or an operator of a power station. It is also of its nature a major hazard, whose introduction into the Energy Park would entail design constraints and regulatory controls.

56. The pressurised hot water at 200degC (which is not a domestic supply but a closed flow and return system) would serve a district heating system, if the Claimant were minded to install one in part or parts of the Energy Park, but otherwise would only be likely to be wanted by some occupiers of units. That is particularly so as the output from the power station is intermittent, in the sense that it is not required to be uninterrupted, so there is no assurance of a constant supply. Thus, although on the face of it a supply of electricity at a discount is attractive, an occupier who wanted to have an assured, uninterrupted supply would need to have a back-up supply for times when the Energy Centre is not creating electricity, or alternatively take its supply from the National Grid instead. The intermittency of the supply is likely to lessen its attraction to any occupier.

57. The extent of demand for high pressure un-odorised gas and pressurised hot water may also be relevant to the proper design and sizing of the pipes and cables that the Defendant is to install, in so far as the design is not specified in the Contract.

However, that on its own cannot be a reason for deferring the Stage 2 works because they are capable of being triggered by the demand of an occupier, which might be long before the total demand from the Qualifying Buildings is known.

58. The works in Phase 1 are preliminary works, likely to be at relatively low cost to the Defendant. They are also works that can much more conveniently be done at the time of the construction of the Energy Centre. The laying of ducts in advance would greatly facilitate the installation of cables and pipes at a later time, if required. Were it to turn out that the Services were not required by any occupier of the Qualifying Buildings within the 15-year period, not too much unnecessary expenditure would have been wasted.

59. The works required in Phase 2 are significantly more substantial and expensive. To carry out those works at the outset could entail considerable wasted expenditure and the creation of unnecessary design constraints and regulatory issues (as regards the HP gas pipe). Objectively, there is enough doubt about whether there will be demand for all or any of the three Services to make substantial further expenditure by the Defendant at the outset unreasonable, even if extra cost would result from doing the Phase 2 works at a later time. In other words, the parties and the Council appear to have agreed that substantial funds on the Phase 2 works were only to be spent if and when the Services were going to be needed.

60. That conclusion means that the Claimant's initial suggestion that the notices required by paragraph 5.2 and 5.6 could be given by the Claimant irrespective of the truth of what they state cannot possibly be right. The Claimant could not give the notices to the Defendant once the ink on the Contract was dry, on the basis that it had an absolute right to do so. Nor in my judgment could it do so because it considered that the marketing of the Energy Park might be benefited by being able to say that the Services were available. The criterion is not whether provision of the Services would assist the Claimant in promoting or marketing its development but whether the occupiers of the development have or will have a need for the Services.

61. Whether the future development of the Energy Park was likely to be done speculatively by the Claimant could have a bearing on the question of how the occupier demand was to be assessed. It is common ground that there was no indication one way or the other, at the date of the Contract, as to how the development would proceed. The only relevant term of the Energy Park s.106 in that regard was the provision for Starter Units to be constructed and leased to the Council. To that limited extent there was a requirement for construction, but the needs of the Council or the end occupiers of the Starter Units for the Services was unknown.

62. Given that the parties must be taken to have understood that development might (at least as to part or parts of the Energy Park) proceed speculatively, there was a real possibility that demand for one or more of the Services from the eventual occupiers of the units in the Qualifying Buildings would be determined by the Claimant, by its choice of what enabling and infrastructure words to carry out and the base-build specification of any units built speculatively.

63. If the Claimant decided to build speculatively and install a district heating system as the means of supplying heating to the units (which the Defendant does not dispute was a reasonable potential use of the pressurised hot water supply), it would need to install a network of pipes on the Energy Park (or part or parts of it) to connect the units with the Defendant's supply. The creation of the district heating network would determine the issue of demand from future occupiers, in that the necessary pipework to the units would be installed as part of the Claimant's own works and the heating would inevitably then be used by occupiers of the units. There might at that stage be no identified occupier of any unit, yet the future demand for hot water from occupiers would be established.

64. The same could be true of the electricity supply, were the Claimant (for example) to take a supply from the Energy Centre into a substation on the Energy Centre and build a back-up generator, or take an additional supply into the substation. The Claimant might take the same approach if only servicing the land in the Energy Park in order to sell serviced plots, rather than build units speculatively. However, speculative installation of a high-pressure un-odorised gas supply pipeline on the Energy Park, in addition to the MP gas supply pipeline provided by the Defendant, is almost unthinkable, given the highly specialised nature of the supply and the development constraints for the Claimant or any purchaser that would result from it.

65. In my judgment, the Defendant's argument that the terms of paragraph 5.2 and 5.6 mean that an identified occupier of the Qualifying Buildings must exist before a notice can be validly given is wrong. Although some support for it could be said to derive from the use of the definite article ("… a demand for hot water from the occupiers …"), that is too weak a prop to support the argument (and in fairness to Mr Mort, he did not rely on it). The requirement for an identified occupier would unreasonably restrict the freedom that the Claimant must have been intended to have as regards its development of the Energy Park.

66. A requirement for an identified occupier would also to be likely to operate contrary to the assumptions that must have underlain Part 5, having regard to the nature of the Services, the nature of the works required before a supply can be provided to an occupier, and the likely sequence of those works. I explain these conclusions below.

67. In the ordinary course of development of the Energy Park (whether speculative or bespoke), one would expect the Phase 2 works to be triggered before or at the same time as the Claimant carries out its own enabling and infrastructure works, so that infrastructure built by the Claimant as the initial stage of its development can connect into Services pipes and cables installed by the Defendant. It would make little business sense for the Claimant or anyone first to build units, so that there are Qualifying Buildings that are occupied (in whatever sense), and then for notice to be able to be given requiring the provision of pipes and cables to the boundary between the Energy Centre and the Energy Park. Although under the terms of paragraph 5.2 and 5.6 that is possible, it is not the most likely sequence.

68. In my judgment, for these reasons it must have been within the contemplation of the parties and the Council that the notice triggering the Phase 2 works could be given at an early stage, before there was any identified occupier of a Qualifying

Building. If, as part of such works, the Claimant decided to install a district heating system, or an electrical supply from the Energy Centre, to connect to the units in the Qualifying Buildings, that would be a case where there will be a demand for those Services from the occupiers (in due course) even if no specific occupier is capable of being identified at the time. It would be bizarre if, in those circumstances, the Claimant, who was minded to lay infrastructure for the Services on the Energy Park land, was unable to give a valid notice requiring construction of pipes for those very supplies. I therefore conclude that the Defendant's argument that there must be an identified occupier with a demand before a valid notice can be served is wrong.

69. If, as I hold, paragraph 5.2 and 5.6 does not mean that there has to be an identifiable occupier, the words "will be a demand … from the occupier" are capable of embracing not just cases where the Claimant intends to install the Services infrastructure itself, so that any occupier of the Qualifying Buildings will use them, but also cases where the land will be sold by the Claimant to another developer, or units will be built by or for future occupiers (as yet unidentified) of a type who will have a demand for one or more of the Services. These will be cases where the question of future demand is not a known fact but a matter of judgement. Much will depend on the likely identity or type of the purchasers or occupiers, having regard to the nature of the Services and the consequences of using them. The Claimant's case – which I have accepted – that Part 5 does not require that an occupier is identifiable as such before a notice can be given, means that there will in some cases be uncertainty about the occupiers' demand for the Services. The Claimant, in giving a notice under paragraph 5, will not in all cases be asserting a provable fact about occupier demand but exercising its judgement about likely future events. That judgement, when made, will affect the interests of the Defendant, as well as its own interests.

70. The Claimant accepts that in such circumstances it is insufficient for it to give notice on the basis that it believes that there might be occupier demand; it must be on the basis that it believes that there will be a demand. The Claimant argues that this is only a requirement for a genuine belief, however irrational or unjustified; the Defendant argues that what is required is a rationally made decision that there will in future be a demand.

71. Despite the Claimant's concession, I consider it improbable that the parties and the Council understood that the control mechanism was the Claimant's honest belief in a future demand for the Services. The Claimant emphasises that the validity of a notice given under Part 5 was intended to be a matter between the Defendant and the Council as well as between the Claimant and the Defendant under the Contract. I accept that the parties would have regarded the draft s.106 as being almost certain to be executed formally, after the Contract was made, and that they would therefore have recognised that the Council has an interest in the validity of any notice given. I do not, however, see why that makes it more likely that a criterion of honest belief applies. However unlikely it might be that a notice would be challenged, any challenge on that basis would involve an inquiry into the state of mind of the Claimant – a third party, so far as the Energy Centre s.106 obligations are concerned. The parties and the Council are likely, in my view, to have expected there to be a proper basis for a conclusion that there will be a

demand in future for the Services (or any of them) from an occupier. They did not intend that the Defendant should have to carry out the Phase 2 works unnecessarily. Any challenge to a notice would more likely have been envisaged on the basis that there was no rational basis for concluding that there is or will be a demand for the Services, or one or more of them – an issue which is more readily amenable to challenge and determination than a question of the Claimant's belief.

72. The parties and the Council cannot have intended that a notice should be capable of being given on the basis of a whimsical belief or an irrational conclusion about future demand. They must have intended there to be some control on the ability of the Claimant to compel the Defendant to install infrastructure. In many cases, a lack of honest belief and irrationality will overlap, e.g. if notice were given a year before a ban on further use of natural gas power stations came into effect, or if a notice were given in late 2024 after the Defendant had indicated it would not supply the Services after spring 2025. But in other cases there may be a genuine but ill-considered or irrational belief about what will happen in future, and in my judgment it is implausible that the parties and the Council meant that the Claimant could require Phase 2 works to be carried out by the Defendant in those circumstances.

73. The Claimant mounted a number of arguments against such a conclusion. It argued that the language of paragraph 5.2 and 5.6 does not admit a conclusion that there must be a rational basis for stating that there will be occupier demand. Mr Polley emphasises that the language of the paragraph does not in terms require any evaluation or decision to be made by the Claimant, other than (implicitly) a decision to give a notice. Having rejected the performative utterance argument, however, the right conclusion is that the words "that there is or will be a demand from the occupiers" are not merely a formula to be inserted into a notice. There must be a conclusion or belief that the demand either does exist or will exist. The Claimant's argument is that only honest belief needs to be implied, in order to give the Contract business efficacy, not a "Braganza" term.

74. This is not a straightforward "Braganza" issue, as in the Mid Essex Hospital and Curo Places cases, because there is no single set of circumstances in which the notice can be served by the Claimant. There may be cases where current demand or even future demand is factually certain, and in those cases whichever criterion for validity is implied the result will be the same. But there may also be cases in which there is uncertainty, and in those cases the Claimant – because it is not sufficient merely to rehearse the words of paragraph 5.2 or 5.6 in the notice that is served – must consider and, necessarily, form a judgement about whether there will be occupier demand in future for one or more of the Services.

75. I do not accept Mr Polley's argument that the Defendant's case for a "Braganza" restriction on giving notice involves heaping implication upon implication (by which he meant first implying a term requiring honest belief and then implying an additional term that the belief must be a rational one) and is wrong for that reason. That seems to me to be emphasising form rather than substance, and the argument only arises if one accepts the Claimant's concession that a requirement for honest belief is implicit. The real question – which is a question of implication of a term of a contract – is which of the rival terms, if either, is necessary for commercial efficacy and/or obviously what the parties (including the Council)

intended. The fact that the Contract does not use the words "belief" or "opinion" does not preclude a "Braganza" implication, if it is otherwise evident that – in some circumstances at least – there will be a need for the Claimant to make a judgement about whether a state of affairs exists or will exist.

76. As regards the same issue arising under the Energy Centre s.106 between the Defendant and the Council, the Claimant argued that the dispute resolution provisions in the draft s.106 (and in the executed agreement), which provide for expert determination, imply that there could have been no intention that a question of whether there was a rational basis for serving a notice under Part 5 would be reviewed by an expert. Mr Polley accepted that, on the Claimant's case, there might be a need for his client's honest belief to be reviewed, but he suggested that since any such challenge would involve in substance an allegation of fraud, it would not have been something that the parties would have contemplated as likely to happen. They may not have contemplated either that the dispute resolution mechanism would be likely to be used to determine whether the Claimant acted irrationally, but one must be careful not to allow the tail to wag the dog. Parties do not usually make bespoke provision for how each possible dispute arising under a contract is to be resolved.

77. In any event, clause 24 of the draft s.106 is not restrictive. It provides that any dispute between the parties is to be determined by an expert, save as otherwise provided, and that in default of agreement the President of the Law Society shall appoint an expert. Clause 24.3 provides that where the President is of the view that the subject matter of the dispute is best dealt with by a surveyor or an architect, he can either appoint one or refer the matter to the relevant professional body for appointment. Thus, it is contemplated that a variety of disputes may arise under the s.106 agreement and provision is made for a variety of experts to determine them. This does not seem to me to support an argument that the parties and the Council cannot have envisaged that a dispute about whether the Claimant had reached an irrational decision about a future demand for Services would arise and be determined. Although an expert may rely on their own expertise and judgement, they are not bound to do so; and clause 24.3 requires the expert to consider any written representations received. Neither is it obvious that the parties and the Council would have considered that a consulting engineer rather than a lawyer or a surveyor would be needed to decide whether the Claimant acted reasonably (in public law terms) or whether it was irrational to conclude that there would be a demand for pressurised hot water, high pressure un-odorised gas or an electricity supply from the Energy Centre.

78. I am not persuaded either by the Claimant's argument that, elsewhere in the Contract, where the parties meant to specify criteria for entitlement to exercise a right, or for what a notice must contain, they did so expressly, and that the wording of paragraph 5.2 and 5.6 of Part 5 by way of contrast does not do so.

79. The Claimant relies on clauses 8.5, 12.4 and 13.4 of the Contract in particular, in this regard. Clause 8.5 requires the Claimant to designate the site for the Starter Units of such size and shape as shall be reasonable and to notify the Council of the site, to include a plan to enable the Council to identify the location and size of the site. Clause 12.4 confers on the Defendant a right to enter onto certain land to do works, but only if it has first given notice to the Claimant specifying the

breach justifying the entry. Clause 13.4 confers on the Defendant and statutory undertakers rights to enter onto certain land to do works provided that prior to commencing work a written notice has been served on the Claimant confirming the exact dimensions and location of the works. These clauses, which are quite different in character from the clause empowering the Claimant to serve notice triggering the Phase 2 works, do all require the giver of a notice to include particulars relating to the right to be exercised.

80. In so far as the Claimant relies on the contrast to support its argument that the Part 5 notices do not need to identify the occupiers in question, I have already determined in its favour that no particular occupier has to exist or be identified for a valid notice to be given. In so far as it relies on the contrast to suggest that nothing more than an assertion is required, I have rejected the suggestion that nothing more than the mere words is required to trigger the right. The only live issue is whether an honest belief in demand is sufficient for a valid notice or whether there must be a rational basis for the assertion and a reasonable exercise of judgement that gives rise to it. I do not consider that a comparison with other clauses in the Contract assists in resolving that question, which depends on the nature of the particular obligation that is triggered.

81. Mr Polley suggested on a number of occasions that the Phase 2 obligations were simply part of the "price" that the Defendant had agreed to pay for its planning permission and that the Court should therefore not strive to confer additional protection on the Defendant, nor should it imply a term to limit the Claimant's rights. In planning law terms, Mr Polley is of course wrong in arguing that the planning obligations agreed by the Defendant are payment for the planning permission. Had that been so, they would not have been lawful. The planning obligations are included to ensure that the local area is improved in various respects as a result of the permitted development, rather than harmed by it. There would be no benefit to the local community in carrying out the Phase 2 works – including the creation of a hazardous HP gas pipeline on land immediately adjoining the Energy Park – if no one was likely to benefit from it. The nature of the Phase 2 infrastructure obligations as planning obligations emphasises rather that the obligations are intended to serve a purpose. In that context, it seems obvious that the works should only be triggered when they were rationally concluded to be needed.

82. As the evidence from Mr Benson of the Claimant has demonstrated, the Claimant in fact considered in 2018 that it had an interest in bringing forward the provision of the Services as an aid to marketing the Energy Park, emphasising its different character from other business and industrial developments in Devon. That illustrates that under paragraph 5.2 and 5.6 there is the potential for a conflict of interests when the Claimant decides whether there is or will be a demand for the Services, or any of them, given the Defendant's interest in not being required to waste money on providing infrastructure that will not be used. Since the decision involves the exercise of judgement – for the reason that the "occupier" need not be identified or be in occupation at the time – the law implies a term to prevent a decision being made on an unreasonable or irrational basis.

83. I therefore conclude that there is implicit in paragraphs 5.2 and 5.6 of Part 5 a requirement that, in asserting in a notice that there is or will be a demand from

occupiers for the Services, the Claimant must reach a decision on each Service by a reasonable process (in public law terms), not for extraneous reasons, and the decision must not be capricious or irrational.

The decision-making process: the witness statements

84. The Claimant's evidence about its decision to serve the Notice and its corporate state of mind at the time has emerged in stages. The starting point is the witness statement of Mr Patrick Arben dated 10 November 2020 that was served in support of the Part 8 claim.

85. Mr Arben, who is a solicitor at the firm acting for the Claimant, said that the provision of the Services at discounted rates was a draw to potential tenants because the Services were unusual and materially differentiate the Energy Park from other developments (para 28). He said that in late 2018 and early 2019, the Claimant was in discussion with the Council about building units for the Council to buy and let; at the same time, the Claimant was considering building units speculatively, and it obtained planning permission for this on 5 June 2020 (for 32,000 sq ft of flexible space) (para 33). Mr Arben also said that "the Claimant expected to have occupiers in place and therefore believed that the demand for the utilities would arise by mid-2019" (para 38). He suggested that it was necessary for the gas, hot water and electricity infrastructure to be installed for the Claimant to be able to design its development and market and let the units (paras 40, 41).

86. At para 47, Mr Arben said:

> "The Claimant then explained to the Defendant [in a letter dated 12 July 2018] that it was in discussion with a number of parties who were potentially interested in developing and occupying parts of the Energy Park. This was something the Defendant had been informed about previously and was the reason that the Notice was given."

In the letter of 12 July 2018, one potential purchaser was identified, by reference to an email of 26 April 2018 (which identified a developer – confirmed in oral evidence by Mr Benson to be a company by the name of "Unit Build" - which wished to acquire some of the Claimant's land north of Holland Road). Mr Benson confirmed that Unit Build wished to acquire undeveloped land from the Claimant, freed from the obligations in the Contract.

87. Mr Arben was not required to attend for cross-examination, doubtless because it was self-evident that he had no personal knowledge of the facts about which he gave evidence in his witness statement.

88. Although the witness statement of Mr Arben pre-dated the introduction of CPR PD 57AC relating to trial witness statements, it is nonetheless unsatisfactory in terms of its non-compliance with CPR PD 32. In particular, apart from identifying that a Mr David Philpot was the source of information in paragraphs 6 to 17 of his statement, Mr Arben makes a number of general statements about what the

Claimant believed and what the Claimant informed him, without identifying who was the source of the information. Mr Benson said in cross-examination that it was not him to whom Mr Arben had come for information. Who formed the views and took the decision referred to in paras 38 and 47 of Mr Arben's statement was therefore hidden, at that stage.

89. In view of what has subsequently emerged from the disclosed documents, further information given by the Claimant and Mr Benson's own evidence, I am unable to place any reliance on the assertions made by Mr Arben. What he says in his statement is nevertheless material to an assessment of Mr Benson's evidence.

90. Mr Benson's first witness statement was made on 22 January 2021, mainly to address a debate expected to take place at a case management conference about whether the claim was properly a Part 8 claim and what factual disputes existed. At paras 19.1 to 19.9 and 20, Mr Benson comments from his own perspective, as he puts it, on the requirements of the Contract regarding Part 5 notices. The following passages are material:

> "I signed the 27 June Notice and therefore can attest to the fact that the Claimant did believe on the 27 June 2018 that there would be demand for the Utilities. Specifically, I believed (and believe) that likely occupiers of the Energy Park would have a use for electricity and hot water. In relation to gas, as I explained further below, I accept that high-pressure un-odorised gas is less likely to be of use to all potential occupiers of the Energy Park, however I believed (and believe) that potential occupiers would want a supply of gas in some form…" (para 19.1)
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> "… Phase Two [of the Part 5 provisions] – with which we are concerned in this case – relates to the installation of connections once the Claimant knew that the development would proceed and expected that there would be a demand for the Utilities". (Para 19.2)
>
> "the Claimant has also highlighted previously (in paragraph 47 of the Witness Statement of Patrick Arben) that it has been in discussion with a number of parties who were potentially interested in developing and occupying parts of the Energy Park – this was the reason that the 27 June Notice was given. As was explained to the Defendant, for confidentiality reasons, the Claimant was unable (and in any event, was not required) to disclose details of negotiations with potential occupiers. However, for the purposes of the present proceedings, I wish to highlight the following examples of interest and demand for the Utilities from Potential Occupants of the Energy Park in order to demonstrate the fact that there "there is or will be a demand" for the Utilities. The following examples (paragraphs 19.4 to 19.9) were either known to me or have been described to me by colleagues David Philpot, Keith Clarke, David Bee and Vickery Holman. The use of the following examples should not be taken as an exhaustive list of the demand." (para 19.3)

> "Prior to service of the 27 June Notice the Claimant was also in discussions with several companies (including a food service company and 2 supermarkets) who were interested in developing cold storage facilities, as part of wider food storage facilities – again the availability of hot water to supply energy for cooling was a potential attraction of the site and demonstrates that "there is or will be a demand" for the Utilities." (para 19.5)
>
> "Between mid-2017 and the end of 2018 (both before and after the service of the 27 June Notice), the Claimant was in very advanced negotiation over the sale of part of the Energy Park land to a local developer who wish to acquire the land to carry out speculative development of industrial units. During this process, it was evident that either the developer would carry out the developments or that the market demand was strong enough that the Claimant would carry out such speculative developments itself. Although negotiations with this particular developer ended, at the end of 2018 the claimant obtained outline prices from a building contractor to carry out the developments in spring 2019. In January 2020, a reserved matters application for 32,000 ft² of speculative development on the Claimant's "Phase 3" land was made and was obtained in June 2020…" (para 19.6)
>
> "The above demonstrates that both before and after the service of the 27 June Notice, the Claimant was in, what in several cases were advanced, discussions with major businesses and entities who required the Utilities offered by the Energy Park as part of the Revised Section 106 Agreement." (para 20)

91. In referring to the "Utilities" in that form in this witness statement, it is clear in context that Mr Benson is referring to the Services described in Part 5 and not to other Service Media. Para 19.4 of Mr Benson's witness statement additionally gave an example of a commercial grower of flowers, interested in developing glasshouses on the Energy Park, for whom the supply of hot water and electricity had allegedly been a major attraction, but where the discussions foundered at an early stage, for commercial reasons.

92. Taken at face value, Mr Benson's first witness statement implies that he, as the person who signed the Notice on behalf of the Claimant, was of the opinion that there would be demand for the Services from likely occupiers, and that this view was formed on the basis of advanced discussions with the various identified parties at or prior to 27 June 2018, who required the Services described in Part 5; and that this was the reason why the 27 June Notice was given. Mr Benson confirmed in cross-examination that Mr Philpot would have reviewed this witness statement and may have contributed to the text and suggested changes to it. He then accepted that the factual evidence in paragraph 19 and the assertion of what was said in paragraphs 19 and 20 was simply what Mr Philpot had told him.

93. Mr Benson said that he did not know of any reason why Mr Philpot could not have made a witness statement in the proceedings, attesting to what he personally

knew. Mr Benson said that he thought it was right for him to take responsibility, as he had signed the Notice. Given the considerable involvement of Mr Philpot behind the scenes at all stages, I cannot accept that as a full explanation. I conclude that a tactical decision was taken to have someone other than Mr Philpot give evidence about the Claimant's decision to give the Notice.

94. The Defendant sought further information relating to the various unidentified negotiating parties in Mr Benson's first witness statement and disclosure of documents relied upon to evidence any interest and demand for the Services. The Claimant's response identified Lidl, Friar's Pride, Palmer & Harvey and the Department of International Trade as the persons referred to and provided some disclosure relating to their interest. This revealed that Lidl, Friar's Pride and Palmer & Harvey had expressed some interest in taking or building units over the period 2014 – 2016 but that their interest had ended, and that they had said nothing at the time about any of the Services or their need for similar services. It also showed that the interest of the flower growers referred to in paragraph 19.4 of Mr Benson's statement was no more than fleeting and ended in July 2014.

95. The only person, it emerged, with whom the Claimant was in any discussion at a relevant time was Unit Build, which was itself a developer looking to buy land. It wanted to take land free from the co-operation obligations in the Contract. Interest expressed later by a company called Ribeye Ltd, initially and briefly in autumn 2019 and then again in spring 2021, did lead to heads of terms being agreed in September 2021, which include reference to the Services. There was some questioning about how the heads of terms came to include reference to the Services, but it is not an issue that it is necessary for me to resolve in view of the time of the negotiations (more than 3 years after the Notice was given) and Mr Benson's evidence in court.

96. On 10 September 2021, Mr Benson made a second witness statement "in order to update the court on a number of factual matters concerning the development of the Energy Park and the basis of my honest belief, which the defendant repeatedly calls into question". That witness statement does not comply with PD 32 either: it contains much hearsay evidence, without identifying the particular source of the evidence, and relies on and provides a narrative of various documents, which appear to be the source of other information that Mr Benson advances as evidence.

97. Mr Benson states that the Claimant is continuing to promote and market the Energy Park and to negotiate with Ribeye, although he accepted in court that he was not personally involved. As to his honest belief in the demand for the Services, he said that documents included in disclosure:

> "…informed my belief as to the future demand for the Utilities. However my knowledge and honest belief in the demand is not limited to those documents. My understanding and knowledge has, over the years, also been informed by:
>
> 1. oral conversations between me and other individuals at the Claimant, consultants engaged by the Claimant, the potential occupiers themselves and/or or the Claimant's agent, Vickery Holman, or;

> 2. information that was relayed to me by other individuals at the Claimant, consultants engaged by the Claimant and/or Vickery Holman, based on oral communications they had had with potential occupiers or other relevant individuals"

No particulars of these conversations are provided and no individual with whom the conversations allegedly took place is identified.

98. Despite the second witness statement containing the required statement and certificate of compliance with PD 57AC, it does not comply. What it contains is not evidence of facts personally known to Mr Benson, or properly admissible hearsay evidence; it is a narrative of what documents show and an argument in support of the Claimant's (not Mr Benson's) alleged belief of demand for the Services. It does not indicate whether and to what extent Mr Benson's memory has been refreshed by considering documents and if so which documents.

99. In September 2021, the Defendant amended its Defence to plead an implied term of the Contract that the Claimant had to make a reasonable determination of the demand for the services before serving a Part 5 notice; also pleaded were steps that the Claimant had failed to take and matters that the Claimant failed to consider prior to the service of the Notice. In response to that new case, Mr Benson made a third witness statement dated 14 October 2021. In it, he says that he makes it to "provide an explanation as to factors that the Claimant took into account when deciding to serve the June 2018 Notice on the Defendant."

100. The third witness statement does not comply with PD 57AC either: it makes assertions – more in the nature of argument than evidence – about what the Claimant decided, discussions that the Claimant had and what the Claimant's view was about the trigger for serving the Notice. It says nothing about what Mr Benson saw, heard or did and does not indicate which individuals on behalf of the Claimant formed the views or made the decisions that are described. The following paragraphs are illustrative of the problem:

> "It was decided that the Claimant would serve the notice in June 2018 because after many years of only limited interest from the market, the Claimant had received a number of enquiries through its agents, Vickery Holman, that convinced the Claimant that it should proceed with the first phase of the build out" (para 11).
>
> "The Claimant's discussions with Vickery Holman, prior to the service of the June 2018 Notice, were indicating that the demand for good quality, new build industrial and commercial units in the Plymouth area was growing and the specific enquiries gave us confidence that it was worth making the investment in starting to build the units." (para 12)
>
> "In the Claimant's view, the decision to proceed with the development of the first phase of the Energy Park was the trigger to issuing the June 2018 Notice to the Defendant". (para 13)

101. What Mr Benson notably does not say in his witness statements is that, in deciding to proceed with a speculative development of the first part of the Energy Park, he or anyone else on behalf of the Claimant decided to install infrastructure for the benefit of any units forming part of the Qualifying Buildings, to provide a supply from the Energy Centre of high-pressure un-odorised gas, pressurised hot water at 200degC, or even an electricity supply from the Energy Centre.

The decision-making process: the oral evidence of Mr Benson

102. In his evidence in court, Mr Benson said that his main focus was taking forward projects on the Energy Park. He said that a Mr David Bee was a consultant acting for the Claimant, whose role was to try to find interested parties to lease or buy the land, and that Mr Philpot interacted with Mr Bee and had the most direct knowledge of what was happening. He (Mr Benson) did not have direct contact with the agents, Vickery Holman, and was mainly involved in other projects from 2012 to 2017, and became aware of discussions about the Energy Park from Mr Philpot.

103. Mr Benson explained that the Claimant has 3 directors: himself, Mr Philpot and Mr Keith Clarke. Although he had heard something about a dispute with the Defendant about landscaping charges, he was not involved and the signing and sending of the Notice was the first involvement that he had had with the Defendant. The Notice was sent to the Defendant's registered office (Mr Barrett of the Defendant said in his evidence that it was Mr Philpot who had later sent him an email attaching the Notice).

104. Mr Mort put to Mr Benson in cross-examination that the Notice had not been served for any genuine reason but only to put pressure on the Defendant in connection with the dispute about landscaping charges and the Claimant's previously expressed desire to amend the Contract. Mr Benson denied that and said that he was unaware of a desire to amend the Contract. He also said that he was unaware of the email correspondence between Mr Nettleton on behalf of the Defendant and Mr Philpot on behalf of the Claimant about landscaping charges, which was live immediately before and after the Notice was served.

105. Mr Benson's first comment in cross-examination about why the Notice had been served was volunteered in answer to a question about the effect that the Notice would have had on the Defendant:

> "I would say the effect of the notice and the reason why I issued it was because it was a key part of getting the infrastructure in place to proceed with the business park".

Asked which developer or tenant wanted an HP gas supply, Mr Benson said that he had thought it through in the context of these proceedings and:

> "The demand for the gas, in my view, came from the fact that we were developing a business park, we had decided to proceed with the build out of initial units and those units would need gas. In my view, that was -- that was the judgment that I was making."

Asked again about the consequences of the Notice for the Defendant, Mr Benson said:

> "I believed there would be a demand, so the obligation's on the client to comply …"

106. As Mr Benson's evidence continued, it became clear that he personally had had little familiarity in June 2018 with marketing of the Energy Park and seeking interested purchasers or tenants. It was Mr Philpot who was directly involved, with Mr Bee and Vickery Holman doing the daily leg work. Having been shown the relevant documents, he was forced to accept that, as far as he knew, there was no person other than Unit Build (who wanted land freed from the Contract obligations) interested in the Energy Park in summer 2018. The disclosed documents support that evidence. There had been other interest expressed in 2014 – 2016, though not in the Services, and Mr Benson had not been involved at the time. All such interest had ended by 2016.

107. Faced with the uncomfortable realisation that what (1) an email from the Claimant dated 26 April 2018, (2) a letter from the Claimant dated 12 July 2018, (3) Mr Arben's witness statement and (4) his own first witness statement had said or implied about there being considerable interest in the Energy Park in summer 2018 was not the truth, Mr Benson then volunteered that the discussion with Unit Build (with which he was not involved) was an indication of the state of the market at that time and of improvement of appetite for occupiers of units of the kind that Unit Build wanted to build, and:

> "my notice was on the basis that we'd decided to do that ourselves. Regardless of what happened or didn't happen with UnitBuild, our intention was to move forward and do something similar because we felt that if UnitBuild was so confident that they could see a demand for such things, we should look to speculatively build for ourselves."

108. Mr Benson accepted, however, that he did not know whether Unit Build (which was itself a developer, not an end user) had a demand for any of the three Services. There is no evidence that Unit Build's development model involved taking a supply of high-pressure un-odorised gas, pressurised hot water or an electricity supply from the Energy Centre. It therefore cannot be the case that the Claimant required the Services because Unit Build wanted them. There is equally no credible evidence that the Claimant, if it intended at or about June 2018 speculatively to develop part of the Energy Park, was intending to lay infrastructure on its own land to supply any of the Services to units that it intended to build.

109. When pressed in cross-examination, Mr Benson said that the Claimant is <u>now</u> planning to install a heating network that will work from a utilities building around the intended units and supply space heating to the units. But no detail was provided, in disclosure or in Mr Benson's evidence, about the nature of the heating network or the utilities building. The only document disclosed relating to the proposed development is an external levels plan dated September 2021 but it shows nothing of a heating network. Mr Benson suggested that there is a later drawing showing it, but this was not in evidence. Later he said, in relation to a

recent proposal to build units for the Council, that the Claimant's plan is to install thermal heating for the whole business park, taking advantage of the heat supply. However, again, there was no detail disclosed and, more significantly, this related to a proposal for which the Claimant only applied for planning permission in January 2020. There was no evidence of any such intention in June 2018.

110. Mr Benson said that he thought that the decision to serve the Notice had been taken by the Claimant in May 2018 – the initial draft on his computer was dated 11 June 2018. He prepared the Notice because of the Claimant's desire to start the development and it came out of the discussions about Unit Build. He explained it in this way:

> "in that context the discussion also involved the value that UnitBuild wanted to take out of the development and the appetite -- the confidence that UnitBuild were showing, and I would really see that as the trigger for the notice in that we thought we can do this ourselves. Therefore we should -- we're going to proceed. If we're going to proceed, I was well aware of the infrastructure obligations in the 106, we had been talking about that for a while, and we felt that this was a demand subject, you know, of a confident enough level that we should issue the notice."

111. As for the timescale for occupation and demand for the services stated in the Notice (mid-2019), Mr Benson said that it was probably he who had included that timescale in the Notice but that, in the event, planning took longer than expected. In fact, no application was made for planning permission until January 2020, so it was not the planning process that was to blame. The timescale stated in the Notice could only have been realistic (if at all) had the Claimant had a number of tenants negotiating heads of terms for offices, for which detailed planning permission existed. That of course was the kind of picture that the correspondence and original witness statements sought to paint, but it was false. No one was negotiating to take a unit in a Qualifying Building. In any event, it is difficult to imagine any office tenant that would have a demand for a supply of high-pressure un-odorised gas.

112. Mr Benson was pressed repeatedly about the nature of the internal discussion that led to his decision to serve the Notice. He said that there was discussion about serving the Notice in the course of the directors talking about other commercial matters. This suggests that there was no detailed discussion. He did not recall who had suggested serving the Notice and did not want to speculate, as it was now too long ago. But he felt that the desire by the Claimant to proceed speculatively, inspired by Unit Build's confidence, was enough to entitle the Claimant to serve the Notice. His evidence was:

> "I would say, you know, it was very much about the opportunity that we saw now in moving forward with the land we'd owned at Langage for a long time and actually developing it out, and that that was a firm enough decision that that -- you know, sorry, the "is" or "will be" demand element of that part of the section 106 was: yeah, that's enough, issue the notice. We need this in because it's part of making

> the business park and certainly the speculative development of the units valuable."

Mr Benson explained that he rather than Mr Philpot signed the Notice because it was regarded as part of the development activity rather than a legal notice. That, in my view, is a very strange conclusion to have reached. The Notice was clearly a legal document. Once it had been served, it was Mr Philpot who conducted the correspondence relating to it.

Conclusions on the decision-making process

113. Mr Benson's evidence was not clear or confidently given. He seemed to be feeling his way towards answers because he did not know enough about the underlying facts. He was also in my judgment treading something of a tightrope, trying to be truthful but not wishing to damage the Claimant's case. He found himself in a difficult position in that regard because the truth about why the Notice was served was radically different from what had been asserted on behalf of the Claimant previously. The account that he eventually gave was quite different from the story that had previously been told. He made some sensible concessions, when they were appropriate, and I find him to have been broadly an honest witness, despite the misleading appearance that had been created by him at an earlier stage. I conclude that, despite what he said, he was not personally involved in deciding what the Notice should say, and that others have been principally involved in advancing the Claimant's case. It is however a matter of concern that Mr Benson was able to approve and sign a witness statement which contains facts and assertions that are untrue and misleading.

114. I further find that Mr Benson's recollection of what the position was in mid-2018 has been significantly affected by what has emerged since that time, by the course of the litigation and by careful consideration of what the Claimant's case is, which has changed over time. It is however possible to reach a conclusion about what probably happened in June 2018, based on what Mr Benson has said in the witness box rather than the assertions made in his witness statements, which are unreliable, but weighing that oral evidence with the facts established by the documents, the fact that different explanations were previously given by him and Mr Arben, and the inherent probability of what the Claimant had addressed at that time.

115. What I understood Mr Benson to be saying, in substance, was that the negotiations with Unit Build inspired someone at the Claimant (unnamed, but probably Mr Philpot) to think that they might proceed speculatively in a similar way, and they wanted to do that, in principle; and it was that realisation that led the directors to think that they could and should serve the Notice, because giving the Notice would start the process of putting in infrastructure. As he later said, Unit Build was the "commercial driver" for the decision. However, there was no suggestion that the directors had taken a decision to proceed with a speculative development, nor any document to support it, before 2020.

116. The Notice was, in my judgment, regarded by the directors as a first step towards development of the Energy Park and one that could be taken easily, with no expenditure on the part of the Claimant. It was something that they felt that they

were entitled to do, by asserting that there was occupier demand for the Services. They wanted to do something to start to progress the development of the Energy Park. It was suggested to Mr Benson that his evidence that this was the motivation in 2018 was false, and that it was not until 2020 that the directors had this idea, when they applied for planning permission. On balance, I accept Mr Benson's evidence that the directors did think of the possibility of proceeding speculatively themselves in 2018 – but as the delay in applying for planning permission shows, their consideration was only at a very preliminary stage in 2018 and did not take root until a year or more later. There was no decision made by June 2018 to proceed with a speculative development.

117. I find that there was no consideration, in June 2018 or earlier, of exactly what services would be required, what demand there was for any of the Services, or what infrastructure the Claimant was going to build on the Energy Park. The directors probably did appreciate that any development would need electricity, gas and heating and someone (probably Mr Philpot) was aware that Part 5 related to supplies of electricity, gas and heating, but that was as far as their consideration went. There was no attempt to assess whether high-pressure un-odorised gas would be of any benefit, or whether or how a supply of thermal heating would be used, or whether an intermittent supply of electricity would be required by occupiers or be sufficient for the Claimant's development purposes.

118. Had anyone at the Claimant had the thought in or before June 2018 (or indeed at any time before the witness statements were made) of installing on a speculative basis a district heating system, or plant to step down and odorise HP gas, or a back-up electricity supply, the written evidence of the Claimant would have so stated, instead of wrongly asserting that there were advanced negotiations with several commercial occupiers for space on the Energy Park who required the Services to be provided. When serving the Notice, neither Mr Benson nor the other directors believed that there would be a demand for the Services. Their state of mind was that they were entitled to serve the Notice and wanted to do something to start the process of development at the Energy Park.

119. As to the suggestion that the Notice was served only to apply pressure to the Defendant to negotiate the terms of the Contract and be reasonable about the landscaping charges, I do not find that to be proved, though I accept Mr Barrett's evidence that he genuinely believed that to be the case. There seems to me to be nothing sinister in the fact that the Notice was served at the same time as correspondence about landscaping charges and renegotiation was being exchanged. After the Notice, apart from one letter, the two issues were dealt with separately.

120. To summarise, therefore, I find that:

    i) Mr Benson, when he signed the Notice and arranged for it to be served on the Defendant in June 2018, did not believe that there was or would be (as distinct from "might be") a demand from the occupiers of the Qualifying Buildings. There were no actual intending occupiers at that stage, as Mr Benson must have known from his source of information, Mr Philpot. There was only one developer who was showing interest at that time, who wished to buy unserviced land for its own development, freed from the obligations

of the Contract. The Claimant had no intention at that stage to install infrastructure for a district heating system or for use of high-pressure un-odorised gas, or even for a supply of electricity from the Energy Centre rather than the National Grid; and Mr Benson therefore did not believe that there was demand on the basis that the Claimant was going to install the Services speculatively, for the benefit of future occupiers.

ii) The Claimant served the Notice because Mr Benson and Mr Philpot considered that it had a right to do so, because it would be an initial step towards starting a development and it might be beneficial in terms of marketing land on the Energy Park to have the infrastructure for a supply of electricity, gas and hot water laid to the boundary of the Energy Park.

iii) The directors or the Claimant did not prior to serving the Notice consider the true nature of the three Services, their unusual character or limitations, or ask themselves whether those particular Services would be demanded by an occupier of the Qualifying Buildings. It did not at that stage understand the design and regulatory implications of an HP gas pipe coming onto the Energy Park, the unsuitability of such a supply for almost all occupiers, or the possibility or the cost implications of installing plant to convert the high-pressure un-odorised supply into a low-pressure odorised supply; nor did it consider the limitations of an electricity supply from a power station that was not obliged to provide a continuous supply, or the possible need in those circumstances for a back-up supply.

iv) The directors of the Claimant did not consider in June 2018 the implications for intending occupiers of supplies being taken from a gas-fired power station rather than greener energy taken from the National Grid. As the expert witnesses at trial confirmed, the environmental issues associated with power stations such as the Energy Centre had changed very significantly between 2008 and 2018, as had the perceptions of most occupiers about the source of the energy that they would be consuming.

121. When the Claimant served the Notice, it therefore did not believe that there was or would be a demand for the Services from occupiers of the Qualifying Buildings. It gave the Notice without considering the material issues relating to the Services and for reasons that were extraneous to an assessment of whether such a demand existed, namely that: the Claimant considered that it had a right to serve it; that the Defendant's obligation to carry out the Phase 2 works was part of the price that it had agreed to pay for the planning permission for the Energy Centre, and so it should carry out the Phase 2 works; and that to be able to say that the Services were being provided might help in the marketing of the Energy Park.

122. The Claimant failed to consider whether, as at June 2018, there was likely to be any demand for any of the three Services from future (but unidentified) occupiers, given that by 2018 most occupiers would be concerned (in varying degrees) about their carbon footprints and that, by then, electricity supplied by the National Grid was about 50% "greener" than energy provided by a gas-fired power station. In

this latter respect, I accept the evidence of Mr Stillman that no reasonable engineer or consultant by 2018 would advise a client to build a development or a unit that was dependent on use of energy supplied by a gas-fired power station rather than electricity from the National Grid, or other greener sources, and that most clients would be concerned to avoid as far as possible dependence on fossil fuels.

123. Thus, whether, as I have found, the Notice had to be served reasonably (in public law terms) or only with an honest belief in what it stated, the Notice was invalid. If, contrary to my decision, the Claimant is right in contending that the only restriction on giving a notice is that it must have an honest belief in occupier demand for the Services, the Claimant did not believe at that time that there was or would be occupier demand. It probably considered that any occupier would have a need for electricity and a gas supply in general terms, but it did not believe that an occupier would have a demand for an electricity supply from the Energy Centre, or a high-pressure un-odorised gas supply rather than a supply at medium or low pressure; and, at highest, it considered that an occupier might have a demand for thermal energy. The Claimant did not have the relevant belief, which had to be about demand for the particular Services supplied from the Energy Centre.

Disposal

124. In those circumstances, I will not make the declarations sought by the Claimant to the effect that the Notice was valid and the Defendant became subject to obligations relating to the Phase 2 works with effect from 27 June 2018. On the contrary, I find that the Notice was invalid.

125. The other declarations sought by the Claimant were to the effect that the Defendant was obliged to provide the infrastructure as requested in the Notice, and that it failed to comply with its obligations as soon as reasonable practicable.

126. Had I reached a different conclusion about the validity of the Notice, I would not in any event have made either of the further declarations sought by the Claimant. The language used in the Notice to describe the infrastructure that the Defendant was required to provide is, for the most part, very general (see para 27 above) and making a declaration in those terms is of no real benefit to the parties over and above the language of Part 5 itself. Given the obligation in the Contract to co-operate and act reasonably in pursuance of such rights as the Claimant establishes, making a declaration with reference to the terms of the Notice does not take matters any further forward. Were the Notice valid, it is self-evident that the pipes and cables of a kind briefly described in the Notice have to be provided, but the detailed design and specification is something that has to be worked up collaboratively. Mr Duncan's evidence (which I accept) was very clear that there are now serious regulatory and safety issues with providing a high-pressure gas supply to the Energy Park that would have to be addressed by the parties.

127. In short, I see no benefit to the parties in making a broad declaration in the terms sought and as a matter of discretion would therefore have refused to do so. That does not of course mean that, if my conclusion on the validity of the Notice were different, the Claimant would not have such rights as the Contract provides.

128. I also would not have seen any advantage in making a declaration that the Defendant has failed to comply with its obligations as soon as practicable. The effect of that would be to establish that the Defendant was in breach of contract, but that would have no relevance to the right of the Claimant specifically to enforce the obligations in the Contract, if necessary. Breach might be relevant of course to a subsequent claim for damages, but then the important matter would be the first date on which the Defendant was in breach.

129. Despite a valiant attempt by Mr Polley to persuade me that there was sufficient clarity in the expert evidence to reach a conclusion about that, in my judgment any conclusion would be no more than extremely broad brush, as the evidence did not address the point with any detail. Had the Defendant been liable to install the infrastructure in Phase 2 as soon as reasonably practicable after June 2018, it is highly likely that a breach of that obligation would be established at some time before the date of trial, given the obligation on the Defendant to act co-operatively and reasonably. This would entail its liaising to ascertain design parameters and any other requirements (as indeed it did in or before August 2007); but I am unable to make a confident finding about when that breach occurred, nor indeed does the declaration sought require me to do so.

Appendix

Part 5

5. **Energy costs**

Hot Water

5.1 **The Applicant shall prior to the Commissioning of the Development install:**

5.1.1 **flanges at suitable points in the process pipework on the Energy Centre to facilitate the future connection of the pipework to be installed pursuant to paragraph 5.2.1; and**

5.1.2 **ductwork to accommodate the aforementioned pipework to a single point at the eastern boundary of the Spine Road the location of which shall be in accordance with the plan annexed to the Fifth Schedule**

5.2 **In the event that the owner of the LEPL Land notifies the Applicant and the Council that there is or will be a demand for hot water from the occupiers of the Qualifying Buildings, the Applicant shall as soon as reasonably practicable install:**

5.2.1 **supply and return pipework for the passage of hot water within the ductwork installed pursuant to paragraph 5.1.2 above; and**

5.2.2 **a heat exchanger on the Energy Centre**

5.3 **In the event that:**

5.3.1 **the Qualifying Buildings are connected to the plant and pipework installed Pursuant to paragraph 5.2 above; and**

5.3.2 **any lawful occupiers of those buildings notify the Applicant that they wish to take a supply of hot water from the Applicant**

subject to paragraphs 5.4 and 5.8 the Applicant will make available at a single point at the eastern boundary of the Spine Road a supply of pressurised hot water to those occupiers at prices to be agreed with them from time to time which are fair and reasonable and if there should be published any government figures for the appropriate prevailing market price the prices shall be five percent (5%) below such prevailing market price

5.4 **The pressurised hot water to be supplied by CLL pursuant to paragraph 5.3 shall:**

5.4.1 **when the Power Station is operating at or above 50% of the maximum available output for the ambient conditions, be capable of providing 2MWt of thermal energy through the supply of pressurised hot water at a maximum supply temperature of 200 degrees centigrade**

5.4.2 **when the Power Station is operating below 50% of the maximum available output for the ambient conditions, provide as much thermal energy as possible (up to 2MWt) subject to such supply not being detrimental to the performance of the Power Station**

5.4.3 **be supplied at the required water flow rate as notified by the owner of the Energy Park but CLL shall not at any time be required to supply more than 20 tonnes per hour**

Electricity and Gas

5.5 **Subject to paragraph 5.8 in the event that any lawful occupiers of the Qualifying Buildings notify the Applicant that they wish to take a supply of electricity and/or gas from the Applicant, the parties agree that the following shall apply:**

5.5.1 **occupiers will only qualify for discounted electricity and/or gas if they take the relevant supply from British Gas; and**

5.5.2 **qualifying occupiers will receive a discounted tariff for the supply of electricity and/or gas (as the case may be) equal to 5% below the appropriate prevailing market price as identified in the Department for Business Enterprise and Regulatory Reform publication "Quarterly Energy Prices" or such publication as may replace it from time to time**

5.6 **Subject to paragraph 5.8 in the event that the owner of the Energy Park notifies the Applicant and the Council that there is or will be a demand from the occupier of the Qualifying Buildings for un-odorised gas and/or electricity to be supplied directly from the Power Station, the Applicant shall as soon as reasonably practicable install (as appropriate):**

5.6.1 **pipework for the passage of high pressure un-odorised gas;**

5.6.2 **electrical cables**

within the ductwork installed for that purpose as part of the Service Media

5.7 **In the event that:**

5.7.1 **the Qualifying Buildings are connected to the pipework and/or cables (as appropriate) installed pursuant to paragraph 5.6 above; and**

5.7.2 **any lawful occupiers of those buildings notify the Applicant that they wish to take a supply of un-odorised gas and/or electricity (as appropriate) directly from the Applicant,**

subject to paragraph 5.8 the Applicant will make such a supply available to those occupiers at a price equal to 5% below the appropriate prevailing market price as identified in the Department for Business Enterprise and Regulatory Reform publication "Quarterly Energy Prices" or such publication as may replace it from time to time

5.8 **The Applicant's obligations under this Part 5 shall cease upon the earlier of:**

5.8.1 **the date which is 15 years from the Commissioning of the Development; and**

5.8.2 **the date on which the supply of such discounted energy ceases to be lawful**