Neutral Citation Number: [2022] EWHC 338 (Comm)

Case No: CC-2020-MAN-000025

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (QB)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 0DJ

Date: 18 February 2022

Before :

His Honour Judge Cawson QC
Sitting as a Judge of the High Court

- -

Between :

THURCROFT POWER LIMITED	**Claimant**
- and -	
VOLTA ENERGY GROUP LIMITED	**Defendant**

- -
- -

Chris de Beneducci (instructed by **Horwich Farrelly Limited**) for the **Claimant**
Michael d'Arcy (instructed by **Squire Patton Boggs (UK) LLP**) for the **Defendant**

Hearing dates: 18-21 January 2022

- -

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.

.....

HHJ CAWSON QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, and by release to BAILII.

The date and time for hand-down is deemed to be 10.30 a.m. on 18 February 2022

HHJ CAWSON QC:

CONTENTS	Para. No.

Introduction

1. In the present proceedings, the Claimant claims that the Defendant is liable to it in consequence of the Defendant having been unjustly enriched at the Claimant's expense and/or having acted in breach of implied contractual terms.

2. In short, it is the Claimant's case that:

   i) Against the background of the grant by the Claimant to the Defendant of an option to purchase (at a price of £800,000 (subject to variation)) an asset related to a project concerning the development of a battery storage facility, and before the exercise of the option, the Claimant transferred the assets to the Defendant, or at least permitted the Defendant to use the same;

   ii) Following the expiration of the period for exercising the option, and without the option having been exercised, the Defendant sold or otherwise dealt with the assets the subject matters of the option agreement without accounting in any way to the Claimant in respect of the proceeds of sale received;

   iii) The assets were transferred to the Defendant, or the Defendant was permitted to use the assets, on the basis that the Defendant's right to retain and deal with the same was conditional upon the payment of a *"success fee"* equivalent to the option price if the Defendant proceeded with the relevant project, by building out itself or otherwise in any way;

   iv) The Defendant has been unjustly enriched upon the failure of the basis;

v) Further or in the alternative, the Defendant has acted in breach of an implied term of the option agreement that, after the expiry of the option period, it would cease to make use of any asset or assets which it had been using during the course of the option period for the purposes of facilitating the project that the option agreement was intended to facilitate, and that if it did make use of any such assets in order to proceed with the relevant project, after the expiry of the option period, by building out or otherwise, it would become liable to pay the price provided for by the option agreement.

3. The Defendant submits that the claim is misconceived and without merit:

i) In respect of the unjust enrichment claim, not least because the assets in question were either never the subject matter of the option agreement, or if they were, the Defendant never conferred any benefit in respect of them on the Defendant, and in any event the basis or condition contended for never existed; and

ii) In respect of the breach of contract claim, because there is no proper basis for implying the alleged implied terms as they are theoretical given that the situations in which they could apply do not arise, and in any event, they are neither necessary nor obvious terms to imply.

4. The Claimant was represented by Mr Chris de Beneducci of Counsel, and the Defendant by Mr Michael d'Arcy of Counsel. I am grateful to them both for their helpful written and oral submissions.

Key individuals and entities

5. The following individuals and entities are of particular relevance for the purposes of the present claim:

i) Andrew Brown ("**Mr Brown**"): At all material times, sole director of and shareholder in AB Energy Agency Co Limited ("**ABE**"), a company which specialises in finding potential construction sites for battery storage projects and in applying to distribution network operators for grid connections. Mr Brown was TPL's sole witness.

ii) Kenneth Smithers ("**Mr Smithers**"): From 22 September 2017 onwards (and prior to 31 March 2017), a director (with his wife) of, and shareholder in Tiger Energy Management Limited ("**TEM**"), a company (now known as Newton Energi Limited) which specialises in making applications for planning permission in the energy sector and in identifying investors for battery storage projects.

iii) Anthony and Julie Green ("**the Greens**"): The freehold owners of land at Green Lane, Thurcroft, Rotherham S66 9JD ("**the Thurcroft Site**").

iv) The Claimant, Thurcroft Power Limited ("**TPL**"): A company incorporated on 28 July 2017 as a special purpose vehicle for the purpose of undertaking the initial stages of a battery storage project at the Thurcroft Site ("**the Thurcroft Project**"). Mr Brown was appointed as a director of TPL on incorporation.

ABE and TEM were appointed as corporate directors of TPL on 14 August 2017. TEM resigned as a director of TPL on 16 February 2018. Following incorporation, 20 shares of £1 each held by Mr Brown, and 10 shares of £1 each were held by Clare Black. 30 shares of £1 each were allotted to TEM on or about 14 August 2017.

v) The Defendant, Volta Energy Group Limited ("**Volta**"): A company incorporated on 25 July 2017 to deliver battery storage sites, and a subsidiary of Effective Energy Group Limited.

vi) Don Leiper ("**Mr Leiper**"): At all material times, acted as Volta's Managing Director, albeit not formally appointed as a director of Volta. Now Chief Operating Officer for Alta Capital Limited, but still engaged as a consultant to Volta. Witness for Volta.

vii) Shaun Adams ("**Mr Adams**"): At all material times, Chief Financial Officer of Effective Energy Group Limited and Volta, and a director of Effective Energy Group Limited. Witness for Volta.

viii) Julian Windmill ("**Mr Windmill**"): At all material times, a short-term contractor to Volta, who assisted with project administration on the Thurcroft Project.

ix) Howard Kirke ("**Mr Kirke**"): Commercial Engineer at Northern Powergrid (Yorkshire) plc ("**NPG**"), the relevant distribution network.

x) Max Jones ("**Mr Jones**"): an architectural technologist, and a director and founder of Max Design Consultancy Limited ("**MDC**"), an architectural planning and consultancy firm engaged to prepare and submit a planning application in respect of the Thurcroft Project. Witness for Volta.

Battery storage facilities

6. Central to the present case is a project intended to lead to the development of a battery storage facility on the Thurcroft Site. Before considering the background to the present dispute, it is necessary to understand what the development of a battery storage facility involves.

7. In essence, battery storage facilities are a collection of high-power, high-capacity batteries, which are used to store electrical energy taken from the National Grid that can be released back to the latter.

8. There are two principal purposes for battery storage facilities, namely:

i) The acquisition of electricity from the National Grid when the supply of electricity exceeds demand, and the supply of electricity to the National Grid when demand for electricity exceeds supply; and

ii) The stabilisation (or regulation) of frequency so as to ensure that the 50Hz frequency of the electricity in the National Grid remains within the required tolerance.

9. A battery storage facility can potentially generate income through three revenue streams, namely:

   i) Providing frequency stabilisation services;

   ii) Providing a reliable source of power by guaranteeing capacity in the event of a shortfall of generation capacity, thereby ensuring that there is enough energy to meet customer demands on the National Grid; and

   iii) Purchasing energy to charge the facility's batteries at the lowest possible cost in order to be able to release the energy back to the National Grid to meet demand at peak times when the energy cost is at its most expensive thereby profiting from the differential price charging.

10. So far as providing frequency stabilisation services are concerned, prior to the events in question in 2017, the National Grid announced a number of incentives to attract investment in short-term grid balancing measures, known as *"Frequency Response"*, able to react to unpredictable changes in the electricity network. Battery storage facilities provide an ideal solution to such unpredictable changes, being able not only to inject power in the event of a sudden increase in demand, but also to soak up excess power in the event, for example, of a large user suddenly shutting down. Such *"Frequency Response"* might be required only momentarily, or for longer periods of time.

11. As to providing a reliable source of power in the event of a shortfall of generation capacity, the Government had, prior to the events in question in the present case, introduced a capacity market ("**the Capacity Market**") to ensure that electricity supply met demand at times of peak consumption. Generation capacity in the UK is insufficient to meet requirements during times of seasonal peak demand, and so it is necessary for additional electricity to be purchased from third parties, including operators of battery storage facilities.

12. The *"Capacity Market"* is made up of businesses who generate or consume large volumes of electricity, who have successfully bid in an annual auction known as *"the Capacity Market Auction"* for contracts either to supply the National Grid with *"top up"*, or alternatively *"not to consume"* electricity during periods of high electricity demand. The *"Capacity Market"* is thus a mechanism under which providers and/or users of electricity bid for contracts from the National Grid to provide capacity, or alternatively not to consume, through a competitive process, with contracts being awarded to the highest bidders every January.

13. Under the contracts awarded to successful bidders, the National Grid pays a fixed annual sum to the providers according to the amount of capacity made available, whether or not the *"top up"* electricity is actually drawn by the National Grid. Thus, payment is made purely for the facility of the capacity made available, and not the market value of the electricity, and so provides an additional income stream.

14. In 2017, the expectation was that such fixed sums payable would be approximately £25,000 per annum per MW of capacity provided, with an upper limit of £30,000-£35,000. Batteries which could supply at full power for 1 hour would be valued by the National Grid at approximately 97% of this price.

15. In order to bid in the Capacity Market Auction, a provider of electricity must *"pre-qualify"* several months in advance. In the case of a battery storage facility, this, at the relevant time, required that the project the subject matter of the bid met a number of technical requirements, including having a grid connection agreement in place, and planning consent for the relevant project. It was not, however, necessary that the battery storage facility had actually been built at the time of pre-qualification given that it was possible to bid for a *"T4 category"* of contract, in respect of which the capacity would not need to be provided for four years following the auction.

16. As identified in the evidence of both Mr Leiper and Mr Brown, and as is common ground between the parties, a project to develop a battery storage facility required, in order to be in a position to pre-qualify, three elements to be in place, namely:

    i) A suitable connection to the National Grid;

    ii) The right to use the land on which the battery storage facility was to be situated; and

    iii) Planning permission for a battery storage facility.

17. So far as a connection to the National Grid is concerned, this, so far as concerned the Thurcroft Project, required an application to be made to NPG, the district network operator ("**DNO**") for the relevant area (Yorkshire), where the Thurcroft Project was to be developed. The application process required an application to be made to the DNO for a quotation in respect of the proposed connection for the relevant project and involved the issue by the DNO of a quotation (or connection offer), which it was then open to the applicant to accept. The quotation issued by the DNO would contain a quote for the cost of the works required to be carried out by the DNO to enable the connection.

18. The cost involved would vary dependent upon the location of the site of the relevant battery storage facility and depend upon various factors such as proximity to a substation, the status of the particular substation, and the costs that might be involved in modifying, extending or renewing an existing substation and/or connecting cables. The most economic sites on which to develop battery storage facilities were, at all relevant times, those closest to substations that had historically served a high demand for power, but which no longer existed, e.g., a site close to a closed down steelworks. Such a substation would be likely to have an infrastructure better able to deal with the additional demand created by the battery storage facility.

19. Consequently, a key preliminary task in working up a proposal for a battery supply facility would be the identification of a suitable site, ideally a piece of land of approximately one or 2 acres in close proximity to a suitable substation to which the battery storage facility could be connected. Mr Brown described this as a process involving identifying potential plots from Google Earth and then conducting an online search for any planning applications in the area identified in order to check for any proposed new developments, or any competitive energy project developments which might have been rejected or which might not have gone ahead for some other reason.

20. Once the site has been identified, it is then necessary to seek to identify the owner or owners thereof, and to then seek to reach agreement with the latter, ideally by

agreeing heads of terms, and subsequently entering into an option for the lease or purchase of the site in the event that the project is able to go ahead.

21. Once the site has been so earmarked, then the application for a connection can be made to the DNO, and an application made for planning permission for the development of a battery storage facility on the site. However, before the application for a connection can be made to the DNO, it is necessary to obtain a letter of authority from the owner of the site. Mr Brown says that before the connection application is made, it is ABE's practice to consult a planning consultant, and to request an appraisal of the outline project.

The history of the Thurcroft Project

22. In March 2017, Mr Brown identified the Thurcroft Site as a suitable location for a battery storage facility.

23. On 21 March 2017, Mr Brown met the Greens, the owners of the Thurcroft Site, at the Thurcroft Site. On the same day, the Greens signed a letter addressed to NPG providing confirmation that they agreed to give *"Bluebell Energy"*, an entity that Mr Brown and ABE were then working with, permission to discuss with NPG the connection of an energy project at the Thurcroft Site.

24. Mr Brown was, in March 2017, also in discussion with Mr Alkesh Patel ("**Mr Patel**"), the director of Stoneview Limited, with regard to another site capable of connecting to the same substation on the North-East Side of Moat Lane, Wickersley ("**the Wickersley Site**"). On 21 March 2017, Mr Patel wrote to NPG confirming that permission had been given to ABE to discuss with NPG a connection from the Wickersley Site.

25. Further, at this time, Renewable Energy Systems Limited ("**RES**") was also in discussion with the Greens with regard to the Thurcroft Site. On 29 March 2017, and with the Greens' authority, RES applied to NPG for a connection quotation in respect of a proposed battery storage project at the Thurcroft Site ("**the First Thurcroft Application**").

26. On 7 June 2017, Mr Brown, having by then fallen out with Bluebell Energy, was introduced to Mr Smithers and TEM by Mr Kirke, a mutual contact at NPG.

27. On 12 June 2017, a *"Bilateral Confidentiality Agreement"* was entered into between TEM and ABE. Mr Brown and Mr Smithers thereafter agreed that the initial stages of a battery installation project at the Thurcroft Site should be pursued between them and/or their respective companies as a joint venture.

28. On 24 July 2017, ABE applied to NPG for a connection quotation in respect of a proposed battery storage project at the Wickersley Site ("**the Wickersley Application**").

29. On the same day, 24 July 2017, ABE applied to NPG for a connection quotation in respect of a proposed battery storage project at the Thurcroft Site ("**the Second Thurcroft Application**"). Although ABE was identified as the *"Applicant"*, TEM was identified in the application as a *"Consultant"*.

30. Volta was incorporated on 25 July 2017 as a subsidiary of Effective Energy Group Limited.

31. On 26 July 2017, the Greens conferred on ABE exclusivity in respect of any battery project at the Thurcroft Site, thus effectively excluding any competition from RES, which had made the First Thurcroft Application.

32. TPL was incorporated on 28 July 2017 as a special purpose vehicle to pursue the early stages of the development of a battery supply installation at the Thurcroft Site. Mr Brown explained that it was his modus operandi, or rather that of ABE, to establish a special purpose vehicle company ("**SPV**") to establish the relevant connection to the National Grid through the relevant DNO, obtain an option from the owner of the relevant land on which the battery supply facility was to be situated, and obtain planning permission. In this way, a *"shovel ready"* battery storage facility could be marketed through the sale of shares in the SPV.

33. TPL was incorporated, following discussions between Mr Brown and Mr Smithers, as a joint venture between them, or their respective companies. As referred to above, on 14 August 2017, ABE and TEM were appointed as directors of TPL in addition to Mr Brown.

34. In the meantime, on 2 August 2017, the Greens signed Heads of Terms issued by ABE in respect of the grant of an option for a lease of the Thurcroft Site to TPL for a term of 25 years at a rent of £80,000 per annum. On the same day, ABE, TPL and the Greens entered into a Non-Disclosure Agreement.

35. On 30 August 2017, NPG issued a quotation to ABE in respect of the First Thurcroft Application ("**the First Connection Offer**"). The First Connection Offer was made out to ABE as *"the Applicant"*, TEM as the *"End User"*, and TEM as the *"Payor"*. In addition, the First Connection Offer specified that: *"In this Quotation,* ***Northern Powergrid (Yorkshire) plc*** *may be referred to as "We" or "Us" or "Our" or "Distributor"; and* ***Tiger Energy Management Ltd, whose registered office number is 10199022*** *as the "Customer" or "You" or "Your"."*

36. Further, the First Connection Offer provided that if NPG undertook all the necessary work to connect the proposed battery storage facility to the substation (*"Full Works"*), the cost would be £2,764,603.66 plus VAT, but if NPG only undertook the *"Non-Contestable (Point of Connection)"* option for work, the cost would be £900,328.48 plus VAT. As initially issued, the First Connection Offer required the payment of £140,000 plus VAT on acceptance, but Mr Smithers subsequently negotiated a reduction of the payment due on acceptance to £70,000 plus VAT, with a second payment of £70,000 plus VAT being due four months after acceptance.

37. On 5 September 2017, ABE and TEM entered into a joint venture agreement ("**the JVA**"). The recitals thereto recorded that ABE and TEM wished to: *"establish between them a number of joint ventures to (a) collaborate in producing Part Shovel Ready and Completely Shovel Ready sites and (b) the subsequent sale of the Joint Venture's SPVs, each of which owns the rights to the Part Shovel Ready and Completely Shovel Ready projects."*

38. As to the terms of the JVA:

i) *"Completely Shovel Ready"* was defined by clause 1.1 as meaning: *"A Site which has been made ready for the construction process to commence, and has a grid connection and planning permission for an Energy Project"*.

ii) Clause 5.1 provided for the parties to make an initial contribution to the joint venture as therein set out, namely:

> *"5.1.1 [ABE] will:*
> *(a) Find a suitable Site*
> *(b) Make an application to the relevant Distribution Network Operator for a grid connection to the Site.*
> *(c) Negotiate lease option with the site owner*
> *(d) Fund the setting up of the SPV*
> *(e) Create the SPV and distribute the shares in the SPV*
> *(f) Maintain accounts for the SPV*
> *(g) Maintain all statutory requirements of the SPV*
> *(h) Produce a statement of external costs incurred in making the project Part Shovel Ready or Completely Shovel Read (sic).*
> *5.1.2 [TEM] will:*
> *(a) Initially consult a planning consultant as to the prospect of obtaining planning consent for an Energy Project on the Site.*
> *(b) Act as consultant to AB Energy in respect of its applications to the relevant Distribution Network Operator for a grid connection to the Site.*
> *(c) Instruct a planning consultant to seek planning consent for the Project*
> *(d) Assist with Project design as required*
> *(e) Instruct solicitors to act in obtaining lease option with the site owner*
> *(f) Fund external costs, including the planning costs, and the legal costs*
> *(g) Negotiate the sale of the SPV with Project Developers."*

iii) Clause 6 provided that in the event that the joint venture generated a profit prior to sale, the profit would firstly be used to repay any monies due to ABE and TEM and would then be distributed between the shareholders in proportion to their shareholding.

39. By this time, Mr Smithers had been in discussion with Volta with a view to Volta funding the initial payment of £70,000 due to NPG on acceptance of the First Connection Offer and acquiring the battery storage project that was being put together in respect of the Thurcroft Site, i.e., the Thurcroft Project. Consistent with the terms of the JVA, it is not seriously in dispute, but that Mr Brown left it to Mr Smithers to negotiate with Volta in respect of these matters.

40. Mr Smithers says that TPL did not have the funds available to pay the deposit of £70,000 plus VAT, and that he agreed with Mr Brown that the best option would be to ask Volta to pay the deposit on the basis that it would take the benefit of the connection quotation offer. Mr Brown disputes that this was discussed with him in

these terms and complains that Mr Smithers never approached him to see whether he might have been able to raise the £70,000 plus VAT, which he says that he could have done.

41. In the event, on 7 September 2017, Mr Leiper, on behalf of Volta, forwarded to Mr Smithers a number of documents including a draft option agreement with the Greens in respect of the Thurcroft Site, a draft option agreement granting Volta an option to purchase the share capital of TPL, a draft side letter *"RE the grid connection payment"*, and a red line drawing *"for Thurcroft"*.

42. So far as these documents are concerned:

    i) The draft option agreement with the Greens was to be one entered into between the Greens and Volta, under which Volta was granted an option to require the Greens to grant a lease of the Thurcroft Site to TPL, or such other company as Volta might direct;

    ii) The draft option agreement in relation to the share capital of TPL provided for a payment of £50,000 by way of *"Option Fee"* on the grant of the option, but a price of only £1 payable as *"Completion Money"* following the exercise of the option;

    iii) The draft side letter was addressed by Volta to TPL, and recorded that Volta would, on or before 11 September 2017, *"on your behalf"*, pay the sum of £70,000 plus VAT *"to the DNO in respect of the Grid Connection Offer"*, and that TPL would request that *"the DNO repays the Deposit to you within 5 working days of our written notice to you that we no longer wish to proceed with the development of the Property for a battery storage project ("the Project") or you unilaterally withdrawing from the negotiations in respect of the Project,"* and that within 5 working days of the receipt of the repayment, "*you will pay the Deposit to us, less any sums the DNO properly deducts from the Deposit."* This therefore provided for a mechanism for Volta to recover the deposit of £70,000 plus VAT if *"the Project"* did not proceed.

43. Mr Smithers forwarded the draft option agreement in respect of the share capital in TPL, and the draft side letter to Mr Brown. Mr Brown signed the same and returned them to Mr Smithers, together with the signed JVA, on 8 September 2017. Mr Brown accepted under cross-examination that there were details within the draft option agreement that required to be finalised.

44. Mr Smithers did not forward to Mr Brown the draft of the option agreement with the Greens. However, by email dated 7 September 2017, Mrs Green forwarded a copy thereof to Mr Brown.

45. Further, Mr Smithers never returned the option agreement in respect of the share capital of TPL as signed by Mr Brown (and Clare Black), or the side letter as signed by Mr Brown, to Volta. Indeed, these documents were never returned to Volta because, following further communication between Mr Smithers and Mr Leiper, it was agreed between the latter the matters would be structured in a different way. It is Mr Brown's case that he was never informed of this, and that it was his understanding that an option agreement in respect of the share capital of TPL in the terms of that

which he had signed had been entered into to govern the relationship between the parties, until he discovered differently in January 2018 in the circumstances referred to below.

46. In the event, Volta required a side letter in different terms, which Mr Smithers signed and returned to Volta without reference to Mr Brown. The circumstances in which Volta required a different side letter appears from an exchange of emails between 7 September 2017 and 10 September 2017.

47. In essence:

    i) On 7 September 2017, Adam Jones, Special Project Director with Sterling Power Group, emailed Mr Leiper with a number of recommendations concerning the First Connection Offer, and the provision by Volta of the deposit of £70,000 plus VAT required thereby. This included a recommendation that: *"the offer will not have time to be novated from Thurcroft therefore you need assurances that Thurcroft will novate the connection royalty free post Volta paying."*

    ii) On 8 September 2017, Mr Smithers emailed Mr Leiper, forwarding an email from Mr Kirke with regard to the return of the deposit. Mr Smithers suggested that this: *"with link should give you comfort in the deposit repayment being return to you if you don't get planning and want to shelve the project."*

    iii) Mr Leiper forwarded Mr Smithers' email to Mr Adams the same day expressing confidence that what Mr Smithers had said was correct but saying that he would *"follow it through over the weekend"*.

    iv) Mr Adams responded quickly the same day saying: *"I agree but it it's (sic) the issue of the "Payor" being a defined contract term and the lack of side letter from Ken that is more of the issue. Plus we need the LOA when we make the payment."*

    v) On 10 September 2017, Mr Leiper replied to Mr Adams saying: *"Fyi, I have changed the wording in the Side Letter to better reflect what we are saying/doing and strengthens our position, I think. A revised version attached."*

48. The reference to *"Payor"* in Mr Adams' email is a reference to TEM having been described as such in the *"First Connection Offer"*, and reflected a concern that, although the deposit might be repayable if the project did not proceed, Volta might potentially be exposed if TEM, effectively on behalf of TPL, had the benefit of the First Connection Offer, and thus that it would be TPL and/or TEM, rather than Volta, that would, as against NPG, be entitled repayment of the deposit if the project did not proceed.

49. The revised side letter ("**the Revised Side Letter**") was dated 11 September 2017 and recorded that Volta had agreed that it would, on or before 11 September 2017 and subject to the provisions of the Revised Side Letter as to repayment, pay the sum of £70,000 plus VAT *"to the DNO in respect of the Grid Connection Offer"*. The Revised Side Letter then went on to include the following paragraph:

> *"We anticipate that by doing this, we will obtain legal title to the Connection Agreement, and by signing this letter you confirm this is your belief and intent also. However, in the event that the project is cancelled, and a refund obtained, and such refund comes to [TPL] rather than directly to ourselves, then you will within 5 working days repay the deposit to us, less any sums the DNO properly deducts from the Deposit."*

50. The Revised Side Letter then went on to state that TPL allowed Volta and its contractors and consultants to enter the Thurcroft Site on reasonable notice to carry out geotechnical, environmental and other site investigation surveys in connection with its intended development of a battery storage facility.

51. Mr Smithers, without reference to Mr Brown, signed the Revised Side Letter, and returned it to Volta on 11 September 2017.

52. On the same day, 11 September 2017, Volta provided a *"Form of Acceptance"* to NPG in respect of the First Connection Offer and paid a deposit of £70,000 plus VAT ("**the Deposit Sum**"). In doing so, Volta selected the Point of Connection option. The Form of Acceptance was signed by Mr Leiper, as *"CEO"*, on behalf of Volta.

53. On 21 September 2017, Limejump Virtual 5 Limited ("**Limejump**"), by a letter that had been amended and approved by Mr Leiper, wrote to National Grid House on behalf of Volta. This letter included the following paragraph:

> *"The Quotation for the Connection Agreement is between [NPG] and [ABE] as evidenced on page 4 of the file NBTH - Connection acceptance – Thurcroft"*

54. This letter is relied upon by TPL and Mr Brown as being inconsistent with any suggestion that the effect of, or intent behind the Revised Side Letter was that legal title to, or ownership of the *"Connection Agreement"* should belong to Volta. Under cross examination, Mr Leiper sought to explain that the reason why this letter was expressed in the way that it was that the relationship with National Grid was liable to be prejudiced if anything was said in this letter that was inconsistent with the way in which the First Connection Offer had been expressed. I accept that explanation.

55. On 22 September 2017, MDC submitted an application to Rotherham Metropolitan Borough Council ("**Rotherham**") for planning permission in respect of: *"the siting of a Small Scale Electricity Battery Storage Facility consisting of 25 x 2MW Battery Contains and 10 2MW Inverters and Plant and Substation and external works"* ("**the Planning Application**").

56. The Planning Application was made in the name of *"Thurcroft Energy Limited."* I understand it to be common ground that this was intended to be a reference to TPL. Consistent with the terms of the JVA, MDC was instructed by Mr Smithers/TEM, although I consider it to be clear that MDC, whilst it might have formally recognised TEM as the client for billing purposes, was instructed by TEM on behalf TPL. Mr Jones said in evidence that he treated TEM as the client *"by default"*.

57. On 24 January 2018, MDC invoiced TEM in an amount of £5000 plus £1000 VAT, for: *"Professional Services for Planning Application and Approval for BESS application Thurcroft."* This invoice was paid by TEM sometime in 2020.

58. Condition 13.1 of MDC's standard terms and conditions, relating to Intellectual Property, provided, so far as is relevant, that:

> *"The copyright and all other intellectual property rights in all designs and all drawings reports and other documents produced by us will remain vested in us but subject to payment of the fees due to us you shall have an irrevocable royalty free non exclusive license to use such deigns and documents for the purpose for which they are were prepared and for all other purposes of constructing using maintaining and marketing the property concerned…"* [Emphasis added]

59. TPL relies upon the fact that, on 22 September 2017, Charlotte Butterfield, Project Support Co-ordinator with Effective Energy, sent to Mr Leiper a copy of a *"Red Line Drawing"* of the Thurcroft Site comprising a plan prepared by MDC in September 2017 that referred to the client as TEM and which had the title *"Proposed 50MWE Battery Storage Application"*. Shortly thereafter the same day, Mr Leiper forwarded the plan to Mr Smithers, copying in John Danahy of Squire Patton Boggs (UK) LLP ("**SPB**"), Solicitors acting for Volta. Mr Leiper's email read: *"Ken, my handwritten version for Thurcroft - please can you check and confirm this is consistent and will be included in the documents."* Shortly thereafter, Mr Smithers emailed the plan ("**the Red Line Plan**") to Mr Jones, and it was used for the purposes of the Planning Application.

60. Also on 22 September 2017, Mr Smithers, who had resigned as a director of TEM on 31 March 2017, was reappointed as a director of TEM. The evidence suggests that the reason for Mr Smithers having resigned as a director of TEM on 31 March 3017 is that another company belonging to Mr Smithers, with a similar name to TEM, had entered into liquidation. Although not formally appointed as a director of TEM between 31 March 2017 and 22 September 2017, this did not stop Mr Smithers from acting on behalf of TEM at all relevant times throughout 2017, his wife remaining as a de jure director of TEM throughout.

61. On 29 September 2017 Volta entered into an option agreement with the Greens. Pursuant to clause 2 thereof, the Greens granted Volta an option to require the Greens to grant a lease for a term of 26 years over the Thurcroft Site to TPL or to any other company that Volta directed the Greens to grant the lease to. The *"Option Period"* within which such option was exercisable was the period from the date of the option agreement expiring six months from and including the date upon which Volta confirmed its acceptance of the *"Planning Permission"*. The Red Line Plan was used for the purposes of defining the land the subject matter of this option agreement.

62. On 9 October 2017, Mr Windmill of Volta prepared a *"Status Pack"* providing what were, in effect, particulars of the state of progress in respect of projects in which Volta was concerned, including that relating to the Thurcroft Site. TPL relies on the wording thereof, because TPL says that it is inconsistent with there having been, or the parties treating there as having been, a transfer of the *"Connection Agreement"* to Volta. The Status Pack, under the heading *"Site Relationship Details Thurcroft"*, reads:

> *"• Option with JULIE GREEN and ANTHONY GREEN*
> *• Planning by Thurcroft Energy Ltd- agent Max Design*
> *• Grid connection - Mr Andy Brown of AB Energy Agency*
> *• Joint Venture agreement between AB Energy Agency and Tiger Energy Management Ltd*
> *• Asset Transfer agreement required to transfer rights of Thurcroft Energy Ltd for Planning and the jv of AB Energy Agency and Tiger Energy Management Ltd for Grid connection [Note: This is interesting as we were told it was with Tiger Energy Management Limited by Ken. Can we see the documents please]"*

63. On 25 October 2017, NPG issued a quotation to *"Thurcroft Energy Ltd"* in respect of the Second Thurcroft Application. Then, on 30 October 2017, NPG issued an amended quotation to *"Thurcroft Energy Ltd"* in respect of the Second Thurcroft Application ("**the Second Connection Offer**"). Although naming *"Thurcroft Energy Ltd"* as the Applicant, TEM was referred to in the Second Connection Offer as the *"End User"* and as the *"Payor"*, and TEM was referred to therein as *"Customer"* or *"You"* or *"Your"*.

64. On 2 November 2017 Volta and TEM entered into a consultancy agreement as contained in a letter from Volta to TEM signed on behalf of both parties. This set out that in consideration of Volta having exchanged an option agreement in respect of the development of a battery storage project on the Thurcroft Site with the Greens, Volta had paid TEM the sum of £50,000 plus VAT (described as the *"Consultancy Fee"*) for its consultancy services. The letter went on to provide that TEM would only be entitled to retain the Consultancy Fee if Volta or a *"Group Company"* completed a lease of the Thurcroft Site for a *"Storage Project"* with a capacity of not less than 50 MW, or in circumstances where the option agreement was rescinded by the Greens because of Volta's insolvency. In other circumstances, the Consultancy Fee was to be repayable.

65. It was Mr Brown's evidence that, on 29 September 2017, he was asked by Mr Smithers to raise an invoice for £20,000 plus VAT. ABE raised an invoice for £20,000 plus £4000 VAT the same day addressed to TEM. Mr Brown said that he understood from Mr Smithers that this related to ABE's half share of the option fee of £50,000 after planning fees of £10,000 had been deducted. The invoice raised by ABE refers to *"Share Option Fee"*, and Mr Brown's covering email says: *"Please find the Option Fee invoice for Thurcroft attached."* Mr Brown says that ABE was paid on 1 October 2017. In cross examination, Mr Smithers was unable to assist as to the circumstances in which he asked Mr Brown to raise an invoice, but he did say that the agreement was that he/TEM would be entitled to deduct £30,000 from the £50,000, leaving a balance of £20,000 for ABE, the £10,000 deducted representing MDC's planning fees, and additional expenses that Mr Smithers/TEM had incurred.

66. On 3 November 2017, an Option Agreement was entered into between TPL and Volta ("**the Option Agreement**"). This did not relate to the share capital of TPL, but rather purported to relate to assets of TPL that Volta was given the option to acquire. The Option Agreement was executed by Volta, and by TEM, as a director of TPL, Mr Smithers thus signing Option Agreement in his capacity as a director of TEM.

67. The front page of the Option Agreement (under the title *"OPTION AGREEMENT"*) refers to itself as: *"relating to planning documents relating to land adjacent to the electricity Thurcroft."*

68. The following provisions of the Option Agreement are of particular importance:

    i) Clause 1.1 of the Option Agreement included the following definitions:

        a) *"Assets"* as meaning: *"assets of [TPL] relating to the Storage Project which are at the date of this Agreement or subsequently, owned by [TPL] and which include all assets in relation to the Storage Project made or submitted in the name of Thurcroft Energy Limited."*

        b) *"Asset Transfer Agreement"* as meaning: *"the agreement for the sale of the Assets by [TPL] to [Volta] substantially in the form annexed in Appendix 1 and which is subject to such amendments as are agreed between the parties prior to the exercise of the Option, each party acting reasonably."* In fact, Appendix 1 to the Option Agreement was blank, and no asset transfer agreement was annexed to it.

        c) *"Option"* as meaning: *"the option to require [TPL] to transfer the Assets to [Volta] or any Group Company of [Volta] that [Volta] shall direct the Assets to be transferred to, in consideration of the Price on the terms set out in the Asset Transfer Agreement."*

        d) *"Option Notice"* as meaning: *"notice exercising the Option signed by or on behalf of [Volta] substantially in the form set out in Schedule 1."* Schedule 1 to the Option Agreement set out a specific form of Option Notice to be signed on behalf of Volta.

        e) *"Option Period"* as meaning: *"the period commencing on the date hereof and expiring 6 months from and including the date upon which [Volta] confirms its acceptance of the Planning Permission in accordance with clause 3."*

        f) *"Planning Permission"* as meaning: *"the planning permission for the installation and operation of a Storage Project at the Property."*

        g) "Price" as meaning: *"the price for the acquisition of the Assets calculated in accordance with the provisions set out in Schedule 2."* Schedule 2 to the Option Agreement then set out, in paragraph 1.1 thereof, a formula for the calculation of *"the Price"*. Essentially, this formula provided for a *"consultancy fee"* of £800,000, that was subject to potential deductions to the extent that grid costs exceeded £1.5 million, and if costs were incurred in respect of obtaining title indemnity insurance. Further, paragraph 1.2 of Schedule 2 provided for a further reduction in the *"consultancy fee"* if *"Consented capacity"* should be less than 50MW.

h) *"Storage Project"* as meaning: *"the electricity storage and discharge scheme under which [Volta] intends to design, procure funding for, construct, operate and maintain the Equipment on the Property."*

ii) By Clause 2 of the Option Agreement TPL granted *"the Option"* to Volta upon payment of an *"Option Fee"* of the £1, on terms that provided that the Option should be exercised by Volta sending *"the Option Notice"* to TPL's Solicitors at any time during *"the Option Period"*.

iii) Clause 2.3 specifically provided that on exercise of *"the Option"*, TPL should sell and Volta or any Group Company of Volta that Volta should direct *"the Assets"* to be transferred to, should buy *"the Assets"* on the terms set out in *"the Asset Transfer Agreement."*

iv) Clause 3 dealt with *"Planning Permission"*. Clause 3.1 provided for TPL or its agent to promptly make an application to the relevant local planning authority for *"Planning Permission"* for a *"Storage Project of not less than the Minimum Capacity Requirement"*, and then diligently pursue the application. Clause 3.2 then provided as follows:

> *"As soon as possible after the date hereof, [TPL] shall procure that there is provided to [Volta] copies of the Planning Permission, together with all related documentation and shall thereafter reply to such reasonable enquiries as [Volta] may raise in relation to the planning status of the Property."*

v) Clause 4 provided that *"the Price"* should be calculated in accordance with Schedule 2.

69. It is TPL's case that *"the Assets"* as defined by the Option Agreement encompassed TPL's interest in respect of the connection offers made by NPG ("**the Connection Offers**"), as well as its rights in respect of the planning documents relating to the Planning Application. As pleaded, it was Volta's case that there were no assets as such encompassed within the definition of *"the Assets"*, and that the Option Agreement was simply a mechanism for Volta to pay a success fee to TPL in the event that Volta proceeded with the *"Storage Project"*. However, at trial, as foreshadowed by Mr d'Arcy's Skeleton Argument, Volta proceeded on the basis that the definition of *"the Assets"* in the Option Agreement extended to but was limited to planning documents. Volta produced a draft Re-Re Amended Defence at the conclusion of submissions, and no pleading point has been pressed in relation thereto.

70. However, it remains Volta's position that the Option Agreement provided a mechanism for paying a success fee to TPL in the event that Volta proceeded with the *"Storage Project"*, and that there is no correlation between *"the Price"* as provided for by the Option Agreement and the intrinsic value of the relevant planning documents as at 3 November 2017.

71. Although Volta provided a *"Form of Acceptance"* to NPG in respect of the Second Connection Offer that bears the date 15 November 2017, this relates to a revised connection offer that NGP reissued in Volta's name on 16 July 2018. Mr Leiper signed and returned this document, backdating it to 15 November 2017. This Form of

Acceptance identified Volta as the *"End User"*. Whilst the *"Contract Estimate"* was expressed therein as being £839,601.94 plus VAT, Mr Leiper crossed out on the reference to payment of the Contract Estimate being payable in full on acceptance and wrote: *"This acceptance supersedes the previous acceptance. However, the Project will still be subject to the staged payments in the previous acceptance."*

72. Thereafter, Mr Windmill sent a letter dated 31 October 2017 to Mr Smithers at TEM asking him to arrange for himself and Mr Brown to sign: *"this letter as proof of your agreement to novate the Grid Applications for the Thurcroft site from yourselves to [Volta]'s. Once we have received this side letter we will instruct [NPG] to change the applications into our name."*

73. Although this letter was dated 31 October 2017, it is clear that it was sent to Mr Smithers at the end of November 2017. Mr Smithers then signed the letter on 27 November 2017 under the words: *"On behalf of [TEM], I agree to transfer the Thurcroft Grid application into the name of [Volta]."* Likewise, Mr Brown signed the letter on 28 November 2017 under the words: *"I, Andy Brown Director of [ABE] agree to transfer the Thurcroft Grid application into the name of [Volta]."*

74. There is a conflict of evidence as to the circumstances in which this letter ("**the Transfer Letter**") came to be signed.

75. Mr Brown says that he was pressurised into signing the Transfer Letter, and led to believe, principally by Mr Smithers, that this was the first stage in completion of the share sale process under an agreement for the sale of the share capital of TPL as envisaged by the draft option agreement in relation thereto that he had signed. However, Mr Brown also refers to a conversation with Mr Windmill on 27 November 2017 when he says that he was told that Volta was in a difficult situation regarding transferring the *"Deposit"* over to the Second Connection Offer and obtaining the benefit of staged payments. He says that Mr Windmill referred to a share sale agreement a number of times during the course of this conversation, and to a settlement figure of in the region of £1,661,000. On this basis, he says, he signed the Transfer Letter.

76. Under cross examination Mr Brown accepted that the *"object of the exercise"* in signing the Transfer Letter was to assist Volta to *"take control of the grid"* and getting the payment of £70,000 plus VAT that had been credited against the First Connection Offer credited against the Second Connection Offer, although at one stage he spoke in terms of NPG having *"revoked a credit rating … or something"*. However, he repeated that he was: *"being told that Volta was going to complete on this as soon as the planning had been granted, so it was all in a very short space of time."*

77. Mr Windmill did not give evidence, a point that TPL relies upon.

78. In his witness statement, Mr Smithers said that the Transfer Letter was signed at Volta's request. Under cross examination, it was put to Mr Smithers that the purpose behind the Transfer Letter was to get back the benefit of the staged payments. Mr Smithers disputed that this was the case, or at least said that that was not his recollection of events. The gist of his evidence was that the transfer was: *"to make it correct in all aspects, one of which was the timing of payments, but the other one was*

that it was in the right name." He referred to having met Mr Kirke on several occasions, and to having spoken to him on many occasions, and said that: *"We were all clearly under the impression of the connection for the Thurcroft Project being in Volta's name…"*

79. Mr Smithers observes in his witness statement that despite the Transfer Letter been provided to NPG, it was not until 16 July 2018 that NPG issued a revised connection offer in Volta's name.

80. However, on 7 December 2017 NPG did reissue the Second Connection Offered to Volta, addressing the issue in relation to instalments that Mr Leiper had identified in completing the Form of Acceptance dated 15 November 2017.

81. There were then a number of developments in late 2017/early 2018 that significantly affected matters, namely:

    i) The market for energy storage plants collapsed due to the Government's decision to reduce the amount that it would pay for the relevant batteries. This meant that the potential revenue from sites such as Thurcroft were significantly diminished, and that many projects involving sites such as Thurcroft were no longer financially viable, certainly if payment of a large "success fee" was required. In the event, following the next relevant Capacity Auction, amounts paid were approximately £7000-£8000 per MW/year, as against the expected minimum of £25,000. This served to reduce the annual value per MW from an expected £24,250 (97% of £25,000), to approximately £1500, (20% of £7500).

    ii) Mr Brown and Mr Smithers fell out, as I understand it in relation to issues in respect of another project in which they were involved.

82. After Mr Brown had chased for the same, on 2 January 2018, Mr Windmill provided Mr Brown with a copy of the Option Agreement by email, commenting: *"As we discussed earlier, Volta have an option agreement contract with Thurcroft Power Limited through which Volta will have the right to novate / assign the rights to all property relating to the site. This includes planning permission and the Grid Application. This contract is the one which covers the fee of £800K, which as I explained is payable when Volta enact the option. This can be done at any time during the option period. This period expires 6 months after we accept the planning approval"*

83. Reliance is placed by TPL upon the fact that Mr Windmill referred to the Option Agreement as including planning permission and *"the Grid Application"*, i.e., the benefit of the Connection Offers. It is further said by TPL that Mr Smithers was copied in on this email but did not seek to correct it at the time.

84. By email dated 3 January 2018, Mr Brown wrote to Mr Smithers informing him that he wished him to cease with immediate effect any marketing of ABE's projects. In this email, Mr Brown raised a number of complaints in relation to Mr Smithers' conduct, including that, in relation to the Thurcroft Project, that he had changed the proposed arrangements with Volta from a share purchase option agreement in respect

of the share capital of TPL to an asset sale agreement without reference to him, and that Mr Smithers had failed to consult with him in respect of the planning application.

85. Further, on 4 January 2018, Mr Brown responded to Mr Windmill's email of 2 January 2018 expressing shock at having only discovered on 2 January 2018, the true nature of the Option Agreement. Mr Brown alleged that this had been entered into without his authority, and he disputed that the Option Agreement was valid or effective. Despite this initial approach taken in this email, Mr Brown subsequently, by email dated 31 January 2018, accepted on behalf of TPL that the Option Agreement was binding and did take effect in accordance with its terms, and the present case has been fought on that basis.

86. On 15 January 2018, Rotherham issued a decision notice granting the application for planning permission in respect of the Thurcroft Site ("**the Planning Permission**").

87. On 13 February 2018, Volta wrote to TPL in respect of the Option Agreement. The letter invited the directors of TPL to participate in a conference call, a number of dates being suggested. The letter went on to state:

> *"Given the recent Capacity Market clearing price the Board of [Volta] has been forced to revaluate its previous strategy regarding battery storage. The purpose of the call is to update [TPL] and its Directors on the current thinking of the [Volta] management team. Rest assured it remains the intention of the [Volta's] management team to generate the maximum value for all interested parties including [TPL] and [the Greens]."*

The letter sought a prompt response.

88. The letter dated 13 February 2018 was sent on the same day as a Volta Board Meeting. For the purposes of this meeting, slides were produced showing the outcome in respect of Volta's sites, including the Thurcroft site, based upon a sale, rather than Volta building out itself, at £40,000 per MW and £50,000 per MW. These slides showed that after allowing for *"Value to Tiger"* of £800,000 (plainly a reference to the *"Price"* under the Option Agreement), the value for Volta was £140,000 in the former case, and £640,000 in the latter case.

89. On 16 February 2018 TEM changed its name to Newton Energi Limited, and Mr Smithers ceased to be a director of TPL. Mr Smithers has subsequently alleged that, at a later date, Mr Brown caused TPL to amend its articles of Association and allot further shares that resulted in TEM's shareholding therein being significantly diluted so as to give Mr Brown effective control of TPL. Whilst these actions might potentially have been capable of challenge, Mr Smithers has not sought to do so, and the present proceedings have been brought on the basis that Mr Brown has effective control of TPL.

90. A conference call between the interested parties took place on 19 February 2018, attended by Mr Brown, Mr Smithers, Mr Leiper, Mr Adams, Ruth Shillam (Solicitor acting for Mr Smithers), and a representative of SPB (acting for Volta). Prior to this meeting, the Board of Volta had agreed to propose that the ongoing project at the Thurcroft site be sold to a third party at the best price that could be obtained, and the sale proceeds split 50-50 between Volta and TPL, on the basis that the proceeds of

sale payable to TPL would then be split 50-50 as between Mr Brown/ABE and Mr Smithers/TEM.

91. It was the evidence of Mr Leiper and Mr Adams that a consensus to proceed along the lines of Volta's proposal was reached during the course of the conference call on 19 February 2018. However, as a result of email exchanges on 22 February 2018, it became clear that Mr Brown was not prepared to go along with any such consensus in that:

    i) By an email to Mr Adams (at 17.29), Mr Brown expressly refused to consent to Volta's *"selling the Thurcroft Project for a figure which would provide a return greatly below the contract value."*

    ii) By an email to Mr Adams (at 19.33), he stated, in relation to a potential sale of the Thurcroft Project that: *"I formally reserve the right to Veto (sic) if the price doesn't come up to scratch."*

    iii) By an email (at 22.40) to Mr Adams and Ruth Shillam, he asserted that he had a veto *"if an offer is received on the Thurcroft project."*

92. Further, apart from any differences with Volta, disagreements between Mr Brown and Mr Smithers arose as to how the 50% of the proceeds of sale payable to TPL would be shared as between them (or their respective companies). Mr Brown was insistent that he should receive more than 50% of the proceeds of sale to reflect the fact that Mr Smithers would be in a position to obtain a net sum in excess of that received by Mr Brown because of advantageous tax treatments available to him/TEM, but not to Mr Brown/ABE.

93. Consequently, whilst sale opportunities were then explored by Volta, with assistance from Mr Smithers, Mr Brown did not participate therein.

94. Key to any development of the Thurcroft Site was, clearly, the Greens. Volta enjoyed the benefit of the option granted by the Greens under the option agreement relating to the Thurcroft Site dated 29 September 2017. On 20 February 2018, Mrs Green emailed Mr Leiper to inform him that she had been called by Mr Brown who had told her that if Volta did not complete, then he could sell to another company and the Chinese government. Mrs Green said that she and her husband would prefer to only have contact with Volta and Mr Smithers *"as we feel both parties are acting in our best interest in moving forward the site."* Mrs Green asked Mr Leiper to ask Mr Brown not to contact them personally. Further, on 23 February 2018, Mrs Green emailed Mr Brown saying: *"…we are finding all the telephone conversations with you very stressful and it's making us ill. Will you please not contact us again."* Mr Brown disputes that he ever acted towards the Greens in the manner complained of.

95. The option granted by the Option Agreement expired pursuant to clause 2.4 of the Option Agreement on 15 July 2018, but Volta did not, by 5.30pm that day, exercise the Option. The option thus lapsed, and clause 2.5 of the Option Agreement provided that, thereupon: *"[Volta's] rights to exercise the Option shall cease without prejudice to any accrued rights of any party against the other party."*

96. On 16 July 2018, TPL returned the Option Fee of £1 to Volta.

97. However, by early July 2018, if not earlier, Gresham House Energy Storage Fund plc ("**Gresham**") had expressed an interest to Volta and/or Mr Smithers in the Thurcroft Site, and the project for a battery storage installation thereat.

98. On 3 July 2018, a representative of Gresham emailed Mr Leiper to inform him that Gresham's lawyers: *"are doing the DD in the background and we also have an SBA draft ready."* Mr Leiper forwarded this to Mr Smithers, and in a subsequent email highlighted that a key question remained: *"can they move fast enough?"*. Mr Smithers responded: *"Yes agreed you have highlighted to them the need to close by 17th July this allows us to get out of AB [i.e., Mr Brown]".* Mr Leiper responded to this to say: *"No, have stuck with 12th now to demonstrate importance of pace - let's see what that leads to today - we can flex after that."*

99. On 10 July 2018, Gresham visited the Thurcroft Site for the first time.

100. On 12 July 2018, Mr Adams emailed Mr Brown stating: *"As you are aware, we have been exploring opportunities to build a battery site, or sell it on to 3rd parties through the period of the option. The option period terminates on 12th July, being six months after the date on which planning permission was received for the site."* The email went on to refer to an inability to secure a viable project in the time available, and to the Greens confirming that they would not extend the option. Reference was then made to Volta currently holding *"the Grid Connection"* as it had paid the £70,000 plus VAT, and as to how this might be managed with the Greens. Reference was also made in this email to the consultancy agreement with TEM dated 2 November 2017 and the sum of £50,000 paid pursuant thereto, which it was suggested might have become repayable. As to this, Mr Adams commented: *"at this time given the extensive support provided by Ken Smithers to Volta to make this project happen I'm currently minded to waive the right of recovery."*

101. Mr Brown responded to Mr Adams' email by an email dated 12 July 2018 in which he suggested that what was proposed was: *"a long way from the requirements placed on Volta under the asset sale agreement and also what was agreed and minuted during the conference call in February."* He went on to allege that it was incumbent on Volta to *"restore the situation to as it was prior to the contract, this position was that a) [ABE] had grid offer with three months in which to accept and pay the deposit and b) an agreement with the Greens that they would sign a six-month option agreement."* He required that this be done *"with immediate effect"*.

102. By an email dated 13 July 2018 to Mr Brown, Mrs Green informed him that the Greens: would *"not be giving [ABE] or [Mr Brown] any authority to discuss with any fund, NPG or any other 3rd party any development for a grid storage, peaking plant or any other project, on land owned by us."* The letter went on to threaten that they would have no alternative but to *"issue an injunction"* if Mr Brown continued to call, text, email or otherwise *"harass"* the Greens. Under cross examination, Mr Smithers admitted that he had prepared this email for the Greens to send.

103. In the meantime, terms were being agreed as between Volta, Mr Smithers and Gresham. By an email from Mr Leiper to the Board of Volta dated 15 July 2018, Mr Leiper circulated a draft of an *"Asset Purchase Agreement"* with Gresham, Mr Leiper noting that: *"we only really have one asset, being the Grid Connection"*. The email

then summarised the proposed terms with Gresham, including the payment terms in respect of which Mr Leiper said as follows:

> *"The payment terms. The total is £600k (£300k for Volta, £300k for Ken Smithers as per previous agreements, and completely independent of Immingham/loan discussions), and the timing is proposed as follows:*
>
> *a. £300k on Novation of the Grid Connection to Gresham, expected approx. 4 weeks after signature of the APA/signing of the lease between the landlords and Gresham. Note: at this point Volta would also receive £70k for the Grid deposit from Gresham solely for Volta's account and outside the £600k*
>
> *b. £200k on Notice to Proceed to an EPC. I would expect this to be approx. November*
>
> *c. £100k on commissioning. I would expect this to be approx. March 2019"*

104. A contemporaneous analysis of the position from Volta's perspective was set out in a document headed *"Filenote re Vendor or Warranties - Thurcroft Connection Sale"*, prepared on or about 16 July 2018.

105. On 16 July 2018, Volta's board approved the terms of the proposed Asset Purchase Agreement with Gresham ("**the Gresham APA**"), which was entered into on 17 July 2018 between Volta and HC ESS7 Limited, an SPV established by Gresham ("**the Gresham SPV**"). Under the terms thereof, the *"Assets"* the subject matter of the sale were defined as meaning:

> *"...(if any) all assets owned by and all rights enjoyed by [Volta] and/or its affiliates pertaining to the proposed development, construction and operation of a battery storage plant on the Property comprising for these purposes all reports, records, designs, drawings, plans, schematics, applications, correspondence and all relevant intellectual property rights contained therein and other relevant information pertaining to the Lease, any application for Planning Permission made by or on behalf of [Volta] (but not the Planning Permission itself which it is acknowledged attaches to the Property and is not an asset of the [Volta]) and the benefit (subject to the burden of the liabilities thereunder rising post-Completion) of the Grid Connection pertaining to such project".*

106. The definition of *"Data Room"* in the Gresham APA makes reference to an online data room relating to *"the Project"* hosted by Volta. *"The Project"* is defined as: *"the project to develop a battery storage facility system for the storage and supply of electricity at the Property pursuant to the Lease in accordance with the Planning Permission and the Grid Connection bracket to the extent implemented by the Purchaser."* Despite Mr Leiper being somewhat non-committal as to this, I consider that it is likely that the *"Data Room"* would have hosted documents that included plans prepared by Mr Jones/MDC in relation to the Planning Application.

107. In the course of his evidence, Mr Leiper accepted that he would have provided Gresham with a link to the planning section of Rotherham's website detailing the planning application in respect of the Thurcroft Site.

108. In the event, the sale to Gresham's SPV pursuant to the Gresham APA proceeded, and a consideration of £600,000 was received, £300,000 which was retained by Volta, and £300,000 by Mr Smithers.

109. Nothing was paid to TPL, ABE or Mr Brown, hence the bringing of the present claim.

Issues to be determined

110. Although a number of causes of action are pursued in the Amended Particulars of Claim, TPL's case at trial has been limited to the following claims, namely:

    i) A claim that Volta has been unjustly enriched at TPL's expense as a result of the transfer to Volta of (a) the benefit of TPL's rights in respect of the Connection Offers made by NPG, and in particular the Second Connection Offer (otherwise described in contemporaneous documentation as *"the Grid Connection"*), and (b) TPL's licence or right to use the drawings underlying the Planning Permission in respect of the Thurcroft Site. TPL alleges that this gives rise to a liability to pay the sum equivalent to the price specified in the Option Agreement, namely £800,000; and

    ii) Further or in the alternative, a claim that the Option Agreement was subject to the following implied terms that Volta has breached, giving rise to a liability to pay damages equivalent to the amount of the price provided for by the Option Agreement, the implied terms alleged being the following, namely:

        a) After the expiry of the *"Option Period"*, Volta will cease to make use of any *"Assets"* which it has been using with TPL's permission during the *"Option Period"* for the purposes of pursuing the *"Thurcroft Project"*;

        b) If Volta makes use of the *"Assets"* in order to proceed with the *"Thurcroft Project"* (either itself or by selling or otherwise disposing of the Project to a third party) after the expiry of the Option Period, it will thereupon become liable to pay TPL the *"Price"* under the Option Agreement.

111. In his closing submissions, Mr de Beneducci, on behalf of TPL, addressed me under the following headings, namely: the witnesses; the agreements between the parties (i.e., the Revised Side Letter, the Option Agreement, and the Transfer Letter); TPL's case as to unjust enrichment; and TPL's case as to breach of implied terms. This judgment follows the same structure.

The Witnesses

112. This is not a case in which any witness was, in my judgment, giving deliberately or obviously false evidence.

113. However, I bear in mind the much-repeated observations of Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse Limited* [2013] EWHC 3560 (Comm) at [15]-[22] with regard to the unreliability of memory, and his caution to place limited weight on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or provable facts. These observations have a resonance in the present case where we are concerned with events that took place over four years ago, and where there is particular scope for witnesses to subconsciously recall events, and their understanding as to the nature of the transactions in which they were involved, in a self-serving way. Nevertheless, I recognise that any findings that I make must be made by reference to all the evidence, that is both documentary evidence and witness evidence, placing such weight as the circumstances require on each.

114. I am satisfied that Mr Leiper, Mr Adams and Mr Jones were doing their best to assist the Court, subject to the observation that I have made in the previous paragraph.

115. There are significant conflicts of evidence between Mr Brown and Mr Smithers, in particular as to whether Mr Brown was told that an option agreement in respect of the share capital of TPL was no longer to be pursued, and that the matter was proceeding on the basis of an option to acquire *"Assets"* belonging to TPL, and more generally as to what was said to Mr Brown prior to him signing the Transfer Letter.

116. There is force in the criticisms made by Mr d'Arcy of Mr Brown's evidence that he made a number of assertions in the course of his evidence in response to particular lines of questioning that he might have been expected to have mentioned in his lengthy witness statement, e.g. that he might have been able to raise the £70,000 plus VAT from his mother, and that alternative proposals could have been pursued with Mr Patel and his company in July 2018. However, even taking account of a document sent by Mr Smithers of December 2017 that had referred to *"a Consultancy Agreement of £800,000"* under which Mr Brown would be getting £400,000, the documentary evidence strongly supports Mr Brown's position that he was unaware that matters were not proceeding by way of a share purchase agreement until he received Volta's email dated 2 January 2018. Of particular significance in this respect is ABE's invoice dated 29 September 2017 that referred to *"Share Option"*, and Mr Brown's response to Volta's email dated 2 January 2018.

117. The credibility of Mr Smithers' evidence is necessarily called into question by the fact that he was convicted of fraud in April 2021 on a charge relating to false evidence concerning an invoice in other proceedings involving Mr Brown and Mr Smithers. However, to his credit, Mr Smithers gave a full and detailed explanation as to the circumstances behind this conviction, and as to the salutary effect that it had on him, and his fear of giving false evidence in the present proceedings. Further, he frankly admitted, without any attempt to conceal his actions, that he had drafted the email sent by Mrs Green on 13 July 2018. Despite his conviction, I found Mr Smithers to a credible and truthful witness.

118. TPL relies upon a failure on the part of Volta to call Mr Windmill, in particular to deal with what he might have said to Mr Brown prior to Mr Brown signing the Transfer Letter. The Court may, in appropriate circumstances, draw adverse inferences from the failure of a party to call a witness that might have been expected to have been called – see *Efobi v Royal Mail* [2021] 1 WLR 3863 at 41-48, per Lord

Leggatt. However, Mr Leiper explained that Mr Windmill's function within Volta was an essentially administrative function to do with managing documents, rather than dealing with the substance of transactions. In the circumstances, and given this limited role within TPL, I consider it at least quite possible that Mr Windmill might have misdescribed the nature of the transaction during the course of a conversation or conversations with Mr Brown.

119. Ultimately, I consider any conflict of evidence between Mr Brown and Mr Smithers in relation to the extent to which Mr Smithers might have kept Mr Brown informed as to developments is more likely than anything else to have been down to a breakdown in communications between the two, or misunderstandings between the two, at the relevant time, with Mr Smithers perhaps having been rather less full and frank than he might have been with regard to the explanations that he gave to Mr Brown as to developments.

120. However, I do not ultimately consider that anything of substance turns on these conflicts of evidence. Mr Brown accepted under cross examination the essential reasoning behind the Transfer Letter, namely that Volta wanted their existing payment made as against First Connection Offer to be credited as against the Second Connection Offer, hence the need to transfer the latter to Volta (Day 2, page 19). Further, although Mr Smithers' authority to act on behalf of TPL was challenged in the Amended Particulars of Claim, at trial Mr de Beneducci has not, in the light of the evidence, pursued a case of lack of authority on the part of Mr Smithers. Consequently, as between the parties to the case, what really matters is what might have been agreed between Mr Smithers, on behalf of TPL, and Volta.

Agreements

Introduction

121. The issues have narrowed somewhat so far as concerns the Revised Side Letter and the Transfer Letter, although TPL's formal position, as understood, remains that the effect of the Revised Side Letter was not to give rise to any transfer, or agreement to transfer any interest to Volta, and that no contractual estoppel arises in consequence thereof.

122. So far as the Transfer Letter is concerned, TPL's position is that it accepts that it did cause a transfer of the benefit of the Second Connection Offer to Volta, but that this was conditional. As pleaded, the transfer was alleged to be conditional on the Option being exercised, and *"the Price"* being paid – see paragraph 46.4 of the Amended Particulars of Claim. However, TPL's case at trial as to the terms of this condition was put rather differently as referred to below.

123. So far as the Option Agreement is concerned, the issue between the parties is as to whether the definition of *"Assets"* extended to anything more than TPL's rights in respect of the planning documents, and specifically whether the definition also extended to TPL's rights in respect of the Connection Offers.

Legal Principles

124. There is no dispute between the parties as to the principles to be applied in construing a contractual document.

125. In essence, the Court is concerned with the objective exercise of determining what the words used in the relevant document would mean to the reasonable objective observer with knowledge of the background circumstances, there being excluded from consideration the prior negotiations leading to the conclusion of the contract, and the parties' subjective intentions.

126. Mr d'Arcy placed particular reliance upon how the issue was put by Leggatt LJ, with whom Longmore LJ and Sir Geoffrey Vos C agreed, in *Minera Las Bambas SA v. Glencore Queensland Limited* [2019] EWCA Civ 972, at [20]:

> *"The principles of English law which the court must apply in interpreting the relevant contractual provisions are not in dispute. They have most recently been summarised by the Supreme Court in Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] AC 1173 at paras 10-14. In short, the court's task is to ascertain the objective meaning of the relevant contractual language. This requires the court to consider the ordinary meaning of the words used, in the context of the contract as a whole and any relevant factual background. Where there are rival interpretations, the court should also consider their commercial consequences and which interpretation is more consistent with business common sense. The relative weight to be given to these various factors depends on the circumstances. As a general rule, it may be appropriate to place more emphasis on textual analysis when interpreting a detailed and professionally drafted contract such as we are concerned with in this case, and to pay more regard to context where the contract is brief, informal and drafted without skilled professional assistance. But even in the case of a detailed and professionally drafted contract, the parties may not for a variety of reasons achieve a clear and coherent text and considerations of context and commercial common sense may assume more importance."*

127. A particular question arises as to whether the Transfer Letter had retrospective effect, reliance being placed by Volta upon the fact that it was sent to Mr Smithers for signature under cover of a letter that bore the date 31 October 2017, albeit only actually sent shortly prior to it being signed by Mr Smithers and Mr Brown on 27 and 28 November 2017. Mr d'Arcy refers me to *Northern & Shell Plc v John Laing Construction Ltd* [2003] EWCA Civ 1035. The key point to be gained from the leading judgment of Nelson J in that case is that whether or not a clause in a contract is capable of having a retrospective effect depends upon the express or implied intention of the parties, reference being made to *Trolloppe & Colls Limited v The Atomic Power Constructions Limited* [1963] 1 WLR at 340, 341, per Megaw J. This must, as I see it, give rise either to a question of construction of the relevant contract, or a question as to whether a term is to be implied as a matter of necessity to give business efficacy to the contract.

128. The basis of a contractual estoppel was explained in *Peekay Intermark Ltd v. Australia & New Zealand Banking Group Ltd* [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep. 511 at [56], per Moore-Bick LJ, as follows:

> *"There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel: see Colchester Borough Council v Smith [1991] Ch 448, affirmed on appeal [1992] Ch 421."*

See also: *Springwell Navigation Corp v. JP Morgan Chase Bank* [2010] EWCA Civ 1221; [2010] 2 CLC 705 at [157]-[170], and Chitty on Contracts, 34th ed., at 6-126.

The Revised Side Letter and the Transfer Letter

129. The original draft side letter that Mr Brown signed, but which was never signed by Volta, contained what was in effect an agreement on TPL's part to forward any refund of the £70,000 plus VAT received from NPG to Volta. However, it is, as I see it, clear from Adam Jones's email dated 7 September 2017, and the email exchanges between Mr Adams and Mr Leiper between 8 September 2017 and 10 September 2017, that the genesis of the Revised Side Letter was a concern that the side letter as drafted did not sufficiently protect Volta's interests because Volta did not have an interest in the relevant Connection Offer (then the First Connection Offer). Looking at the matter objectively in this context, one can therefore see that the purpose of the additional wording included in the Revised Side Letter was to confer such an interest on Volta by providing that *"by doing this"*, i.e., paying the £70,000 plus VAT, Volta would *"obtain legal right to the Connection Agreement"*.

130. Although the following wording, namely *"by signing this letter you confirm this is your belief and intent also"*, is a little woolly, I consider the intent to be clear, namely that by signing the letter, TPL agreed that if the £70,000 plus VAT was paid by Volta, then Volta would become legally entitled as against TPL to the benefit of the First Connection Offer. I will consider the effect of this, in the context of the Option Agreement, when considering the effect of the Option Agreement below.

131. The Second Connection Offer was issued on 30 October 2017. It is, as I see it, clear from the evidence that the genesis of the Transfer Letter was that Volta recognised, and was concerned, that it had paid the £70,000 plus VAT deposit in relation to the First Connection Offer, and that it would be necessary, when the Second Connection Offer was accepted, that the deposit be transferred to that Connection Offer, and therefore that there was an imperative that just as it had been agreed that the First Connection Offer should be treated as between TPL and Volta as belonging to the latter, and be in the name of the latter, so should the Second Connection Offer so as to protect Volta's position. As I have mentioned, Mr Brown accepted that the reasoning behind the Transfer Letter was that the deposit be transferred to the Second Connection Offer.

132. It is common ground, subject to TPL's argument as to the conditionality of the transfer to which I will return when considering the case as to unjust enrichment, that the effect of the Transfer Letter was to transfer TPL's interest in the Connection

Offers (described in the Transfer Letter as "*Grid Applications*") to Volta. This could not have been, as described in the covering letter dated 31 October 2017, a novation because NPG was not a party to the Transfer Letter.

133. The question then arises as to whether the Transfer Letter, and the transfer effected thereby, is to be treated as having retrospective effect. I am not persuaded that it is. Whilst the fact that the covering letter may have been dated 31 October 2017 may point to an intention on the part of Volta that the benefit of the Second Connection Offer should, from its issue, be treated, as between TPL and Volta, as belonging to the latter, the wording which Mr Smithers and Mr Brown actually signed refers to them agreeing, prospectively, *"to transfer"* into the name of Volta. If it had been intended that by signing the Transfer Letter it should have retrospective effect, then one might have expected that to have been reflected in the wording that Mr Smithers and Mr Brown signed against. Absent wording suggesting retrospectivity, I do not consider that it can be said that the express or implied intention of the parties (plural) points to an intention to give the Transfer Letter retrospective effect.

The Option Agreement

134. The issue that arises is, as I have identified, as to whether the definition of *"Assets"* contained therein extends to TPL's interest in the Connection Offers issued by NPG or is limited to TPL's rights in respect of the planning documentation.

135. I consider it to be an important consideration, forming part of the admissible background to the Option Agreement, that prior to the entry into the Option Agreement the parties had agreed that the legal interest in the First Connection Offer should be transferred to, or at least treated as between themselves as having been transferred to, Volta. This is because, if the legal interest had passed to Volta, then there would be no need for the Option Agreement to deal with it because the benefit of it would have already passed to Volta.

136. The position is complicated by the timing of the Second Connection Offer, and the fact that it was issued a matter of days before the entry into the Option Agreement, particularly if the Transfer Letter is not to be construed as having retrospective effect.

137. TPL points to the fact that the plural *"Assets"* is used and says that if it had been intended that the only *"Asset"* that should pass, if the option were exercised, was a right to the planning documents, then the Option Agreement could simply have just said so.

138. There is the further point that a price of £800,000 (subject to variation) is a very large sum of money to pay if the only asset to pass is the right to use some planning documents, particularly if the only right enjoyed by TPL is a non-exclusive licence with copyright belonging to MDC. However, Mr Leiper explained that, in reality, the Option Agreement provided a mechanism to pay a *"success fee"* to TPL in the event that the *"Storage Project"* proceeded, and the option was exercised. I did not understand TPL to dispute Mr Leiper's evidence as to this, which is supported by the fact that the *"Price"* is, as provided for by Schedule 2, determined by reference to adjustments that may or may not need to be made to a *"consultancy fee"* of £800,000.

139. Reliance is placed by Volta on the fact that the Option Agreement is described on its front sheet as: *"relating to planning documents relating to land adjacent to the electricity Substation of Green Lane, Thurcroft."*

140. I consider that wording such as this on the front sheet of a document is to be treated as akin to a heading to a clause within it. Lewison, the Interpretation of Contracts, 7th ed., at 5.108 expresses the view that: *"A heading to a clause may be taken into account in construing the clause, but it cannot override the clear words in a clause or create an ambiguity where, but for the heading, none would otherwise exist. Where the contracts so provide, headings should not be taken into account."* Headings have been taken into account in construing contractual provisions in cases determined at the highest level, including cases in the Court of Appeal and Supreme Court – see e.g., *Farstad Supply AS v Enviroco Ltd* [2011] 1 W.L.R. 921.

141. In my judgment, properly construed, the definition of *"Assets"* in the Option Agreement does not extend to TPL's interests in respect of any Connection Offer with NPG.

142. The definition refers to: *"assets of the Seller relating to the Storage Project which are at the date of this Agreement or subsequently, owned by the Seller"*. As I have said, the Revised Side Letter and the reasoning behind the same forms part of the admissible background by reference to which the Option Agreement is to be construed. As between TPL and Volta, it had been agreed that the First Connection Offer belonged or was to be treated as belonging to Volta. Viewed objectively therefore, this is not an asset that one would have considered was intended to be included within the definition of *"Assets"*

143. The position is, as I have said, complicated by the timing of the Second Connection Offer, and the fact that the Second Connection Offer pre-dated the Option Agreement, but was only formally dealt with by the Transfer Letter thereafter. Nevertheless, at the time that the Option Agreement was entered into, the Second Connection Offer had only just been issued, and bearing in mind the way in which the First Connection Offer had been dealt with by the Revised Side Letter, and the fact that Volta had put up the £70,000 plus VAT, which would now, logically, need to be transferred to the Second Connection Offer, I do not consider that the reasonable objective observer would conclude that there was an intention that the ownership of the rights in respect of the Second Connection Offer should be dealt with under the Option Agreement in a different way than the rights in respect of the First Connection Offer.

144. I consider this so particularly given the wording on the front sheet. One asks, rhetorically, surely if there were other identified assets that it was intended would be encompassed by the Option Agreement, and the definition of *"Assets"* therein, then, objectively considered, there would have been no need to use the restricted wording that was used on the front sheet referring only to planning documents.

145. One does still have the point that the definition itself refers to *"Assets"* (plural), and does not, unlike the front sheet, simply refer to planning documents. However, I consider this to be explicable on the basis that the draughtsman would have wanted to ensure that if there were other relevant assets clearly intended to pass, they would be caught by the general words used, and thus fall within the scope of the Option Agreement.

146. Consequently, I conclude, that a matter of proper interpretation, the definition of *"Assets"* in the Option Agreement did not extend to such rights as TPL had enjoyed in respect of the Connection Offers, i.e, either the First Connection Offer or the Second Connection Offer.

147. To the extent that the Second Connection Offer might, contrary to my finding above, have fallen within the scope of the definition of *"Assets"* in the Option Agreement, then I consider that the effect of the Transfer Letter was to take it outwith the scope of the Option Agreement, i.e. to transfer the interest of TPL in the Second Connection Offer to Volta so that Volta's entitlement thereto did not depend upon the exercise of the option. However, I do not consider that that Transfer Letter in itself gave rise to an exercise of the option as has been contended by TPL. The Option Agreement provided for an *"Option Notice"* to be served in the form expressly provided for by Schedule 1 to the Option Agreement. In my judgment, the exercise of the option required strict compliance there with – cf. *Greenclose Ltd v National Westminster Bank plc* [2014] EWHC 1156 (Ch), [2014] 2 Lloyds 169 at [88].

148. I have considered whether the existence of a contractual estoppel is relevant to consideration of the present case. A contractual estoppel will more typically arise where the relevant agreement itself provides that it has been entered into on a particular basis, or on the basis of particular agreed facts. In the present case, the Revised Side Letter preceded by some time the entry into the Option Agreement itself. Further, the Revised Side Letter was, strictly, solely concerned with the First Connection Offer. In the circumstances, and bearing in mind that the case does not, as I see it, turn upon the point, I do not base my decision upon the existence of a contractual estoppel.

Unjust enrichment

Introduction

149. It is common ground between the parties that the essential elements required for a claim in unjust enrichment are as summarised by Lord Clarke (with whom Lords Kerr and Wilson agreed) in *Benedetti v. Sawiris* [2013] UKSC 30, [2014] AC 938 ("***Benedetti***"), at [10], as follows:

> *"It is now well established that a Court must first ask itself four questions when faced with a claim for unjust enrichment as follows. (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?"*

150. As more recently expressed by Lord Burrows in *Samsoondar v Capital Insurance Co Limited* [2020] UKPC 33 at 18: *"…a claim in the law of unjust enrichment has three central elements which the claimant must prove: that the defendant has been enriched, that the enrichment was at the claimant's expense, and that the enrichment at the claimant's expense was unjust. If those three elements are established by the claimant, it is then for the defendant to prove that there is a defence".*

151. It is therefore necessary to consider TPL's claim in unjust enrichment by reference to these elements.

TPL's case in unjust enrichment

Enrichment?

152. TPL relies on *Goff & Jones, The Law of Unjust Enrichment,* 9th ed., at 4-03 for the proposition that, for these purposes, *"enrichment"* is a *"term of art"*, with the Court seeking to identify something with *"a financial value"*.

153. TPL submits that Volta has been relevantly enriched (in the sense of having a benefit conferred upon it) in two ways:

    i) It is said that Volta has received a benefit from TPL in the form of the *"licence to use the designs, drawings, and other documents prepared by MDC for the purpose for which they were prepared and for all other purposes of constructing, using, maintaining, and marketing the property concerned"*, reference being made to clause 13.1 of MDC's standard terms; and

    ii) It is said that Volta has received a benefit from TPL in the form of the rights under and associated with the Connection Offers, which were transferred to Volta on 28 November 2017, pursuant to the Transfer Letter, in so far as not already transferred or treated as transferred pursuant to the Revised Side Letter.

154. As to the former benefit, it is said that as a stranger to the contract between TPL (as disclosed principal, with TEM acting as agent) and MDC, Volta did not possess any rights or licence in respect of the relevant documents until TPL conferred the same upon Volta.

155. So far as TPL's ability (vis-à-vis MDC) to confer rights in relation to the planning documents upon Volta is concerned, TPL relies upon *Blair v. Osborne & Tomkins & anor* [1971] 2 QB 78, per Lord Denning MR at 85A-C as authority for the proposition that where a client engages an architect to prepare drawings to obtain planning consent for development, there is an implied licence to the client to use the drawings for all purposes connected with the development to which the plans relate, and for the client to transfer that licence to a purchaser of the site.

156. Mr de Beneducci refers to the fact that in Volta's Skeleton Argument, it is acknowledged at paragraph 153 that "[*if] Volta was going to proceed with the project itself, … it would have needed a licence to use the planning documents to construct the project as designed"*. It is said that this statement recognises that a party (such as Gresham), which wished to develop the Thurcroft Project, would require such a licence. It is said that this *"sits uneasily"* with the following assertion in Volta's Skeleton Argument at paragraph 144:

> *"As regards the planning documentation, Volta never acquired the rights, nor did it purport to do so; nor did it purport to sell them. Hence, again, the "failure of basis" is not engaged because there was no benefit conferred on Volta".*

157. It is alleged that TPL did allow Volta to enjoy the benefit of the relevant right, and that Volta used the same.

158. Reliance is placed upon a pre-action letter from SPB dated 17 July 2020 in which it is alleged that the planning application was submitted and paid for by TEM, and that Volta utilised the planning documents with the implicit consent of TEM. It is said that the consent given was not that of TEM, but rather that of TPL as disclosed principal, and that what is said by SPB amounts to an admission that a benefit (the consent) was conferred upon Volta and utilised by the latter for the purposes of the sale to the Gresham SPV.

159. Reliance is also placed upon the Red Line Plan, on which Mr Leiper annotated on 22 September 2017 for the purposes of the Planning Application, and also the use of the same plan for the purposes of the option agreement entered into between the Greens and Volta on 29 September 2017, to which TPL was not a party.

160. So far as the transfer of the rights under and associated with the Connection Offers is concerned, TPL's case is, as referred to, that these were transferred pursuant to the Transfer Letter, in so far as not already transferred or treated as transferred pursuant to the Revised Side Letter. TPL's case is that Volta benefited therefrom by selling the rights pursuant to the Gresham APA, under which a sale price of £600,000 was paid.

161. As to the value of the alleged enrichment:

i) TPL relies upon *Benedetti* as the leading authority on the valuation of benefits, and submits that the following principles emerge from the judgment of Lord Clarke:

a) *"It is clear that the enrichment is to be valued at the time when it was received by [the defendant]"* ([14]).

b) *"The starting point in valuing the enrichment is the objective market value, or market price of the [benefits conferred on D]*" ([15]).

c) Under this *"objective approach"*, the relevant test is *"the price which a reasonable person in the defendant's position would have had to pay for the [benefits]"* ([17]).

ii) TPL also relies upon what is said in Goff and Jones (supra) at 4-16, namely: "*What if there is no general market for a benefit, but the parties agreed a price for it? In this case, the Court may take the parties' agreed price to be the relevant measure because this is the best available evidence of the benefit's objective value"*.

iii) As authority for this latter proposition, Goff & Jones refer to Lord Neuberger's observation in *Benedetti* at [128] that:

> *"[I]n the absence of any other evidence or any good reason to the contrary, where two parties agree, at arm's length, that one of them will pay a certain sum, or at a certain rate, for a type of benefit to be provided by the other, there must be a prima facie presumption that that amount is, or at least is good evidence of, the market value of that type of benefit. Apart from complying with commercial common sense, this approach seems to have been assumed to be correct almost 400 years ago … The approach is*

also inherent in the well-established practice of invoking comparable transactions in the field of rating and other property valuation disputes".

iv) Mr de Beneducci also relies upon what was said in *Benedetti* by Lord Reed at [105]:

> *"So understood, market value is specific to a given place at a given time. That point can be illustrated by the episode in Vanity Fair in which Becky Sharp sells her horses during the panic which grips the British community in Brussels after the battle of Waterloo, when rumours reach the city that Napoleon has defeated Wellington and that his army is approaching. The circumstances create a market in which horses are exceptionally valuable, and Becky obtains a price which is far in excess of the ordinary value. It is, nevertheless, the value of the horses in the market in which they are sold."*

v) In reliance upon this latter passage, it is submitted on behalf of Volta that the mere fact that the market price might have been determined on the basis of a false assumption makes it no less the market price, because that was the price demanded by the market at the time.

vi) On the basis of the above authorities, it is submitted on behalf of TPL that:

a) The benefits were received by Volta on 22 September 2017 (rights in respect of planning documents) and 28 November 2017 (rights in respect of Connection Offers) respectively.

b) On 3 November 2017, TPL and Volta executed the Option Agreement.

c) Of the two rights transferred by TPL to Volta, at least one of these constituted an *"Asset"* within the meaning of the Option Agreement, it being common ground that TPL's rights in respect of the planning documents fell within the scope of the Option Agreement.

d) The *"Assets"* transferable under the Option Agreement were valued by the parties at £800,000 plus VAT (subject to adjustment as provided for by Schedule 2). Reliance is placed upon the fact that Mr Leiper, an experienced businessman in this field, described this figure as representing *"reasonable value"* for both parties.

e) Accordingly, the objective market value of the benefits transferred was, at the date of receipt, £800,000 plus VAT.

At TPL's expense?

162. As to the relevant legal principles, TPL relies upon the following from the judgment of Lord Reed in *Investment Trust Companies v. Revenue and Customs Commissioners* [2017] UKSC 29 ("**ITC**"):

i) At [43], Lord Reed identified that in considering whether enrichment was at the claimant's expense, the Court is seeking to identify a *"transfer of value"* – i.e., *"that the defendant has received a benefit from the claimant … [with the claimant] also having suffered a loss through his provision of the benefit"*.

ii) At [45] Lord Reed went on to say that:

> *"…there need not be a loss in the same sense as in the law of damages … the loss to the claimant may, for example, be incurred through the gratuitous provision of services which could otherwise have been provided for reward, where there was no intention of donation. In such a situation, the claimant has given up something of economic value through the provision of the benefit and has in that sense incurred a loss."*

163. Applying the above to the present case, TPL submits that it has, in the events which have transpired, gratuitously conferred rights on Volta in circumstances where (i) those rights could have been provided for reward and (ii) there was no intention of donation.

164. Thus, it is submitted that TPL has given up something of economic value (valued as referred to in paragraph 161 above) through the conferral of those rights, and has, in that sense, incurred a loss.

Was the enrichment unjust?

165. Mr de Beneducci referred to the judgment of Carr LJ in *Dargamo Holdings Limited & anor v. Avonwick Holdings Limited & ors* [2021] EWCA Civ 1149 ("***Dargamo***") at [77] – [80] for the helpful summary that Carr LJ there provides as to the principles to be applied in considering a case of unjust enrichment based upon an alleged "*failure of basis"*.

166. I note that earlier in her judgment, at [55], Carr LJ had identified elements of a claim for unjust enrichment, including the need to show that the enrichment alleged was *"unjust"*. As to this, at [57] Carr LJ identified that the claimant must positively identify what has been described as the *"unjust factor"*. At [58], Carr LJ said that it is this *"unjust factor"* that distinguishes the English claim in unjust enrichment from the civilian *"absence of basis"* approach, and she went on to identify as examples of *"unjust factors"*, the following, namely: mistake, duress, undue influence, failure of consideration, necessity and legal compulsion. She went on to say that:

> *"These unjust factors are recognised because they establish that the claimant did not intend the defendant to receive a benefit in the circumstances, either because the claimant never had an intention to benefit the defendant in those circumstances or the intent was vitiated or qualified in some way."*

167. At [79], when specifically dealing with failure of basis, Carr LJ identified that the concept of *"failure of basis"* is that a benefit has been conferred on a joint understanding that the recipient's right to retain it is conditional. She referred to Goff & Jones (supra) at 12-01, which is relied upon by TPL, in which it is said that:

> *"The core underlying idea of failure of basis is simple: a benefit has been conferred on the joint understanding that the recipient's right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit. The condition might take one of a variety of forms. For instance, it might consist in the recipient doing or giving something in return for the benefit (hereafter referred to as "counter-performance") … Failure of basis is, therefore, to be*

distinguished from unjust factors that focus on whether the payment is truly voluntary (such as mistake, duress, etc). In failure of basis cases, the claimant's intention to confer the benefit is genuine, but it is conditional."

168. Seeking to apply the above principles, it is TPL's case that it conferred the benefits identified above in respect of rights to planning documents and the rights to the Connection Offers on Volta (so as to enrich it) on the joint understanding that Volta's right to retain the benefits conferred was conditional.

169. As to the relevant condition, as referred to above, it was pleaded in paragraph 46.4 of the Amended Particulars of Claim that the relevant assets were transferred to Volta on condition that Volta would exercise the option provided for by the Option Agreement and pay *"the Price"*. TPL's case at trial has been somewhat refined, and as expressed in closing submissions, it is said that the benefits were transferred from TPL to Volta on condition that if Volta proceeded with the Thurcroft Project in any way (whether by developing it itself, selling it, or otherwise), a *"success fee"* would be payable to TPL, as that was the *"essential bargain"* between the parties – see paragraph 12 of Mr de Beneducci's Closing Note. As Mr de Beneducci put it, TPL was not sharing the planning documentation and Connection Offers with Volta for fun, and Volta embarked upon the Thurcroft Project understanding this to be the case.

170. Mr de Beneducci submits that the witnesses' written and oral evidence made clear that there was a mutual understanding that something would be payable to TPL upon Volta (to whom it had introduced the Project) bringing the Project to fruition or financial close. He submitted that this was recognised as a basic premise in the industry, and was reflected in Volta's business model, with the payment of finder's fees and, subsequently, success fees if a project went ahead.

171. Mr de Beneducci relied upon the fact that Mr d'Arcy, in cross-examination, actually put it to Mr Brown that: *"…the very concept of a success fee is that it is payable when a developer proceeds with a project … That is the expectation/understanding of when a success fee would be paid"*. He submits that that was Mr Leiper's evidence too, i.e., that in respect of a project, a success fee would be payable upon the developer *"bringing it to fruition"*.

172. It is submitted that, in the instant case, the relevant trigger for payment was *not* confined to Volta's *"building out"* the Thurcroft Project itself but extended to the circumstances that in fact occurred with Volta entering into the Gresham APA. It is said that there is nothing in the contemporaneous documents to the effect that the trigger was Volta building out, and Mr de Beneducci makes the point that a search of the PDF Main bundle for the phrase *"building out"* or *"build out"* yields no matches.

173. Mr de Beneducci says that this was not the premise of the parties' negotiations in February 2018, which plainly envisaged that a sum would be payable to TPL on the *sale* of the Thurcroft Project. It is said the same conclusion should be drawn from Volta's internal documentation, such as the Board's discussion slides prepared for the meeting on 13 February 2018, which referred to: *"landlord plus agent fees due on completion"* in the context of a sale of the site. It is said that the evidence of Mr Adams under cross-examination was *"unconvincing"* to the extent that he suggested that completion here did not refer to the completion of a sale.

174. In short, it is said by TPL that the suggestion that the relevant trigger for payment was *"building out"* by Volta is a *post hoc* attempt on Volta's part to avoid its obligation to make payment to TPL. It is submitted that this is confirmed by the fact that Volta did in fact pay Mr Smithers a (staggered) success fee of £300,000 plus VAT upon the completion of the *sale* to the Gresham SPV.

175. Thus, so it is submitted, the jointly understood basis for TPL's transfer of benefits to Volta was as follows: TPL expected to receive a payment if and when Volta proceeded with the Thurcroft Project, and Volta expected to make such a payment if and when it proceeded with the Thurcroft Project. That *"essential bargain"* between the parties formed the basis for their entire interaction, but specifically the transfer of the benefits (in respect of the rights in respect of the planning documents and the Connection Offers) that TPL relies upon.

176. It is then submitted that the basis relied upon has failed. Although Volta did proceed with the Thurcroft Project, in the sense of negotiating and entering into the Gresham APA, no payment has been made to TPL.

Defences available to Volta?

177. TPL recognises that a defendant may be able to avoid or reduce its liability in unjust enrichment if its *"position has so changed that it would be <u>inequitable</u> in all the circumstances to require [it] to make restitution, or alternatively restitution in full"* (emphasis added) – see *Lipkin Gorman (A Firm) v. Karpnale Ltd* 1991 2 AC 548, per Lord Goff at 580, cited in Goff & Jones (supra) at 27-01.

178. Apart from the fact that no change of position defence has been pleaded, TPL submits that:

    i) It would *not* be inequitable to require Volta to make restitution in full. This is because Volta proceeded with a sale to the Gresham SPV in the knowledge that there had been no agreed variation in the price payable under the Option Agreement, and notwithstanding that, so it is said, Volta had entered into negotiations with TPL in February 2018 *on the very premise* that it would be uneconomical for such a sale to take place unless the Option Agreement was varied. Volta is therefore said to be the author of its own misfortune.

    ii) Further, the payment of £300,000 plus VAT to Mr Smithers does not assist Volta because, so it is said, this was an expense voluntarily incurred by Volta in the face of its obligations under the Option Agreement and incurred in circumstances where Mr Smithers was pressing Volta to *"get out of AB"* - see Mr Smithers' email dated 3 July 2018. In any event, this was not *"expenditure [which] might in any event have been incurred by [D] in the ordinary course of things"* – see Goff & Jones (supra) at 27-08.

179. Consequently, so it is submitted, there is no change of position defence available to Volta.

180. To the extent that a defence of change of position is available to Volta, it will operate, it is submitted, at most to reduce Volta's liability to £600,000 plus VAT.

Conclusion in respect of TPL's case as to unjust enrichment

181. It is submitted by TPL that Volta is, for the above reasons, liable to make restitution to TPL in the sum of £800,000 plus VAT, which is said to be the reasonable value, at the date of receipt, of the benefits which were transferred on a condition which failed to materialise. Any reduction below £800,000 plus VAT would, it is said, allow Volta to take advantage of its inequitable conduct in proceeding with the sale to the Gresham SPV in circumstances where it must have known (given the negotiations in February 2018) that it was riding roughshod over the unvaried obligations in the Option Agreement.

Volta's defence to the case on unjust enrichment

Legal principles

182. As well as taking me to the passages in Carr LJ's judgment in *Dargamo* referred to in paragraphs 166 and 167 above, Mr d'Arcy referred me to [66] and [67], where Carr LJ considered the interrelationship between a claim in unjust enrichment, and the rights of parties under a contract, observing that whilst invalidity of the relevant contract is not a necessary prerequisite to a successful claim in unjust enrichment: *"That is not to say that claims in unjust enrichment must not respect contractual regimes and the allocation of risk agreed between the parties."*

183. Further, Mr d'Arcy took me to [102] of Carr LJ's judgment in *Dargamo*, where she observed that: *"It is well established that failure of basis must be total: even if a very small part of the benefit which form the basis for the payment has been conferred, no action will lie."* However, it is to be noted that she went on at [103] to observe that the courts have not always adopted a literal approach to the total failure of basis requirement, and that the practical significance of the principle has been reduced by the development of a doctrine of apportionment which allocates parts of the payment to distinct elements of the benefit in return for which the payment was made. See also on this point – Goff & Jones (supra) at 12-24.

184. Further, dealing specifically with failure of basis, Mr d'Arcy took me to Goff & Jones (supra) at 12-08, where it is observed that:

> *"Whilst a broad approach to failure of basis is generally appropriate, it should be emphasised that if the concept is stretched too far, it loses its analytical utility. Failure of basis identifies situations where a transfer of value has been made both voluntarily and conditionally, and the condition for its retention by the recipient has failed."*

185. As to quantification of benefits, Mr d'Arcy referred to Goff & Jones (supra) at 4-08 to 4-25, and in particular to 4-12. In this latter paragraph it is noted that whilst one approach would be for the court to determine the objective value by asking what price a willing supplier and buyer would have agreed upon, in *Benedetti*, Lord Clarke at [17] had preferred the test propounded by Etherton LJ in the Court of Appeal that the court should ask what price *"a reasonable person in the defendant's position would have had to pay*". Goff & Jones (supra) go on at 4-12 to observe that: *"On this approach, the court can take into account "conditions increasing or decreasing the objective value of the benefit to any reasonable person in the same (unusual)*

position" as the defendant, quoting what Lord Neuberger had said in *Benedetti* at [145].

186. Further, Mr d'Arcy referred me to Goff & Jones (supra) at 4-24 where it is observed that the Supreme Court had rejected the argument advanced by the claimant in *Benedetti* that the objective value ought to be based upon a generous offer to settle. He rejected this argument on the basis that a defendant's subjective overvaluation of the benefit can never be an appropriate measure for a claim in unjust enrichment.

187. So far as change of *position* is concerned, Mr d'Arcy took me to Goff & Jones (supra) at 27-01, 27-03 and 27-08. At 27-08, Goff & Jones observe by reference to *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50; [2002] 1 All E.R. (Comm.) 193, per Lord Goff at [38], that the test is whether the party seeking to raise the defence entered a transaction that he would not have entered but for his enrichment.

Basis of Volta's defence

188. The essence of Volta's defence is that, on proper analysis, many of the necessary components of a successful unjust enrichment claim are simply missing. In particular, it is said that there was no gratuitous transfer of value, whether jointly understood to be conditional as alleged or otherwise, either in respect of any rights of TPL in respect of planning documents, or in respect of the Connection Offers.

189. Thus:

    i) So far as the supposed transfer of rights in respect of the planning documents is concerned, Volta submits that:

        a) There was no transfer of any rights from TPL to Volta. Whilst the effect of MDC's terms and conditions may have been that TPL had, through TEM, a non-exclusive right to use the planning documents, it never purported to, and nor did it transfer any such right to Volta or confer any benefit upon Volta in respect thereof, although it would have done had the option provided for by the Option Agreement actually been exercised;

        b) In any event, to the extent that Volta might have had use of any planning documents, they were not used by Volta to enrich itself, whether unjustly or otherwise.

    ii) So far as TPL's rights in respect of the connection offers are concerned:

        a) The transfer of the relevant rights to Volta was not gratuitous, but effected in return for Volta agreeing to, and in fact paying the £70,000 plus VAT deposit required on acceptance of the Connection Offers;

        b) Further, the transfer into Volta's name was not conditional, but unconditional.

190. Further, Volta submits that there was not, in any event, any underlying condition of the kind contended for by TPL, namely that if Volta proceeded with the Thurcroft Project in any way, whether by building out or otherwise, then a *"success fee"* would

be payable of an amount equal to the *"Price"* provided for by the Option Agreement, namely £800,000.

191. Whilst Volta accepted that there *might* have been some basis for a case if Volta had proceeded to build out the Thurcroft Project itself using the planning documents the subject matter of the Option Agreement without actually exercising the option, that is not what has occurred because the stars never aligned to make it economically viable to exercise the option provided for by the Option Agreement and proceed with the development itself.

192. Volta disputes that it formed any part of the basis or understanding of the parties that the option would be exercised, and the *"Price"* paid as a success fee, if Volta, for genuine commercial reasons, did not proceed with the Thurcroft Project itself, but simply sold to a third party such rights as it might have acquired in consequence of the transfer to it of ownership of the rights to the Connection Offers, the value of which was likely to depend upon whether the Greens could be persuaded to co-operate once the option as between them and Volta had expired.

193. Mr d'Arcy, on behalf of Volta, submits that, on a proper analysis of the evidence, Mr Leiper did not in fact accept that the underlying purpose behind the Option Agreement was to provide for a finder's introductory fee, and a success fee in circumstances such as those that occurred in the present case. Rather, Mr Leiper's evidence was that the Option Agreement provided a mechanism, amongst other things, to pay a success fee if Volta exercised the option with a view to proceeding with the *"Storage Project"*, building the battery facility itself on the Thurcroft Site itself.

194. I note from one of the passages from Mr Leiper's evidence under cross examination that Mr d'Arcy drew my attention to, that Mr Leiper said this (Day 2, page 145):

> *"All of our projects had an initial fee, which was to cover the planning, which was to be managed and paid for by Mr Smithers. We would -- bearing mind there was no other SPVs like Thurcroft Power, that we would own the grid connection, pay for and own the grid connection ourselves, own the land option ourselves and therefore, consistent with other things, the only thing left was planning to be done and we would pay a success fee for the project if we built it out later, and that was the vehicle we used for those activities. So yes, if we built it out, then a further fee would be payable on commercial close or whatever you want to call it when we exercised that option."*

195. On behalf of Volta, Mr d'Arcy relied upon the fact that matters did not work out as intended due to the collapse in the battery market in December 2017/January 2018. In consequence, it was no longer economically viable for Volta to develop the Thurcroft Project itself, and exercise the option, as demonstrated by the figures produced for the Board of Volta on 13 February 2018.

196. It is said on behalf of Volta that what was proposed during the conference call on 19 February 2018 was not a variation of the Option Agreement, but a different arrangement outside the terms and scope of the Option Agreement. In the event, for reasons that are explained above, Mr Brown/ABE did not wish to participate in seeking to realise by sale what could reasonably be realised in respect of the

respective parties' interests in the Thurcroft Project. With the cooperation of the Greens, which was essential bearing in mind that they owned the Thurcroft Site, it was possible to agree the terms that were agreed with Gresham that form the subject matter of the Gresham APA. However, on Volta's case, this was something outwith the scope of the Option Agreement, and the *"success fee"* that the Option Agreement was designed to provide for by the exercise of the option contained therein.

197. In short, it is Volta's case that TPL has failed to demonstrate that Volta has been enriched, has failed to demonstrate that any such enrichment was at TPL's expense, and has failed to demonstrate that any such enrichment was unjust. On this basis, Volta submits that TPL's claim in unjust enrichment must fail.

198. Further, even if a claim in unjust enrichment can be established, it is Volta's case that the value to be attributed to any unjust enrichment is nowhere near the figure of £800,000 provided for by the Option Agreement.

199. Applying the principles referred to above, Volta submits that the starting point would be what a reasonable person in Volta's position would have had to pay for the relevant rights at the time that the benefit thereof was conferred on Volta, taking into account conditions liable to increase or decrease the objective value of the benefit of any reasonable person in the same (unusual) position as Volta.

200. It is Volta's case that the figure of £800,000 provided for by the Option Agreement was a figure based upon expectations as at the time that the Option Agreement was entered into, and assuming at the time that Volta came to exercise the option, that commercial considerations made it worthwhile to exercise the option, As I postulated during the course of submissions, if the stars then aligned. Thus, so it is submitted, the figure of £800,000 cannot provide a proper basis for the value of any rights transferred prior to the exercise of the option.

201. Further, Volta submits that what one is concerned with is the value of the right actually transferred i.e., the value of such right to the planning documents, if any such right was transferred, as was transferred. Bearing in mind that only £5000 plus VAT was paid to MDC for the planning documents, it is submitted that this must be the realistic maximum value of the same at the relevant time being the most realistic assessment of the price that a reasonable person in Volta's position would have had to pay for the same.

202. So far as the change of position defence is concerned, Volta emphasises that the key issue ought to be whether it can be said that Volta incurred expenditure by entering into transactions that it would not have entered into but for its enrichment, if indeed it was enriched. On this basis it is submitted that even if TPL is right about everything else, any award in favour of TPL ought to be capped at £600,000, but further Volta ought to be entitled to credit for the sums that it has paid Mr Smithers because it would not have had to pay Mr Smithers had it not been enriched (if it was).

Determination of unjust enrichment issue

Context of Option Agreement

203. At first blush, the Option Agreement is a somewhat unusual agreement in the sense of providing for an option to acquire *"Assets"*, limited as I have found to rights over planning documents costing only some £5000 plus VAT to obtain, but providing for the payment of a *"Price"* of £800,000 (subject to adjustment) on exercise of the option. Nevertheless, is not suggested that the Option Agreement was in any sense a sham document, or not intended to take effect otherwise than in accordance with its terms that provided that if the option was exercised, then Volta would be entitled to call for the transfer of such rights over the planning documents as TPL had, and Volta would be obliged to pay *"the Price"*.

204. As already mentioned, it had been Volta's pleaded position that, on proper analysis, the Option Agreement did not provide for the passing of any rights over any assets, and simply provided the mechanism for the payment of a success fee. However, as the case was argued at trial, both parties accepted that the scope of the Option Agreement extended to the planning documents, the issue between them being as to whether it also extended to the rights over the Connection Offers.

205. I understood it to be common ground between the parties that, apart from providing a mechanism for the transfer of such *"Assets"* as, as a matter of true construction thereof, fell within its terms, the Option Agreement was also to be considered (subjectively at least) as providing a mechanism to pay a *"success fee"* to TPL. To the extent that there might be any dispute as to this, I accept the evidence of Mr Leiper to this effect, and I consider this to be supported by:

    i) The reference to *"commission"* in the formula in respect of *"the Price"* in Schedule 2 thereto; and

    ii) The disparity between the intrinsic value of the *"Assets"* to be transferred on exercise of the option (particularly if restricted to rights in respect of the planning documents) and *"the Price."*

206. In the course of his evidence, Mr Leiper explained that Volta became involved in the Thurcroft Project intending to build out the proposed battery storage facility itself, and that it was not its expectation that it would end up doing what it did, namely selling such rights as it had to a third party. As he put it: *"... we would pay a success fee for the project if we built it out, and that was the vehicle we used for those activities. So yes, if we built it out, then a further fee would be payable on commercial close whatever you want to call it when we exercise that option"* (Day 2, pages 145-146).

207. Further, Mr Leiper explained that this *"success fee"*: *"...is a success fee for bringing the project to fruition, because at the beginning we haven't necessarily got a whole raft of things"* … *"A whole series of other things needed to be put in place before you could make the decision to build the project out with funding"* (Day 2, page 147).

208. In other words, the Option Agreement provided a mechanism under which, if the *"raft of things"* fell into place such that it was commercially worthwhile for Volta to

proceed with the Thurcroft Project, then it could, and in practice would, exercise the option, acquire the *"Assets"* the subject matter of the Option Agreement, which would be needed to proceed, and pay the £800,000 (subject to deduction as provided for by Schedule 2 to the Option Agreement to TPL).

209. However, I consider it to be reasonably clear from the evidence that the premise behind the exercise of the option, and the triggering of the payment of the *"success fee",* was linked to the commercial feasibility of the *"Storage Project"*, as defined by the Option Agreement, and the ability of Volta to build out itself, rather than realising such rights as it might have in some other way. Not only is this supported by the evidence of Mr Leiper that I mentioned above, which evidence I accept, but also the definition of *"Storage Project"* in the Option Agreement, namely: *"the electricity storage and discharge scheme under which the Buyer intends to design, procure funding for, construct, operate and maintain the Equipment on the Property"* (emphasis added). I note that the Option Agreement concerned an option to acquire the *"Assets"* which were defined as meaning the assets of TPL *"relating to the Storage Project"* (emphasis added).

210. I bear in mind Carr LJ's observations in *Dargamo* at [66]-[67] that invalidity of the relevant contract is not a necessary prerequisite to a successful claim in unjust enrichment, but Carr LJ did emphasise that claims in unjust enrichment ought to: *"respect contractual regimes and the allocation of risk agreed between the parties."* Thus, whilst unjust enrichment might provide the mechanism for filling the gaps in the parties' bargain, it ought not to be used as a way of undermining the bargain between them.

Elements of the unjust enrichment claim

211. I will consider in turn the various necessary elements of an unjust enrichment claim as identified by Lord Clarke in *Benedetti* at [10].

Enrichment

212. The onus is on TPL to demonstrate that a benefit has been conferred on Volta.

213. So far as the planning documents are concerned, as we have seen, TPL's case is that the benefit was in the form of the licence to use the planning drawings. However, I agree with the submissions on behalf of Volta that no such benefit was in fact conferred by TPL on Volta.

214. The effect of clause 13.1 of MDC's terms and conditions was that intellectual property rights remained with MDC, but that MDC granted a non-exclusive right to use the plans produced to the client. That does raise the issue as to who, in the present case, MDC's client was. I am prepared to proceed on the basis that, for these purposes, TPL is to be treated as MDC's client because, in instructing MDC, TEM acted as agent for TPL, its disclosed principal.

215. As referred to in paragraph 155, there is authority to the effect that where a client has engaged an architect to prepare drawings in order to obtain planning consent for development, the licence to the client to use the drawings in connection with the development might be transferred to the purchaser of the site. However, that is not the

situation in the present case. If Volta had wanted to proceed with the development with a benefit of the planning permission that had been obtained, then it could have exercised the option, and TPL could have transferred such rights as it had to use the plans to Volta as envisaged and provided for by the Option Agreement. But that point was never reached. All the evidence suggests that whathappened was that Mr Leiper annotated a plan prepared by MDC to produce the Red Line Drawing, which was then used for the purposes of the planning application (made by TPL), as well as being used as the plan attached to the option agreement entered into on 29 September 2017 between the Greens and Volta.

216. This does not, to my mind, evidence the transfer of any rights or benefit by TPL to Volta. Indeed, it seems to me that TPL was doing no more than acting (albeit prospectively) in a manner consistent with the performance of its obligation under clause 3.2 of the Option Agreement to: … *"procure that there is provided to the Buyer copies of the Planning Permission, <u>together with all related documentation</u>…"* (emphasis added).

217. I do not see any inconsistency between paragraph of 144 Mr d'Arcy's Skeleton Argument on behalf of Volta, and paragraph 153 thereof. If Volta was going to proceed with the project itself, then it may well have needed a licence to use the planning documents to construct the project as designed. But it did not, itself, construct the project as designed by MDC. Following the Gresham ASA, it would have been a matter for Gresham as to what plans it used, and with what licence or authority, in order to build out on the Thurcroft Site, and it was for Gresham to satisfy itself that it had the appropriate rights to use the plans that it did use. Further, as I have found, no rights in respect of the relevant plans passed to Volta, and so Volta had no rights to pass on to the Gresham SPV, and therefore Volta did not purport to do so.

218. It may be that in presenting a package to Gresham of its own right to the Connection Offers, and its own right under its option agreement with the Greens, or at least the cooperation of the Greens if that option had expired, Volta identified to Gresham that planning permission had been obtained, and indeed directed Gresham to Rotherham's website evidencing the same. However, this, in my judgment, falls well short of dealing with rights which, in any event, Volta did not have.

219. I do not gain any assistance on this point from SPB's letter dated 17 July 2020.

220. Clearly, different considerations arise in respect of the Connection Offers, in that a benefit was conferred on Volta.

At TPL's expense

221. As Lord Reed identified in *ITC* at [43] and [45], the question is not simply whether Volta received a benefit, but whether TPL suffered a loss through the provision of the benefit, in the sense of giving up something of economic value.

222. So far as the planning documents are concerned, if TPL did not give away its non-exclusive licence, then it is difficult to see that it can properly be considered to have suffered any loss.

223. So far as rights in respect of the Connection Offers are concerned, the essence of TPL's case is that it gratuitously conferred rights on Volta, and did so in circumstances where the rights could have been provided for reward, and there was no intention of donation – see paragraph 9 of Mr de Beneducci's Closing Note. However, on proper analysis, such rights as were transferred, or are to be treated as transferred, by the Revised Side Letter or the Transfer Letter were not so dealt with on a gratuitous basis, but in return for Volta agreeing to fund the £70,000 plus VAT deposit required in order to accept the Connection Offers. In these circumstances, I do not consider that Volta can properly said to have been enriched *at TPL's expense*.

224. In closing submissions, Mr de Beneducci, whilst holding fast in relation to his case in respect of the planning documents, realistically accepted the difficulties in his case in relation to the rights in respect of the Connection Offers, saying: *"The court may conclude, however, that in the light of the Revised Side Letter the Grid Application or Connection Offer was not a relevant enrichment in this case."*

Unjust factor

225. In the present case, the unjust factor is said to be a failure of basis.

226. As identified above, the key consideration in considering an alleged failure of basis is as to whether a benefit has been conferred on the joint understanding that the recipient's right to retain it is conditional, such that if the condition is not fulfilled, the recipient must return the benefit – See e.g., Goff & Jones (supra) at 12-01.

227. I note that Goff & Jones (supra), at 12-08 comment that:

    i) Whilst a broad approach to failure of basis is generally appropriate, there must be a concern that if the concept is stretched too far, it loses its analytical utility; and

    ii) A failure of basis identifies situations where a transfer of value has been made both voluntarily and conditionally, and the condition for its retention by the recipient has failed.

228. In the light of my findings in respect of enrichment, and whether there has been enrichment at TPL's expense, one does not strictly get to this element of the claim, having failed to establish the existence of the other elements. However, I deal with this third element in case I should be wrong in respect of the issues of enrichment, and enrichment at TPL's expense.

229. The condition in the present case is said to be that if Volta proceeded with the Thurcroft Project, a *"success fee"* would be payable, on the basis that this was the *"essential bargain"* between the parties. Mr de Beneducci's reference to the *"essential bargain"* reflects that a mere failure of expectation which might have motivated TPL to act in the way that it did will not suffice. It is necessary to find, looking at the matter objectively, a clearly understood consensus as to the basis upon which TPL was prepared to confer the relevant benefit on Volta.

230. However, as I have identified above, I consider that the bargain between the parties in respect of the payment of a success fee was essentially founded upon the Option

Agreement, and upon the Option Agreement providing a mechanism for the payment of the success fee if, ultimately, all the stars aligned, and Volta exercised the Option Agreement with a view to proceeding with the development of the *"Storage Project"* itself. I do not consider that one can read into the circumstances some underlying condition that the success fee should be payable if matters were dealt with in a manner not envisaged by the Option Agreement, and not envisaged by the parties in entering into the Option Agreement.

231. I do not consider that TPL's case is assisted by the negotiations that took place in February 2018. The parties were not then negotiating a variation of the Option Agreement. Rather, confronted with a significant change in economic circumstances, namely circumstances that made the exercise of the option provided for by the Option Agreement simply uneconomic bearing in mind the consideration that would require to be paid on exercise of the option, Volta sought to agree new terms, i.e., new terms that did not involve the exercise of any option, but a different arrangement under which the parties agreed that attempts would be made to find a purchaser to purchase the Thurcroft Project, and the proceeds split 50-50 between TPL and Volta to reflect the changed economic circumstances. This did not, to my mind, reflect a recognition that a success fee by reference to the Option Agreement would be payable in the circumstances, but rather a recognition that the respective parties had various rights and negotiating positions, and that a measure of cooperation between the respective parties was likely to be required in order to achieve any return.

232. Mr Brown was not, for reasons that are referred to above, prepared to go along with what was being proposed. It is true that the proceeds obtained by Volta were ultimately split between itself and Mr Smithers/TEM. However, as I see it, this reflected the fact that once Mr Brown, who by then was effectively controlling TPL, was not prepared to engage with the alternative sale strategy, it was necessary to secure Mr Smithers' assistance in order to get any sale over the line with the cooperation of the Greens.

233. In the circumstances, even if a relevant benefit in respect of the planning documents or the Connection Offers was conferred by TPL on Volta, I am not persuaded that there was the basis (or joint understanding) that Volta's right to retain the benefit or benefits was conditional, as alleged, on a success fee being payable in circumstances as actually pertained, such that upon the condition not being been fulfilled, Volta is obliged to return the benefit.

Defences

234. In the light of my findings, it is not strictly necessary for me to consider whether the defence of change of position is available to Volta. However, I deal with the point shortly in case I should be wrong in respect of my earlier conclusions.

235. On the basis of the authorities identified above, the key consideration is as to whether the position so changed that it would be inequitable in all the circumstances to require Volta to make restitution, or alternatively restitution in full. To the extent the Volta relies upon having entered into some transaction, then the key consideration is as to whether Volta entered into a transaction that it would not otherwise have entered into but for its enrichment.

236. I am satisfied that Volta's position has so changed such that it would be inequitable to require Volta to make restitution over and above the £600,000 consideration received on the sale to the Gresham SPV. The payment of £300,000 out of the proceeds of sale to Mr Smithers is rather more difficult. It is certainly expenditure that would not have been incurred had Volta not been enriched. Further, it is expenditure that I consider Volta is likely to have had to have incurred in order to get a sale over the line given Mr Smithers' assistance in securing the cooperation of the Greens. On this basis, on balance, I am satisfied the credit should also be given for the £300,000 paid to Mr Smithers/TEM.

237. As to the pleading point, of course the defence of change of position ought to have been pleaded. However, TPL's case as to unjust enrichment has, itself, somewhat departed from the pleaded case, in particular as to the condition that is said to have formed the basis that failed. Further, there is no realistic suggestion that TPL is not able to deal with the defence of change of position as canvassed during the course of the hearing. In the circumstances, I would not have allowed a pleading objection to have prevented reliance upon the defence of change of position that was advanced.

Valuation of benefit

238. The above consideration of the defences available to Volta assumes that the value of the benefit conferred upon Volta, if any benefit was so conferred, is to be taken to be £800,000, being the consideration (subject to adjustment) provided for by the Option Agreement. It is against this sum that the defences have been applied in my analysis in paragraph 236 above.

239. However, I agree with the submissions on behalf of Volta that the consideration provided for by the Option Agreement is not the correct starting point.

240. I consider that the authorities that I have referred to above demonstrate that it is first necessary to identify the benefit said to have been conferred, and to then consider the value of the benefit so identified at the time that it was conferred. The key question is then as to the price that a reasonable person in the defendant's position would have to pay for the benefit. Whilst the starting point for that might well be whatever consideration has been agreed between the parties, the agreement in question must relate to the benefit actually conferred and take into account factors such as subjective overvaluation given the particular circumstances of the defendant.

241. The consideration agreed between the parties in the present case was a consideration agreed to be paid on the premises that the circumstances had arisen in which, as I found, Volta wished to proceed to build out the battery storage facility itself in circumstances in which it was in Volta's commercial interests to do so, and therefore exercise the option.

242. To the extent that, contrary to my finding above, a benefit may have been conferred by transfer of a right to use the planning documents, I consider that any claim for unjust enrichment must be limited to the value of those rights at the time of their transfer. That cannot, as I see it, have been anything approaching £800,000. I agree with the submissions on behalf of Volta that the most realistic indication of the value of the relevant rights is the price paid to MDC of the plans, namely £5000 plus VAT.

243. Different considerations arise in respect of the Connection Offers, and the rights in respect thereof. There is a case that the value of those rights, on their own, might be reflected in the price actually obtained by Volta under the terms of the Gresham APA. However, the right was transferred prior to the obtaining of planning permission, and the Revised Side Letter preceded the conclusion of the option agreement with the Greens, let alone the Option Agreement. On this basis, it is impossible to see that the value as at the time of transfer can have been £800,000, or anything remotely approaching that sum.

Conclusion in respect of the unjust enrichment claim.

244. For the reasons that I have identified above, I consider that TPL has failed to establish the necessary elements of a successful claim for unjust enrichment in respect of any transfer to Volta of rights in respect of the planning documents, or the Connection Offers. Consequently, TPL's claim in unjust enrichment must, in my judgment, fail.

Alleged breach of implied terms

TPL's case

245. As clarified in Mr de Beneducci's closing note, the implied terms of the Option Agreement asserted and relied upon are the following:

i) *"After the expiry of the Option Period, Volta will cease to make use of any "Assets" which it has been using with the TPL's permission during the Option Period for the purposes of pursuing the Thurcroft Project".*

ii) *"If Volta makes use of the "Assets" in order to proceed with the Thurcroft Project (either itself or by selling or otherwise disposing of the Project to a third party) after the expiry of the Option Period, it will thereupon become liable to pay TPL the "Price" under the [Option Agreement]"*

246. There is no issue between the parties as to the relevant law on the implication of contractual terms, and TPL relies upon the recent helpful summary of the relevant principles provided by Carr LJ in *Yoo Design Services Limited v Iliv Reality Pte* [2021] EWCA Civ 560 at [50]:

> *"In summary, the relevant principles can be drawn together as follows:*
>
> *i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on of the obviousness test;*
>
> *ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;*
>
> *iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;*

iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;

v) A term will not be implied if it is inconsistent with an express term of the contract;

vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching 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;

vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;

viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test."

247. Mr de Beneducci submitted that it is *necessary* to imply these two proposed terms in order to give the Option Agreement business efficacy, or practical and commercial coherence. He further submitted that the proposed terms are so obvious as to go without saying. This is, he submitted, because the terms *"go to the heart of a time-limited Option Agreement and its nature"*.

248. Mr de Beneducci submits that once the option has expired, the relevant party has lost the opportunity to acquire the asset or assets in question, and that if the option is not exercised, the relevant party cannot purport to deal with the subject matter of the option, i.e., the asset or assets that the party had agreed to purchase on exercising the option. There can be, as Mr de Beneducci put it: *"no second bite of the cherry"*. He submits that the lacuna created by the absence of such terms would *"drive a coach and horses"* through the effect of the Option Agreement, and undermine its commercial purpose.

249. So far as breach of the alleged implied terms are concerned, TPL alleges that there was a breach thereof by Volta in its making use of *"the Assets"* the subject matter of the Option Agreement when it sold to the Gresham SPV pursuant to the Gresham APA.

250. Mr de Beneducci relies upon the fact that Mr Leiper emailed Gresham in order to provide a link to the planning documents on planning section Rotherham's website. He suggests that Gresham must have made use of the relevant plans because he refers to an email dated 29 August 2019 from Mr Smithers in which Mr Smithers refers to the fact that Gresham *"changed planning"*, the point being that Gresham must have used plans in order to change the Planning Permission.

251. Mr de Beneducci also referred to an email dated 20 June 2018 to Richard Thwaites of Penso Power, another potential purchaser, in which Mr Leiper stated: *"The site has full planning for the 50MW'*. It is said that this all shows that, expressly or implicitly, Volta was making use of the rights associated with the planning documents to achieve a sale, and that Volta plainly thought that it enjoyed the right to make use of the relevant planning documentation.

252. Further, Mr de Beneducci referred to the terms of the Gresham ASA, and suggested that objectively understood, Gresham must have thought that it was buying the licence to use the planning documents, even though, under the terms of the Gresham APA, Volta was only purporting to sell that which it owned.

253. On this basis, it is alleged that Volta acted in breach of the first of the implied terms, and also in breach of the second of the implied terms, in the latter case because Volta became liable pursuant to the terms of the second implied term to pay a sum equivalent to the *"Price"* under the Option Agreement (£800,000), which it has failed to pay.

254. It is thus TPL's case that Volta is liable to it for damages for breach of contract in an amount of £800,000.

Volta's defence

255. On behalf of Volta, Mr d'Arcy emphasised that the relevant test as to implication of terms is one of necessity, not reasonableness, and that this is a stringent test.

256. Mr d'Arcy submitted that the implied terms contended for are not necessary, and are, in any case, theoretical because the situations in which they could apply do not arise. This is because, so it is said, Volta never took ownership of any rights in relation to the planning documentation, and rights in respect of the connection offers did not fall within the definition of *"Assets"* for the purposes of the Option Agreement. In any event, the transfer of the latter was contractually agreed to have preceded the Option Agreement by operation of contractual estoppel in both the Revised Side Letter and the Transfer Agreement. Further, such dealings as the parties had in relation to the rights in respect of the Connection Offers were freely carried out, outside the framework of the Option Agreement.

257. It is thus submitted, on behalf of Volta, that even if the terms in question might represent reasonable matters that the parties might have discussed between themselves had the issues been considered when the Option Agreement was drafted and agreed, the fact is there was no discussion in relation to, and there is no need for the Option Agreement to include the terms in question for the Option Agreement to be perfectly workable. It is said that the Option Agreement is a simple contract providing for

exercising an option at Volta's discretion, triggering a substantial payment, and that there is simply no need for the additional complexities contended for.

258. Volta thus submits that TPL's claim based upon the proposed implied terms must fail.

Determination of implied terms issue

259. I accept Volta's submission that, on proper analysis, the implied terms contended for are theoretical because the situations in which they could apply do not arise:

i) So far as the planning documents are concerned, if, as I have found, no rights or benefits were conferred upon Volta in respect thereof, then there can, as I see it, have been no question of Volta using *"Assets"* with TPL's permission during the Option Period, and no question of Volta making use of the same after the expiry of the Option Period.

ii) So far as TPL's rights in connection with the Connection Offers are concerned, if, as I have found, these rights never fell within the definition of *"Assets"* in the Option Agreement then, again, there can be no question of Volta using *"Assets"* with TPL's permission during the Option Period, and no question at Volta making use of the same after the expiry of the Option Period.

260. Further, and in any event, I do not consider that it can properly be said that the implication of the terms contended for was *necessary* in order to give business efficacy to the Option Agreement. The question is whether, without the implied terms contended for, the Option Agreement lacks commercial or practical coherence. I do not consider that it does, in that it is well capable of taking effect in accordance with its terms, and giving effect to the Option Agreement in accordance with its terms does not create any commercial or practical difficulty.

261. As to the application of the obviousness test, the term sought to be implied requires to be so obvious that it goes without saying. This is a question that requires to be considered by reference to the time at which the Option Agreement was entered into, rather than with the benefit of hindsight in the light of a particular issue that has in fact arisen. In considering the obviousness test, the required obviousness must extend not just to the concept of the particular implied term, but also to the wording of the particular term sought to be implied. Further, it is not enough to show that if the parties had foreseen the particular eventuality that has arisen, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution, or that one of several possible solutions would without doubt have been preferred.

262. As I have found, in entering into the Option Agreement, the parties clearly anticipated that the stage might be reached where all the stars aligned, and Volta would wish to exercise the option provided for by the Option Agreement in order that it could proceed with the *"Storage Project"* by developing the Thurcroft Site in accordance with the planning permission that had been obtained. We are concerned now, with the benefit of hindsight given the occurrence of an eventuality that had not specifically been foreseen at the time of entry into the Option Agreement, with whether it can properly be said that if the parties had given thought to the issue at the relevant time,

they would *obviously* have come up with the solution provided by the terms that TPL seeks to imply, or something along these lines.

263. I do not consider that it can properly be said that the parties would obviously have come up with the solution provided by the terms that TPL seeks to imply, particularly bearing in mind that, pursuant to the terms that are sought to be implied, Volta would have had to have agreed to accept a liability to pay £800,000 for any use after the expiry of the Option Period of any *"Assets"* that might have been made use of during the Option Period with TPL's permission, whatever the actual value of those "Assets" was, and whatever the circumstances in which Volta came to make use of it. That is, in my judgment, wholly unrealistic.

264. In the circumstances, and for the various reasons set out above, I do not consider that it is possible to imply the terms that TPL seeks to imply into the Option Agreement.

265. Consequently, there cannot have been any breach of contract on Volta's part by acting in breach of any implied term.

266. I would add that in *Yoo Design Services Limited v Iliv reality Pte* (supra) at [51(ii)], Carr LJ observed that whilst the business efficacy and obviousness tests are alternative tests, it will be a rare or unusual case where one, but not the other, is satisfied. This observation is, in my judgement, particularly apt in respect of the case such as the present where one is seeking to deal in hindsight with an issue that has arisen since the entry into the relevant contract.

Overall conclusion

267. For the reasons set out above, TPL has failed to establish its claim in unjust enrichment, or for breach of contract.

268. In the circumstances, the claim must be dismissed.