Neutral Citation Number: [2023] EWHC 412 (Comm)

Case No: LM-2022-000151

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

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

Date: 27/02/2023

Before :

MR SIMON BIRT KC
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

- -

Between :

Drax Smart Generation Holdco Limited	**Claimant**
- and -	
Scottish Power Retail Holdings Limited	**Defendant**

- -
- -

David Quest KC and Philip Hinks (instructed by **Clyde & Co LLP**) for the **Claimant**
Sa'ad Hossain KC and Joyce Arnold (instructed by **Womble Bond Dickinson (UK) LLP**) for the **Defendant**

Hearing date: 19 January 2023

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Monday 27th February 2023.

Mr Simon Birt KC:

1. In this action, the Claimant (**"Drax"**) claims under a share purchase agreement for breach of warranty, other breaches of contract and an indemnity. The current applications are: i) an application made by the Defendant (**"Scottish Power"**) for summary judgment under CPR part 24 and dismissal of the claim; and ii) an application by Drax to amend its Particulars of Claim, an application which was made in response to the summary judgment application.

2. Both applications relate to the content and timing of the notification of the claims. Scottish Power says, in short, that the notification was insufficient to comply with the contractual requirements, with the result that the claims must fail.

3. Drax did not seek to resist the summary judgment application on the basis of its originally pleaded case, but only on the basis of its proposed amendments to the Particulars of Claim. The parties agreed that the two applications fell to be considered together and that (save for an issue relating to a part of the proposed amendments that Scottish Power said was inadequately particularised) the outcome of each turned on the question whether, in relation to the issues dealt with below, Drax has a real prospect of success in its claims as formulated in its draft amendments to the Particulars of Claim.

Background to the claim

4. Drax claims under an agreement for the sale and purchase of shares dated 16 October 2018 (the "**SPA"**), by which Drax bought the shares in a company that was, at the time, called Scottish Power Generation Limited and is now named VPI Power Limited (**"the Company"**).

5. One of the assets of the Company is a site known as Damhead Creek II. The site has long been considered a potential location for a new Combined Cycle Gas Turbine (**"CCGT"**) power station, although it is unclear whether such a power station will ever be built.

6. If a CCGT power station were to be built at Damhead Creek II, it would need to be connected to the national electricity grid. It was (and is) expected that any such connection would be made at the site of the (now demolished) Kingsnorth Power Station (**"Kingsnorth"**), which site is adjacent to Damhead Creek II. This would necessitate the laying of cables over the Kingsnorth land to connect the Damhead Creek II site to the national electricity grid.

7. Damhead Creek II was previously owned by another company in Scottish Power's group, namely ScottishPower (DCL) Limited (**"SPDCL"**). SPDCL had entered into an option agreement dated 12 March 2014 with E.ON UK plc (**"the Option Agreement"** and **"E.ON"** respectively). E.ON was, at that time, the owner of Kingsnorth. The Option Agreement gave SPDCL the right to require the grant of an

easement over land at the Kingsnorth site, to enable cables to be laid from the potential power station at Damhead Creek II to the electricity grid connection point at Kingsnorth.

8. The option under the Option Agreement was valid during a period which ran until 12 March 2019 (the **"Option Period"**). Clause 6.2 of the Option Agreement provided that: "*The Grantee shall be permitted to assign or transfer its rights or obligations under this Deed to a Group Company without the prior consent of the Grantor … provided that the assignee shall enter into a direct deed of covenant in favour of the Grantor to perform the obligations on the part of the Grantee hereunder*". Clause 1.1(j) stated that the expressions "*Grantor*" and "*Grantee*" "*shall include their respective successors in title and assigns.*"

9. By an agreement dated 1 March 2016 (**"the Damhead & Shoreham Asset Sale Agreement"**), SPDCL agreed to transfer to the Company its Business, which included the Damhead Creek II site and SPDCL's rights under the Option Agreement. As a result of this agreement, the Company became the owner of the Damhead Creek II site.

10. It was also intended that the Company would become the beneficiary of the Option. It appears that SPDCL assigned (or purported to assign) its rights under the Option Agreement to the Company on 1 June 2016. However, during the later negotiations with Drax (referred to below) it came to light that no copy of the instrument affecting that assignment could be located. Accordingly, SPDCL executed a Deed of Assignment dated 5 October 2018 by which it assigned (or purported to assign) all of its rights, title, interest and benefit in and to the Option Agreement to the Company with effect from 1 June 2016.

11. Seeking to comply with clause 6.2 of the Option Agreement, a deed of covenant was given by the Company in favour of E.ON on 1 June 2016. By that deed, the Company covenanted to perform "*the covenants, conditions and other obligations on the part of the Grantee contained in the [Damhead Creek II Option Agreement] as if [the Company] had been named as the Grantee therein*."

12. However, by that date E.ON was no longer the relevant Grantor for the purposes of the grant of the easement, as the Kingsnorth site had been transferred to another company, Uniper UK Limited (**"Uniper"**) on or around 30 September 2015. Accordingly, the deed of covenant was given in favour of the wrong party. No deed of covenant was given by the Company in favour of Uniper within the Option Period.

13. Although there is a dispute between the parties (which does not arise to be determined on this application) as to the correct legal characterisation and analysis of the transfer of SPDCL's rights under the Option Agreement, the upshot was (as was common ground) that the Company was not entitled to exercise rights (including serving a notice on Uniper) under the Option Agreement.

14. Scottish Power subsequently decided to sell the Company and Drax was selected as the purchaser. The transaction was a large one: the Company held many assets in addition to those related to Damhead Creek II and the eventual Final Price under the SPA was £702 million. In the course of negotiating the sale, the information Scottish Power provided to Drax included some information as to the assignment of the Option Agreement.

15. The sale took place under the terms of the SPA, a long and complex document running to 224 pages. The relevant provisions are dealt with in more detail below. They included provisions by which (in summary) Scottish Power warranted that the benefit of the Damhead Creek II Option Agreement would be assigned to the Company prior to Completion and agreed to indemnify Drax for all losses suffered in relation to the Option Agreement. They also included, at Schedule 4 paragraph 2.1, a pre-condition to Scottish Power's liability for certain claims that a notification of claim be made within a certain period from the completion date under the SPA (the **"Completion Date"**), allowing differing periods for different categories of claim (certain periods and categories being subsequently amended). The Completion Date was 31 December 2018.

16. Drax only discovered that the Option had not been effectively assigned to the Company after the expiry of the Option Period. Under cover of letters dated 8 March 2019 (which was shortly prior to the expiry of the Option Period), Drax sent (by its then solicitors) two Option Notices to Uniper, one requesting that the route of the easement be varied, and one purporting to exercise the option for grant of an easement contained in the Option Agreement. Following some correspondence, Uniper's solicitors informed Drax by a letter dated 11 April 2019 that, in the absence of a deed of covenant having been given in favour of Uniper, the purported exercise of the option was of no effect and, with the expiry of the Option Period, the option had fallen away.

17. By a letter dated 22 May 2019, Drax gave notice to Scottish Power of "*a matter which may give rise to a claim under the SPA*", summarising the events set out above. There then followed correspondence between the parties over the course of the following year, none of which is said to amount to notification of a claim for the purposes of paragraph 2.1 of Schedule 4 of the SPA.

18. During 2020 the parties entered into two deeds of variation in relation to the SPA:

    (1) The **"First Deed of Variation"**, dated 30 June 2020, defined a new type of claim under the SPA: a **"Damhead Creek II Option Agreement Claim"**. A new sub-paragraph to paragraph 2.1 of Schedule 4 was inserted, providing that the time limit for Drax to give notice in respect of any Damhead Creek II Option Agreement Claim was 24 months from the Completion Date.

(2) The **"Second Deed of Variation"**, dated 29 December 2020, amended that 24 month period to a 30 month period (i.e. to 30 June 2021).

19. In December 2020, Drax sold the Company on to VPI Generation Limited (**"VPI"**), pursuant to a sale and purchase agreement dated 15 December 2020.

20. By a letter dated 30 June 2021 (the last day of the relevant notice period in relation to at least some of the claims), Drax sought to give formal notice of a Damhead Creek II Option Agreement Claim, and also a "Reorganisation Claim" (pursuant to paragraph 2.1.7(b) of Schedule 4 to the SPA, where the relevant claim is referred to as a "Reorganisation Indemnity Claim")), to Scottish Power under paragraph 2.1 of Schedule 4 of the SPA (**"the Notice of Claim"**). The terms of the Notice of Claim are central to these applications.

Contractual provisions

21. As noted above, the SPA was varied by two Deeds of Variation. The provisions of the SPA set out below are in the form as they were amended by those Deeds of Variation. There was no controversy about how the amendments operated or what the words of the amended provisions are.

22. Clause 1 contains definitions. Those that are relevant to the other provisions of the SPA set out below include the following:

> "**Buyer's Group Undertaking**" means Drax Group plc or an undertaking which is, on or at any time after the date of this Agreement, a subsidiary undertaking of Drax Group plc (including, after Completion, the Group Companies) and "**Buyer's Group**" and "**Buyer's Group Undertakings**" shall be construed accordingly.
>
> "**Damhead Creek II Option Agreement**" means an option deed relating to land at Kingsnorth Power Station, Rochester, Kent between E.ON UK plc and Scottishpower (DCL) Limited dated 12 March 2014.
>
> "**Damhead Creek II Option Agreement Claim**" means any claim under or pursuant to this Agreement arising out of or in connection with or in respect of any failure to validly assign the benefit of the Damhead Creek II Option Agreement from ScottishPower (DCL) Limited (Company No. 02675504) to the Company, including without limitation any claim under or pursuant to the Agreement arising out of or in connection with or in respect of any failings or deficiencies in the Damhead Creek II Option Covenant and/or the Damhead Creek II Option Assignment.
>
> "**Damhead Creek II Option Assignment**" means the Deed of Assignment of the Damhead Creek II Option Agreement relating to land at Kingsnorth Power Station, Rochester, Kent between ScottishPower (DCL) Limited (Company No. 02675504) and the Company dated 5 October 2018.

"**Damhead Creek II Option Covenant**" means the Deed of Covenant between the Company and E.On UK PLC dated 1 June 2016.

"**Loss**" or "**Losses**" means any and all losses, liabilities (including liabilities in respect of Taxation and the loss or setting off of any Reliefs), actions and claims, including charges, costs, damages, fines, penalties, interest, surcharges and all reasonable legal, experts', consultants' and other professional fees and expenses.

"**Relevant Claim**" means a claim by the Buyer under or pursuant to this Agreement, excluding a Pensions Indemnity Claim, a Daldowie Indemnity Claim, a Reorganisation Indemnity Claim, or a claim under or pursuant to Clause 10.3, 14.8, 14.11 or 14.44, Schedule 6 (Completion Accounts) or paragraph 10 of Schedule 7 (Pensions).

"**Reorganisation**" means: (i) the reduction of capital of the Company carried out in 2018 to make available distributable reserves; (ii) the waiver of certain loans made by the Company to other members of the Seller's Group; (iii) the transfer of assets, rights, obligations and liabilities to or from the Company, each as contemplated by or provided for in the Reorganisation Documents (including the Hatfield Transfer and the Avonmouth Transfer); and (iv) the novation of the Wrong Pocket Contracts to the Company.

"**Reorganisation Agreements**" means […] the Damhead & Shoreham Asset Sale Agreement […]

"**Reorganisation Documents**" means: (i) the Reorganisation Agreements; […]

"**Reorganisation Indemnity Claim**" means a claim pursuant to Clause 11.1.

"**Warranty**" means a statement contained in Schedule 3 (Seller's Warranties) and "**Warranties**" means all those statements.

"**Warranty Claim**" means a claim by the Buyer under or pursuant to Clause 8.1.

23. Clause 8.1 provides that:

> "The Seller warrants to the Buyer that the Warranties are true and accurate at the date of this Agreement. […]"

24. The Warranties themselves are set out in Schedule 3. They include:

(1) Paragraph 9.1: "The Reorganisation has been carried out in accordance with the Reorganisation Agreements and, except as Disclosed, all transfers and other actions envisaged by the Reorganisation Documents have occurred."

(2) Paragraph 9.3: "All material licences, registrations, consents, permits, concessions, certifications, approvals and other authorisations (public and private) that are necessary for the completion of the Reorganisation have been obtained."

25. Clause 11.1 contains the indemnity under which one of the claims is brought:

> "Subject to Completion taking place and subject to Clauses 11.2 and 11.3, the Seller covenants to pay to the Buyer, each Group Company and each other Buyer's Group Undertaking within five (5) Business Days of a demand by written notice from the Buyer to the Seller an amount which is equal, on an after-Tax basis, to any and all Losses suffered by any Group Company or any member of the Buyer's Group, whether arising before, on or after Completion: …
>
> 11.1.3 in relation to, or arising out of, any steps or actions taken to implement the Reorganisation (or any part thereof) (including, for the avoidance of doubt, any steps or actions comprised in the Reorganisation which occur after Completion) and including Losses arising as a result of a Group Company ceasing to be a member of a group or consortium or other association for Tax purposes with any member of the Seller's Group which would not have arisen but for any transfer or transfers undertaken pursuant to the Reorganisation;
>
> 11.1.4 that would not have been suffered but for (i) the fact that the Reorganisation (or any part thereof) other than the Avonmouth Transfer and the Hatfield Transfer was not implemented and completed in full prior to the date of this Agreement; or (ii) the fact that the Reorganisation (or any part thereof) was not implemented and completed correctly in accordance with the Reorganisation Documents and Applicable Law; …"

26. Clause 14.51.3 contains the obligation underlying one of the claims for breach of contract:

> "The Seller shall procure that the benefit of the Damhead Creek II Option Agreement shall be assigned to the Company on or prior to Completion on terms approved by the Buyer (such approval not to be unreasonably withheld or delayed)."

27. The key provisions of the SPA providing limitations on Scottish Power's liability that relate to these applications are found in of Schedule 4 to the SPA. These include:

(1) Paragraph 1.1:

> "The Seller is not liable in respect of a Warranty Claim:
>
> 1.1.1 unless the amount that would otherwise be recoverable from the Seller (but for this paragraph 1.1.1 of this Schedule 4 (*Limitations on the Seller's Liability*)) in respect of that Warranty Claim exceeds £702,000; and

1.1.2 unless and until the amount that would otherwise be recoverable from the Seller (but for this paragraph 1.1.2 of this Schedule 4 (*Limitations on the Seller's Liability*)) in respect of that Warranty Claim, when aggregated with any other amount or amounts recoverable in respect of such other Warranty Claims (excluding any amounts in respect of a Warranty Claim for which the Seller has no liability because of paragraph 1.1.1 of this Schedule 4 (*Limitations on the Seller's Liability*)), exceeds £7,020,000 and in the event that the aggregated amounts exceed £7,020,000 the Seller shall be liable for the full amount of such Warranty Claims and not only the amount by which such threshold is exceeded (subject always to paragraph 1.2 of this Schedule 4 (*Limitations on the Seller's Liability*)).”

(2) The key provision relating to notification for the purpose of these applications is to be found in paragraph 2.1 of Schedule 4 to the SPA, which provides (as amended by both Deeds of Variation):

“In the case of the types of claim detailed below, the Seller shall not be liable for a claim unless the Buyer has notified the Seller of the claim, stating in reasonable detail the nature of the claim and the amount claimed (detailing the Buyer's calculation of the Loss thereby alleged to have been suffered):

2.1.1 in respect of any Relevant Claim (other than any Fundamental Warranty Claim, any Fundamental Property Warranty Claim, any claim under Schedule 9 (Tax Covenant), any Tax Warranty Claim, any claim under or pursuant to Clause 14.19 or Clause 14.43, or any Damhead Creek II Option Agreement Claim), on or before the date which is 18 months from the Completion Date;

2.1.2 in respect of any Fundamental Warranty Claim, on or before the date which is seven (7) years from the Completion Date;

2.1.3 in respect of any Fundamental Property Warranty Claim, on or before the date which is seven (7) years from the Completion Date;

2.1.4 in respect of any Tax Warranty Claim or any claim under Schedule 9 (Tax Covenant), on or before the date which is seven (7) years from the Completion Date;

2.1.5 in respect of any claim under or pursuant to Clause 14.43, on or before the date which is seven (7) years from the Completion Date;

2.1.6 in respect of any Daldowie Indemnity Claim, on or before the date which is two (2) years from the Completion Date;

2.1.7 in respect of any Reorganisation Indemnity Claim:

(a) which relates to EHS Matters (including, without limitation, decommissioning), on or before the date which is ten (10) years from the Completion Date;

(b) which relates to any other matter, event or circumstances, on or before the date which is seven (7) years from the Completion Date;

2.1.8 in respect of any Pensions Indemnity Claim, on or before the date which is eight (8) years from the Completion Date;

2.1.9 in respect of any claim under or pursuant to Clause 14.8 or Clause 14.11 of this Agreement, on or before the date which is six (6) months from the date on which the Group Companies are released and discharged from the SPUK PLC Support Commitments; or

2.1.10 in respect of any Damhead Creek II Option Agreement Claim, on or before the date which is 30 months from the Completion Date."

(3) The parties also referred to paragraph 3 and paragraph 8 of Schedule 4:

Paragraph 3

"In respect of any claim notified in accordance with paragraph 2 of this Schedule 4 (Limitations on the Seller's Liability), such claim is unenforceable against the Seller on the expiry of the period of six months starting on the day of notification of such claim, unless proceedings in respect of such claim have been properly issued and validly served on the Seller within such six month period or, in the case of a claim under Schedule 9 (Tax Covenant) within six months of the due date for payment specified in Schedule 9 (Tax Covenant), except that in the case of a claim where a Buyer's Group Undertaking has made a corresponding claim against an insurer or another third party, the six month period shall commence on the date on which the corresponding claim or entitlement is finally settled or determined."

Paragraph 8

"The Seller shall not be liable for any Relevant Claim (other than a claim under Schedule 9 (*Tax Covenant*)) which arises by reason of a liability which, at the time when written notice of the Relevant Claim is given to the Seller, is contingent only or is otherwise not capable of being quantified and the Seller shall not be liable to make any payment in respect of such Relevant Claim unless and until the liability becomes an actual liability or (as the case may be) becomes capable of being quantified, but in respect of such Relevant Claim (i) the Buyer will not be prevented from notifying under paragraph 3 of this Schedule 4 (*Limitations on the Seller's Liability*) such a Relevant Claim and (ii) if any such Relevant Claim is notified within the applicable time limit in paragraph 2 of this Schedule 4 (*Limitations on the Seller's Liability*) then the relevant six-month period in paragraph 3 of this Schedule 4 (*Limitations on the Seller's Liability*) will commence on the day the Buyer actually suffers the loss or incurs the liability."

28. It was common ground that compliance with the notification clause was a condition precedent to Scottish Power's liability for the claims.

The claims in brief summary

29. In very brief summary, the claims brought by Drax in these proceedings are:

(1) Breach of warranty claims, alleging that Scottish Power is in breach of clause 8.1 of the SPA because the warranties at paragraphs 9.1 and 9.3 of Schedule 3 were not true (the **"warranty claims"**). Drax's case is that the "Reorganisation" included the transfer of SPDCL's rights under the Damhead Creek II Option Agreement to the Company, but that at the date of the SPA the Option had not been effectively assigned to the Company. Also, that since a deed of covenant had not been given in favour of Uniper, it was not the case that all material consents, approvals and/or other authorisations necessary for the completion of the Reorganisation had been obtained by the date of the SPA.

(2) Drax claims that Scottish Power is in breach of clause 14.51.3 of the SPA (the **"other breach of contract claim"**). (Clause 11.6 had also been pleaded, but that was not pursued at the hearing by Drax). The Deed of Covenant having been given in favour of the wrong party (i.e. E.ON rather than Uniper), Drax says that the Option was not effectively assigned to the Company on or prior to Completion.

(3) A claim for an indemnity under clauses 11.1.3 and 11.1.4 of the SPA, which provided for Scottish Power to provide an indemnity in certain circumstances for (in summary terms) loss incurred in relation to steps taken to implement the Reorganisation or that would not have been suffered but for incorrect or complete implementation of the Reorganisation (the **"Indemnity Claim"**). The terms of clause 11.1 are considered in greater detail below when dealing with the applications as they relate to the Indemnity Claim.

30. As will be apparent, underlying each of the claims was the broad complaint that Scottish Power had not put the Company in a position where it was entitled to exercise the Option. Drax contends that amounts under the terms of the SPA to a breach of warranty, and/or other breach of contract, and/or gives rise to a claim for an indemnity. I will deal below with what is alleged concerning loss and how it is said to be suffered in respect of the warranty claims and the other breach of contract claim, as that is central to the applications in relation to those claims.

31. Scottish Power denies liability for all these claims, including but not only on the basis that they were not properly notified. The defences also include (among others)

contentions that none of the obligations under the SPA relied on by Drax required Scottish Power to have perfected the assignment (as Scottish Power puts it) in relation to Uniper and that there was adequate disclosure to Drax of the position. These are not issues that fall to be resolved on these applications.

32. It was common ground between the parties that: (i) the warranty claims and the other breach of contract claims are Damhead Creek II Option Agreement Claims; and (ii) the Indemnity Claim is both a Damhead Creek II Option Agreement Claim and a Reorganisation Indemnity Claim.

The Notice of Claim

33. The Notice of Claim was a nine-page letter from Drax's then solicitors (Walker Morris) dated 30 June 2021. It explained that it was giving formal notice of (i) a Damhead Creek II Option Agreement Claim pursuant to para 2.1.10 of Schedule 4 of the SPA, and (ii) a Reorganisation Indemnity Claim pursuant to para 2.1.7(b) of Schedule 4 of the SPA.

34. The Notice of Claim contained a recitation of the relevant background, identified the relevant clauses of the SPA, the attempt to exercise the Option, and the subsequent negotiations between Drax and Uniper. In relation to the latter, it stated as follows:

> "25. *Acting reasonably, Drax/[the Company] entered into discussions with Uniper in relation to obtaining an easement over the Land. Uniper indicated to Drax/[the Company] that it was potentially willing to grant an easement at current open market rates, but over a different route which would lead to increased costs to [the Company]. In the event that [the Company] is unable to agree suitable terms with Uniper, [the Company] may need to consider applying for a compulsory purchase order in order to gain the required rights over the Land. ...*"

35. The Notice of Claim went on to assert that, in breach of the SPA, the Reorganisation had not been fully implemented or completed and/or that Scottish Power had failure to procure that the benefit of the Option be assigned to the Company on or prior to Completion.

36. It referred to and identified the previous correspondence between Drax and Scottish Power and asserted that all such correspondence was to be read "*such that all facts relating to this matter are incorporated into and form part of the detail of the claim subject to this notice letter.*" It also referred to the two Deeds of Variation.

37. The section on loss began at paragraph 40, but there was a section immediately preceding it which identified the sale of the shares in the Company from Drax to VPI in December 2020 and then stated:

> "37. *Drax remains liable for any and all losses suffered by [the Company] in relation to the Reorganisation, and the fact that the Reorganisation (or any part thereof) was not implemented and completed in full prior to the date of the SPA (between Drax and ScottishPower), or the fact that the Reorganisation (or any part thereof) was not implemented and completed correctly in accordance with the Reorganisation Documents*."

38. The section on loss then explained as follows:

> *"40. In the circumstances, the loss suffered is yet to crystallise. As such, we set out below the details of the likely heads of loss (in relation to both the potential terms that may be agreed with Uniper and in the event that such agreement is not reached and a compulsory acquisition is required) and where possible an estimate of the potential loss that is likely to be suffered. Given the unique circumstances of this matter, this is of course an estimate and Drax reserves the right to update the loss suffered as matters develop and the loss is crystallised.*
>
> *41. As the losses are yet to crystallise, Drax shall seek an indemnity from ScottishPower in relation to any future losses that may arise.*
>
> *Potential agreement with Uniper:*
>
> *42. Based on Drax's previous involvement with negotiations with Uniper, Drax understands liabilities under a potential new agreement with Uniper may be as follows: [six sub-paragraphs specifying potential fees and payments]*
>
> *43. In addition, the following additional losses are likely to be incurred: [five sub-paragraphs specifying potential costs]*
>
> *Potential compulsory acquisition:*
>
> *44. In the event a compulsory acquisition is required, Drax estimates the following losses are likely to be incurred: [five sub-paragraphs specifying potential costs]*."

39. The proper construction of parts of the Notice of Claim are contentious between the parties, in particular how it is to be understood in relation to the alleged loss and how loss was said to be suffered. I will return to this below.

40. I should also note at this stage that, in response to what was said in the Notice of Claim about Drax remaining liable for losses suffered by the Company, even though it had already sold the Company to VPI, Scottish Power asked for a copy of the sale agreement with VPI and any relevant side letter or separate agreement. Drax did not provide any such documentation.

The claims as pleaded and the draft amendments

41. It is necessary to set out in a little more detail how the claims have been pleaded, in particular what has been pleaded about loss and how it is alleged to have been suffered. This is important in relation to Scottish Power's contention that the claim as notified did not give reasonable detail of the nature and amount of the claim that is now sought to be pursued in the Amended Particulars of Claim.

42. In its original Particulars of Claim, once it had set out the background, including the SPA and its terms, and the allegations of breach, Drax pleaded its claim as to loss:

(1) Paragraph 22 pleaded, carefully distinguishing between the Claimant and the Company, that:

"*The Claimant has suffered loss as a result of the said breaches of the SPA. Further, the Company has suffered (and will, in the future, suffer) loss as a result of the said breaches of the SPA. The Claimant intends, in due course, to adduce evidence as to the losses caused by the Defendant's breach of the SPA. The best particulars that the Claimant is presently able to give in respect of such losses are set out below.*"

(2) Paragraph 23 went on to plead that the Company would only be able to replace the rights it purported to exercise under the Option Agreement by (i) purchasing such rights from Uniper, or (ii) via compulsory acquisition.

(3) Paragraph 24 then alleged:

"*The Company has to date suffered losses in negotiating the acquisition of the Option Rights in the form of legal costs of £107,602. The Claimant and / or the Company have to date suffered losses in negotiating the acquisition of the Option Rights on behalf of the Company in the form of lost management time in a sum to be assessed.*"

(4) Paragraph 25 pleaded that "*The Claimant anticipates that the Company will suffer the following further heads of loss in the future*", and went on to set out the costs that it was alleged that the Company would incur if it entered into an option agreement with Uniper, or pursued compulsory acquisition.

43. Drax's claim for loss, therefore, was: first, for past loss, having being suffered by the Company (in the form of legal costs of £107,602) and suffered by Drax and/or the Company (being an unquantified claim for lost management time in negotiating an agreement for the option rights); and second, for future loss, which would be suffered by the Company (associated either with an option agreement with Uniper or in relation to compulsory acquisition).

44. The draft amendments now seek to change the basis of the claim for loss in important ways. References to the Company having suffered, or that it will suffer, loss are

deleted in the amendments, and no claim for the Company's loss is pursued by the amended case. The case for loss is now squarely put on the basis of Drax's loss and it pleads that loss only by reference to the allegation that the value of the Company acquired was less than it would have been had Scottish Power complied with its contractual obligations in the SPA. The loss claimed is the difference between (a) the warranted value of the Company (i.e. its value with the benefit of the Option rights) and (b) what Drax contends was the Company's true value (i.e. its value without the benefit of those rights). Drax contends that loss should be assessed as at the time of its discovery of the alleged breaches of the SPA.

45. The amendments set out what are said to be the best particulars of loss. Details are given (a) in a new paragraph 23A of the fees that Uniper has allegedly said it would charge to the Company for the granting of a new option for a new easement (over a new route), amounting to £2,833,332, and (b) in a new paragraph 23B of estimates of additional costs it is alleged the Company would have incurred in concluding such a new agreement with Uniper (not all of which are quantified, but the largest of which is £5,223,448.69 in relation to increased contractor costs).

46. Paragraph 23C then pleads that Drax will rely upon the matters pleaded in paragraphs 23A and 23B as "*evidence of the diminution in the value of the Company caused by the Defendant's breaches of the SPA, and so as evidence of the loss it has suffered by reason of those breaches*". There is no further pleading of how it is said the diminution in value ought to be assessed, but there is a reference at paragraph 27 (in the context of the Indemnity Claim) to the total of the currently ascertained figures pleaded at paragraphs 23A and 23B (being approximately £8.1 million) as Drax's estimate of the loss it has suffered, suggesting that the case is the alleged diminution in value of the Company is equal to the potential costs of the Company acquiring an option agreement and then exercising the option.

47. For completeness, I also note that the previous plea that the option rights might be acquired via compulsory acquisition is deleted by the proposed amendments, as are the previous paragraphs 24 and 25.

48. Drax also seeks to amend the claim to the indemnity by adding a demand for an ascertained sum (as already noted above) based upon the losses it now pleads.

<u>The issues that arise on these applications</u>

49. As noted above, both applications largely turn on the same point, namely whether the claims formulated in the Amended Particulars of Claim have a real prospect of success. In broad outline, the issues that arise are:

(1) In relation to the warranty claims and the other breach of contract claim:

a) Scottish Power contends these claims have no real prospect of success because the claims made – whether as set out in the Particulars of Claim or the draft Amended Particulars of Claim – were not notified in the Notice of Claim. As already noted, there was no attempt by Drax to resist summary judgment by reference to the way in which the claims were formulated in the Particulars of Claim, only by reference to the draft amendments in the draft Amended Particulars of Claim. Drax contends that the claims as pleaded in the draft amendments were properly notified in the Notice of Claim dated 30 June 2021. In relation to the warranty claims and the other breach of contract claim, subject to the additional point about further information noted below, the applications therefore turn on the adequacy of that notice in relation to those claims (as formulated in the draft amendments), in particular in relation to what was said about the claim for loss and how loss was alleged to be suffered, and gives rise to issues of the proper construction of the relevant clauses of the SPA and of the Notice of Claim.

b) Scottish Power also makes a related complaint that the pleading of loss in the draft amendments is not adequate. Drax says it is adequate but that in any event any lack of clarity could be dealt with by way of further information if required.

(2) In relation to the Indemnity Claim:

a) Scottish Power contends this claim has no real prospect of success because, in respect of the claim made in the original Particulars of Claim, no demand for an ascertained sum had been or was made (which Scottish Power says is a pre-requisite to any liability for the indemnity) and reasonable detail of the amount claimed was not provided in the Notice of Claim, and in respect of the Amended Particulars of Claim, which themselves contain a demand for an ascertained sum, that demand was made too late to comply with the notification requirements of the SPA. Drax contends that the demand in the Amended Particulars of Claim was made in time because either (i) the time limits applying to notifications of claim under paragraph 2 of Schedule 4 to the SPA do not apply in respect of a written demand for an ascertained sum under clause 11.1, or (ii) in any event, if they do apply, the relevant time limit would be 7 years and that has not yet expired. This gives rise to further issues of construction of the SPA.

b) Scottish Power also contends that the declaration that is sought in relation to the Indemnity Claim serves no purpose and there is no real prospect of it being made. Drax contends it is potentially useful, and should not be dismissed at this stage.

50. The principles to be applied on the applications in terms of the court's approach are well-established and were not in dispute. The Court may give summary judgment against the claimant on a claim or issue if it considers that the claimant has no real prospect of succeeding on the claim or issue. The principles to be applied were summarised by Lewison J in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15].

51. The test to be applied when considering an application to amend is whether the case sought to be added by amendment has a real as opposed to a fanciful prospect of success, i.e. the same test as is applied on an application for summary judgment: Kawasaki Kisen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33, [2021] 3 All ER 978 at [17].

52. Neither party suggested the issues raised on this application were not suitable issues for summary judgment or that the construction points were ones that should not be grappled with at this stage.

Authorities

53. As noted above, the applications largely turn on the proper construction of the SPA and of the Notice of Claim. The applicable principles of construction were not seriously disputed.

54. In relation to construction of the SPA, the parties agreed that, in summary, the court's task is to ascertain the objective meaning of the language used, considering the contract as a whole and the context in which it was made, and that when there are rival meanings the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. See Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900; Arnold v Britton [2015] UKSC 36, [2015] AC 1619; Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173.

55. Both parties referred to a number of authorities dealing with notification clauses in cases dealing with breaches of warranties and similar claims. Notice clauses take many different forms, and the authorities deal with the adequacy of notifications of claim in relation to a variety of differently worded notice provisions. As Simon J pointed out in Ipsos S.A. v Dentsu Aegis Network Limited [2015] EWHC 1171 (Comm) at [16]:

> "The starting point is the statement of Ward LJ in *Forrest v. Glasser* [2006] 2 Lloyd's Law Rep 392 at [24] in which, referring to the observations of Gloster J in *RWE Nukem Ltd v. AEA Technology plc* [2005] EWHC (Comm) 78, he observed that the only true principles to be derived from the authorities is that every notification clause turns on its own wording."

56. Nonetheless, Simon J went on to identify certain broad principles from the authorities which were of potential relevance to the case before him, as other judges have tended to do in similar cases. Some guidance can be found in the authorities, in particular those with similar wording to the clause in issue in the present case.

57. The courts have emphasised that part of the purpose of a notification clause is certainty for the party being notified. Contentions that a notification clause has not been complied with are not dismissed as merely technical complaints: see Stobart Group v Stobart [2019] EWCA Civ 1376 at [36]-[38]. As Cooke J observed in Laminates Acquisition v BTR Australia Limited [2004] 1 All ER (Com) 737 at [29] (cited by the Court of Appeal in Stobart at [38]):

> "Notice clauses of this kind are usually inserted for a purpose, to give some certainty to the party to be notified and a failure to observe their terms can rarely be dismissed as a technicality."

58. Cooke J went on to state as follows in Laminates, as is relevant to the clause in the present case:

> "The starting point here must be, … that the terms of the notice provision are clear in debarring claims which have not been notified within the required period. Thus the clause begins "No claim … shall be brought … unless …". A compliant notice is therefore a matter of importance. Secondly, since the clause provides for conditions precedent to the liability of BTR under the Agreed Assurances, it is for Laminates to establish, as a matter of fact, compliance with those conditions precedent, although, because this is an exclusion clause, the usual principles which apply to construction of exclusion clauses apply when interpreting the clause itself."

59. Such a clause forms a delineation of the seller's liability, and through it the parties place on the purchaser the onus of compliance.

60. Mr Quest (appearing for Drax) relied on, and Mr Hossain (for Scottish Power) confirmed he did not disagree with, what was said about the purpose of a notice clause by Popplewell LJ in Dodika Ltd v United Luck Group Holdings Ltd [2021] EWCA Civ 638 at [46]:

> "The purpose of a notice clause such as that in schedule 4 para 2(b) of the SPA is to enable the recipient to make such inquiries as it is able, and would wish, to make into the factual circumstances giving rise to the claim, with a view to gathering or preserving evidence; to assess so far as possible the merits of the claim; to participate in the tax investigation to the extent desirable or possible with a view to influencing the outcome; and to take into account the nature and scope of the claim in its future business dealings, whether by way of formal reserving or a more general assessment of the potential liability."

61. What can be said about the purpose of such a clause in any particular case is of course shaped by the words of the clause and their context. In Dodika, the notification clause included, in addition to requiring reasonable detail of the nature of the claim and the amount claimed, a requirement of reasonable detail of the matter giving rise to the claim, and therefore was wider in that respect than the clause in the present case. However, neither party suggested that narrowed the purpose of the clause in the present case compared with that in Dodika, and both parties were content with the above statement. In any event, helpful guidance can nonetheless be taken from that description of the purpose of such clauses in general.

62. In Dodika, it was accepted that the additional information that the vendor contended ought to have been contained in the notification letter would not have advanced any of the commercial purposes of the clause. That was crucial, as Popplewell LJ went on to explain:

> "I balk at a conclusion that the level of detail provided in a notice of this sort fell short of what was required as reasonable, that is to say was unreasonably deficient, when the additional level of detail said to have been required would not have furthered any of the commercial purposes for giving such a notice. What is reasonable takes its colour from the commercial purpose of the clause, and what businessmen in the position of the parties would treat as reasonable. Businessmen would not expect or require further detail which served no commercial purpose. That would be the antithesis of what was reasonable."

63. Drax also relied upon a case about notification of claims in a different context, namely a voyage charter: National Shipping Co of Saudi Arabia v BP Oil Supply Co [2011] EWCA Civ 1127. There, Tomlinson LJ held that where in a commercial contract one finds a provision to the effect that one party is only to be liable to the other in respect of claims of which he has been given notice within a certain period, "*it is fair to assume that the parties wish their relationship to be informed rather by certainty than by strictness*" (at [60]). Accordingly (at [61]):

> "the touchstone of the approach ought in my view to be a requirement of clarity sufficient to achieve certainty rather than a requirement of strict compliance which, if applied inflexibly, can lead to uncommercial results."

64. There is clearly a resonance in that with what is said in a number of the cases dealing with notification clauses rather closer to the facts of this case, as identified above, and whilst helpful to an extent in this context, it does not seem to me materially to add to what was said by the Court of Appeal in Dodika, in particular in relation to information not required to fulfil the commercial purpose of the clause.

65. Some of the cases have sought to identify what is meant by a clause requiring a notice to state "the nature of the claim". In Laminates, Cooke J noted (at [31]) that the parties before him had agreed "*that this must mean notification of what is being*

claimed and the basis of it by reference to the SPA – namely the form and substance of the claim." That is a formulation that has been repeated in subsequent cases (e.g. Ipsos at [24]).

66. The requirement that "reasonable detail" be provided was considered in ROK Plc (in administration) v S Harrison Group Ltd [2011] EWHC 270 (Comm) by Mr Richard Siberry QC (sitting as a Deputy Judge of the High Court):

> "The words "in reasonable detail" were presumably intended to add something to a requirement to specify the nature of the Claim and the amount claimed. It is impossible to define, in abstract terms, what would, or would not, constitute reasonable detail – though it is clear, as ROK submitted, that these words did not require ROK to give as much detail as possible in the light of available information. What constitutes reasonable detail will depend on the nature of the Claim, bearing in mind also that it is unlikely to have been the parties' intention, at the time of contracting, that the details to be provided should be as extensive as those that would be required, doubtless after further investigation, in the legal proceedings to be issued and served within six months of the notice."

67. The notice clause in this case is similar to that before the court in the ROK case, where the Judge said this about the clause:

> "The Notice Clause is … a relatively "low threshold" notice clause in comparison with some of the notice clauses that have been before the Courts. It requires written notice of the Claim which specifies, in reasonable detail, the nature of the Claim and the amount claimed. But it does not require details (or particulars) to be given of the grounds on which the Claim is based (as in *Senate Electrical*), or of the matter (*Laminates*) or event or circumstances (*Bottin*) which have given rise to the Claim, or of the specific matter(s) in respect of which the claim is made (*RWE Nukem*, *Curtis*). The parties have not provided for that degree of specificity (cf. Ward LJ‟s comments in para.23 of his judgment in *Forest v. Glasser*). They have chosen an expression, "the nature of the Claim", which is more general and less prescriptive, as was recognised by Dyson J in *Odebrecht*, in contrasting the phrase "nature of such breach" with the detail of the breach."

68. In a difference from the clause in the ROK case, here the notification clause required reasonable detail not only of the nature of the claim and the amount claimed, but also specifically stated that the notice should detail Drax's calculation of "the Loss thereby alleged to have been suffered" (cf. the Judge's comment in ROK at [70]).

69. The parties both also referred me to the decision of HHJ Waksman QC in Highwater Estates Limited v Graybill [2009] EWHC 1192 (Comm) where it was held that a notification clause was not complied with in respect of a claim in misrepresentation. Drax drew my attention to [43] where the judge stated that "*the commercial purpose of such clauses is to enable the vendor to know in sufficient detail what he is up*

against (not least because it might then enable the parties to settle without recourse to litigation)". One of the points that case illustrates is that when it comes to providing reasonable detail of the amount of the claim, it may be important to identify the type of damages claim in issue. There, the claim to damages in the notice was based on the lost profit of the target company, whereas the pleaded claim was a diminution in value claim. That appears to have been part of the reason why the Judge there held the pleaded claim had not been notified (see [46]).

70. Drax also relied upon what it referred to as the principle of *contra proferentem* construction which it said was engaged by the notification clause because it acts as a limitation or exclusion clause. Whilst the language *contra proferentem* is often now seen as problematic (see e.g. Andrew Burrows QC (sitting as a Judge of the High Court) in The Federal Republic of Nigeria v JP Morgan Chase Bank NA [2019] EWHC 347 (Comm) at [34]), there is a principle of construction that is engaged. The principle was explained by Briggs LJ in Nobahar-Cookson v The Hut Group [2016] EWCA Civ 128, a case dealing with the construction of a notification clause in a share purchase agreement which had some similarities to the clause in the present case.

71. Briggs LJ recorded (at [16]) that recent decisions about exclusion clauses had continued to affirm the utility of the principle that, if necessary to resolve ambiguity, they should be narrowly construed, including in relation to commercial contracts. He explained the relevant principle as follows:

> "18. In my judgment the underlying rationale for the principle that, if necessary to resolve ambiguity, exclusion clauses should be narrowly construed has nothing to do with the identification of the proferens, either of the document as a whole or of the clause in question. Nor is it a principle derived from an identification of the person seeking to rely upon it. Ambiguity in an exclusion clause may have to be resolved by a narrow construction because an exclusion clause cuts down or detracts from the ambit of some important obligation in a contract, or a remedy conferred by the general law such as (in the present case) an obligation to give effect to a contractual warranty by paying compensation for breach of it. The parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect: see *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 per Lord Diplock at 717H, applied in *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691, by Moore-Bick LJ at para 29.
>
> 19. This approach to exclusion clauses is not now regarded as a presumption, still less as a special rule justifying the giving of a strained meaning to a provision merely because it is an exclusion clause. Commercial parties are entitled to allocate between them the risks of something going wrong in their contractual relationship in any way they choose. Nor is it simply to be mechanistically applied wherever an ambiguity is identified in an exclusion clause. The court must still use all its tools of linguistic, contextual, purposive and common-sense analysis to discern what the clause really means. In the *Seadrill Management* case Moore-Bick described the principle as:

> "essentially one of common sense; parties do not normally give up valuable rights without making it clear that they intend to do so." "

72. Briggs LJ therefore approached the issue of construction of the notification clause "*upon the basis that there remains a principle that an ambiguity in its meaning may have to be resolved by a preference for the narrower construction, if linguistic, contextual and purposive analysis do not disclose an answer to the question with sufficient clarity.*"

73. Similarly, in Federal Republic of Nigeria v JP Morgan Chase Bank (above), Andrew Burrows QC held (at [34(iii)]):

> "Applying the modern approach, the force of what was the *contra proferentem* rule is embraced by recognising that a party is unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words. And as Moore-Bick LJ put it in the *Stocznia* case, at [23], 'The more valuable the right, the clearer the language will need to be'."

74. As to construction of the notice, it was common ground that a contractual notice is to be construed objectively. The question is how a reasonable recipient would have understood the notice, taking into account the relevant objective contextual scene: Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 at 767G (Lord Steyn). This has been applied in the context of breach of warranty claims in a number of cases, including by Cooke J in Laminates and Simon J in Ipsos. The exercise is similar to that of contractual construction, notwithstanding the unilateral nature of a contractual notice: Stobart at [25]-[30].

The Warranty Claim and the Other Breach of Contract Claim

Sufficiency of the Notice of Claim

75. The first issue that arises is whether the Notice of Claim was sufficient to fulfil the requirements of paragraph 2 of Schedule 4 to the SPA in respect of the warranty claims and the other breach of contract claim as those claims are now formulated in the proposed Amended Particulars of Claim.

76. Scottish Power contends that the Notice of Claim does not fulfil those requirements in relation to those claims because it did not notify any claim for loss based on diminution in value of the Company's shares. It says that the requirements of paragraph 2 of Schedule 4 included stating in reasonable detail the nature of the loss, the amount claimed and giving detail of Drax's calculation of the loss suffered, each of which Scottish Power contends required that, if Drax were to make a claim based on the diminution in value of the shares in the Company, that had to be set out in the Notice of Claim.

77. Drax contends that the Notice of Claim gave sufficient detail. Among other things, it says that the fact that the claims were for loss based on diminution in value of the Company's shares was not part of the "nature of the claim" and did not have to be identified in order to give reasonable details of the amount claimed, such that it did not have to be identified in the notification; but in any event that the parties can be assumed to have appreciated that damages would be assessed on such a basis; and it contends that any difference between the Notice of Claim and the draft amendments to the Particulars of Claim was only as to the legal measure of damages claimed, which did not need to be stated in the notification, and nor would stating it have furthered the commercial purpose of the notification clause.

78. I have already identified above the claims that Drax now seeks to bring in the Amended Particulars of Claim. Critically, for present purposes, the loss claimed is pleaded to be the difference between the actual value of the Company and the value it would have had absent the alleged breaches of contract, for which the various sums said to make up the cost (or likely cost or what had previously been offered as the cost) of obtaining a new option from Uniper and exercising such an option are alleged to be evidence.

79. I have set out and described above the key parts of the Notice of Claim. Those need to be examined in order to identify what, on a proper construction of that letter, was being notified in terms of the claim.

80. The Notice of Claim clearly identified claims that would be made by Drax for breach of the SPA. It was, in many respects, an informative document. The "*Background*" section of the letter (paragraphs 2 to 25) provided detailed particulars of the events giving rise to the claims, i.e. the failure effectively to assign the benefit of the Option to the Company. A reasonable recipient of the letter would have understood the reasons why claims were being notified. In addition, the Notice of Claim states that notice is being given of a 'Damhead Creek II Option Agreement Claim' (as well as a 'Reorganisation Indemnity Claim'). The letter made express reference to (and quotes from) the relevant provisions of the SPA, including (as regards the warranty claims) clause 8.1 and paras 9.1 and 9.3 of Schedule 4; and (as regards the other breach of contract claim) clause 14.51.3. Further, the letter asserted, under the heading "*Breach of Contract*", that in breach of the SPA Scottish Power failed to assign the benefit of the Option to the Company. There was no dispute about the amount of detail that was included in relation to the background, the relevant clauses of the SPA or the alleged breaches of warranty or other breaches of contract.

81. However, none of that deals with the point in relation to which Scottish Power contends the Notice of Claim was deficient. The issue between the parties relating to the content of the Notice of Claim was, essentially, whether it gave reasonable detail of the nature of the claim in respect of the loss suffered and in relation to the amount claimed and its calculation.

82. It appears to me that the reasonable recipient would have read the Notice of Claim and understood from it that the loss that was being claimed in it was loss suffered in the first place by the Company, for which Drax was liable. In other words, it was not setting out a loss suffered directly by Drax (with the exception of one reference to Drax's lost management time) or by way of reflective loss by way of reduction in the value of Drax's shareholding in the Company, but rather it was identifying particular heads and items of loss which the Company would suffer and for which Drax bore a liability. That is the case for the following reasons:

(1) There was no reference in the Notice of Claim to a diminution in value of the shares in the Company, nor any reference even to the value of the Company generally.

(2) Paragraph 37 of the letter (set out above) stated that Drax remained liable for any and all losses suffered by the Company in relation to the Reorganisation, etc. That was a statement of how Drax would suffer *its* loss, namely by way of liability for losses suffered by the Company. The natural reading of the document is that Drax has entered into some form of (unspecified) agreement with VPI to indemnify the Company and/or VPI in respect of losses caused by a failure to validly assign the Option Agreement and so, if the Company incurs such losses in the future, Drax will be liable.

(3) Paragraphs 40 to 44 identified various items of loss, but through the use of the passive voice did not expressly refer to those losses being suffered by either Drax or by the Company. However, in the context of the Notice of Claim and the circumstances of the case, they most obviously read as costs and liabilities to be incurred in the first place by the Company, and therefore suffered as loss by the Company, for which Drax would be liable. As to the itemised costs and liabilities being incurred and suffered as a loss by the Company, they are items associated with the *Company* obtaining an easement in the future, and Drax had sold the Company at the date of the Notice of Claim, such that these must be costs and liabilities (to be) incurred by the Company. Indeed, consistently with this, in its skeleton argument Drax noted that the Notice of Claim set out particulars of the estimated costs that would be incurred by *the Company* in acquiring an easement. As to Drax then being liable for those losses of the Company, that was stated expressly in paragraph 37 (as noted above).

(4) In the Notice of Claim, the losses are repeatedly described consistently with future losses: "*the likely heads of loss*" and "*the* potential *loss that is likely to be suffered*" (both at paragraph 40); "*liabilities under a potential new agreement with Uniper* may *be as follows*" (paragraph 42); "*the following additional losses are likely to be incurred*" (paragraph 43); and "*the following losses are likely to be incurred*" (paragraph 44). Those descriptions were not consistent with Drax making a claim for loss represented by diminution in value of the shares in the Company that is alleged to have been already suffered (as is the claim now pleaded in the draft Amended Particulars of Claim).

(5) In a telling acknowledgement of the difficulties of the language used in the Notice of Claim, Mr Quest accepted that it might have been better if the letter had said "likely to have been suffered" rather than "likely to be suffered". However, the two phrases mean different things, and there was no reason for the reasonable recipient of the Notice of Claim to have read those words in paragraph 40 in any different way to their normal meaning, which refers to the future.

(6) Relatedly, that use of language, describing losses as "*likely*" or "*potential*" was an express recognition that there was no certainty that the Company would incur such costs in acquiring an option or in subsequently exercising it to acquire an easement. There was no attempt in the Notice of Claim to place any historical (or even present) value on the possibility of such future costs or to explain (let alone quantify) any connection to the (present or historical) value of the Company. There was, for example, no attempt to analyse how the probability of such costs being incurred should be factored in to the value of the Company nor how the fact that they were potential *future* costs should be discounted to a present or historic value of the Company.

(7) Similarly, the Notice of Claim identified (at paragraph 25) that there were two possibilities for the Company to obtain the rights over the Kingsnorth land. The first was to agree terms with Uniper, which would lead to "*increased costs to [the Company]*"and the second was for the Company to apply for a compulsory purchase order. The Notice of Claim went on (at paragraphs 42 to 44) to list potential liabilities and losses for each of those two possibilities, which read as explanations of the two different ways in which the Company might suffer loss, depending on which route is taken, and therefore which of the two would be the basis for the claim to recover the losses. There was no attempt to say which was the more likely (or how likely either of them was) or anything else to suggest these were being identified as a way of establishing a historic diminution in value of the Company's shares.

(8) The Notice of Claim stated (at paragraphs 40 and 41) that "*the loss suffered is yet to crystallise*". Drax contended that this statement did not mean that no loss had yet been suffered but, rather, that no loss had yet been precisely calculated. However, that puts a strain on the words that they cannot bear, in particular when read in the context of the rest of the Notice of Claim. This phrase is used at the start of paragraph 40 of the Notice of Claim, and is followed by: "*As such, we set out below the details of the likely heads of loss … and where possible an estimate of the potential loss that is likely to be suffered.*" The words "*As such*" at the start of that sentence refer back to the previous sentence that states "*the loss suffered is yet to crystallise*" – in other words, they mean "*Because the loss is yet to crystallise…*" – and the sentence then goes on to refer to likely heads of loss and, where possible, an estimate of the potential loss that is likely to be suffered. Both of those refer to the future. The explanation why only likely heads of loss, and loss likely to be suffered, is

being set out, rather than identified loss already suffered, is the fact that the losses have not yet crystallised. In other words, they have not yet been suffered. The reference in the next paragraph, stating "*As the losses are yet to crystallise, Drax shall seek an indemnity from Scottish Power in relation to any future losses that may arise*" is consistent with and supports that.

83. I should also deal with two further points made by Drax. First, Drax emphasised that it was clear that the Notice of Claim was given by Drax (not by the Company), and was given expressly pursuant to paragraph 2 of Schedule 4 of the SPA, that being the provision pursuant to which Drax was to notify Scottish Power of claims for losses Drax has suffered, for breach of obligations owed in the SPA to Drax. It therefore said that the reasonable recipient of the Notice of Claim would have understood that the loss referred to therein had been suffered by the Claimant, Drax. That is fair up to a point, in the sense that the recipient would have understood that the claim was being made by Drax, as Claimant, and for loss which it said it had suffered. But that does not mean that each of the itemised losses in the Notice of Claim had been suffered directly by Drax, as opposed to by the Company. The Notice of Claim set out that Drax remained liable for loss suffered by the Company, and any reasonable recipient would have understood that was the way in which Drax was contending it would suffer loss, and that the loss that it was claiming was the loss suffered by the Company for which Drax remained liable. Drax cannot therefore say that the loss set out in the Notice of Claim must be, or can only have been, understood as having been suffered directly by Drax, by way of diminution in value of its shareholding in the Company.

84. Second, Drax also placed reliance on the fact that the normal basis on which damages for breach of a warranty given on a sale of shares are determined is by comparing the actual value of the shares with the value they would have had if the warranty had been true: see Lion Nathan Ltd v C-C Bottlers Ltd [1996] 1 WLR 1438 at 1441; MDW Holdings Limited v Norvill [2022] EWCA Civ 883 at [24]. It sought to suggest that any reasonable recipient of the Notice of Claim would have known as much and would have essentially read that in to the notice as the basis for the claim of damages that was advanced in it. However:

(1) The fact that is the normal basis for damages in such a case does not mean that a reader was bound to assume that Drax was formulating its claim by reference to it, in particular where the terms in which Drax did formulate its claim in the Notice of Claim were inconsistent with it. As far as the reasonable recipient is concerned, it was open to Drax to put its claim in the Notice of Claim in another way if it wished to do so. Even if it were the case that a reasonable recipient could be assumed to understand the normal basis for an award of damages in such a case, the terms of the letter would have caused them nonetheless to understand that Drax was putting their claim for loss in a different way. That is particularly the case where the notice was drafted by and sent by experienced commercial solicitors, who a reasonable recipient would have expected would have identified such matters if they were key to an understanding of the claim. Whether a reasonable recipient might have

thought, for example, that was because Drax appeared to see some advantage in framing its case for loss in a different way, or had a problem in framing it in the normal way, or that Drax had made an error in formulating its case, does not matter. A reasonable recipient was entitled to proceed on the basis of the claim as outlined in the Notice of Claim.

(2) Moreover, this is not a notice where there was a gap in the essential information which a reasonable recipient might have filled with its own understanding of the law. The Notice of Claim set out how Drax contended it would suffer a loss in paragraph 37, where it identified that it remained liable for losses suffered by the Company in relation to the Reorganisation.

Therefore, there was no reason for the reasonable recipient to have read into the Notice of Claim a "diminution in value of the shareholding" basis of claim.

85. The notice therefore does not reflect the claims that Drax now seeks to bring in relation to the way in which it is said that Drax suffered loss or how loss is to be determined. The consequent issue is whether that has the result that the Notice of Claim did not comply with paragraph 2 of Schedule 4 to the SPA.

86. I have already set out the text of paragraph 2 of Schedule 4 of the SPA. Pursuant to its terms, in order for Scottish Power to be liable for a claim, Drax had to, in its notification of that claim: (i) state in reasonable detail the nature of the claim; and (ii) state in reasonable detail the amount claimed (detailing Drax's calculation of the loss thereby suffered).

87. In my view, each of those requirements meant that, if Drax's claim was one based on the diminution in value of the shares in the Company at the point of Drax's discovery of Scottish Power's breaches, as is now the claim sought to be brought in the Amended Particulars of Claim, that had to be identified in the Notice of Claim.

88. First, it is part of the "*nature of the claim*" advanced in the Amended Particulars of Claim that it is a claim for diminution in value of the shares in the Company. It is part of the "form and substance" of such a claim both (i) that the loss being claimed is loss suffered directly by Drax (as opposed to loss suffered by the Company for which Drax is liable) and ii) that the loss claimed has already been suffered (rather than it being potential future loss depending on one or more contingencies).

89. Drax suggested that providing reasonable detail of the nature of the claim required Drax only to identify that it was a claim in contract, for breaches of specific provisions (and for an indemnity), that it relates to breaches arising out of the failure to transfer the benefit of the Option to the Company, and a statement of the remedy, namely damages. But the nature of a claim goes further than that, and includes (where damages are claimed) how loss is alleged to have been suffered. In a case where a

claimant makes its claim for loss suffered by a third party for which the claimant contends it has a liability (in respect of which it is seeking damages) the identification of the third party as the party which has suffered the loss directly and the allegation that the claimant bears a liability in respect of that loss is part of the nature of the claim. Reasonable detail is likely to include some form of explanation of how the claimant is said to bear that liability. Similarly, where a claimant is saying it has suffered reflective loss, in the sense of a loss in the value of its shareholding in a subsidiary company through the defendant's actions affecting the subsidiary, that is part of the nature of its claim. It is part of the nature of a claim how the breach of warranty or other breach of contract is said to have caused loss to the claimant. How much detail has to be provided will no doubt vary from case to case.

90. Drax relied upon certain statements in ROK (at [63]) and in Highwater (at [41]) in support of its submission as to what the notice had to include. The courts in both of those cases identified that reasonable detail of the nature of the claim required identification of the contractual provision in question, i.e. the relevant warranty alleged to have been broken, but neither was seeking to say that such a reference was *sufficient* to fulfil the relevant clause. Richard Siberry QC in ROK said such a notification should refer to the contractual provisions "*as a minimum*" in a case where various details had been given, but where the crucial point was that the warranty sought to be relied upon had not been identified in the notification. In Highwater, HHJ Waksman QC said that what would be required was "*a reference to the relevant warranty broken, how broken and so on,*" clearly not seeking to exclude all other matters.

91. Drax also sought to develop a further point by seeking to characterise the difference between the Notice of Claim and the claim as presented in the draft Amended Particulars of Claim as a difference only in the measure of loss being claimed. It said that the Notice of Claim had identified the losses on a "cost of cure" basis, whereas the Amended Particulars of Claim did so on a "difference in value" basis, but that both were seeking to get to the true measure of a claimant's loss, and that cost of cure could be an adequate proxy for difference in value. However, whatever may be the legal merits of such an argument if it were run at trial, the problem here with the Notice of Claim is more fundamental than it simply having identified a different measure of loss. It was not just the method of calculating loss that was set out in the Notice of Claim, it was the way in which Drax was alleged to suffer loss. The Notice of Claim identified the Company's losses and said that Drax remained *liable* for those losses, it did not say that Drax had suffered a loss by way of diminution in value of its shareholding in the Company.

92. Drax also suggested, in a similar vein, that what was missing from the Notice of Claim was simply a description of the legal basis upon which it contends that damages should be measured. That seems to me to understate what was missing. It was not just a question of the identification of the correct legal label to the facts and matters set out in the letter, but rather that an explanation of a critical part of the claim now brought (namely, how it is said that loss was caused) was missing (and, indeed, a different explanation as to how Drax would suffer loss was included in it).

93. Second, in order to state in reasonable detail "*the amount claimed* (*detailing [Drax's] calculation of the Loss thereby alleged to have been suffered)*", Drax would have had to explain that the calculation of its loss was the difference between the warranted value of the shares in the Company, and the actual value of the shares, and either state those two values, or otherwise explain the basis on which a figure had been arrived at for the difference.

94. However, that was not set out in the Notice of Claim. There was no claim for diminution in the Company's share value. On the contrary, the losses claimed in the Notice of Claim were largely losses said either to have been suffered, or were potentially going to be suffered, by the Company, for which it was said Drax was or would be liable. There was a reference to Drax having suffered some direct loss by way of management time, but that was not a diminution in value claim (and, in any event, the claim for Drax's lost management time is no longer pursued in the draft amendments to the Particulars of Claim).

95. Drax contended that it was sufficient that the Notice of Claim provided a numerical estimate of the loss suffered as a result of the Defendant's breaches of the SPA and, therefore, the amount claimed. However, in relation to these claims, simply stating a numerical estimate would not constitute the provision of "*reasonable detail*" of the amount claimed "*detailing [Drax's] calculation of the Loss thereby alleged to have been suffered.*" As noted by Richard Siberry QC in ROK, "*the words "in reasonable detail" were presumably intended to add something to a requirement to specify the nature of the Claim and the amount claimed.*" It suggests a need to go beyond simply stating a numerical estimate in terms of a bare number. Moreover, the provision of a "*calculation of the Loss thereby alleged to have been suffered*" requires the calculation of the loss to relate to the claim made, and part of the reasonable detail to be provided is explaining how it so relates.

96. In my view, details have to be provided sufficient for the recipient of the notice to understand why that is the figure being claim and what its basis is said to be. It is not necessary for the notice to go into the same level of detail as Particulars of Claim might need to do (and Scottish Power did not contend otherwise), but nonetheless there had to be sufficient set out in it to allow Scottish Power to understand the claim against it in at least outline terms, including how it was said that the loss said to have been suffered had been suffered and was recoverable by Drax.

97. Consideration of the commercial purpose of the notification clause reinforces this in respect of both requirements (i.e. both the "nature of the claim" and "the amount claimed"). The commercial purpose of the notification clause included enabling the recipient to understand the claims being made, including understanding the basis for the amount of the claim; to make such inquiries as it is able, and would wish, to make into the matters relating to the amount being claimed, potentially with a view to gathering or preserving evidence; to assess so far as possible the merits of the claim; and to take into account the nature and scope of the claim in its future business

dealings, whether by way of formal reserving or a more general assessment of the potential liability; and potentially to seek to resolve the claim. In order to fulfil those purposes, it was necessary for Drax to state what the basis was of its claim for loss.

98. Here, it cannot be said (as it was in Dodika) that the detail Scottish Power contends should have been included in the Notice of Claim would not have furthered the commercial purposes of the notice requirement in the SPA. The information would certainly have been required to understand how the claim was formulated, in terms of how it was said the loss was caused by the breaches alleged, and therefore in order to assess the merits of the claim as well as to assess the likely quantum of the claim. In relation to the latter, the reasonable detail is required not only so the defendant can appreciate what amount is claimed from it, but also whether it is that, or some lower sum, that is likely to be recoverable as loss for the breaches alleged. That is a factor which, in a case such as the present, does not just go to quantum but goes to liability as well, because of the provisions of paragraph 1 of Schedule 4 which exclude liability for breaches of warranty unless certain financial hurdles are surmounted.

99. It would also have been relevant to know that the claim was for diminution in value of the shares in the Company because that gives rise to issues of valuation of the Company. Drax's skeleton argument for the applications referred to the diminution in value claim being the subject of expert evidence in due course, as one would expect. But there would have been no need for company or share valuation expert evidence on the claim as it was presented in the Notice of Claim.

100. Moreover, it was also relevant for Scottish Power to know whether what was being asserted by Drax was an actual or a contingent liability on the part of Scottish Power. A defendant would no doubt normally want to know that in any claim, but here it had additional importance. Paragraph 8 of Schedule 4 to the SPA provided, in summary, that where a liability is contingent only, it may still be notified, but: (i) Scottish Power would not be liable to make any payment until the liability becomes actual; and (ii) the six-month period for bringing proceedings in respect of a notified claim, as set out in paragraph 3 of Schedule 4, would not commence until "*the day [Drax] actually suffers the loss or incurs the liability*". Whether a claim was contingent or not therefore affected both Scottish Power's liability, and the period in which it could expect proceedings to be brought against it.

101. Accordingly, the Notice of Claim did not state in reasonable detail the nature of the claim or the amount claimed (detailing Drax's calculation of the loss thereby alleged to have been suffered). If Drax's claim was one based on the diminution in value of the shares in the Company at the point of Drax's discovery of Scottish Power's breaches, as is now the claim sought to be brought in the Amended Particulars of Claim (or indeed at any earlier date such as the date the shares were transferred), that ought to have been identified in the Notice of Claim. In fact, a different basis for Drax having suffered loss was identified, namely that Drax bore a liability for losses suffered by the Company.

102. The result is that the Notice of Claim did not comply with paragraph 2 of Schedule 4 to the SPA in relation to the warranty claim and the other breach of contract claim. There is therefore no real prospect of Scottish Power being liable for those claims, and summary judgment on those claims ought to be granted to it.

The quantum of the claim – the financial limitation provision

103. Scottish Power contends that there is a further reason why the warranty claims should be dismissed, namely because it says that the claim now pursued in the Amended Particulars of Claim (based on diminution in value) is bound to be worth less than the contractual minimum of £7,020,000 for aggregate warranty claims (at paragraph 1.1.2 of Schedule 4). It points to the fact that the Notice of Claim identified a potentially lower sum in respect of loss if the Compulsory Acquisition route were to be pursued (something which does not figure at all in the draft Amended Particulars of Claim).

104. In light of my conclusions above, this point does not arise. However, if I had had to determine it, I would have rejected Scottish Power's argument on this point. The claim pleaded by Drax in its proposed amendments exceeds £7,020,000. There may have turned out to be good arguments at trial that (if the claim were otherwise a good one) the level of damages should be lower than that amount, as Scottish Power suggested e.g. if acquiring the rights by way of a compulsory acquisition process would have been reasonable and cheaper and/or if the amounts claimed ought to be discounted to reflect the chance that the rights over the land would not be needed. However, those would have been matters for trial. No evidence was advanced on this application as to valuation of the land rights, or as to the diminution in value in the Company's shares with those rights missing, and nor was there any suggestion that I should resolve any such matters on this application. It could not have been said that there was no real prospect of Drax's claim exceeding that figure. This may turn out to be a good defence to the entire claim on the basis of paragraph 1.1.2 of Schedule 4 to the SPA, but on the basis of the material put forward on this application is not a basis for summary judgment against the warranty claims at this stage.

Further information

105. Scottish Power also contended that if, contrary to its primary case, the court was minded to permit the amendments in relation to the warranty claims and other breach of contract claims, Drax should be required to re-plead paragraph 23C to identify the amount of the alleged diminution in value and its basis. It said that the current draft amendments were not properly particularised, and needed to be read together with Drax's evidence on these applications in order to understand Drax's case.

106. Given the conclusion I have reached above in relation to the warranty claims and the other breach of contract claim, this is not a matter that falls to be determined. However, for completeness, I add that the pleading of loss in paragraph 23C was not particularly clear – the only attempt in it to explain how the loss of diminution in value of the Company as at the date of the Claimants' discovery of the breaches was being quantified was the reference to the various items of cost to the Company that were referred to as "evidence" of that diminution. There was no clear statement that

what was being alleged was that the diminution in value was the sum total of those costs without any discounting (e.g. for future probabilities or for present or past value) or how that was said to be the correct way of calculating the diminution in value, if indeed that was the case being pleaded, or if it was not what the case on the amount of diminution in value was at all.

107. Had I determined the point on notification in relation to the warranty claims and the other breach of contract claims in favour of Drax, I would therefore have required it to provide further particulars (subject to a formulation I would have asked the parties to agree or, failing their agreement, I would have determined). However, as I say, this point does not now arise.

The Indemnity Claim

Background and the parties' positions in summary

108. The Indemnity Claim is made under clauses 11.1.3 and 11.1.4 of the SPA, which provide in relevant part:

> "*Subject to Completion taking place and subject to Clauses 11.2 and 11.3, the Seller covenants to pay to the Buyer, each Group Company and each other Buyer's Group Undertaking within five (5) Business Days of a demand by written notice from the Buyer to the Seller an amount which is equal, on an after-Tax basis, to any and all Losses suffered by any Group Company or any member of the Buyer's Group, whether arising before, on or after Completion:*
>
> > *11.1.3 in relation to, or arising out of, any steps or actions taken to implement the Reorganisation (or any part thereof) (including, for the avoidance of doubt, any steps or actions comprised in the Reorganisation which occur after Completion) …;*
> >
> > *11.1.4 that would not have been suffered but for (i) the fact that the Reorganisation (or any part thereof) other than the Avonmouth Transfer and the Hatfield Transfer was not implemented and completed in full prior to the date of this Agreement; or (ii) the fact that the Reorganisation (or any part thereof) was not implemented and completed correctly in accordance with the Reorganisation Documents and Applicable Law;…*"

109. Scottish Power's objections to the Indemnity Claim were different to those relating to the other claims dealt with above. In summary, Scottish Power contended that the original claim for an indemnity in the Particulars of Claim was bound to fail because:

(1) No liability arises under clause 11.1 unless and until a demand by written notice had been sent and, as clause 11.1 imposes an obligation on it to pay within five Business Days, a demand under clause 11.1 must be for an ascertained sum.

(2) Drax had made no written demand for an ascertained sum, with the result that it had no real prospect of succeeding in its Indemnity Claim.

110. Drax did not seek to rely on its original pleading, nor to contend that there was no requirement for a demand for an ascertained sum as a pre-condition to a liability to pay under clause 11.1, but rather it responded by making a demand for an ascertained sum (being £8,116,780.69) in its draft amendments and/or in the letter dated 28 July 2022 under cover of which the draft amendments were sent to Scottish Power.

111. Scottish Power accepted that the draft pleading amendments do demand payment of an ascertained sum. However, it objects to the amendment pleading the Indemnity Claim, and says it has no real prospect of success, because it contends that notice dated 28 July 2022 was out of time under the time limits in paragraph 2 of Schedule 4 of the SPA.

112. There therefore arise the following issues between the parties:

(1) Whether Drax had to identify an ascertained sum for the purposes of its Indemnity Claim within the time limits set out in paragraph 2 of Schedule 4 to the SPA. This comprised two questions: a) Do the requirements of paragraph 2 of Schedule 4 to the SPA as to time limits apply to a demand by written notice under clause 11.1? b) Did paragraph 2 of Schedule 4 to the SPA require identification of an ascertained amount being claimed in respect of the Indemnity Claim?

(2) If it did, which sub-paragraph of paragraph 2 of Schedule 4 applies to such a claim – paragraph 2.1.7 (providing a 7 year period after the Completion Date) or paragraph 2.1.10 (providing a 30 month period from the Completion Date)?

Whether the time limits apply to the identification of and demand for an ascertained sum

113. First, dealing with (a) in paragraph 112(1) above, Scottish Power contends that it was not open to Drax to make a demand under clause 11.1 in its draft amendments because, by that date, the relevant time limit in paragraph 2 of Schedule 4 had expired. That presupposes that the time limits in paragraph 2 of Schedule 4 apply to the making of a demand under clause 11.1.

114. However, in my judgment, the time limits under para 2 Schedule 4 do not so apply. As Mr Quest, for Drax, contended, there are two requirements and they are independent. The first (in clause 11.1) requires the demanding of an ascertained sum by written notice, the second (in paragraph 2 of Schedule 4) requires a notice of the claim, stating in reasonable detail the nature of the claim and the amount claimed, etc. They are two separate requirements. There are specific time limits in respect of the second of those, as set out in paragraph 2 of Schedule 4, and a notice needs to be sent

before the relevant time period expires. There is no such time limit in relation to the demand required by clause 11.1.

115. There is nothing in the wording of the SPA, or in any material context that was drawn to my attention, that suggests that the demand under clause 11.1 had to meet the requirements not only of clause 11.1 but also of paragraph 2 of Schedule 4.

116. Indeed, the suggestion by Scottish Power that a demand for an ascertained sum had to be made within the time periods identified at paragraph 2 of Schedule 4 would have uncommercial results that it is unlikely the parties intended. If, for example, the sum the subject of the indemnity could not be precisely ascertained within the Schedule 4 paragraph 2 timeframe, then the claim could never be brought. It would also mean that even if an ascertained sum had been demanded, but it turned out (after further investigation, or even after a trial) that it was the wrong sum, if that determination of the correct sum was only reached after the expiry of the Schedule 4 paragraph 2 time limit, it could not be claimed. Neither of those appears to me to be an outcome that the parties can have intended.

117. Second, dealing with (b) in paragraph 112(1) above, there was, as with the other claims, a requirement that a notice of claim fulfilling the requirements of paragraph 2 Schedule 4 be served in relation to the Indemnity Claim. Scottish Power contended that the requirement that the notice give reasonable details of the amount claimed was not fulfilled in relation to the Indemnity Claim because (it alleged) the claim notified in the Notice of Claim had to be for an ascertained amount (as it would be made in respect of failure to meet a demand for an ascertained sum). I reject that contention:

(1) The Notice of Claim was sufficient in this respect in setting out the details that could be identified, at the time it was sent, in terms of the loss suffered including the potential loss to be suffered in the future. Paragraph 2 of Schedule 4 required the notice to set out the amount claimed in reasonable detail (detailing Drax's calculation of the loss alleged to have been suffered). It required *reasonable* detail, not some other more exacting form of words (such as "full detail" or "as much detail as possible"), nor did it require "the precise amount" or similar. In circumstances where the full extent of the loss identified in the Notice of Claim was not yet ascertainable, it does not appear to me that stating the amount claimed in reasonable detail requires identifying an ascertained sum.

(2) There was sufficient information in the Notice of Claim, in terms of identifying what loss had been suffered and what was likely to be suffered, including the giving of figures where they could be given (and in some places estimates of figures), to allow Scottish Power to understand what was being claimed against it and for what amounts and (where specific amounts were not identified) the types and categories of costs and liabilities in respect of which an indemnity would be claimed. The commercial purpose of the clause,

including the level of certainty the clause sought to provide to Scottish Power, was satisfied by the details provided in relation to the Indemnity Claim.

(3) Scottish Power's approach would lead to the result that I have already described above as unlikely to correspond to the parties' intentions that, if the sum the subject of the indemnity could not be precisely ascertained within the Schedule 4 paragraph 2 timeframe, then the claim could never be brought.

(4) The fact that clause 11.1 required a demand of an ascertained sum before liability arose under the indemnity does not mean that identifying the amount claimed in reasonable detail for the purposes of the paragraph 2 Schedule 4 notice necessarily had to include the identification of that ascertained sum. There may be circumstances where "reasonable detail" would include that identification, but in the circumstances of this case (in particular, where the losses claimed in the Notice of Claim included potential future losses) it did not.

118. Beyond that, the problems with the Notice of Claim in respect of the warranty claims and other breach of contract claim, namely with the basis of loss and how it is said loss is suffered, do not arise with the Indemnity Claim (and Scottish Power did not suggest otherwise) because of the different nature of that claim and the terms of clause 11.1, including that it includes an indemnity in respect of loss suffered by the Company.

The applicable time period for the notice relating to the Indemnity Claim

119. As I have held (a) that the time periods in paragraph 2 of Schedule 4 did not apply to a demand for an ascertained sum under clause 11.1, and (b) that sufficient detail of the amount claimed was provided in the Notice of Claim in respect of the Indemnity Claim, there is no need to determine which of the time limits under paragraph 2 of Schedule 4 applied to the Indemnity Claim. However, as the point as to the correct time limit was fully argued I will also deal with it.

120. Scottish Power contends no reliance can be placed on the notice dated 28 July 2022 as it was out of time under paragraph 2.1 of Schedule 4 to the SPA. This point turns on the construction of that paragraph 2.1.

121. Pursuant to the amendments to the SPA introduced by the First Deed of Variation dated 30 June 2020, the defined expression "Damhead Creek II Option Agreement Claim" was introduced to mean:

> "any claim under or pursuant to this Agreement arising out of or in connection with or in respect of any failure to validly assign the benefit of the Damhead Creek II Option Agreement from ScottishPower (DCL) Limited (Company No. 02675504) to the Company, including without limitation any claim under or pursuant to the Agreement arising out of or in connection with or in respect of any failings or deficiencies in the Damhead Creek II Option Covenant and/or the Damhead Creek II Option Assignment."

122. The same deed (together with the Second Deed of Variation dated 29 December 2020) amended the wording of paragraph 2 of Schedule 4 in the following way (with text added by amendment underlined):

> "In the case of the types of claim detailed below, the Seller shall not be liable for a claim unless the Buyer has notified the Seller of the claim, stating in reasonable detail the nature of the claim and the amount claimed (detailing the Buyer's calculation of the Loss thereby alleged to have been suffered):
>
> 2.1.1 in respect of any Relevant Claim (other than any Fundamental Warranty Claim, any Fundamental Property Warranty Claim, any claim under Schedule 9 (Tax Covenant), any Tax Warranty Claim, or any claim under or pursuant to Clause 14.19 or Clause 14.43, or any Damhead Creek II Option Agreement Claim), on or before the date which is 18 months from the Completion Date; …
>
> 2.1.7 in respect of any Reorganisation Indemnity Claim:
> (a) which relates to EHS Matters (including, without limitation, decommissioning), on or before the date which is ten (10) years from the Completion Date;
> (b) which relates to any other matter, event or circumstances, on or before the date which is seven (7) years from the Completion Date; …
>
> 2.1.10 in respect of any Damhead Creek II Option Agreement Claim, on or before the date which is 30 months from the Completion Date."

123. It should also be noted, in relation to the above provisions, that a "Relevant Claim" was defined to exclude a "Reorganisation Indemnity Claim" (under clause 1 of the SPA).

124. The issue between the parties was whether the period for the Indemnity Claim was the 7 year period under paragraph 2.1.7(b) or the 30 month period under paragraph 2.1.10. It was common ground between them that the claim was capable of falling within the definitions of both a "Reorganisation Indemnity Claim" and a "Damhead Creek II Option Agreement Claim".

125. For the following reasons, it is my view that Drax is correct on this issue, that the relevant time period is that under paragraph 2.1.7(b), which is the period that applies to a Reorganisation Indemnity Claim, and that the fact that the Indemnity Claim is also capable of falling within the definition of a Damhead Creek II Option Agreement Claim does not result in paragraph 2.1.10 applying to the exclusion of paragraph 2.1.7(b):

(1) Before the amendments that led to the introduction of the defined term "Damhead Creek II Agreement Claim", there would have been no argument about which time period applied to a Reorganisation Indemnity Claim. Such a claim was not within paragraph 2.1.1 because the definition of Relevant Claim

expressly excluded a Reorganisation Indemnity Claim, and such a claim was covered separately at paragraph 2.1.7. The amendments made were to carve out from paragraph 2.1.1 any Damhead Creek II Option Agreement Claim that fell within the definition of "Relevant Claim", such that any such claims were no longer subject to the 18 month period under that paragraph, and to give them a longer time period. Those claims that were removed from paragraph 2.1.1 were given their own time period in paragraph 2.1.10. In other words, the parties were introducing a new paragraph 2.1.10 to apply only to Damhead Creek II Option Agreement Claims which were Relevant Claims (and thus not a Reorganisation Indemnity Claim). There were no words added expressly removing any Reorganisation Indemnity Claim from paragraph 2.1.7 nor any other indication that the parties intended to remove any Reorganisation Indemnity Claim from paragraph 2.1.7 such as also to place such a claim within paragraph 2.1.10.

(2) During 2021, there was good reason to extend the notification period for claims, given this allowed Drax further time to explore how much Uniper might charge for a new easement of the Kingsnorth land. However, there is no obvious reason why the parties would have intended to shorten (considerably) the period for bringing a Reorganisation Indemnity Claim just because it was also a Damhead Creek II Option Agreement Claim. In fact, if Scottish Power were correct that notification of an Indemnity Claim needed to contain a demand for an ascertained amount (which, although I have held to the contrary above, would trigger the hypothesis on which this argument arises in this case) then there would be good reason why the notification for an Indemnity Claim was considerably longer than for certain other claims, given that it may take some time for the amount for which the indemnity was sought to be ascertained.

(3) Scottish Power's construction leads to a situation where two separate time limits govern the same claim. However, the parties are likely to have intended to create a scheme by their amendments to the SPA which did *not* lead to overlapping time periods for the same claim. The original paragraph 2.1 identified separate time periods for each claim. There is no reason to suppose that the parties intended to do something different when they made the amendments.

(4) To the extent that there is ambiguity about this, there is scope to resort to the principle that such clauses, having the effect of limiting the remedy that would otherwise be available to a party, should be construed narrowly. As Briggs LJ observed in The Hut Group (at [18]), parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words to that effect. There are no such clear words in paragraph 2 of Schedule 4.

126. Scottish Power relied upon the fact that clause 2.1.10 refers to "*any Damhead Creek II Option Agreement Claim*", which was wide wording. However, that mirrors the

wording at the start of every one of the sub-paragraphs of paragraph 2.1, including paragraph 2.1.7, which starts "*in respect of any Reorganistion Indemnity Claim*", suggesting that the parties intended all such claims to have the 7 year limit as much as paragraph 2.1.10 suggests the parties intended all Damhead Creek II Option Agreement claims to have the 30 month limit. This does not therefore appear to me to be a point that assists either way.

127. Scottish Power suggested that, as a general matter, when two such restrictions overlap "*the stricter one applies*." There seems to me to be no such general principle. In some circumstances, it may be that the stricter restriction applies; in others, it may be the less strict restriction. It depends upon the language used, in its context, as any matter of contractual construction.

128. On this point, Scottish Power placed some reliance on the decision in Towergate Financial (Group) Ltd v Hopkinson [2020] EWHC 984 (Comm) where Cockerill J concluded that where notice of a claim had to be given "*as soon as possible and in any event … on or before the seventh anniversary of the date of this Agreement*", there was no liability unless notice was given as soon as possible, even if it was given within seven years. However, that is not an equivalent situation: it is clear from those words that the parties in that case intended the two limitations to be cumulative, and there is sense in having them both where they operate by reference to different criteria (one a fixed date, the other by reference to circumstances ("as soon as possible")) – it is different from the situation in the present case where, on Scottish Power's approach, two separate dates under different provisions apply to the same claim. In addition, in that case the words "in any event" assist in the construction, whereas there is no equivalent in the present case.

129. Scottish Power also suggested that the effect of Drax's interpretation would be to render the 30-month limit in paragraph 2.1.10 pointless. That does not appear to me to be correct. All Damhead Creek II Option Agreement Claims other than Reorganisation Indemnity Claims would need to be notified within the 30-month period pursuant to paragraph 2.1.10. Even if Damhead Creek II Option Agreement Claims could be reformulated as Reorganisation Indemnity Claims (which is not entirely clear) that does not mean that the claims and their remedies are necessarily the same (and, in their skeleton argument, Scottish Power expressly noted that it did not accept that Drax could simply claim the same losses under clause 11.1 as would arise on breach of other provisions of the SPA). In any event, it was always a feature of the original scheme under paragraph 2 of Schedule 4 (before Damhead Creek II Option Agreement Claims were removed from paragraph 2.1.1) that Reorganisation Indemnity Claims had a longer time limit than any Relevant Claim, even where such a Reorganisation Indemnity Claim could be said to have been a reformulation of a Relevant Claim.

130. I should also record that Mr Quest (on behalf of Drax) referred me to correspondence between the parties preceding the First Deed of Variation in which Scottish Power had stated their willingness in principle to extend the date by which, pursuant to paragraph 2.1.1 of Schedule 4, Drax was required to give notice of any Relevant

Claim arising from the matters relating to the Option Agreement. Emphasis was placed on the fact that this was a discussion about amending the time period for notifying a sub-set of "Relevant Claims", consistent with Drax's case on construction. However, Mr Quest went on to accept that this was not something that could properly be taken into account on the construction point, and I have not done so in coming to my conclusion on construction above.

131. Accordingly, the time period in paragraph 2.1.7(b) applies in respect of the Indemnity Claim. Therefore, even if Scottish Power were correct that the time limits in paragraph 2 of Schedule 4 applied to a demand by written notice under clause 11.1 or that the Notice of Claim did not contain reasonable detail of the amount claimed in respect of the Indemnity Claim, the demand made by Drax on 28 July 2022 would have been within time.

Conclusion in relation to the Indemnity Claim

132. In relation to the issues that arise on these applications in relation to the Indemnity Claim: (1) Drax did not have to identify an ascertained sum for the purposes of its Indemnity Claim within the time limits set out in paragraph 2 of Schedule 4 to the SPA (because the requirements of paragraph 2 Schedule 4 as to time limits do not apply to a demand by written notice under clause 11.1, and paragraph 2 of Schedule 4 did not require identification of an ascertained amount being claimed in respect of the Indemnity Claim), and (2) even if it did, the relevant time limit for the Indemnity Claim is to be found in paragraph 2.1.7, giving a period of 7 years after the Completion Date. As a result, the basis for the objection to the amendments in respect of the Indemnity Claim is not made out and that claim has a real prospect of success, such that, in relation to the Indemnity Claim, the amendments are permitted and the summary judgment application fails.

The claim for a declaration

133. In addition to the claim for an indemnity in a particular sum, Drax also seeks a declaration that Scottish Power is liable to indemnify it in respect of certain losses, in the form it has pleaded at paragraph 30 of its Reply:

> "The Defendant shall pay to the Claimant, within five business days of a written demand for the same, an amount which is equal, on an after-tax basis, to the losses suffered by the Claimant: (i) in relation to, or arising out of, any steps or actions taken to implement the Reorganisation (as defined in the sale and purchase agreement dated 16 October 2018 (the "SPA"), or any part thereof; and/or (ii) that would not have been suffered but for the fact that the Reorganisation (or any part thereof) was not implemented and completed in full prior to the date of the SPA."

134. Scottish Power contends that this formulation of a declaration is a summary of clauses 11.1.3 and 11.1.4 of the SPA and serves no useful purpose, as there is no dispute between the parties as to the terms of those clauses.

135. Whilst I can see some force in that complaint, the granting of declaratory relief is a matter of discretion, where the relevant circumstances will need to be taken into account, and whether and to what extent any particular declaration might serve a useful purpose is something that might well become clearer over the course of the proceedings and at trial. In the circumstances of this case it cannot be said at this stage that there is no real prospect of the Court granting such a declaration. In addition, where (as a result of my decision above) the Indemnity Claim will proceed to trial, there seems to me little downside in permitting the claim to this declaration also to proceed.

Conclusion

136. For the reasons set out above, the applications are disposed of as follows:

(1) The amendment application is permitted in relation to the Indemnity Claim. It is refused in relation to the warranty claims and the other breach of contract claim.

(2) Scottish Power's summary judgment application is granted in relation to the warranty claims and the other breach of contract claim. This application is dismissed in relation to the Indemnity Claim.

137. This outcome will need to be reflected in a further version of the Amended Particulars of Claim. If the parties cannot agree what amendments should be made consequential on the rulings made above, they can address me on what directions ought to be made to resolve that.