Neutral Citation Number: [2024] EWHC 2537 (Comm)

Case No: CL-2020-000686

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 14th October 2024

Before :

THE HONOURABLE MRS JUSTICE DIAS

- -

Between :

URE ENERGY LIMITED **Claimant**

- and –

NOTTING HILL GENESIS **Defendant**

- -
- -

Mr Hugh Sims KC and Mr James Wibberley (instructed by **Burges Salmon LLP**) for the **Claimant**
Mr Jamie Riley KC and Ms Chinmayi Sharma (instructed by **Devonshires**) for the **Defendant**

Hearing dates: 10-11, 15-18, 22-23 July 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 14th October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

The Honourable Mrs Justice Dias :

Introduction

1. The Claimant ("URE") is an energy company. It was incorporated on 28 July 2016 under the name of Faraday Energy Supply Limited by Utiligroup Limited, a company which sells energy businesses "in a box", and was purchased from Utilitgroup on 17 July 2017 by Energy Logic Limited ("ELL") owned by a Mr Gary Ensor. ELL purchased the business specifically in order to enter into a contract to supply electricity and apply energy saving measures to the housing estate of the Genesis Housing Association ("Genesis"). Following the purchase, the name of the company was changed to URE Energy Ltd and Mr John Coombs and Mr Paul Cripps were appointed directors alongside Mr Ensor becoming equal shareholders with him in the business.

2. On 3 April 2018, Genesis amalgamated with the former Notting Hill Housing Trust ("NHH") to become Notting Hill Genesis ("NHG"), a publicly funded charitable organisation and the Defendant in these proceedings. NHG is the statutory successor to Genesis having succeeded to its assets and liabilities.

3. The principal claim made by URE in these proceedings is for a contractual termination payment in the sum of £3,946,861.56 said to be due on the termination in November 2018 of a four-year electricity supply contract (the "Contract") concluded between URE and Genesis on 29 September 2017.

4. The claim is advanced on two bases. URE's primary case is that the amalgamation of Genesis and NHH in April 2018 gave rise to a right to terminate under clause 10.2(d) of the Contract and that upon termination it became entitled to payment of the above sum pursuant to clause 10.5. This was referred to as the "Amalgamation Claim".

Alternatively, it contends that NHG was in breach of clauses 6.3 and/or 5.1 of the Contract, essentially in (i) failing to provide URE with reasonable access for the purpose of taking meter readings and replacing existing electricity meters with smart meters across the Genesis estate, and (ii) failing to provide all assistance and information reasonably required for that purpose. URE submits that these breaches were material and incapable of remedy, alternatively were not remedied within the time required by the Contract such that URE became entitled to terminate the Contract under clause 10.2(b) and claim the termination payment under clause 10.5 as liquidated damages, alternatively as common law damages. This was referred to in argument as the "Material Breaches Claim". In the further alternative, URE submits that it was entitled in the circumstances to terminate the Contract at common law for repudiatory breach by NHG to and claim damages at large.

5. NHG's initial position in relation to the Amalgamation Claim was that on a proper construction of clause 10.2(d) the amalgamation did not give rise to an entitlement to terminate but that if it did, URE had either waived such right by conduct or was estopped from exercising it. In 2022, URE applied for summary judgment on the Amalgamation Claim. The application was heard by Mrs Justice Moulder, who held that a right to terminate had indeed arisen under clause 10.2(d). She also struck out NHG's estoppel defence. However, she considered that NHG's defence of waiver raised factual issues as to URE's knowledge and conduct during the six-month period between the amalgamation and URE's termination which were arguable and should go to trial.

6. In very broad outline, NHG's response to URE's claim is that:

i) URE's right to terminate the Contract as a result of the amalgamation was waived by election and its purported termination under clause 10.2(d) was itself a repudiatory breach of the Contract which NHG accepted thereby giving rise to a counterclaim for damages for repudiation;

ii) On its proper construction, the termination payment under clause 10.5 is to be calculated by reference to URE's anticipated net profits such that a nil sum is payable;

iii) NHG was not in breach of the provisions relied upon, let alone in material breach and no right to terminate under clause 10.2(b) had accrued at the time URE sought to terminate the Contract. In any event URE never purported to terminate on this ground;

iv) URE cannot rely on clause 10.5 in relation to the Material Breaches Claim as in this context it is penal and unenforceable;

v) URE had no entitlement to terminate at common law and did not purport to do so. In any event it has not suffered the losses claimed.

7. For its part, NHG brings a counterclaim against URE for a credit balance due to it in relation to the charges under the Contract and also for damages in the event that it was NHG who validly terminated the Contract, rather than URE. The first of these counterclaims is agreed and, subject only to any contractual limitation of liability, so also is the quantum of the second.

The Contract

8. It is convenient at this point to set out the material terms of the Contract:

*"1 **Definitions and Interpretation:***

1.1 In this Contract, unless the context otherwise requires:

...

***Charges** mean as applicable the Supply Rate or the Deemed Contract Rate together with any other amounts payable by the Customer to the Supplier under or in accordance with this Contract;*

...

***Contract Start Date** means 1 October 2017;*

...

***End Date** means 30 September 2021;*

...

***Industry Agreements** includes the BSC; the Grid Code; the Master Registration Agreement; the CUSC (each having the meanings given to them in the BSC) and any supplemental agreements made thereunder or pursuant to such documents, the meter operator, meter administration, teleswitch operator, data collection, data aggregation and data transfer agreements relating to the Metering and all service lines, agreed procedures and codes of practice made under or pursuant to any of the foregoing and any other agreement, licence or code governing the generation, transmission, distribution, supply and/or trading of electricity in Great Britain to which the Customer or the Supplier is or should be a party or is otherwise obliged to comply with and which affects its ability to perform its obligations under this Contract, in each case, as amended, varied, supplemented or replaced from time to time;*

...

***Licence** means the electricity supply licence granted to the Supplier as modified or amended from time to time;*

***Metering** means the appropriate metering and related equipment used for measuring energy consumption at each Connection Point and for the collection and transmission of such data;*

...

***Supplier** means URE Energy Limited whose registered address is 14 Berkeley Mews, London, England, W1H 7AX and whose company number is 10300613;*

***Supply Premises** means each of the premises listed in the Contract Site and Pricing Schedule, as amended from time to time, or where the Customer is taking a supply of electricity from the Supplier in relation to a property without entering into a formal agreement with the Supplier in respect of that property, that property (as applicable);*

...

*2 **DURATION***

2.1 Subject to clauses 2.2, 2.3 and 10, this Contract shall take effect on the Contract Start Date and shall end on the End Date.

...

2.3 If:

(a) following the End Date the Customer has not agreed in writing to enter into a replacement contract with the Supplier for the supply of electricity to Supply Premises; or

(b) any electricity supply contract between the Supplier and the Customer in relation to Supply Premises is terminated or expires for any reason and the Supplier supplies / continues to supply (as applicable) electricity to the Customer at such Supply Premises,

a deemed contract shall be formed between the Customer and the Supplier and the Deemed Contract Rate shall apply to the electricity supply by the Supplier, until such point as the Customer's electricity supply at the Supply Premises has switched to another electricity supplier, or the Customer signs a new contract with the Supplier. The terms and conditions of the Supplier's deemed contract are these Terms and Conditions.

...

*5 **OBLIGATIONS OF THE CUSTOMER***

5.1 The Customer agrees to (i) provide the Supplier with all assistance and information reasonably required by the Supplier to enable the Supplier to supply each Supply Premises with electricity, become registered in respect of the Metering at each Connection Point under the Industry Agreements and comply with its obligations under this Contract, any Industry Agreement, Licence, code, authorisation or consent necessary to permit the supply of electricity to each Supply Premises; and (ii) to provide the Supplier with updated information as soon as reasonably practicable after any relevant changes.

...

*6 **METERING AND ESTIMATES***

...

6.3 The Customer shall allow any representative of the Supplier, any meter operator, any Network Operator and/or any other person authorised by the Supplier, reasonable access to read, install, remove, inspect, check, replace, reset, maintain and/or de-energise Metering and/or to carry out their respective functions under or pursuant to any Industry Agreement.

…

*7 **CHARGES AND PAYMENT***

7.1 After the expiry of each Month, or at such other intervals as agreed by the parties, the Supplier shall send to the Customer, by prepaid post or email, an account (either by way of an invoice or a statement) in respect of all Charges due to the Supplier under this Contract in respect of that Month or the applicable billing period.

…

*10 **TERMINATION***

…

10.2 The Supplier may terminate this Contract at any time for all or any Supply Premises if:

(a) the Customer fails to pay any amount when due under this Contract and does not pay such outstanding amount in full within five days of receipt of notice from the Supplier of such failure;

(b) the Customer commits a material breach of this Contract (excluding an obligation referred to in clause 10.2(a)) and where such breach is capable of remedy, fails to remedy such breach within 10 days of the Supplier giving the Customer notice of such breach and requiring the Customer to remedy such breach;

…

(d) the Customer passes a resolution for its winding up which shall include amalgamation, reconstruction, reorganisation, administration, dissolution, liquidation, merger or consolidation (other than a solvent amalgamation, reorganisation, merger or consolidation approved in advance by the Supplier) or a petition is presented for, or a court of competent jurisdiction makes an order for, its winding up or dissolution, or an administration order is made in relation to it or a receiver is appointed over, or an encumbrancer takes possession of or sells, one or more of its assets or the Customer makes an arrangement or composition with its creditors generally or ceases to carry on business;

…

10.3 The Customer may terminate this Contract:

(a) if the Supplier commits a material breach of this Contract and where such breach is capable of remedy, fails to remedy such breach within 20 days of the Customer giving the Supplier notice of such breach and requiring the Supplier to remedy such breach;

…

10.4 Where the Supplier terminates this Contract in respect of any or all of the Supply Premises in accordance with clause 10.2, it (a) shall give notice to the Customer of

the date of termination; and (b) may discontinue the supply of electricity to such Supply Premises or arrange for its discontinuation without further notice (save as may be required by law).

10.5 Where, in relation to any Supply Premises, this Contract is terminated by the Supplier pursuant to clause 10.2, the Customer shall within 10 days of the termination date pay to the Supplier the 50 percent of the remaining value of this Contract to the Supplier in respect of the relevant Supply Premises (as determined by the Supplier acting reasonably) as notified by the Supplier.

10.6 The Customer shall, on demand, pay to the Supplier, on an indemnity basis, all costs incurred by the Supplier in the enforcement of this Contract.

10.7 The Customer and the Supplier acknowledge and agree that the payment obligations in clauses 7 and 10 (including any payments arising as a consequence of early termination of this Contract) are reasonable in light of the anticipated harm and represent a genuine and reasonable pre-estimate of the losses, costs and expenses the Supplier may incur.

…

11 ***LIMITATION OF LIABILITY***

…

11.2 The Supplier shall be liable to the Customer in respect of physical damage to the Customer's property which results directly from a breach of this Contract by the Supplier and which was at the Contract Start Date reasonably foreseeable as likely to result in the ordinary course of events from such breach (subject always to clauses 11.5 and 11.6).

11.3 The Supplier shall not be liable to the Customer for any type of economic loss, loss of profit, loss of revenue, loss of contract, loss of goodwill or any indirect or consequential loss of any type whatsoever arising from or in connection with this Contract or the supply of electricity made pursuant to this Contract.

…

11.5 The total aggregate liability of the Supplier to the Customer whether in contract, tort (including negligence or breach of statutory duty) or otherwise arising directly or indirectly under or in connection with this Contract shall in no circumstances exceed the total Charges payable to the Supplier each Month, as calculated from time to time by the Supplier.

…

13 ***MISCELLANEOUS***

13.1 No delay or omission by either party in exercising any right, power or remedy under this Contract shall be construed as a waiver of such right, power or remedy and any single or partial exercise shall not prevent any other or further exercise of the same or the exercise of any other right, power or remedy.

…"

Factual background

9. For the most part, the background facts giving rise to the claim were not contentious but, so far as necessary, I find them to have been as follows. Where there were critical factual disputes between the parties, these are addressed more specifically in the discussion of the issues below.

10. Mr Ensor was a businessman who seems to have been something of an entrepreneur. During the course of his career, he had set up a number of companies, most of which had since been wound up for one reason or another. From around 2005, he began to develop a particular interest in LED lighting and other energy efficiency measures which led him in 2012 to incorporate a company called LED Logic Solutions Ltd with a friend, Richard Burrows, to supply and install LED light bulbs. It was in connection with this business that he was introduced to a Mr Paul Jameson who at that time was working for a housing association and they discussed the potential for providing energy efficient light bulbs and other energy saving measures to his residents under one of the government-backed schemes.

11. Mr Jameson subsequently moved to Genesis as Procurement Director and he and Mr Ensor renewed their discussions about rolling out LED lighting within the communal areas of the Genesis estate, which Mr Ensor believed could result in an energy saving of as much as 70%. Mr Jameson shared Mr Ensor's enthusiasm for green energy and energy efficiency and was also anxious to reduce costs for his residents as far as possible. One possibility which Mr Jameson raised with both Mr Ensor and others was that Genesis might set up its own energy business. Genesis ultimately decided against this, but discussions concerning other energy saving projects continued between Mr Ensor and Mr Jameson.

12. During this period, Mr Ensor developed a concept in which he hoped to interest Genesis. This involved the installation of LEDs across the entire estate and the construction by URE of a solar farm to generate electricity which URE could then supply to Genesis along with energy from other renewable sources. The capital outlay for URE would obviously be considerable and would have to be funded by borrowing. However, the aim was to enter into a long-term supply contract with Genesis over a period of 25 years, which would allow URE to recover its outlay while simultaneously delivering savings to Genesis through reduced consumption and significantly lower energy charges than it would have had to pay a conventional supplier. Power purchase agreements ("PPAs") of this length were not common in the industry, and the novelty of Mr Ensor's approach lay in combining the supply of energy with the provision of LED lighting and a power-sharing agreement in the same customer contract so as to be able to reduce energy consumption by around 70% and guarantee supply from entirely renewable sources. However, because URE would be charging for energy at lower than market rates, a 25-year long-term contract with the customer was fundamental to the success of the concept to ensure that the company eventually recouped its outlays.

13. Ultimately, Mr Ensor decided that the only way to move forward with this concept was to set up his own energy business and it was for that reason that he purchased URE in July 2017 as a "business in a box" with an existing electricity supply licence. Shortly after its purchase, Mr Ensor brought in Mr Coombs and Mr Cripps who became directors and equal shareholders in the company with him. Mr Ensor had not previously known Mr Coombs but was introduced to him by a friend. Mr Coombs had worked in the energy industry for many years and had a thorough knowledge and understanding of the way it worked which Mr Ensor considered would be helpful to

URE. Mr Cripps had been known to Mr Ensor for several years. He was a qualified accountant with Ernst & Young and had worked with Mr Ensor on devising a financial model for the business. Neither Mr Coombs nor Mr Cripps played any significant part in the day-to-day running of the business which was handled by Mr Ensor. At that stage, URE had no customers or other source of income. It was funded by Mr Ensor through commissions earned by another of his companies.

14. There was no dispute that around this time, Mr Ensor was under personal financial pressure. One of his other companies had been put into liquidation, and in 2017 the liquidators brought proceedings against him in respect of an outstanding director's loan. HMRC had also made a claim in respect of a failed Employee Benefit Trust and in September 2017 a bankruptcy petition was presented against him. In due course, Mr Ensor entered into an individual voluntary arrangement with his creditors ("IVA") which commenced on 5 January 2018 although it subsequently failed.

15. Meanwhile, in May 2017, Mr Jameson had alerted Mr Ensor to the fact that Genesis was planning to go out to tender for an energy procurement contract. There was some suggestion during the cross-examination of Mr Ensor that URE may have been improperly benefiting from insider information. Whether or not that is the case I am unable to determine, although it may have been one of the factors which led to NHG's investigation into Mr Jameson in 2018 and his subsequent departure from the organisation. Be that as it may, it is not relevant to any of the matters arising for determination in this case.

16. On 25 July 2017, Genesis launched an Energy Supply Mini-Competition tender process for a 3- or 4-year fixed term supply contract with a closing date of 17 August 2017. This was obviously a much shorter timescale than was needed to deliver

URE's concept and URE submitted a deliberately disruptive bid for a 25-year contract in the hope that Genesis might reconsider its approach. This tactic was successful and on 29 August 2017 the original competition was cancelled.

17. Instead, on 31 August 2017, Genesis issued a second Energy Supply Mini-Competition, which this time included the opportunity to bid for a 25-year contract. On 11 September 2017 URE submitted a bid for the 25-year contract which included:

    i) the installation of LED lighting in the communal areas of the entire Genesis estate;

    ii) the construction of a 5-megawatt solar farm; and

    iii) the upgrade of all existing "dumb" electricity meters to smart meters (automated meter reading or "AMR" meters).

18. URE's bid was successful, and an initial meeting with NHG took place on 13 September 2017 although there was a dispute between the parties as to exactly what was discussed and/or agreed at this meeting. This is relevant to the Material Breaches Claim and I return to it below.

19. At all events, it is common ground that the parties were not in a position to execute a 25-year long-term contract at that point, not least because URE still needed to obtain funding for the construction of the solar farm. It was therefore agreed that they would start negotiations for the long-term contract but would meanwhile enter into a 4-year short-term contract as a "placeholder" to be superseded by the long-term contract in due course. It should be noted that under the terms of the tender, Genesis was expressly not obliged to enter into any long-term contract and was at liberty to withdraw at any stage, although Mr Ensor did not realise this at the time.

20. There was a degree of urgency about finalising the short-term contract since Genesis' contract with its existing supplier, Opus, was due to expire on 1 October 2017 after which Genesis would automatically be moved to much higher "deemed rates" for its electricity supply. Speedy agreement of a contract with URE was therefore necessary in order to ensure that Genesis could avoid these higher charges and benefit from URE's significantly lower rates, and URE instructed its lawyers, Burges Salmon LLP, to draft the necessary contractual documentation. The supervising partner at Burges Salmon was a Mr Ross Fairley, although the actual drafting was carried out by an associate, Mr Andrew Meaden.

21. Mr Meaden based the short-term contract on a precedent which he then adapted for URE's specific purposes. A first draft was sent to Mr Ensor for his review on the evening of 25 September 2017 along with Burges Salmon's engagement letter which was signed and returned by Mr Ensor on the following day. The formal retainer included the following indicative scope of work:

"1. Draft an interim electricity supply agreement between URE Energy and Genesis.

2. Draft an enduring electricity supply agreement between URE Energy and Genesis."

22. Following various exchanges concerning the drafting of the short-term contract (which it will be necessary to consider in more detail in relation to the Amalgamation Claim), the final version was signed on 29 September 2017 with a start date of 1 October 2017. This is the Contract at issue in these proceedings. It was negotiated on behalf of Genesis by its specialist broker, Fidelity Energy Limited (which had initially been introduced to Genesis by Mr Ensor) and by its Head of Corporate and Professional Services, Mr John Carey.

23. Although the AMR rollout had formed part of URE's tender for the long-term contract, and although the installation of smart meters was one of URE's regulatory obligations, the Contract itself did not contain any positive obligation in this respect. Nonetheless, it was not in dispute that URE – with the agreement of Genesis – had taken steps towards implementation of the rollout even before the Contract was signed. In fact, this was a programme which had already been commenced by Opus using the services of an energy meter provider called IMServ Europe Limited ("IMS") who had installed some 20 AMR meters between June and September 2017. On 25 September 2017, URE itself engaged IMS to prepare a high-level plan for the rollout.

24. One of the main benefits of smart meters from the customer's point of view was that meter readings were automatically relayed to the supplier so that it was possible to calculate accurate consumption figures without the need to read the meters manually. Otherwise, in the absence of a meter reading, consumption had to be billed to residents on the basis of estimates calculated pursuant to an industry-wide Estimated Annual Consumption ("EAC") formula and subsequently adjusted when accurate readings could be obtained. It is clear that the lack of physical meter readings was a particular problem for Genesis which was concerned that application of the EAC formula was causing residents to be significantly overcharged.

25. The initial implementation plan produced by IMS on 10 November 2017 contemplated two phases to the rollout. Phase 1 was to include some 600 meters with the highest consumptions, thereby yielding the greatest savings soonest, while Phase 2 would cover the remainder of the estate.

26. The main person handling the AMR rollout on behalf of URE was Mr Jeremy Waitt, who had been taken on by URE in September 2017 as Head of Operations. His role

was essentially to manage the operational side of the business including, in particular, the rollout. For its part, Genesis had in around October 2017 nominated its Estates Contract Manager, Mr Eric Nolander, to assist in the project. An initial planning meeting was held on 30 October 2017 between Mr Waitt, Mr Joe Wetherall of IMS and Mr Nolander, at which IMS proposed that they should schedule installations directly with the managers of the relevant sites. Although Mr Nolander claims to have had reservations about this approach (to which it will be necessary to return) he nonetheless agreed that the rollout should proceed in this manner since IMS had specialist experience of meter upgrades and had worked with housing associations previously.

27. In the event, the start of the rollout was considerably delayed while URE put funding in place for the purchase of the meters and while certain decisions were taken as to the type of meters which should be installed. Thus, the programme did not commence in earnest until June 2018.

28. Meanwhile, on 1 February 2018, Genesis passed a special resolution providing for a merger with NHH to form NHG. Notice of the forthcoming amalgamation was sent to existing suppliers of Genesis, including URE, on 22 March 2018 in the following terms:

> *"**Notice of amalgamation between Notting Hill Housing Trust and Genesis Housing Association***
>
> *As you are a supplier to Genesis Housing Association I am writing about the contract(s) we have with you and the proposed merger.*
>
> *Genesis Housing Association Limited (Genesis) and Notting Hill Housing Trust (Trust) are proposing to merge. The merger will be completed through the amalgamation of Genesis and the Trust under section 109 of the Co-operative and Community Benefit Societies Act 2014 (Amalgamation). The Amalgamation will create one new "combined" society which has a new legal identity which will be called Notting Hill Genesis (NHG). We have been progressing toward the*

Amalgamation for some time and are aiming to complete the Amalgamation around Easter.

The effect of the Amalgamation is that all of our properties and other assets, including our Contract(s) with you, will automatically vest in NHG. Consequently, there is no novation or assignment of any Contract required. NHG will assume responsibility for the performance of our obligations from the date of completion of the Amalgamation.

Our amalgamation date is planned for early April 2018; when completed you will be dealing with Notting Hill Genesis (NHG), a new legal entity. We will contact you again in April, once the amalgamation is complete, to tell you about our new address and other legal identifiers, such as our new VAT number.

For the moment it continues to be "business as usual" with respect to invoicing, payment terms, receipt of payment and contact details. Please continue to send all communications to the current address and individual/department with whom you deal at the moment.

You can find more information on our websites at https://www.genesisha.org.uk/about-us/proposed-partnership, but please let me know if you have further questions or if you'd like to discuss in more detail how our plans might affect how we work with you. You can send any queries to me via GenesisSuppliers@genesisha.org.uk.

Yours sincerely,

Paul Jameson"

29. The amalgamation was formally registered on 3 April 2018. On 4 April 2018, NHG wrote to the suppliers of the former Genesis and NHH housing associations informing them that they would need to amend their records to reflect the new name of NHG but that this was the only action they needed to take. On 6 April 2018, Mr Ensor emailed a copy of the 22 March notice to Mr Meaden informing him that *"the merger completion was confirmed to me yesterday so we will need to mark all of the contracts/schedules with the new entitles* [sic] *name."* On 20 April 2018, Mr Ensor asked Mr Jameson for details of the new organisation for invoicing purposes. In his response, Mr Jameson confirmed that the invoicing remained the same save for the change in name. Otherwise, business continued between the parties as normal both as regards the operation of the Contract and the negotiations for the long-term contract.

30. By early April 2018, URE had finalised the list of sites to be covered in Phase 1 of the rollout, which had now been reduced from 600 to around 200 sites. By this stage it was already concerned that the site address details and profiles provided by Genesis were not accurate. On 15 May 2018, a meeting took place between Mr Wetherall, Mr Waitt and Mr Nolander to discuss the rollout. Prior to the meeting, Mr Waitt sent the following to Mr Nolander for review by NHG and discussion: (i) a data set for the Phase 1 installations with a note that contact names for the relevant site managers needed to be clarified as soon as possible; (ii) a process map; and (iii) a template letter to be sent to site managers. Following the meeting, Mr Nolander agreed internally with NHG's Procurement Manager, Mr Chris Brown, that NHG would ensure there was an up-to-date contact list for each of the Phase I meters.

31. On 30 May 2018, after some chasing, Mr Nolander provided updated contact details for the site managers and amendments to the template letter. The letter as approved by Mr Nolander was duly sent out to site managers by IMS around 18 June 2018 with a view to installations commencing from 25 June 2018. In accordance with the procedure previously agreed between the parties, the letter invited the site managers to contact IMS directly to arrange a convenient time for the installation of the new meter(s) at their particular site(s). At the same time as replacing the meters, it had also been agreed that IMS would take a physical meter reading which would allow accurate bills to be calculated and, hopefully, reduce the amounts being charged to residents.

32. The implementation of the rollout and the difficulties it faced are matters which I discuss in more detail in relation to the Material Breaches Claim. For the present, it is sufficient to note that a constant complaint on the part of IMS and URE was that site

managers were not engaging with the process despite repeated attempts by IMS to contact them and that as a result, it was proving impossible to arrange appointments for the installations. Thus, by 18 July 2018 a report prepared by Mr Waitt showed that only 13 of the planned 191 installations had taken place with a further 30 scheduled. In the vast majority of cases (136), IMS had been unable to contact the site managers even to book an appointment. The remaining 9 attempted installations had had to be aborted, mainly due to lack of a GSM signal (although in one case the site manager did not even know where the meter was located). An email dated 24 July 2018 sent by Mr Waitt to Mr Brown and Mr Nolander attached a list of site managers who needed to be chased and identified that 10 of them were collectively responsible for half of the proposed installations.

33. IMS had initially hoped to install 150 AMR meters by the end of July. This target was subsequently revised down to a minimum of 100 to be completed by mid-August. However, a further update report produced by Mr Waitt on 14 August 2018 showed that only 13 installations had been completed in the previous month bringing the total to 26. IMS had still been unable to arrange appointments for 134 sites.

34. On 10 September 2018, IMS'S weekly implementation report recorded that 36 installations in total had been completed with a further 7 due to take place. 57 installations had been withdrawn altogether due to incorrect contact details or unresponsive site managers, leaving 79 jobs outstanding or unconfirmed. 55 sites were controlled by 11 managers, including those previously identified in June by Mr Waitt. By 25 September 2018, IMS concluded that they could make no further progress and recommended bringing Phase 1 to an end.

35. On 1 October 2018 a further meeting took place between URE and NHG to discuss the Phase 1 rollout. This was attended by Mr Ensor and Mr Waitt on behalf of URE. The meeting was chaired by David Morrissey, NHG's Operations Lead. Miles Lanham, NHG's Regional Operations Manager, Mr Brown and two members of NHG's financial team were also present. It is apparent from Mr Waitt's notes of the meeting (which were accepted by Mr Brown as a fair summary) that Mr Morrissey's predominant concern was in relation to apparent overcharging. It had come to his attention in the previous few weeks that some 288 properties were considerably over-budget in relation to energy costs and this was a significant problem for NHG as it could not recover the costs from its customers. URE explained to Mr Morrissey that the reason for the apparently high costs was because bills necessarily had to be calculated by reference to EAC estimates. URE's proposed solution had been to install updated meters and take accurate readings at the same time but IMS had been unable to gain access to a large number of properties, including many sites which had been identified as having particularly high consumption. It was also pointed out to Mr Morrissey that NHG's broker, Fidelity, should in any event have been validating URE's invoices and picking up any costs which were higher than expected.

36. The problems with the meter exchange programme were discussed and URE emphasised that this was critical to addressing any issues of overcharging. It was therefore agreed that a further meeting would take place with Mr Lanham and Mr Brown to examine the matter in more depth. Mr Lanham's impression was that the access problems were due to requests not being channelled through Mr Nolander and co-ordinated across NHG. The following day, Mr Waitt provided Mr Brown with data identifying the sites originally included in Phase 1 to which IMS had not been able to gain access.

37. On 11 October 2018, Mr Waitt produced a formal report on Phase 1 of the AMR rollout programme. This recorded the following:

    i) Phase 1 of the programme had been intended to install new meters as soon as possible for 70%-80% (by energy consumption) of the entire portfolio. However, this phase had now been closed.

    ii) The majority of new meters (in numerical terms) were to be installed in 2019-2020 so as to take advantage of the industry-wide technology changes from first-generation smart meters (SMETS 1) to second-generation meters (SMETS 2);

    iii) Lack of response from site managers had been a major issue with the installation programme which had also impacted the ability to take meter readings. This had been raised with NHG and it was hoped that improvement could be achieved as this would be especially important for Phase 2;

    iv) Over 119 installations had been withdrawn due to lack of response despite six attempts to make contact with each manager and notwithstanding requests to NHG's central project teams for assistance in making contact;

    v) Phase 2 would cover 350 key volume meters. These needed to be installed by 5 December 2018 as this was a hard deadline for the installation of SMETS 1 meters and it was not anticipated that URE would get accreditation to instal SMETS 2 meters until March 2019.

38. Around this time, a separate problem emerged. So far as its express terms were concerned, the Contract provided for URE to be paid monthly in arrears for electricity supplied. However, it was not in dispute that Mr Ensor and Mr Jameson had agreed

that URE would initially be paid quarterly in advance and subsequently, from around March 2018, monthly in advance. The reason for this was that URE was a start-up company without resources of its own or any customers other than NHG. Although it was confident that it would be able to obtain funding for the project overall, it would not in practice be possible to put this in place until the long-term contract had been concluded. Meanwhile, URE would be underfunded while the long-term contract was being negotiated and this would put a strain on its cashflow.

39. It was common ground that this was a collateral agreement which was not intended to amend or substitute the express payment terms of the Contract altogether. Where the parties were at odds, however, is as to how long it was to last. Mr Ensor's understanding was that the advance billing arrangement was to last until the long-term contract was put in place, at which point the Contract would fall away. He did not believe that the Contract would be in place for very long. Mr Carey and Mr Brown's belief (based on what they had understood from Mr Jameson) was that it was only to last for one year, whereafter the parties would revert to billing in arrears.

40. This difference of understanding first emerged in August 2018 when Mr Brown queried URE's August invoice, although it does not appear to have been picked up at that stage by Mr Ensor who did not challenge Mr Brown on the point. However, matters came to a head at the beginning of October 2018 when URE submitted its invoice for November's estimated supplies. This was again queried by Mr Brown on the basis that payment in advance had only been agreed for one year after which invoices would revert to being settled in arrears. In an email dated 8 October 2018, Mr Brown informed Mr Ensor that the matter had been referred to the directors and that he could see it being a real problem.

41. By this time, Mr Jameson had left NHG and his role in relation to the Contract was being carried out by Mr Carey. Mr Ensor accordingly met Mr Carey on 9 October 2018 to discuss both the long-term contract (which was still under negotiation) and NHG's proposed change to the payment mechanism. As regards the latter, Mr Ensor asked whether NHG would be prepared to allow a three-month notice period before reverting to billing in arrears in order to allow URE to put funding in place.

42. However, this request was refused by NHG and following an internal meeting within NHG, Mr Carey informed Mr Ensor by telephone on 17 October 2018 that the payment terms were to revert to the contractual position with immediate effect. Mr Ensor's response to Mr Carey was that this would likely result in URE being wound up.

43. Also on 17 October 2018, a follow-up meeting took place between Mr Wetherall, Mr Waitt and Messrs Brown, Lanham and Nolander to discuss the AMR rollout in the light of Mr Waitt's Phase 1 report. Mr Wetherall's email of 18 October 2018 to the participants was accepted to be an accurate summary of the meeting and recorded that despite IMS's best efforts using the information with which it had been provided, it had proved impossible to schedule appointments for the majority of the Phase 1 sites. Accordingly, it had been agreed that a different approach was to be adopted for Phase 2 using Mr Nolander as a central contact point to schedule appointments, rather than IMS attempting to do this themselves. The outstanding Phase 1 installations would be rolled into Phase 2 which was proposed to start in the week commencing 3 December 2018 with a provisional end-date of 25 February 2019.[1] To that end a four-step action plan (the "17 October Action Plan") had been agreed as follows:

[1] The email actually read 25 February 2018, but it was common ground that this was a typographical error.

i) Step 1: URE would draw up a list of proposed Phase 2 installations (anticipated to be around 500 including those withdrawn from Phase 1);

ii) Step 2: NHG would cleanse the Phase 2 schedule and group the installations by geographical area if possible and provide any additional information on site addresses where reasonable and where known;

iii) Step 3: NHG would share its asbestos register with URE and IMS;

iv) Step 4: NHG would review the installations withdrawn from Phase 1 to ensure that repeat occurrences were avoided in Phase 2.

44. In a further attempt to resolve the impasse over payment terms, Mr Ensor emailed Mr Carey on 23 October 2018 making clear that it had not been his understanding that the advance payment agreement was only to last for one year and proposing a short-term factoring arrangement whereby URE would get paid in advance but NHG would only pay in arrears. He also informed Mr Carey that URE had identified credits owing to NHG of some £97,000 and requested that these be spread over two months rather than being applied in their totality to the December invoice.

45. It is clear, not least from internal correspondence, that by this time NHG was actively discussing internally how it could terminate its relationship with URE, including by means of putting it under financial pressure so as to force it into administration. It is unnecessary to explore precisely why this was. It appears that an enquiry had been launched into Mr Jameson's activities in April which had resulted in his departure from the organisation in September and it may be that in the eyes of NHG's management anything that Mr Jameson had handled was suspect and that URE was tainted by association. It may also have been, as Mr Carey suggested, due to a

concern about URE's financial stability – a concern heightened by URE's evident dependence on NHG for its cashflow. Be that as it may, on 29 October 2018 Mr Carey emailed Mr Ensor rejecting the factoring proposal (notwithstanding that, as he accepted in cross-examination, this would actually have reduced the financial risk for NHG) and demanding immediate repayment of all credits due to NHG. He also gave written notice that NHG no longer intended to proceed with the long-term contract.

46. This latter came as a complete bombshell to URE, whose very *raison d'être* was the long-term contract with NHG. Indeed, it had no other customers and its entire business strategy was focused on the long-term contract which it thought it had effectively secured, albeit the terms had not yet been finalised. Mr Ensor readily accepted that the long-term contract was critical to generating the income which he needed to sustain the business and also clear his personal debts. It was clear from the evidence, and I accept, that he did not appreciate that NHG was under no binding obligation to proceed with the long-term contract.

47. It was NHG's case that Mr Ensor had in fact been told previously, either during the meeting on 9 October 2018 or the telephone conversation on 17 October 2018, that NHG would not be moving ahead with the long-term contract. This was denied by Mr Ensor who recalled Mr Carey saying only that it was not a priority at that time. I find that Mr Ensor's recollection on this point is correct and indeed, Mr Carey accepted in cross-examination that Mr Ensor's email to Burges Salmon on 29 October 2018 was an accurate summary of both the meeting on 9 October 2018 and the conversation on 17 October 2018. He also disclosed that the email sent in his name on 29 October 2018 was not his own document but had been drafted for him by NHG's lawyers.

48. On receipt of this email, Mr Ensor immediately sought the views of his fellow directors. He also emailed Burges Salmon for advice as to whether URE could argue that NHG was bound to continue with the long-term contract, alternatively that it had constructively terminated the Contract by restricting URE's ability to trade through changing the payment terms. He was acutely aware of the real possibility that URE might have to be placed in administration and I accept his evidence that his main concern was to protect the company and its creditors as far as possible in the event that the relationship with NHG was terminated. Mr Ensor did not mention the amalgamation or ask Burges Salmon for advice as to whether it gave any grounds for termination.

49. As Mr Fairley was away, Mr Meaden responded the same day with some preliminary views but also saying that it would be necessary to consult Burges Salmon's litigation team. He advised Mr Ensor that under the terms of the tender NHG was not bound to enter into any long-term contract and that it would be difficult to prevent NHG from reverting to the contractual payment terms unless a course of dealing could be established. Mr Meaden did not mention the amalgamation in his advice.

50. At 0801 on 30 October 2018, Mr Ensor asked Mr Meaden for advice on three further points, including in particular regarding URE's rights if NHG had not provided access for the purpose of taking meter readings. He followed this with a further email regarding the problems that had been experienced in obtaining access for the AMR installations. Mr Meaden's response later that afternoon was that URE could assert that failure to provide access was a breach of clause 6.3 of the Contract and that if it was a material breach (which was a question of fact), URE could terminate the Contract under clause 10.2 and claim a termination payment under clause 10.5.

51. Also on 30 October 2018, Mr Nolander emailed Mr Weatherall and Mr Waitt chasing provision of the information that URE was to provide pursuant to Step 1 of the 17 October Action Plan.

52. Following discussion between Mr Ensor, Mr Coombs and Mr Cripps, URE drafted a termination letter addressed to Mr Carey (the "Termination Letter") which was hand-delivered to NHG on 31 October 2018. They did not seek any advice or input from Burges Salmon on the terms of the letter. As this and the exchanges which followed are important, I set them out at some length:

> *"I am writing in response to your email of 29 October. To say I was extremely disappointed to receive this news in this way, is an understatement.*
>
> *As you know, we have been in discussions with Genesis Housing Association ("Genesis" or "GHA") for several years in trying to find a solution to reduce long-term energy consumption, and therefore manage energy expenses, for your social housing residents.*
>
> *We understood we had entered a partnership with Genesis, that was reflected in the awarding of Lot Sand the 25 year contract in August 2017. On this basis we have invested a considerable amount of time and money (in excess of £100k to date) in developing a genuinely innovative, first-of-a-kind contract to underpin our partnership. We have incorporated feedback from your lawyers into this contract on several occasions and continued to develop the contract on the instruction of officers of your company. The last draft was submitted to you for further comment on 30th August 2018.*
>
> *Despite numerous efforts on our part to progress this, we have received nothing from you until your email of 29 October. We were assured that the 'Amalgamation' of Notting Hill and Genesis to create Notting Hill Genesis (NHG) under section 109 of the Co-operative and Community Benefit Societies Act 2014 would have no impact on our ongoing interactions with you, it was merely a name change. Patently this is not true.*
>
> *Moreover, your continued failure to provide us with access to a vast number of the meters we are legally required to assess/ upgrade, or to remedy the situation despite several repeated attempts on our part to engage you dating back to July and August 2018 (as per the attached and previously provided to you), means you are in material breach of clause 6.3 of our current supply agreement. At the time of writing we have just received correspondence from you with reference to the substance of the contract breach. The obstruction to URE Energy Ltd by you having consistently not performed under the terms of the contract goes back to April 2018, coinciding with the assimilation of GHA into NHG. A last minute recognition by you of this long*

outstanding issue does not resolve matters. We have correspondence from all parties involved that confirms your non-compliance with the contract.

Given this situation, together with your refusal to engage in any meaningful correspondence on this or any other matter of interest to us, we believe we have no option at this juncture other than to issue notice of our intention to terminate the contract with immediate effect (as per clause 10.4) today.

The basis for compensation due from NHG to URE in the event of a material breach of contract is set out in clause 10.5. Based on consumption for the year to 30 September 2018, extrapolated for the remainder of the contract (to 30 September 2021), we believe that the expected total cost of energy for the remaining 35 months of the contract is £7,998,914.77. In accordance with the contractual terms, 50% of this amount, £3,999,457.38 is payable to URE within 10 days of the termination date.

We regret that the situation has reached this point but due to your total change in approach since the Amalgamation and your continued failure to act reasonably, we feel we are left with no alternative.

As your contract is classed as terminated you will be placed onto our deemed rates as from Midnight tonight…"

53. The following day, Mr Ensor responded to Mr Meaden's email of the previous evening, informing him that URE had decided to terminate the Contract and attaching a copy of the Termination Letter. Mr Meaden replied advising that the matter be referred to the litigation team and pointing out that clause 10.2 of the Contract required URE to give 10 days' notice to remedy the breach before being entitled to terminate. He asked whether URE had given such a notice. Mr Ensor confirmed that notice had not been given and enquired whether it was still possible to do so. Mr Meaden repeated that it would be necessary to take advice from the litigation team.

54. On 2 November 2018, URE sent a further letter (the "Revocation Letter") to Mr Carey in the following terms:

"URE Energy is revoking its letter of termination of the contract dated 31st October 2018. For the avoidance of doubt this letter replaces and revokes our letter of 31 October 2018.

We confirm that we will continue to perform our obligations under the contract until further notice.

URE Energy maintains that NHG are in material breach of clause 6.3 of the contract.

In accordance with clause 10.2 b, we therefore request that NHG remedy this situation within 10 days."

55. Separately on 2 November 2018, after the Revocation Letter had been sent, Mr Waitt provided Mr Nolander with the information required under Step 1 of the 17 October Action Plan and asked Mr Nolander to let him know about appointment schedules. On 5 November 2018, Mr Brown instructed Mr Nolander to stop communicating with URE altogether but, following receipt of legal advice, this instruction was reversed and Mr Brown informed Mr Nolander during the course of a Skype conversation mid-afternoon on 6 November 2018 that *"we've been told to be proactive in our comms to show that we're looking to resolve the issue they've raised in their letters."* Mr Nolander immediately emailed Mr Waitt and Joe Weatherall to say that he was in the process of grouping the site visits on the basis of the data provided and hoped to have a plan ready by the following day. He expressed the hope that this would not delay the rollout by too much and confirmed that he remained willing to work with URE and IMS to resolve any issues. In the events which transpired, no such plan was ever provided whether by 7 November 2018 or at all.

56. Meanwhile, a telephone conversation had taken place during the late afternoon of 5 November 2018 between Mr Ensor and Mr Andrew Burnette, a litigation partner in Burges Salmon, during the course of which Mr Burnette advised Mr Ensor that URE could have a right to terminate without notice on the basis that NHG had not sought URE's approval for the amalgamation.

57. On 7 November 2018, Burges Salmon wrote to NHG (the "Second Termination Letter") referring to the earlier Termination Letter and subsequent Revocation Letter and demanding payment of URE's outstanding invoices on the basis that the advance

payment arrangement was still in operation. The letter continued in the following terms:

"OTHER BREACHES OF CONTRACT

The amalgamation of Notting Hill Housing and Genesis Housing Association in April 2018 without approval in advance by our client entitles our client to terminate the Contract pursuant to clause 10.2(d). Giving our client notice of the amalgamation shortly beforehand does not amount to the seeking of approval.

Accordingly, our client hereby gives notice pursuant to clause 10.4 that the Contract will terminate at 4pm on 14 November 2018. If NHGHA has not put in place a replacement supplier by this date, then clauses 10.9 and 2.3 shall apply, such that our client will continue supply under a deemed contract at the Deemed Tariff Rates as notified to you in our client's letter dated 31 October 2018.

Further, NHGHA has been in persistent, long-standing and material breach of clause 6.3 of the Contract by failing to allow our client's representatives to have reasonable access to Metering (as defined). This is a matter which has been drawn to your attention by our client on a number of occasions and, we understand, is acknowledged by you. The denial of access to Metering amounts to a fundamental obstruction to our client's effective performance of the Contract. It means that our client cannot acquire accurate data for billing purposes nor exchange meters for smart meters to enable collation of accurate consumption data for estimating purposes.

Our client has already given you notice to remedy this breach of the Contract within 10 days (by 14 November 2018).

We further consider that your client's clear breaches of clause 6.3 inevitably amount to breaches of clause 5.1.

CONSEQUENCES OF TERMINATION

In accordance with clause 10.5 of the Contract, upon a termination by our client pursuant to clause 10.2, NHGHA is obliged to pay our client 50% of the remaining value of the Contract within 10 days. Our client calculates the relevant sum to be £3,946,861.78 based on the annual consumption of the Supply Premises extrapolated from termination of the Contract on 14 November 2018 until its intended End Date of 30 September 2021.

Please pay this sum into our client's account provided on its invoices by 24 November 2018, failing which we anticipate instructions to commence further High Court proceedings for its recovery immediately thereafter without further notice to you…"

58. NHG's then solicitors, Winckworth Sherwood, replied the same day complaining about non-compliance with the Pre-Action Protocol. They did not address the

substance of Burges Salmon's letter but reserved NHG's position.

59. On 13 November 2018, NHG paid URE's October invoice under protest, no doubt to avoid any possibility of URE terminating for non-payment. At 1610 on 14 November 2018 (some 10 minutes after expiry of the 1600 deadline set by Burges Salmon in the Second Termination Letter), NHG hand-delivered its own letter to URE addressing only the amalgamation issue and asserting that the amalgamation did not give rise to any right to terminate under clause 10.2(d) of the Contract and that the Second Termination Notice was accordingly a repudiatory breach of contract:

> *The purported termination of the Agreement by you, as set out in the letter from your solicitors, is wrongful and constitutes a repudiatory breach by you of the Agreement between us. By this letter we hereby give notice of our election to accept that repudiatory breach, which means that the Agreement comes to an immediate end.*
>
> *Our acceptance of your repudiatory breach entitles us to claim damages in respect of our losses arising from your breach. Our solicitors will correspond with your solicitors to set out the basis of our claim for these damages and to seek to agree a mechanism for a final reconciliation of the amount owed between the parties for electricity used (both before the termination of the Agreement and on the basis of the deemed contract that now arises). This reconciliation will take account of the credit balance which you hold in our name.*

60. NHG stated that it reserved its position on the other points raised in the Second Termination Letter and that it would respond to the extent appropriate.

61. In a second letter sent on 14 November 2018, Winckworth Sherwood refuted the allegations that NHG was in breach of clause 6.3, albeit noting that this was purely for the record as the Contract had already been terminated.

62. On 15 November 2018, Burges Salmon reserved URE's position in relation to both letters, noting that:

> *"the Agreement has terminated irrespective of whose actions brought about that event. Accordingly, clauses 10.9 and 2.3 now apply, such that our client will continue*

to supply under a deemed contract at the Deemed Tariff Rates as previously notified to your client until a new supplier is in place."

63. Thus, the scene was set for the dispute which now falls to be determined as to by whom, when and on what basis the Contract was terminated and the consequences which flow as a result.

64. Following the termination of the Contract, URE effectively ceased to operate. Without the prospect of the long-term contract, it was unable to secure funding with the result that it ultimately failed to meet its regulatory obligations. Its energy supply licence was accordingly revoked by Ofgem on 14 September 2019. Its sole asset is the present claim against NHG.

The Issues

65. The parties agreed a detailed list of issues for the determination of the court. While each headline issue raises numerous sub-issues, the critical matters to be addressed are as follows:

(1) The Amalgamation Claim

66. Did URE waive by election its right under clause 10.2(d) to terminate the Contract?

i) Was URE aware of its right to terminate and, if so, when?

ii) Is it to be inferred that URE was advised and so aware of its right to terminate because it was in receipt of advice from Burges Salmon?

iii) Did URE waive its right by continued performance?

iv) Is URE to be deemed to have elected to continue with the Contract through lapse of time?

(2) The Material Breaches Claim

67. Was NHG in breach of clause 6.3 and/or clause 5.1 of the Contract?

    i) If so, were any such breaches material?

    ii) If so, were any such breaches capable of being remedied?

    iii) If not, was URE required to give a 10-day notice under clause 10.2(b)?

(3) Termination

68. In the light of the court's decision on (1) and (2) above, on what basis did the Contract come to an end?

    i) Was URE entitled to terminate the Contract forthwith on 31 October 2018? If not:

        a) Did URE's letter of 31 October 2018 amount to a repudiatory breach of the Contract?

        b) Was URE entitled to withdraw the letter and continue performing the Contract such that NHG had no continuing right to accept the repudiation after 2 November 2018?

    ii) Was URE entitled to terminate the Contract forthwith on 2 November 2018? If not:

        a) Did URE's letter of 2 November 2018 amount to a repudiatory breach of the Contract?

        b) Was Burges Salmon's letter of 7 November 2018 a valid termination notice as required under clause 10.2(b)?

        c) If not, did it amount to a repudiatory breach of the Contract?

d) If not, was NHG's letter of 14 November a repudiatory breach of the Contract and was such repudiation accepted by URE?

(4) Termination Payment and other remedies

69. On its true construction does the termination payment referred to in clause 10.5 fall to be calculated by reference to URE's anticipated future income under the Contract (agreed as a figure at £3,946,861.56) or its anticipated future net profit?

70. If the Contract was validly terminated by URE under clause 10.2(b) or at common law, is clause 10.5 an unenforceable penalty clause?

71. What losses is URE entitled to claim as a result of any accepted repudiation by NHG?

(5) Counterclaim

72. Are the damages counterclaimed by NHG (which are otherwise agreed) excluded or limited by clauses 11.3 and/or 11.5 of the Contract?

The Witnesses

73. I heard oral evidence on behalf of URE from Mr Ensor, Mr Cripps, Mr Coombs, Mr Meaden and Mr Waitt, and on behalf of NHG from Mr Brown, Mr Carey and Mr Nolander.

74. Mr Ensor suffered from dyslexia and there was some discussion about whether special measures might be required to enable him to give evidence. In the event, however, this did not prove necessary save to the following extent. Mr Ensor struggled at the start of his evidence with navigating the electronic witness bundle. He was therefore provided with a hard copy bundle and a member of URE's legal team was permitted to help him find the relevant pages. Thereafter, he experienced no obvious problems and I was satisfied that he was able to give his evidence fully and properly. However,

it became obvious as the trial progressed that the electronic bundle was causing difficulties not only for Mr Ensor and similar latitude was allowed without objection to all other witnesses who requested it.

75. I bear in mind in relation to all the witnesses that they were being asked detailed questions about events some 6-7 years ago (or even longer). It does not appear to have been the practice of any of the witnesses to take contemporaneous notes. The exception was Mr Meaden, but his evidence was that any manuscript notes he took would be reflected in an email or file note and then destroyed. In those circumstances it was unsurprising that most of the witnesses had no independent recollection of events but were reliant on the documents. Moreover, such recollection as they did have was very often based on residual impression rather than detail, with the result that their recall of the actual timing or sequence of events was not infrequently shown to be inaccurate. The contemporaneous documentation is therefore of considerable importance in this case, although I am mindful that towards the end of the relationship there was undoubtedly an element of tactical manoeuvering on NHG's side which means that its communications with URE around this time were not entirely candid and have to be approached with caution.

76. As far as concerns the witnesses who were called to give evidence, my findings in relation to their testimony are as follows.

77. Mr Ensor: I found Mr Ensor to be a transparently honest witness. He was co-operative in his answers and anxious to be helpful, to the extent that he readily conceded many of the points put to him by Mr Riley without demur or prevarication. He was frank and fair about his thought processes and motivations and he remained unruffled and forthcoming even under intense cross-examination as to his past

business record with its implicit criticism of his abilities and conduct as a businessman. There were many questions to which his answer was simply that he could not remember. I do not hold this against him. As I have said, it is unsurprising in the circumstances and, if anything, it is to Mr Ensor's credit that he did not try to speculate or pretend to a favourable recollection which he did not in fact have. Where he did have a recollection, however, he held his ground which carried all the more weight in the light of his readiness to make concessions where appropriate. His evidence was also entirely consistent with the contemporaneous documents.

78. I therefore reject NHG's submission made in closing that he was evasive and dishonest and that concessions had to be forced out of him. Were any such allegation to be seriously pursued, it should in any event have been put expressly to Mr Ensor. The more specific respects in which Mr Riley suggested that Mr Ensor was unreliable are addressed in the discussion of the issues below.

79. Mr Cripps: Mr Cripps was less spontaneously forthcoming than Mr Ensor and gave his evidence rather more carefully, perhaps because of his professional background. Moreover, his involvement was relatively limited so far as the material issues were concerned. Nonetheless, I accept him as a witness of truth in so far as he was able to provide relevant evidence.

80. Mr Coombs: Mr Coombs likewise was unable to give evidence on many of the crucial issues. In so far as he did, I found him to be truthful and honest.

81. Mr Meaden: Mr Meaden came across as slightly nervous – unsurprisingly given that his conduct was under critical scrutiny. He was also unable to recall much of the detail of his exchanges with Mr Ensor in relation to either the initial drafting of the Contract or the events leading up to the termination. Given that the Contract was

drafted at speed under considerable pressure of time, I do not regard this as a matter of criticism. Moreover, URE had waived privilege in Burges Salmon's transaction file so that the entire documentary record was before the court. I accept that Mr Meaden is highly unlikely to have given any advice to URE which was not reflected in the file. I found his explanation as to why he chose to highlight certain provisions of the Contract to Mr Ensor and not others to be plausible and convincing.

82. Mr Waitt: Mr Waitt was also an honest and reliable witness whose evidence I had no hesitation in accepting in its entirety.

83. Mr Brown: Mr Brown struck me as a somewhat nervous witness who was not very forthcoming. While I do not believe that he was dishonest or obstructive in any way, he was clearly uncomfortable when cross-examined about certain internal exchanges within NHG in the build-up to the termination of the Contract and I did not find his evidence about this altogether satisfactory. It seemed to me that Mr Brown, as is natural with many witnesses, was concerned to protect his own position as far as possible. It was also noteworthy that apparently categoric assertions in his witness statement, for example about the principal cause of the problems with the AMR rollout, were accepted by him in his oral evidence not to be correct. For that reason, I preferred his oral evidence to his written evidence save where the latter was supported by the documents.

84. Mr Carey: Mr Carey's involvement in events prior to September 2018 was under the supervision of Mr Jameson. It is therefore understandable that he did not have a detailed recollection, even if he was perhaps more involved than his witness statement suggested. It also emerged in his oral evidence that his email to Mr Ensor on 29 October 2018 had been drafted for him by lawyers and he accepted that certain

assertions in it were untrue. I felt that he nonetheless answered the questions put to him honestly as best he could save that I found him, like Mr Brown, to be less than candid about internal conversations that he had within NHG immediately prior to the termination.

85. Mr Nolander: Mr Nolander was a frank witness who I found to be generally honest in his oral evidence, although he too was somewhat unconvincing when cross-examined on correspondence to which he was party at the end of October and early November 2018. However, it is clear that his written statement was inaccurate in some respects and, as with Mr Brown, I prefer his oral evidence to his written evidence save where supported by the contemporaneous record.

86. Both sides made submissions regarding witnesses who were not called by the opposing party. In its written opening served on 3 July 2024, NHG submitted for the first time that both Mr Fairley, the partner supervising Mr Meaden, and Mr Wetherall were relevant witnesses who should have been called. In relation to the former it was submitted that I should infer either that Mr Fairley had advised URE as to its rights under clause 10.2(d) when reviewing the draft Contract or that his evidence would have been that Mr Ensor knew of this right. In relation to the latter, I was invited to draw certain inferences as to the risk of URE failing to meet its regulatory deadlines for the installation of smart meters.

87. By letter dated 5 July 2024, Burges Salmon responded to these allegations stating that Mr Wetherall had been approached to give evidence but had declined on the basis that he could not remember anything. Consideration had also been given to putting in a statement from Mr Fairley, but it had been concluded that this would be disproportionate in circumstances where his involvement was high level and where

his evidence would add little, if anything, to the documents. He had nonetheless been contacted in the light of NHG's criticisms but was now unavailable to give evidence at the trial as he was leaving for Cambodia on 7 July for a three-week family holiday.

88. I accept that these are perfectly valid and reasonable explanations for why these particular witnesses were not called and, in fairness, Mr Riley did not pursue the point in his closing submissions.

89. For his part, Mr Sims suggested that Mr Jameson was a glaring omission from NHG's line-up, for which no explanation had been offered. He did not go so far as to suggest that I should draw adverse inferences against NHG from his absence, but he pointed out that it was undoubtedly convenient for NHG to be able to lay the blame for any problems which arose in relation to the Contract on Mr Jameson, and for its witnesses to distance themselves from anything he had done. The corollary, however, was that the evidence of those witnesses was necessarily hearsay in relation to anything Mr Jameson had said or done and was therefore inherently less reliable save where confirmed on the documents. This was a fair point so far as it went and I bear it in mind.

90. In the light of this evidence, I now turn to the issues.

(1) The Amalgamation Claim

91. In her judgment referred to above, Moulder J rejected NHG's defence of estoppel on the basis that no sufficient detrimental reliance had been established. Accordingly, the outcome of this claim turns solely on NHG's remaining defence of waiver by election.

92. There was no material dispute between the parties as to the applicable principles, which are derived from those articulated by Lord Goff in the well-known passage in his speech in *The Kanchenjunga,* [1990] 1 Lloyd's Rep. 370 at 389 and from the decision of the Court of Appeal in *Peyman v Lanjani,* [1985] Ch. 457 at 487, 494, 500 namely:

i) Where a party (A) becomes entitled to terminate a contract, whether pursuant to a contractual right or a repudiatory breach by the other party or otherwise, it must elect whether to exercise that right or not;

ii) In order to make that election, A must be aware both of the facts giving rise to the right to terminate and of the right itself;

iii) A must actually make a decision. If it does not, the time may come when the law nonetheless deems an election to have been made;

iv) If, with the requisite knowledge set out in ii) above, A acts in a manner which is consistent only with one or other of two inconsistent courses, it will be held to have elected accordingly;

v) An election can be made by any words or conduct which communicates an intention to choose one or other course of action but, particularly where A has elected to abandon a right which it would otherwise possess, such election must be communicated in clear and unequivocal terms.

Was URE aware of its right to terminate and, if so, when? Is knowledge to be inferred from the fact that it was receiving advice from Burges Salmon?

93. These questions are addressed compendiously since they are both directed at the same critical issue of knowledge.

94. Clearly Mr Ensor was aware that the amalgamation had taken place and the contrary was not suggested. The battleground between the parties centred on whether he was also aware that in the circumstances which had occurred, URE had a right to terminate.

95. I note at the outset that it is somewhat unattractive for NHG to argue that URE was aware of its right to terminate the Contract following the amalgamation when for many years prior to the judgment of Moulder J, it was contending that no such right was conferred by clause 10.2(d). However, that is a purely forensic point and carries no independent weight. Either URE had the required knowledge or it did not and that depends solely on the evidence.

96. It was not suggested with any vigour that either Mr Cripps or Mr Coombs was aware that a right to terminate had arisen. Accordingly, URE's knowledge for this purpose depends solely on the knowledge of Mr Ensor. As to this, "knowledge" means actual knowledge: *TCG Pubs Ltd v The Master and Wardens or Governors of the Art or Mystery of the Girdlers of London,* [2017] EWHC 772 (Ch) at [76]-[78] *per* Mann J. Simply having the means of knowledge is not enough: *The SK Challenger,* [2020] EWHC 3448 (Comm); [2021] 2 Lloyd's Rep. 109 at [202] *per* Foxton J (not appealed on this point).

97. That said, while constructive knowledge is clearly insufficient, I accept that blind-eye knowledge or "Nelsonian" blindness would suffice. Mr Riley referred me to the judgment of Lord Justice Rix in *Kosmar Villa Holidays v Syndicate 1243,* [2008] EWCA Civ. 147; [2008] 2 All ER (Comm) 14 at [74] in support of a submission that knowledge which was "obviously available" would be sufficient for a waiver by election. However, against the background of the authorities, it seems to me that the

reference to "obviously available" knowledge in that case must be taken as a reference to blind-eye knowledge.

98. There was no dispute that NHG was entitled to rely on an evidential presumption that since URE was in receipt of legal advice from Burges Salmon, it had been appropriately advised and was aware of its rights: *Peyman v Lanjani (supra)* at 487. However, the presumption is not irrebuttable, and it was therefore open to URE to seek to rebut the presumption by putting before the court evidence of the advice which it was actually given and the extent to which it was actually aware of the right which it is alleged to have abandoned: *Moore Large & Co. Ltd v Hermes Credit & Guarantee plc,* [2003] EWHC 26 (Comm) at [105]-[106] *per* Colman J.

99. Seeking to rebut the presumption in this way will almost invariably require a waiver of privilege so that the court can examine the question of what legal advice was or was not given. URE accordingly waived privilege in Burges Salmon's transaction file, such that all advice received up to 5 November 2018 was put before the court. Mr Riley nonetheless submitted that the bare file was insufficient to enable URE to rebut the presumption. He put it to both Mr Ensor and Mr Meaden in cross-examination that advice was given orally in meetings or on the telephone which was not recorded or reflected in the file. In this regard, he was grasping at straws. I accept Mr Meaden's evidence that he avoided giving advice orally and that, if he did, it would have been confirmed in a follow-up email or otherwise recorded in a file note or other documentary form. I am therefore satisfied that the disclosed file fairly reflects the extent to which URE was advised by Burges Salmon. In addition, I had the benefit of oral evidence from Mr Meaden and, for the reasons already given, I consider that no adverse inferences can be drawn from the absence of Mr Fairley. I

am accordingly in a position to decide for myself what advice was given to URE and whether it was aware of its right to terminate under clause 10.2(d) following the amalgamation.

100. Although URE bears the evidential burden of rebutting the presumption, the critical question is always whether URE was aware of its right to terminate in the circumstances which had occurred and the ultimate legal burden of proving such knowledge lies firmly on NHG. Having seen and heard both Mr Ensor and Mr Meaden and looked at the documents, I am quite satisfied that Mr Ensor was not aware that URE had this right and that prior to 5 November 2018 he was never advised that it did.

101. As I find on the facts, Mr Ensor was clearly aware that the Contract included a clause 10 dealing with termination which itself comprised various sub-clauses, including clauses 10.2, 10.4 and 10.5. He was further aware that clauses 10.4 and 10.5 were triggered by clause 10.2, and that clause 10.2 itself had a number of sub-clauses including clause 10.2(d). But there is a world of difference between knowing that a particular clause exists and understanding what it means or how is potentially applies in different circumstances.

102. Mr Ensor's evidence was that he regarded these as "boilerplate" provisions and so did not pay them much attention. He was cross-examined at length by Mr Riley on his precise understanding of a "boilerplate" provision, and on the fact that he must have read and understood the clauses in order to identify them as such. In response he explained that in his mind "boilerplate" provisions were standard provisions in a contract to which bespoke provisions would be added and while he would not

necessarily know for certain that a particular provision was a boilerplate provision, he would make assumptions.

103. I found this evidence to be plausible and I suspect that the same is true of many lay businessmen. A non-legal commercial person may well have scanned clause 10.2. They would have noted that there were a number of potential events of default giving rise to termination, and that clause 10.2(d) was one of nine. They would have seen that clause 10.2(d) referred to winding up and that amalgamation was referred to in that context. They would probably also have been aware (as indeed was Mr Ensor) that it was standard to have provisions in a commercial contract providing for termination on the insolvency of one or other party. It is therefore unsurprising that Mr Ensor assumed that the sub-clause as a whole was dealing with insolvency-related matters and did not bother with the rest of it. I accept his evidence in this regard and find that he did not in fact understand clause 10.2(d) to any greater extent than this.

104. It is relevant to note in relation to this finding that:

i) The Contract was being negotiated at speed because of the need to have an agreement in place which would prevent Genesis from incurring deemed charges under its current contract with Opus after 1 October 2017. Since 1 October was a Sunday, this in practice meant getting the Contract finalised by Friday 29 September 2017.

ii) As is typically the case with businessmen, Mr Ensor was embarking on the relationship with Genesis in the hope and expectation that it would be successful and lead to a long-term contract. It is therefore unsurprising that the precise circumstances in which it might come to a premature end were not uppermost in his mind.

iii) Mr Ensor's focus was very much on the commercial and financial terms, such as the duration of the Contract, the pricing and the amount of any termination payment.

iv) Clause 10.2(d) was not a provision which was specifically flagged up for him by Mr Meaden and there was accordingly no reason for him to think that he needed to give it specific attention.

v) Furthermore, it is by no means a straightforward provision. Even for a lawyer, it is not an easy clause. Not only does it encapsulate a number of permutations, but the wording of particular relevance to this case is inserted in parenthesis (not generally taken to denote something of importance) by way of exception to an extended definition of "winding up".

vi) So far as the evidence went, Mr Ensor had signed three previous contracts, of which two did not mention amalgamation at all, while the third had a similar exception for solvent amalgamation but *without* the qualification that it be approved in advance.

105. All in all, it is in my judgment expecting far too much to suggest that Mr Ensor should have understood and appreciated that clause 10.2(d) gave URE a right to terminate in the circumstances which subsequently transpired.

106. I am also satisfied that neither Mr Meaden nor anyone else at Burges Salmon advised Mr Ensor about the meaning or application of clause 10.2(d) and what it entailed in practical terms. Burges Salmon had no retainer to advise generally but were retained specifically to draft the Contract and the LTC. It was not suggested that anything occurred subsequently which triggered a duty to advise and accordingly Burges

Salmon were under no duty to advise on the consequences of the amalgamation after the Contract was signed unless specifically asked to do so, which they were not.

107. As it is, the file shows that there were no detailed discussions of the draft contract on a clause-by-clause basis and no discussion of the consequences of an amalgamation, whether before or after the Contract was signed. Instead, when the first draft was sent out by Mr Fairley at 1904 on 25 September 2017, he informed Mr Ensor that it was based on a contract previously used for other clients and that some clauses had been bracketed for his consideration. These clauses included matters regarding pricing, tariff rates, end date, interest for late payment and the level of compensation payment where the Contract was terminated for default by Genesis. None related to the provisions of clause 10.2.

108. It is therefore not surprising that Mr Ensor focused on the specific clauses highlighted for him. He responded to Mr Fairley (also copying Mr Meaden) at 0952 on 26 September 2017, providing some of the information which had been requested from him and seeking guidance on certain points relating to monetary aspects of the Contract, including the compensation payment. Mr Ensor accepted that clause 10.5 (which was numbered 10.4 in the first draft) referred expressly to clause 10.2. He also accepted when it was put to him that in order to understand clause 10.4 it was necessary to understand clause 10.2. However, he could not recall going back to check the termination provisions in clause 10.2 for this purpose and I accept that he did not. There would have been no reason or need for him to do so. As flagged up by Burges Salmon, this was a payment to be made in the event of termination by URE for default by Genesis. It was wholly unnecessary for Mr Ensor to delve into the detail of all the different ways in which the Contract might be terminated in order to

fix a compensation sum which would apply indiscriminately to all of them. His evidence, which I accept, was that his concern in this respect was to make sure that the business and its creditors were protected as far as possible in the event of termination by either side. Moreover, as appeared clearly from his response to Mr Meaden, the time pressure to sign the Contract was very great and I do not find it remarkable that he did not go through every clause in detail himself. After all, he had instructed lawyers and it was not unreasonable for him to have expected them to identify anything unusual or important for him to consider.

109. At Mr Ensor's request, Mr Waitt and Mr Rob Eynon of New Energy Consulting also commented on the points raised by Burges Salmon and Mr Ensor's responses. Nothing was raised by either gentleman regarding the termination provisions of clause 10.2.

110. So far as Mr Meaden's evidence was concerned, while he understandably could not recall the specifics of every exchange he had with Mr Ensor, he was clear that he never advised on clause 10.2 and that Mr Ensor never asked for advice on clause 10.2. He further stated that from his knowledge of Mr Ensor, this was not the sort of clause that Mr Ensor would have been interested in, or would have raised for himself. Rather, his impression was that Mr Ensor was concentrating on the commercial aspects of the deal such as the level of charges, the amount of the termination payment and the duration of the Contract. This accords with my own impression of Mr Ensor. I also accept Mr Meaden's evidence that he highlighted everything he considered important to bring to Mr Ensor's attention – which did not include clause 10.2. He was comfortable that Mr Ensor understood everything he needed to understand.

111. One point pursued by NHG with particular vigour concerned a meeting between Mr Ensor and Mr Fairley on 26 September 2017 at which it was alleged that the terms of the Contract were discussed, including clause 10.2. This submission was based on a Burges Salmon fee note which recorded that Mr Fairley spent 4½ hours on 26 September 2017 on *"review docs and meeting client"*. However, I accept Mr Ensor's evidence that he did not have any lengthy meeting with Mr Fairley on that day and that he did not discuss the draft contract with him in any detail, if at all. His spontaneous recollection in cross-examination was that he spoke to Mr Fairley about issues to do with Fidelity on which he had asked for advice, and this was entirely borne out by the contemporaneous documents. Thus:

i) On 25 September 2017, before he had even received the first draft of the Contract, Mr Ensor raised a question in an email to Mr Fairley about commissions payable to Fidelity and suggested that it would be helpful to have a conversation to agree a strategy. He said that he would be in town the following day to drop off some anti-money-laundering documents and asked whether Mr Fairley might have 15 minutes to spare. Mr Fairley's response later that evening (which attached the first draft of the Contract) said that he would be in the office from the following afternoon and asked Mr Ensor to drop off the documentation. However, he also said that if he was not there, Mr Ensor was to leave it with reception or ask them to take a copy. This exchange does not suggest that Mr Fairley had it in mind – if he met Mr Ensor at all – to give him any important advice about the detailed terms of the Contract. Given the context in which a meeting had been proposed, any conversation was clearly intended to address the question of Fidelity's commissions.

ii) The second draft of the Contract was circulated by Mr Meaden at 1228 on 26 September 2017 and it was Mr Meaden, not Mr Fairley, who provided the answers to the specific questions raised by Mr Ensor on the draft. In relation to the termination payment, he informed Mr Ensor that there was no industry standard but that the sum chosen should reflect a genuine and reasonable pre-estimate of URE's losses.

iii) At 1404 on 26 September 2017, Mr Ensor responded to Mr Meaden's email (with a copy to Mr Fairley) while on his way to Burges Salmon's offices. He did not address either the draft or Mr Meaden's comments but instead raised a completely separate issue about a Third Party Introducer Agreement which Fidelity had demanded be put in place before they would present the draft contract to Genesis.

112. In these circumstances and on the basis of these contemporaneous exchanges, I am satisfied that any time spent by Mr Fairley on reading documents or meeting Mr Ensor was in connection with the specific queries that the latter had raised regarding Fidelity. Apart from sending out the first draft, Mr Fairley seems to have delegated the drafting of the Contract to Mr Meaden and I find that it would have been Mr Meaden and not Mr Fairley who gave any advice on its detailed provisions.

113. At 2103 on 26 September 2017, Mr Ensor responded to Mr Meaden's comments accompanying the second draft (including those relating to the amount of the termination payment). There is nothing in any of these communications to suggest that he had had any discussion of the terms with Mr Fairley or, indeed, that anyone was showing the slightest interest in clause 10.2. Further revisions were then made by

Mr Meaden and a further draft was sent to Mr Ensor which was subsequently presented to Genesis and Fidelity at a meeting held at 1500 on 27 September 2017.

114. Between about 0900 and 1000 on 29 September 2017, Mr Carey received and reviewed various comments that Fidelity had raised on the draft on behalf of Genesis. At 1059, Mr Carey indicated to Fidelity that he agreed with all their points and that Genesis did not therefore see the need to obtain any legal advice of its own. He asked Fidelity to obtain the amendments from URE and send him the revised contract for signature.

115. Mr Carey himself then forwarded Fidelity's comments to Mr Ensor.[2] Fidelity also sent them. Most are of no relevance and none related to clause 10.2. However, the final comment pointed out that the draft contained no provision for termination by the customer (Genesis) and no indication of what notice period was required. Fidelity asked for these to be added. Mr Ensor passed these comments to Mr Meaden at 1124 saying that he had verbally agreed the changes with Mr Carey but that Mr Meaden should advise if there were any major concerns. Mr Meaden responded at 1234 recommending that the only rights of termination given to Genesis should be in respect of URE's insolvency or a material breach of contract by URE not remedied within a timeframe to be decided by Mr Ensor.

116. Mr Ensor replied at 1257. In relation to termination, he expressed the belief that there would be an industry standard clause but indicated that he had agreed with Mr Carey on the telephone that as it was a four-year contract, Genesis should only have the right to terminate within 30 days of the End Date and not before. I am quite satisfied on the evidence that Mr Ensor was only concerned with the timing of the notice and that

[2] It is slightly unclear from the timings of the emails whether he did so at 1021 or 1121, although for present purposes it does not much matter which.

he did not have any detailed termination provisions in mind but was relying on Mr Meaden to insert whatever provision was standard in the industry. I bear in mind that this was a last-minute point which needed to be resolved quickly as this was the last day to conclude the Contract and there were only a few hours left.

117. In the event, Mr Meaden copied clauses 10.2(b) and (d) from the existing draft and wrote back at 1420 stating that *"I have given them termination rights for URE Energy's insolvency or material breach (this is standard and hard to argue against)"*. After some further correspondence about precisely when Genesis needed to give notice of termination, the finalised draft was sent for signature at around 1614.

118. Mr Riley argued that these exchanges demonstrated Mr Ensor's familiarity with termination clauses and the fact that he was able to give Mr Meaden instructions about the appropriate notice period and how termination would operate. I reject this submission. Mr Ensor's reliance on Mr Meaden to insert a standard industry provision in itself indicates that he was not applying his own mind to the substance of any termination right to be given to Genesis. He was aware that the clauses drafted by Mr Meaden mirrored clauses 10.2(b) and (d) but that does not mean that he understood them any more clearly in this context. I can see no reason why he was not entitled to rely on Mr Meaden's advice that this was standard in the industry and leave it at that. I do not accept that it shows he was aware of and understood both clauses.

119. In short, I am satisfied that Mr Ensor himself was not aware prior to the amalgamation that URE would have the right to terminate in the events which in fact transpired. Nor was there any reason why he should have been. I find that he skimmed clause 10.2(d) without analysing it in detail and assumed that it was all to do with

insolvency. It was never drawn specifically to his attention and its detailed provisions were never explained to him.

120. Did this position change thereafter? It is not controversial that Mr Ensor knew about the proposed merger between Genesis and NHH some time before it actually took place. His evidence was that his conversations with the Genesis team in which it was mentioned led him to believe that it would be a positive development, not least because of the increased customer base. He had no reason to believe that anything in the relationship would change.

121. This understanding was confirmed by the Notice of Amalgamation sent on 22 March 2018 and the notice dated 4 April 2018 which were very much drafted to reassure suppliers that nothing was changing apart from the need to amend the name of the entity in their records. The Notice of Amalgamation expressly stated that no assignment or novation was involved and that the change would happen automatically. It is hardly surprising that Mr Ensor interpreted these developments in the way I find he did. That he so understood what had happened is further confirmed by the fact that he did not seek clarification following the 22 March Notice and also by the email in which he forwarded it to Mr Meaden on 6 April with a simple instruction to change the name of the entity in all contracts and documents. He did not ask for advice as to URE's rights and there was no reason why he should have done if nothing was changing. It would only have been relevant to seek advice if he had understood that clause 10.2(d) might confer a right to terminate for a solvent amalgamation which had not been approved in advance. The fact that he did not (and indeed even described the amalgamation as *"All positive"* in response to an enquiry from Smartest Energy) is entirely consistent with the fact that he did not know about

this right. Instead, he continued to focus on the LTC which he accepted was the crucial matter from URE's point of view.

122. The first draft of the LTC was sent to Mr Ensor at 1719 on 12 April 2018. The contemporaneous documents show that the termination of the Contract was then raised by him with Burges Salmon. However, I accept his evidence in cross-examination that this was in the context of wanting to know whether the LTC would automatically supersede the Contract once it was agreed or whether the latter needed to be specifically terminated. I am satisfied that he did not have the early termination provisions of the Contract in mind at all and did not go back to them. This was simply a general query as to how the two agreements interacted. Not only is that something which a lay client would be much more likely to ask, it is also consistent with the comments that he and Mr Meaden inserted on the draft of the LTC, and with Mr Meaden's email of advice on 20 April 2018 in which he recommended a simple termination agreement.

123. Mr Ensor accepted that he was aware that clause 13.2 of the draft LTC contained materially identical provisions to clause 10.2 of the Contract and a provision for a termination payment similar to clause 10.5. However, that in itself still does not mean that he understood their precise effect any better than he had done when the Contract was concluded. At the end of August 2018, there was a specific discussion between Mr Meaden and Mr Ensor regarding termination payments under the LTC. Again, these only related to the amount payable and not the specific circumstances which might give rise to a termination. Moreover, these circumstances were described by Mr Meaden in short-hand form as relating to termination where either NHG or URE was in "default". Whether or not Mr Meaden understood that a solvent amalgamation

not approved in advance gave rise to a right to terminate, use of such terminology would not have suggested this to Mr Ensor.

124. The contemporaneous documents are compelling in establishing that in fact Mr Ensor only appreciated for the first time that URE might have a right to terminate under clause 10.2(d) when he was so advised on 5 November 2018 by Mr Burnette. For example, Mr Ensor accepts that he looked at the termination provisions before sending the Termination Letter. If so, it is inconceivable that URE would not have relied on clause 10.2(d) in that letter if he had appreciated that it had such a right, given that URE was now actively looking to exit the Contract in a way that would secure a termination payment which would allow it to pay off its creditors. Moreover, if Mr Ensor failed to understand the rights given to URE by clause 10.2(d) at the time when it actually mattered, this further supports the case that he did not understand them at the outset when he would not have been concerned about termination.

125. As it was, none of the exchanges between Mr Ensor and Burges Salmon after receiving Mr Carey's email of 29 October 2018 referred to amalgamation at all. This again strongly suggests that no-one had identified it as a possible ground for termination, whether at URE or Burges Salmon. Further confirmation can be found in the email sent by Mr Ensor to Jonathan Hemmings of URE's accountants, Nunn Hayward, shortly after his conversation with Mr Burnette on 5 November 2018. On any fair reading indicate this indicates that it was a completely new point so far as Mr Ensor was concerned:

"Yes, lots of developments and possibly too many for me to recount however, on a positive note, NHG are in breach of two further clauses of our contract.

1. ...

2. They needed to seek our approval to continue the contract after their merger. No notice is required and the contract could be terminated instantly.

Burgess salmon's litigation partner is working on a letter to consolidate our position taking into account our previous letters and I hope this will be sent tomorrow.

…"

Thus it was that the first time clause 10.2(d) was raised in correspondence between the parties was in the Second Termination Letter of 7 November 2018.

126. In short, I conclude that Mr Ensor did not know that the circumstances in which the amalgamation took place gave rise to a right to terminate until he was told for the first time by Mr Burnette on 5 November 2018. He did not therefore have any knowledge of the right which could be attributed to URE.

127. It was suggested in NHG's written opening that this was nonetheless a case of blind-eye knowledge on the basis that Mr Ensor took a deliberate decision to continue performance of the Contract with a view to securing the LTC which was vital to the survival of URE rather than acquiring obviously available knowledge as to URE's contractual rights. It was submitted by Mr Riley that Mr Ensor could and should have consulted Burges Salmon about URE's rights and that this was knowledge which was obviously available to URE.

128. I reject this submission. Obviously Mr Ensor could have asked Burges Salmon to advise about all sorts of things but I find that there was no deliberate decision by him to avoid acquiring knowledge so as to amount to blind-eye knowledge. In my judgment, in order for that to occur, he would have had to suspect that there was some relevant provision in the Contract which may have been triggered by the events which had occurred but which he preferred not to know about. However, on the facts as I find them, he did not have any such suspicion. The situation is therefore far removed from one where Mr Ensor deliberately and for tactical reasons decided not to acquire

definite knowledge of a matter which he believed it was likely he could confirm as in *ICCI v Royal Hotel Ltd,* [1998] Lloyd's Rep.I.R. 151 at 172 *per* Mance J (as he then was). The fact that a contracting party may be contractually bound by terms in a contract which it has not read does not mean that it is fixed with knowledge of each and every term for the purposes of waiver by election even if it has no true understanding of them.

Did URE waive its right to terminate by continued performance?

129. In the light of my finding that URE did not have the requisite knowledge of its right to avoid, this question strictly does not arise. However, I deal with it in deference to the full submissions which I received from both parties.

130. It was not in dispute that following the amalgamation, the parties continued to perform the Contract as before. Thus, URE continued to supply energy and to submit invoices every month. It also continued its efforts to achieve the AMR rollout, asking repeatedly for NHG's co-operation in gaining access to the relevant sites, and of course it carried on with the negotiations for the LTC.

131. If URE had known of its right to terminate under clause 10.2(d), conduct of this nature without a reservation of rights would have been a very powerful indication that it was affirming the Contract so as to amount to a waiver. The only real question would have been whether the provisions of the Contract prevented such a conclusion, specifically clause 10.2 itself, which provides for a right of termination *"at any time"* and clause 13.1, which provides that *"No delay or omission by either party in exercising any right, power or remedy under this Contract shall be construed as a waiver of such right, power or remedy…"*.

132. As recently confirmed by the Supreme Court in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd,* [2018] UKSC 24; [2019] AC 119, the courts will generally enforce any agreement of the parties as to the effect to be given to their subsequent dealings by a "no oral modification" or entire agreement clause. Thus, the parties can expressly agree by means of such clauses to limit or alter what would otherwise have been the effect of their conduct during the course of the contract. And while a party can be estopped in an appropriate case from relying on such a clause, its very existence necessarily raises the threshold before the conduct in question can give rise to an estoppel: see *MWB v Rock (supra)* at [16]. In other words, the parties' agreement becomes part of the matrix against which the conduct falls to be assessed.

133. In agreement with Mr Justice Butcher in *Sumitomo Mitsui Banking Corp Europe Ltd v Euler Hermes Europe SA NV,* [2019] EWHC 2250 (Comm); [2019] 2 CLC 349, I consider that the same must be true by parity of reasoning with non-waiver clauses. There is therefore no reason in principle why a non-waiver clause cannot itself be waived, although waiver in the face of such a clause will require conduct which makes clear that the waiver is intended to be effective notwithstanding the clause: see *Sumitomo (supra)* at [64]; *A v B,* [2020] EWHC 2790 (Comm) at [41]. Clauses 10.2 and 13.1 accordingly fall to be construed in this light.

134. Like Moulder J, I do not construe either clause as excluding the doctrine of waiver altogether. Taking clause 10.2 first:

i) The words *"at any time"* are inherently ambiguous and could bear any one of at least three meanings:

a) They could refer to the occurrence of the event of default, thus permitting termination whenever during the life of the contract the

event occurs;

b) Or they could mean that the right can be exercised so as to terminate the contract with effect from a date which need not be immediate but could be at any time in the future;

c) Or they could refer to the exercise of the right of termination itself, thus allowing termination at any time after the relevant event irrespective of when it occurred.

ii) In my judgment, the first two of these possibilities can properly be said to fall within an ordinary and natural reading of the words. Indeed, the second possibility naturally dovetails with the obligation in clause 10.4 to notify the date on which the contract is to terminate.

iii) However, I do not think that the words naturally cover the third possibility, at least without qualification. If taken at face value, they would permit a termination potentially years after the relevant event, possibly after the contract itself had expired. Assuming that the terminating party was aware of its right to terminate, I can see no good commercial reason why the parties intended it to be able to nurse a private intention to terminate without disclosing it or without at least reserving its rights and I do not consider that this is what a reasonable person would have understood the parties to intend. After all, the underlying premise of clause 10.2 is that the stipulated events are so serious as fundamentally to undermine the relationship between the parties such that the innocent party is allowed to choose whether to bring it to an end or not. In this respect, the position is not dissimilar from an election to terminate or affirm following a repudiatory breach. It is certainly not

analogous to the case of break clauses such as discussed in *BDW Trading Ltd (t/a/ Barratt North London) v JM Rowe (Investments) Ltd,* [2011] EWCA Civ. 548 where it was held that the right could be exercised at any time after it had arisen. On the contrary, in such circumstances, it can reasonably be expected that the terminating party will make a decision promptly and I can discern no objective intention that it should be allowed to wait and see indefinitely without either disclosing its intentions to the other party or reserving its rights.

iv) For these reasons, I hold as a matter of construction that clause 10.2 is not effective to exclude the doctrine of waiver where the innocent party is aware of its right to terminate. Where it is unaware of the right, waiver is of course not possible, although there may be scope for an estoppel in appropriate circumstances.

135. As regards clause 13.1, I held in *Prakash Industries Ltd v Peter Beck und Partner Vermögensverwaltung GmbH,* [2022] EWHC 754 (Comm), following the decision of the Court of Appeal in *Tele2 International Card Company SA v Post Office Ltd,* [2009] EWCA Civ 9, that as a matter of construction, a materially identical clause only applied to the negative sin of omission, i.e., pure delay or omission, and did not preclude reliance on positive acts such as a demand for contractual performance from a counterparty. *Tele2 (supra)* further makes clear that a clause of this nature does not exclude the doctrine of waiver by election although, in accordance with the approach in *MWB v Rock,* the clause must be taken into account in determining whether the conduct relied upon is sufficient to constitute waiver, or whether it is no more than mere delay or omission which the parties have agreed is not to be so regarded. In that case, there was held to be affirmation by continued performance.

136. Mr Sims accepted the proposition that clause 13.1 did not preclude NHG from relying on positive conduct but submitted that the conduct relied upon had to be looked at in context. He pointed out that the parties here were locked into a contract which required the ongoing supply of energy by URE. Pursuant to its regulatory obligations, URE could not simply cut off supplies and so any delay in exercising its rights necessarily meant a continuation of the Contract. He submitted that if it were otherwise, clause 13.1 would have no practical operation. At the very least, he said, it must limit the circumstances in which URE's conduct can be construed as a clear and unequivocal communication of a decision to abandon its right to terminate.

137. There is some force in this submission and, as I have already accepted, clause 13.1 itself must play its part in any assessment of whether URE's conduct is truly to be regarded as a waiver. However, continuing to supply electricity because there is no possibility of doing anything else is one thing. Positively requiring NHG to perform its obligations is another. Thus, even if the former on its own would not amount to a waiver in the particular circumstances of an electricity supply contract, I have no doubt that positively calling upon NHG to co-operate in relation to the AMR rollout and continuing to negotiate for the LTC was sufficient positive conduct to amount in principle to an affirmation and thus to a waiver notwithstanding clause 13.1.

138. I am not persuaded by Mr Sims' further argument that URE needed sufficient time to assess the consequences of the amalgamation. He submitted that these consequences only became apparent upon NHG's decision not to proceed with the LTC. However, NHG was always at liberty not to go ahead with the LTC and in a sense this was a risk which URE always faced (whether it was aware of it or not). In any event, if URE had been aware of its right to terminate under clause 10.2(d), and was seriously

considering termination as a possibility, I would have expected it to take proactive steps to ascertain the position and not just to sit on its hands. In my judgment, this is not a case like *Force India Formula One Team Ltd v Etihad Airways PJSC,* [2010] EWCA Civ.1051; [2011] ETMR 10 where it was held to be both legitimate *and necessary* for the innocent party to consider its position in the face of a repudiatory breach and that both parties knew that this is what it was doing.

139. I am also unpersuaded by Mr Sims' submission that in circumstances where NHG itself did not think there was any right to terminate as a result of the amalgamation, it could hardly have understood that URE did think there was such a right and was electing to waive it. In this connection, he relied upon *Kosmar (supra)* at [38] where Rix LJ held that waiver not only required knowledge of the right on the part of the allegedly waiving party, but also knowledge on the part of the other party that a choice was being made. However, later in his judgment at [74], he quoted with approval a passage from *Royal Hotel (supra)* which makes clear that (i) the impact of the conduct on the other party is to be assessed *objectively* by reference to its impact on a reasonable person in the position of the other party and (ii) a reasonable person in that position must be treated as having a general understanding of the possibility of a choice. I cannot therefore regard *Kosmar* as authority for any proposition that the non-electing party must *subjectively* appreciate that there is a choice to be made.

140. In summary, if (contrary to my findings) URE had been aware of its right to terminate, its conduct following the amalgamation would have been sufficient and, on an objective basis, sufficiently clear and unequivocal to amount to a waiver.

Is URE to be deemed to have elected to continue with the Contract through lapse of time?

141. A closely-related argument advanced by NHG in reliance on *The Kanchenjunga, Kosmar* and *Force India (supra)* was that even if it was wrong about everything else, nonetheless the lapse of time between URE becoming aware of the amalgamation and its purported exercise of the right to terminate (some eight months) was so great that URE should be regarded as having elected to continue with the Contract.

142. This argument was put forward for the first time in the Re-Re-Amended Defence. URE submitted that it was not open to NHG to raise the argument because it sought impermissibly to go behind the judgment of Moulder J. Mr Sims referred me to paragraph 94 of Moulder J's judgment which he argued made clear that NHG's case had been firmly based on a positive act of waiver rather than mere delay. That, he said, was the only issue on which the judge permitted the matter to go to trial and an argument that lapse of time was sufficient in itself would fall outside the scope of NHG's permission to defend.

143. I have not found it necessary to examine in detail the ambit of the permission granted by Moulder J, since I take the view that a mere lapse of time – however long it lasts – is not a positive act absent some further positive act of performance. It is therefore clearly caught by clause 13.1 for the same reasons as I gave in *Prakash v Beck (supra)* at [113].

Conclusion on the Amalgamation Claim

144. Mr Riley made much of the fact that URE's continued performance of the Contract after the amalgamation was due to it having its eyes firmly fixed on the prize of the LTC which was its very *raison d'être.* He submitted that Mr Ensor was disingenuous in maintaining in cross-examination that he did not know what he would have done in April 2018 if he had been aware of URE's right to terminate at that stage. As to this,

Mr Ensor readily agreed, indeed positively averred, the importance of the LTC from URE's point of view. He also accepted that URE's decision to terminate at the end of October 2018 was triggered by NHG's announcement that it would not after all proceed with the LTC. In those circumstances, I suspect that in April 2018 he would more likely than not have continued with the Contract on the basis of his understanding that the amalgamation had not affected the relationship in any fundamental way. Critically, however, in that scenario, he may well have taken legal advice and been told that any continuation should be under a reservation of rights. Nonetheless, this is pure speculation on a hypothesis which on my findings does not arise because he did not in fact have the requisite knowledge for a waiver.

145. I therefore conclude that URE had not waived its termination right under clause 10.2(d) prior to the date at which it sought to exercise it. It was entitled to terminate on this ground with all the consequences which follow, and the Amalgamation Claim accordingly succeeds.

146. To the extent that this seems a surprising result, I remind myself that this conclusion does not mean that NHG was left completely without remedy in the face of what I have held to be otherwise affirmatory conduct. As I have held, URE's conduct following the amalgamation would have been sufficient to found an estoppel and this was a defence which was open to NHG in principle and which it sought to pursue. However, it failed on the facts because NHG could not establish any detrimental reliance. It is no doubt unfortunate for NHG, but not unjust, that it cannot rely on a legal defence to fill the gap left by the failure of its equitable defence.

(2) The Material Breaches Claim

147. Given my conclusion on the Amalgamation Claim, URE's alternative case based on material breach is moot. It nonetheless occupied a considerable part of the trial and it is right that I should deal with it.

148. Before turning to the issues which arise under this part of the case, it is necessary first to address the question of what, if anything was agreed between the parties regarding the AMR rollout.

149. Following URE's successful tender for the Contract, a meeting took place between the parties on 13 September 2017. There was a dispute as to whether this was anything more than an initial meet-and-greet occasion (NHG's case) or whether more substantive matters were discussed and agreed (URE's case). Mr Ensor's recollection was that in addition to discussing the need for urgency in concluding an agreement, the parties also discussed the AMR rollout which had, in fact, already commenced under the contract with Opus. His evidence was that, although the rollout technically formed part of URE's bid for the LTC, Genesis wanted the programme accelerated because of the benefit in having smart meters installed as soon as possible. He recalled a conversation about the need to take meter readings and that Mr Brown had complained about site managers being unresponsive to his requests for readings. This prompted an exchange between Mr Jameson and Mr Brown as to whether Mr Jameson should be making the requests as he was more senior than Mr Brown and the managers were accordingly more likely to pay attention to him. According to Mr Ensor, it was agreed that taking readings from some 2900 meters would be challenging and that the best approach would be to take readings at the same time as a smart meter was installed. In that way, the site managers would be relieved of the need to take readings themselves and only one visit to the site would be necessary.

This effectively killed two birds for Genesis with one stone and it was Mr Ensor's clear understanding that this was agreed.

150. In the event, Mr Brown accepted in cross-examination that Mr Ensor's account of the meeting was quite possibly accurate. He certainly agreed that there had been historical problems with a lack of response by site managers and that the parties had agreed that readings would be taken as and when meters were installed. The entire subsequent history of the relationship confirms that both parties understood that URE would be undertaking the rollout as part of its obligations under the Contract, irrespective of the fact that there was no express written provision requiring it to do so. I therefore proceed on the basis that it was agreed between the parties that the rollout would be carried out as soon as possible for their mutual benefit and that URE would take meter readings at the same time as carrying out the installations. NHG's obligations under clauses 5.1 and 6.3 of the Contract must therefore be approached in the light of this agreement.

151. As described in paragraph 27 above, there was considerable delay in the start of the rollout. It is unnecessary to determine whether this might have formed a legitimate cause for complaint by Genesis/NHG against URE as no such claim has been made. I therefore regard the relevant question as being whether NHG was in breach of its obligations at any time from 15 May 2018, that being the date of the meeting when the rollout effectively kicked off.

152. NHG's obligation under clause 6.3 was uncontroversial: it was required to allow URE reasonable access to instal meters and obtain readings. Clause 5.1 gave rise to more debate. Under this clause NHG was obliged to provide URE with all assistance and

information reasonably required by URE to comply with its obligations under its Licence or any Industry Agreement necessary to permit the supply of electricity.

153. I agree with URE that as a matter of construction *"necessary"* qualifies the category of Industry Agreement, Licence, code etc., not the word *"obligations"*. In other words, the first question is whether the relevant Licence etc. was "necessary" in order to permit the supply of electricity. If it was, then in my judgment NHG was obliged to provide all assistance and information reasonably required by URE to enable it to comply with the totality of its obligations under that Licence not just the specific provisions relating to the physical supply.

154. In this case, URE's Supply Licence was clearly necessary to enable URE to supply electricity and therefore fell squarely within the ambit of the clause. It was not suggested by either party that there was any other agreement or code etc. which might need to be considered. So far as relevant, Condition 21B.4 of the Licence required URE to take all reasonable steps to obtain a meter reading for each meter at least once every year, while Condition 39.1 required it to take all reasonable steps to ensure that smart meters were installed on or before 31 December 2020.

155. The regulatory deadline for the installation of smart meters was subject to change by the authorities, often without warning and at very short notice. It was nonetheless common ground that the deadline at the date of the Contract was 31 December 2020. It is also relevant in this case to take account of the fact that first generation smart meters (SMETS 1) were being superseded by second generation meters (SMETS 2) and that in order to be permitted to instal SMETS 2 meters, URE required to pass an audit which it would not be able to do until March 2019. Accordingly, both parties understood that Phase 1 of the rollout as planned would be undertaken with SMETS 1

meters and that it was therefore necessary to work to a hard deadline of 5 December 2018.

156. In my judgment NHG was therefore obliged under clause 5.1 to provide URE with all assistance and information reasonably required by URE to enable it to take reasonable steps itself to obtain meter readings annually and to instal at least the Phase 1 SMETS 1 meters by 5 December 2018.

157. NHG submitted that clause 5.1 required URE to specify in relation to each request for assistance/information the precise provision of the Contract or industry agreement or licence etc. under which, and the purpose for which, access to each site was required, i.e., whether to read or instal a meter or both. I regard this as a wholly unrealistic lawyers' point. There was nothing to this effect in the wording of the clause and it works perfectly well without. If NHG was ever in doubt as to the reasonableness of what it was being asked to do, it could always have asked for clarification. Moreover, there was no suggestion that this was ever an issue. On the contrary, NHG clearly understood and agreed that access would be required for either or both purposes.

158. Mr Riley pointed out that URE was only obliged under its Licence to take "reasonable steps" to instal meters or take readings. He submitted that URE could not therefore be in breach of its obligations provided it had made reasonable efforts to gain access and that it made reasonable efforts by asking NHG to procure access. Consequently, he said, breach by URE of its obligations could not depend on anything done or not done by NHG and NHG's obligation was commensurately diluted such that it was not required actually to *ensure* access.

159. I cannot accept this submission. Its effect would be that NHG could sit on its hands and do nothing in response to any requests because (on its case) URE would not be in

breach. This is pure sophistry. URE's underlying substantive obligation was actually to instal the meters and take the readings, not simply to take reasonable steps and in my judgment, on its ordinary and natural meaning NHG's obligation under clause 5.1 was effectively of the same order as under clause 6.3, namely to provide all assistance and information reasonably required by URE to enable it to do so in accordance with the programme as agreed from time to time. Whether or not the regulator regarded URE as having taken reasonable steps was of no concern to NHG. In any event, URE's obligation was to take *all* reasonable steps and I agree with Mr Sims that it would not necessarily have been sufficient for URE simply to ask for access and then sit back and take no further steps to follow up a request should access not initially be provided.

160. The actual progress of the rollout can only be described as halting: see paragraphs 3043 above. There was an initial delay of about two weeks before Mr Nolander provided the updated contact details as agreed. Moreover, despite the approach to the rollout having been agreed, and the template letter to site managers reviewed and agreed by Mr Nolander, it appears that NHG had taken no steps to warn the managers in advance that they would be receiving an approach from IMS or to inform them about the rollout more generally. Several of them were evidently taken by surprise and thought that it was a scam of some kind, with the result that Mr Nolander had to send out a reassuring email.

161. Where the letter inviting site managers to get in touch to arrange an appointment did not elicit a response, the IMS procedure involved calling each manager at least three times. In many cases, they were called up to six times. However, it is clear that IMS was having virtually no success and the rollout proceeded at a pitifully slow rate. The

evidence of Mr Waitt was that the main problem was the unresponsiveness of the site managers and Mr Brown accepted in his oral evidence (although not in his written statement) that this was the case. For his part, Mr Nolander accepted in cross-examination that IMS'S request to managers to make contact to arrange an appointment to suit their convenience was reasonable and that there was no reason why they should not have responded.

162. The lack of response is overwhelmingly supported by the contemporaneous correspondence and in fact appears to have been a continuing manifestation of an historic problem that Genesis was already experiencing prior to the conclusion of the Contract. This much is clear from an email sent by Mr Brown on 23 May 2018 in which he complained internally that he had asked all business managers to submit meter readings in May 2017 (a year previously and well before the Contract with URE) but had since received fewer than ten. As he stated in that email *"this has been a problem for some time now."*

163. There is no doubt that NHG was aware of the problems. The fact that Mr Ensor and IMS also anticipated that access might be a problem even before the Contract was concluded is beside the point. Both Mr Brown and Mr Nolander accepted that there had been an agreement to adopt the procedure suggested by IMS and that URE was looking to NHG when difficulties were experienced. I therefore find it baffling why NHG, and in particular Mr Nolander, did not think it necessary to take more proactive steps to ensure that the site managers responded. For example, there was no evidence that Mr Nolander took any steps to chase up the list of non-responsive managers provided to him on 24 July 2018. This is extraordinary given that, on his own evidence, they nearly all worked in the same office as him. He even agreed that it

would have been very simple for him to convene a quick meeting or at least arrange to speak to them individually and that there was no reason not to have done so. However, for reasons best known only to himself, he did not do it – even when Mr Waitt expressly asked whether he could attend a meeting with the site managers. Nor did Mr Nolander take any steps to explain to the site managers the importance of the installation of smart meters for NHG or to urge them to co-operate with the process. In fact, there was no evidence of any real effort being made in response to URE's requests for assistance: no attempt was made to analyse the reasons why access was proving such a problem or to suggest (let alone implement) any alternative solutions. On the contrary, Mr Nolander seemed quite content to leave everything until Phase 2 and I had absolutely no sense that NHG regarded this as anything it needed to exert itself over.

164. In his oral evidence, Mr Nolander advanced a number of rather limp excuses to the effect that he had not been notified of any particular contact numbers that were not correct. He claimed that he would have been more proactive if he had been. I bear in mind, however, that URE and IMS would not necessarily know that a failure to respond was because the contact details were incorrect. Even if they were, that could only have been because Genesis/NHG had provided incorrect data in the first place. In any event, NHG was provided on at least three occasions with a list of serial offenders and the contact details that IMS were using. Mr Nolander accepted *"with hindsight"* that he could have done more sooner. Realistically, he had little option, although I do not accept that he needed the benefit of hindsight to appreciate this. I therefore reject his supposed justifications for his inaction.

165. In these circumstances, I have little doubt that NHG did not provide URE with all assistance and information reasonably required to enable URE to comply with its regulatory obligations as regards installing smart meters and obtaining meter readings at least annually. Nor did it provide reasonable access for these purposes. URE and IMS found that contact details for the site managers were frequently inaccurate and despite their repeated pleas for help in contacting the serial offenders, NHG and Mr Nolander did nothing to move the process forward when they could very readily have done so. This was a running sore and a constant complaint. I therefore find that NHG was in breach of both clauses 5.1 and 6.3 of the Contract.

166. The next question is whether those breaches were material. In order for a breach to be material, it must be serious and substantial. This is a fact-specific assessment which depends on all the facts, such as the terms and duration of the agreement, the circumstances in which the breach was committed and its nature and consequences, including, where appropriate, its commercial consequences: see *Vivergo Fuels Ltd v Redhall Engineering Solutions Ltd,* [2013] EWHC 4030 (TCC) at [364].

167. I have not found this an entirely straightforward enquiry. Prior to the end of October 2018, no-one knew that the Contract would be terminated after little more than a year. I am not persuaded that there was any real risk that the breaches would put URE in breach of its licence obligations. URE was clearly making efforts to progress matters and from a regulatory point of view, it did not particularly matter about the timescale for installation of smart meters provided it was completed by 31 December 2020. There is no indication that this final deadline was ever in jeopardy. The "deadline" of 5 December 2018 to which the parties were working for Phase I was purely self-imposed because of URE's need to undertake an audit before it was permitted to instal

SMETS 2 meters and if NHG had to wait until March 2019 for SMETS 2 meters, it only had itself to blame. I accept that the breaches had the potential to impact URE adversely in the sense that lack of accurate consumption data meant there was a risk of it having to purchase energy at a disadvantageous rate over and above what it had purchased forward on the basis of its calculation as to its requirements. However, there was no evidence as to what extra expenditure it had already incurred for this reason at the date of termination or what additional expenditure it could reasonably expect to incur.

168. In any event, despite URE's continual complaints, the contemporaneous evidence shows that both sides were sitting down to discuss the problem on the basis that it was something which could and should be worked through. It was not regarded as insurmountable and there was no indication that URE was treating it as a serious contractual failing by NHG. On the contrary, at the meeting on 17 October 2018 the parties agreed an action plan to take the project forward on terms which were apparently satisfactory to both sides.

169. Taking all the evidence in the round, I conclude that NHG's breaches, while hugely irritating and wholly unnecessary, and while they were obviously impeding the rollout, were not preventing URE from performing its primary obligations under the Contract. All the evidence shows that URE was working constructively with NHG to overcome the difficulties and was deliberately trying not to make mountains out of molehills (in Mr Waitt's words). URE never suggested that they amounted to a serious breach of contract until it was itself looking for reasons to terminate following the indication that the LTC would not be concluded. In those circumstances, I am unable to say that NHG's breaches were material in terms of the Contract overall.

170. That being the case, the question of remediability does not arise. I nonetheless express my views very briefly.

171. "Remediable" in this sense means putting the breach right for the future, rather than nullifying the effect of the breach to date: *F.L. Schuler AG v Wickman Machine Tool Sales Ltd,* [1974] AC 235 at 249-250. The breaches were clearly remediable in this sense – at least in theory. Indeed, URE positively argued that the 4-step action plan was the agreed means of remedy. URE was therefore required by the terms of clause 10.2(b) to serve a 10-day notice.

172. Despite Mr Sims' submission to the contrary, I do not accept that the obligation to serve a 10-day remediation notice under clause 10.2(b) is only engaged where the breach in question is capable of remedy within 10 days. Such a construction of the clause would make the contractual framework for giving notice unworkable since it would be left to the supplier alone to assess whether the breach was capable of remedy in time without giving the customer any opportunity to argue to the contrary. That seems to me to be wholly uncommercial and cannot be what the clause requires. To the contrary, on its plain wording the clause states that if the breach is capable of remedy, a notice must be served. If the parties had intended this to mean "capable of remedy within 10 days" they could very easily have said so.

173. Whether or not NHG had either the capability or willingness to remedy the breach (and, if so, whether it could have been accomplished within 10 days) is, of course, an entirely different question. For what it is worth, I very much doubt that the four stages of the action plan could or would have been completed within 10 days, but since it is irrelevant to the obligation to serve a notice, and because the Contract was

brought to an end before the notice period had expired, there is no need for me to make a finding one way or the other.

174. In summary, I find that URE did not have any right to terminate the Contract under clause 10.2(b) and the Material Breaches Claim fails.

(3) Termination

175. As I have found above, as at the end of October 2018 URE had a right of termination under clause 10.2(d) (albeit not under clause 10.2(b)). Under clause 10.4, it was obliged to give notice specifying the date on which the Contract would terminate. Accordingly, while it might in theory have been able to terminate forthwith on 31 October, it could not do so without giving notice to this effect, which it did not do. It is not in dispute that the Termination Letter was accordingly repudiatory, not least because it purported to terminate only under clause 10.2(b) in circumstances where (as I have found) there was no material breach and the requisite 10-day notice was not given.

176. Nonetheless, it is trite law that a repudiatory breach is a thing writ in water unless and until it is accepted and in this case, the Termination Letter was withdrawn before the repudiation was accepted. Both parties proceeded thereafter on the basis that the Contract was still on foot. I reject NHG's suggestion that the Revocation Letter was itself repudiatory. On the contrary, it expressly cured and withdrew the previous repudiation and made clear that URE intended to continue performing its obligations in accordance with the Contract. I do not regard the assertion that NHG was in material breach (even if incorrect) as itself a repudiation or renunciation of the Contract. An actual purported termination might have been different, but a contracting party does not necessarily repudiate a contract by invoking contractual

machinery in support of an incorrect view of the counterparty's obligations. It is unnecessary for me to determine whether (as NHG argued) the Revocation Letter was ineffective as a 10-day notice because it failed to specify the alleged breaches or what was required to remedy them.

177. In any event, even if the Revocation Letter was repudiatory, the repudiation was not accepted prior to service of the Second Termination Letter. I do not accept that the latter was repudiatory. It was clearly not repudiatory in so far as it sought to terminate the Contract under clause 10.2(d) as I have found that URE was entitled to terminate on that basis. Nor was it repudiatory in any other respect. It did not purport to terminate under clause 10.2(b) and could not in any event have done so until the 10-day notice period had expired. It merely reiterated URE's view that NHG was in material breach and that a 10-day notice had been given. It did not attempt to serve a fresh notice, although it might be said to have cured at least some of the alleged deficiencies in the Revocation letter by identifying the nature of the breaches in more detail.[3]

178. The Second Termination Letter was accordingly effective to give notice of termination under clause 10.2(d) as from whatever date was specified in accordance with clause 10.4, namely 4.00 pm on 14 November 2018. There is no contractual requirement for a clause 10.4 notice to specify any particular date or time, so it is irrelevant that URE may have intended the date to align with the 10-day notice given under 10.2(b) but miscalculated the correct period. It follows that there is no need to read the Second Termination Letter other than in accordance with its terms. It is

[3] I note that both the Termination and the Revocation Letters referred only to clause 6.3. I regard it as doubtful whether URE could simply "tack on" clause 5.1 in the Second Termination Letter without serving a further 10-day notice.

equally irrelevant that the 10-day notice given under clause 10.2(b) had not then expired.

179. It follows that NHG's letter of 14 November 2018 was ineffective for any purpose. It expressly only addressed the notice of termination given under clause 10.2(d), which it purported (incorrectly on my findings) to treat as a repudiatory breach. It does not address the allegations of material breach. Moreover, it was delivered at 1610, after the Contract had already been terminated by the Second Termination Letter.

180. Accordingly, I find and hold that the Contract was terminated in accordance with URE's notice of termination under clause 10.2(d) at 4.00 pm on 14 November 2018. URE's alternative case that it accepted NHG's repudiatory breach on 15 November 2018 therefore does not arise.

(4) Termination Payment

181. It was common ground that if the Contract was validly terminated under clause 10.2(d) as I have held it to be, URE was entitled to whatever Termination Payment was properly payable under clause 10.5. The only issue between the parties in this respect was whether the words *"the remaining value of this Contract to the Supplier"* meant the anticipated future income over the remaining life of the Contract or the net profit that URE would have made over the remaining term.

182. URE's case was that it meant the former. It argued as follows:

i) The fact that clause 10.5 is capable of applying to only some of the Supply Premises suggests strongly that the clause was looking at anticipated income which can readily be calculated for each set of premises. Profit, on the other

hand, depends on costs which may be incurred globally rather than in relation to separate premises.

ii) The words *"remaining value"* likewise point to income, since income is received in a roughly linear fashion whereas costs may not be incurred evenly over the life of the Contract. Indeed, it is completely adventitious when costs are incurred. They may be front-loaded, so that no profit is made until the later stages of the contract; or they may not be incurred until later; or, as in this case, no profit at all may have been incurred by the date of termination.

iii) Profit can only be calculated at the end of the Contract once all the costs are known.

iv) The word *"value"* as used in clause 4.4 clearly refers to income and should be construed consistently in clause 10.5.

v) Bearing in mind that clause 10.5 allows compensation following termination on grounds of default, the commercial intention must have been to compensate the claimant for some of its costs and some of its anticipated profits. 50% of income is a rough and ready approximation for this purpose.

vi) The parties could easily have stipulated for 50% of profits if that had been intended.

vii) Clause 10.7 expressly refers to clause 10.5 as a genuine and reasonable pre-estimate of losses, costs and expenses, suggesting that the latter is not simply addressing profits.

viii) The right of termination under clause 10.2 is for serious breaches which may well be repudiatory. There is no logic in limiting the contractual remedy under clause 10.5 to 50% of profits when the claimant could recover 100% of its lost profits in a common law claim for damages for repudiation. Moreover, the benefit of a liquidated damages clause is that it obviates the need for any complicated calculations. This benefit would be entirely negated if the clause required a calculation of net profits.

ix) The factual matrix included the fact that the Contract was a placeholder for the LTC. However, the charge for energy supply under the Contract was the same as that proposed under the LTC which, as noted above, would inevitably be loss-making for URE initially and would only become profitable in the long-term. URE was a start-up company and Genesis was its only customer. It had incurred significant start-up costs and it was therefore known by both parties that it would be unlikely to be making any profits. The collapse of the Contract would inevitably mean the collapse of the LTC and URE would need at least some contribution to its costs to allow an orderly winding-up.

183. NHG's contrary submissions were as follows:

i) The sums billable under the Contract were expressly defined as "Charges". The parties could and would have referred to "Charges" if they had intended clause 10.5 to refer to the sums payable for the remainder of the Contract.

ii) The *"remaining value of this Contract to the Supplier… (as determined by the Supplier acting reasonably)"* indicates that that value is specific to URE and requires calculation. This can only be a reference to profits rather than income, since the latter is fixed and known in advance.

iii) 50% of income would be a huge windfall for URE because if it purchased forward in large quantities, it could on-sell the energy, whereas if it only purchased small amounts, it would receive a disproportionately large payment. By definition this could not be a genuine pre-estimate of losses as stated in clause 10.7.

iv) 50% of income makes no commercial sense when termination could be triggered by events which did not necessarily involve any default by NHG.

v) Furthermore, as was known by Mr Ensor and Mr Jameson before the Contract was concluded, URE would not in fact be purchasing forward for more than one month at a time. This was part of the factual matrix against which clause 10.5 falls to be construed and it is implausible that the parties intended to refer to remaining turnover since it was never contemplated that URE would be exposed to the risk of purchasing large quantities forward which it would not be able to resell.

184. There are points to be made on both sides of this debate. Ultimately, however, I have concluded that URE's construction is to be preferred, essentially for the reasons it advanced. The natural and ordinary meaning of the words suggests that "value" signifies the amount payable to the supplier over the remaining life of the Contract. NHG's argument that the parties could have used the defined term "Charges" if they had meant income runs into the difficulty that "Charges" is defined as a rate rather than as a sum of money and also includes more than simply income, being defined as everything owed under the Contract. Moreover, the point is neutralised by the converse argument that the parties could equally well have said "profit" if that was what they meant. Furthermore, in circumstances where it could not be predicted in

advance whether or when profits would be made over the duration of the Contract, the *"value of this Contract"* more naturally reads as the amount payable under the Contract to the supplier.

185. The fact that this amount requires calculation despite supply rates being fixed is explicable because URE would need to estimate the amounts of energy that would be supplied to specific premises and this is therefore a calculation that it is obliged to carry out acting reasonably. I accept that URE would not have been purchasing large quantities of energy forward, but energy costs would not have been the only costs incurred by URE in setting up the business and preparing for the LTC. It is accordingly not unreasonable to take 50% of income as a rough and ready approximation of reasonable compensation for losses sustained in the event of early termination, even if one leaves out of account the fact that both parties knew this was only the precursor to a much longer contract where any profits would be generated. I regard this construction as entirely consistent with the acknowledgment in clause 10.7 that this was a genuine pre-estimate of losses, costs and expenses. It would also be somewhat counterintuitive for a liquidated damages clause to require a full-blown profit calculation.

186. The parties have agreed that on that basis the termination payment under clause 10.5 is properly and reasonably calculated as £3,946,861.56.

187. It is common ground that in relation to contractual termination under clause 10.2(d), clause 10.5 is enforceable in accordance with its terms. It is therefore unnecessary for me to determine whether the clause is nonetheless an unenforceable penalty in the event of termination for material breach under clause 10.2(b) or for repudiation at common law: see *Lewison, The Interpretation of Contracts* (8th ed.) paras 17.30-

17.31. I merely note that Mr Riley's submission that the proper construction of clause 10.5 is informed by whether it would be considered penal in a breach scenario puts the cart before the horse. In my judgment, the proper approach is to determine as a matter of construction what the clause means before attempting to decide whether or not it is penal.

188. URE's alternative claim for damages at common law on the grounds of repudiatory breach likewise does not arise.

(5) Counterclaim

189. The amount of credit due to NHG is now agreed at £156,000 and my judgment will reflect this. However, since I have held that URE was entitled to terminate the Contract as it did and was not in repudiatory breach, the remainder of the counterclaim fails. It is therefore not necessary to determine the extent to which the agreed damages would have been limited or excluded, if at all, by virtue of clauses 11.3 and/or 11.5.

Conclusion

190. There will therefore be judgment for URE on its claim in the sum of £3,946,861.56 with contractual interest under clause 7.11 at 2% above Bank of England Base Rate.

191. I wish to express my thanks to all counsel and their respective legal teams for their assistance, including junior counsel. I intend no discourtesy in not prolonging this judgment by addressing the points argued most effectively by Mr Wibberley and Ms Sharma.