Neutral Citation Number: [2022] EWHC 1844 (QB)

Appeal Reference: CH-2022-BRS-000002
County Case No: G97YX537

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE BRISTOL
ON APPEAL FROM THE COUNTY COURT AT SWINDON
ORDER OF MR RECORDER McGRANE DATED 7 JANUARY 2022

Bristol Civil and Family Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 15 July 2022

Before :

THE HONOURABLE MR JUSTICE MURRAY

- -

Between :

NPOWER COMMERCIAL GAS LIMITED	**Respondent/ Claimant**
- and -	
SEP PROPERTIES LIMITED	**Applicant/ Defendant**

- -
- -

Mr Steven Reed (instructed by **Talbots Law Limited**) for the **Applicant**
Mr Trevor Berriman (instructed by **Judge & Priestley LLP**) for the **Respondent**

Hearing date: 7 July 2022

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Approved Judgment

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THE HONOURABLE MR JUSTICE MURRAY

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down are deemed to be 15 July 2022 at 10:30 am.

Mr Justice Murray :

1. This is a renewed application by SEP Properties Limited ("SEP") for permission to appeal against an order dated 7 January 2022 made by Mr Recorder McGrane ("the Order") in relation to a claim made by Npower Limited ("NP") against SEP (County Court Claim No. G97YX537), the trial of which was heard by the judge sitting in the County Court at Winchester on 20-21 October 2021.

2. The judge set out his reasons for making the Order in his judgment dated 5 January 2022, which according to a recital in the Order was handed down on 10 January 2022 ("the Judgment").

3. In the Order, the Judge gave judgment for NP in various sums in relation to three periods of time, dealt with interest and costs, and made other related directions.

4. Under paragraph 1 of the Order, the respondent, Npower Commercial Gas Limited ("NP Commercial Gas"), was substituted for Npower Limited ("NP") as claimant for the purposes of this claim. As noted at paragraphs 110-112 of the Judgment, following a restructuring of the Npower Group, a Global Substitution Order was made by the High Court on 9 November 2021 pursuant to which, it appears, Npower Commercial Gas acquired the rights and obligations of NP for certain purposes. Paragraph 1 of the Order confirms that position in relation to this claim and is not challenged.

5. SEP sought permission to appeal from the judge on five grounds, corresponding to Grounds 1-4 and 6 of the six Grounds of Appeal appended to its Appellant's Notice. The judge gave his reasons for refusing permission in a written decision dated 21 January 2022.

6. When SEP filed its Appellant's Notice and Grounds of Appeal (sealed by the Court on 14 February 2022), it added an additional ground, Ground 5.

7. On 1 April 2022, Foxton J granted SEP permission to appeal against the Order on Ground 1 and refused permission on the remaining five grounds. SEP renews its application for permission to appeal on each of Grounds 2 to 6.

8. The relevant test for granting permission to appeal on a first appeal from the County Court to the High Court is set out at CPR r 52.6. On SEP's renewed application, I have to determine whether any of Grounds 2 to 6 would have a real prospect of success on appeal or whether there is some other compelling reason for the appeal to be heard.

Relevant background

9. The background is set out in some detail in the Judgment. A brief summary will suffice for the purposes of this application.

10. At the relevant times, NP was a company primarily in the business of supplying electricity to commercial and residential consumers.

11. SEP is a company in the business of owning and letting property. Its Defence and Counterclaim states that it is the owner of over 350 commercial properties. It is a

wholly owned subsidiary of SEP Properties Holdings Limited. It has also acted at times as a property management agent for related companies, including SEP Properties Group Limited.

12. This matter relates to a property combining commercial and residential units at an address in Cresswell Crescent in Walsall. At that address there is a building comprised of eight ground floor commercial units, numbered 10 – 24 (even), matched by eight first floor residential units, numbered 26 – 40 (even) ("the Property").

13. This claim relates to the supply of electricity by NP to a meter in the commercial unit in the Property known as 14 Cresswell Crescent. There were, in fact, two meters located in those premises, but this claim only concerns the supply made by NP to the meter referred to as "Meter 2" or "M2" in the Judgment.

14. NP by its claim sought to recover from SEP the sum of £24,171 for unpaid electricity supplied to Meter 2 pursuant to a written agreement between the parties dated 29 January 2015 ("the M2 Supply Contract") and an estimated amount of £15,000 for future sums that it anticipated would become owing by the time judgment was entered.

15. SEP denies liability on the basis that the electricity supplied by NP to Meter 2 did not supply electricity to the commercial unit at 14 Cresswell Crescent but instead to the associated residential unit upstairs known as 30 Cresswell Crescent. SEP maintains that, under the M2 Supply Contract, NP was obliged to supply electricity to the "site", which is 14 Cresswell Crescent. NP failed to do that as Meter 2 was supplying the flat at 30 Cresswell Crescent. According to SEP, it is for NP to pursue the relevant occupier/owner of 30 Cresswell Crescent for payment of the electricity supplied via Meter 2. As a matter of contract, SEP has no obligation to NP under the M2 Supply Contract.

16. The freehold of the Property had at one time been owned by Walsall Council.

17. During the 15 year period prior to January 2015, a company named Dave's Discount (Stores) Limited ("DDSL") leased certain ground floor units in the Property, including the commercial unit at 14 Cresswell Crescent. One of the directors of DDSL was Mr Palminder Singh, a director of SEP with day-to-day management of its business and the main witness for SEP in the proceedings before the judge.

18. On 25 September 2013 the freehold of the Property was purchased from Walsall Council by Mr Singh, his brother Mr Engrez Singh, Ms Sumerjit Kaur, and Ms Harjinder Kaur.

19. On 31 March 2015, the freehold of the Property was purchased by SEP Properties Group Limited, a company owned by Mr Palminder Singh and Mr Engrez Singh.

20. On 31 March 2020, the freehold of the Property was purchased by SEP from SEP Properties Group Limited.

21. In January 2015, SEP, acting as a management agent for SEP Properties Group Limited, engaged the services of an energy broker, Energy Booker Limited ("EBL"), to check the energy market on its behalf and source a competitive deal for energy for

the property portfolio it managed, including the Property. Further to that mandate, EBL approached NP on SEP's behalf.

22. In relation to the commercial unit at 14 Cresswell Crescent, EBL procured from NP two written proposals (subject to contract), each dated 28 January 2015, for the supply of electricity, one proposal relating to a meter referred to in the Judgment as "Meter 1", located at 14 Cresswell Crescent and the other proposal relating to Meter 2. It is not disputed that each proposal was accepted by SEP, one being the M2 Supply Contract and the other being a supply contract in relation to Meter 1 on almost identical terms other than the specification of the relevant meter.

23. The M2 Supply Contract provided for a fixed period of 19 months for the supply of electricity, starting from 1 March 2015 and ending on 30 September 2016. Condition 4.2 of the M2 Supply Contract required receipt by NP of written notice of termination from SEP at least 30 days prior to the end of the fixed contract period. Condition 8.2 required, in the event that SEP intended to stop trading at, or to leave, the site, that SEP give NP 30 days' written notice, including information as to the name and contact details of the new occupier. Condition 8.2 further provided:

> "To avoid doubt, you will continue to be responsible for paying all charges that relate to the site under your contract until the landlord or new owner or occupier takes over responsibility for the supply or until we de-energise the site."

24. By a lease dated 29 January 2016, SEP Properties Group Limited granted a 20-year lease of the commercial units at Nos 14, 16 and 18 Cresswell Crescent to One Stop Stores Limited ("One Stop") and Trigger Retail Limited. The lease provides that the tenant is liable to pay "all reasonable and proper costs connected with any Utilities which are supplied to or consumed on the Premises".

25. On or about 14 July 2020, after SEP had failed to pay various invoices issued in relation to the electricity supply to Meter 2, NP, having concluded that SEP had failed to terminate the M2 Supply Contract or to appoint a new supplier, issued this claim.

26. On or about 28 September 2020, SEP filed its Defence and Counterclaim, the counterclaim being to recover payments made on invoices issued under the M2 Supply Contract, which SEP claimed that it had paid "innocently" but mistakenly, given that the invoices related to electricity provided by NP to Meter 2 that, in fact, supplied the flat at 30 Cresswell Crescent and not 14 Cresswell Crescent.

The Judgment

27. In the Judgment, the judge reviews in some detail the factual background dealing with the transfer of responsibility for the electricity supplies to Meter 1 and Meter 2. No issue arises on this claim in relation to Meter 1.

28. In relation to Meter 2, one of the issues in the case, referred to in the Judgment as "Issue A", is set out at [41(A)] as follows:

> "A. Whether SEP/EBL (on its behalf) notified NP in writing of a change of tenant/occupier to One Stop

> Stores Limited ('One Stop') in respect of SEP's Meter 2 Account, with effect from 29 January 2016 when One Stop assumed occupation of Nos 14-18 Cresswell Crescent pursuant to the Lease …; or whether the supply contract was otherwise ended."

29. Another issue, referred to in the Judgment as "Issue B", is set out at [41(B)] as follows:

> "B. Whether Meter 2 was operating correctly."

30. In the Judgment at [23], the judge described the "central contentious issue" in the case as being the question of the "site" to which NP was required to supply electricity under the M2 Supply Contract in order to fulfil its contractual obligations to SEP. I will refer to this as the "Site Issue".

31. In relation to the Site Issue, the judge concluded at [37] of the Judgment that:

> "… the 'site' which NP was required to supply electricity on a proper construction of the supply contract was Meter 2, that is to say the existing commercial meter located at Daves Discount Stores at No 14 Cresswell Crescent, and registered at that physical address in the ECOES database."

32. In light of that conclusion, he found at [38] that:

> "… it follows that SEP is required to pay NP for all electricity supplied by NP to Meter 2 as the contracted site, under Condition 5.1 of the Conditions attaching to the supply contract."

33. A concomitant finding of the judge (also at [38]) was that where the electricity went after it had been supplied by NP "to the contracted site" (that is, to Meter 2), and how it was used, was the responsibility of SEP as the customer under the M2 Supply Contract.

34. On Issue A, the judge concluded at [51]-[52] and [54] of the Judgment that:

i) NP never received formal notification of a change of tenant/occupier from SEP to One Stop as from 29 January 2016 in respect of Meter 2;

ii) no such written notification was ever sent to NP, whether by SEP, EBL, One Stop or anyone else; and

iii) accordingly, the M2 Supply Contract never came to an end under the relevant terms of the M2 Supply Contract and therefore remains in full force and effect.

35. In relation to Issue B, the judge concluded at [84] of the Judgment that Meter 2 was in proper working order, that it accurately recorded the consumption of electricity supplied to Meter 2 by NP under the M2 Supply Contract at all material times.

36. In the Judgment at [55]-[83], the judge reviewed the factual evidence relating to the operation of Meter 2 in some detail. At [85] he rejected SEP's case that Meter 2 only ever supplied 30 Cresswell Crescent and never 14 Cresswell Crescent.

37. In the Judgment at [86]-[90], the judge set out his reasons for rejecting SEP's counterclaim.

Grounds 2 to 6

38. Grounds 2 to 6 are as follows:

> "**Ground 2**
>
> 2. The Recorder erred and/or made a serious procedural error rendering the decision unjust by failing to consider the Claimant's disclosure failures either properly or at all and thereby allowing the Claimant to benefit from its own disclosure failures (that only became apparent during the trial).
>
> **Ground 3**
>
> 3. The Recorder erred by finding that the supply contract continued after the end of the fixed term.
>
> **Ground 4**
>
> 4. The Recorder erred by finding that the word 'site' in the supply contract was an administration number from an industry database when on a proper construction of the agreement the word 'site' meant 14 Creswell Crescent.
>
> **Ground 5**
>
> 5. The Recorder erred by finding that the electricity supply in issue was not supplied exclusively to 30 Cresswell Crescent despite the Claimant's and the Defendant's evidence indicating that this was the case.
>
> **Ground 6**
>
> 6. The Recorder erred by finding that the electricity meter was operating correctly when there was no evidence before the Court to support such a finding."

Ground 2

39. In support of Ground 2, Mr Steven Reed, counsel for SEP, made the following submissions:

    i) The evidence at trial demonstrated "beyond argument" that NP had failed to disclose relevant documents.

    ii) It was NP's case that it had not received a change of tenant/occupier notice ("COT Notice") from SEP in relation to the M2 Supply Contract. However, SEP provided evidence that it did send the COT Notice, a completed copy of which was in the trial bundle. While it could not provide conclusive evidence that NP received it, the COT Notice and related correspondence are difficult to explain if the COT Notice was not sent to NP.

    iii) NP's disclosure failures called into question the reliability of their disclosure exercise, including raising doubt about whether they had conducted proper searches. This should have given rise to an adverse inference in favour of SEP, particularly where there was positive evidence from SEP that the COT Notice was sent. Instead, NP was wrongly given the benefit of the doubt.

    iv) It is arguable that NP's disclosure failings were a serious procedural or other irregularity in the proceedings before the Recorder. In the absence of proper disclosure, the judge could not safely conclude that the COT Notice had not been received. The judge did not properly assess the possibility that it had been received but, for example, simply mislabelled or misfiled by NP. NP's failure to comply with its disclosure obligations was a serious procedural failure rendering the judge's decision wrong and/or unjust.

40. In refusing permission on Ground 2, Foxton J found that the judge had offered clear and careful reasons in support of his conclusion that no COT Notice had been received by NP in respect of Meter 2, while finding that one had been received in relation to Meter 1. He agreed with the judge's view in his decision refusing permission to appeal that the suggestion that disclosure of dealings with EBL might have shed light on the position is pure speculation.

41. Mr Reed took me through (i) the evidence supporting the submission that NP had made a number of failings in disclosure and (2) the evidence supporting SEP's contention that a COT Notice was submitted in relation to Meter 2. He complained that the judge had not addressed this point in his Judgment, which had been raised in his written closing submissions on behalf of SEP. As Foxton J noted, the judge did address this in his written decision refusing permission to appeal in relation to this ground.

42. I agree with Foxton J's reasons for refusing permission on Ground 2. The judge, who considered the evidence with obvious care in the Judgment, gave clear and persuasive reasons for his factual finding. SEP's arguments regarding NP's alleged disclosure failings are set out in some detail in Mr Reed's written closing submissions, and the judge must have considered them. There is no real prospect of SEP succeeding on appeal on this ground by showing that the judge's factual finding was plainly wrong or one that no reasonable judge could have reached on the evidence.

Ground 3

43. In support of Ground 3, Mr Reed made the following submissions:

    i) The M2 Supply Contract provided for a fixed term from 1 March 2015 to 30 September 2016. Clause 4.2 provides that either party can terminate the fixed term contract by providing written notice at least 30 days prior to the fixed term end date. Clause 4.4, however, provides that where, as in this case, there is a fixed term contract, NP will send a statement of renewal terms 60 days before the fixed term end date, describing how SEP can end the contract, outlining available contract options and prices. NP never did this. The judge failed to consider the effect of this failure or how SEP could end the contract without the information required to be provided by NP under Clause 4.4.

    ii) The judge should have concluded, on a proper interpretation of the contract, that NP's failure to send a statement of renewal meant that the contract came to an end at the end of the fixed term, 30 September 2016. The judge was wrong to conclude otherwise at [53] of the Judgment. He gave no explanation of the purpose of Clause 4.4 that made sense of it.

    iii) The effect of the fixed term ending under the M2 Supply Contract in circumstances where NP is continuing to supply electricity to Meter 2 is governed by paragraph 3(1) of Schedule 6 to the Electricity Act 1989. In those circumstances, a deemed contract arises between NP and the occupier (or owner, if unoccupied) from time to time of the premises actually supplied via Meter 2, namely, 30 Cresswell Crescent. That would be a matter for NP to settle with the relevant occupier/owner.

    iv) The judge ignored the practical reality of this situation, which is that SEP no longer wants the supply and has sought to bring the supply arrangement to an end, which is clear from the Defence and other documents supplied by SEP in these proceedings. NP refuses to end the supply or to acknowledge that SEP's agreement with NP is at an end.

44. In refusing permission on Ground 3, Foxton J was of the view that Clause 4.4 does not affect the requirement under Clause 4.2 to provide 30 days' written notice. He noted that this view was supported by the answer to the question "What happens at the end of my fixed contract?" in the "Common Questions" concerning "Principal Terms for contract customers (April 2014)", which formed part of the written proposal (subject to contract) dated 28 January 2015 sent by NP to SEP, which formed the basis for the M2 Supply Contract. Accordingly, in his view the judge's conclusion at [53] of the Judgment is "unassailable".

45. I agree. There is no reason to interpret Clause 4.4 as a necessary pre-condition to SEP's right to terminate the M2 Supply Contract on 30 days' written notice. Put another way, if NP had received a COT Notice from SEP, NP could not have successfully argued (had it wished to do so) that the COT Notice was invalid or ineffective because NP had not served a statement of renewal terms under Clause 4.4.

46. Clause 4.4 contemplates that there are cases where a customer of NP will want to renew its arrangement with NP for the supply of electricity. The sending of the

renewal terms is an administrative step and, no doubt, good practice as a matter of client communication. It is not, however, arguable that sending the renewal terms is a necessary pre-condition to a customer's effective exercise of its right to bring the contract to an end by a simple written notice sent 30 days in advance of the proposed termination date, particularly where no form of renewal is contemplated by the customer. Ground 3 is not arguable.

Ground 4

47. In support of Ground 4, Mr Reed, made the following submissions:

i) The judge failed to apply properly the principles of contractual interpretation in reaching his conclusion as to the meaning of "site" in the M2 Supply Contract.

ii) In the Judgement at [37], the judge concluded that:

> "… the 'site' to which NP was required to supply electricity on a proper construction of the supply contract was Meter 2, that is to say the existing commercial meter located at Daves Discount Stores at No 14 Cresswell Crescent, and registered at that physical address in the ECOES database."

In the same paragraph, the judge specifically rejected the construction that "site", for this purpose, means the business premises at No 14 Cresswell Crescent.

iii) There are various uses of the term "site" in the M2 Supply Contract, including, for example, in Clauses 2.1.1, 2.1.2, 2.3.3, 2.3.6, 5.1, 9.1, 10.1, 11.1, 11.3, 11.4, 12.3, 12.4, and 12.5, as well as the Glossary (incorporated into the M2 Supply Contract by Clause 1.2). From a review of these examples, it can be clearly seen that (a) the term "site" in the M2 Supply Contract is used to refer to the physical premises that are being supplied and (b) the term is used, contrary to the judge's interpretation, in contradistinction to the terms "meter", "metering point", and "MPAN" (meter administration point number).

iv) The definition of "site" in the Glossary is:

> "Each location you want us to supply energy at or which we supply with energy under your contract."

v) On a proper construction of the M2 Supply Contract as a whole, a reasonable person having all the background knowledge available to the parties would not have understood the word "site" to mean a meter defined by an MPAN. If that were the case, there would be no need to refer to a site but simply to a meter. The judge was wrong to conclude that the addition of "M2" to the site details specified in the "Contract Price and Site Information Sheet" forming part of the M2 Supply Contract supported his view.

vi) The fact that paragraph 3(1) of the Schedule 6 to the Electricity Act 1989 refers to "premises" rather than a "meter" in cases where a deemed contract

arises supports SEP's view as to how the word "site" would be understood by a reasonable person with the relevant background knowledge who was construing the M2 Supply Contract.

48. In refusing permission on Ground 4, Foxton J said:

> "10 The Recorder's reasoning on this issue is very persuasive and reflects not simply the terms of the contract itself, but a detailed consideration of the history and background of the supply of electricity to the relevant properties. The Judge's conclusion receives strong support from the inclusion of M2 and the second meter's unique 'supply number' in the site information in the CPSI sheet for this contract.
>
> 11 The Appellant offers no credible alternative to the argument that the supply was to be made to the electricity meter (that being the point where consumption is measured, and it not being realistic for the electricity supplier to monitor where the electricity goes after that point). The suggestion that, if electricity was diverted from Meter 2 to a destination other than 14 Cresswell Crescent, the Appellant did not have to pay for it is wholly uncommercial given that it was the Appellant, and not the Respondent, who was in a position to control events 'downstream' of Meter 2."

49. I agree. How a word is to be understood in a contract depends on its use in the contract, having regard to the immediate context as well as the contract as a whole. While there are multiple uses of the word "site" in the contract that, in their immediate context, must be understood to refer to physical premises as opposed to a meter, metering point or MPAN, each use of the term needs to be considered on its own merits.

50. The issue for the judge, as he formulated it, was what the term "site" signifies for purposes of determining the location to which NP was required to supply electricity under the MS Supply Contract in order to fulfil its contractual obligations to SEP. SEP has offered no plausible alternative answer to the question as to what it means to supply electricity to the site under the M2 Supply Contract. In this context, a meter is necessarily involved. There are two supply contracts referring to the premises at 14 Cresswell Crescent. The principal distinction between the two contracts is the identification of the relevant meter, each registered with its own MPAN in the national database of all meters and MPANs registered with energy suppliers, namely, the Electricity Central Online Enquiry Service ("ECOES") database.

51. As I have noted at [33] above, the judge observed that what happened to the electricity after it was supplied to Meter 2 was a matter within the control of SEP and not NP.

52. Ground 4 is not arguable.

Ground 5

53. In support of Ground 5, Mr Reed submitted, in summary, that the judge's finding that the electricity supply made by NP under the M2 Supply Contract was contrary to the evidence of both parties.

54. In refusing permission on Ground 5, Foxton J said:

> "12 This issue arose in the context of the Appellant's argument at trial that the electricity consumption recorded by Meter 2 must be too high because the electricity was only being supplied to Flat 30, and the level of consumption recorded over the 5-year period was too high to be explained by use by one residential flat.
>
> 13 The Respondent was clearly concerned that electricity from Meter 2 may well have been diverted elsewhere and was keen to send an electrician around to check. The Appellant sought to obstruct such visits.
>
> 14 The Judge explained his reasons for rejecting the suggestion that the electricity in question was only ever supplied to Flat 30. He provided detailed reasons for rejecting the results of Mr Shibber's investigation conducted 5 years after supply first began. The Judge also provided compelling reasons for concluding that the Appellant had diverted electricity to other upstairs unmetered flats occupied by its employees as required and knew throughout that electricity from Meter 2 was not supplied exclusively to Flat 30 but to those flats as well. There is no realistic prospect of an appellate court interfering with that conclusion."

55. I agree. Ground 5 is not arguable.

Ground 6

56. In support of Ground 6, Mr Reed submitted, in summary, that NP had failed to discharge its burden of proof in relation to whether Meter 2 was operating correctly at all relevant times.

57. In refusing permission on Ground 6, Foxton J noted that the judge had considered the evidence and that it was for him to determine the weight to be given to the evidence of Mr Choudhry (a witness for NP) and Mr Shibber (a witness for SEP).

58. I agree with Foxton J that the judge's detailed conclusions on this issue were compelling. There is no real prospect of an appeal on Ground 6 succeeding.

Conclusion

59. The judge took time for consideration before handing down his Judgment, which was meticulous, careful, and scrupulously fair. Foxton J has concluded that it is arguable that the judge erred in law in relation to Ground 1 and granted permission on that ground.

60. Grounds 2, 5, and 6 are disagreements with the judge's factual conclusions that do not come close to mounting the high hurdle that an applicant for permission to appeal must overcome on a challenge to the factual findings of a first instance judge. Grounds 3 and 4 are challenges to the judge's construction of the M2 Supply Contract, but these grounds are not arguable for the reasons I have given.

61. SEP's renewed application for permission to appeal on each of Grounds 2, 3, 4, 5, and 6 is refused.