Neutral Citation Number: [2020] EWHC 1971 (TCC)

Claim No HT-2020-000178
Claim No HT-2020-000199

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2020

Before :

THE HON. MR JUSTICE STUART-SMITH

- -

Between :

Claim No HT-2020-000199

EMPYREAL ENERGY LIMITED

Part 7 Claimant

-and-

DAYLIGHTING POWER LIMITED

Part 7 Defendant

AND

Claim No HT-2020-000178

DAYLIGHTING POWER LIMITED

Part 8 Claimant

-and-

EMPYREAL ENERGY LIMITED

Part 8 Defendant

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to bailii. The date and time for hand-down is deemed to be 10:30am on Wednesday 22nd July 2020.

- -
- -

Ms Jennifer Jones (instructed by **Stephens Scown LLP**) for **Empyreal Energy Limited**
Mr Tom Coulson (instructed by **Bird & Bird LLP**) for **Daylighting Power Limited**

Hearing date: 20 July 2020

Stuart-Smith J :

Introduction

1. Two sets of proceedings have been issued, which arise out of an EPC contract dated 19 November 2015 ("the Contract") made between Empyreal Energy Limited ("EEL") as employer and Daylighting Power Limited ("DPL") as contractor. The contract was for DPL to carry out the design, supply, installation, testing and commissioning of a solar park in Essex. EEL alleges that DPL's work was defective.

2. DPL issued Part 8 proceedings on 14 May 2020. EEL commenced Part 7 proceedings on 29 May 2020. For present purposes the issues they raise are identical, namely whether Mr Robert Sliwinski, acting as an expert, had jurisdiction to determine and order that DPL pay to EEL the sum of £1,708,474.00 in respect of the cost of remedying works which EEL asserts but DPL denies were defective. Mr Sliwinski made ancillary orders for the payment of interest and his fees of the determination. EEL seeks to enforce Mr Sliwinski's order; DPL resists enforcement.

3. Before the court today are:

    i) EEL's application for summary judgment to enforce Mr Sliwinski's order; and

    ii) The trial of DPL's Part 8 proceedings.

4. It is common ground that the outcome will be determined by the court's answer to two questions, namely:

    i) Was the dispute which EEL purported to refer to the expert determiner, and which he purported to decide, a dispute which the Contract permitted to be referred to expert determination in accordance with Clause 36?

    and

    ii) Did EEL serve a notice on DPL of its intention to refer the dispute for expert determination in accordance with the requirements of Clause 36.1 of the Contract?

The principles to be applied

5. The applicable principles are well established and largely common ground between the parties.

General principles of contractual interpretation

6. The Contract is to be interpreted in accordance with well established principles for the construction of commercial contracts: see, for example, *Arnold v Britton* [2015] UKSC 36 at [15]-[23] and *Wood v Capita Insurance* [2017] UKSC 24 at [10]-[15]. In briefest outline, and without derogating from the many full and authoritative expositions of principle in *Wood*, *Arnold* and many other decisions of the highest authority, the court's task is to identify the intention of the parties by reference to what a reasonable person, with the parties' shared background knowledge, would have understood them to have meant by the language which they used in the agreement. The words of the contract must be interpreted in the context of the

agreement as a whole as well as taking into account any admissible wider context that qualifies to be included as part of the factual matrix.

The approach of the court to provisions for expert determination

7. It is sufficient to refer to two authorities on the approach of the Court when interpreting provisions for expert determination.

8. In *Homepace Ltd v Sita South East Ltd* [2008] EWCA Civ 1, Lloyd LJ summarised the law on expert determination as follows at [18]:

> "Each case depends on the terms of the contract under which the determination is made, both as to what it is the expert has to decide, and as to how far his decision is binding on the parties. In each case it is necessary to examine the determination, in order to see whether it lies within the scope of the expert's authority. If it does not, then it has no effect as between the parties."

9. In *Barclays Bank plc v Nylon Capital LLP LLP* [2011] EWCA Civ 826, Thomas LJ (with whom Etherton LJ and Lord Neuberger MR agreed) summarised the correct approach to the construction of expert determination clauses as follows at [27]-[28]:

> "27. However, although the parties must adhere to the agreement which they have made, I do not consider that the approach to an expert determination clause should be the same as that which is now taken to an arbitration clause. The rationale for the approach in the *Fiona Trust* case is that parties should normally be taken, as sensible businessmen, to have chosen one forum for the resolution of their disputes. As arbitration will usually be an alternative to court for the resolution of all disputes between the parties, it would not accord with the presumed intention of sensible businessmen to draw fine distinctions between similar phrases to allow a part of the dispute to be outside the arbitration and allocated to the court.
>
> 28. In contradistinction expert determination clauses generally presuppose that the parties intended certain types of dispute to be resolved by expert determination and other types by the court (or if there is an arbitration clause by arbitrators). The rationale of the *Fiona Trust* case does not therefore apply, as the parties have agreed to two types of dispute resolution for disputes which might arise under the agreement… The simple question is whether the dispute which has arisen between the parties is within the jurisdiction of the expert conferred by the expert determination clause or is not within it and is therefore within the jurisdiction of the English court. It is a question of construction with no presumption either way."

What the expert may decide

10. EEL relies upon the decision of the Court of Appeal in *Norwich Union Life Insurance Society v P&O Property Holdings Ltd* [1993] 1 EGLR 164 at 168-169 as support for the submission that an expert may take into account and determine the factual matters that are necessary for their decision on the point or points that have been referred to them. That submission is not contentious and, in my judgment, is correct; but it requires that close scrutiny be given to determine what point or points have been (lawfully) referred to the expert. In *Norwich Union* the question that was referred was whether the works had been completed in accordance with the design documents. This question, of necessity, required the expert to engage in a detailed investigation. As to *completion*, it required the expert to consider in what respects the works had not been completed and the significance of any failures to complete. As to whether there had been completion *in accordance with the design documents*, it required the expert to consider whether the original design documents had been subject to an approved variation. The cited passage establishes that the starting point will be to decide what question has been referred to the expert and then to decide what facts and matters that question requires the expert to consider and determine in order to decide the question. It does not follow that referral of any question permits the expert to decide any and everything that may be material to the question. The terms of the agreement between the parties will define and circumscribe the scope of what may be referred to the expert for their decision and may do so in terms that preclude the expert from considering some matters that would otherwise be considered relevant to the question the expert is required to decide. In other words, the terms of the contract or the terms of the question that the expert is asked to decide may put some potentially material facts or matters beyond the reach of the expert's consideration and determination.

Criteria for referral notices

11. The criteria for valid unilateral notices were considered in *Mannai Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749. The question, which must be approached objectively, is how a reasonable recipient would have understood the notice. In considering that question, the notice must be construed taking into account the relevant objective contextual scene. Even if a notice contains errors, it may be valid if it is sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when it is intended to operate: see Lord Steyn at 767G-H, 768G-H. Many other statements of principle to like effect could be cited including *Easybiz Investments v Sinograin (The Biz)* [2010] EWHC 2565 (Comm) at 11 per Hamblen J, a decision on s. 14(4) of the Arbitration Act 1996 which provides a timely reminder that the need is for a notice sufficiently to identify the dispute to which it relates and that one should concentrate on the substance rather than the form of the notice.

12. In *Atlanska Povidba v Consignaciones Astrugianas SA (the "Lapad")* [2004] EWHC 1273 at [17], a decision on the meaning of s. 16(3) of the Arbitration Act 1996, Moore-Bick J emphasised the need to concentrate on substance rather than form, but drew the distinction between giving notice of an intention to refer rather than merely threatening to do so if demands are not met. In my judgment it is not possible to elaborate this point further: it is common ground that, in the present case, what is required is notice of a party's intention to refer the dispute to expert determination as provided by clause 36.1. That requirement would not be satisfied by a document

which is properly characterised as merely threatening to refer if a party's demands are not met. The only observation I would make is that the phrase "an intention to refer" suggests a settled state of mind to proceed to referral even if there are stated contingencies that might prevent that course of action being followed.

The Contract

13. The Contract contained dispute resolution provisions at clauses 36 and 37.

14. Paragraph 37 included that:

    i) Either party may refer any dispute or difference arising under the contract to adjudication where part II of the 1996 Act applies: Clause 37.1. It is common ground that it does not apply in present circumstances because the primary purpose of the works is power generation;

    ii) The parties may agree to try to settle disputes by mediation: Clause 37.2;

    iii) The Contract and any dispute arising under it is governed by and to be construed in accordance with English law: Clause 37.3; and

    iv) The English courts have exclusive jurisdiction: Clause 37.4.

15. Clause 36 made provision for expert determination and stated as follows:

> "36.1 Where this Contract provides for a dispute to be referred to an expert, any Party may serve notice on the other Party of its intention to refer the dispute to the Chartered Institute of Arbitrators (or such other expert as may be agreed between the Parties) (the "Expert") acting as an independent expert.
>
> 36.2 The Expert shall be independent of the Parties and will not act as an arbitrator. The Expert shall decide the dispute referred to him taking due and proper account of any submissions of the Parties (if any, to be provided to the Expert within five (5) Working Days of the appointment of the Expert) and will issue his decision within seven (7) Working Days following the date of his appointment.
>
> 36.3 Each Party shall co-operate with the other Party and the Expert in the investigation of the dispute and shall provide at its own expense any information, documents, records or access as the Expert reasonably requires to make his determination.
>
> 36.4 The Expert's determination shall be in writing and shall be binding on the Parties, except in the case of fraud or manifest error, unless and until agreed by the Parties or by the final determination of the dispute by a court or judge thereof. Each Party shall bear its own costs in relation to the reference to the Expert, provided that the Expert shall be entitled to determine how his fees shall be shared between the Parties."

16. The following points may be noted:

    i) Resort to expert determination is only available where the Contract provides for the dispute to be referred to an expert;

    ii) The process of referral to an expert is commenced by a party serving notice on the other party "of its intention to refer the dispute" either to the Chartered Institute of Arbitrators ("the CIArb") or such other expert as may be agreed between the Parties. There are therefore two express requirements of the Notice that must be given that are stated in paragraph 36.1. The first is that notice must be given of "*intention to refer*". The second is that notice must be given of the party's intention to refer "*the dispute*" to the expert. Consistently with these express requirements, paragraph 36.2 states that the expert shall decide "the dispute referred to him". The dispute identified in the Notice as the dispute intended to be referred and the dispute which the expert is entitled and required to decide are therefore one and the same;

    iii) The parties have only five working days to make their submissions to the expert who is to provide his decision within 7 working days of his appointment;

    iv) The expert's determination is interim in the sense that it is binding "unless and until agreed by the Parties or by the final determination of the dispute by a court or judge thereof". If the parties do not agree otherwise or do not obtain a final determination by a court, it will remain binding, but that is up to them.

17. It is common ground that the Contract provides for Expert Determination in five separate circumstances. Each side relies upon the provisions as providing relevant context for the interpretation of the Contract in accordance with normal principles, and I therefore set them out here.

Clauses 3.20(f) and (g)

18. Clauses 3.20(f) and (g) provide as follows:

> "(f) If the Photovoltaic System or Property is found to be in breach of the Planning Consents or Planning Agreements:
>
> (i) the Contractor shall upon receiving notification from the Employer take all necessary steps (at the Contractor's cost) in order to ensure that the Property or Photovoltaic System is determined to be compliant with the Planning Consents or Planning Agreements that it has [been][1] found to be in breach of; and
>
> (ii) where any work or act carried out pursuant to clause 3.20(f)(i) has an adverse effect (i) which is material and permanent in respect of the performance of the Photovoltaic System; or (ii) on the capacity of the Photovoltaic System, the Employer shall determine and agree with the Contractor

[1] The word "been" is missing from the Contract but it is common ground that the sense requires it to be read in.

> a reasonable reduction in the Contract Price (or where the Contract Price has already been paid, a reimbursement of a part of the Contract Price to be paid by the Contractor as a debt). For the purposes of calculating a reasonable reduction in the Contract Price, this shall include such reduction as to allow the Employer to achieve the same level of return as it would have achieved without such adverse effect.
>
> (g) If the Employer and the Contractor are unable to agree a reduction or reimbursement of the Contract Price as required by clause 3.20(f)(ii) then this shall be resolved by the Parties in accordance with clause 36."

19. These subparagraphs appear immediately after provisions requiring DPL to comply with all obligations of EEL in respect of the property pursuant to any planning agreements and to comply with any notices that may be served by the authorities before the issue of the Provisional Acceptance Certificate. Clause 3.20(g) does not arise unless there is a finding that the System or Property is in breach of the Planning Consents or Planning Agreements. If such a finding is made, then the Contractor is obliged to take necessary steps to achieve compliance as required by clause 3.20(f)(i). The carrying out of that work must precede the operation of clause 3.20(f)(ii) – see the opening words of sub-clause 3.20(f)(ii). It follows that the finding of breach of the planning consents must also precede both the carrying out of the works and the applicability of clause 3.20(g), including reference to an Expert for determination in accordance with clause 36.

20. Clause 3.20(f) does not specify by whom the finding that the system or property is in breach of Planning Consents or Planning Agreements. The apparent candidates could be (a) the Planning Authorities, by serving notice to that effect, or (b) the court. It cannot be the Expert, since the question of referral to the expert under clause 3.20 can only arise *after* the System or Property has been found to be in breach.

21. Clause 3.20(g) requires close scrutiny. In combination with clause 3.20(f) it provides an interim solution and remedy after the System or Property is found to be in breach and works have been carried out pursuant to clause 3.20(f)(i). The starting words of 3.20(f)(ii) mean that what follows (including clause 3.20(g)) does not apply unless the work or acts carried out pursuant to clause 3.20(f)(i) has an "material and permanent" adverse effect in respect of the System or on the capacity of the System. In that event, the next step is for the Employer to determine a reasonable reduction or reimbursement of the Contract Price, which shall include "such reduction as to allow the Employer to achieve the same level of return as it would have achieved without such adverse effect."

22. What then does clause 3.20(g) say about the nature of the dispute that may be resolved in accordance with clause 36? On the plain meaning of the words of the sub-clause, the word "this" must refer to the inability of the Employer and Contractor to agree a reduction or reimbursement of the Contract Price. This has certain implications. Even assuming that the parties agree or it has been established in some way that the work or acts carried out pursuant to clause 3.20(f)(i) has had some qualifying effect, the expert could not reach any rational view of what would be a reasonable reduction in or reimbursement of the Contract price without considering

and determining what should have been the performance and capacity of the System and the causative impact of any qualifying adverse effect. That necessarily involves consideration of the work or act and its effect upon the performance or capacity of the system.

23. The reasons why the parties are unable to agree a reasonable reduction or reimbursement may be many and varied. For example, (a) the parties may agree that work or acts carried out pursuant to clause 3.20(f)(i) have been carried out and that they have had an agreed effect on performance or capacity but may disagree about the consequential effect on the Employer's level of return either with or without the adverse effect; or (b) they may agree that the work or acts have been carried out but not as to the extent (if any) of any adverse effect; or they may not even agree that the work or acts have been carried out. I exclude from consideration a case where the Contractor simply refuses to engage with the Employer: the Contractor should not be entitled to rely upon its failure to implement the contractual machinery.

24. Whether or not work or acts were in fact carried out pursuant to clause 3.20(f)(i), or whether such work or acts do in fact have a qualifying adverse effect and, if so, what that effect may be and how that should be reflected in a reduction or reimbursement of the contract price may all ultimately have to be resolved by a court. At the interim stage, all that can be said is that the Employer is asserting that the facts it is alleging satisfy the criteria for a reasonable reduction or reimbursement in the sum for which it is contending and that, somewhere along the line, the Contractor disagrees. Whatever the reason for this disagreement, the expert will have to consider and determine all of the constituent elements that will inform his interim determination of what is a reasonable reduction or reimbursement.

25. For these reasons, and applying the principles identified in [10] above, I would hold that an expert instructed under clause 3.20(g) to resolve the parties' inability to agree a reduction or reimbursement of the Contract Price would be entitled to consider whether work or acts carried out pursuant to clause 3.20(f)(i) had a qualifying adverse effect even if that was in issue between the parties.

Clause 7.7

26. Clause 7 concerns Commissioning Testing and Works Completion. Clause 7.1 provides for the Contractor to carry out Commissioning Tests on the Photovoltaic system following completion of the Works. Clause 7.2 provides that, if the Commissioning Tests are failed, the Contractor is to carry out and make good works before repeating the Commissioning Tests in accordance with clause 7.1. Once all tests are carried out and various other requirements satisfied, the Contractor issues the signed Works Completion Certificate, which the Technical Adviser and Employer are to countersign or give written reasons why they think that the requirements for the Works Completion Certificate are not satisfied: Clauses 7.3 and 7.4.

27. Clause 7.7 provides as follows:

> "The Technical Adviser shall, within ten (10) Working Days from Commissioning, by providing a minimum of two (2) days prior written notice to the Contractor, inspect the Works for the purpose of preparing the list to be agreed as the Punch List.

> Subject to notice being received by the Technical Adviser pursuant to clause 7.1, within five (5) Working Days from such inspection, the Technical Adviser shall issue to the Employer and the Contractor such list. In the event that the Technical Adviser does not inspect the Works or issue the list to the Employer and the Contractor within the required periods, the Contractor shall be entitled to issue such list to the Employer and the Technical Adviser. If within ten (10) Working Days from the issue of the list by the Technical Adviser or the Contractor (as applicable), the Parties are unable to agree the Punch List or any part of the Punch List, the matter may be referred to the Expert pursuant to clause 36."

28. Commissioning is defined in the Contract as meaning that various specified tests showing functionality and connection to the grid have been completed. The Punch List is defined in the Contract as a list "of uncompleted site items (minor finishing works) which form part of the Works and which are not expected to adversely affect the operational performance of the Photovoltaic System, however which must be completed for both plant longevity and for full delivery of the Photovoltaic System under the Contract." It may be described as a form of snagging list.

29. It is apparent that what is contemplated is that the Expert to whom a reference is made under clause 7.7 shall determine whether items on the Punch List are properly included, which necessarily implies consideration of the state of the Contract works in order to reach such a determination.

Clause 8.5(b)

30. Clause 8.1 requires the Contractor to carry out the Provisional Acceptance Tests as soon as is reasonably practicable after Commissioning. Those tests include a visual inspection, a functional test, a performance ratio test and provision of a commissioning pack. Immediately upon their completion, clause 8.3 requires the Contractor to notify the Employer in writing of the outcome of the Provisional Acceptance Tests. If the system fails the Provisional Acceptance Tests, clause 8.4 requires the Contractor at its own cost to carry out make good works and take whatever steps are necessary to enable the Tests to be passed.

31. Clause 8.5 provides:

> "In the event the Contractor fails to pass the Provisional Acceptance Tests (including any repeats thereof under clause 8.4) within one hundred and eighty (180) days of Works Completion, then the Employer shall be entitled, at its sole option and discretion, to:
>
> (a) require the Contractor to carry out further make good works and to carry out a further repeat of the Provisional Acceptance Tests in which case this clause 8.5 shall continue to apply until such time as the Provisional Acceptance Tests have been passed to the satisfaction of the Employer; or

> (b) seek to agree with the Contractor a reasonable reduction in the Contract Price (including, where a portion of the Contract Price has already been paid by the Employer, a pro rata reimbursement of a part of the Contract Price, which shall be payable by the Contractor as a debt). If the Employer and the Contractor are unable to agree a reduction or reimbursement of the Contract Price then the Employer shall at its option be entitled to refer the matter to determination by an Expert pursuant to clause 36. … ."

32. It may be noted at this point that the context for a reference under clause 8.5(b) will be that "the Contractor fails to pass the Provisional Acceptance Tests". On present information the court cannot exclude the possibility that there could be a dispute about whether or not the Contractor has failed to pass the Provisional Acceptance Tests. However, and in addition to the need for failure of the Provisional Acceptance Tests, the Expert's role arises when the parties "are unable to agree a reduction or reimbursement of the Contract Price". The role of the expert will be to determine the appropriate reduction or reimbursement of the Contract Price in that context. There is no further explanation of what is meant by failure of the Provisional Acceptance Tests or of "inability" to agree a reduction or reimbursement.

33. The structure of clause 8.5 is similar to that of clause 3.20, save that (a) it does not provide for a failure to pass the Provisional Acceptance Tests to be "found", and (b) sub-clauses 8.5(a) and (b) are alternatives. It has in common with clause 3.20 that, even if it is agreed that the Contractor has failed to pass the Provisional Acceptance Tests, the expert would need to consider and determine the nature and extent of the failure in order to assess and determine what is a reasonable reduction or reimbursement. The reasoning I have set out at [22]-[24] above therefore applies equally to this clause.

34. For these reasons, and applying the principles identified in [10] above, I would therefore hold that an expert appointed to determine what is a reasonable reduction or reimbursement under clause 8.5 is entitled to consider and determine the existence, nature and extent of the failure to pass the Provisional Acceptance Tests as a necessary part of his determination even if that was in issue between the parties.

Clause 23.5(c)(ii)

35. Clause 23 is under the heading and makes provision for Termination. Clause 23.1 entitles the Employer to terminate the Contract immediately in circumstances including material and persistent breach of the Contract or failure to proceed regularly and diligently with the Works. Experience shows that assertions by an employer of such failures by a contractor are often highly contentious. Clause 23.2 entitles the Contractor to terminate the Contract if the Employer becomes insolvent or fails to make payment to the Contractor of any undisputed sum properly due under the contract. Such disputes may be equally contentious. Clauses 23.4 and 23.5 are under the heading and make provision for Consequences of Termination. Clause 23.4 makes provision for what is to happen after termination by the Employer in accordance with Clause 23.1.

36. Clause 23.5 makes provision for what is to happen after termination by the Contractor in accordance with Clause 23.2. It provides:

> "23.5 In the event that the Contract is terminated by the Contractor in accordance with clause 23.2, the Contractor's sole remedy for such termination shall be to recover:
>
> (a) any amounts properly due under this Contract to the Contractor up until the date of termination; and
>
> (b) the reasonable losses incurred by the Contractor as a result of the early termination of any agreement which it has been entered into in connection with this Contract, provided that the Contractor can demonstrate that such reasonable losses are payments to be made by the Contractor to any counterparty to such agreement under the express provisions of such agreement; and
>
> (c) if such termination arises prior to due date for payment of the milestone pursuant to 11.4, an amount equal to:
>
> (i) the then relevant Contract Price; less (without double counting);
>
> (ii) any amounts properly due under this Contract to the Contractor up until the date of termination and which have been paid to the Contractor in accordance with this Contract and the estimated costs to complete the Works (as agreed between the Parties or determined by an expert pursuant to clause 36);
>
> in any case, not to exceed the then relevant Contract Price."

37. There will usually be no doubt about whether the Contractor has terminated, though there may often be dispute about whether it was entitled to do so. Whether the words in brackets in clause 23.5(c)(ii) refer only to the estimated costs to complete the Works or also include amounts properly due under the Contract up until the date of determination which have been paid, it is evident that any reference to the expert under this clause may involve him determining what remains outstanding to complete the Works and the estimated costs to the Contractor of doing those works.

Clauses 13.7 and 13.8

38. These are the clauses directly in issue in the present case. Clause 13 is headed and is concerned with Defects, as defined in the Contract. The material feature of the definition (which it is not necessary to set out in full here) is that it does not say anything about how, when or by what means Defects may be proved to exist for the purposes of other provisions of the Contract. Clauses 13.1-13.4 make provision for Defects identified during the warranty period. Clause 13.6 permits the Employer's Representative in certain circumstances to require the Contractor to re-perform Commissioning Tests or Provisional Acceptance Tests. Clauses 13.7 and 13.8 are set

out below. Clauses 13.9 to 13.11 make provision for what shall happen when all Defects appearing during the Warranty Period have been made good and make further provision about the scope of the Contractor's liability for defects thereafter.

39. Clauses 13.7 and 13.8 provide:

> "13.7 If the Contractor fails to remedy any Defect at the Photovoltaic System, the Employer may:
>
> (a) arrange for the work to be carried out itself or by a third party, the costs of which shall be deducted from amounts due to the Contractor or recoverable from the Contractor as a debt;
>
> (b) determine and agree with the Contractor a reasonable reduction in the Contract Price (or where the Contract Price has already been paid, a reimbursement of a part of the Contract Price to be paid by the Contractor as a debt); or
>
> (c) in so far as the defect materially impacts on the performance or the safety of the Works and it is not commercially viable to remedy the defect, terminate the Contract.
>
> 13.8 If the Employer and the Contractor are unable to agree a reduction or reimbursement of the Contract Price as required by clause 13.7(b) then this shall be resolved by the Parties in accordance with clause 36."

40. Clause 13.7(a) is of a type that is familiar in construction contracts. The Contract does not say that a Defect must be proved by any particular means before the Employer may arrange for the work to be carried out by itself or by a third party as contemplated and allowed by clause 13.7(a). In a typical construction contract, if the parties are not agreed that Defects exist and the Employer carries out works purportedly in accordance with clause 13.7(a), it runs the risk of a subsequent finding that there was in fact no relevant Defect and that it will be unable to recover the costs of the works that it has arranged. There is nothing in the Contract to preclude such a sequence of events here; but, as elsewhere, clauses 13.7 and 13.8 do not state when and by whom the existence or non-existence of a Defect is to be established, either generally or in the event of a reference to an expert pursuant to clause 13.8. That is the nub of the present dispute - EEL says the expert may determine the existence or non-existence of the defects it alleges; DPL says he may not.

41. It may also be noted that clause 13.7(a) is not stated to be a pre-requisite to taking steps under clause 13.7(b). To the contrary, if the Employer arranges for the work to be carried out, the costs are to be deducted or are recoverable as a debt under Clause 13.7(a): in this event there is no provision for reference to Expert Determination. The overall structure of clause 13.7 indicates that clause 13.7(b) is likely to apply in circumstances where the Employer has not arranged for the work to be carried out. Since clause 13.8 applies where the parties have not reached agreement pursuant to clause 13.7(b), it follows that clause 13.8 may also apply where no works have been

arranged by the Employer. It is at least arguable that sub-clauses (a), (b) and (c) are alternatives so that, if the Employer arranges for the work to be carried out it commits itself to sub-clause (a). That, however, is not this case: here the Employer is relying on the prospective cost of works that it has not carried out. There is nothing in the terms of clause 13.7 or elsewhere to preclude reliance upon notional costs in support of an argument for a reduction or reimbursement under sub-clause 13.7(b). The question here is whether that is what EEL has done. In answering that question it is important to bear in mind that the cost of repairs are not necessarily or even probably to be equated with an appropriate adjustment to the Contract Price: some defects may be of marginal significance but very expensive to repair; others may be very significant for the operation of the system and its capacity but comparatively cheap to fix.

42. Turning to the position of the expert, the structure of clause 13.7 is similar to that of clauses 3.20 and 8.5. In common with clause 8.5 (a) it does not make provision for Defects to be "found", and (b) sub-clauses (a), (b) and (c) are alternatives. As with clauses 3.20 and 8.5, there may be any number of reasons why the parties are unable to agree a reduction or reimbursement of the Contract Price as required by clause 13.7(b), ranging from a dispute about the existence or non-existence of any Defects to disagreement about the consequences of an admitted Defect. What is clear, however, is that an expert could not reasonably assess and determine what is a reasonable reduction or reimbursement without considering the nature, extent and effect of any Defect upon which the Employer relies and its financial consequences. The reasoning I have set out at [22]-[24] above therefore applies equally to this clause.

43. For these reasons, and applying the principles identified in [10] above, I would hold that an expert instructed under clause 13.8 to resolve the parties' inability to agree a reduction or reimbursement of the Contract Price would be entitled to consider as a necessary part of his determination whether the Contractor has failed to remedy any Defect as alleged by the Employer and, if so, the nature, extent and effect of that Defect even if that was in issue between the parties.

The factual background

44. In June 2018 EEL issued a formal Notice of Defect to DPL. A further Notice of Defects letter was sent in November 2018. A Notice of Serial Defect letter was sent on 3 June 2019. On 7 June 2019 DPL replied, rejecting the allegations of continuing defects. The position remains contentious with EEL asserting the existence of Defect and DPL refuting it.

45. On 25 February 2020 EEL's solicitors wrote to DPL "in relation to a dispute with yourselves regarding defects with works" under the Contract. They identified various heads of defect which they categorised as "1. Module Defects, 2. Technical Defects, 3. Planning Defects.". The letter alleged that numbers of modules were operating at below their warranted power and provided estimated costs of replacing the modules as £1,572,579.00. Second, it alleged a failure to remedy 18 items on the Technical Punchlist with a cost to remedy those works being £111,130. Third, the letter asserted failures to comply with all planning obligations and lease obligations, with an estimate that it would cost £29,965 to remedy those defects. The total cost of the Defects being asserted was £1,713,674.60. The letter concluded:

> "**The dispute process**
>
> If you fail to pay the sums claimed above, our client intends to proceed with a formal claim against you.
>
> The contract sets out the processes for resolving disputes at Clauses 36 and 37.
>
> Clause 36 sets out a process for expert determination. Clause 13.8 states that, if the parties cannot agree a reimbursement to cover the costs of the defects, the dispute shall be resolved by expert determination under clause 36.
>
> Alternatively, Clause 37 states that either party may refer a dispute to adjudication for determination.
>
> Our client has the option of either having this dispute dealt with by expert determination or by adjudication. Our client's preferred option would be adjudication. Please would you confirm that you agree that this dispute should be resolved by adjudication and that you accept the adjudication provisions in Clause 37 apply to this dispute.
>
> **Summary**
>
> There are defects with the work that you undertook on this site. Our client has already invited you to rectify these defects but you have failed to do so. Our client therefore now seeks from you reimbursement of the costs that they will incur to rectify the defects as a debt and/or damages.
>
> If you fail to pay the sums set out above within the next 7 days then our client will consider a dispute to have crystallised and will refer the dispute to an expert or adjudicator to be resolved.
>
> In relation to the dispute process, we invite you to agree that the adjudication provisions set out in Clause 37 apply to this dispute. Alternatively, our client reserves the right to have the dispute dealt with by expert determination instead."

46. On 3 March 2020 DPL replied saying that it had not received all documents. EEL's solicitors replied on 4 March 2020, disputing the suggestion that not all documents had been provided and concluding:

> "In light of the above, we consider that a dispute has crystallised and we confirm that we are now instructed to proceed immediately with a referral of this dispute to expert determination. Should you wish to avoid a referral being made for expert determination you should take the following steps immediately: a) Pay the sum of £1,713,674.60; or b) Confirm that you agree for this dispute to be resolved by adjudication. "

47. On 5 March 2020, solicitors now appointed for DPL wrote to EEL's solicitors stating that they would try to respond by close of business on Friday 13 March 2020. They sent another email timed at 15.29 on 13 March 2020 reasserting that DPL had not been provided with all relevant documents and asking for them to be provided so that DPL could finalise its response.

48. On 17 March 2020 EEL applied to the CIArb for the appointment of an expert. The application identified the three heads of dispute that had been set out in the Solicitors' letter to DPL of 25 February 2020, including the aggregate "Amount in dispute" which was now stated to be £1,708,474.60 though based on the same constituent elements. It did not refer to the terms of the Contract pursuant to which the application was made.

49. On 22 March 2020 DPL's solicitors wrote to EEL's (copied to the CIARb) expressing concerns about whether the reference fell within the terms of clause 36 of the Contract and asking the CIArb to take no further action. Further details of their jurisdictional challenge were sent on 24 March 2020. On 17 April 2020 DPL wrote saying that it would not participate in the expert determination.

50. On 24 April 2020 the CIArb appointed Mr Sliwinski. DPL submitted jurisdiction submissions to Mr Sliwinski on 1 May 2020, after which they took no further steps in the determination. On the same day EEL submitted jurisdiction and substantive submissions. In their substantive submissions they outlined the same three sets of defects and associated costs as in the letter of 25 February 2020. The submission stated:

> "**Claim**
>
> 68. DPL have breached the express and/or implied terms of the EPC as set out above. As a result of the various breaches of the EPC, [EEL] have suffered and will suffer losses to rectify the various defects.
>
> 69. The cost to rectify the defects are as follows: [The submission then set out the three subheadings and the aggregate total of £1,708,474.60]
>
> **Expert Determination and Notice**
>
> [After setting out clause 36.1 the submission continued:]
>
> 71. On 25 February 2020, [EEL's] solicitors, … , wrote to DPL … demanding payment of the outstanding sums owed within 7 days. In the absence of payment, the letter confirmed that the dispute would be referred to adjudication (if DPL provided its consent), or expert determination (the default position under the EPC). …

> **Redress sought**
>
> 73. [EEL] seeks the following declarations/decisions from the Expert:
>
> (1) That DPL should pay to [EEL] the sum of £1,708,474.60 or such other sum that the Expert considers appropriate;
>
> (2) That DPL should pay the expert's fees and expenses

51. EEL's submissions on jurisdiction included the following:

> "**The dispute**
>
> 11. This dispute relates to DPL's failure to agree the sum payable to [EEL] to rectify defects with the work undertaken by DPL. Full details of the dispute are set out in the Submission document.
>
> 12. DPL have refused to rectify defects and have refused to reimburse EE for the costs that EE will now incur to rectify the defects.
>
> **The Contract**
>
> 13. The relevant provisions related to defects are set out in Clause 13 of the Contract, in particular the following: [the submission then set out clauses 13.7 and 13.8 of the Contract]
>
> …
>
> 15. The defects that are complained of within this dispute are defects to the Photovoltaic System.
>
> 16. DPL has refused to rectify the defects complained of.
>
> 17. [EEL] will therefore have to arrange for the necessary remedial work to be carried out by others. [EEL] have notified DPL of the cost that will be incurred to rectify the defects and they have requested that DPL agree this cost and reimburse this sum to them.
>
> 18. Clause 13.7(a) states that [EEL] are entitled to claim the cost of this remedial work from DPL as a debt.
>
> 19. Clause 13.7(b) states that the amount to be reimbursed to [EEL] for having to engage other[s][2] to carry out the work should be agreed with DPL.

[2] The "s" is missing in the original

> 20. Clause 13.8 states that where the amount of reimbursement pursuant to Clause 13.7(b) cannot be agreed then it shall be resolved in accordance with Clause 36 (ie. Expert determination).
>
> …
>
> 25. The dispute that [EEL] have referred to expert determination is for an assessment of what sum should be reimbursed to them as a result of DPL's failure to rectify the defects in the Photovoltaic System. Insofar as it is necessary to determine what defects exist in order to value the cost of rectifying such defects then this forms part and parcel of the dispute that has been referred.
>
> 26. Clause 13.8 states that a dispute can be referred to expert determination where the parties "…are unable to agree a reduction or reimbursement of the Contract Price as *required by Clause 13.7(b)…*". The right to refer to expert determination is triggered where there is no agreement on whether a reimbursement should be made. It is not restricted to situations where the parties have failed to agree the value of any such reimbursement. Therefore, if the failure to agree a reimbursement arises because one party denies the existence of any defect(s) then clause 13.8 is triggered and the dispute can be referred to expert determination.
>
> …
>
> **Summary**
>
> 28. This is a dispute about whether EE should be reimbursed for the cost of remedying defects that they say DPL has failed to remedy and, if so, how much should be paid. Clause 13.8 expressly states that if the parties cannot agree a reimbursement then that dispute can be referred to expert determination.
>
> 29. Clause 13.8 is not restricted to determining the value of any such reimbursement. It includes authority on the expert to determine the principle of whether a reimbursement should be made. In order to assess this, the expert is given express authority to determine whether defects exist as well as the authority to value any reimbursement.

52. On 5 May 2020 Mr Sliwinski reached his decision, which EEL now seeks to enforce. It is material to be considered when the court has to decide what dispute was referred to him and what dispute he decided. In the preliminary section of the determination he recorded that the dispute arises from allegations by EEL of module defects, technical issues and planning issues arising from the works carried out by DPL and that "the cost to rectify the defects are said by [EEL] to be" the costs set out in the letter of 25 February 2020 including the "Total of Claim" of £1,708,474.60. He recorded that:

> "[EEL] seeks the following redress against DPL:
>
> 1. That DPL should pay to [EEL] the sum of £1,708,474.60 or such other sum that I consider appropriate; …"

53. In his section of jurisdiction, he summarised the submissions of the parties, including setting out paragraphs 25 and 26 of EEL's jurisdiction submissions in full. He then characterised the dispute as follows:

> "7. As noted by EE, and upon my reading of the dispute that has been referred, this dispute is in relation as to whether EE should be reimbursed for the cost of remedying defects that they say DPL has failed to rectify and, if so, how much should be paid. I also note that Clause 13.8 of the Contract states "the Employer and the Contractor are unable to agree a reduction or reimbursement of the Contract Price as required by clause 13.7(b) then this shall be resolved by the Parties in accordance with clause 36." Clause 36 being expert determination."

54. Having decided that there was no clear case that he did not have jurisdiction, he continued to consider the substantive materials that had been made available to him, noting that DPL had decided not to make any substantive submissions. Under each of the three headings advanced by EEL he came to the conclusion that the heads of claim were substantiated. Under the heading "Quantum" he considered the costs claimed by EEL under each of the three heads and accepted them in the sums claimed. His decision was in the following terms:

> "**I NOW DECIDE AND DECLARE THAT: -**
>
> [DPL] shall forthwith pay to [EEL] the sum of £1,708,474.00"

55. The following points emerge:

i) There is no mention or analysis in EEL's substantive submissions of the contractual structure or of clause 13.7(b); nor is there anything to indicate that they seek a reimbursement of part of the Contract Price pursuant to the machinery established by clauses 13.7(b) and 13.8. The word reimbursement is not used;

ii) Paragraph 71 of EEL's substantive submission is framed in terms that would be appropriate to a claim for damages (or debt) for defects. Such a claim would not fall within clause 13.7(a) because EEL had not arranged for the work to be carried out. Nor would it fall within clause 13.7(b) as it is not a claim for the reduction or reimbursement of the Contract Price;

iii) EEL's submissions on jurisdiction are equally confused and confusing. Paragraph 11 speaks of a failure "to agree the sum payable to [EEL] to rectify defects", which is not the basis of a claim under clause 13.7(b): it indicates a claim for the costs of repairs as such, not an adjustment of the purchase price. This impression is reinforced by paragraphs 17 and 18. Paragraph 19 is simply wrong in asserting that clause 13.7(b) states that the amount to be reimbursed

to EEL for having to engage others to carry out the work of rectification should be agreed with DPL. That is not what it says or implies. This error infects the references to reimbursement which follow in paragraphs 20, 25 and 26;

iv) Perhaps unsurprisingly in the light of the misleading submissions that had been made to him by EEL, Mr Sliwinski's Determination contains no consideration of whether the costs of curing the alleged defects were or should be equated to any appropriate reduction or reimbursement of the Contract Price pursuant to clauses 13.7(b) and 13.8. Despite his passing reference to clause 13.7(b) in paragraph 7 of his Determination, his determination is expressed overall in terms that are much more consistent with a straightforward money claim for the cost of remedying defects.

Question 1: Was the dispute which EEL purported to refer to the expert determiner, and which he purported to decide, a dispute which the Contract permitted to be referred to expert determination in accordance with Clause 36?

56. DPL's first ground of resistance is that the dispute that was referred to Mr Sliwinski was not a dispute about a reduction or reimbursement of the Contract price, "because it encompassed a wider dispute about whether or not there were Defects in the Works in the first place." For the reasons set out at [38]-[43] I reject this submission. Any assessment and determination of what, if anything, would be a reasonable reduction in or reimbursement of the Contract Price necessarily involves an assessment and conclusion about the existence, nature and extent and effect of defects. That applies whether or not any or all those features are contentious. DPL describes its fundamental submission on this point as being that "Clause 13.8 was only applicable in circumstances in which it was agreed that there were Defects but the parties had been unable to agree the amount of the reduction or reimbursement of the Contract Price to be afforded to EEL as a result." That is not what the Contract says: there is no reference to the need for the parties to have agreed that there were Defects, and no proper legal basis for writing those words into clause 13.7 or 13.8.

57. While making no presumptions about the width or narrowness of the terms of the Contract, it is material to bear in mind that:

i) We are here concerned with an interim remedy only;

ii) Without the existence of provision for an interim resolution, clause 13.7(b) would be little more than an exhortation to agree; and

iii) If DPL's submission is correct, the Contractor could prevent any resolution of the issue by disputing the existence of Defects or even by merely asserting that they are not proved.

None of these features are determinative, but they sit more comfortably with a contractual interpretation that gives the interim procedure some substance rather than enabling the Contractor to empty it of content by the simple expedient of not agreeing.

58. DPL's second ground of resistance is that the dispute concerned the cost of carrying out remedial work, not the amount of any reasonable reduction in the Contract Price.

It relies on the terms of EEL's solicitor's letter of 25 February 2020, EEL's application to the CIArb dated 18 March 2020, EEL's submissions in the expert determination dated 1 May 2020, and Mr Sliwinski's determination of the dispute he was resolving.

59. The court was informed during the hearing that EEL has paid the Contract Price, so that this is a case about reimbursement rather than reduction of the Contract Price. The letter from EEL's solicitors dated 25 February 2020 was not clear. It was founded on costs that would be required to cure alleged defects if EEL were to carry out those works. The passage set out at [45] above referred to clause 13.8 but wrongly said that the dispute was to be resolved by an expert if the parties cannot agree a reimbursement "to cover the costs of the defects". That is not what is said in clause 18 or in clause 13.7(b). On the other hand, the use of the term "reimbursement" may be taken as a reference to clause 13.7(b), which is the only relevant place where reimbursement is mentioned. Furthermore, clause 13.7(a) could not be relevant because, quite apart from the fact that EEL has not arranged for the work to be carried out, there can be no reference to an expert of a dispute under clause 13.7(a). That said, the letter was equivocal about whether the dispute should be referred to expert determination or to adjudication, which provides some explanation for the reference to a claim for damages: clause 13.7(a) and (b) both refer to the Employer's recovery being "as a debt."

60. The email of 4 March 2020 took matters little further, but included a claim for immediate payment of the cost of cure with no reference to adjustment of the Contract Price under clause 13.7(b)

61. The application to the CIArb made no mention of the dispute being about a reimbursement of part of the Contract Price. In fact it said little or nothing other than to identify the sum in dispute by reference to the three headings that EEL were pursuing, which it said arose because of the need to carry out repairs and replacement. To that extent it was more consistent with being a claim for damages than a claim for adjustment of the Contract Price.

62. EEL's submissions to Mr Sliwinski were confused and confusing, particularly in misrepresenting the true effect of clause 13.7(b): see [55] above. In those circumstances, it is not surprising that Mr Sliwinski treated the claim as a simple claim for the cost of repairs with no reference to the question whether that would be an appropriate adjustment to the Contract Price.

63. Despite the occasional use of the word reimbursement, I consider that the overall effect of the language used by EEL was to advance a claim for the cost of repairs and not a claim for an adjustment of the contract price in relation to which the notional cost of repairs was supporting evidence. I reach this conclusion because of the repeated emphasis on the need to be paid the cost of repairs and the failure to identify the true basis for a claim under clause 13.7(b), as set out above. This confusion started with the letter of 25 February 2020 with its reference to clause 13.8 being applicable "if the parties cannot agree a reimbursement to cover the costs of the defects" and, later the summary of the claim as being that EEL "now seeks from you reimbursement of the costs that they will incur to rectify the defects as a debt and/or damages." This characterisation, combined with the failure to mention that what was in fact being claimed was adjustment and reimbursement of the Contract Price

continued through the request to the CIArb and EEL's submissions to Mr Sliwinski. On an objective reading, EEL was asking for reimbursement of the costs of cure. That is not the same as seeking reimbursement of part of the Contract Price.

64. I therefore conclude that the dispute that was referred to Mr Sliwinski (and which he decided) was a claim for the cost of the proposed remedial works that did not fall within clause 13.7(b). Accordingly he had no jurisdiction to decide it.

Question 2: Did EEL serve a notice on DPL of its intention to refer the dispute for expert determination in accordance with the requirements of Clause 36.1 of the Contract?

65. In case I am wrong in my determination of question 1, I go on to consider question 2.

66. The applicable principles are summarised at [11] and [12] above. The contextual scene is set by the notices of defects that EEL had sent and DPL's refutation of those allegations, as summarised at [44] above.

67. EEL submits that the letter of 25 February 2020 and the email of 4 March 2020 should be read together as constituting an adequate notice of intention to refer. I agree with that approach. I am not troubled by the failure to state in those documents that they were intended to be a Notice of Intention to Refer: it is much more important to look at the substance than the form.

68. When read together, I would not characterise the two documents as being a mere threat. The email of 4 March 2020 indicates a settled intention to refer, albeit that it would not be necessary to do so if DPL were to pay the sum claimed or agree to adjudication. The real problem, in my judgment, is the confusion that permeates the documents about the nature of the dispute that is being referred, as discussed in relation to Question 1 above. Viewed objectively, it cannot be concluded that the composite notice was sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt that it was intended to be a claim for adjustment of the Contract Price pursuant to the operative provisions of clauses 13.7(b) and 13.8. It is therefore not necessary to consider the additional point taken by DPL that the notice was not sufficiently served in accordance with the provisions of clause 33 of the Contract. The purported notice was therefore inadequate and invalid.

Conclusion

69. For the reasons set out above:

i) The dispute which EEL purported to refer, and which Mr Sliwinski purported to decide, was not one which the Contract permitted to be resolved by expert determination;

ii) EEL failed to serve a notice on DPL of its intention to refer the dispute in accordance with clause 36.1 of the Contract;

iii) Mr Sliwinski lacked jurisdiction and his Determination dated 5 May 2020 is null, void and of no effect and is not binding on the parties.

iv) Accordingly EEL's claim to enforce Mr Sliwinski's determination fails.