Neutral Citation Number: [2019] EWHC 593 (TCC)

Case No: HT-2019-000020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2019

Before :

MRS JUSTICE JEFFORD DBE

- -

Between :

EQUITIX ESI CHP (SHEFF) LIMITED	**Claimant**
- and -	
VEOLIA ENERGY & UTILITY SERVICES UK PLC	**Defendant**

- -
- -

Rupert Choat (instructed by **CMS Cameron McKenna Nabarro Olswang LLP)** for the **Claimant**
Rachel Ansell QC (instructed by **Stephenson Harwood LLP**) for the **Defendant**

Hearing dates: 19 and 20 February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE JEFFORD

Mrs Justice Jefford :

Introduction

1. These are Part 8 proceedings which have been listed urgently by the Court because of the applications for injunctions made by the Claimant. On 24 January 2019, Stuart-Smith J dismissed a limited interim injunction that had previously been granted and gave directions for this hearing. Amongst other things, he directed a Statement of Agreed Facts and what follows at paragraphs 2 to 10 is largely taken from that document.

2. This case concerns a biomass energy plant in Holbrook, Sheffield ("the Facility"). The claimant ("Equitix") owns the Facility and is a special purpose vehicle set up for this project. On 17 June 2015, Equitix entered into an EPC Contract with Kantor Energy Limited ("Kantor") for the design and construction of the Facility. On the same date, Equitix entered into a contract with the defendant ("Veolia") for the operation and maintenance of the plant. Where I refer in this judgment to the contract without further specification, that is a reference to the O&M Contract.

3. The Taking Over Certificate under the EPC Contract was issued on 29 May 2018 which gives the Operational Start Date and the Actual Taking Over Date under the O&M Contract. Since then Veolia has notified 31 Alleged Defects (as defined) to Equitix.

4. Under the O&M contract there are requirements for service levels and provision for deduction of performance related damages. The detail of these provisions has not been relied upon and has not been before me and, other than as appears below, I need say no more about them.

5. In short, however, Veolia alleges that the reason for the problems is the 31 Alleged Defects and the supply of non-compliant biomass fuel (under the Biomass Fuel Supply Agreements). Equitix has served notices pursuant to clause 7.5 of the O&M Contract in respect of all the Alleged Defects. It is the effect of those notices on the dispute resolution provisions of the O&M Contract that gives rise to the first issue in the dispute before me.

6. Equitix commenced these Part 8 proceedings on 17 January 2019. Equitix sought a declaration that Veolia was not entitled to commence proceedings under Part 3 of Schedule 8 to the O&M Contract in respect of Alleged Defects which are the subject of

a notice under clause 7.5, where Part 3 of Schedule 8 is the dispute resolution procedure which would otherwise apply in respect of Alleged Defects in Kantor's works.

7. Equitix sought a further declaration which was relevant if Part 3 applied and was in the following terms:

> "The President of the CIArb [the Chartered Institute of Arbitrators] is obliged to appoint experts in the field of biomass energy plants pursuant to paragraph 1.9 of Schedule 8, Part 3 of the O&M Contract meaning persons who possess technical expertise in the field of biomass energy plants."

8. Equitix further sought injunctions restraining Veolia from taking steps to commence an adjudication under Part 3 and from applying to the President of the CIArb to appoint an adjudicator unless the application stated that the person should be an "expert with technical expertise in the field of biomass energy plants."

9. An application was made for an interim injunction; a limited interim injunction was initially granted; but that injunction was discharged by Stuart-Smith J on 24 January 2019.

10. Thereafter, on 29 January 2019, Equitix itself applied to the President for the appointment of 3 experts to form the panel envisaged by the contract (as more fully set out below). Equitix's position now is that the three appointees selected by the President do not meet the contractual specification.

The relevant provisions of the O&M and EPC Contracts

11. I set out below the provisions of the O&M and EPC Contracts to which I will refer in this judgment. I shall refer to some clauses without setting them out in full and summarising the nature of their provisions only.

O&M Contract

12. Under the O&M Contract, Equitix is referred to as the Employer and Veolia as the Contractor. Kantor is referred to as the EPC Contractor.

13. Clause 1: Definitions and Interpretation

(i) At clause 1.1, the following definitions, amongst others, are provided:

"Defect": means any defect, shrinkage, or other fault in the Works or any part thereof which is caused by a failure of the EPC Contractor to comply with the terms of the EPC Contract.

"Defects Notification Period": means …. the time period for notifying Defects in the relevant element of the Works under the EPC Contract, being a period of two (2) years such period to be calculated from the Actual Taking Over Date …."

"Derived Benefit": means a right or benefit in respect of circumstances under or pursuant to any Related Agreement to which the Employer is or becomes entitled from time to time, to the extent that such circumstances relate to a right or benefit (including relief from the Contractor's obligations under this Agreement) claimed by the Contractor arising under or pursuant to this Agreement (whether or not in this Agreement such right is expressed to be subject to clause 7 (Related Agreements and Interface) ….."

"Dispute Resolution Procedure": means the process set out in Clause 38 (Dispute Resolution Procedure) of this Agreement;

"Efficiency Liquidated Damages": a payment to be made by the Contractor to the Employer in accordance with paragraph 4.1.1 of Part 2 of Schedule 2

"Employer Breach": means a breach by the Employer of any of the Employer's material obligations under this Agreement or by any Employer's Counterparty (other than the EPC Contractor the approach to which is detailed in Schedule 8 (Interface)) of such Employer's Counterparty's material obligation under the relevant Related Agreement, the approach to which is detailed in Clause 7 (Related Agreement and Interface) in each case if and to the extent that such breach materially affects the Contractor's ability to comply with its obligations under this Agreement …..

"Employer's Counterparty": means a counterparty to the Employer under a Related Agreement

"Employer Related Parties": means the Employer's sub-contractors, suppliers and consultants …

"Employer Risk": means any of the following:

…

(b) a Defect that occurs during the First Operating Year, provided that the Contractor has complied with the provisions of Part 2 of Schedule 8 (Interface); ….

(d) a Defect that is the subject of a Defect Notice prior to the end of the Defect Notification Period and has not been rectified by the end of the Defect Notification Period (until such time as it is rectified), provided that the Contractor has complied with the provisions of Part 2 of Schedule 8 (Interface); ….

"Energy Service Liquidated Damages": a payment to be made by the Contractor to the Employer in accordance with paragraph 2.1.1 of Part 2 of Schedule 2

"EPC Parties": means the EPC Contractor and its sub-contractors and suppliers …

"**Excluded Event"**: means loss or damage to the Facility or any part thereof:

(a) to the extent resulting from an Employer Risk; or

(b) to the extent resulting from any act(s) or omission(s) of the Employer or any Employer Related Party (apart from (i) the EPC Parties which shall be governed according to Schedule 8 (Interface) and ….

"Operational Period Start Date": the Actual Taking Over Date

"Parallel Defence": means any defence or resistance available to the Employer in respect of any claims, disputes or proceedings raised or brought by any Employer's Counterparty under any Related Agreement, to the extent that the circumstances giving rise to such defence or resistance relate to any defence or resistance available to the Contractor in respect of any claims, dispute or proceedings raised or brought, or that may be raised or brought, by the Employer pursuant to this Agreement ….

"Performance Liquidated Damages" the Energy Service Liquidated Damages and/or the Efficiency Liquidated Damages

"Related Agreements": means the EPC Contract, the PPA, the Agreement for Lease, the Lease, the Biomass Fuel Supply Agreements, the Connection Agreement, the Management Services Agreement and the Independent Certifier Contract.

(ii) Clause 1.4: "This Agreement shall be read and construed as a whole and any provision of this agreement may qualify or affect the interpretation of any other provision of this Agreement."

(iii) Clause 1.7: "Where this Agreement contains any reference to the EPC Contractor liaising with, giving an instruction to or otherwise dealing with the Contractor, the EPC Contractor shall in all circumstances be deemed to be acting on behalf of the Employer (but without prejudice to the provisions of Clause 7 (Related Agreements and Interface) and Schedule 8 (Interface)."

(iv) Clause 1.8: "where this Agreement obliges a Party to procure that something occurs or does not occur, such obligation shall only be discharged if such thing occurs or does not occur …."

(v) Clause 1.9: "Clause headings do not form part of or affect the interpretation of this Agreement."

14. Clause 2.2 provides:

"The Contractor shall provide the Services as follows:

2.2.1 prior to the Mobilisation Period Start Date [defined as a date not less than 5 months prior to the Anticipated Taking-Over Date], the Contractor shall not be required to provide any of the Services (but, for the avoidance of doubt, shall comply with and be bound by the other terms of this Agreement, including the provisions of paragraphs 2, 3.3 and Part 5 of Part 1 of Schedule 8 (Interface);

2.2.2 during the Mobilisation Period, the Contractor shall provide the Initial Mobilisation Services ….; and

2.2.3 during the Operational Period, the Contractor shall provide the Full Services."

15. Clause 5 sets out the Contractor's obligations which included the obligation to provide assistance to the EPC Contractor during the Initial Mobilisation Period [defined as the period commencing on the Mobilisation Period Start Date and ending 5 months thereafter] and to provide the Full Services during the Operational Period. Clause 6 sets out the Employer's Obligations and in particular the procuring and supply of the biomass fuel for the facility. Biomass Fuel is defined as "a non-hazardous, processed, homogenised, heterogenous fuel prepared from recycled life expired wood meeting the definition of biomass under the Renewables Obligation Order 2009".

16. Clause 7, which is central to the issues before me, is headed Related Agreements and Interface and contains the following:

    (i) Clause 7.1: "The Parties acknowledge that the Employer has provided to the Contractor copies of the Related Agreements …."

    (ii) Clause 7.2: "The Contractor acknowledges that a breach by the Contractor of this Agreement is likely to result in, amongst other things, a loss or liability for the Employer under one or more of the Related Agreements …. Conversely the Employer acknowledges that a breach by any Employer Counterparty of any Related Agreement is likely to result in the non or poor performance by the Contractor of the Services which in turn shall have an impact on the availability of the Renewable Benefits and revenue for the Employer.

    (iii) Clause 7.3: "Where any question arises as to whether the Contractor or the EPC Contractor is, or the proportion in which the Contractor and/or the EPC Contractor are, liable to the Employer in respect of any failure in the performance of the Facility or other liability incurred by the Employer and/or the Contractor, the provisions of Part 2 of Schedule 8 (Interface) shall apply."

    (iv) Clauses 7.5 to 7.7 appear under the heading Pursuit of Employer Entitlements

    (v) Clause 7.5:

"Where the Employer considers that any matter or circumstance under this Agreement and/or under a Related Agreement gives rise to either a Derived Benefit or a Parallel Defence (being a **"Parallel Liability"**), the Employer shall be entitled to give the Contractor written notice that the following provisions of these Clauses 7.5 to 7.7 shall apply (provided that if this Clause 7.5 is not invoked by the Employer, the Contractor may nevertheless pursue its rights under this Agreement in accordance with Clause 38 (*Dispute Resolution Procedure*))."

(vi) Clause 7.6 the provides:

"Following service of a notice under Clause 7.5 above, the Employer shall:

7.6.1 submit to the relevant Employer's Counterparty an application (prepared by the Contractor on the Employer's behalf) with all necessary supporting particulars for any such Parallel Liability, and provided that such application as prepared by the Contractor complies with any requirements as to format, content and timing to the extent stipulated by this Agreement and/or the relevant provisions of the relevant Related Agreement on which the Employer shall comment. For the avoidance of doubt, provided that the Contractor complies with the requirements of this Clause 7.6.1, the Employer shall not amend or alter the Contractor's application in a way that would have an adverse effect on the Contractor's interest in the Employer's rights or entitlements under the said application without the Contractor's prior written consent;

7.6.2 the Employer shall not without the prior written consent of the Contractor compromise or waive any Parallel Liability under any Related Agreement; and

7.6.3 where an application to the relevant Employer's Counterparty for any Parallel Liability is unsuccessful (and such application shall be deemed to be unsuccessful if it has not been resolved to the reasonable satisfaction of the Employer and the Contractor within thirty (30) days of submission of the relevant application), the Contractor may require the further pursuit of that Parallel Liability by the Employer in accordance with Clause 7.7."

(vii) Clause 7.7 provides that:

"Where pursuant to Clause 7.6.3 this Clause 7.7 applies, the Employer shall pursue the relevant Parallel Liability including by invoking the relevant Related Agreement's "Dispute Resolution Procedure" or commencing proceedings pursuant to the relevant Related Agreement as the case may be and the following provisions shall have effect:

7.7.1 The Employer shall act in good faith in the operation of this Clause 7.7 and before incurring any material costs in relation thereto, the Employer shall obtain the Contractor's comments in relation to such costs, provided that nothing in this subclause shall prevent the Employer from proceeding to pursue the Parallel Liability in a timely manner or incurring such costs.

7.7.2 The Contractor shall in a timely manner afford to the Employer such co-operation as may be reasonably requested by the Employer to assist the Employer in pursuing a Parallel Liability against the relevant Employer's Counterparty under this Clause 7.7. Such co-operation shall include the provision of documents and the making available of witnesses.

7.7.3 The Employer shall bear and discharge all claims, proceedings, loss, damage, costs and expenses (including legal costs, expert witness costs, witness expenses and court, adjudicator's, mediator's, expert's and arbitrators' fees and charges) incurred by the Employer arising from the operation of this Clause 7.7 by the Employer. Following conclusion of the Parallel Liability, the Contractor shall indemnify the Employer for such costs as the court, adjudicator, mediator or arbitrator under the relevant dispute resolution procedure shall order and, in the event that the adjudicating party does not make a clear order as to costs between the Contractor and the Employer, any costs of the action shall be borne in the proportion of one third by the Contractor and two thirds by the Employer.

7.7.4 The Employer shall keep the Contractor fully informed as to the progress of the Employer's claim and shall, if requested by the Contractor and at the Contractor's expense, provide copies of all documentation relating to the same.

7.7.5 The Employer shall not, without the consent of the Contractor (such consent not to be unreasonably withheld or delayed) waive, compromise or settle any claim being pursued by it against an Employer's Counterparty under this Clause 7.7.

(viii) Clauses 7.8 to 7.11 are headed "*Pass-Down of Parallel Liabilities*":

"7.8 Notwithstanding any other provision of this Agreement the Contractor agrees that its rights (whether in contract, tort, by way of restitution or otherwise) in respect of any Parallel Liability shall be limited as set out in these Clauses 7.8 to 7.11.

7.9: The Contractor agrees and acknowledges that, providing the Employer complies with Clauses 7.5 to 7.7 above, any agreement, compromise, settlement reached by the Employer with any relevant Employer's Counterparty on any Parallel Liability or determined by legal proceedings brought by the Employer shall be binding on the Contractor and the Contractor shall not be entitled to separate or further determination of the Parallel Liability."

7.10 Notwithstanding the above Clause 7.9 the ability of the Contractor to claim a Derived Benefit shall not be lost in the event that no agreement, compromise, settlement or binding determination by legal proceedings can be obtained due to the insolvency of the Employer's Counterparty under the relevant Related Agreement.

7.11 Notwithstanding any other provisions of this Agreement, to the extent of any inconsistency between the provisions of these Clauses 7.8 to 7.11 and any other provisions of this Agreement, the provisions of these Clauses 7.8 to 7.11 shall take priority."

17. Clause 19: Relief Events

"Relief for the Contractor

19.1 Subject to clause 19.5 (Relief Events) below, the Employer will not be entitled to Performance Liquidated Damages to the extent that failure to meet the Performance Requirements arises as a direct result of:

…..

19.1.3 an Excluded Event …

19.1.5 an Employer Breach; or

19.1.6 an Employer Risk; …

..."

18. Clause 20 is headed Performance Requirements. The clause provides for the Contractor to measure the performance of the Facility (in accordance with Schedule 2) and, amongst other things, for the payment of Performance Liquidated Damages to the Employer on a yearly basis, with a corresponding provision for the payment of a Performance Bonus Payment.

19. Clause 37.1 provides that English law applies and clause 37.2 provides that:

"Subject to Clause 38, the Parties irrevocably agree that the English courts shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with the Agreement or its subject matter or formation (including non-contractual disputes or claims)."

20. Clause 38:

(i) Clause 38.1 provides that "either party may, subject to Clause 7 (*Related Agreements and Interface*) and Schedule 8 (*Interface*) refer a dispute under this Agreement to an Adjudicator at any time by giving written notice (the "**Adjudication Notice**") to the other Party stating its intention to do so". Clause 38.2 provides for the agreement by the Parties, within two days of the receipt of the Notice, of the individual to be appointed as the Adjudicator "from the appropriate panel". So far as I am aware there is no such panel. If the parties have not agreed on the Adjudicator, the referring Party shall request the President for the time being

of the Chartered Institute of Arbitrators to select a person to act as Adjudicator within 5 days of such request.

(ii) Thereafter, the provisions of clause 38 can be summarised as follows. A Referral Notice with supporting documents (referred to as an Adjudication Statement) is submitted within 7 days and a Response within 16 days. A written decision is provided within 28 days of the Adjudicator's appointment unless the parties agree an extension (clause 38.4). Unless and until revised, cancelled or varied by a decision of the courts, the decision shall be final and binding on both Parties, who shall forthwith give effect to the decision (clause 38.5). Under clause 38.6 either party may, within 42 days of receipt of the decision, refer any dispute to the courts in accordance with Clause 37.2.

(iii) Clause 38.8 provides "The provisions of Schedule 8 (Interface) shall apply to any Interface Dispute."

Schedule 8

21. This Schedule to the O&M Contract is headed Interface. Under Part 1, and in particular paragraphs 1.2 and 1.3, the Employer shall procure that the EPC Contractor carries out its obligations under the EPC Contract and designs and carries out the Works in accordance with that Contract. Under clause 1.7, the Contractor confirms that, without prejudice to Clause 19, it will be able to provide the Services at the Facility if the EPC Contractor carries out its works in accordance with the EPC Contract. Then:

(i) Much of the balance of Part 1, which is too lengthy to set out, is concerned with the Employer's procuring the EPC Contractor's performance but obligations as to co-operation are also imposed on the Contractor. Under paragraph 2.4, for example, the Contractor agrees that it will perform its obligations so as to avoid causing the EPC Contractor to incur additional cost, delay and disruption. Since there is no contractual relationship between Veolia and Kantor that provision must be intended to enable Equitix to pass down a claim from Kantor that arises in such circumstances.

(ii) Paragraph 3 deals with the Construction Programme and notification of take over. Paragraph 4 is concerned with Access to be given by the EPC Contractor to the

O&M Contractor during the Mobilisation Period and by the O&M Contractor to the EPC Contractor during the Operational Period. Paragraph 5 is headed Design Development; Paragraph 6 is Mobilisation, Testing and Commissioning.

(iii) Paragraph 10 provides for the notification of incidents or events that may give rise to an Interface Dispute (as defined in Part 3) but expressly without prejudice to either Party's right to refer any dispute to adjudication in accordance with Part 3 of this Schedule.

22. Part 2 is headed "Failure Attributable to Defects". It states that it only applies to matters notified by the Contractor to the Employer and the EPC Contractor prior to the end of the Defect Notification Period, although that may not, in fact, be accurate:

(i) Paragraph 1 contains a number of further definitions:

""Alleged Defect" means any defect or failure in the Facility which the Contractor considers is a Defect and which the Contractor notifies to the Employer and the EPC Contractor in accordance with this Part 2 before the end of the Defect Notification Period."

""Defect" has the meaning given to such term in Clause 1 of this Agreement."

""Service Performance Shortfall" means any failure of the Contractor to satisfy its obligations under this Agreement, including any failure to meet any of the obligations of Clause 20 (Performance Requirements)."

(ii) Paragraph 2: Notification of Alleged Defects provides:

"2.1 The Contractor shall notify the Employer and the EPC Contractor of all Alleged Defects in accordance with paragraph 2.2 below.

2.2 The Contractor's Representative shall notify the Employer and the EPC Contractor's Representative initially by telephone and by email and subsequently by notice in writing ("**Defects Notice**") in accordance with the

reporting procedure set out in paragraph 3.1 or as otherwise agreed between the Contractor and the Employer."

(iii) Paragraph 3 sets out the obligation of the Contractor to notify the Employer promptly and provide specified information if the Contractor determines that an Alleged Defect has occurred and/or there is a Service Performance Shortfall caused by an Alleged Defect.

(iv) Paragraph 3.4 then provides:

"Following notification under paragraph 3.3 above, the Employer shall notify the Contractor whether:

3.4.1 the EPC Contractor accepts that the Alleged Defect is a Defect and, in the case of a Defect arising prior to the end of the Defects Notification Period, if so when the EPC Contractor will attend the site to rectify the same; or

3.4.2 the EPC Contractor does not accept that the Alleged Defect is a Defect and considers that further investigation of the Alleged Defect is required in order to determine whether the Alleged Defect is a Defect, in which case the Employer shall either: (a) where the Alleged Defect arises prior to the end of the Defects Notification Period procure that the EPC Contractor shall promptly attend the Site to investigate the Alleged Defect; or (b) where the Alleged Defect arises after the end of the Defects Notification Period, at the Employer's option procure that the EPC Contractor shall promptly attend the Site to investigate the Alleged Defect or instruct the Contractor to promptly investigate the Alleged Defect unless the Contractor, in its discretion, has already started to investigate the Alleged Defect; or …

3.4.3 the EPC Contractor does not accept that the Alleged Defect is a Defect and does not consider that any further investigation of the Alleged Defect is required to determine whether the Alleged Defect is a Defect, in which case the Employer shall procure that the EPC Contractor provides its reasons in writing to the Employer and the Contractor for concluding that the Alleged Defect is not a Defect.

(v) Paragraph 3.5 provides for the information from any investigation to be provided by the EPC Contractor or the Contractor as applicable, following which the

Contractor is to give notice to the Employer as to whether it continues to consider the Alleged Defect to be a Defect.

(vi) Paragraph 3 continues as follows:

"3.6 Where limb (a) of paragraph 3.4.2 applies and, pursuant to paragraph 3.5 above the Contractor notifies to the Employer that it no longer considers that the Alleged Defect is a Defect or it is determined pursuant to the procedure in Part 3 of this Schedule 8 (*Interface*) that the Alleged Defect is not a Defect, the Contractor shall pay to the Employer the EPC Contractor's Net Costs associated with the investigation of the Defect pursuant to paragraph 3.4.2 above.

3.7 Where limb (b) of paragraph 3.4.2 applies, and such Alleged Defect has been notified by the Contractor to the Employer prior to the End Date and, pursuant to paragraph 3.5 above the Employer notifies the Contractor that it accepts that the Alleged Defect is a Defect or it is determined pursuant to the procedure in Part 3 of this Schedule 8 (*Interface*) that the Alleged Defect is a Defect, the Employer shall pay to the Contractor the Contractor's Net Costs associated with the investigation of the Defect pursuant to paragraph 3.4.2 above. ….

23. Paragraph 4.2 provides:

"If, having followed the procedure in paragraph 3 above, the Employer and/or the EPC Contractor do not agree that the Alleged Defect is a Defect, the Employer or the Contractor may refer the matter for determination pursuant to Part 3 of this Schedule 8 (Interface), provided that any such referral shall be without prejudice to the right of the Employer to accept at any time thereafter that the Alleged Defect is a Defect and the right of the Contractor at any time thereafter to accept that the Alleged Defect is not a Defect."

24. Under paragraph 5, the Employer shall procure that the EPC Contractor remedies Defects notified in the Defect Notification Period in accordance with clause 11.4 of the EPC Contract and, if the EPC Contractor fails to do so, may instruct the Contractor to do so. Paragraph 5.6 provides for the Contractor to be entitled to an Excusing Cause in relation to Defects on certain conditions.

25. Paragraph 7.2 provides:

"Pending agreement or determination under Part 3 of this Schedule 8 as to whether or not an Alleged Defect is a Defect, the Employer shall, for the purposes of calculating compliance with the Performance Requirements and calculation of any liquidated damages due pursuant to Schedule 2 (*Performance Requirements and Performance Payments*) be entitled to assume that the Alleged Defect is not a Defect and does not constitute an Excusing Cause and the Contractor shall be liable under this Agreement for the consequence of such Alleged Defect. ….."

26. Part 3 is entitled Interface Schedule Dispute Resolution Procedure and contains the following provisions:

(i) Paragraph 1.1: "All disputes between the Contractor and the Employer arising out of or in connection with any provision of Parts 1 or 2 of this Schedule 8 (Interface) (an "**Interface Dispute**") or any remedies relating thereto shall be determined in accordance with this Part 3 (Dispute Resolution Procedure) of Schedule 8, provided that this shall be without prejudice to the mechanism set out in paragraph 5 (Design Development) of Part 1 of this Schedule 8 (Interface)."

(ii) Paragraph 1.2: "The Contractor:

1.2.1 acknowledges that the EPC Contractor is required (under schedule 17 (Interface) to the EPC Contract) to comply with an equivalent dispute resolution procedure in respect of Interface disputes between the EPC Contractor and the Employer arising out of or in connection with schedule 17 (Interface) of the EPC Contract;

1.2.2 acknowledges that any Interface Dispute may also raise issues which relate to a dispute between the Employer and the EPC Contractor under the EPC Contract;

1.2.3 agrees that any Interface Dispute will be determined pursuant to a dispute procedure conducted under this Part 3 (Interface Dispute Resolution Procedure); and

1.2.4 understands that the Employer has entered into like obligations with the EPC Contractor under part 3 of schedule 17 (Interface) of the EPC Contract to govern the participation of the EPC Contractor in any Interface Dispute"

(iii) Paragraph 1.3:

"Any Interface Dispute shall be resolved by adjudication in accordance with this Part 3 (Interface Dispute Resolution Procedure) and the Parties agree that this procedure shall operate to the exclusion of the Dispute Resolution Procedure set out at Clause 37 [sic] (Dispute Resolution Procedure) except as provided in paragraph 1.19."

(iv) Paragraph 1.4:

"Either party may give the other notice of its intention to refer any Interface Dispute to adjudication ("**Notice of Adjudication**"). The Notice of Adjudication shall include a brief statement of the issue to be referred and the redress sought. The party giving the Notice of Adjudication ("**Referring Party**'") shall on the same day and by the same means of communication send a copy of the Notice of Adjudication to the EPC Contractor and an adjudicator selected in accordance with paragraph 1.5 (Identity of Adjudicator)."

(v) Clause 1.5:

"The Adjudicator nominated to consider a dispute referred to him shall be selected on a strictly rotational basis from the relevant panel of experts which shall comprise three (3) experts in the field of biomass energy plants and who shall be selected jointly by the Contractor, the EPC Contractor and the Employer, all such parties acting reasonably. Such selection shall take place within twenty (20) Working Days of the Commencement Date."

(vi) Paragraph 1.8:

"In the event that the nominated Adjudicator is unable or unwilling to confirm acceptance of his appointment as Adjudicator within two (2) Working Days of

receipt of the Notice of Adjudication, then the Referring Party shall invite the person next in line to act as the Adjudicator. In the event that the second panel member is unwilling or unable to confirm acceptance of his appointment as Adjudicator within two (2) days or if the parties disagree as to the relevant panel of experts to be used, the Referring Party may apply to the President for the time being of the Chartered Institute of Arbitrators who shall within three (3) Working Days of any such application nominate an Adjudicator to determine the issue set out in the Notice of Adjudication."

(vii) Paragraph 1.9:

"If the Employer, the Contractor and the EPC Contractor are unable to agree on the identity of the experts to be selected to the panels, the President for the time being of the Chartered Institute of Arbitrators shall appoint such expert(s) within thirty (30) days of any application for such appointment by either party."

(viii) Paragraphs 1.10 to 1.18 set out the procedure to be followed for the adjudication. These include a requirements for service on the EPC Contractor (who is defined as a Responding Party) and who is also required to serve a Response. Paragraph 1.13 which deals with the Adjudicator's Decision provides that "Unless and until revised, cancelled or varied by the English courts, the Adjudicator's decision shall be binding <u>on both parties</u> who shall forthwith give effect to the decision" (my emphasis).

(ix) Paragraph 1.19:

"Either Party or the EPC Contractor may (within ninety (90) calendar days of receipt of the Adjudicator's decision or where the Adjudicator fails to give a decision pursuant to paragraph 1.13 (Adjudicator's Decision) give notice to the other party of its intention to refer the dispute to the courts of England and Wales for final determination."

The EPC Contract

27. Under this contract, the Employer engaged Kantor to design, construct, install and commission a biomass boiler and associated works.

28. Clause 11 is entitled Defects Liability. It imposes on Kantor an obligation to remedy defects and makes various provisions in this respect including under clause 11.4 the right of the Employer to fix a date by which a defect must be remedied.

29. Clause 20 is headed "Disputes". It provides for adjudication and, subject to clause 22, for "Related Disputes" to be referred to the same adjudicator.

30. Clause 22 is entitled Interface and starts in similar terms to clause 7 of the O&M Contract. In particular:

(i) Clause 22.3 provides that:

> "Where any question arises as to whether the Contractor or the O&M Contractor is, or the proportion in which the Contractor and/or the O&M Contractor are, liable to the Employer in respect of any failure in the performance of the Facility or other liability incurred by the Employer, the provisions of Part B of Schedule 17 (Interface) shall apply.

(ii) Clause 22.5:

> "The Employer shall comply with its obligations under these clauses 22.5 to 22.8 in order to establish or resolve all entitlements, rights and other matters or to secure the full performance of all (or any) obligations, rights or duties owed to the Employer under the Related Agreements which are necessary:
> 22.5.1 for the Contractor to become entitled, in turn, to any Derived Benefit; or
> 22.5.2 in order to pursue any Parallel Defence; or …..
> (being a "**Parallel Liability**") in which case the following provisions shall apply."
>
> The definition of Derived Benefit is similar to that in the O&M Contract but makes reference to "(whether or not in this Contract such right is expressed to be subject to Schedule 11 (Related Agreements))". No reference has been made by either party to this Schedule.

(iii) Clause 22.6 then provides for the Contractor to operate the following provisions in order to seek to establish the relevant Parallel Liabilities. On written request by the Contractor, the Employer is to submit an application to the Counterparty. The Employer shall not compromise or waive any Parallel Liability without the consent of the Contractor. Where the application is unsuccessful "the Contractor may require the further pursuit of the Parallel Liability in accordance with clause 22.7 or 22.8" and the Employer is entitled to elect which one of these applies. Clause 22.7 provides for a name borrowing by Kantor and clause 22.8 for the pursuit of the Parallel Liability by Equitix in its own name.

(iv) Clause 22.9:

"Notwithstanding any other provision of this Contract the Contractor agrees that its rights (whether in contract, tort, by way of restitution or otherwise) in respect of any Derived Benefit shall be limited as set out in these Clauses 22.9 to 22.12."

(v) Clause 22.10:

"The Contractor shall not be entitled to any Derived Benefit or recovery of Derived Benefit by any means other than and save only to the extent that an agreement has been made between the relevant Employer's Counterparty and the Employer or a binding determination has been made under or in connection with any Related Agreement [as set out in Schedule 11] establishing that the Employer is entitled to that Derived Benefit."

(vi) Clause 22.12:

"Notwithstanding any other provisions of this Contract, to the extent of any inconsistency between the provisions of these Clauses 22.9 to 22.12 and any other provisions of this Contract, the provisions of these Clauses 22.9 to 22.12 shall take priority."

31. Schedule 17 Part 1 corresponds to Schedule 8 Part 1 in the O&M Contract. It imposes obligations on the Employer to procure that the O&M Contractor carries out its obligations under the O&M Contract (which, so far as directly relevant to Kantor are those in Schedule 8, Part1). That is reflected in the balance of Part 1 under which the

Employer is obliged to procure Veolia's co-operation; Kantor is obliged to give access to Veolia and vice versa; and the provisions broadly mirror the provisions of Schedule 8.

32. Part 2 of Schedule 17 is concerned with the circumstances which, in the O&M Contract are addressed in Part 2 of Schedule 8, namely where Veolia considers that there is a Defect and the Employer's obligations are to procure the performance of Veolia's obligations under that Part (including the notification of Defects and provision of information). There are equivalent provisions in paragraphs 3.6 and 3.7 to those in Schedule 8 Part 2 which expressly provide for resolution of the dispute as to whether there is a Defect pursuant to the procedure in Part 3 of Schedule 17. However, in this contract, pending determination of whether or not an Alleged Defect is a Defect, Kantor agrees that the Employer is entitled to assume that the Alleged Defect is a Defect (paragraph 7.2).

33. Part 3 of Schedule 17 is similar but not identical to Part 3 of Schedule 8.

(i) Under paragraph 1:

"1.1 All disputes between the Contractor and the Employer arising out of or in connection with any provision of Parts 1 and 2 of Schedule 17 (Interface) (an **"Interface Dispute"**) or any remedies relating thereto shall be determined in accordance with this Part 3 (Dispute Resolution Procedure) of Schedule 17 provided that this shall be without prejudice to the mechanism set out in paragraph 5 (Design Development) of Part 1 of Schedule 17 (Interface).

1.2 The Contractor:

1.2.1 acknowledges that the O&M Contractor is required (under Schedule 8 (Interface) to the O&M Contract) to comply with an equivalent dispute resolution procedure in respect of Interface disputes between the O&M Contractor and the Employer arising out of or in connection with schedule 8 (Interface) of the O&M Contract;

1.2.2 acknowledges that any Interface Dispute will also raise issues which relate a dispute between the Employer and the O&M Contractor under the O&M Contract; and

1.2.3 agrees that any Interface Dispute will be determined pursuant to a dispute procedure conducted jointly under this Part 3 (Interface Dispute Resolution Procedure) and part 3 of schedule 8 (Interface) of the O&M Contract with the participation of the Parties and the O&M Contractor.

1.3 Any Interface Dispute shall be resolved by adjudication in accordance with this Part 3 (Interface Dispute Resolution Procedure) and the Parties agree that this procedure shall operate to the exclusion of the Dispute Resolution Procedure set out at Clause 20 (Disputes)."

(ii) Paragraphs 1.4 to 1.18 then set out provisions for the appointment of an adjudicator from a panel of experts in the field of biomass energy plants or by the President of the Chartered Institute of Arbitrators, and for the progress of the adjudication in which the O&M Contractor is also a Responding Party. As under the O&M Contract, the adjudicator's decision is binding on "both parties" who shall forthwith give effect to it.

The parties' arguments

34. Equitix's argument is simply set out in its Particulars of Part 8 Claim. It is that Veolia is not entitled to commence proceedings under Part 3 of Schedule 8 in respect of Alleged Defects which are the subject of a notice under clause 7.5. Equitix contends that clause 7.5 is clear and unambiguous. The operation of clauses 7.5 to 7.11 is at Equitix's election so there is no inconsistency with clause 7.3: that clause and Schedule 8, Part 3 will apply if no notice is given. Equitix's interpretation, it is pleaded, permits the avoidance of inconsistent decisions.

35. Veolia's argument at its simplest is that this is wrong because, in the case of the Alleged Defects, the dispute resolution procedure is that in Schedule 8, Part 3. That procedure may run alongside the procedure under clauses 7.5 to 7.7 but it is not excluded by it.

The law

36. I was reminded by counsel of the decisions of the Supreme Court in *Arnold v Britton* [2015] UKSC 36 and *Wood v Capita Insurance Services* [2017] UKSC 24.

37. Lord Hodge's statement of principles in *Wood v Capita* includes the following passages:

> *"10 The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to the elements of the wider context in reaching its view as to that objective meaning. .....*
> *11 .... Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause .... and it must be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest .... Similarly the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.*
> *...*
> *13 Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared by skilled legal professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example, because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn*

contract which lack clarity and the lawyer or judge in interpreting such provisions may particularly be helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. ….."

38. I bear these paragraphs in mind in considering the construction of the contract and, in particular, the latter part of paragraph 13 which recognises that drafting of complex contracts may not always result in a logical and coherent text and identifies the relevance of the purpose of the provisions in such circumstances.

The construction of the contract

39. It seems to me most straightforward to start, as Ms Ansell QC did with Schedule 8. Equitix would, on the basis of its submissions, regard this as the tail wagging the dog and submits that the appropriate course would be to analyse the conditions of contract first and then see where Schedule 8 fits in. The contract is to be read as a whole and there is no order of precedence prescribed. So I am not constrained to start with the conditions of contract. Nonetheless, I will return to this point below.

40. Schedule 8 is headed "Interface". Clause 1.9 expressly provides that clause headings do not form part of or affect the interpretation of the contract but they are a convenient means of navigating a complex contract and I have generally included them above.

41. As I have set out above, Schedule 8 Part 1 then starts with Equitix's obligation to procure that the EPC Contractor carries out its obligations under the EPC Contract (paragraphs 1.2) and to procure that the EPC Contractor designs and carries out the Works in accordance with the Employer's Requirements and Contractor's Proposals under the EPC Contract (paragraph 1.3). That sets the scene for further provisions which deal, as the heading suggests, with the interface between the EPC Contract and the O&M Contract.

42. Paragraph 10 of Part 1 is headed "Notice of Claims" and provides for the resolution of Interface Disputes (as defined in Part 3 of Schedule 8) in accordance with the terms of that Part. This paragraph must relate to disputes which arise out of the obligations in Part 1 and those are capable of encompassing disputes which arise out of a failure to procure that the EPC Contractor carried out its obligations under the EPC Contract. Those

obligations in turn would include the obligations to remedy defects notified in the Defects Notification Period.

43. Although issues relating to defects are, therefore, capable of falling within the obligations under Part 1, the parties have elected to deal with them discretely in Part 2. A Defect is defined in clause 1 of the Agreement as set out above and an Alleged Defect is defined in Part 2. The effect of paragraph 2 of Part 2 is to oblige the Contractor to notify Alleged Defects to both the Employer and the EPC Contractor. Defects notified within the Defect Notification Period are to be remedied by the EPC Contractor (paragraph 5).

44. Paragraph 3 sets out a procedure which is applicable where the Contractor determines, acting reasonably, that an Alleged Defect has occurred and/or a Service Performance Shortfall has occurred which has been caused in whole or in part by an Alleged Defect. A Service Performance Shortfall is defined as any failure by the Contractor to meet its obligations, including any failure to meet any of the obligations under Clause 20 (Performance Requirements). Although not directly relevant to the issues before me, I shall return to this aspect of the contract below. The procedure which follows provides for notification of both the Employer and the EPC Contractor and the provision of details of the defects and proposed remedial works. If the EPC Contractor accepts that the Alleged Defect is a Defect, he must notify the date he intends to return to site to remedy the same (if the Defect arises prior to the end of the Defect Notification Period). If the EPC Contractor does not accept that the Alleged Defect is a Defect, there may be further investigation.

45. If the Contractor does not accept the outcome of that investigation, paragraph 3 contemplates that the dispute will be resolved by the dispute resolution procedure in Part 3, hence the references in both paragraph 3.6 and 3.7 to the procedure in Part 3. There is thus an express and clear intention that disputes under this Part and these clauses are to be dealt with in accordance with Part 3. There is no qualifying wording to suggest that, in some circumstances, the parties may have intended a different dispute resolution procedure to apply and on the strict wording of the paragraphs any other means of resolution would not satisfy the paragraph. Paragraph 4.2 is in similar terms.

46. Paragraph 7.2 also expressly invokes the dispute resolution procedure in Part 3 and does so in terms that do not contemplate any other dispute resolution procedure. The context for this paragraph is the provisions relating to "liquidated damages":

    (i) One of the matters that may give rise to a Derived Benefit is "relief from the Contractor's obligations under this Agreement".

    (ii) There is an express contractual regime concerned with relief from the Contractor's obligations to be found in clause 19.1.

    (iii) Under clause 19.1, the Employer is not entitled to Performance Liquidated Damages to the extent that failure to meet the Performance Requirements arises as a direct result of an Excusing Cause. Performance Liquidated Damages are Energy Service Liquidated Damages and/or Efficiency Liquidated Damages, both defined in Schedule 2 (to which I have not been referred).

    (iv) So far as may be relevant, the Excusing Causes under clause 19 include an Excluded Event, an Employer Breach and an Employer Risk. The definition of an Excluded Event includes loss or damage to the Facility resulting from an act or omission of the Employer or any Employer Related Party (as defined) "apart from the EPC Parties which shall be governed according to Schedule 8 (interface)" and an Employer Breach means what it says and includes a breach by any Employer's Counterparty (party to a Related Agreement) other than the EPC Contractor "the approach to which is detailed in Schedule 8 (Interface)." An Employer Risk includes Defects "provided that the Contractor has complied with the provisions of Part 2 of Schedule 8."

47. In other words, so far as relief from liquidated damages is concerned, in the case of Excluded Events and Employer Breach, the contract draws a very particular distinction between matters that may be relied on as an Excusing Cause under clause 19 and matters that are dealt with in Schedule 8. Defects that may be Employer Risks require the Contractor to comply with the provisions of Part 2 of the Schedule 8 which itself bring into play the provisions of paragraphs 3 and 4 which provide for determination under Part 3 of whether an Alleged Defect is a Defect. The role of a Defect as an Excusing Cause is further dealt with in paragraph 5.6 of Part 2 and Paragraph 7.2. Under that latter

clause, pending agreement or determination as to whether or not an Alleged Defect is a Defect, the Employer is contractually entitled to assume that the Alleged Defect is not a Defect (and not an Excusing Cause) for the purposes of Performance Requirements and the calculation of liquidated damages under Schedule 2. That determination is "under Part 3 of this Schedule" as one might expect and not under clause 7 or clause 38. Neither party placed any particular reliance on these provisions but they seem to me to further emphasise the extent to which the parties have provided a particular procedure for the resolution of disputes arising under this Schedule. Thus in respect of Alleged Defects and the potential of a Defect to give rise to an Excusing Cause there is express provision for the resolution of any dispute under Part 3 and not by any other means.

48. On behalf of Veolia, Ms Ansell QC submits, in my view rightly, that there is a clear process set out to deal with Alleged Defects (and their consequences) and that is one that leads, if there is a dispute, to Part 3.

49. That is further what Part 3 says:

(i) Part 3 is entitled "Interface Schedule Dispute Resolution Procedure". So far as Part 3 is concerned, paragraph 1.1 makes plain that the application of this Part is mandatory. It does so by providing that all disputes arising out of or in connection with any provision of Parts 1 or 2 of this Schedule 8 or any remedies relating thereto shall be determined in according with this Part 3. There is no qualification or "subject to" wording relating to clause 7 of the contract. In contrast, there is a qualification that the mandatory dispute resolution procedure is "without prejudice to the mechanism set out in paragraph 5 (Design Development)".

(ii) By paragraph 1.2.3, the Contractor agrees that any Interface Dispute will be determined (my emphasis) pursuant to a dispute procedure conducted under this Part 3.

(iii) If paragraphs 1.1 and 1.2 were not clear enough, paragraph 1.3 then repeats that the parties agree that any Interface Dispute shall be resolved in adjudication in accordance with this Part 3 and that the procedure in this Part "shall operate to the exclusion of the Dispute Resolution Procedure set out in clause 37 (Dispute

Resolution Procedure) except as provided in paragraph 1.19." The reference to clause 37 is an obvious error and should be to clause 38 (which has the title given). Paragraph 1.19 deals with reference to the Court.

(iv) What paragraph 1.3 does, therefore, is state in terms that so far as disputes arising under Parts 1 and 2 are concerned, the dispute resolution procedure is the adjudication procedure in Part 3, and not that in clause 38, which may be followed by reference of the dispute to the Court. There is again no qualifying language that suggests that in some circumstances another dispute resolution procedure might be applicable or take precedence.

50. Paragraphs 1.2.1, 1.2.2 and 1.2.3, recite the Contractor's acknowledgment and understanding of an equivalent dispute resolution procedure between the Employer and the EPC Contractor in respect of Interface Disputes. Under paragraph 1.2.4 the contractor's understanding is that "the Employer has entered into like obligations with the EPC Contractor under part 3 of schedule 17 (Interface) of the EPC Contract to govern participation of the EPC Contractor in any Interface Dispute".

51. As set out above, the equivalent procedure to be found in Part 3 of Schedule 17 to the EPC Contract. Schedule 17 Part 1 is largely a mirror image of Schedule 8 Part 1. Part 2 is similarly concerned with failure attributable to defects but it is concerned not with "defects" in the performance of the O&M Contractor but, in summary, with the circumstances in which the O&M Contractor alleges a Defect in the EPC Contractor's works. In Part 3 of Schedule 17 an Interface Dispute is defined as a dispute between the (EPC) Contractor and the Employer arising under Parts 1 or 2 which, therefore, includes a dispute about whether an Alleged Defect notified by the O&M Contractor is a Defect. Paragraph 1.2.3 contains a provision not in the O&M Contract as follows:

"[The Contractor] agrees that any Interface Dispute will be determined pursuant to a dispute procedure conducted jointly under this Part 3 (Interface Dispute Resolution Procedure) and part 3 of schedule 8 (Interface) of the O&M Contract with the participation of the Parties and the O&M Contractor".

52. Both the O&M Contract and the EPC Contract, therefore, anticipate, in respect of defects, an adjudication in which all three parties participate. To that end, under each contract

the non-party, so to speak, participates in the selection of the panel of experts from which the adjudicator is appointed. The party referring the dispute to adjudication must send a copy of the Notice of Adjudication to the non-party who is then one of the Responding Parties. The Adjudicator's decision is to be provided to all parties. The decision shall be "binding on both parties who shall forthwith give effect to the decision". The decision is not expressed to be binding on all parties.

53. It seems to me that the purpose of these provisions was and is to ensure that, where there is a dispute as to the performance of the O&M Contractor or the EPC Contractor that sits, so to speak, on the interface, there is a dispute resolution procedure in which the three relevant parties are involved. That is particularly so in the case of an Alleged Defect. The respective Part 3 provisions seek to achieve that by involving the non contracting party in the adjudication thus minimising the risk of inconsistent decisions.

54. The provisions do not go so far as to make the decision of an adjudicator under one contract binding on the non party. That may be intentional or it may be the product of the wording as to the parties giving effect to the decision which the non party could not do under the particular contract. However, if there is an adjudication under the O&M Contract, Kantor agrees to participate and it is open to Equitix to commence an adjudication under the EPC Contract which will be dealt with jointly.

55. So far as Veolia's Notices of Alleged Defects are concerned, and subject to any other arguments as to the nature of these notices, any dispute would, therefore, fall to be determined under Part 3 of Schedule 8 with the participation of the EPC Contractor as provided for by Part 3 and, it may be anticipated, jointly with a corresponding adjudication under the EPC Contract.

56. Equitix's position is that that construction is wrong because it ignores the provisions of clause 7.5 to 7.11 relating to Parallel Liabilities and it is submitted that it is wrong to start the analysis with consideration of Schedule 8 rather that the clause 7 itself. Equitix further submits that it does not reflect the purpose of clause 7 which is to avoid the risk of inconsistent decisions under the O&M Contract and Related Agreements, including the EPC Contract.

57. I start with clause 7.5 which is relied on by Equitix to give the notices which it has given. Putting it in straightforward terms, Equitix's position is that where the Contractor alleges that there is a Defect, there is a Derived Benefit which falls within this clause 7.5 because the Contractor is entitled to have the Employer have the EPC Contractor remedy the Defect. It is not, and could not, be argued that there is a Parallel Defence.

58. I accept the submission, and Veolia did not dispute, that where the Contractor alleges that there is a Defect, there can be a Derived Benefit, as defined. Under the EPC Contract, in respect of a Defect notified within the Defects Notification Period, the EPC Contractor is obliged to remedy the Defect (and the Employer had the right to have it remedied). Correspondingly, under the O&M Contract, the Contractor is entitled to have the Employer procure the performance of the EPC Contractor's obligations and thus has the right to this performance both of which arise from the same circumstances. However, the Contractor's right arises under Schedule 8 (either by the operation of the obligations in Part 1 or by the specific operation of Part 2), and, as I have set out above, any dispute about this right is to be resolved in accordance with Part 3 of Schedule 8.

59. Equitix's answer to that is that there are two possible dispute resolution streams but that, if they give notice under clause 7.5, that stream is the only route available to Veolia. Veolia's argument is the opposite, namely that there are two streams and that both may be operated.

60. If I start, as Equitix submits I should, with clause 7, then I start not at clause 7.5 but with clauses 7.1 to 7.3. By clause 7.1 the Contractor is fixed with knowledge of the Related Agreements. By the second part of clause 7.2, the Employer recognises exactly the position which Veolia says has happened in this case, namely that a breach of a Related Agreement has affected its performance. In this case, that includes alleged breach of the EPC Contract. Clause 7.3 then also appears to cover that particular situation, namely whether it is the EPC Contractor that is liable to the Employer in respect of that breach or whether it is Veolia that is liable including by way of liquidated damages (from which Veolia would be excused if there was an Excusing Cause). Clause 7.3 provides that where that question arises, the provisions of Part 2 of Schedule 8 apply, and the definitions of Excusing Cause also lead to Part 2 of Schedule 8. In turn, Part 2 of Schedule 8 provides that a dispute shall be resolved under Part 3. Reading clause 7 as a

whole, therefore, the clauses that precede clause 7.5 are entirely consistent with the provisions of Schedule 8 as to dispute resolution.

61. Equitix's argument, therefore, amounts to saying that the parties have in one breath provided expressly for the manner in which disputes relating to whether or not there is a Defect will be resolved and in the next have provided a wholly different procedure, without any express wording (for example making clause 7.3 subject to clause 7.5) to demonstrate that peculiar intention.

62. Clause 7.5 similarly contains no wording that expressly excludes the operation of clause 7.3 or Part 3 of Schedule 8. What it does make reference to is clause 38: if clause 7.5 is not invoked by the Employer, the Contractor may nevertheless pursue its rights under this Agreement in accordance with Clause 38. Equitix submits, in effect, therefore, that if a notice is given, the right to adjudicate under clause 38 is excluded. As I understand it the argument goes further and Equitix submits that, as a result of clauses 7.8 to 7.11, any other recourse that the Contractor may have to the courts is also excluded.

63. Mr Choat submits that the words in brackets – "in accordance with clause 38" - make plain that the procedure under Part 3 is also excluded since clause 38.8 provides that "The provisions of Schedule 8 (Interface) shall apply to any Interface Dispute" and that provides the route to Part 3. Although there is obvious merit in that argument as a matter of the wording of the contract, I cannot accept it.

64. Firstly, the preceding clause 7.3 itself expressly provides that the resolution of a dispute as to whether the Contractor or the EPC Contractor is liable to the Employer in respect of a failure of performance is one to which the provisions of Part 2 of Schedule 8 apply and thus, as set out above, Part 3 of Schedule 8 applies. Secondly, clause 38.1 expressly provides that it is subject to Part 3 and Part 3 expressly provides that it excludes clause 38. Part 3 in turn is a mandatory dispute resolution procedure for an Interface Dispute. Clause 38.8 is, if anything, a belt and braces provision which reiterates the "subject to" provision of clause 38.1 but is not the route to the right to dispute resolution under Part 3 which arises under the terms of Schedule 8 itself and under the various contract provisions that invoke it.

65. I have considered also the definition of Derived Benefit which includes the words "whether or not in this agreement such right is expressed to be subject to clause 7". In my view what those words do is clarify that something that meets the definition of a Derived Benefit is a Derived Benefit even if there is no express reference to clause 7. The "subject to" wording is apt to encompass the whole of clause 7, including clause 7.3, and does not make Schedule 8, Part 3 subject to clause 7.5.

66. In my view, and subject to consideration of clauses 7.8 to 7.11 below, the way to make all these provisions work together and give them effect is to recognise, as Veolia contends, that there are two dispute resolution streams which may be operated at the same time. The proviso to clause 7.5 makes clear that, in the case of the Related Agreements to which clause 38 applies, a claim by Veolia against Equitix cannot proceed in tandem with a claim by Equitix under the Related Agreement but, in my view, that cannot be applicable to the discrete procedure under Part 3. If it were, it would make Part 3 virtually pointless and do so despite the fact that it is expressed to be a mandatory procedure and one embedded in a number of contractual provisions.

67. In answer to that, Mr Choat advanced a number of arguments as to the purpose of these dispute resolution provisions. His most persuasive argument, to my mind, was that, if clauses 7.5 to 7.7 operated, as Equitix contended, in any instance where Veolia alleged that there was a defect in Kantor's works, and Equitix gave notice under clause 7.5, the dispute would, in due course, be resolved under Schedule 17, Part 3 to the EPC Contract. There would then be one resolution of the dispute and Veolia would be bound by that result. That must, therefore, it was submitted be how clause 7.5 was intended to work because it would enable Equitix to avoid the risk of inconsistent decisions. There is undoubtedly merit in that argument and absent Part 3 it would make considerable sense (as it does in relation to the other Related Agreements), but, so far as the EPC Contract is concerned, it ignores the provisions of Schedule 8, Part 2 at paragraphs 3.6, 3.7, 4.2 and 7.2 as to the determination of whether an Alleged Defect is a Defect; the provisions of Schedule 8, Part 3, and the contemplation in Schedule 17, Part 3 of a joint adjudication process where Equitix claims against Kantor for breach of Kantor's obligations in Parts 1 and 2.

68. Equitix further submitted that Part 3 was primarily to deal with those instances in which Equitix may have a claim against Veolia arising out of a claim by Kantor in respect of a breach by Veolia. To take that example, a claim by Kantor in respect of a breach of the O&M Contract would arise from Part 1 of Schedule 17 to the EPC Contract and the dispute resolution procedure would be that under Part 3 of that Schedule but that would not result in a decision binding on Veolia. Under clause 22, Kantor could also, it appears, require Equitix to submit the equivalent claim to Veolia which could lead to an adjudication against Veolia either by Equitix in its own name or by Kantor's borrowing Equitix's (at Equitix's election). As I have said, it would appear that those procedures could run in tandem. The latter adjudication would be pursuant to the dispute resolution procedure under Part 3 of Schedule 8 since the relevant Veolia obligations would be those in Part 1. There are undoubtedly obligations imposed on Veolia under Schedule 8 Part 1, such as an obligation to co-operate with Kantor, but the bulk of the obligations in Part 1 are those imposed on the Employer to procure Kantor's performance. Part 2 of Schedule 8 is entirely concerned with alleged defects/defects in Kantor's works, albeit there are some obligations imposed on the Contractor as to notification. Part 2 of Schedule 17 is correspondingly concerned with Kantor's obligations in respect of defects notified by Veolia. The scope of the disputes that might be determined under Part 3, on Equitix's case as to the primary purpose of these provisions, is thus very limited and completely inconsistent with this detailed and specific dispute resolution procedure for a far broader scope of disputes.

69. The Part 3 procedure, it seems to me, ensures that there is provision for prompt dispute resolution in respect of these particular Interface Disputes, even if the position in respect of other Related Agreements may be different.

70. Veolia's further argument is that in any event, it may bring what it referred to as the parallel procedures to an end at the stage of clause 7.6.3. At that point, and whether or not the Part 3 procedure has been commenced, Veolia may take the option of not requiring the Employer to pursue Kantor and Veolia may then pursue its rights under Part 3. If clause 7.5 does not operate to exclude the right to pursue an adjudication under Part 3, then that must follow but, if anything, it might be said to be adverse to Veolia's case because it would seem to defeat the purpose of clause 7.5. Having said that, it is consistent with the emphasis given to the Part 3 procedure. Nor does it prevent Equitix

from pursuing a claim in any event against Kantor, in which case the provisions of Schedule 17 Part 3 would apply under which Kantor has agreed that the Interface Dispute will be determined jointly with the dispute under Schedule 8 Part 3.

71. It seems to me that the very fact that the parties have sought in these respective parts to avoid inconsistent decisions also militates in favour of Veolia's construction. There are difficulties with the extent to which these procedures do achieve this aim but these elaborate provisions would be pointless if the same result could simply be achieved by the operation of clause 7.

72. Equitix, however, argues that a construction of clause 7 which does not affect Veolia's right to proceed under Part 3 cannot be right and/or cannot be given effect because it is contrary to the provisions of clause 7.8 to 7.11. Clause 7.8 provides that notwithstanding any other provision of this Agreement the Contractor agrees that its rights in respect of any Parallel Liability shall be limited as set out in in clauses 7.8 to 7.11. Clause 7.9 in summary provides that the Contractor is bound by the outcome of any claim pursued on its behalf by the Employer provided that the Employer has complied with Clauses 7.5 to 7.7.

73. Thus, Equitix argues, if the Contractor has the right to a Derived Benefit, the Contractor's rights are only those under clause 7.8 to 7.11. In fact, clause 7.8 provides no right and only clauses 7.9 and 7.10 identify any right. The effect of clause 7.9 is that if the Employer gives notice under clause 7.5 and if the claim is compromised or pursued to determination, the Contractor is bound by the result. Equitix argues by the same token that if the Employer gives notice but the Contractor does not require him to pursue the claim, the Employer has complied with these clauses and the Contractor has no other claim or entitlement. Further, clause 7.11 resolves any inconsistency in favour of clauses 7.8 to 7.11.

74. I reject that argument both as a matter of construction and on a commercial reading of the contract. None of clauses 7.8 to 7.11 excludes the Contractor's right to pursue its remedy under Part 8. But if a compromise or decision is obtained by the Employer in accordance with clauses 7.5 to 7.7 which differs, then Veolia agrees that it will be bound by that outcome.

75. Mr Choat also placed emphasis on the fact that clause 7.5 applied not only to a Derived Benefit but also to a Parallel Defence. Thus if Kantor made a claim against Equitix in respect of a failure by Veolia to perform under the O&M Contract, and Equitix contended that it had a defence because Veolia was not in breach, that would give rise to a Parallel Defence. On Equitix's argument, in those circumstances, Equitix would be able to give notice under clause 7.5 of the O&M Contract. If Kantor did not accept that there was such a defence, any further resolution of that dispute would proceed under clause 7.7 so that Veolia would be bound by the outcome of that dispute between Equitix and Kantor. Nothing in that seems to me to assist Equitix's position in these proceedings. It is difficult to envisage any relevant obligation of Veolia to Equitix arising other than under Schedule 8, Part 1 and any relevant obligation of Equitix to Kantor arising other than under Schedule 17, Part 1. Say that Kantor commenced an adjudication under Schedule 17 Part 3 before Equitix had given any notice under cl. 7.5. If Equitix then gave a clause 7.5 notice, Equitix would be obliged to pursue the defence in accordance with clause 7.6 but out of kilter with the pursuit of the same defence in the Schedule 17 adjudication. There would be a decision in that adjudication binding as between Equitix and Kantor but not binding on Veolia unless the parties agreed to bring the proceedings into line so that the Schedule 17 adjudication could be treated as falling within clause 7.7. The only other way to achieve a decision binding on Veolia would be for Equitix to pursue Veolia under Schedule 8, Part 3 so as to compel Veolia to run its defence. I cannot see that anything in that scenario supports Equitix's approach to clause 7.

76. In this context, I should add that it seems to me that the position of Kantor and Equitix under the EPC Contract is somewhat different from that of Veolia and Equitix under the O&M Contract. Clause 22 in the EPC Contract is similar to but significantly different from clause 7 of the O&M Contract. Clause 22.5 requires the Employer to pursue entitlements under the Related Agreements but gives to Kantor the option to seek to establish Parallel Liabilities by requiring the Employer to submit an application to the Counterparty. There is therefore no equivalent to the triggering notice under cl 7.5 because it is the Contactor, Kantor, that sets this process in train. If the Employer's application is unsuccessful and Kantor wishes to take the matter further, the Employer may elect a name borrowing procedure or pursue the matter itself.

77. There are, however, in clauses 22.9, 22.10 and 22.12 provisions similar to those in clause 7 and on which Equitix relies (under the O&M contract) for its argument that there can be no separate right to pursue an entitlement under Schedule 8. Clause 22.10 is in different terms and includes Derived Benefits to which Kantor is entitled to the extent that a binding determination has been made "under or in connection with any Related Agreement establishing that the Employer is entitled to that Derived Benefit". It is not necessary for me, and I do not in the absence of Kantor, decide the meaning of this provision but it seems to me that it could encompass a decision pursuant to the provisions of Schedule 17, Part 3 that Veolia was in breach (which could be a decision in connection with a Related Agreement). Thus under the EPC Contract, there is no obvious reason why Kantor could not pursue a claim under Schedule 17 (which would not bind Veolia), at the same time as requiring Equitix to pursue a claim under the O&M Contract (by operation of clause 22). So, in my view, the emphasis in Equitix's argument on the intention to avoid inconsistent decisions is, at the least, somewhat overstated.

78. It will be apparent that the workings and indeed the intended workings of these clauses are by no means easy but, if one recognises, that the parties' primary intention was that Interface Disputes could be in the first instance resolved in adjudication for which there were specific provisions which were not abrogated by clause 7.5 much of the difficulty disappears.

79. I should add that there is nothing in what I have said that renders clause 7.5 otiose. On the contrary, it works perfectly well in any circumstance where the Derived Benefit or the Parallel Defence does not arise under the EPC Contract and fall within the provision of Schedule 8.

Conclusion on the declaration no. 1

80. I therefore do not grant the first declaration sought by Equitix.

The "appointment" declarations

Background

81. As set out above, Schedule 8, Part 3 at paragraph 1.5 provides for an Adjudicator to be appointed from a panel of three selected jointly by Equitix, Veolia and Kantor. The panel are to be "experts in the field of biomass energy plants". It is common ground that no steps were taken within 20 business days of the Commencement Date, or at the time prior

to late 2018, to agree "the panel of experts" as ought to have been done. In 2018, some proposals have been made by Veolia's solicitors but did not find favour with Equitix. The sticking point between the parties was and is that Equitix contends that the experts must have, as it was put in the second declaration, technical expertise.

82. In the event of failure to agree on the identity of the experts, the parties have agreed that the appointments to the panel shall be made to the President of Chartered Institute of Arbitrators (paragraph 1.9).

83. As summarised at the beginning of this judgment, Equitix initially sought to restrain Veolia from making any application to the CIArb or the appointment of an adjudicator unless that application specified that the experts should be "technical" experts. Equitix then sought to move matters forward by making its own application sent on 28 January 2019. CMS, on behalf of Equitix, asked for the appointment of persons with technical expertise. Stephenson Harwood, for Veolia, set out their position that that was not the proper construction of the contract.

84. On 7 February 2019, the CIArb notified the parties that 3 people had been appointed to the panel by the President and those people were willing and able to act. Those three people were Appointee 1 (a quantity surveyor dually qualified as a barrister (non-practising)); Appointee 2 (Queen's Counsel with a specialist practice in construction and engineering); Appointee 3 (a practising barrister with further technical qualifications). Equitix contends that none of these meets the criteria in the contract and that the appointments are therefore invalid. I note that I was invited in the course of the hearing to consider whether I should anonymise the names of these appointees. I initially saw no need to do so. No question of their abilities or conduct arises. The only issue is whether as a matter contractual construction, they meet a particular definition. However, I am conscious that some of the matters that were raised in the correspondence that followed may be confidential and, for that reason, I shall refer to them as Appointees 1, 2 and 3.

85. On appointment, each of these three appointees signed a form entitled Acceptance of Nomination As Adjudicator which include a paragraph (4) in the following terms: "I have the necessary experience and qualifications specifically required by the adjudication

agreement, the contract or any other agreement of which I am aware [Delete if not appropriate]":

(i) Appointee 1 inserted a footnote to paragraph 4 in which he said "My position is that I have had some involvement with biomass power generation and disputes arising therefrom (one such case). However I would not hold myself out as a technical expert in that area."

(ii) Appointee 2 in a covering e-mail stated that she had experience in biomass disputes and was currently a panel adjudicator on a waste to energy project.

(iii) Appointee 3 added above this paragraph; "I am not an expert in the field of biomass energy plants although I have dealt with a disputes (sic) concerning such matters, including a dispute between a plant operator and supplier of feedstock for such a plant."

86. Equitix's solicitors thereafter corresponded (by e-mail) with the three appointees and made inquiries of them about their expertise "in the field of biomass energy plants".

87. Appointee 1 by e-mail dated 8 February 2019 repeated that he was not a technical expert in "the field of biomass technology" but he added that he had had occasion to address and advise upon such (and related) technology. He said that in his lengthy career in dispute resolution he had been engaged on power generation contracts and disputes, one of which concerned a biomass facility. By e-mail dated 13 February 2019, Equitix's solicitors asked for further information about the dispute in relation to a biomass facility. They stated that they were not referring to biofuels derived from biomass but to bioenergy using a definition provided in world Energy Resources Bioenergy 2016 (a document produced by the World Energy Council), namely "Bioenergy is energy from organic matter (biomass), ie. all materials of biological origin that [are] not embedded in geological formation (fossilised). Biomass can be used in its original form as fuel, or be refined to different kinds of solid, gaseous or liquid biofuels." In his response, Appointee 1 confirmed that his experience related to a plant by which energy was produced from biomass fuel.

88. Appointee 2 (by e-mail dated 8 February 2019) said that if the contract properly construed required the adjudicator to have technical qualifications, she did not. If the contract

required expertise in the resolution of technically complex disputes arising out of similar projects, she gave examples of such expertise including disputes relating to a biomass energy plant (which from the earlier e-mail appears to be an energy from waste facility), an anaerobic digestion and gasification plant and a waste to energy plant. Equitix asked Appointee 2 to confirm whether the panel appointment she referred to was one concerning a biomass energy plant producing heat and electricity. Her response was that it was a plant "converting waste into biomass energy"; that it was variously described as "a residual waste, waste to energy or biomass plant"; but that it did not produce heat or electricity by burning biomass. The very nature of that response is illustrative of the lack of clarity in the expression "in the field of biomass energy plant".

89. Appointee 3 in an e-mail of the same date said that he had acted as the tribunal in disputes concerning a renewable energy (but not biomass) plant; a plant producing biodiesel; and between the supplier of foodstuffs for conversion into energy and the plant operator, along with other process engineering disputes.

90. In the light of these developments, Equitix indicated that it no longer pursued declaration no. 2 and that instead it sought the following two declarations:

> "(1) Appointee 1, Appointee 2 and Appointee 3 are each not experts in the field of biomass energy plants for the purposes of Schedule 8, Part 3, paragraphs 1.5 and 1.9.
>
> (2) The appointment by the President of the Chartered Institute of Arbitrator of Appointee 1, Appointee 2 and/or Appointee 3, as communicated to the parties by the letter dated 7 February 2019 from Paul Hudson (Dispute Appointment Services (DAS) Case Officer for CIArb) is void or invalid."

91. In parallel with this application to the CIArb, CMS (by e-mail to Stephenson Harwood and to Fenwick Elliott (for Kantor) for the first time proposed 3 candidates for the panel whom they said they considered to have "the requisite technical expertise". Candidate 1 was a mechanical engineer. His CV did not make any specific reference to biomass energy plants. He appears to have been asked for and provided further information in which he did identify experience of biomass boilers and "boiler plant" and a biomass fuel manufacturing plant. Candidate 2 was also a mechanical engineer. His CV made

numerous references to work related to biomass with most of the work being described as due diligence reports and strategic advice. Candidate 3 holds a graduate qualification in Energy Engineering and, in his CV, described himself as "specialising in heat generation and transfer technologies, particularly biomass and energy from waste." These CVs and self-descriptions are of some assistance in demonstrating how someone asked to identify their expertise "in the field of biomass energy plants" might respond.

The issues

92. The dispute here raises two issues: (i) what is the meaning of "experts in the field of biomass energy plants" and (ii) if the appointees do not meet that description what is the consequence in law.

93. The first of these issue raises a difficult question. There is, obviously, no express reference to any "technical" expertise in the description of the panel of experts and Ms Ansell QC argues that there is no basis for reading in such an additional word or words. I do not think that that captures or meets the point which is not so much one of reading in words but of articulating what the words used mean. Further, Mr Choat points out that the declarations as reformulated do not require the insertion of words but relate to the particular appointees. Whilst that is correct, they still involve consideration of what the words in paragraph 1.5 mean.

94. If the words "experts in the field of biomass energy plants" are taken in isolation, one would be surprised if a lawyer were to profess such expertise. But if the expression were used in the context of expertise in contracts related to or disputes related to the field of biomass energy plants, the answer might be different. To take an example, a specialist barrister who has acted as advocate and arbitrator in numerous cases about the construction of bridges would not naturally refer to themselves as an expert in bridges but as an expert in cases about bridges or disputes about bridges or even projects about bridges. But much would depend on the context. If an inquiry was being made of the same counsel's clerk along the lines of whether she had expertise in bridges, the answer might well be "yes" because, in context, the nature of the expertise would be a given. The use of "expert" is similarly opaque. In the context of court proceedings an expert would be someone giving expert evidence, not the lawyers, but in a dispute resolution

scenario where different expertise may be relevant a lawyer may well be an expert and the word is clearly not being used here as if it refers to expert evidence. The words "in the field of" themselves suggest that something wider than a specific technical expertise is intended.

95. It seems to me that context is material here in two respects. The context is that of dispute resolution and that militates in favour of a meaning which relates the nature of the expertise to dispute resolution. By that I do not mean that additional words about expertise in dispute resolution should be read in but rather that who may be an expert in the field of disputes is wider than those who have a specific technical qualification or expertise. Secondly, it is fair to say that the disputes that may arise in respect of defects are likely to be of a technical nature but they are not so limited. They may well extend to health and safety issues, performance measurement and other issues relating to liquidated damages, cost of remedial works, other loss and damage, and so forth.

96. What the parties have argued the qualification or background of the experts should be is certainly not determinative but it is illustrative. What can be seen from the correspondence set out above is that Equitix has adopted a very restrictive interpretation. An expert in the field of biomass energy plants must be one who has "technical" expertise in plant generating energy from biomass – expertise in biomass fuel production would not seem to suffice even though this might well be regarded as in the relevant field, nor apparently would plant generating energy from waste or even biomass boilers which do not form part of a plant. Of the three appointees that have been proposed by Equitix, the majority of the experience of one appears on the face of his CV to be with (possibly small scale) boilers and of another with due diligence exercises (albeit in some instances the right field).

97. The difficulties that these added layers of meaning produce and the difficulty in finding people who meet Equitix's specification militate against the interpretation that Equitix contends for. I do not mean by that that the practicalities of identifying, on Equitix's case, suitable appointees, dictate the meaning of the express words but rather that, in both cases, these points lend weight to the argument that the phrase should be given broader meaning that is capable of encompassing those with dispute resolution expertise in this field.

98. Ms Ansell QC placed some reliance also on the fact that the contract provides that the CIArb should be the appointing body and not an engineering institution or other technical body. Whilst not a determinative point, since the Chartered Institute has many technically qualified members, it is some further support for Veolia's case.

99. Both parties drew my attention to the decision of the Court of Appeal in *Allianz Insurance plc v Tonicstar* [2018] EWCA Civ 434. The case concerned a reinsurance agreement containing an arbitration clause under which each party nominated an arbitrator. Clause 5.5 provided that: "Unless the parties otherwise agree the arbitration tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance." One of the parties appointed Alistair Schaff QC and the other sought his removal on the grounds that he did not meet that description.

100. Giving the judgment of the Court, Leggatt LJ said this:

> *"15. In support of this argument, [counsel] took as an example a sports arbitration and submitted that a requirement that an arbitrator should have not less than 10 years' experience of sports would not be satisfied by showing that he or she had more than 10 years' experience of sports law. Similarly, a requirement to have not less than 10 years' experience of engineering or telecommunications would not be satisfied by showing that the arbitrator had 10 years' experience of advising and acting in disputes involving engineering or telecommunications. In the same way, [counsel] submitted, experience of insurance or reinsurance law is not the same as experience of insurance or reinsurance.*
>
> *16. Attractively as this short point was put ..., I cannot accept it. Unlike sports, engineering and telecommunications, which are clearly distinct from the law regulating those activities, no similar distinction can be drawn between insurance and reinsurance "itself". Insurance contracts create legal relations and obligations and those whose business it is to negotiate and draft insurance contracts, whether as underwriters or brokers, need to have some understanding of insurance law. They need, for example, to understand the duty of an insured to disclose facts which are material to the risk to the insurer before the contract is concluded and the scope of that duty. ...*
>
> *17. Conversely, barristers and solicitors who practise in the field of insurance and reinsurance need to understand practical aspects of the business. It is a safe inference*

that a lawyer who has specialised in insurance and reinsurance for at least 10 years will have acquired considerable practical knowledge of how insurance and reinsurance business is conducted ….. Such practical knowledge will inform and assist their legal analysis and their ability to give effective representation and advice.

18. It is precisely because the practical and legal aspects of insurance and reinsurance are so intertwined that both market professionals and lawyers who have specialised in the field for many years are commonly appointed as arbitrator in insurance and reinsurance disputes. It may well be true that … many such lawyers would not know, for example, how to set an underwriting rate for a risk. But I see no reason to assume that an experienced underwriter or broker cannot be assumed to have expertise in analysing case law or in how to conduct arbitration proceedings. Both lawyers and market professionals have potentially relevant skills which make them suitable for appointment.

19. The conclusions that I would draw are, first, that there is no such thing as insurance or reinsurance "itself" which is separate and distinct from the law of insurance and reinsurance and, secondly, that, unless the parties have some special reason for wishing to exclude lawyers from the pool of candidates eligible for appointment, a person who has practised as a barrister specialising in the field of insurance and reinsurance for more than 10 years would naturally be regarded as qualified for appointment as an arbitrator. In these circumstances I consider that reasonable parties who incorporate the JELC Clauses into their contract of excess of loss reinsurance would understand such a barrister to have the requisite experience of "insurance or reinsurance" within the natural meaning of those words. I also consider that, if the intention were to restrict the parties' freedom of choice by excluding such a person from eligibility, a clear expression of that intention would be needed, which on any view the clause in question does not contain. I would therefore reject the respondent's argument."

101. In that case, the expression used was "ten years' experience of insurance or reinsurance". There is real ambiguity in what that might mean: for example does it refer to the industry or any particular aspect of the industry; can that experience be gained only from acting in the industry or in some associated area (such as law)? The ambiguity is exacerbated by, and the court's decision is based on, the analysis that "insurance/ reinsurance" does not exist as a thing in itself and that there is a considerable overlap between what insurers do or require expertise in and what those involved with the legal aspects of insurance do or require expertise in.

102. There is a less obvious overlap in, say, the engineering of biomass energy plants and the expertise gleaned by those involved in the legal aspects of them or disputes about them. Mr Choat relies on the contrast drawn by counsel and Leggatt LJ between insurance and "sports, engineering and telecommunications". However, the contrast is not as marked in this case where what is required is not "an expert in biomass energy plants" but "an expert in the field of biomass energy plants". There are no clear words to limit those experts to those who have particular technical qualifications (whatever they may be) or to exclude those whose expertise consists of or is derived from dispute resolution in that field. I note also that, although Leggatt LJ was not in any sense being asked to construe the same expression as is used in this case, when articulating the point that the pool of potential arbitrators did not exclude lawyers, he referred to a barrister who has specialised "in the field of insurance and reinsurance", naturally giving a wider meaning to those words.

103. I conclude, therefore, that Veolia's construction of this clause is right and that it was open to the President to appoint, as he has done, adjudicators who do not profess to be technical experts.

104. There was a secondary level of argument which appeared to arise in this way. Ms Ansell QC accepted that if the appointees fell outside the description then their appointment was invalid because the President had not followed his instructions. If the words used were to be construed as not requiring some particular technical expertise so that the appointees might fall within it, the President's appointments could only be challenged on grounds of Wednesbury unreasonableness. In reality, I did not understand Equitix to be making the latter type of challenge but properly founding their case on the proposition that the President had not followed his instructions. That was reflected in the re-formulation of the declarations to the effect that the appointees are not experts in the field of biomass energy plant and that was the purpose of the further questioning of the appointees about their experience.

105. I approach this issue against the background that, in general terms, there is good reason why parties should be discouraged from challenging appointments made by adjudication appointing bodies. This process is vital to the process of adjudication as we know it and

it would run contrary to policy if parties were able to thwart an adjudication by readily challenging whether the adjudicator was an appropriate appointee.

106. Relying on a decision in the Court of Appeal if the Channel Islands in *Epoch Properties Ltd. v British Homes Stores (Jersey) Ltd.* [2004] JCA 156; [2004] 48 EG 134, it was submitted by both parties that the President, in this instance, acts as an expert (or at the least that he may do so). The case raised a similar issue as to whether a surveyor appointed by the President of the RICS was "of recognised standing experienced in the valuation and letting of premises so far as practicable of similar character or comparable to the Demised Premises … within Jersey … or the Channel Islands or nationally".

107. As set out at paragraph 28 of the judgement, the Royal Court below had decided that:

"(1) the position of the president when presented with a request for appointment of an expert (or arbitrator) under the terms of such a lease is to be equated with that of an independent expert;
(2) if the president asks himself the right questions and exercises his jurisdiction accordingly, his appointment cannot be challenged on the basis that he made a mistake;
(3) if the president departs from his instructions as set out in the lease, that is, if he appoints someone who does not fulfil the criteria laid down in the lease his decision is invalid,
(4) if the question as to whether the president has so departed from his instructions involves an area falling within his expertise (for example, judgment as to the surveyor's appropriateness for the task), he will not be found to have departed from his instructions unless he has reached an unreasonable decision that no reasonable president could have reached (that is a test analogous to Wednesbury unreasonableness.)."

108. The judgment of the Hon Michael Beloff QC continued:

"[29]To elaborate the point made in [28](4), some of the stipulated characteristics are listed in clause 1(i) of the lease. Thus, if the president were to appoint a solicitor instead of a chartered surveyor, the court would be bound to find that he had departed from his instructions. But some of the characteristics are subjective, for example, standing and experience. In such context, the president has to form an appreciation of whether the

qualities possessed by his potential appointee are of the required level. In relation to those, there is clearly room for differing views.

[30] In our view when deciding whether the president has departed to a material extent from his instructions in those areas, where the parties have clearly chosen him for his own expertise, the court should apply a test analogous to Wednesbury unreasonableness. If the decision of the president as to whether his appointee has the stipulated experience or standing is one to which no reasonable president could come, the court will find that he has departed from his instructions. If the court, however, is merely of the view that he has reached a decision on these matters other than that which the court itself would have reached, it would not interfere.

[31] Epoch has not suggested that Mr Finn is not a chartered surveyor or that he is not independent or that he is not of recognised standing. The sole question, therefore, is whether the decision of the president – that Mr Finn's appointment complies with the stipulated requirements of the lease as to relevant expertise – is one to which the president could not reasonably have come…"

109. I do not find the distinction drawn at paragraphs (3) and (4) of the Royal Court's decision as cited easy to apply. If the President in this case acts as an expert, then as Ms Ansell QC submits, *Jones v Sherwood Computer Services plc* [1992] 1 WLR 277 is authority for the proposition that his decision can only be challenged if he has not followed his instructions in some material respect. That is the same point as is made in *Epoch Properties*. But, in this case, the President's instructions are to appoint someone who is an expert in the field of biomass energy plants (for the purposes of adjudication) so I still have to consider whether he has done so, bearing in mind the view that I have formed on the meaning of clause 1.5.

110. What I think paragraph (4) above is aimed at, and it is why I have set out the paragraphs that follow, is the scenario where compliance with the instructions specifically involves some assessment of a person's suitability or experience. If the appointing expert has not made such an assessment, he has not complied with his instructions. If he has made such an assessment (and, therefore, on the face of it complied with his instructions), what *Epoch* decides is that that assessment can only be challenged if it is irrational. Whether that is good law in the courts of England and Wales is another matter because, as Ms Ansell QC argues, following *Jones v Sherwood*, if the appointor acts as an expert there

would not normally be room for such a challenge. For the reasons I explain below it is not necessary for me to decide this issue of law.

111. If the President does not act as an expert, then he acts pursuant to a contract to perform a service in accordance with the terms of the appointment which must be to appoint someone who fits the description in the relevant clause. If he has not complied with the terms of contract, then that person has not been properly appointed.

112. On the face of it, therefore, the question for me is whether the persons appointed are appointed in accordance with the President's instructions. The fact that I ask myself this question in this case should in no way open the floodgates to challenges to adjudicators' appointments. Provisions of this nature are rare. The norm is for a person to be named or a nominating body to be named with no more. Assuming that such limiting provisions comply with the Housing Grants Construction and Regeneration Act 1996 (which was not a matter argued before me), the courts would be cautious not to allow such a provision to thwart the appointment of an adjudicator in the time required by the Act. Under the Scheme, where a nominating body is named or no nominating body is named there is simply no provision for any limitation on the description of the person to be appointed as adjudicator.

113. Having decided that the wording of clause 1.5 does not require the appointees to be technical experts, in my view, the President has clearly complied with his instructions and appointed people who are experts in the field of biomass energy plants, having regard to their experience particularly in dispute resolution. I do not see that that expression could or should be restricted to mean that that experience must relate specifically to plants that produce energy from biomass – the field must at the least extend to and include biomass boilers and the production of biomass fuel. In any event, the appointment process has inherent in it an assessment by the President of the expertise of the appointees. There is nothing to suggest that he has not carried out that assessment and it seems to me to follow that he has complied with his instructions and his appointments cannot be challenged. If I am wrong about that and there is room for consideration of the rationality of his appointments, they are patently not irrational or *Wednesbury* unreasonable.

114. Accordingly, I do not grant the further declarations sought by Equitix.