Neutral Citation Number: [2023] EWHC 2885 (TCC)

Case Number: HT-2022-000386

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KB)

Rolls Building,
London, EC4A 1NL

Judgment given on 17 November 2023

Before:

His Honour Judge Stephen Davies sitting as a High Court Judge

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Between:

MW HIGH TECH PROJECTS UK LIMITED	**Claimant**
- and -	
(1) OUTOTEC (USA) INC **(2) METSO OYJ** **(formerly METSO OUTOTEC OYJ)**	**Defendants**

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Robert-Jan Temmink KC & Matthew Finn (instructed by **HFW, London EC2**) for the **Claimant**
Adrian Williamson KC, Paul Bury & John Steel (instructed by **Walker Morris, Leeds**) for the **Defendants**

Heard on: 24 & 25 October 2023
Judgment circulated in draft: 9 November 2023

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APPROVED JUDGMENT

***Remote hand-down*:**

This judgment was handed down remotely at 10:30am on 17 November 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

I direct that pursuant to CPR PD 39A paragraph 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.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

Introduction and summary of decision

1. This judgment follows the hearing over 2 days of the Defendants' application for strike out or summary judgment of this substantial claim, which has been vigorously contested and extremely well prepared and argued, both in writing and orally, on both sides. The following issues require determination:

   i) Whether the entire claim brought by the Claimant (MW) against the First Defendant (Outotec) is an abuse of process and, thus, should be struck out in its entirety. If not

   ii) Whether the claim for misrepresentation brought by MW against Outotec is an abuse of process and should be struck out and/or whether the breach of contract claims (or certain such claims) also brought against Outotec should be struck out as abusive; and

   iii) Whether the breach of contract claims brought by MW against Outotec should be summarily dismissed on the basis that the re-assignment relied upon by MW to establish such claims is, on its true construction, ineffective to re-transfer rights under the subcontract made between them in the absence of prior consent from Outotec to such re-assignment; and

iv) Whether the misrepresentation claim and/or the breach of contract claims against the Second Defendant ("Metso"), brought under the parent company guarantees given by Metso to MW, should be allowed to proceed even if, or to the extent that, the same claims against Outotec are struck out or summarily dismissed.

2. In short, my decision on each of the issues identified above is as follows, in the order in which I have dealt with them below:

i) The breach of contract claims against Outotec should be summarily dismissed because the re-assignment, being made without consent, was ineffective as between MW and Outotec.

ii) The breach of contract claims cannot be separately pursued as against Metso under the parent company guarantee.

iii) The misrepresentation claim is within the scope of the parent company guarantee and MW can pursue such claim against Metso even if the misrepresentation claim against Outotec is to be struck out as an abuse, unless there is a separate basis for striking out the misrepresentation claim against Metso as an abuse.

iv) The misrepresentation claim against Metso should not be struck out as an abuse.

v) The misrepresentation claim against Outotec should not be struck out as an abuse.

vi) Had the breach of contract claims not been summarily dismissed, it would not have been an abuse to pursue them.

3. My reasons appear below. Because the case is listed for a case management conference on 8 December 2023 it will assist the parties for me to produce this judgment as speedily as practicable. Hence, I have attempted to keep this judgment reasonably brief. I have not specifically identified and separately dealt with each and every point raised by the parties, only those which are of importance to my decision.

Background

4. For the same reasons as identified above I will keep this section reasonably brief, adopting with gratitude the non-controversial sections of counsels' respective opening written submissions[1].

5. The parties relevant to this case are as follows:

[1] Where I refer in this judgment to the submissions of Mr Temmink KC and Mr Williamson KC I am of course not overlooking the significant contributions of all junior counsel.

i) MW is a company registered in England and Wales which engaged in the engineering, procurement, and construction of energy from waste ("EfW") plants.

ii) Outotec is a company registered in Idaho, USA, which engages in the supply of combustion and gasification technologies for converting waste materials into energy.

iii) Metso is registered in Finland, and engages in the design, development, construction, and maintenance of processing plants and equipment. Metso is the parent company of Outotec.

6. In 2015: (a) a company named Energy Works Hull Limited ("EWH") entered into a main contract with MW for the construction of a new waste to energy power plant in Hull ("the Hull project") for a price of around £154 million; (b) MW entered into the sub-contract with Outotec to supply plant for use as part of the main contract works ("the subcontract"). The subcontract was an amended version of the IChemE Yellow Book standard form.

7. Metso, being Outotec's parent company, offered three parent company guarantees (in 2017, 2021 and 2022, all in the same or substantially the same terms) in respect of Outotec's liabilities arising from the project. MW also engaged Outotec in two similar projects within the UK; one in Levenseat, Scotland and the other in Surrey. In each case, Outotec's plant was, effectively, the same.

8. The Hull project was beset with difficulties and, ultimately, EWH terminated the main contract on 4 March 2019. Under the terms of the main contract EWH was entitled to call for MW to assign the subcontract with Outotec to itself and, having called on MW to do so, MW duly complied.

9. EWH then commenced proceedings against MW in July 2019, pleading a claim for damages for breach of the main contract on the basis that:

i) MW was guilty of culpable delay from 10 April 2018 until 7 January 2019 and liable for liquidated damages in the sum of £23 million (this being the delay damages cap under the main contract) or general damages in a similar sum;

ii) EWH was entitled to terminate the main contract for default and/or at common law, and was entitled to claim damages arising from termination. These damages were ultimately claimed at around £130 million;

iii) MW's pre-termination work was defective in the respects set out at Appendix 4 to the Particulars of Claim. Following amendment, there were 33 defects in total claimed at around £11.5 million.

10. MW commenced Part 20 Proceedings against Outotec on 27 September 2019, pleading the following claims "primarily" on the basis that it retained the benefit to accrued pre-assignment rights under the subcontract and, alternatively, under the Civil Liability (Contribution) Act 1978 (the "1978 Act"). The basis for these claims was that the commissioning of Outotec's plant was significantly delayed and that such delay was caused by defects and other performance shortfalls in Outotec's plant.

    i) Liability for liquidated damages for delay under the subcontract in the sum of $5.3m.

    ii) Certain defects alleged by EWH to arise out of breaches of contract by Outotec. Following amendments, these ultimately amounted to 15 alleged issues (the "EWH defects claims").

    iii) The defects also exposed MW to liability for liquidated damages and termination for default. This claim, if correct, would have exposed Outotec to potentially very large losses.

11. Outotec pleaded a defence to the additional claim and a counterclaim under which it claimed certain outstanding milestone payments from MW along with various unpaid variations. In its original Reply and Defence to Counterclaim MW defended Outotec's counterclaim on the basis of:

    a. Certain alleged defects which had been raised by MW during the course of the works. By paragraph 51(i) MW pleaded that it "continues to rely upon the "Recharges" which currently total $12,179,379.18. Those recharges upon which MW relies will be introduced in due course by way of amendment to the Particulars of Additional Claim".

    b. (By paragraph 51(ii)) MW pleaded that it "remains entitled to set-off any counterclaims or set-offs that may exist against Outotec's money claim". Asked to clarify this, MW responded that the counterclaims it relied upon were those in the Additional Claim and: "It is these claims which MW avers it is entitled to set-off against any sums otherwise due to Outotec, irrespective of the position on the assignment".

12. Outotec also contended that post assignment MW had lost the right to make any claims against it for damages for pre-assignment breaches of the subcontract. The effect of this assignment was an issue in the previous proceedings and was determined by O'Farrell J in her judgment on the preliminary issues ("the preliminary issues judgment") of 24 September 2020. At paragraph 41 she explained the issue as follows:

    "It is common ground that there was a valid assignment of the Sub-Contract by MW to EWHL. The dispute concerns the effect of such assignment, namely, whether it transferred all benefits, including accrued benefits, or merely future rights under the

Sub-Contract; if it transferred all benefits, whether it also transferred all obligations so as to amount to a novation."

13. Having undertaken a detailed analysis, at paragraph 108 she concluded that: "In summary, there was an effective assignment of MW's accrued and future rights under the Sub-Contract by the notices in writing given to EWHL and Outotec."

14. At paragraph 153(ii) she concluded that: "The assignment of the Sub-Contact by MW to EWHL did not transfer the benefit and burden so as to take effect as a novation ..."

15. There was no appeal against these findings and their correctness was not sought to be challenged (even assuming it was open to MW to do so) in these proceedings.

16. She did, however, also find at paragraphs 153(iii)-(iv) that in relation to MW's rights under the 1978 Act:

    i) Any MW liability to EWH following from termination of the main contract was not the same damage as any Outotec liability.

    ii) At least part of any MW liability to EWH for delay was the same damage as any Outotec liability.

    iii) At least part of any MW liability to EWH for defects was the same damage as any Outotec liability.

17. Following, and in the light of, the preliminary issues judgment, MW obviously had to make a decision as to how it could and should progress the Part 20 claim against Outotec going forwards. In November 2020, MW produced its Re-Re-Amended Particulars of Additional Claim, in which it continued to advance its claim for both delay losses and the defects claims and also at paragraph 29A pleaded that:

    "Further or alternatively, M+W is entitled to rely upon the defects alleged in Annex 1 as an abatement against any further monetary claims that Outotec might bring".

18. On 7 May 2021, some one month before the trial was listed to start, O'Farrell J gave MW permission to amend again including, in relation to the Re-Re-Re-Amended Reply, the following amendments:

    i) The intimated claim relating to the Recharges was removed, in the face of Outotec's objection to an earlier draft, seeking to include them as part of the claim.

    ii) The claim for contribution in respect of liquidated damages was also removed.

    iii) As regards the claim for liquidated damages, MW pleaded that it was entitled to retain liquidated damages which it had levied under the subcontract prior to termination and assignment.

19. By the time of the trial Outotec: (a) admitted that it was in culpable delay; (b) made clear that it did not pursue any claim for an extension of time; and (c) therefore admitted that it was liable to MW in liquidated damages up to the cap contained in the subcontract in the sum of around $4 million.

20. The trial came on before Pepperall J and lasted for 5 weeks in June and July 2021, followed by written submissions and oral closings for 3 days in September 2021.

21. Judgment was handed down in two Parts, with Part 1 being handed down on 20 December 2022. The focus of this judgment was on the termination issue as between EWH and MW (on which EWH was successful), the higher-value defects claims, certain issues of principle such as whether the subcontract contained conditions precedent to a claim for defects, Outotec's claim for its milestone payments, and whether MW was entitled in principle to claim an abatement. On the abatement point, at paragraph 822, Pepperall J concluded:

> "Even where M+W has no claim for contribution under the 1978 Act by reason of the lack of notification under clause 37 of the subcontract, it may nevertheless rely on the defence of abatement in reduction of its liability under the subcontract for milestone payments."

22. Insofar as the claim between EWH and MW was concerned, at paragraph 853 Pepperall J recorded that:

> "Four days before this judgment was handed down, EWH and M+W reached terms of settlement. Nevertheless, both parties still filed their list of editorial corrections by the deadline that day and neither asked me not to hand down this judgment. In any event, the third-party proceedings have not been settled and many of the findings are important to those ongoing proceedings."

23. The terms of this settlement entered into on 16 December 2022 between EWH and MW included a payment by MW to EWH of £75 million, said to be in full and final settlement of all claims between MW and EWH and their respective parent companies.

24. The re-assignment appended to the settlement agreement also provided that: "With immediate and automatic effect EWHL assigns the entirety of the Subcontract Benefits ab initio to MW".

25. The phrases "Subcontract Benefits" was defined to mean "all rights, title, interests, and other benefits whatsoever arising in, under, or pursuant to the Subcontract and including any and all rights, title, interests and other benefits whatsoever in all concomitant claims in under or pursuant to the Subcontract which were acquired by EWHL pursuant to the 2019 Assignment and vested in EWHL immediately before the execution of the 2022 Assignment."

26. Thus, the Part 2 judgment did not need to address any further issues as between EWH and MW, but did need to address the remaining issues as between MW and Outotec. It was handed down on 12 May 2023. The remaining defects were considered, as well as Outotec's variations claims and MW's right to claim abatement. In relation to the abatement claim, Pepperall J held that generally MW's abatement claims failed due to lack of evidence before the court as to the diminution in value of the subcontract plant; thus in paragraph 108 he said:

"It is for M+W to prove its defence of abatement and I cannot, without evidence on the point, determine on the balance of probabilities that the task is impossible and that, as a matter of generality, the difference in value of the defective subcontract plant is necessarily greater than the claimed remedial costs."

27. The outcome of the proceedings between MW and Outotec was that Outotec was entitled to judgment in the sum of around £9.3 million principal plus interest of around £2.2 million and to its costs to be assessed on an indemnity basis following a Part 36 offer made during the course of the proceedings.

28. There is an outstanding appeal to the Court of Appeal against one of the issues resolved by the previous proceedings, which is whether or not clause 37 of the subcontract contains a condition precedent to MW's right to make certain claims.

29. The present proceedings were issued on 21 December 2022 (i.e. the day after the Part 1 judgment was handed down and shortly after the purported re-assignment by EWH to MW as part of that settlement) and the Particulars of Claim were served on 31 March 2023.

30. In overview, the claim consists of two parts, a misrepresentation claim and a breach of contract claim.

31. The misrepresentation claim is a claim for damages on the basis of deceit, negligence and/or s.2(1) of the Misrepresentation Act 1967. This claim is for around £170 million, and includes, as set out in paragraph 96 of the Particulars of Claim, all of the costs which MW is said to have incurred on the Hull project, including the sum payable to EWH under the settlement agreement of £75 million, together with various other items including "legals and claims" in the sum of £17.3m, and "Outotec counterclaim" in the sum of £6,632,277.

32. The misrepresentation claim is conveniently summarised in paragraph 7 of the Particulars of Claim in the following terms. As can be seen, it involves a root and branch attack on Outotec's conduct in allegedly inducing MW to place the subcontract with Outotec.

"7. In summary, M+W's case is that:

7.1. Between 2011 and February 2016 Outotec knowingly or recklessly, alternatively negligently, made false representations to M+W that it had experience in the design, supply, and manufacture of process plant and technology suitable for the staged gasification of RDF as required for the Hull Project. Further, Outotec represented that it had pilot plants which:

7.1.1. had been used to test, and thereby verify, process plant and technology equivalent to the Subcontract Plant and which was already proven to be successful in the processing of RDF equivalent to that anticipated to be processed at the Hull Project, and/or

7.1.2. could and would be used to prove, and verify, that the relevant process plant and technology was proven to be successful in the processing of RDF equivalent to that anticipated at the Hull Project prior to the delivery of the Subcontract Plant.

As Outotec intended, M+W acted in reliance on those representations and was induced to enter into the Subcontract.

7.3. Contrary to its representations, Outotec:

7.3.1. did not have any experience or track record of successfully designing or manufacturing or procuring plant or equipment capable of the successful staged gasification of RDF;

7.3.2. did not have multiple pilot plants that it either had used or intended to use to verify that its process plant was proven, and that its technology was viable for the gasification of RDF;

7.3.3. did not have a pilot plant at which it could test plant and equipment equivalent to the Subcontract Plant to be supplied for the Hull Project;

7.3.4. did not have any intention of establishing that the process plant, and technology it intended to supply for the Hull Project would work and was 'proven' before delivery of the Subcontract Plant for the Hull Project;

7.3.5. did not have sufficiently experienced personnel to provide advisory and supervisory services for the construction, installation, commissioning and testing of the Subcontract Plant in accordance with Good Industry Practice (as defined by Clause 1.1 of the Subcontract) and/or good engineering practice and/or as otherwise required by the Subcontract.

7.5. As a result, M+W sustained losses of not less than £166,855,844 which it would not have sustained had it not entered into the Hull Subcontract and Main Contract ..."

33. The breach of contract claim is a claim for damages for breach of the purportedly re-assigned subcontract . This claim is for around £122 million plus $5.2 million and

includes, as set out in paragraph 105 of the Particulars of Claim, "defect rectification costs" in the sum of around £12.4 million together with liquidated damages claims and claims for delay and disruption, "Legal costs incurred in respect of EWHL proceedings" in the sum of £14.1m, and the £75 million settlement sum.

34. The claim is summarised in paragraphs 7.4 and 7.5 of the Particulars of Claim as follows:

> 7.4. In breach of the Subcontract, and thereby placing M+W in breach of the Main Contract, Outotec delivered Subcontract Plant that was defective, unproven, and incapable of performing the staged gasification of RDF as required by the Subcontract without significant and expensive re-engineering and modification.
>
> 7.5. As a result, M+W sustained … alternatively, losses of not less than £122,383,034 and $5,209,000 which it would not have sustained had the Subcontract been properly performed, and it claims those losses as set out further below."

35. It will be seen that because the misrepresentation claim is pleaded on the basis that MW is entitled to recover all of the losses suffered as a result of entering into the main contract and the subcontract, if successful those claims sweep up all of the breach of contract claims.

36. Proceedings between MW and Outotec are also extant in the London TCC in respect of the Surrey project and in an ICC arbitration seated in Scotland in respect of the Levenseat project. In each of those actions MW is claiming against Outotec for breach of contract and for misrepresentation. The claim in respect of the Surrey project was issued on 1 April 2022 and is also brought against Outotec and Metso and is also listed for a CCMC on 16 December 2023. The claim in respect of the Levensheat project was commenced via notice of arbitration served on 17 March 2021 and has a hearing on liability scheduled to take place over 5 weeks in August and September 2024. MW complains that in the aggregate it has suffered loss extending to over £400 million and has been driven out of the energy from waste industry entirely as a consequence of Outotec's misrepresentations and the failure of Outotec's plant in the projects across the UK. It is aggrieved that, this notwithstanding, under the previous proceedings it has been ordered to pay Outotec the judgment sum plus interest and the recently agreed Outotec's costs of the previous proceedings, in the sum of £4.25 million.

37. It is convenient to deal with the issues in the following order because, as will be apparent, my conclusions on the abuse of process argument are in part influenced by my decisions on the re-assignment issue and the parent company guarantee issue.

The re-assignment issue – MW's breach of contract claim against Outotec

38. I will begin with the re-assignment point, because it is a short and largely self-contained issue, where the principal issue is a pure point of construction. It is

appropriate to determine this point first; as Lewison LJ observed in Allsop v Banner Jones Ltd [2021] EWCA Civ 7 at paragraph 47(iii) "it is generally preferable to consider whether a claim or allegation should be struck out for failing to disclose a reasonably arguable case, before the question of abuse of process is considered". As I find, my conclusion on this issue disposes of a substantial part of the case against Outotec and, as I also find, against Metso as well.

39. Clause 9.1 of the subcontract provides that:

"Neither the Contractor nor the Subcontractor shall without the previous consent of the other transfer any benefit or obligation under the Subcontract to any other person in whole or in part, except that

(a) the Subcontractor may without such consent transfer the right to receive any money which is or may become due to him under the Subcontract; and

(b) if so required by the Purchaser under the Main Contract the Contractor may assign the Subcontract to the Purchaser".

40. The word Contractor is a defined term and "means the person named as such in the Subcontract Agreement *or his permitted assigns*" (emphasis added). It is common ground that MW is the person named as the "Contractor" in the subcontract (and Outotec is the named subcontractor and EWH the named Purchaser). Thus the clause, inserting that definition, reads:

"Neither MW [nor its] permitted assigns nor Outotec shall without the previous consent of the other transfer any benefit or obligation under the Subcontract to any other person in whole or in part, except that

(a) Outotec may without such consent transfer the right to receive any money which is or may become due to him under the Subcontract; and

(b) if so required by EWH MW may assign the Subcontract to EWH".

41. It is common ground that MW was required by EWH to, and did, assign the subcontract to EWH. I have already referred to what O'Farrell J found as regards the impact of that assignment in the preliminary issues judgment.

42. The question for me to determine is whether or not the EWH settlement agreement, referred to at paragraph 24 above, operated as a valid and effective re-assignment as between MW and Outotec, in circumstances where it is common ground that EWH neither sought nor obtained the prior consent of Outotec before entering into the settlement agreement.

43. This is a straightforward question of construction of Clause 9.1, as to which the established principles of contract construction, as recently summarised by Court of

Appeal in DnaNudge Limited v Ventura Capital GP Limited [2-23] EWCA Civ 1142 at paragraphs 38 to 48 (Snowden LJ) apply.

44. The starting point for the analysis as a matter of general principle is that:

i) In the absence of an express contractual restriction there is no prohibition upon either of the parties to a contract (A or B) assigning benefits under that contract to a third party (C).

ii) In the absence of agreement between A, B and C, A may not assign the burden of any obligations arising under a contract to C so as to replace A by C as the party liable to B for the further performance of those obligations. This requires a novation of the contract, under which, by agreement of all three, A is replaced by C as contracting party for all purposes from the novation is agreed to take effect.

iii) A valid assignment of the benefits of the contract by A to C does not, even if it purports to be an assignment of all of the benefits of the contract, have the effect of substituting C as the contracting party. This is a necessary corollary of point 2 above, since A remains the contracting party for the performance of the obligations under the contract.

iv) The parties may agree in their contract that any assignment from A to C requires the previous consent of B to be effective so as to allow C to enforce the terms of the contract directly as against B. Such a restriction will be effective between the parties according to its express terms.

45. There is also a difference between a novation which has the effect of a transfer of the burden as well as the benefit of the contract and what is referred to as the principle of conditional benefits. This is something which was also addressed by O'Farrell J in the preliminary issues judgment where at paragraph 89 she summarised the principle as follows:

"This concept is addressed in Chitty [on Contracts] at 19-079 &19-080: "The principle that the burden of a contract cannot be transferred so as to discharge the original contractor without the consent of the other party means that, as a general rule, the assignee of the benefit of a contract involving mutual rights and obligations does not acquire the assignor's contractual obligations… … However, where contractual rights are assigned, the extent of those rights will be defined by the original contract… The conditional benefit principle arises where the right assigned is conditional or qualified, the condition being that certain restrictions shall be observed or certain burdens assumed. The restrictions or qualifications are an intrinsic part of the right which the assignee has to take as it stands. The question whether a contract creates a conditional benefit is one of construction."

46. She also referred to the judgment of Gloster LJ in Budana v Leeds Teaching Hospitals NHS Trust [2017] EWCA Civ 1980 at [26] by way of further elucidation of this principle:

> "… where a right under a contract was conditional upon, or qualified by, performance of some obligation in return for which the right has been granted, an assignee of the benefit of such right will only be entitled to exercise the right subject to performance of the burden: Tito v Waddell (No.2) [1977] Ch 106, 290, per Megarry V-C; Rhone v Stephens [1994] 2 AC 310, 322, per Lord Templeman; Davies v Jones [2010] 2 All ER (Comm) 755, para 27, per Sir Andrew Morritt C. That principle is referred to in the authorities as "the conditional benefit principle"."

47. In my judgment the clause, when read with the definition of the Contractor inserted, is crystal clear in its effect, which is that EWH, as a permitted assign, had no right to re-assign to MW without the previous consent of Outotec. That is what the clause says in plain language and there is no conceivable reason to give it any different meaning.

48. Even if the definition was ignored the clause would still have the same effect in my judgment. The clause cannot be construed as meaning that, once there has been a permitted assignment to EWH (or, for that matter, an assignment to any other party with Outotec's consent), the assignee is free to assign again to another party without Outotec's consent. Instead the clause must be construed as meaning that the restriction on assignment without consent applies as much to any assignee of MW or Outotec as it does to MW or Outotec themselves. In short, on a proper construction of the clause the conditional benefit principle applies. That is for the following reasons:

    i) To hold otherwise would have the effect of conferring a wider right to assign to EWH as the assignee than was previously enjoyed by MW. In my judgment clear words would be required to achieve such a surprising consequence.

    ii) Just because the default position in the absence of express restriction is that a party may assign without consent does not mean that this is the default position where there has already been one permitted assignment with consent. It is true, as Mr Temmink submits, that some contracts do contain an express provision on re-assignment without consent. But that does not mean that the absence of such express provision means that the default position is that there is no such limitation.

    iii) If, as here, a contract requires the consent of B before it can be assigned by A, then in my judgment the natural conclusion is that the parties have an objective common intention that the identity of the assignee is sufficiently important to require prior consent to the assignment. In the absence of circumstances demonstrating a different common intention it would make no sense to conclude that the identity of any subsequent assignee was of no importance such as to dispense with the need for consent to any re-assignment. This

argument applies as much to MW, who relies on the subcontractor to ensure that it performs its own obligations to EWH, as it does to Outotec.

iv) It is irrelevant that Outotec was obviously willing to contract initially with MW. It cannot safely be assumed that just because Outotec was willing to enter into a wholly executory subcontract with MW it would also be equally willing in the future to consent to a re-assignment by EWH back to MW in a wide variety of different factual scenarios.

v) The fact that - on this hypothesis - the clause refers to "Contractor" and "Subcontractor" without express reference to their permitted assignees does not mean that these words cannot or should not be read in.

49. As regards point (iv) above, MW also argued that it was not "any other person" within the meaning of clause 9.1, since it is the "Contractor" for the purposes of such clause and cannot therefore also be "any other person". This argument is unsustainable in the light of the definition of Contractor as including its permitted assigns. It is also unsustainable given my decision that consent is required in relation to successive assignments, since it is obvious that a successive assignment will be undertaken by an assignee of the Contractor and there is no reason to treat the wide phrase "any other person" as excluding the original assignor in such a case.

50. Finally, MW argued that even if consent was required it was deemed given by virtue of Outotec having initially entered into the subcontract with MW. However, it is impossible in my judgment to see the act of entering into the subcontract containing this clause as amounting to an advance consent to re-assignment back to the original assignee, whether back to MW (as in the current scenario) or re-assignment back to Outotec in a similar scenario. I repeat the point made at paragraph 48(iv) above. Clause 9.1 contains two express exceptions from the general requirement to obtain consent. There is no possible basis for implying some further exception to permit EWH to re-assign to MW without Outotec's prior consent.

51. It follows in my judgment that the re-assignment was ineffective to transfer the benefits of the subcontract to MW so as to allow it to enforce the subcontract against Outotec.

52. However, MW contends that it is not open to Outotec to rely upon this defence on the basis of estoppel and abuse of process. It contends that in the previous proceedings Outotec successfully argued in the preliminary issues trial that the assignment to EWH did not take effect as a novation, so that EWH did not become the contractor for the purposes of the subcontract, and was able to rely on that finding to its benefit at the main trial. It contends that, having successfully so argued, Outotec may not now seek to argue the reverse and contend that EWH did become the contractor so as to be subject to the prohibition of re-assignment without consent.

53. In my judgment this argument is based on a misconception of the true basis for Outotec's successful argument. Outotec is not arguing that EWH became the Contractor in the sense that it is arguing that benefit and burden of the subcontract was novated to EWH or, if it is, that is not the argument which I have accepted. The argument is simply that, post the assignment, EWH had the same obligation to seek and obtain Outotec's consent to any further assignment as MW as the contractor had in relation to any original assignment, save where permitted under sub-clause (b). It follows that there is no question of Outotec seeking to advance an inconsistent case in these proceedings from that which is argued in the previous proceedings.

54. It follows that all such parts of the existing claim in which such allegations are made must be dismissed.

MW's claim against Metso for defects and/or delay related damages – consequences of the ineffective re-assignment

55. It is also convenient at this point to deal with the consequences of this finding as between MW and Metso. This depends largely upon the proper construction of the parent company guarantee. Since the construction of the parent company guarantee is also determinative of the issue as to whether or not MW is entitled to advance its misrepresentation claim against Metso, it is convenient to refer to the most relevant clauses of that guarantee at this point.

56. Clause 2.1 of the parent company guarantee provides as follows:

> "The Guarantor [Metso] hereby guarantees the due and proper performance by the Subcontractor [Outotec] of the Subcontractor's duties and obligations arising under or in connection with the Subcontract so that if the Subcontractor shall in any respect fail to perform any of its duties or obligations arising under or in connection with the Subcontract or shall commit any breach of any provision, or fail to fulfil any warranty or indemnity, set out in the Subcontract, then, upon the Contractor's [MW's] written demand, the Guarantor shall forthwith perform and fulfil in the place of the Subcontractor each and every duty, obligation, provision, warranty or indemnity in respect of which the Subcontractor has committed a breach or which the Subcontractor has otherwise failed to fulfil."

57. Clause 3.1 provides:

> "If the Subcontractor in any respect fails to observe or perform any of its duties or obligations to the Contractor under or in connection with the Subcontract, or if the Subcontractor fails to pay any direct debt, losses, damages, expenses, charges, interest or costs due from the Subcontractor to the Contractor under or in connection with the Subcontract, or if the employment of the Subcontractor under the Subcontract shall determine by operation of or notice given under Clause 44 of the Subcontract, then the Guarantor shall indemnify the Contractor against all direct losses, damages, costs

and expenses incurred by the Contractor by reason of such failure or non-payment or termination (including costs and expenses incurred by the Contractor in connection with the enforcement of or preservation of its rights under this Agreement) provided that the Contractor shall take all reasonable measures to mitigate any loss or damage which it has suffered or incurred or may suffer or incur pursuant to this Clause 3 and the Guarantor shall upon first written demand itself pay to the Contractor without any deduction or set-off the amount of such direct debt, losses, damages, expenses, charges, interest or costs as the case shall require. Such amounts to be paid by the Guarantor to the Contractor within 30 days of receipt of such demand. However, subject to the other provisions of this Guarantee, this shall not be construed as imposing greater obligations or liabilities on the Guarantor than are imposed on the Subcontractor under the Subcontract."

58. Clause 5 provides:

"The Guarantor agrees that its obligations under this Agreement shall be those of a primary and independent obligor and that the Contractor shall not be required to pursue any remedy against the Subcontractor before proceeding against the Guarantor under this Agreement."

59. Clause 8.1 provides:

"The Contractor shall be entitled to recover no more under this Agreement in respect of any matter than the Contractor would be entitled to recover from the Subcontractor in respect of that matter, and, without prejudice to the foregoing, as between the Guarantor and the Contractor, all the limitations and defences available to the Subcontractor in respect of its obligations and liabilities under the Subcontract or otherwise available to the Subcontractor at law shall be available to the Guarantor in respect of its liabilities under this Agreement. The Contractor shall not be entitled to commence proceedings against the Guarantor under this Agreement in respect of any claim once any proceedings against the Subcontractor in respect of such claim would be statute-barred."

60. Clause 8.2 provides:

"The Guarantor's obligations and liability under this Agreement will remain in full force and effect and shall not be discharged, released, reduced, impaired or affected by reason of any of the following:

8.2.1. any provision of the Subcontract being or becoming illegal, invalid, void, voidable or unenforceable for any reason whatsoever;

….

8.2.8. any other fact, circumstance, act, event, omission or provision of statute or law or otherwise which, but for this clause, might operate to discharge, impair or

otherwise affect any of the obligations of the Surety under this Agreement or any of the rights, powers or remedies conferred on the Contractor by this Agreement or by law."

61. Finally, clause 9 makes provision for assignment of the parent company guarantee as follows:

9.1. The Contractor may with the prior consent of the Guarantor assign or charge the benefit of this Agreement to any person to whom the Contractor lawfully assigns or charges the benefit of the Subcontract.

9.2. The Guarantor shall not be entitled to contend that any person to whom this Agreement is assigned is precluded from recovering under this Agreement any loss incurred by such assignee resulting from any breach of this Agreement by reason that such person is an assignee and not a named promisee hereunder.

62. As Mr Temmink submitted, the process of construction applicable to a guarantee is the same as the process of construction applicable to any other contract: see the judgment of Rimer LJ in National Merchant Buying Building Society Ltd v Bellamy [2013] EWCA Civ 452 at paragraph 39 where he said this:

"… A guarantee is merely a particular type of contract. The relevant question – in this as in every case – is 'what is the nature of the guarantee obligation that the guarantor has assumed?' That is the question that Phillips J, in the *Mystery of Mercers* case, recognised as the critical one. It is the question that in *St Microelectronics NV v. Condor Insurance Ltd* [2006] EWHC 977 (Comm); [2006] Lloyd's Law Reports Vol 2 525, at paragraph 36, Christopher Clarke J said underlies all cases such as this; and it is the question that the judge also asked himself in paragraph 92 of his judgment in this case. The answer to the question turns on the interpretation of the guarantee, as to which there are no special rules. A guarantor is likely in most cases to know the nature of the business relationship between the principal and the creditor. So is the creditor. But proof of such knowledge by either or both parties to the guarantee does not, by itself, tell you anything conclusive about the nature, terms or intended effect of the guarantee. That depends upon the true interpretation of its language, an inquiry involving 'the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract' (*Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, at 912, per Lord Hoffmann). In engaging in such an inquiry, it may well be appropriate to have regard to the commercial arrangements which were at the time in place between the principal and the creditor, which will form part of the background against which the guarantee is given. But the proposition that the interpretation of the guarantee is conclusively dictated by knowledge that the guarantor may alone have had is inconsistent with the now well-settled approach to the construction of written instruments, including guarantees, and is wrong."

63. I pause to note that the eminent authors of the Law of Guarantees (7th edition) observe, at paragraph 4-002, that "there are also numerous cases at the highest level which support a rule that contracts of this kind must be strictly construed so that no liability is imposed on the surety which is not clearly and distinctly covered by the terms of the agreement". However, since my decision in this case does not turn on the difference between the two approaches, I need not address this issue in this judgment.

64. In my judgment it is simply not possible as a matter of construction for MW to advance against Metso a claim, post assignment to EWH and in the absence of a valid re-assignment back to MW, for damages for breach of contract on the footing that Metso is liable to MW under the parent company guarantee for non-performance or breach by Outotec of its duties, obligations, provisions, warranties or indemnities arising under the subcontract. In my judgment this follows from the clear words of clauses 2 and 3.1, which are the primary operative provisions of the parent company guarantee.

65. This is not a case where MW can seek to rely on clause 5 to argue that, because Metso has accepted primary and independent obligations to MW under the guarantee, its liability to MW is not affected by the fact of the assignment to EWH. The whole thrust of the parent company guarantee is that Metso accepts liability where Outotec fails to perform its obligations under the subcontract to the Contractor (i.e. MW). By virtue of the assignment, the benefit of the right to performance of these obligations is transferred to EWH, so that MW was no longer entitled to claim against Outotec for damages for breach of these obligations, as O'Farrell J found in the preliminary issues judgment. Instead, EWH has the contractual right to enforce these obligations. Whilst MW's right to assign the benefit of the parent company guarantee is subject to the requirement to obtain Metso's prior consent under clause 9.1, that does not affect the conclusion that post-assignment, and in the absence of any valid re-assignment, MW cannot claim against Metso under the parent company guarantee because such claims fall outside the wording of clauses 2 and 3.1.

66. Insofar as there is any doubt on the point it is removed in my judgment by clause 8.1. If, as O'Farrell J found, post assignment MW is entitled to recover nothing against Outotec under the subcontract, then it can recover no more as against Metso. Since I have decided that Outotec is able to rely on the defence based on the lack of consent to the re-assignment as against MW in respect of the claim brought by MW against it under the subcontract, the same defence is also available to Metso.

67. MW seeks to rely upon sub-clauses 8.2.1 and 8.2.8 to avoid this conclusion. It is clear that clause 8.2 is intended to operate to exclude, in cases falling within the individual sub-clauses, the operation of the rules relating to guarantees where such matters as material variations of the terms of the principal contract will discharge the surety. It is also clear that clauses 8.1 and 8.2 are to be read together, so that there is no reason to give the individual sub-clauses of paragraph 8.2 a strained, wider meaning than justified by their words and intended purpose.

68. Thus, as regards clause 8.2.1, in my judgment the assignment to EWH cannot be said to amount to a "provision of the subcontract being or becoming illegal, invalid, void, voidable or unenforceable for any reason whatsoever".

69. As regards clause 8.2.8, nor can it be said to amount to "any other fact, circumstance, act [or] event … which, but for this clause, might operate to discharge, impair or otherwise affect any of the obligations of the Surety under this Agreement or any of the rights, powers or remedies conferred on the Contractor by this Agreement or by law". The assignment to EWH does not do any of these things. Metso's obligations are unaffected by the assignment, as are the rights etc. conferred on MW under the agreement, save that by reason of EWH's exercise of its powers under the main contract MW has assigned those rights to EWH. If these words were read as widely as MW contends that would deprive clause 8.1 of any effect. These sub-clauses cannot in my judgment be used to re-write the fundamental ambit of the liability covered by the guarantee.

MW's misrepresentation claim against Metso under the parent company guarantee

70. The reason that I am considering this issue next is that it is of relevance when considering the abuse of process arguments to know whether or not as a matter of the true construction of the parent company guarantee: (a) MW's claim for misrepresentation falls within the scope of the parent company guarantee; and whether or not if so (b) MW can pursue its claim if the claim against Outotec is struck out as an abuse of process.

71. MW contends that: (a) since Metso was not a party to the previous proceedings the justification for treating the misrepresentation claim against Metso as an abuse is even less strong than the alleged justification for treating the misrepresentation claim against Outotec as an abuse; (b) it follows that the misrepresentation claim against Metso can be pursued regardless of what might otherwise be decided in relation to the same claim against Outotec. If so, then logically it must follow that any decision to strike out the misrepresentation claim against Outotec as an abuse would need to take into account the fact that MW could pursue the same claim against Metso in any event.

72. The key issue for consideration in relation to the first issue is whether or not the claim for misrepresentation can be said to be a failure by Outotec to perform, duly or properly, any of its duties or obligations arising "in connection with the subcontract" so as to fall within the scope of clauses 2.1 and 3.1 of the parent company guarantee.

73. Mr Temmink submitted that the phrase "in connection with" is plainly a wide term and that the misrepresentation claims arise in connection with the subcontract on the simple and straightforward basis that the misrepresentations are all said to have

caused MW to enter into the subcontract and to have led to it suffering the losses pleaded as having occurred as a result of its entry into the subcontract.

74. Mr Temmink also submitted that, since the subcontract itself contains clauses which address the impact of claims for misrepresentation, including fraudulent misrepresentation, this also indicates that such claims arise in connection with the subcontract. He relies in particular upon clause 45.3, which provides that: "The total aggregate liability of the Subcontractor to the Contractor arising out of or in connection with the Subcontract and the Subcontract Works shall not exceed the Subcontract Price (including but not limited to any liability arising under negligence, tort, common law or indemnity)", and which also disapplies this limitation in respect of "fraud, wilful misconduct, fraudulent misrepresentation or prohibited acts or deliberate breach of the contract".

75. This, I accept, is an indication that the parties to the subcontract contemplated that claims in tort could fall within the scope of claims arising out of or in connection with the subcontract, including fraudulent misrepresentation claims which were thus expressly excluded from this limitation. It follows, I accept, that the parties to the parent company guarantee must also be treated as having been aware of this.

76. Neither counsel has been able to refer me to authority directly on the point in a similar context. However, as Mr Williamson acknowledged, there is authority in the context of arbitration clauses. In particular, there is the decision of the Court of Appeal in Ashville Investments Ltd v Elmer Contractors Ltd [1989] Q.B. 488, which considered the question whether or not claims for damages allegedly sustained by the claimant as a result of an innocent misrepresentation and/or a negligent mis-statement made to them by the defendant's representatives which induced them to enter into the contract fell within the scope of the arbitration clause in that contract which extended to claims "in connection with" the contract.

77. The Court of Appeal held that they did. Whilst one might discern some difference of approach as between the three members of the Court (May, Balcombe and Bingham LJJ) as to whether or not it was appropriate to adopt a more liberal approach to the construction of arbitration clauses than to other clauses containing the same words, their common approach to the simple question of construction was expressed by Bingham LJ at p.509 as follows:

> "Elmer's claims in misrepresentation and negligent mis-statement are founded upon the allegedly tortious conduct of Ashville said to have induced Elmer to sign and execute the contract. Had the statements complained of become terms of the contract, Elmer's claims for breach would, it would seem, have fallen under head (b). It is not said that the statements became terms of the contract, but that does not mean that the claims arising from them are not connected with the contract. In my view Elmer's claims in misrepresentation and negligent mis-statement relate to statements made in connection with the contract in the very real sense that they are said to have induced

the making of it. Any other conclusion would in my view introduce an unwelcome element of artificiality into a very ordinary commercial transaction."

78. This approach was also followed by the Court of Appeal in Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd (No.2) 87 BLR. 52, 63 Con. L.R. 160, which was not an arbitration clause case, where the only reasoned judgment was given by the then Vice-Chancellor, Sir Richard Scott.

79. In the circumstances, both by reference to the words of the clause and to authority, I am satisfied that the misrepresentation claims do fall within the scope of clauses 2.1 and 3.1 and, hence, are claims which MW is entitled to maintain against Metso under the parent company guarantee.

80. What about the consequences of a decision to strike out the claim against Outotec as an abuse of process?

81. Mr Temmink submits that a decision to strike out as an abuse of process is a procedural decision which bars the remedy and not the right. He relies again upon clause 5, submitting that if MW is not required to pursue a remedy against Outotec before proceeding against Metso it cannot be said that an inability to pursue a remedy against Outotec because it is struck out as an abuse of process can operate to prevent MW from proceeding against Metso.

82. Mr Williamson relies upon clause 8, submitting that if Outotec is entitled to have the action against Outotec struck out as an abuse then that is a "limitation" or "defence" "which is available to the subcontractor at law" which is, therefore, also available to Metso. However, as Mr Temmink observed, whilst clause 8.1 provides expressly that MW cannot proceed against Metso if a claim against Outotec would be statute-barred, there is no equivalent provision in the case of other procedural bars, such as striking out as an abuse of process.

83. Mr Temmink also relied upon clauses 8.2.1 and 8.2.8 in the same way as he did in relation to the re-assignment issue.

84. In my judgment clause 8.1 is not sufficiently wide to include a case where a court decides that a claim against Outotec should be struck out as an abuse of process. That is not in my judgment a limitation or a defence within the scope of that clause.

85. I accept that there may be cases of some similarity to the present which could lie either side of the dividing line. For example, if Outotec could successfully plead that a particular claim made against it is liable to be struck out by operation of the principle of issue estoppel then I can see that this would very likely be regarded as a limitation or defence falling within clause 8.1. Equally, however, if there came a time when Outotec could show that a claim made against it was liable to be struck out because of something in the way in which the case was being conducted (for example

very culpable delay or reliance on false documents) made it an abuse of process, in my view this would fall outside clause 8.1.

86. What I am concerned with here is the case where, on this hypothesis, Outotec can show that the misrepresentation claim against it is liable to be struck out as an abuse under the Henderson principle. In my view such a state of affairs falls outside clause 8.1 on its proper construction.

87. If I was wrong on this point then I would not have concluded that MW could rely on clauses 8.2.1 or 8.2.8, for the same reasons as given above, but that does not matter given my primary conclusion.

88. It follows that I agree with MW that the misrepresentation claim against Metso may be pursued under the parent company guarantee even if the same claim against Outotec is struck out as a Henderson abuse, unless the claim against Metso ought also to be struck out on the same basis, which is a convenient lead-in to these topics.

Abuse of process – legal principles

89. The two key authorities for the purposes of this case are the decision of the House of Lords in Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1 and the decision of the Court of Appeal in Aldi Stores Limited v WSP Group plc & others [2007] EWCA Civ 1260.

90. In Johnson the House of Lords set out the modern approach to what is commonly referred to as Henderson abuse, after the decision in Henderson v Henderson (1843) 3 Hare 100 in which it is said that Wigram V-C first articulated the principle. Lord Bingham summarised the position, in a frequently cited passage which has subsequently been accepted as being authoritative, as follows:

> "The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my

opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all circumstances, a party is misusing or abusing the process of the court in seeking to raise before it the issue which could have been raised before. […] While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

91. It is helpful to refer, as did Thomas LJ in Aldi, to the judgment of Clarke LJ in Dexter v Vlieland-Boddy [2003] EWCA Civ 14, where he summarised the principles to be derived from Johnson v Gore-Wood at paragraphs 49-53 as follows:

"49…:

i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.

ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.

iii) The burden of establishing abuse of process is on B or C or as the case may be.

iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.

v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.

vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.

50. Proposition ii) above seems to me to be of importance because it is one thing to say that A should bring all his claims against B in one action, whereas it is quite another thing to say that he should bring all his claims against B and C (let alone against B, C, D, E, F and G) in one action. There may be many entirely legitimate reasons for a claimant deciding to bring an action against B first and, only later (and if necessary) against others.

51. Those reasons include, for example, the cost of proceeding against more than one defendant, especially where B is apparently solvent and the case against B seems stronger than against others. More defendants mean more lawyers, more time and more expense. This is especially so in large commercial disputes. It by no means

follows that either the public interest in efficiency and economy in litigation or the interests of the parties, including in particular the interests of C, D and E, is or are best served by one action against them all.

52. It seems to me that the courts should be astute to ensure that it is only in a case where C can establish oppression or an abuse of process that a later action against C should be struck out. I could not help wondering whether the defendants in this case would have given their lawyers the same instructions on the question whether they should have been sued in the first action if they had been asked before that action began as they have given now that a later action has been begun.

53. It is clear from the speeches of both Lord Bingham and Lord Millett that all depends upon the circumstances of the particular case and that the court should adopt a broad merits based approach, but it is likely that the most important question in any case will be whether C, D, E or any other new defendant in a later action can persuade the court that the action against him is oppressive. It seems to me to be likely to be a rare case in which he will succeed in doing so."

92. Turning to Aldi, the facts, which were complex, were summarised by Thomas LJ at paragraph 2 of his judgment. In short, however, Aldi as leaseholder had sued the main contractor under a building contract and warranty who had in turn joined in two consultants, against whom Aldi also had the benefit of warranties, as Part 20 defendants seeking contribution. Aldi did not, however, join in those consultants as defendants. Instead, they pursued the main contractor and its indemnity insurers, obtaining judgment against the main contractor and payment from the primary layer insurers but eventually deciding not to pursue the claim against the secondary layer insurers. In the meantime the Part 20 actions in these and related proceedings had gone to a lengthy trial which had settled during the trial.

93. There had been some correspondence between Aldi and the consultants making clear that Aldi was considering action against them if they did not obtain judgment against the secondary layer insurers but they took no steps to do so in advance of the Part 20 trial and, although they wrote to the court advising that this was a possibility, they did not seek directions from the court in that respect.

94. Over 18 months after the settlement Aldi brought fresh proceedings against the consultants, who applied to strike out the claim as an abuse of process. The first instance judge, Jackson J, did so on the basis, summarised in paragraphs 13 and 14 of the judgment of Thomas LJ, that Aldi could and should have re-joined the main action and joined the consultants as defendants before the Part 20 action went to trial, rather than deciding to wait and see what happened with the claim against the secondary layer insurers.

95. Thomas LJ accepted that Aldi could have done so, the question was whether or not they should have done so. He identified a number of factors which in his view

demonstrated that Aldi's conduct did not amount to an abuse of process, including that in his view Aldi's strategy of seeking to conclude the claim against the secondary layer insurers before considering bringing a claim against the consultants was one which was sensibly open to them and they did notify the consultants of their strategy who did not take any steps themselves to compel Aldi to join them now or be forbidden from doing so in the future.

96. Thomas LJ expressed the view in paragraph 24 that the public interest in not having successive expensive TCC actions and trials was not a decisive factor and, at paragraph 24, that "there is a real public interest in allowing parties a measure of freedom to chose whom they sue in a complex commercial matter and not to give encouragement to bringing a single set of proceedings against a wide range of defendants or to complicate proceedings by cross-claims against parties to the proceedings [when] [t]hat freedom can and should be restricted by appropriate case management".

97. In paragraphs 29 - 31 he indicated the approach that should be adopted if a similar problem arises in the future, saying that "in circumstances such as those that arose in this case, the proper course is to raise the issue with the court" to allow the court to take such action as is appropriate in the particular case, warning that "[t]here can be no excuse for failure to do so in the future".

98. Wall and Longmore LJJ delivered short concurring judgments, both expressly stating their agreement with what Thomas LJ said in paragraphs 29-31.

99. I should also mention the subsequent decision of the Court of Appeal in Stuart v Goldberg Linde (a firm) and others [2008] EWCA Civ 2; [2008] 1 W.L.R. 823 where Sedley LJ said:

"77. …as the Aldi Stores Ltd case again makes clear and as Sir Anthony Clarke MR stresses, a claimant who keeps a second claim against the same defendant up his sleeve while prosecuting the first is at high risk of being held to have abused the court's process. Moreover, putting his cards on the table does not simply mean warning the defendant that another action is or may be in the pipeline. It means making it possible for the court to manage the issues so as to be fair to both sides."

100. Sir Anthony Clarke MR said:

"96. For my part, I do not think that parties should keep future claims secret merely because a second claim might involve other issues. The proper course is for parties to put their cards on the table so that no one is taken by surprise and the appropriate course in case management terms can be considered by the judge. In particular parties should not keep quiet in the hope of improving their position in respect of a claim arising out of similar facts or evidence in the future. Nor should they do so simply because a second claim may involve other complex issues. On the contrary they

should come clean so that the court can decide whether one or more trials is required and when. The time for such a decision to be taken is before there is a trial of any of the issues. In this way the underlying approach of the CPR, namely that of co-operation between the parties, robust case management and disposing of cases, including particular issues, justly can be forwarded and not frustrated.

97. While these considerations have been highlighted in the Aldi Stores Ltd case [2008] 1 WLR 748, they have been relevant considerations at least since the CPR came into force in 1999…"

101. Finally, I agree with Mr Williamson that it is now clear that complying with the Aldi guidelines cannot be regarded as optional (see the judgment of Briggs LJ in Gladman CP v Fisher Hargreaves Proctor [2013] EWCA Civ 1466 at paragraphs 65 and 66), although I also agree with Mr Temmink that failure to do so can only ever be one relevant factor rather than a conclusive factor.

Abuse of process – discussion and decision

102. To recap, the abuse of process argument must be considered separately as against Outotec and Metso and in the context that I have already decided, as a matter of construction of the re-assignment and the parent company guarantee, that as a matter of law: (a) MW may not pursue the breach of contract claim against Outotec or Metso; but (b) MW may pursue the misrepresentation claim against Metso as well as against Outotec; and (c) even if the misrepresentation claim against Outotec is struck out as an abuse of process that does not mean that the misrepresentation claim against Metso cannot still be maintained unless it, too, is struck out as an abuse of process.

103. Whilst it follows that there are some issues which are different in the case of Outotec and the case of Metso, there are also a number of issues which are common to Outotec and Metso, which it is convenient to consider together, beginning with the scope of the misrepresentation claim and its inter-relationship with what was in issue in the previous proceedings and what will be in issue as regards the other extant proceedings relating to the Levenheat and the Surrey projects.

104. The scope of the misrepresentation claim – the alleged representations. The claim will involve a detailed analysis of the discussions between MW and Outotec over an extended period of time from 2011 to 2016 where, as is expressly pleaded, these discussions related to 5 other projects, including the Surrey and Levensheat projects, and should be regarded as relating to the Hull project even if made in relation to those other projects. The existence of these misrepresentations was not an issue in the previous proceedings. Mr Williamson made the point that it is unlikely that the misrepresentation claim could be brought to trial much within 2 years, so that the court will have to deal with allegations going back up to 14 years. He also pointed to the fact that the allegations had potential reputational ramifications not just as regards

Outotec but also as regards named individuals who may no longer be within Outotec's employment.

105. The scope of the misrepresentation claim – the alleged falsity. The claim will involve a detailed analysis of: (a) the position before and during the pre-contractual stages when it is alleged the representations were made; (b) an analysis and a report produced by an independent intervention team in 2017 which MW says began to reveal the true position; (c) what was discovered during the course of the performance of the subcontract, including the alleged defects in the equipment supplied which are the subject of the breach of contract claims and (paragraph 58) which are relied upon as demonstrating that "Outotec did not have either proven plant or technology at the time the representations were made [or] at any other time prior to entry into the subcontract". As to these issues: (i) issue (a) was not an issue in the previous proceedings; (ii) issue (b) was touched on in the Part 1 judgment but was not the subject of detailed consideration. As to issue (c), what can fairly be said is that but for the finding of O'Farrell J in the preliminary issues judgment and MW's decision not to include the recharges as part of its case on abatement there would almost certainly have been a considerable overlap between what would have been litigated in the previous proceedings and what will be litigated in these proceedings. However, having read the evidence and written submissions and listened to the oral submissions I have not been persuaded that there is in fact any or any significant overlap between the case on defects which was litigated to trial in the previous proceedings and as pleaded in these proceedings. (I address this point in a little more detail in the concluding section of this judgment – I do not need to deal with it head-on because of my conclusion on the re-assignment issue.)

106. The scope of the misrepresentation claim – the alleged consequences. As already observed, MW's primary pleaded case is that all of the net losses it has suffered through entry into the main contract and the subcontract are recoverable which, thus, includes all of its liabilities to EWH and all of its liabilities to Outotec as found in the previous proceedings and, as regards EWH, the subject of the settlement. This will, thus, involve an investigation into the course and outcome of the previous proceedings in terms of the ultimate financial position in which MW has been left, but it does not involve any re-litigation of the issues raised in the previous proceedings.

107. The misrepresentation claim as regards Outotec and Metso and in relation to the other projects. Even if this misrepresentation claim is struck out as an abuse as against Outotec that will not have the effect as a matter of construction of the parent company guarantee of bringing the claim against Metso to a halt. In any event, such striking out will not prevent the alleged misrepresentations from being litigated in the separate arbitration proceedings as regards Levenseat and the separate TCC action as regards Surrey. Thus, Outotec (and Metso in relation to the Surrey project) are going to have to defend themselves against these claims in any event, so that striking out this claim as an abuse of process will only mean that they will not have to defend this claim as

regards causation and quantum and will not be exposed to the risk of having to indemnify MW against such of its claims as it may establish in relation to this project.

108. Could MW have brought the misrepresentation claim in the previous proceedings? Mr Williamson submitted that this was an unusual case because there is no dispute that MW could have brought the misrepresentation claim within the previous proceedings. Whilst this is correct in the sense that MW does not, in its evidence or submissions, positively contend that it could not have done, the position is not one of unqualified acceptance. Thus, in his witness statement Mr Wieliczko stated in paragraph 115 that MW had, by the date the Part 20 claim was brought in September 2019, "a significant amount of information that it now seeks to rely on to support its misrepresentation claim. Namely, the misrepresentations themselves, the Intervention Team report and knowledge of the extensive defects in Outotec's Subcontract Plant; but M+W had not by this point investigated a claim in misrepresentation or formed a view as to whether and how such a claim could be advanced against Outotec".

109. He continued in this section of his witness statement to explain that it was not until after the installation of a further system in Levenseat in the first quarter of 2020 that the "extent of the design and construction problems, and the failure to provide 'proven' design or plant and which was the foundation of the misrepresentation claim was properly appreciated". He stated how this continuing investigation into the problems at Levenseat was ongoing at a time whilst MW was also dealing with the termination of its employment at Hull in March 2019 and the proceedings being issued in July 2019. He said that "faced with a claim from EWHL of a sum in excess of £131 million, M+W's focus at that time was understandably defending its position against EWHL. The EWHL Proceedings were high value and complex, even by TCC standards". He said at paragraph 121 that "M+W had neither the resource, nor the inclination, to focus at this stage on a potential misrepresentation claim against Outotec. Nor was it required to do so".

110. He then turned to identify the differences between the Part 20 claim which was pleaded and the misrepresentation claim and to give his opinion as to why it would "have been entirely impractical and unreasonable for all parties involved in the EWHL Proceedings (including the Court) for M+W to have brought its misrepresentation claim against Outotec as part of the EWHL Proceedings", saying that: "If M+W had brought its claim in misrepresentation against Outotec in the EWHL Proceedings, the entire litigation would have become completely unmanageable for all parties involved". Whilst I will consider this point below, it is worth noting his conclusions at paragraphs 128 and 129 of his witness statement.

"128. Practically, M+W was, in any event, simply not in any position to bring its claim for misrepresentation against Outotec at the time of the EWHL Proceedings. M+W could not, therefore, realistically have issued its misrepresentation claim any earlier than it actually did."

"129. M+W was not, in any event, obliged to prejudice its own position in both the EWHL Proceedings and the subsequent Hull Proceedings and issue its claims against Outotec prematurely, simply to make life easier for Outotec. There is no basis at all therefore for Outotec to claim that M+W should have brought this claim any earlier."

111. In his submissions, Mr Williamson said that the court should be cautious before placing too much weight on this evidence, in circumstances where Mr Wieliczko was not the solicitor acting for MW in the previous proceedings and does not identify the person(s) who are the source of this information or, if from documents, identify or exhibit the documents. I accept this criticism. Indeed in my view Mr Wieliczko's witness statement as a whole is unduly replete with submission and argument but rather light on hard fact.

112. Further, insofar as Mr Wieliczko was focussing on the difficulties which MW would have faced in getting a properly pleaded misrepresentation claim off the ground in September 2019, he failed to refer to the letter of claim from EWH's solicitors to MW's former solicitors dated 19 July 2019, enclosing its draft Particulars of Claim. This letter was relevant because in it EWH, having referred to the need to obtain a judgment by November 2020 in order to make a claim under a performance bond provided by MW, had offered to agree to defer issuing proceedings to allow the pre-action protocol to proceed but on condition that MW agreed to procure an extension of the performance bond. Mr Harbage noted in his second witness statement that MW "chose to refuse to agree any extension". MW has failed to provide any explanation as to why not, despite the point being raised again in submissions by Mr Williamson. In the circumstances, it does not seem to me that MW can argue that it was forced into defending the claim against EWH and issuing the Part 20 proceedings against Outotec in great haste because they had no reasonable alternative option.

113. Mr Williamson also submitted that there was no evidence from MW as to the assertion that it did not have the "resource" to "focus at this stage on a potential misrepresentation claim". In his second witness statement Mr Harbage had identified the resources available to MW through its parent group and ultimate owner and this evidence was not challenged. MW clearly had the financial resource to defend the EWH claim and to prosecute the Part 20 claim down to a full trial and now has the resource to run three sets of extensive and expensive proceedings (i.e. these proceedings, the Surrey proceedings and the Levenheat arbitration) in tandem.

114. Mr Temmink suggested that the reference to "resource" should be read as a reference to the time available to the MW personnel involved on these projects who were busy in 2019 and 2020 in seeking to avoid termination of the Hull project and achieve a satisfactory conclusion, of the others, however there is no evidence to support this suggestion. Indeed, since the Hull main contract was terminated in March 2019, it is plain that the relevant personnel were no longer actively involved on the Hull project after that time, and there is no evidence that they had to be, or were, diverted to other projects in circumstances where they were simply unable to assist with investigations.

It is also worth noting that MW was able in the time available to plead a detailed Part 20 claim against Outotec. In terms of the additional work involved in investigating and pleading the misrepresentation claim, that is far less complex a task in my view than investigating and pleading a detailed defects and delay claim. That is particularly so where the claim as pleaded in this case is a claim for full recovery of the entire net losses incurred in entering into the project, so that it would not have been possible to plead this out in precise detail until the underlying EWH claim and Part 20 claim over against Outotec was resolved.

115. Finally, what is meant by the lack of any "inclination" to do so was not explained. In submissions Mr Temmink contended, echoing paragraph 129 of Mr Wieliczko's witness statement above, that MW cannot be criticised for not introducing the misrepresentation claim into the previous proceedings because that would have fatally weakened its defence of the EWH claim. I am unable to accept this submission for two reasons.

i) First, because I cannot accept the implicit premise that MW could properly have defended the EWH claim down to trial on the basis of a positive pleaded case denying that its performance (which must include the performance of Outotec as its subcontractor) was such as to justify termination, supported by witness evidence and expert evidence, and simply omitting all reference to the facts and matters the subject of the misrepresentation claim including its positive case as to the serious failures by Outotec.

ii) Second, because it is commonplace for a main contractor, faced with a claim by an employer and the option of a recovery claim over against a subcontractor, to plead a case on the basis that if, which is denied or not admitted (as the case may be) the employer proves its case against the main contractor, then it is entitled to recover over against the subcontractor on the basis of a positive pleaded case which is inconsistent with its primary position. It may well be an uncomfortable position for the main contractor to find itself but it is not uncommon and insofar as the main contractor wishes to hedge its bets it still has to make clear what its position is against the party up the line and the party down the line.

116. In saying this I do not entirely discount the difficulties undoubtedly facing MW at this time. However, by mid-2019 MW plainly knew that the Hull project was a disaster and that it was facing a very substantial claim from EWH. It also believed that Outotec was largely responsible for this disaster and, in particular, for the delays and defects. It was ready, willing and able to join in Outotec to the proceedings in order to establish its right to recover both an indemnity against EWH's claims and its own breach of contract claims. Mr Wieliczko does not dispute that even at that stage MW had grounds for believing that it had been induced into entering into the Hull project as a result of false statements by Outotec which, if made out, would provide a further basis for recovering a complete indemnity against all of the adverse financial

consequences of so doing. Had it asked for and obtained advice from its undoubtedly competent legal advisers it could not have possibly have believed that it was free to decide to leave over any misrepresentation claim, and indeed to avoid any mention of it, until the EWH proceedings and the Part 20 claim had been litigated to a conclusion, without a risk of being told by the court that it was now too late to assert such a claim.

117. If MW had decided to commit resource to the misrepresentation claim there is no good reason for concluding that it could not have investigated, asserted and pleaded the claim in reasonably short order. By way of comparison, it commenced the arbitration in respect of Levenseat in March 2021 and hence within 12 months of the end of the "first quarter of 2020" when, according to Mr Wieliczko, the "foundation of the misrepresentation claim was properly appreciated". This, it should be noted, in circumstances where there is no suggestion that it was any particular time pressure to do so.

118. In summary, therefore, I consider that the answer to the "could" question is "yes", in that in my judgment MW could, had it decided that it wanted to do so, have investigated and pleaded the misrepresentation claim in reasonable detail by late 2019. If I am wrong, and it had needed some more time to get to that point, then it could and should have agreed to EWH's suggestion to extend the performance bond to buy itself that further time.

119. Should MW have brought the misrepresentation claim in the previous proceedings? This is the more complex question which requires me to make a broad merits-based assessment.

120. It is sensible to begin by considering what MW ought to have done and when in order to comply with the Aldi guidelines in the context of the procedural steps in the previous proceedings. The first substantive CCMC took place in October 2019, following which the case was listed for a 4 week trial on all issues in June 2021 with directions for disclosure, witness statements and expert evidence.

121. In my judgment compliance with the Aldi guidelines would have required MW either to have pleaded the misrepresentation claim in its Part 20 claim (which, as I have said, in my judgment it could have done) or to have notified the other parties and the court prior to the October 2019 hearing that it was considering bringing a misrepresentation claim against Outotec, in order that the other parties and the court could have considered what – if any – directions should be sought or made in that respect. It was suggested that a letter from MW to Outotec dated 27 November 2018 gave such notice, referring as it did to various complaints by MW about Outotec's performance under this and another subcontract (presumably Levenseat or Surrey, the text relating to that subcontract being redacted), and ending with the words: "We confirm that it is our intention to hold you fully liable under the subcontracts and we will seek remedy to the extent available under the subcontracts and at law or in tort for all losses and

costs incurred". That, however, plainly did not give notice of any intention to bring the misrepresentation claim which is now advanced.

122. I firmly reject the suggestion by MW that in the latter scenario the court would have decided to do nothing because it was obvious that the misrepresentation claim had no connection with the existing claims and could not be case managed or tried together with the existing claims. Instead, in my judgment the obvious course would have been for the court to direct MW to notify the other parties and the court within a specified period as to whether or not it intended to make an application to amend its Part 20 claim to bring such a misrepresentation claim and, if so, to make such an application within a further specified period. The court had in fact already ordered a review CCMC to take place before the end of December 2019, once Outotec had filed its Defence to the Part 20 claim, and it is most likely that the court would have ordered these steps to be taken by that stage as well.

123. In fact, the review CCMC was vacated by consent because no parties requested any further substantive directions and it was not until March 2020 that Outotec's solicitors made an application for a trial of preliminary issues and not until June 2020, in the face of opposition from MW, that O'Farrell J made an order to that effect with a two day listing in July 2020 which resulted in the preliminary issues judgment.

124. However, assuming that a review CCMC had taken place, either at the end of December 2019 or in early 2020, the question is what would have happened. Obviously that would have depended to a large extent on whether MW had made an application for permission to amend its Part 20 claim to include the misrepresentation claim as, in my view, it could and should have done. If it had done, then the court would have needed to consider a range of different views and options, both in relation to the question of the preliminary issues and in relation to the question of what to do about any misrepresentation claim. EWH clearly wanted to proceed with all speed, although it was also supportive of the preliminary issue application. MW would in this hypothesis presumably have wanted to include the misrepresentation claim into the trial. Outotec may or may not have objected.

125. I firmly reject the submission from MW that in such a scenario the judge would have decided that the case would be unmanageable if the misrepresentation claim was to proceed alongside the existing claims. Although MW seeks to rely upon certain observations made by Pepperall J in his Part 1 judgment as to the scale and complexity of the trial, nothing said by him provides any support for a submission that he, or any other TCC judge, would have considered the case, if it included the misrepresentation claim, as unmanageable. Indeed, when one considers the approach taken by the Court of Appeal to the question of unmanageability in the Fundao Dam case [2022] EWCA Civ 951, together with the formidable experience built up by the TCC in case managing and trying the most complex of cases, this seems to me to be a quite hopeless submission.

126. In the course of oral submissions, one possibility which was ventilated was that the case managing judge would have decided that there should be a Part 1 trial dealing with all, or at least most, of the following issues: (a) EWH's principal claim, i.e. that it had rightly terminated the main contract for default by MW and was entitled to recover its losses flowing therefrom; (b) EWH's principal defects claims (which, as appears from paragraph 474 of Pepperall J's Part 1 judgment, involved 7 claims over £500,000 comprising the vast majority of the pleaded claim); (c) MW's Part 20 contribution claim, seeking to pass any liabilities arising from the above down the line to Outotec; (d) Outotec's counterclaims against MW (which, as appears from paragraph 701 of the Part 1 judgment and the whole of the Part 2 judgment were relatively limited in number and extent); and (e) the misrepresentation claim, either in full, on the basis that quantum would largely depend on the outcome of the trial or – possibly - perhaps only on the issue of liability only. That would leave a Part 2 trial follow to deal – if necessary – with the smaller defects claims and, perhaps, the quantification of the misrepresentation claim.

127. The other possibility would have been for all issues to be litigated at the same time, but with the time allowed for the trial to have been extended accordingly. Although Mr Wieliczko suggested in paragraph 125 of his witness statement that the misrepresentation claim would have required a further 6 weeks of court time, in my judgment that is simply unrealistic as an estimate of what additional time a case managing judge would have allowed on the basis of one trial dealing with all such matters. In my judgment it is likely that an additional 2 weeks would have been allowed, which most probably could have been added onto the existing trial dates at that stage.

128. I accept that I cannot be confident that either course would have been taken. It is entirely possible, for example, that MW might have said that it wanted to run the misrepresentation claims for Surrey and (subject to agreement not to arbitrate it, for Levenseat) in one combined claim. The case managing judge would probably have accepted that it would not have been realistic to have added such an expanded claim to the existing case. It is also possible that the case managing judge would have taken a more pessimistic view than I have as to the additional time required, or it might not have been possible to add the extra time onto the existing trial and EWH would have successfully opposed any attempt to put back the trial. The case managing judge might have decided that in the circumstances it was best, especially if MW and Outotec agreed, to leave what to do about the misrepresentation claim on the back-burner, at least until after the trial of the preliminary issues and possibly until after the principal trial. If the decision had been taken to leave over the question of the misrepresentation claim until after the preliminary issues had been determined then it almost certainly would have been too late to shoehorn the misrepresentation claim into the existing trial.

129. The authorities do not suggest that the court is required to make a retrospective finding as to what would have happened had a party complied with the Aldi guidelines. However, it seems to me at least to be relevant to consider the realistic outcome (or range of realistic outcomes) had it done so, because that will be a relevant factor when deciding whether there has been an abuse and if so that is such as to justify striking out the claim. If it is obvious that the current claim could and would have been case managed and tried with the existing claim without any or significant delay or expense that will be a factor strongly supporting a conclusion of abuse, whereas the reverse is also true.

130. In this case, in my view, MW's failure to comply with the Aldi guidelines is a factor which weighs against it, especially because had it acted with appropriate expedition from the outset the misrepresentation claim could, should and probably would have been tried with the previous proceedings. However, I must acknowledge that there is room for reasonable doubt as to whether or not that would have happened and, thus, this cannot be said to be a clear-cut case which points very strongly to the current claim being struck out as an abuse of process.

131. Other relevant factors. As I have indicated, this is not a case where there is any significant overlap between the issues litigated in the previous proceedings and the issues which will be litigated in the misrepresentation claim. Moreover, Outotec will have to face similar claims anyway in relation to Levenseat and in relation to Surrey (where Metso is also a defendant under the parent company guarantee). It was always extremely unlikely that compliance with the Aldi guidelines would have led to all of the claims in the Hull proceedings, including the misrepresentation claim, being tried in the same proceedings together with the parallel misrepresentation claims in relation to Surrey and, subject again to the arbitration issue, the Levenseat project. It follows that it was always extremely likely that Outotec would have been faced with two separate claims in any event. It follows that this is not a case where it can clearly be seen that to allow the misrepresentation claim to proceed would lead to unjust harassment or oppression of Outotec, still less of Metso who was not a party to the previous proceedings and who could still be sued even if the claim against Outotec was struck out for abuse unless the claim against Metso itself was also struck out for abuse.

132. Ought MW to have sued Metso in the previous proceedings? There is no obvious evidential or other basis for such a conclusion. In paragraph 25 of his witness statement Mr Wieliczko said that: "In 2022, Metso announced that it intended to divest itself of its EfW operations in the USA. Since then, the Outotec business has rapidly declined". In paragraph 26 he referred to evidence showing that from 2020 to 2022 Outotec's sales figures have declined from around $47 million to around $4 million. Although he does not state in terms that this is behind the decision to sue Metso under the parent company guarantee in these proceedings, it is a reasonable inference – in the absence of any evidence to the contrary from the defendants and in

circumstances where Metso was joined into the intervening Surrey proceedings – that there was no obvious good reason for Metso to be joined in on the basis of what was known about Outotec's financial position at that stage. In any event, there is no suggestion or evidential basis for a submission that the decision not to join Metso into the previous proceedings was taken for some ulterior motive.

133. Abuse of process as against Metso? In the circumstances discussed above it is in my view impossible for Metso to succeed in its abuse of process argument in relation to the misrepresentation claim. As was put succinctly by Mr Temmink in his skeleton argument at paragraph 34: "Having not been a party to the EWHL proceedings, Metso cannot hope to establish that it has been vexed twice. It has not - yet - been vexed even once".

134. Abuse of process as against Outotec? In the circumstances I am satisfied that Outotec has not satisfied the onus of proving abuse of process such as to justify striking out in relation to the misrepresentation claim. Whilst having stronger arguments than does Metso, in my view they are still not strong enough to justify the sanction of strike out. Although MW failed to comply with the Aldi guidelines, it is not the most egregious of non-compliances. It cannot be said that as a result of its failure Outotec is now faced with an entirely new claim which is very closely connected with the previous proceedings in terms of the issues for determination. Nor can it be said with complete confidence that the misrepresentation claim would have been litigated as part of the previous proceedings had MW complied with the Aldi guidelines or, therefore, that Outotec is now beyond doubt faced with a very expensive and very disruptive second set of proceedings which could, should and would have been avoided had MW complied. Furthermore, this is not a case of collateral attack on the previous proceedings or a case where MW has acted dishonestly.

135. Whilst allowing the misrepresentation claim to proceed will result in Outotec and individuals having to defend statements made up to 14 years ago, and whilst it is possible that some individuals may already have left Outotec's employment, no specific details of specific prejudice are provided so that this factor is of relatively limited weight. Paragraph 101 of Mr Harbage's witness statement does not provide sufficient detail to justify giving this factor any greater weight.

136. Moreover, and perhaps the two key factors militating against striking out, are first that since the claim against Metso will continue in any event, it is difficult to justify the striking out of the claim against Outotec as Metso's subsidiary company in the absence of some evidence of prejudice specific to Outotec from continuing to be involved even if Metso is still a party, as to which there is none specified. And second is the fact that Outotec will still have to defend the claims brought by MW in relation to the Surrey project and the Levenseat project in any event, so that again Outotec will still have to address the same key issues, at least in relation to the issues of representation and falsity, in those proceedings in any event.

Other matters

137. I have not dealt separately with the abuse of process argument in relation to the breach of contract claims. Given my conclusion on the re-assignment issue it is not strictly necessary to do so. However, it is worth addressing the point briefly, since it was argued before me in some detail, although inevitably on the hypothetical scenario that, contrary to my actual decision, it is open to MW to bring the breach of contract claim.

138. The first and in my view most significant point is that, whatever the position before the preliminary issues judgment, once the preliminary issues judgment was handed down MW could no longer maintain a breach of contract claim against Outotec for these claims. MW was only in a position to plead these claims once it had obtained the re-assignment. This is not a case where MW had chosen to assign the claims to EWH for its own commercial purposes and then, having realised the disadvantageous consequences to itself of so doing, obtained the re-assignment to get itself out of a hole of its own creation. It was forced to assign to EWH under the main contract and had no right to obtain a re-assignment and no basis for doing so unless and until it was forced to settle with EWH. It was only having seen the draft Part 1 judgment that it reached a settlement with EWH, for what were plainly good commercial reasons, and obtained the re-assignment as part of that settlement.

139. Although the preliminary issues judgment did not prevent MW from continuing to seek to pass on the EWH claim in the contribution proceedings and to seek to defend Outotec's counterclaim by relying on its defence of abatement, those were very different claims from the full breach of contract delay and defects claims which it has, post re-assignment, pleaded in this case. It is true that it could have sought to plead the "recharges" as a further element of its abatement defence. But the fact is that it did not, so that it cannot be said that it is now seeking to have a second bite at the cherry in relation to these claims. To say that it could and should have litigated these claims as an abatement, even though it could not have maintained a direct breach of contract claim for them post the preliminary issues judgment, seems to me to be unrealistic.

140. In the circumstances, if I had found in MW's favour on the re-assignment issue, I would not have held that it was an abuse of process for MW now to litigate its delay and damages breach of contract claims. It would not in my judgment have been unjust or oppressive to require Outotec to have to deal with them on the merits.

141. That conclusion is reinforced by my conclusion, stated briefly above, that I have not been satisfied that there is any, or any substantial, overlap between the defects claims as litigated down to trial in the previous proceedings and the defects claims as litigated in these proceedings. It is fair to say that at first blush there appears to be an overlap, perhaps due to the fact that the defects are referred to both in the context of the explanation of the misrepresentation damages claim and then separately in their

own right. However, by reference to the detailed analysis conducted by Mr Purcell in his witness statement and by Mr Temmink in his oral submissions, it seems to me that the claims are in reality different claims, in that: (a) as I have said, the pre-termination defects / recharges claims were not previously litigated down to trial given the impact of the preliminary issues judgment on MW's ability to advance any such claims; and (b) the post-termination defects claims were only litigated as pass-through claims and, by reference to the worked examples given by Mr Temmink in his oral submissions, it cannot be said on the basis of the competing evidence and analysis from Mr Harbage and Mr Purcell that the claims now made are the self-same claims.

142. It is unnecessary to lengthen this judgment by referring to the difference between issue estoppel and Henderson abuse. It suffices to say that this is not a case where on the material before me Outotec has made out a case to the effect that specific defects claims advanced by MW in these proceedings involve impermissible challenges to adverse decisions made by Pepperall J in the previous proceedings. And nor, as I have said, has it made out its case in relation to Henderson abuse, either generally or in relation to specific defects.

143. The penultimate point that I wish to raise concerns what I said above as regards the scope of the misrepresentation claim in relation to the alleged falsity and in particular paragraph 58 of the Particulars of Claim which pleads that:

"Further, or alternatively, M+W will rely on the defects in the equipment supplied, as set out below at paragraphs 69 to 76, which collectively and/or severally demonstrate that Outotec did not have either proven plant or technology at the time the representations were made, at any other time prior to entry into the Subcontract."

144. From a brief perusal of these paragraphs, whilst some of the defects pleaded can reasonably easily be seen to be relevant to the allegation that Outotec did not have either proven plant or technology at the time the representations were made, at any other time prior to entry into the subcontract, the connection is not so readily apparent as regards others. Given that I have decided that the contractual claim cannot succeed, it would be wholly inappropriate for any defects which are not properly capable of being relied upon to support the misrepresentation claim to be left in, through inadvertence or otherwise. I would therefore expect MW to undertake a careful review of this part of its pleaded case and, when an amended Particulars of Claim is produced which deletes the contractual claim, any of the allegations in paragraphs 69 to 76 which are still relied upon should make clear the basis by which it is said that they are relevant to the misrepresentation claim.

145. In the meantime, it follows that the Defence, due to be filed and served in advance of the CCMC listed for 9 December 2023, need not plead to the breach of contract claims, including those allegations in paragraphs 69 to 76 pending clarification of MW's case as above..

146. The final point I wish to make also relates to the preparation for the forthcoming CCMC. Whilst I appreciate that the Levenseat arbitration is confidential, given that there is a 5 week hearing on liability listed in that arbitration next summer, it would be helpful for the parties to consider in advance whether there is any sensible way in which duplication of effort and cost could be avoided or at least minimised in relation to this case and the Surrey case given the steps which have already been taken and will have to be taken between now and next summer in that arbitration.

End