Neutral Citation Number: [2020] EWHC 850 (Comm)

Case No: CL-2017-000677

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 8 April 2020

Before:
LORD JUSTICE PHILLIPS

- -

Between:

GWYNT Y MÔR OFTO PLC	**Claimant**
- and –	
(1) GWYNT Y MÔR OFFSHORE WIND FARM LIMITED **(2) UK GREEN INVESTMENT GYM PARTICIPANT LIMITED** **(3) INNOGY GYM 2 LIMITED** **(4) INNOGY GYM 3 LIMITED** **(5) INNOGY GYM 4 LIMITED** **(6) GYM OFFSHORE ONE LIMITED** **(7) GYM OFFSHORE TWO LIMITED** **(8) GYM OFFSHORE THREE LIMITED** **(9) GYM RENEWABLES ONE LIMITED**	**Defendants**

- -
- -

Richard Handyside QC and Max Evans (instructed by **Jenner & Block London LLP** for the **Claimant**
Anneliese Day QC and Max Kasriel (instructed by **Norton Rose Fulbright LLP**) for the **Defendants**

Hearing dates: 11-13 and 17 June 2019
Further written submissions 9, 13 and 17 September 2019

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 4 pm Wednesday 8 April 2020.

....

Lord Justice Phillips:

1. By a sale and purchase agreement dated 11 February 2015 ("the SPA") the defendants agreed to sell and the claimant agreed to buy the business of owning, maintaining and operating the electrical transmission link between the Gwynt y Môr wind farm situated off the North Wales coast ("the Wind farm") and the National Grid ("the Business"). The Business' assets ("the Assets") included four subsea export cables. The transaction completed on 17 February 2015 ("Completion"), at which point title to the Assets passed to the claimant.

2. On 2 March 2015 one of the cables (SSEC1) failed. A second cable (SSEC2) failed on 25 September 2015. In each case the claimant undertook urgent repairs. The cost of that reinstatement exercise has been agreed at £15 million.

3. On examination, the excised section of each cable could be seen to have suffered from severe corrosion, dating back months or years[1]. The unchallenged evidence was that the most likely cause was damage to part of a polyethylene (PE) sheath during the process of manufacture, permitting seawater to penetrate and start the process of corrosion.

4. The claimant now claims the reinstatement costs from the defendants, relying upon an indemnity in clause 8.2 of the SPA ("the Indemnity") which reads as follows:

> "If any of the Assets are destroyed or damaged prior to Completion (Pre-Completion Damage), then, following Completion, the [defendants] shall indemnify the [claimant] against the full cost of reinstatement of any Assets affected by Pre-Completion Damage."

5. The defendants deny that the Indemnity, properly construed, covers the costs of reinstating the cables, contending:

   i) that the Indemnity (on a true interpretation) applies only if the cables were damaged in the period between the signing of the SPA and Completion;

   ii) ongoing corrosion (and the consequential failure of the two cables) did not entail that the cables were damaged within the terms of the Indemnity;

   iii) that even if corrosion did amount to the cables being damaged, such damage occurred prior to execution of the SPA or (in the case of the failures of the cables), after Completion; and

   iv) that it was in any event a condition of claiming under the Indemnity that the claimant had given notice of any Pre-Completion Damage (pursuant to clause 8.3 of the SPA) so as to permit the defendants to put forward proposals for making good the damage, a condition the claimant failed to fulfil.

6. The defendants also object to the claim on the grounds that the claimant seeks the full cost of reimbursement despite at least some of the damage having been suffered post-completion and, as a related point, that the claim is improper because it is a "global

[1] SSEC1and SSEC2 had been installed in May and July 2013 respectively.

claim", failing to distinguish between causes of damage for which the defendants are and are not said to be liable.

7. The defendants further contend (by way of counterclaim) that, if the Indemnity as drafted does extend to damage to the cables prior to execution of the SPA, it should be rectified to read as follows:

> "If any of the Assets are destroyed or damaged between the date of this Agreement and Completion (Pre-Completion Damage)….".

8. The claimant refutes the defendants' arguments as to the interpretation of clauses 8.2 and 8.3 of the SPA and denies that the Indemnity should be rectified, maintaining that it is entitled to recover the costs of reinstating the cables under the Indemnity.

The background facts

The Wind Farm

9. The Wind Farm, comprising 160 wind turbines, was developed by the defendants and is owned and operated by the first defendant (defined as "the Operating Company" in the SPA) as trustee and agent for the second to ninth defendants (defined as "the Vendors"). The Vendors are participants in an unincorporated joint venture, holding their interests through their respective shareholdings in the first defendant. Companies ultimately owned by RWE Innogy GmbH ("RWE") hold the largest shareholding.

10. The cables, installed by the defendants as part of the development of the Wind Farm, each has three "power cores" along which electrical power is transmitted. Each cable also contains two fibre optic cables ("FOCs") designed to transmit control and monitoring data. The FOCs each contain 48 optical fibres within a stainless-steel tube, protected by seven aluminium armour wires. Around these wires is extruded a black semi conductive PE sheath.

The tender process

11. The applicable offshore electricity regulatory regime did not (and still does not) permit persons in control of a wind farm also to control the transmission system or its operator. The defendants were therefore required to sell the transmission system to a third party licenced by the relevant regulator, Ofgem[2], to be the Offshore Transmission Owner, or OFTO.

12. Ofgem operated a competitive tender process under the Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2010 for the grant of the licence, commencing on 17 November 2010. Drafts of the SPA were provided to bidders in October 2012 and in July 2013 a consortium comprising Balfour Beatty OFTO Holding Limited and Equitix Limited ("BBE") was confirmed as the preferred bidder. The claimant, wholly owned by BBE, was to be the OFTO and therefore the Purchaser under the SPA.

[2] The Office of Gas and Electricity Markets, acting on behalf of the Gas and Electricity Market Authority.

Negotiation of the SPA

13. Thereafter negotiations as to the terms of the SPA continued between BBE and the defendants. The purchase price of the Assets was pre-determined to be just under £352m ("the Purchase Price"), being their value as determined by Ofgem[3], but other terms were a matter for commercial negotiation: Ofgem's publication "Guidance on the Transfer Agreement" issued in November 2010 provided that drafting the terms of the SPA was "a matter for the parties to commercially agree" and that "most of the issues arising in the process to close will be for resolution on a commercial basis through direct discussions between the Developer, the Preferred Bidder and any other relevant parties".

14. The process of negotiation involved the usual circulation of drafts and comments between the parties and between their respective solicitors, Allen & Overy LLP (acting for BBE) and Norton Rose Fulbright LLP (acting for the defendants). It will be necessary to consider that process in detail below when addressing the issue of rectification.

15. On 23 January 2015, when the drafting of the SPA (by then on the eighteenth draft) was nearly finalised, Ofgem announced that it had determined to grant the licence to the claimant. The licence was granted on 11 February 2015, upon execution of the SPA. It permitted the claimant to operate the Business for 20 years.

The terms of the SPA

16. The SPA, as executed, extended to 157 pages, including 11 pages of definitions and 15 Schedules. Not surprisingly, it contained numerous "boiler-plate" provisions, including at clause 15.4, a comprehensive "entire agreement" clause.

17. Clause 2.1 provided that the Vendors would sell the Business and Assets as at and with effect from the Completion Date and clause 2.2 provided that title to the Assets would pass at Completion. Clause 2.4 provided that (save as otherwise expressly provided) risk would pass to the claimant at Completion.

18. The full terms of the Indemnity and the notice provisions (in so far as material) were as follows:

> "8.2 If any of the Assets are destroyed or damaged prior to Completion (Pre-Completion Damage), then, following Completion, the [defendants] shall indemnify the [claimant] against the full cost of reinstatement of any Assets affected by Pre-Completion Damage. Without prejudice to any claim made by the [claimant] under this Clause 8.2, to the extent that the [defendants] receive any payments from

[3] The transfer was intended to be financially neutral for the parties. The tender process was not concerned with the terms on which the Assets would be sold and purchased, but with the conduct of the Business by the OFTO once it had acquired the Assets. As explained by May J in *R (Gywnt-y-Môr Offshore wind Farm Limited) v The Gas and Electricity Markets Authority* [2019] EWHC 654 (Admin): "Bidding to become an OFTO is on the basis of the amount of the required revenue stream for the 20-year period, based on each tenderer's required return on investment, the cost of financing its investment in acquiring the assets and the ongoing cost of financing, operating and managing the assets. For the 20-year period after purchasing the assets, the OFTO receives the revenue stream set out in its licence, which reflects the amount of its bid subject to various adjustments."

insurers or third parties in connection with any Pre-Completion Damage, such amounts shall, for the purposes of calculating the total liability of the Vendors [under limitations on liability provisions] only, be deducted from the amount of the Claim.

8.3 If the [claimant] becomes aware of any Pre-Completion Damage which may give rise to a Claim the [claimant] shall:

8.3.1 give written notice (including reasonable particulars of such Third Party Claim or circumstance) to the Operating Company on behalf of the Vendors;

8.3.2 give the Vendors and their professional advisers reasonable access to the applicable Asset to enable the Vendors and their professional advisers to examine such Pre-Completion Damage, subject to the Outage Restrictions; and

8.3.3 subject to Clauses 8.4 and 8.5 below and to the Outage Restrictions, permit the Vendors to replace the Asset that is subject to the Pre-Completion Damage and/or make good the Pre-Completion Damage.

8.4 Following receipt of written notice in accordance with Clause 8.3.1, the Operating Company on behalf of the Vendors shall within fifteen (15) Business Days give written notice to the [claimant] of its proposal for the replacement of the Asset and/or making good of the Pre-Completion Damage including so as to protect the [claimant] against any associated risks to its reasonable satisfaction together with all supporting information that the [claimant] may reasonably require (the **Repair Proposal**).

8.5 If the Parties are unable to agree the Repair Proposal, the matter shall be referred to an expert appointed by agreement of the parties (or in the absence of agreement by the President of Institution of Engineering and Technology), which appointment shall be within ten (10) Business Days of either Party serving such written notice on the other (**the Expert**). The Expert shall determine a reasonable Repair Proposal. A determination of the Expert under this Clause 8.5 shall, in the absence of fraud or manifest error, be final and binding on the Parties. Each Party shall bear its own costs associated with the Expert's determination.

19. In clause 10.2 of the SPA the Vendors warranted (subject to limitations in Schedule 7) that various matters, including those set out in Schedule 6 (the General Warranties), were true, accurate and not misleading. Clause 10.8 further provided that:

"10.8 The Vendors shall promptly (and in any event before Completion) give notice to the [claimant] of any matter or circumstance:

10.8.1 which becomes known to it after the date of this Agreement and before Completion; or

10.8.2 which arises after the date of this Agreement and before Completion,

which results, or is likely to result, in any of the Warranties being untrue, inaccurate or misleading as at the date of this Agreement or as at Completion. …"

20. Among the matters set out in Schedule 6 (and thereby warranted by the Vendors) were the following:

"1.4 No defect or damage has been discovered in relation to any Part A Asset [which included the cables] or part B Asset that is reasonably likely to cause material disruption to the Offshore Transmission System

….

12.2 In respect of the Policies [all policies of insurance relating to the Assets for the current insurance year]:

12.2.1 all premiums have been paid to date; and

12.2.2 all policies of insurance are in full force and effect…."

21. Paragraph 2 of Schedule 7 provided that the Vendors shall not be liable in respect of a Warranty Claim to the extent that the facts and circumstances giving rise to the claim were disclosed.

22. Paragraph 4 of Schedule 7 set out monetary limits on the liability of the Vendors as follows:

"4.1 The total liability of the Vendors in respect of

4.1.1 all Claims for breaches of:

(A) the Warranties other than the Warranties [in relation to title to assets, insolvency and title to sue] …

(B) Clause 8.2; and

(C) Paragraph 1.4 of Schedule 14 (Outstanding Activities),

shall not exceed an amount equal to 20% of the Purchase Price; and

4.1.2 all Claims shall not, when aggregated with the Claims referred to in paragraph 4.1.1, exceed an amount equal to 100% of the Purchase Price.

4.2 The Vendors shall have no liability in respect of any Warranty Claim unless the amount of the liability of the Vendors in respect of all Warranty Claims exceeds £1,000,000…..

> 4.3 The Vendors shall have no liability in respect of any Warranty Claim unless the Warranty Claim (or the aggregate of a series of connected Warranty Claims or Warranty Claims arising out of similar facts or circumstances…) exceeds £250,000 in which case the Vendors shall be liable for the full amount of such Warranty Claim and not merely the excess over £250,000."

23. Clause 11 of the SPA contained provisions concerning insurance, including the following:

> "11.5 The [claimant] acknowledges and agrees that, subject to Clauses 11.6, 11.7 and 11.8, with effect from the Completion Date any insurance cover which the [defendants] maintain will cease to apply to the Assets… and responsibility for procuring insurance cover in relation to the Assets… will be borne by the [claimant].
>
> 11.6 The [defendants] shall for the period commencing on the date of this Agreement and ending at 11.59 p.m. on the Completion Date, continue to maintain all insurance cover which it maintains with respect to the Assets… immediately prior to the date of this Agreement ("Transitional Insurance Cover") and procure that the [claimant] is added as an additional insured to that Transitional Insurance Cover.
>
> 11.7 Without prejudice to Clauses 8.2 to 8.5, any insurance monies received in respect of Pre-Completion Damage shall be applied to reinstatement of the Assets.
>
> 11.8 The [defendants] shall continue to maintain the CAR Insurances for the period until occurrence of [outstanding activities] and shall procure that the [claimant] is added as an additional insured to the CAR Insurances. The [defendants] shall procure that the insurance monies (if any) recoverable under the CAR Insurances in respect of the Assets shall, except to the extent applied by the [defendants] in performing [outstanding activities], be paid to the [claimant]…
>
> 11.9. Notwithstanding the foregoing, any amounts received under any policy of insurance in respect of the following claims (whether made before or after the date of this Agreement) shall be retained and: (a) in respect of Clauses 11.9.1 and 11.9.2 be entirely for the benefit of the Vendors; and (b) in respect of Clause 11.9.3 be applied to reinstate the Assets by the Vendors:
>
> 11.9.1 a claim against the Vendors' Construction All Risks policy… arising out of damage caused to the export cable for the Offshore Transmission System which occurred in September 2012;
>
> 11.9.2 a claim against the Vendors' Construction All Risks policy… arising out of a failure of the export cable for the Offshore Transmission System which occurred in December 2013; and

> 11.9.3 any claim capable being made at any time by the Vendors under any insurance policy of the Vendors in respect of the [outstanding activities] unless and until the [claimant] has exercised its rights [to complete works], in which case any amounts received shall be paid to the [claimant]."

The repair of the cables and diagnosis of the faults

24. The repair of SSEC1 was undertaken by the claimant between 24 May and 16 June 2015, when full operation recommenced. The repair of SSEC2 was undertaken between November 2015 and 26 February 2016. In each case the repair was a substantial exercise. Specialist vessels were chartered to locate the failure points and to raise the cables from the seabed where they had been buried. Faulty sections of the cables were cut out and new sections were grafted on in their place. Then the repaired cable was re-buried.

25. It was only possible to assess the cause of the faults after the repairs were complete. An independent expert consulting firm, RINA Consulting Limited (formerly Edif ERA), examined the faulty sections of cable in its laboratory and produced two reports setting out its findings. These reports, together with a statement from Mark Coates of RINA and a report from NKT, the manufacturer of the cables, were the main sources of information used by Professor John Fothergill, the claimant's expert, in describing the nature of the failure of SSEC1 and of SSEC2, the likely cause of such failure and, to the extent they were damaged, when such damaged occurred.

26. Professor Fothergill's report was not challenged by the defendants at trial and the parties proceeded on the basis that the cable faults were caused in the manner he considered to be most likely. Therefore, for the purposes of this judgment, it is sufficient to summarise Professor Fothergill's conclusions as follows:

    i) the start of the problem in each cable was damage to the PE sheath surrounding one of the FOC cables. It was most likely in each case that the PE sheath was punctured by an external object during the process of manufacture and assembly of the cable;

    ii) once the defective cable was installed on the seabed and electrified, seawater penetrated through the puncture to the aluminium armour wires. In combination with the AC voltage on the FOCs, this caused the wires to corrode and swell, in turn causing the PE sheath to split longitudinally. This process took at least 4 months;

    iii) over the following days or weeks, the aluminium armour wires and the stainless-steel tube became very hot;

    iv) within hours or days of that occurring, the aluminium wires melted;

    v) within hours, the melting resulted in arcing and currents flowing between the FOC and the adjacent power core, causing the lead sheath of the power core to melt in places;

vi) minutes later the insulation of the adjacent power core broke down and the cable failed as the power core ceased to function.

The claim for an Indemnity

27. On 22 April 2016 the claimant wrote to the defendants reserving its rights under clause 8.2. These proceedings were commenced on 8 November 2017.

Interpretation and application of the terms of the SPA

The relevant principles

28. It was common ground that the SPA was to be interpreted in accordance with the well-recognised principles set out in the Supreme Court decisions in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and *Wood v Capita Insurance Services Limited* [2017] UKSC 24, [2017] AC 1173.

29. Lord Hodge, in the last of those decisions, emphasised that the *Rainy Sky* and *Arnold* cases adopted the same "unitary" approach to contractual interpretation, summarising that approach as follows:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of the drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.
>
> 11…. Interpretation is… a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of the drafting of the clause…; and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest … Similarly the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.
>
> 12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated… To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

> 13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type …"

30. The claimant, emphasising that the SPA is a detailed and complex contract negotiated over several years with professional assistance, submitted that it can and should be interpreted principally by a textual analysis. I did not understand the claimant to be suggesting, by that submission, that the relevant provisions should not be considered in the context of the contract as a whole, nor that the commercial sense of the competing considerations should be ignored: Mr Handyside QC, leading counsel for the claimant, made extensive reference to clauses of the SPA and to the commercial sense of suggested interpretations, and he was plainly entitled to do so. The submission, as I understood it, was that this was a case in which limited or possibly no regard should be had to the factual matrix. However, as Lord Hodge explained, provisions in such contracts can nevertheless lack clarity and assistance can be found in the factual matrix. It is therefore still necessary at least to consider the background as known to both parties at the time of contracting, whilst recognising that the text of the contract has particular and potentially decisive weight in relation to a contract such as the SPA.

31. The defendants argued that a restrictive approach should be taken to interpreting provisions of the SPA which impose liabilities on them as they were receiving a fixed price for the Business and Assets and had no commercial or other reason to accept wide or onerous liabilities. I fail to see any real force in that argument. There is no doubt that the defendants did give warranties and accepted potentially extensive liabilities by entering the SPA, and had to do so to reach agreement with the claimant (and to do so within the timescale imposed by the regulatory regime[4]): the only question is the precise nature and extent of what they agreed. There is no reason to start from the premise that

[4] The defendants were permitted to transmit electricity over the Assets for a commissioning period of 18 months: after that period it would have been a criminal offence to continue to do so under the Electricity Act 1989. Further, if the parties had failed to reach a commercial agreement, Ofgem had the power under schedule 2A of that Act to impose a Property Transfer Scheme, and could have done so on the application of the claimant.

the provisions of the SPA which impose liabilities on the defendants should be read restrictively.

32. Because of the defendants' alternative case on rectification, the parties adduced extensive documentary and oral evidence of their pre-contract negotiations during the trial. The defendants sought to refer to certain aspects of those negotiations on the question of interpretation of the SPA (in particular as to the introduction of an interval between signing of the SPA and Completion and the evolution of the wording of clause 8.2), but I accept the claimant's position that all such matters must be left out of account in considering that issue. I have been careful to exclude all the evidence of pre-contractual negotiations from my consideration of the proper interpretation of the SPA.

The textual analysis of clause 8.2

The timing issue: the period encompassed by "prior to Completion"

33. The claimant's starting point was that the phrase "prior to Completion" in clause 8.2 was unqualified, contending that the natural and ordinary meaning of the Indemnity was, therefore, that it applied if any of the Assets were damaged at any time before Completion, including before the execution of the SPA. If the parties had intended the Indemnity to be limited to damage suffered during the short period between the execution of the SPA and Completion, they could easily have so provided: the parties did identify that specific period in relation to warranty obligations and insurance in clauses 10.8 and 11.6. The contrast between those provisions and clause 8.2 was, the claimant submitted, a telling indication that the parties did not intend the Indemnity to be similarly restricted in temporal scope.

34. The claimant further emphasised that provisions of the SPA created a clear dividing line between the position before and after Completion. Before Completion all rights, risks, obligations and liabilities were retained by the defendants, whereas the claimant assumed all such matters from Completion. Thus clause 4.1 provided that the Vendors shall be responsible for all payables incurred "prior to the Completion Date" and 4.2 provided for the claimant to be responsible for those incurred "on or after the Completion Date". Similarly, clauses 5.6 and 5.7 (dealing with contracts assigned to the claimant at Completion) provided that the claimant would have no liability for obligations which should have been discharged "before the Completion Date" and no liability for breaches occurring "prior to the Completion Date". In that context, it made perfect sense, the claimant submitted, for the defendants to be responsible for (and to indemnify the claimant against) the consequences of any damage occurring prior to Completion, including prior to the execution of the SPA.

35. The claimant also placed considerable reliance on the insurance provisions in clause 11 of the SPA, and in particular clause 11.7. The claimant highlighted that that provision is closely tied to the Indemnity, being expressed to be without prejudice to clause 8.2 and using the term "Pre-Completion Damage", that term being defined in clause 8.2. The claimant submitted that:

i) if clause 11.7 was intended to limit the obligation to apply insurance monies received for reinstatement of the Assets to those received in respect of damage during the period between execution of the SPA and Completion, it would surely have mirrored the provisions in clause 11.6, which imposes an

obligation on the defendants to insure the Assets during that period. Yet clause 11.7 neither adopts the temporal formula in clause 11.6, nor does it deploy the definition of Transitional Insurance Cover;

ii) further, the subsequent provisions in clause 11.9 "carve out" certain specified insurance claims, including claims made before the execution of the SPA, indicating that insurance monies received from claims made before the SPA (and therefore in relation to damage suffered before the SPA) are included within clause 11.7;

iii) in any event, it makes commercial sense that the insurance monies received in respect of damage to the Assets suffered at any time prior to Completion should be used for their reinstatement (rather than retained by the defendants);

iv) it follows from the above that Pre-Completion Damage in clause 11.7 includes damage suffered prior to the execution of the SPA: as that term must have the same meaning in clause 8.2 (where it is defined), the Indemnity must also apply to damage suffered before execution of the SPA.

36. In my judgment, however, a close examination of the terms of the SPA points to the opposite conclusion, for the following reasons.

37. First, whilst the claimant is correct that the phrase "prior to Completion" in clause 8.2 is not juxtaposed with an expressly identified "starting point", it is necessary to consider the sentence in which it is used as a whole, and in particular the tense used, in determining the timeframe of the Indemnity. The SPA must be interpreted as at the date it comes into force, so the natural and ordinary meaning of the phrase "If any of the Assets <u>are</u> destroyed or damaged prior to Completion..." (emphasis added) is that it applies to destruction or damage which occurs thereafter, that is, after execution. Such wording, on its face, does not include damage which had already occurred at the date of the SPA. Had the intention been to include destruction or damage occurring before execution, the wording would have been "if any of the Assets <u>have been</u> destroyed or damaged …". Even that wording might have been unclear and required express reference to "including before this Agreement".

38. This reading of clause 8.2 is reinforced by the context of that provision. Without having regard to the headings in SPA (which do not affect its interpretation, as per clause 1.3.14), it is nonetheless obvious that clause 8.1 deals with execution (or "Signing") of the SPA and clause 9 deals with Completion. The insertion, between those provisions, of an indemnity against Pre-Completion Damage, is readily understood as intended to relate to damage occurring between execution and Completion. The need for the Indemnity in that context is readily explained: as at the date of execution the claimant is obliged to purchase the Assets, but does not have title to them or risk in them and so does not have an insurable interest. An indemnity to cover the risk to which the claimant was exposed between signing and Completion was an obvious solution.

39. Further, at paragraph 1.4 of Schedule 6 the Vendors (but not the Operating Company) gave a specific warranty ("the Warranty") as to the absence of damage to the Assets as at the date of the SPA (save as disclosed, as per paragraph 2 of Schedule 7). The Warranty was limited to what had been (i) discovered and (ii) was reasonably likely to cause material disruption to the Offshore Transmission System. The Vendors' liability

also only arose (by virtue of paragraphs 4.2 and 4.3 of Schedule 7) if the total of warranties claims exceeded £1,000,000 and, in respect of any single claim or series of connected claims, if the value exceeded £250,000. Such carefully structured and limited provisions would be rendered pointless (and would provide no protection to the defendants) if the defendants had indeed given a broad indemnity against any and all damage suffered prior to execution of the SPA. Such indemnity would apply to any damage, even if not discovered, not reasonably likely to disrupt the transmission system and even if amounting to a claim of less than £250,000 (there being no *de minimis* provision in clause 8.2). Further, in those circumstances, the sole benefit of the warranty to the claimant would be that it covered defects as well as damage.

40. Yet further, on the claimant's case the Indemnity (on its face) would apply to damage occurring before the signing of the SPA, but which had been disclosed by the Vendors and so was excluded from the scope of the Warranty. Even if it was possible to read across some or all of the limitations to the Vendors' liability under the Warranty (which the claimant did not suggest), there would be the further difficulty that the Operating Company was not party to the Warranty.

41. The claimant argued that there was nothing surprising about parties agreeing both an indemnity and a warranty, the latter being designed to encourage the defendants to give disclosure of all known issues prior to execution. Whilst that is undoubtedly true as a general proposition, it would be remarkable, and unlikely to be intended, that a carefully structured and limited warranty was subsumed and rendered largely otiose by an all-embracing indemnity. Further, the Indemnity would remove the suggested incentive to make full disclosure if the defendants would be liable for reinstating the damage in any event. To the extent that there is a question about whether the indemnity covers the warranted matters, the existence of the Warranty is a powerful indication that the indemnity does not so extend.

42. Further clarification of the relationship between warranty claims and claims under clause 8.2 can be gleaned from paragraph 4.1 of Schedule 7. That provides that claims under the warranties, under clause 8.2 and in respect of Outstanding Activities shall not together exceed 20% of the Purchase Price (and, together with all other claims, shall not exceed 100% of the Purchase Price). In so providing, the paragraph demonstrates that warranty claims and claims under the Indemnity are separate and cumulative (rather than overlapping) and, indeed, can be seen to be structured in a chronological order: (i) warranty claims in relation to the period before execution, (ii) clause 8.2 claims in relation to the period between execution and Completion and (iii) claims in relation to Outstanding Activities, being works the defendants agreed to undertake after Completion.

43. As to the specific points relied upon by the claimant in support of its proposed interpretation:

i) the Vendors warranted the matters set out in Schedule 6 as at the date of the Agreement, so the requirement in clause 10.8 that the Vendors subsequently notify the claimant of any matter or circumstances rendering the warranties inaccurate (becoming known or arising "after the date of this Agreement and before Completion") had to refer to the period after the date of the SPA so as to distinguish the obligation from the warranties given on execution of the

SPA. I do not consider that the wording of this provision significantly affects the interpretation of clause 8.2;

ii) in the same way, the defendants warranted that insurance was in force as at the date of the SPA: clause 11.6 imposed an obligation to maintain that insurance for the transitional period between execution of the SPA and Completion. It was again necessary to refer to that period starting "on the date of this Agreement" in order for it to make sense. Again, I do not consider that this provision significantly impacts on the interpretation of clause 8.2;

iii) whilst it is correct to say that the Completion Date was the watershed point, after which the claimant assumed title, risk, rights and responsibilities, that is hardly surprising or unusual. It does not greatly assist with the question of which party should bear the consequences of damage to the Assets which had occurred but was not known about at the date of the contract. In this case the Vendors provided the Warranty as at the date of the SPA and an Indemnity between that date and Completion: there is no *a priori* reason why the defendants should also be liable to indemnify the claimant for damages outside the Warranty prior to the SPA and, indeed, the opposite is the obvious commercial likelihood;

iv) the use of the expressions "prior to the Completion Date" and "before the Completion Date" in clauses 4 and 5 plainly include the period before execution of the SPA, but in contrast the phrase "until Completion …" is used repeatedly in Schedule 9, providing for pre-Completion covenants from the Vendors such as to give access to the Assets and to operate and maintain them. That phrase plainly speaks to the period from signing to Completion and so does not include the period before. It is clear that expressions in the SPA referring to the period prior to or before Completion have no common (let alone defined) meaning and each much be considered in proper context to determine whether or not the period prior to signing is or is not included;

v) contrary to the claimant's contentions, I consider it to be relatively clear that clause 11.9 does not "carve out" certain claims from the obligation in clause 11.7 in relation to insurance monies received in respect of Pre-Completion Damage, but rather from the obligation in clause 11.8. Clause 11.8 provides that the defendants would pay insurance monies recoverable under the defendants' CAR Insurances to the claimant (save in relation to Outstanding Activities), and clause 11.9 provides exceptions to that obligation, specifically in relation to claims under the CAR Insurances in respect of which the defendants would already have incurred repair costs. The fact that clause 11.9.3 provides for insurance monies to be applied to re-instatement of the Assets demonstrates that that provision is not related to clause 11.7 as that clause provides for such application in any event.

vi) again contrary to the claimant's submissions, clause 11.8 provides an obligation on the defendants to pay insurance proceeds in respect of the Assets (under the CAR Insurances) to the claimant, without limitation as to the period (subject to clause 11.9);

vii) it follows that, whilst clause 11.7 is indeed closely connected with clause 8.2, I do not consider that the use of the term "Pre-Completion Damage" in that clause must be read as including damage suffered before the execution of the SPA. As I read clause 11.7 in context, it appears to be a stand-alone provision within clause 11, dealing specifically with the insurance monies in respect of Pre-Completion Damage, no doubt to protect the defendants by ensuring that insurance proceeds received were applied to reinstatement, thereby reducing their liability under the Indemnity. As such, it does not assist in interpreting the scope of the Indemnity in clause 8.2.

44. In my judgment, therefore, both the specific wording of clause 8.2 and the broader structure, provisions and commercial sense of the SPA support the defendants' case that the Indemnity relates only to damage occurring between the execution of the SPA and Completion. The Vendors gave the Warranty in relation to the period up to the SPA, the Indemnity for the period between execution of the SPA and Completion and a further indemnity in respect of ongoing works, a pattern reflected in paragraph 4.1 of Schedule 7.

The damage issue: the meaning of "are destroyed or damaged"

45. It was not in dispute at the trial that on the date the SPA was signed, and at the Completion Date, the process of corrosion outlined above (flowing from a latent defect) was well underway in both SSEC1 and SSEC2, a process which would ultimately result in their failure.

46. The claimant accepted that a mere latent defect in a cable, such as the puncture of the PE sheaths during manufacture or assembly, was not in itself damage within the meaning of the Indemnity. It was also common ground that ordinary wear and tear was not qualifying damage.

47. The claimant's case, however, was that the corrosion which had occurred in the cables by the date of the SPA meant that they were damaged as at that date (and that such damage was continuing throughout the period between the execution of the SPA and Completion). Whilst resulting from the latent defect, such corrosion was subsequent deterioration in the cables, an adverse change in its condition going beyond wear and tear, therefore falling within the wording of clause 8.2.

48. In this regard the claimant referred to *Reed, Construction All Risks Insurance* (2nd edn, 2016) at 14-007:

> "**The basic definition of 'damage'.** Damage is an adverse change in physical condition. There are three elements to this. First, damage is concerned with the *physical condition* of the subject matter. Secondly, damage requires a *change* to that physical condition occurring within the period of cover. This aspect is crucial to understanding the distinction between damage and a latent defect. Thirdly, the change must, obviously, be for the worse - it must *impair the use or worth* of the item…"

49. The claimant cited a number of cases, again in the context of insurance claims, providing authority for the propositions set out in the passage cited above (also

reflecting the definition of the word "damage" in the Oxford English Dictionary). In *Ranicar v Fridge Mobile Pty Ltd* [1983] Tas Rep 113, the Supreme Court of Tasmania held that an increase in temperature of scallops amounted to damage because, although changes in the scallops did not affect their edibility, taste, smell or appearance, the higher temperature meant they could not be exported, removing a primary quality and reducing their value. Green CJ stated:

> "In the *Oxford English Dictionary* the word "damage" is defined as – "injury, harm; esp. physical injury to a thing, such as impairs its value or usefulness."
>
> Although useful, I do not feel able to adopt that definition without qualification because the use of the word "injury" largely begs the question which I have to determine.
>
> In my view, the ordinary meaning, and therefore the meaning which I should *prima facie* give to the phrase "damage to" when used in relation to goods, is a physical alteration or change, not necessarily permanent or irrepairable, which impairs the value of [sic] usefulness of the things said to have been damaged. It follows that not every physical change to goods would amount to damage. What amounts to damage will depend upon the nature of the goods."

50. *Ranicar* was applied in *Quorum A/S v Schramm* [2002] CLC 77, a case in which there had been a fire at a warehouse containing a Degas pastel. Thomas J (as he then was) found that there had been sub-molecular changes to the pastel which were not visible and could not be ascertained without testing, which would itself damage the pastel. Nonetheless, there was direct physical damage to the pastel which shortened its life and gave rise to a risk of deterioration, affecting its value, amounting to damage within the meaning of the applicable policy of insurance.

51. The distinction between a latent defect and damage was considered in *Promet Engineering (Singapore) Pte Ltd v Sturge (The Nukila)* [1997] 2 Lloyd's Rep 146. The issue in that case was whether extensive cracking in the legs of an accommodation platform was a defect as a result of faulty design or construction, excluded from cover under the relevant policy of insurance, or whether it was damage to the vessel caused by such a defect. The Court of Appeal held that the legs did suffer damage by being subject to stresses which they were unable to resist due to latent defects, namely, wrongly profiled welds and incipient fatigue cracks. Hobhouse LJ stated at p. 151:

> "If a latent defect has existed at the commencement of the period and all that has happened is that the assured has discovered the existence of that latent defect then there has been no loss under the policy. The vessel is in the same condition as it was at the commencement of the period. Therefore, in any claim under the … clause or any similar clause, the assured has to prove some change in the physical state of the vessel. If he cannot do so, he cannot show any loss under a policy… If, however, damage has occurred, that does involve a physical change in the condition of the vessel and can be the subject of a claim under the policy."

52. Ward LJ, at p.157, explained the distinction as follows:

> "If one is considering whether there is damage to the hull and whether such damage is caused by a latent defect in the hull, it follows that the damage must be something different from, something over and above and incrementally greater than the latent defect itself. Where the line is to be drawn is a matter of fact and degree. It requires a factual assessment of, on the one hand, the nature of the latent defect and all that is inherent in it, and, on the other hand, the nature of the damage to the hull."

53. In *Pilkington UK Ltd v GCU Insurance plc* [2004] EWCA Civ 23[5] glass panels installed by Pilkington at the Eurostar Terminal proved defective in that they fractured, but did not cause damage to any person or other part of the terminal. Pilkington made an insurance claim in respect of its liability for Eurostar's decision to close the terminal and install safety features. The Court of Appeal held that the insurer was not liable as there was no "loss of or physical damage to physical property not belonging to" Pilkington, as required under the policy. Potter LJ stated at [51]:

> "…. generally speaking, damage requires some altered state, the relevant alteration being harmful in the commercial context. This plainly covers a situation where there is a poisoning or contaminating effect upon the property of a third party as a result of the introduction or intermixture of the product supplied… However, it will not extend to a position where the commodity supplied is installed in or juxtaposed with the property of the third party in circumstances where it does no physical harm and the harmful effect of any later defect or deterioration is contained within it…"

54. The claimant further emphasised that clause 8.2 did not qualify the term "damage" in any respect, whether by reference to source, length or effect. As the corrosion to the cables constituted a continuing adverse change to the physical condition of the cables, beyond the pre-existing defect in the PE sheath, and as it undoubtedly affected the value or worth of the cables, there was damage within the clause, triggering the Indemnity against the cost of reinstating the cables.

55. The authorities relied upon by the claimant are helpful in indicating how the term "damage" has been interpreted in other contracts, and in particular, the distinction which might be drawn between a latent defect and damage which results from such a defect. However, I accept the defendants' contention that the use of the term "damaged" must be interpreted in the specific context in which it is used in clause 8.2 of the SPA, which is neither a construction contract nor an insurance contract. Authorities on other clauses in other contexts are no more than the most general of guides.

56. The defendants' case in closing was that clause 8.2 is only engaged by "new and patent physical harm", contending that that was the natural reading of the words "are destroyed

---

[5] The defendants referred to an earlier decision of the Court of Appeal in *James Longley v Forest Giles Limited* [2002] EWCA Civ 1242 in which an insurance claim for repairs to a vinyl floor failed. The problem resulted from the floor having been laid prematurely. As there was no damage to adjacent or underlying works, there was no "damage to property": the works and the product supplied were simply defective.

or damaged". It is not clear if the defendants maintained their earlier position that the damage must have been inflicted by an "external" event or source, but they certainly did maintain that the prime concern the clause was intended to address was a cable being damaged by a ship's anchor, one of the few ways in which a subsea cable could be "destroyed or damaged".

57. In my judgment there is no basis for confining the phrase "are destroyed or damaged" to entirely new damage, or to damage caused by an external event. Had one of the cables failed during the period covered by the Indemnity, the relevant section of the cable would plainly be described as having been destroyed or damaged, albeit by the culmination of corrosion resulting from a latent defect.

58. However, I do accept that the phrase requires damage to be patent, in the sense of being readily observable or discoverable (and so does not include undiscoverable corrosion which has not adversely affected performance of the relevant Asset) for the following reasons:

i) the word "damaged" is coupled with and follows "destroyed", indicating that either destruction or damage short of destruction is contemplated: the phrase is inapposite to encompass the slow process of continuing corrosion;

ii) that view is reinforced by contrasting the wording of the Warranty, which refers to "defect or damage", the Vendors being under a continuing duty to notify the claimant of such matters between signing and Completion pursuant to clause 10.8. The Indemnity noticeably did not cover either defects or damage flowing from defects, again no doubt because it was not intended to impose liability where it did not arise under the Warranty, except in the case of a significant event of destruction or damage;

iii) if unobservable corrosion or other process (of any duration or extent) was included within the Indemnity, and resulted in liability for reinstatement when the Asset in question eventually failed, it could result in the defendants being so liable for failures occurring many years in the future, including where most of the corrosion occurred post-Completion. That would seem to be commercially absurd and would, in reality, be rendering the defendants liable for a latent defect;

iv) that would be all the more absurd if (as I have found to be the case on a textual analysis) the Indemnity is limited to the period between signing and Completion, limited to four Business Days (in the event six days). It would be a nonsense if the Indemnity gave rise to liability for the consequences of long-term corrosion just because it was continuing during that short period: the term: "destroyed or damaged" cannot sensibly be read to include such damage, to the extent it can be regarded as such.

59. It follows that, on a textual reading of the SPA, corrosion of cables as occurred in the present case does not fall within clause 8.2.

60. However, even if unobservable corrosion could in principle constitute damage within the terms of the Indemnity, it would only do so (on the claimant's own case) if it impaired the value or usefulness of the cables. Whilst Professor Fothergill's evidence

was that the process of corrosion was continuing throughout the relevant period, including between the signing of the SPA and Completion, there was no evidence or reason to believe that corrosion during that six days was in itself sufficient to impair the value or usefulness of either cable. Thus, if the Indemnity is limited in temporal scope, there was in any event no damage during that limited period.

The contextual analysis of clause 8.2

61. As indicated above, the claimant based its claim upon the wording of the SPA, stressing the primacy of the contractual wording in the context of a detailed professionally negotiated contract. To the extent that the claimant addressed factual matrix issues, it was by way of countering those matters relied upon by the defendants. As I have not accepted the claimant's arguments as to the interpretation of the SPA on its own terms, and it has advanced no other positive case, it is not strictly necessary to consider the factual matrix issues, but in view of the emphasis the defendants placed upon them, I will do so briefly.

62. The defendants first contended that there was an industry standard allocation of risk, namely, that from completion of a purchase of a transmission system, an OFTO would take the risk of failure of assets due to latent defects or damage acquisition.

63. However, the defendants did not adduce expert evidence to support the existence of the alleged market practice (which would be the usual and expected route), but instead argued that it could be gleaned from various sources, in particular:

i) An independent report commissioned by Ofgem from KPMG dated December 2012, which recognised that an OFTO was exposed to the risk of unexpected asset failure due to technical reasons, which it can mitigate through maintenance contracts, insurance and pre-contract due diligence. However, the report did not purport to consider the terms that might be negotiated between the developer/vendor and the OFTO, such as the warranties and/or indemnities that might be sought or provided. It provides no evidence of a market practice in that regard;

ii) Ofgem's response dated 22 December 2016 to the claimant's contention that the cable failures constituted Income Adjusting Events ("IAE"s) , in which Ofgem stressed that the failure of a cable arising from a latent defect is the type of risk that is reasonably foreseeable to a licensee and that, similar to any other transaction involving the purchase of assets, a licensee should enter into such transactions with the awareness that it is assuming any risks arising from damage or defects that it has not been able to discover through its due diligence. In my judgment, that response was no more than the regulator's view of why a licensee should not be entitled to claim that such a failure was an IAE, not a commentary on the allocation of risk as between the developer/vendor and an OFTO.

iii) Ofgem's Consultation on Income Adjusting Event Policy dated 6 February 2018, which stated:

> "… an OFTO licensee should enter into the transaction of acquiring OFTO assets with the awareness that it is assuming

> any risks arising from damage or defects that it has not been able to discover through its due diligence. The offshore regime was not designed to insulate OFTO licensees from all such risks. We consider that latent defects are foreseeable types of risk, and OFTO licensees should put in place appropriate commercial arrangements to manage or absorb these risks…"

Again, this approach reveals the regulator's view as to whether an OFTO can claim that a cable failure is an IAE, not whether an OFTO can or should make a commercial arrangement with its counterparty to be indemnified against that eventuality.

64. It follows, in my judgment, that the defendants fell a long way short of establishing an industry allocation of risk or market practice which could in any way affect the interpretation of clause 8.2 of the SPA.

65. Second, the defendants made extensive reference to the process of negotiation of the warranties, the insurance provisions and the SPA more generally. To the extent that this material was relied upon as an aid to interpretation of the SPA, it was in my judgment impermissible. As recently explained by Leggatt LJ in *Merthyr (South Wales) Limited v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526 at [52], "previous documents may be looked at to show the surrounding circumstances and, by that means, to explain the commercial or business object of a contract", but at [54] "*What is not permissible, as the decision of the House of Lords in the* Chartbrook *case confirms, is to seek to rely on evidence of what was said during the course of pre-contractual negotiations for the purpose of drawing inferences about what the contract should be understood to mean.*"

66. Third, the defendants referred to the steps taken by the claimant to obtain insurance due diligence reports (including discussion of "design cover"), and technical due diligence reports, including discussion of the risk of undetected manufacturing issues, pre-existing damage and latent defect risks. The defendants argued that such matters demonstrated that the claimant knew and accepted that it would be at risk as to cable failure from latent defects, but I fail to see how that affects the interpretation of the SPA. The realisation that such technical risks existed, and a consideration of possible insurance options, may be precisely why (contrary to my conclusion following the textual analysis) the claimant might have sought an indemnity from the defendants.

67. Fourth, the defendants refer to a presentation made by and a preliminary prospectus issued by the claimant to prospective investors in February 2015, explaining the risks of latent defects and the potential mitigations, but not (the defendants assert) referring to the prospect of any indemnity from the defendants. However, the prospectus did refer to the defendants providing an indemnity, using the words of clause 8.2. It is difficult to see how this assists in interpreting that clause, even if (which I doubt) documents published after the relevant wording had been settled in an advance draft could in any event constitute part of the relevant factual matrix.

68. It follows that I do not consider that reference to the matters relied upon by the defendants as forming part of the factual matrix assists in interpreting clause 8.2 of the SPA, even to the extent that such matters are admissible for that purpose.

The effect of clauses 8.3 to 8.5

69. Clause 8.3 imposes an obligation on the claimant, if it becomes aware of any Pre-Completion Damage which might give rise to a claim, to give written notice to the defendants, to give them reasonable access to the affected Asset and to permit them to replace or repair that Asset. Clauses 8.4 and 8.5 provide a detailed mechanism for dealing with any repair and also with any dispute which might arise in that regard. The question which arises is whether compliance with that obligation is, as the defendants contend, a condition of the claimant's entitlement to claim under the Indemnity or whether (if different) the Indemnity is dependent upon the exercise of the mechanism in clauses 8.3 to 8.5.

70. In *AstraZeneca v Albemarle International* [2011] EWHC 1574 (Comm) [2011] 2 CLC 252 Flaux J (as he then was) explained the approach to this type of issue as follows:

> "249. […] Whilst it is clear that, for performance of a provision in a contract to be a condition precedent to the performance of another provision, it is not necessary for the relevant provision to use the express words 'condition precedent' or something similar, nonetheless the court has to consider whether on the proper construction of the contract that is the effect of the provisions: see DRC Distribution Ltd v Ulva Ltd [2007] EWHC 1716 (QB) paragraph 39.
>
> 250. …in the absence of an express term, performance of one obligation will only be a condition precedent to another obligation where either the first obligation must for practical reasons clearly be performed before the second obligation can arise or the second obligation is the direct quid pro quo of the first, in the sense that only performance of the first earns entitlement to the second."

71. In the present case, the Indemnity in clause 8.2 is expressed in unconditional terms, giving rise to a liability on the part of the defendants to indemnify the claimant against full cost of reinstatement of any Assets affected by Pre-Completion Damage. Neither is there any wording in clause 8.3 (or for that matter in 8.4 and 8.5) which suggests that the provisions of those clauses give rise to a condition precedent to the defendants' liability under the previous clause. Indeed, it is difficult to see how a clause which is designed to permit the defendants to carry out repair work can be a condition of the defendants' obligation to indemnify the claimant against the costs of reinstatement, that is to say, costs incurred by the claimant.

72. Further, and as this case demonstrates, failure of certain assets might require urgent work to restore full electrical transmission capability in the interests of the claimant, the defendants and third parties, such urgency being inconsistent with the scheme set out in clauses 8.4 and 8.5 and, yet further, arising in circumstances in which it was not possible to know the cause of failure and whether or not it amounted to Pre-Completion Damage. Those factors heavily weigh against the claimant's rights under clause 8.2 being conditional upon compliance with the subsequent provisions in clauses 8.3 to 8.5.

73. It follows that I find that clauses 8.3 to 8.5 were not conditions precedent to the indemnity under clause 8.2, nor were the obligations interdependent.

74. In any event, however, the claimant was not aware that the failure of the cables was (on its case) due to Pre-Completion Damage until the cables had been lifted and the damaged sections examined: by that time the claimant had performed the works and incurred the costs, and there was nothing left for the defendants to repair. It follows that the claimant was not in breach of clause 8.3 and it would be a nonsense to suggest that its right to an indemnity under clause 8.2 had been lost.

Conclusion on whether clause 8.2 was engaged by the cable failures

75. As will be apparent from the above discussion, I conclude that the Indemnity, on a true interpretation, was limited to damage occurring in the period between signing of the SPA and Completion and to damage which was patent.

76. As changes to the cables during the period of the Indemnity were limited to unobservable corrosion, no damage was suffered during that period. However, even if unobservable corrosion could potentially amount to damage, there is no evidence in this case that it was such as to impair the use or value of the cables, and so there was no damage in any event.

77. In view of the above conclusion, it is not necessary to consider the defendants' further points as to the whether the claim is defective as being a "global claim" or whether the claimant is entitled to all the cost of reinstatement notwithstanding that relevant damage continued to be incurred after Completion. Suffice it to say that the fact that the claimant seeks a full indemnity against the costs of reinstating SSEC2, notwithstanding that it failed many months after Completion (due to continuing corrosion during the post-Completion period) demonstrates the potential absurdity in interpreting the Indemnity as having effect if there has been any corrosion, no matter how minor, during the period of its operation.

Rectification

78. Given my conclusion above, the defendants' counterclaim for rectification of the SPA does not require determination. However, in case my finding that the Indemnity is limited to the period between signing of the SPA and Completion is wrong, I will consider the defendants' alternative contention that clause 8.2 should be rectified to so provide.

The legal principles

79. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 Lord Hoffmann at [48] approved the following summary of the requirements of rectification by Peter Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71,74 para 33:

> "The party seeking rectification must show that (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention."

80. At the trial the parties accepted that the existence of a common continuing intention, even if not amounting to an agreement, must be judged objectively, accepting that the following observation by Lord Hoffmann in *Chartbrook at* [60] represented the law:

> "Now that it has been established that rectification is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, it would be anomalous if the "common continuing intention" were to be an objective fact if it amounted to an enforceable contract but a subjective belief if it did not. On the contrary, the authorities suggest that in both cases the question is what an objective observer would have thought the intentions of the parties to be."

81. However, after the conclusion of the trial, the Court of Appeal gave judgment in FSHC Group Holding Limited v Glas Trust Corporation limited [2019] EWCA Civ 1361, holding that Lord Hoffmann's *obiter dicta* in *Chartbrook* did not represent the law. At [176] Leggatt LJ stated the correct test as follows:

> "… it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord" - meaning that, as a result of communication between them, the parties understood each other to share that intention."

82. I gave the parties permission to provide further written submissions to address the decision in *FSHC* and its effect on the present case. The trial had been conducted on the basis that the key question in relation to rectification was whether there was, objectively, a common continuing intention that the Indemnity should only apply to damage occurring after execution of the SPA, and that the actual (or subjective) intentions of the witnesses were not in themselves relevant. However, neither party applied to adduce further evidence, nor to further cross-examine the witnesses and neither party sought a further oral hearing.

83. In considering the rectification claim, I must of course assume that the true interpretation of clause 8.2 is that for which the claimant contended and look for some other outward expression of accord than the clause itself.

The witnesses

84. The defendants called two witnesses to give evidence in relation to the negotiation of the SPA:

    i) Mauro Mattiuzzo, an experienced corporate partner at Norton Rose Fulbright LLP at the relevant time who had the conduct of the negotiations and drafting of the SPA on behalf of the defendants;

ii) Wojciech Wiechowski, the defendants' OFTO Portfolio Investment Manager at the relevant time, responsible for negotiating the SPA.

85. The claimant called Peter Roughton, who was Senior Transaction Counsel for Balfour Beatty Investments Limited, at the relevant time with responsibility for the legal aspects of BBE's bid for the transmission licence, including liaising with Allen & Overy and negotiating contracts, including the SPA. Mr Roughton had previously been a mergers and acquisitions specialist at Freshfields Bruckhaus Deringer.

86. I accept that each of the above witnesses gave an honest account, doing their best to assist the court. Mr Mattiuzzo was particularly open in his responses. Mr Roughton was combative at times but nonetheless I have no doubt he intended to give truthful evidence, as did Mr Wiechowski.

87. The claimant did not adduce evidence from either Sheila Connell or Hugh Hobhouse, a partner and lawyer respectively at Allen & Overy, nor Sofia Athanassiou, then a Bid Director at Balfour Beatty Investments Limited, all of whom were involved in the negotiation and drafting of the SPA on behalf of BBE/the claimant. On the other hand, the defendants did not call Chris Barras, RWE's Head of Legal in the UK, who worked with Mr Wiechowski in relation to the negotiation of the SPA.

The negotiation of the SPA

88. On 6 December 2013 BBE provided its first mark-up of the draft SPA which had been in circulation prior to the selection of BBE as the preferred bidder. BBE introduced:

i) a split between signing and Completion (which was immediately accepted by the defendants);

ii) an amended draft of the Warranty (which was limited to what has been discovered and would cause material disruption) so that the Vendors would warrant that "There is no material defect or damage to any … Asset";

iii) insurance provisions (in what was then clause 12), including a requirement that the Vendors maintain insurance between signing and Completion (clause 12.6, which became 11.6 in the SPA) and, at clause 12.8, the following:

> "If any of the Assets are lost, destroyed or damaged prior to Completion, then, following Completion, the Purchaser at its option may require that the insurance monies (if any) recoverable in respect thereof shall be paid to it… "

89. Further drafts passing reflected the competing views of the parties as to the scope of the Warranty, the defendants seeking to limit it to discovered defects or damage which were reasonably likely to cause material disruption, whilst BBE sought to expand it to a warranty that there were no defects or damage at all.

90. On 8 August 2014 BBE finally accepted the defendants position, approving the wording now found in the SPA. Mr Roughton explained in his witness statement that BBE took this decision because "we understood the risk of cable failures to be very remote … In addition, we would also be receiving the benefit of warranties from the cable

manufacturer at Completion and the insurance cover for the cables." In other words, at that stage BBE gave up on the type of broad protection which it now claims to have in the form of the Indemnity.

91. On 11 November 2014 BBE proposed an amendment to the insurance provisions in clause 11.7 of the draft, so that it would read as follows:

> "If any of the Assets are destroyed or damaged prior to Completion, then, following Completion, the Vendors shall indemnify the Purchaser against the full cost of reinstatement of those Assets (whether or not an insurance claim is made and whether or not there is an insurance deductible), and any insurance monies received by the Vendors and the Operating company shall, pending payment to the Purchaser, be held by it on trust for the Purchaser absolutely."

92. Mr Roughton explained in his witness statement that BBE was concerned to ensure that, regardless of whether the defendants' insurance was responsive to a claim, the claimant would not be liable in any way for destruction or damage to the assets prior to Completion. He was aware that the defendants had previously refused to agree to a provision which would have given a similar level of warranty protection, but he viewed this as a separate point and still wanted to obtain the broadest protection that could be negotiated.

93. However, Mr Roughton also accepted the main concern in his mind was that something external would happen before Completion, for example a ship's anchor hitting a cable. He wanted to ensure that if an event like that occurred, the claimant would not find itself responsible for a large insurance deductible, or even worse, footing all of the repair costs. Mr Roughton nevertheless stressed that although BBE's focus was on an event between exchange and Completion, BBE also wanted to be held harmless against pre-signing damage.

94. However, on 25 November 2014, after the defendants had circulated a further draft which did not adopt BBE's proposed draft of clause 11.7, Mr Hobhouse sent an email to Mr Wiechowski containing a table of outstanding issues for discussion, referring to clause 11.7 as follows:

> "The OFTO requires [the defendants] to bear the full cost of reinstating the assets if damaged/lost between exchange and completion regardless of [the defendants'] insurance position. The OFTO cannot be expected to bear the risk of [the defendants'] deductible or management of the asset prior to risk transfer on completion."

95. On 28 November 2014 Allen & Overy circulated a further draft, reinstating the revised clause 11.7 which included the indemnity in relation to Pre-Completion Damage. The same day BBE sent an email to Mr Wiechowski, setting out a list of outstanding issues which it was proposed to send (and was in the event sent) to Ofgem. The following was stated in relation to clause 11.7 of the draft:

> "[Norton Rose] advising [the defendants] that risk in the assets should pass to OFTO at exchange. OFTO only willing to take risk in the assets from completion (when it takes ownership of the assets). Issue is who bears cost of reinstating assets if they are lost/damaged between exchange/completion.
>
> [Norton Rose/the defendants] to consider the matter further – OFTO believes this is a reasonable position in line with market practice."

96. In a further draft circulated on 5 December 2014 the defendants removed clause 11.6 (the obligation to insure until Completion) and again removed the indemnity wording from clause 11.7, turning the clause back into a provision solely about insurance proceeds.

97. On 9 December 2014 Mr Roughton emailed Mr Wiechowski, setting out BBE's position that the defendants should continue to insure the Assets between exchange and Completion and should add the claimant as a beneficiary (clause 11.6). In relation to clause 11.7, Mr Roughton recorded the issue as follows:

> "[Defendants]: If assets are damaged between signing and completion then [the defendants] will only pay to the OFTO moneys recovered from insurance/third parties
>
> [BBE]: OFTO should be held harmless from any damage as risk in the assets does not pass until completion and it is not in control of the assets until completion. The OFTO should also not be expected to bear the deductible on the GYM insurance policy"

98. Mr Wiechowski replied on 10 December 2014, accepting BBE's proposal in relation to clause 11.6 and stating the following in relation to clause11.7:

> "*We agree to indemnify the OFTO against any damage during the period from signing to completion, subject to:*
>
> - *The liability being included under the existing 20% Purchase price liability cap in the SPA,*
> - *[the defendants] always [have] the conduct in relation to resolving any issues,*
> - *In the case of a dispute 3rd party expert would assess solution proposed by GYM and if necessary also its resolution. 3rd party expert opinion would be binding.*"

99. The next day a telephone call took place between the parties, to which Mr Roughton and Mr Wiechowski were both party. There is no record of the discussion, but following the call Mr Roughton emailed Mr Wiechowski, asking for confirmation that the following accurately reflected the position on liability caps:

> "Claims for damage to assets between signing and completion capped at 20% of the purchase price (but amounts recovered by [the defendants] from insurers or third parties would not count towards the 20% cap)…."

100. On 12 December 2014 Allen & Overy circulated a revised draft of the SPA, adding clause 11.6 to deal with maintaining insurance until Completion and adding new clauses 8.2 to 8.5. Clause 8.2 was similar to that which had been at clause 11.7 in previous drafts (and almost identical to clause 8.2 in the executed SPA) but added the word "defective", so that the Indemnity read "If any of the Assets are defective, destroyed or damaged prior to Completion .."

101. On 16 December 2014 the defendants responded to that draft, the only change to the new clause 8.2 being the deletion of the word "defective".

102. On 16 January 2015 Allen & Overy circulated a further draft, accepting the deletion of the word "defective" in clause 8.2 and re-introducing a clause 11.7 in the insurance provisions in the terms now found in the SPA.

103. Although further drafts were circulated thereafter, no further material changes were made to the provisions in issue in these proceedings.

Analysis of the contemporaneous documents

104. The starting point must be a consideration of what passed between the parties at the time in writing, both because it is by far the best of evidence of their actual intentions at the time and because it is the primary source for determining whether there was an outward expression of accord.

105. It is also important to recognise the context of the negotiations which took place as to the Indemnity. First, the defendants had steadfastly refused to give a warranty that that there was no material defect or damage affecting the Assets, and had offered a much more limited warranty, restricted to known but undisclosed defects or damage reasonably likely to cause material disruption. Given the firmness of the defendants' position in that regard, it would have been bizarre if the defendants had subsequently agreed to provide a wide indemnity against unknown damage pre-signing, and BBE would plainly have known that (and Mr Roughton accepts that he was aware of the point at the time).

106. Second, the genesis of the provision which became the Indemnity was the introduction of an interval between signing and Completion, raising the question of how to deal with the fact that the claimant was bound to purchase the Assets but did not have an insurable risk. The insurance provisions introduced in clauses11.6 and 11.7 were (at least primarily) intended to address that issue.

107. In that context, it would be surprising (despite Mr Roughton's evidence) if clause 11.7 added to the draft by BBE on 25 November 2014 was intended to provide a blanket indemnity against damage occurring prior to execution of the SPA. Indeed, it is apparent that it was not so intended from Mr Hobhouse's email of the same date, referring to the OFTO's requirement that the defendants bear the full cost or reinstating the assets damaged/lost between exchange and Completion. Again, when clause 11.7

was reinstated in the draft on 28 November 2014, at the same time BBE was proposing to tell Ofgem that the issue was "who bears the cost of reinstating assets if they are lost/damaged between exchange/completion".

108. Mr Roughton's email of 9 December 2014, although potentially ambiguous in stating that the OFTO should be held harmless from any damage as risk does not pass until Completion, was responding to the defendants' position that if the assets were damaged between signing and Completion, they would only pay insurance proceeds to the claimant.

109. But in any event, Mr Wiechowski's response of 10 December 2014 makes it clear that the defendants would agree to an indemnity "against any damage during the period from signing to completion" subject to certain conditions. It is readily apparent that position was discussed and accepted in the telephone call the next day, both because Mr Roughton wrote the same day to seek confirmation of the cap for "[claims] for damage to Assets between signing and completion" (plainly a reference to what became paragraph 4.1 of Schedule 7, and the reference therein to clause 8.2) and because Allen & Overy thereafter, on instructions from Mr Roughton, produced a draft which gave effect to Mr Wiechowski's proposals, moving the Indemnity to clause 8.2 and introducing the conditions at clauses 8.3 to 8.5.

110. In my judgment, therefore, the above correspondence records, fairly conclusively, that the actual intention of the parties, outwardly expressed to each other, was that the Indemnity would relate to damage to the Assets between exchange of the SPA and Completion and that, if clause 8.2 did not reflect that time period, that was a mistake.

111. The claimant's answer is that, whilst the correspondence does record that the Indemnity should apply to the period between signing and Completion, that was because that was the period in dispute and it does not record any common intention as to whether the Indemnity should also extend to the period before signing, that issue being unaddressed or assumed, it being possible that the parties were proceeding on different assumptions or that one or both of them did not turn their minds to the question at all. However, particularly given the context of the warranty discussions, I consider it plain (and known to both sides) that the Indemnity sought by BBE and ultimately agreed to by the defendants was specifically in relation to the interim period and did not encompass the period prior to signing.

The witness evidence

112. The question then arises as to whether the evidence given by the witnesses alters my assessment of the actual intentions of either party or of the existence of a common continuing intention.

113. Mr Mattiuzzo was adamant that, throughout the process of negotiation, his intention was that any indemnity would be limited to the period between signing and Completion. He based that assertion not only on his understanding of the rationale for the Indemnity (an incident such as an anchor drag just before the Assets were handed over), but also on his discussions with his opposite numbers at Allen & Overy, although he was unable to recollect details.

114. Mr Mattiuzzo did accept that when draft clause 11.7 was providing for the Vendors to pay insurance proceeds in respect of pre-completion damage to the claimant, it must have encompassed the period prior to signing, and he recognised that that clause in due course became the Indemnity, but he confirmed, in unequivocal terms, that he studied clause 8.2 carefully before execution and understood to it apply to the same period as specified in clause 11.6.

115. Mr Wiechowski's evidence was that his and the defendants' intention was to give an indemnity precisely as stated in his email of 10 December 2014: "We agree to indemnify the OFTO against any damage during the period from signing to completion …". Although he did not recall details of the telephone call the next day, he understood Mr Roughton to have accepted the offer, not least from his email of 11 December 2014. When cross-examined Mr Wiechowski asserted that the defendants had deliberately and consciously decided to limit the indemnity to the period after signing, an assertion which the claimant criticised as a belated embellishment. It may be right that Mr Wiechowski did not expressly state in his witness statement that the defendants had consciously decided to limit the scope of an indemnity, but he made it entirely plain that that was what he and the defendants had understood was being sought and what they had, eventually, agreed to provide.

116. The difficult question arises in relation to Mr Roughton's evidence. As set out above, in his witness statement Mr Roughton expressly recognised that BBE's focus was on the period between signing and Completion, and that he accepted that the defendants had already refused to warrant that there was no undiscovered damage pre-signing. He also set out the terms of his various communications, in which he had expressly referred to the period between signing and Completion. However, his evidence was that he and BBE, in introducing clause 11.7 in the draft and pursuing its inclusion, were nonetheless seeking the broadest possible indemnity, including in relation to pre-signing damage.

117. I do not doubt the honesty of Mr Roughton's evidence, but he himself appeared to accept that he had no independent recollection of the specific events in question and that his evidence was based on consideration of the documents. I therefore proceed on the basis that what Mr Roughton said in contemporaneous documents is a better guide to his understanding and intentions at the time than his reconstruction some four years later. I consider that Mr Roughton's email exchanges with Mr Wiechoswki between 9 and 11 December 2014 record a common intention, shared and encouraged by Mr Roughton, that the Indemnity would relate to damage incurred in the period between signing and Completion.

Subsequent conduct

118. The defendants submitted that it was also relevant and admissible on the question of rectification (going to the claimant's subjective understanding) that the claimant did not at first make a claim under clause 8.2, did not refer to the possibility of such a claim in its accounts (whereas it referred to other possible claims) and suggested in correspondence with Ofgem that, if the claimant was not entitled to an Income Adjustment, that in future OFTOs would have to seek indemnities of the type now asserted. The defendants also highlighted that the suggestion that clause 8.2 applied to damage occurring pre-signing was first suggested to the claimant by external counsel. It also emerged in the course of Mr Roughton's evidence that the present claim is being brought at the insistence of Ofgem, pursuant to an agreement that, if unsuccessful, the

claimant will be entitled to recover up to £500,000 of its costs through Income Adjustment.

119. I place little weight on such matters, the contemporaneous correspondence being a far more reliable guide as to what was intended by the parties at the time. However, the claimant's conduct after the cable failures does give some support to the defendants' case that the claimant did not understand or intend the Indemnity would cover failures arising from corrosion largely taking place pre-signing and post-Completion.

Finding on rectification

120. For the reasons set out above, I find that the defendants would have been entitled to an order for rectification, had that been necessary. Whilst a finding that a contract should be rectified is unusual, and may be more so in the light of the decision in *FSHC*, it may be less surprising for a court to find, on an alternative basis, that the parties had an actual common intention which accords with the true interpretation of a contract.

Conclusion

121. For the reasons set out above I find that the claimant is not entitled to an indemnity under clause 8.2 of the SPA. The claim must therefore be dismissed.

122. I would like to express my gratitude to both parties for the excellent presentation of the case and to all counsel for their impressive written and oral submissions.