Neutral Citation Number: [2024] EWCA Civ 477

Case No: CA-2023-000655 & CA-2023-000669

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)
Mr Simon Birt KC (sitting as a Deputy Judge of the High Court)
[2023] EWHC 412 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2024

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE MALES
and
LORD JUSTICE BIRSS

- -

Between:

CA-2023-000655

DRAX SMART GENERATION HOLDCO LIMITED	**Claimant/ Appellant**
- and -	
SCOTTISH POWER RETAIL HOLDINGS LIMITED	**Defendant/ Respondent**

- and between -

CA-2023- 000669

DRAX SMART GENERATION HOLDCO LIMITED	**Claimant/ Respondent**
-and-	
SCOTTISH POWER RETAIL HOLDINGS LIMITED	**Defendant/ Appellant**

- -
- -

David Quest KC and Philip Hinks (instructed by **Clyde & Co LLP**) for **Drax**

Sa'ad Hossain KC and Joyce Arnold (instructed by **Womble Bond Dickinson (UK) LLP**) for **Scottish Power**

Hearing date: 16th April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 8 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE MALES:

1. These appeals are concerned with the sufficiency of a notice of claim given pursuant to a Share Purchase Agreement. The agreement provided that unless the buyer notified the seller of the claim by a specified deadline, the seller would not be liable. The buyer's notice was required to state 'in reasonable detail the nature of the claim and the amount claimed (detailing the Buyer's calculation of the Loss thereby alleged to have been suffered)'. Although the notice which the buyer gave extended over nine pages and gave a great deal of information about the claim, the seller contends that it did not satisfy this requirement.

2. The buyer puts its claim in a variety of ways, relying on different provisions of the Share Purchase Agreement. These include a claim for breach of warranty and a claim pursuant to a contractual indemnity. Sitting as a Deputy Judge of the High Court, Mr Simon Birt KC concluded, so far as the breach of warranty claim was concerned, that the notice was insufficient. He therefore dismissed that claim. But he held that the notice was sufficient so far as the indemnity claim was concerned, and therefore allowed that claim to proceed to trial. Each party now appeals.

Background

3. The claim arises under an agreement for the sale and purchase of shares dated 16th October 2018 ('the Agreement'). Scottish Power Retail Holdings Ltd ('Scottish Power') sold the shares in a company then known as Scottish Power Generation Limited and now renamed VPI Power Limited ('the Company') to Drax Smart Generation Holdco Ltd ('Drax') for a total price of £702 million. The Agreement was a long and complex document running to some 225 pages.

4. One of the assets of the Company was a site in Kent known as Damhead Creek II, which is a potential location for a new gas power station. If such a power station were to be built, it would need to be connected to the national electricity grid. The obvious connection point would be at the site of the (now demolished) Kingsnorth Power Station, near Rochester, which is adjacent to Damhead Creek II. This would necessitate the laying of cables over the Kingsnorth land, which was owned by a third party, E.ON UK Plc ('E.ON'), to connect the Damhead Creek II site to the grid.

5. Damhead Creek II was previously owned by another Scottish Power company, referred to as 'SPDCL'. SPDCL had the benefit of an Option Agreement with E.ON dated 12th March 2014 ('the Damhead Creek II Option Agreement'), giving it the right to obtain an easement over the land to enable the necessary cables to be laid. The option was valid until 12th March 2019 and was assignable by SPDCL, but only on condition that the assignee 'shall enter into a direct deed of covenant in favour of the Grantor to perform the obligations on the part of the Grantee hereunder'. The expression 'Grantor' was defined to include successors in title of E.ON.

6. By an agreement dated 1st March 2016 SPDCL agreed to transfer its business, including the Damhead Creek II site and its rights under the Damhead Creek II Option Agreement, to the Company. Seeking to comply with the requirements of the option agreement, the Company entered into a deed of covenant in favour of E.ON. However, by this time E.ON was no longer the relevant Grantor for the purposes of the option agreement, as it had transferred the Kingsnorth site to another company, Uniper UK

Limited ("Uniper") on or around 30th September 2015. Accordingly, the deed of covenant was given in favour of the wrong party. No deed of covenant was given by the Company in favour of Uniper within the option period.

7. The upshot, according to Drax, was that the rights under the Damhead Creek II Option Agreement were not transferred to the Company, with the result that the Company was not entitled to exercise those rights. Unfortunately this mistake was not recognised in time.

8. Scottish Power subsequently decided to sell the Company and the Agreement with Drax was concluded on 18th October 2018. It included terms by which Scottish Power warranted that the benefit of the Damhead Creek II Option Agreement would be assigned to the Company prior to Completion and agreed to indemnify Drax for all losses suffered as a result of (among other things) any failure to transfer the benefit of the option agreement to the Company.

9. The Completion Date under the Agreement was 31st December 2018.

10. On 8th March 2019, shortly prior to the expiry of the option period, the Company gave notice to Uniper that it was exercising the option to acquire an easement contained in the Damhead Creek II Option Agreement. However, on 11th April 2019, Uniper's solicitors responded that, because no deed of covenant had been given in favour of Uniper, the purported exercise of the option was of no effect and, with the expiry of the option period, the option had fallen away.

11. By a letter dated 22nd May 2019, Drax gave notice to Scottish Power of 'a matter which may give rise to a claim under the [Agreement]', summarising the events set out above. There was further correspondence over the course of the next year which it is unnecessary to summarise, save to say that during 2020 the parties entered into two deeds of variation relating to the time limit for notifying claims under the Agreement. The first deed of variation, dated 30th June 2020, defined a new type of claim, a 'Damhead Creek II Option Agreement Claim', and provided that the time limit for Drax to give notice in respect of any such claim was 24 months from the Completion Date. The second deed of variation, dated 29th December 2020, extended this time limit until 30 months from the Completion Date (i.e. until 30th June 2021).

12. In December 2020, Drax sold the Company to VPI Generation Limited ("VPI"), pursuant to a sale and purchase agreement dated 15th December 2020. So far as we have been made aware, it does not appear that the price which Drax was able to achieve for the sale of the Company was affected by its inability to transfer to VPI the benefit of an easement over the Kingsnorth site.

13. By a letter dated 30th June 2021, Drax gave what it described as 'formal notice of a Damhead Creek II Option Agreement Claim', and also 'to the extent necessary … formal notice of a Reorganisation Claim' under the Agreement ('the Notice of Claim'). It is the sufficiency of this notice which is in issue on these appeals. Before examining the terms of the notice, however, it is necessary to set out some of the terms of the Agreement.

Relevant terms of the Agreement

14. In accordance with common drafting practice, defined terms in the Agreement were given an initial capital letter. For the most part, however, once the background set out above is understood, the defined terms to which it is necessary to refer for the purpose of this judgment are self-explanatory and their precise terms do not matter for the purpose of these appeals. Accordingly I need only set out one of those definitions in full. Any reader who wishes to see their full text can find them in the judgment of the court below.

15. Clause 8.1 of the Agreement provided that:

> 'The Seller warrants to the Buyer that the Warranties are true and accurate at the date of this Agreement. …'

16. The Warranties themselves were set out in Schedule 3. Some of them were concerned with what was called the 'Reorganisation', a defined term which for present purposes can be taken to include (among other things) the transfer of the benefit of the Damhead Creek II Option Agreement to the Company. These Warranties provided that:

> '9.1. The Reorganisation has been carried out in accordance with the Reorganisation Agreements and, except as Disclosed, all transfers and other actions envisaged by the Reorganisation Documents have occurred.
>
> …
>
> 9.3. All material licences, registrations, consents, permits, concessions, certifications, approvals and other authorisations (public and private) that are necessary for the completion of the Reorganisation have been obtained.'

17. Clause 11 of the Agreement also referred to the Reorganisation. It contains the indemnity under which one of Drax's claims is brought:

> 'Subject to Completion taking place and subject to Clauses 11.2 and 11.3, the Seller covenants to pay to the Buyer, each Group Company and each other Buyer's Group Undertaking within five (5) Business Days of a demand by written notice from the Buyer to the Seller an amount which is equal, on an after-Tax basis, to any and all Losses suffered by any Group Company or any member of the Buyer's Group, whether arising before, on or after Completion:
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> …
>
> 11.1.3 in relation to, or arising out of, any steps or actions taken to implement the Reorganisation (or any part thereof) (including, for the avoidance of doubt, any steps or actions comprised in the Reorganisation which occur after Completion) and including Losses arising as a result of a Group Company ceasing to be a member of a group or consortium or other association for Tax purposes with any

> member of the Seller's Group which would not have arisen but for any transfer or transfers undertaken pursuant to the Reorganisation;
>
> 11.1.4 that would not have been suffered but for (i) the fact that the Reorganisation (or any part thereof) … was not implemented and completed in full prior to the date of this Agreement; or (ii) the fact that the Reorganisation (or any part thereof) was not implemented and completed correctly in accordance with the Reorganisation Documents and Applicable Law; …'

18. Clause 14.51.3 addressed the Damhead Creek II Option Agreement expressly. It provided:

> 'The Seller shall procure that the benefit of the Damhead Creek II Option Agreement shall be assigned to the Company on or prior to Completion on terms approved by the Buyer (such approval not to be unreasonably withheld or delayed).'

19. The claim which Drax seeks to bring arises out of a single factual complaint, namely that the Company did not have the benefit of the Damhead Creek II Option Agreement, as it ought to have done. The claim is put in three ways. First, it is said that Scottish Power was thereby in breach of clause 14.51.3 of the Agreement. Second, it is said that Scottish Power was in breach of clause 8.1 of the Agreement because the Warranties in paragraphs 9.1 and 9.3 of Schedule 3 were not true and accurate. Third, it is said that Scottish Power is obliged pursuant to clauses 11.1.3 and 11.1.4 of the Agreement to pay Drax an amount which is equal to its losses suffered as a result of the Company not having the benefit of the Damhead Creek II Option Agreement.

20. Scottish Power denies liability, but contends that in any event the claims are barred because the Notice of Claim in Drax's letter dated 30th June 2021 was insufficient to satisfy the requirements of paragraph 2.1 of Schedule 4 of the Agreement (which I shall call the 'Notice of Claim clause'). As originally agreed, this provided:

> 'In the case of the types of claim detailed below, the Seller shall not be liable for a claim unless the Buyer has notified the Seller of the claim, stating in reasonable detail the nature of the claim and the amount claimed (detailing the Buyer's calculation of the Loss thereby alleged to have been suffered):
>
> 2.1.1 in respect of any Relevant Claim … on or before the date which is 18 months from the Completion Date;
>
> 2.1.2 in respect of any Fundamental Warranty Claim, on or before the date which is seven (7) years from the Completion Date;
>
> 2.1.3 in respect of any Fundamental Property Warranty Claim, on or before the date which is seven (7) years from the Completion Date;

> 2.1.4 in respect of any Tax Warranty Claim or any claim under Schedule 9 (Tax Covenant), on or before the date which is seven (7) years from the Completion Date;
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> 2.1.5 in respect of any claim under or pursuant to Clause 14.43, on or before the date which is seven (7) years from the Completion Date;
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> 2.1.6 in respect of any Daldowie Indemnity Claim, on or before the date which is two (2) years from the Completion Date;
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> 2.1.7 in respect of any Reorganisation Indemnity Claim: (a) which relates to EHS Matters (including, without limitation, decommissioning), on or before the date which is ten (10) years from the Completion Date; (b) which relates to any other matter, event or circumstances, on or before the date which is seven (7) years from the Completion Date;
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> 2.1.8 in respect of any Pensions Indemnity Claim, on or before the date which is eight (8) years from the Completion Date; or
>
> 2.1.9 in respect of any claim under or pursuant to Clause 14.8 or Clause 14.11 of this Agreement, on or before the date which is six (6) months from the date on which the Group Companies are released and discharged from the SPUK PLC Support Commitments.'

21. As can be seen, different time limits applied to different kinds of claim. It is common ground that Drax's claims for breaches of clauses 14.51.3 and 8.1 of the Agreement fell within the definition of 'Relevant Claim', so that the applicable time limit for those ways of putting its case was 18 months from the Completion Date (i.e. 30th June 2020) and that its claim pursuant to clauses 11.1.3 and 11.1.4 of the Agreement fell within the definition of 'Reorganisation Indemnity Claim', so that Drax had seven years from the Completion Date (i.e. until 31st December 2025) to give notice of this claim. In this connection it should be noted that the definition of 'Relevant Claim' expressly excluded a 'Reorganisation Indemnity Claim', so that the time limits in paragraphs 2.1.1 and 2.1.7 were mutually exclusive even though a single factual complaint could give rise to a claim under each of these paragraphs.

22. The two deeds of variation referred to above added a new category of claim, a 'Damhead Creek II Option Agreement Claim'. This was defined as follows:

> '"**Damhead Creek II Option Agreement Claim**" means any claim under or pursuant to this Agreement arising out of or in connection with or in respect of any failure to validly assign the benefit of the Damhead Creek II Option Agreement from [SPDCL] to the Company, including without limitation any claim under or pursuant to the Agreement arising out of or in connection with or in respect of any failings or deficiencies in

> the Damhead Creek II Option Covenant and/or the Damhead Creek II Option Assignment.'

23. The deeds of variation then excluded Damhead Creek II Option Agreement Claims from the time limit applicable to 'Relevant Claims', and added a new sub-paragraph 2.1.10 to paragraph 2.1 of Schedule 4:

> '2.1.10 in respect of any Damhead Creek II Option Agreement Claim, on or before the date which is 30 months from the Completion Date.'

24. Accordingly the Notice of Claim dated 30th June 2021 was given on the last possible day for giving notice of a Damhead Creek II Option Agreement Claim, while the time for giving notice of a Reorganisation Indemnity Claim still had 4½ years to run.

25. The Notice of Claim clause as amended by the deeds of variation is the critical term for the purpose of these appeals, but some other provisions of the Agreement should be noticed.

26. Paragraph 1.1 of Schedule 4 provided that Scottish Power would not be liable in respect of a 'Warranty Claim' unless its liability for the particular claim exceeded £702,000 and its liability for all 'Warranty Claims' exceeded £7,020,000. However, while this paragraph applied to Drax's claim for breach of clause 8.1 of the Agreement, the definition of 'Warranty Claim' is such that it would not affect Drax's claims for breach of clause 14.51.3 or for an indemnity pursuant to clauses 11.1.3 or 11.1.4.

27. Paragraph 3 of Schedule 4 provided that (with immaterial exceptions) any claim notified in accordance with the Notice of Claim clause would be unenforceable unless proceedings had been properly issued and validly served on Scottish Power within six months of notification of the claim.

28. Paragraph 8 of Schedule 4 made special provision for Relevant Claims which were contingent only or otherwise not capable of being quantified.

The Notice of Claim

29. The Notice of Claim began by identifying itself as constituting a 'formal notice of a "Damhead Creek II Option Agreement Claim" pursuant to paragraph 2.1.10 of Schedule 4 of the [Agreement], to include, without limitation, a Warranty Claim and/or a Reorganisation Claim and/or any other Relevant Claim'. It added that, 'to the extent necessary', it also constituted 'separate formal notice of a 'Reorganisation Claim' pursuant to paragraph 2.1.7(b) of Schedule 4, in relation to matters arising out of or in connection with the Damhead Creek II Option Agreement Claim which are also a Reorganisation Claim'. Strictly speaking the reference to a 'Reorganisation Claim' should have been to a 'Reorganisation Indemnity Claim', but this was an obvious slip and, rightly, no point has been taken about it.

30. The Notice of Claim continued:

> 'In particular, this letter sets out (in reasonable detail) the nature of the claims and an estimate of the losses alleged to have been suffered.'

31. It then set out in considerable detail relevant provisions of the Agreement and of the Damhead Creek II Option Agreement, together with the factual matters which I have described above. It explained that Drax had entered into discussions with Uniper, which had indicated that Uniper was potentially willing to grant an easement over the Kingsnorth land to Drax at an open market rate, but over a different route which would lead to increased costs. It added that if Drax was unable to agree suitable terms with Uniper, it might need to consider applying for a compulsory purchase order.

32. The Notice of Claim then identified the various respects in which Drax contended that it had a claim against Scottish Power, as I have summarised them. It explained that the Company had been sold to VPI, but added that:

> '37. Drax remains liable for any and all losses suffered by [the Company] in relation to the Reorganisation, and the fact that the Reorganisation (or any part thereof) was not implemented and completed in full prior to the date of the [Agreement], or the fact that the Reorganisation (or any part thereof) was not implemented and completed correctly in accordance with the Reorganisation Documents.'

33. Under the heading of 'Loss', the Notice of Claim continued:

> '40. In the circumstances, the loss suffered is yet to crystallise. As such, we set out below the details of the likely heads of loss (in relation to both the potential terms that may be agreed with Uniper and in the event that such agreement is not reached and a compulsory acquisition is required) and where possible an estimate of the potential loss that is likely to be suffered. Given the unique circumstances of this matter, this is of course an estimate and Drax reserves the right to update the loss suffered as matters develop and the loss is crystallised.'

34. Two calculations were then set out. The first, under the heading 'Potential agreement with Uniper', set out an estimate of the cost of acquiring an easement from Uniper, together with the additional costs which would be incurred as a result of the longer route over the Kingsnorth land on which Uniper would insist. The total of these losses amounted to a figure in excess of £8.1 million. The second, under the heading 'Potential compulsory acquisition', estimated losses of about £6.7 million.

The proceedings

35. Scottish Power did not accept liability and Drax issued its claim form on 22nd December 2021, within the six-month period referred to in paragraph 3 of Schedule 4. The Particulars of Claim set out the various ways in which Drax puts its claim and pleads its losses in accordance with the way in which the loss was identified in the Notice of Claim. The pleading makes clear that the alleged losses to be incurred in obtaining the easement (whether by negotiation or by compulsory acquisition) and the increased cost of laying cables over the Kingsnorth land were losses which would be suffered by the Company rather than by Drax itself.

36. Although Scottish Power also denied liability on other grounds, it contended that the claim as pleaded had no real prospect of success: the claims for breach of clauses 8.1 and 14.51.3 must fail because 'the nature of the claim and the amount claimed' had not been sufficiently notified for the purpose of the Notice of Claim clause, while the claim for an indemnity under clauses 11.1.3 and 11.1.4 must fail because Drax had made no demand pursuant to those clauses, that being an essential element of the claim, and it was now too late to do so.

37. Drax did not attempt to defend the Particulars of Claim as originally pleaded. Instead it sought permission to amend. The draft amendment deleted references to the Company suffering the loss and pleaded a case that the loss was suffered by Drax alone; that loss was suffered at the Completion Date and consisted of the difference between (a) the warranted value of the Company (i.e. its value with the benefit of the Damhead Creek II Option Agreement) and (b) its true value (i.e. without the benefit of those rights); the cost of obtaining an easement by negotiation with Uniper, together with the increased cost of laying cables over a longer route, was evidence of this difference in value; and a case based on compulsory acquisition was no longer advanced.

38. Accordingly there were two applications before the judge, an application by Scottish Power for summary judgment in its favour and an application by Drax for permission to amend the Particulars of Claim. Both applications turned on the same point, whether the reformulated claims in the draft Amended Particulars had a real prospect of success.

The judgment

39. After citing a number of authorities dealing with notice clauses, the judge dealt first with the question whether the Notice of Claim was sufficient to fulfil the requirements of the Notice of Claim clause in respect of the claims for damages for breach of warranty and breach of clause 14.51.3. He held that the reasonable recipient of the Notice of Claim would have understood it as claiming a loss suffered in the first place by the Company, for which Drax was liable; that the Notice of Claim therefore did not reflect the claim for Drax's own loss based on a difference in value which Drax now sought to bring in the draft Amended Particulars of Claim; and that (if that was the claim which Drax now sought to bring), the fact that the claim was one based on the difference in value of the shares had to be notified in the Notice of Claim:

> '86. I have already set out the text of paragraph 2 of Schedule 4 of the [Agreement]. Pursuant to its terms, in order for Scottish Power to be liable for a claim, Drax had to, in its notification of that claim: (i) state in reasonable detail the nature of the claim; and (ii) state in reasonable detail the amount claimed (detailing Drax's calculation of the loss thereby suffered).
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> 87. In my view, each of those requirements meant that, if Drax's claim was one based on the diminution in value of the shares in the Company at the point of Drax's discovery of Scottish Power's breaches, as is now the claim sought to be brought in the Amended Particulars of Claim, that had to be identified in the Notice of Claim.'

40. In the judge's view, the fact that the claim was based on the difference in value of the shares was both 'part of the nature of the claim' and also an essential part of the explanation which would be needed in order to provide the necessary 'reasonable detail' of Drax's calculation of the claim. This fact had not been stated in the Notice of Claim. As a result the claim pleaded in the draft Amended Particulars had no real prospect of success:

> '101. Accordingly, the Notice of Claim did not state in reasonable detail the nature of the claim or the amount claimed (detailing Drax's calculation of the loss thereby alleged to have been suffered). If Drax's claim was one based on the diminution in value of the shares in the Company at the point of Drax's discovery of Scottish Power's breaches, as is now the claim sought to be brought in the Amended Particulars of Claim (or indeed at any earlier date such as the date the shares were transferred), that ought to have been identified in the Notice of Claim. In fact, a different basis for Drax having suffered loss was identified, namely that Drax bore a liability for losses suffered by the Company.
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> 102. The result is that the Notice of Claim did not comply with paragraph 2 of Schedule 4 to the [Agreement] in relation to the warranty claim and the other breach of contract claim. There is therefore no real prospect of Scottish Power being liable for those claims, and summary judgment on those claims ought to be granted to it.'

41. However, the judge took a different view in relation to the claim for an indemnity under clauses 11.1.3 and 11.1.4. Scottish Power's point here was that Drax's claim, based as it was on the failure to provide the Company with the benefit of the Damhead Creek II Option Agreement, fell within the definition of a Damhead Creek II Option Agreement Claim so that the applicable deadline for a notice of claim was 30th June 2021; that because the obligation under clause 11.1 was to pay within five business days of a demand, no liability could arise under clauses 11.1.3 and 11.1.4 until a written demand for payment of an ascertained sum had been sent; that there had been no such demand in the Notice of Claim (or for that matter in the original Particulars of Claim); and that although there had been a demand in the draft Amended Particulars, that came too late because it was after the deadline for a Damhead Creek II Option Agreement Claim.

42. The judge rejected this argument for each of two separate reasons. The first was that the time limits in the Notice of Claim clause did not apply to the making of a demand in clause 11.1 of the Agreement. Instead, notice of the claim under clause 11.1 could be given without a demand for payment having first been made. As the judge put it:

> '113. First, … Scottish Power contends that it was not open to Drax to make a demand under clause 11.1 in its draft amendments because, by that date, the relevant time limit in paragraph 2 of Schedule 4 had expired. That presupposes that the time limits in paragraph 2 of Schedule 4 apply to the making of a demand under clause 11.1.

> 114. However, in my judgment, the time limits under para 2 Schedule 4 do not so apply. As Mr Quest, for Drax, contended, there are two requirements and they are independent. The first (in clause 11.1) requires the demanding of an ascertained sum by written notice, the second (in paragraph 2 of Schedule 4) requires a notice of the claim, stating in reasonable detail the nature of the claim and the amount claimed, etc. They are two separate requirements. There are specific time limits in respect of the second of those, as set out in paragraph 2 of Schedule 4, and a notice needs to be sent before the relevant time period expires. There is no such time limit in relation to the demand required by clause 11.1.
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> 115. There is nothing in the wording of the SPA, or in any material context that was drawn to my attention, that suggests that the demand under clause 11.1 had to meet the requirements not only of clause 11.1 but also of paragraph 2 of Schedule 4.'

43. The judge held that the Notice of Claim had sufficiently identified the basis of the claim as made under clause 11.1 and had given reasonable details of the loss claimed even though an ascertained sum could not be identified.

44. The judge's second reason was that although the claim under clause 11.1 fell within the definition of a Damhead Creek II Option Agreement Claim to which a time limit of 30 months applied, it was also a Reorganisation Indemnity Claim to which a time limit of seven years applied. The judge's conclusion was that the relevant time period was the period of seven years applicable to a Reorganisation Indemnity Claim. Essentially this was because the purpose of the deeds of variation which had created the concept of a Damhead Creek II Option Agreement Claim had been to carve out such claims from the category of Relevant Claims and to apply a longer time period to them, but not to shorten the existing seven year period for bringing a Reorganisation Indemnity Claim:

> '125. …
>
> (1) Before the amendments that led to the introduction of the defined term "Damhead Creek II Agreement Claim", there would have been no argument about which time period applied to a Reorganisation Indemnity Claim. Such a claim was not within paragraph 2.1.1 because the definition of Relevant Claim excluded a Reorganisation Indemnity Claim, and such a claim was covered separately at paragraph 2.1.7. The amendments made were to carve out from paragraph 2.1.1 any Damhead Creek II Option Agreement Claim that fell within the definition of "Relevant Claim", such that any such claims were no longer subject to the 18 month period under that paragraph, and to give them a longer time period. Those claims that were removed from paragraph 2.1.1 were given their own time period in paragraph 2.1.10. In other words, the parties were introducing a new paragraph 2.1.10 to apply only to Damhead Creek II Option Agreement Claims which were Relevant Claims (and thus not a

> Reorganisation Indemnity Claim). There were no words added expressly removing any Reorganisation Indemnity Claim from paragraph 2.1.7 nor any other indication that the parties intended to remove any Reorganisation Indemnity Claim from paragraph 2.1.7 such as also to place such a claim within paragraph 2.1.10. (2) During 2021, there was good reason to extend the notification period for claims, given this allowed Drax further time to explore how much Uniper might charge for a new easement of the Kingsnorth land. However, there is no obvious reason why the parties would have intended to shorten (considerably) the period for bringing a Reorganisation Indemnity Claim just because it was also a Damhead Creek II Option Agreement Claim. …'

Drax's appeal – the submissions in outline

45. On behalf of Drax, Mr David Quest KC submitted that the Notice of Claim gave sufficient detail of the 'nature of the claim' and stated in reasonable detail the amount claimed and Drax's calculation of the loss suffered. In particular, it was unnecessary to state that the claim was based upon a difference in value of the shares in the Company. This was not part of the 'nature of the claim' and did not have to be identified in order to give reasonable details of the amount claimed. All that Drax was required to say was that it was a claim in contract for damages for breaches of specific provisions and for an indemnity, and that it related to the failure of Scottish Power to transfer the benefit of the option to the Company. He submitted further that, because difference in value is the conventional measure of damages in such a case (*Lion Nathan Ltd v C-C Bottlers Ltd* [1996] UKPC 9 at [9], [1996] 1 WLR 1438, 1441; *MDW Holdings Ltd v Norvill* [2022] EWCA Civ 883 at [24]), a reasonable recipient would have understood that damages for the breaches alleged would be assessed on that basis, and the Notice of Claim should have been understood accordingly.

46. On behalf of Scottish Power, Mr Sa'ad Hossain KC supported the judge's reasoning. No claim based on difference in value had been notified and the reasonable recipient would not have understood the Notice of Claim in this way. The fact that the claim was for difference in value was a necessary part of the 'nature of the claim'. The clause required Drax not only to identify the loss claimed, but also the basis on which it was claimed, including the nature of its case on causation. In the case of a difference in value claim, it was necessary to identify the value of the shares as they ought to have been with the benefit of the option and as they in fact were. That information would be needed in order for Scottish Power to obtain valuation evidence.

Notice of Claim clauses

47. Clauses which bar a claim unless notice is given within a specified time limit are a common feature of share purchase agreements. Such clauses sometimes require the notice to state 'the nature of the claim' and sometimes require this to be done 'in reasonable detail'.

48. In general terms, the purpose of a Notice of Claim clause was described by Lord Justice Popplewell in *Dodika Ltd v United Luck Group Holdings Ltd* [2021] EWCA Civ 638 at [46]. The clause in that case required the notice to state 'in reasonable detail the

matter which gives rise to such Claim, the nature of such Claim and (so far as reasonably practical) the amount claimed in respect thereof'. It was accepted that the notice in question had provided reasonable detail of the nature of the claim, the issue being whether it provided reasonable detail of the amount claimed. Lord Justice Popplewell said:

> '46. … The purpose of a notice clause such as that in schedule 4 para 2(b) of the SPA is to enable the recipient to make such inquiries as it is able, and would wish, to make into the factual circumstances giving rise to the claim, with a view to gathering or preserving evidence; to assess so far as possible the merits of the claim; to participate in the tax investigation to the extent desirable or possible with a view to influencing the outcome; and to take into account the nature and scope of the claim in its future business dealings, whether by way of formal reserving or a more general assessment of the potential liability. As Mr Choo-Choy accepted, the additional detail available, if included in the 24 June letter, would not have advanced any of these purposes. I balk at a conclusion that the level of detail provided in a notice of this sort fell short of what was required as reasonable, that is to say was unreasonably deficient, when the additional level of detail said to have been required would not have furthered any of the commercial purposes for giving such a notice. What is reasonable takes its colour from the commercial purpose of the clause, and what businessmen in the position of the parties would treat as reasonable. Businessmen would not expect or require further detail which served no commercial purpose. That would be the antithesis of what was reasonable.'

49. Taking a step back, the initial purpose of such clauses is to provide a contractual limitation period. If no notice is given by the specified deadline, the parties can close their books on the transaction. That promotes finality and certainty in commercial dealings. It is only if some kind of notice is given that the purposes identified in *Dodika* come into play. In that event, it will be obvious that the buyer is seeking to make a claim, so that the achievement of finality and certainty must be postponed.

50. Whether a notice is sufficient to satisfy the requirements of any given clause must depend primarily on the language of the clause. Commercial parties are free to impose whatever requirements they wish. However, where they use broad and general terms such as 'the nature of the claim' and 'in reasonable detail', those requirements should be interpreted in the light of the commercial purposes of such clauses, including those identified in *Dodika*. It is important that Notice of Claim clauses should not become a technical minefield to be navigated, divorced from the underlying merits of a buyer's claim. While a seller's interest will always be to knock the claim out if it can on the technical ground that the notice is insufficient, courts should not interpret such clauses as imposing requirements which serve no real commercial purpose unless compelled to do so by the language of the clause.

51. In this regard it needs to be remembered that such clauses are essentially exclusion clauses. I would respectfully agree with the approach of Lord Justice Briggs, considering a clause which required notice 'specifying in reasonable detail the nature

of the Claim and, so far as practicable, the amount claimed', in *Nobahar-Cookson v The Hut Group Ltd* [2016] EWCA Civ 128:

> '18. In my judgment the underlying rationale for the principle that, if necessary to resolve ambiguity, exclusion clauses should be narrowly construed has nothing to do with the identification of the *proferens*, either of the document as a whole or of the clause in question. Nor is it a principle derived from an identification of the person seeking to rely upon it. Ambiguity in an exclusion clause may have to be resolved by a narrow construction because an exclusion clause cuts down or detracts from the ambit of some important obligation in a contract, or a remedy conferred by the general law such as (in the present case) an obligation to give effect to a contractual warranty by paying compensation for breach of it. The parties are not lightly to be taken to have intended to cut down the remedies which the law provides for breach of important contractual obligations without using clear words having that effect: see *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 per Lord Diplock at 717H, applied in *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691, by Moore-Bick LJ at para 29.
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> 19. This approach to exclusion clauses is not now regarded as a presumption, still less as a special rule justifying the giving of a strained meaning to a provision merely because it is an exclusion clause. Commercial parties are entitled to allocate between them the risks of something going wrong in their contractual relationship in any way they choose. Nor is it simply to be mechanistically applied wherever an ambiguity is identified in an exclusion clause. The court must still use all its tools of linguistic, contextual, purposive and common-sense analysis to discern what the clause really means. In the *Seadrill Management* case Moore-Bick LJ described the principle as:
>
> > "essentially one of common sense; parties do not normally give up valuable rights without making it clear that they intend to do so".'

Drax's appeal – Discussion

52. In my judgment it is impossible to read Drax's Notice of Claim as advancing a claim based on the difference in value of the shares. Mr Quest relied on the reference to 'the losses alleged to have been suffered' in the opening paragraphs of the notice (see para 30 above), submitting that this referred to past losses already suffered by Drax. A fair reading of the notice as a whole, however, makes clear that the loss claimed consists of a future liability to VPI, to whom the Company had been sold. Thus paragraph 37 explained that Drax remained liable for any and all losses suffered by the Company; and paragraph 40 explained that 'the loss suffered is yet to crystallise' and referred to 'details of the likely heads of loss' and 'the potential loss that is likely to be suffered',

while reserving the right to 'update the loss suffered as matters develop and the loss is crystallised'.

53. On the basis of the information now available to the court, this seems a surprising way of putting Drax's claim, as it does not appear that the price obtained for the Company from VPI was affected by the Company's inability to obtain an easement over the Kingsnorth land. Nor has it been suggested that Drax has in fact any legal liability to VPI as a result of the Company not having the benefit of such an easement. However, a reasonable recipient would not be aware of this and would be entitled to take at face value what was said in the Notice of Claim. Importantly, there has been no challenge to Drax's good faith in formulating its claim in the way set out in the Notice of Claim.

54. In my judgment, however, the 'nature of the claim' which Drax sought to advance was straightforward. It was simply a claim that under the terms of the Agreement, the Company ought to have had the benefit of the Damhead Creek II Option Agreement, but did not. Mr Quest was prepared to accept that Drax was required to identify the terms of the Agreement of which Scottish Power was in breach, but I am not sure that even this was necessary. A simple statement that Scottish Power had failed in its obligation to ensure that the Company had the benefit of the Damhead Creek II Option Agreement would have told Scottish Power all that it needed to know, not least as the parties had been in correspondence about this very issue for over a year. If Scottish Power was in any doubt about its contractual obligations, including which terms required it to provide the Company with the benefit of the Damhead Creek II Option Agreement, it had only to read the Agreement or to ask a lawyer for advice. If it wished to investigate whether it had a defence to the claim, perhaps on the ground that the problem with the option agreement had been disclosed to and accepted by Drax, it would know in which files to look or which individuals to ask. If it wished to assess its potential liability, including the likely basis on which damages would be assessed, it would be able to obtain legal advice. In practice, of course, it is likely that Scottish Power had already done all these things as a result of the parties' previous correspondence.

55. I can see nothing in the language of the clause or in its commercial purpose which required Drax to spell out, as part of a statement as to the nature of the claim, that the damages claimed would be based on the difference in value of the shares in the Company as a result of not having the benefit of the Damhead Creek II Option Agreement. To impose such a requirement serves no commercial purpose and merely introduces a trap to defeat what may be a valid claim.

56. So far as the amount of the claim is concerned, all that was required by the Notice of Claim clause was a statement of 'the amount claimed (detailing the Buyer's calculation of the Loss thereby alleged to have been suffered)'. That must refer to a calculation put forward in good faith, otherwise it would not be the buyer's genuine calculation. Unquestionably the Notice of Claim did state the amount claimed, albeit on two alternative bases (negotiations with Uniper and compulsory purchase), and provided details of the way in which this amount was calculated. I do not see why anything further should be required. The claim as then formulated was not a claim based on the difference in value of the shares, but was nevertheless Drax's actual calculation of the loss which it was claiming. As Drax's good faith in formulating the claim in this way has not been challenged, what was put forward *was* 'the Buyer's calculation of the Loss thereby alleged to have been suffered'.

57. Once again, Scottish Power had all the information it needed in order to assess its liability. It could have sought clarification of the basis on which Drax retained a liability to VPI. It could have taken legal advice. If that advice had been that the basis of calculation was legally unsound, because it ought to have been based on a difference in value as at the Completion Date, it could have obtained whatever expert valuation evidence it might need in order to refute the way in which the claim was put. If it thought that the sums claimed by Drax were excessive, it could have offered to take over the negotiations with Uniper in order to obtain a better deal. If it thought it necessary to make a reservation in its accounts, it could have done so.

58. It is true that the draft Amended Particulars now put forward a different basis, i.e. difference in value, on which the damages calculation is based. However, so long as what is put forward in the Notice of Claim is a genuine estimate, it is as a matter of fact 'the Buyer's calculation of the Loss thereby alleged to have been suffered', which is all that the clause requires. There is nothing in the clause to set in stone the calculation of the loss which is stated in the Notice of Claim. If further reflection indicates that the calculation is legally unsound, or capable of improvement, there is nothing in the clause and no good reason to insist that the buyer should be held to the way in which the calculation was formulated in the Notice of Claim. On the contrary, the notice has served its purpose by preventing the claim from becoming barred, and the parties will move forward promptly (if they cannot resolve the matter) to litigation, with a claim form required to be properly issued and validly served on Scottish Power within six months beginning on the date of the Notice of Claim (paragraph 3 of Schedule 4). At that stage the formulation of the claim and the possibility of amendment will not be determined by the Agreement but by the Civil Procedure Rules.

59. For these reasons I would hold that the Notice of Claim did satisfy the requirements of the Notice of Claim clause and that Drax's appeal should be allowed.

Further Information

60. The judge said that, in the event that he had determined this issue in favour of Drax, he would have ordered Drax to provide further particulars of the damages claim pleaded in the draft Amended Particulars of Claim. We heard little or no submissions about this and were not provided with any Request for Further Information. I would leave the Circuit Commercial Court to decide whether further particularisation is needed.

Scottish Power's appeal – the submissions in outline

61. If Drax's appeal succeeds, as I have held that it should, it is not clear to me whether the alternative claim for an indemnity adds anything of substance. The pleaded calculation of the amount claimed is the same for both ways of putting the case, damages and an indemnity. Nevertheless I will consider briefly Scottish Power's appeal against the judge's decision that Drax's claim for an indemnity pursuant to clauses 11.1.3 and 11.1.4 of the Agreement is not barred.

62. Mr Hossain recognised that for its appeal to succeed, Scottish Power would need to win on both of the points on which the judge decided against it (see paras 42 to 44 above).

63. As to the first point, he submitted that because Scottish Power's liability under clause 11.1 is to make a payment of an amount 'within five Business Days of a demand' for

payment of that amount, the making of the demand was an essential element of any claim to be notified under the Notice of Claim clause. Accordingly no valid Notice of Claim could be made until after a demand had been made and five Business Days had elapsed. As there had been no demand, the Notice of Claim was ineffective so far as the indemnity claim was concerned.

64. As to the second point, Mr Hossain submitted that the indemnity claim was a claim 'arising out of or in connection with or in respect of any failings or deficiencies in the Damhead Creek II Option Covenant and/or the Damhead Creek II Option Assignment' and therefore fell within the definition of a 'Damhead Creek II Option Agreement Claim' introduced into the Notice of Claim clause by the deed of variation dated 30th June 2022, to which the 30 month time limit in the new paragraph 2.1.10 of the clause applied.

Scottish Power's appeal – Discussion

65. In my judgment the judge was clearly right, for the reasons which he gave set out at para 44 above, to hold that the applicable time limit for Drax's indemnity claim was seven years from the Completion Date.

66. There was some debate at the hearing whether a claim under clause 11.1 should be characterised as a claim for losses suffered as a result of a failure to implement the Reorganisation (including the transfer of the benefit of the Damhead Creek II Option Agreement to the Company) or as a claim for failure to pay five days after the making of a demand under the clause. In my view the latter is the correct characterisation, but in any event such a claim undoubtedly falls within the wide definition of a 'Damhead Creek II Option Agreement Claim'. The words 'arising out of or in connection with' require only a relatively weak link between the failure to transfer the benefit of the Damhead Creek II Option Agreement to the Company and the claim for an indemnity. On the facts here, however, there is a clear and direct connection, even if the claim is correctly characterised as a claim for failure to pay a specified amount after the making of the demand. Such a claim, therefore, is a 'Damhead Creek II Option Agreement Claim' to which a time limit of 30 months from the Completion Date applies. But it is also a Reorganisation Indemnity Claim to which a time limit of seven years applies.

67. The issue, therefore, is whether the parties intended (or more strictly, whether the objective meaning of the deed of variation is) that the introduction of a new category of 'Damhead Creek II Option Agreement Claim' by the first deed of variation should operate to reduce the existing time limit of seven years for notification of a Reorganisation Indemnity Claim to 24 (and later to 30) months. In my judgment it is clear that they did not. The purpose of the deeds of variation, entered into against the background of the imminent expiry of the time limit for Relevant Claims (i.e. claims for damages), was to extend the time limit for notification of such claims from 18 to 24 (and later to 30) months, without affecting the existing time limit for Reorganisation Indemnity Claims.

68. In this regard it is telling that the deed of variation expressly carved out any 'Damhead Creek II Option Agreement Claim' from paragraph 2.1.1 of the Notice of Claim clause which contained the time limit for 'Relevant Claims', but contained no such carve out from paragraph 2.1.7 which contained the time limit for Reorganisation Indemnity Claims. When the parties wanted to exclude a claim falling within the definition of a

'Damhead Creek II Option Agreement Claim' from one of the other paragraphs of the Notice of Claim clause, they did so expressly.

69. Accordingly, even if (as I would hold) there is no claim, and can therefore be no notification of a claim, under clause 11.1 until after a demand for payment has been made, the applicable time limit for such a claim is seven years from the Completion Date. It follows that the demand made in the draft Amended Particulars of Claim was in time and the claim for an indemnity is not barred by the Notice of Claim clause. I would therefore dismiss Scottish Power's appeal.

Declaration

70. Drax has pleaded a claim for a declaration of Scottish Power's liability to indemnify it in terms which appear to do no more than track the language of clauses 11.1.13 and 11.1.4 of the Agreement. Scottish Power contends that such a declaration would serve no useful purpose as there is no dispute about the terms of these clauses. The judge said that he could see the force of that point, but that the granting of declaratory relief was discretionary and the extent to which any particular declaration might serve a useful purpose was a matter for the trial. I would not disturb that case management decision.

Disposal

71. I would allow the appeal by Drax. Drax's claims for damages are not barred by the Notice of Claim clause. I would therefore dismiss Scottish Power's application for summary judgment and would grant permission to Drax to amend its Particulars of Claim.

72. I would dismiss Scottish Power's appeal. Drax's claim for an indemnity under clause 11.1 is not barred either.

73. Accordingly both ways of putting the case should proceed to trial.

LORD JUSTICE BIRSS:

74. I agree.

SIR GEOFFREY VOS, MR:

75. I also agree.