Neutral Citation Number: [2015] EWHC 152 (TCC)

Case No: HT-14-266

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 February 2015

Before:

THE HONOURABLE MR. JUSTICE COULSON

- -

Between:

MW HIGH TECH PROJECTS UK LTD	**Claimant**
- and -	
HAASE ENVIRONMENTAL CONSULTING GmbH	**Defendant**

- -
- -

Mr Vincent Moran QC (instructed by **Clarke Wilmott LLP**) for the **Claimant**
Mr James Bowling (instructed by **BLD**) for the **Defendant**

Hearing date: 15 January 2015

- -

Judgment

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1. In these proceedings, which were commenced on 12 August 2014, the claimant ("MW") seeks declarations as to the proper construction of their contract with the defendant ("HEC"), pursuant to which MW appointed HEC to develop and complete the design of the process engineering elements of a waste energy plant at Brookhurst Wood Landfill site, Horsham, in West Sussex ("the site"). There has already been one adjudication between the parties in which, on MW's case, the adjudicator failed correctly to construe the relevant terms of the contract (which I shall call "the Appointment"). MW say that they have further claims against HEC, which involve many millions of pounds, and that it would be helpful for the court to grant declarations as to the proper construction of the Appointment.

2. HEC deny that the declarations sought would be of any utility to the parties. Furthermore, although they acknowledge that, in at least one respect, the adjudicator erred in his reasoning, they submit that he got to the right answer. They also say that that part of his reasoning, with which MW now take issue, is not binding on any subsequent adjudicator.

3. I propose to set out the contractual chain and then to identify the essential dispute between these parties. Thereafter, I set out (regrettably, at some length) the express terms of the Appointment. Then, having dealt with both the past adjudication and the future claims I deal, at **Section 7** below, with the issue as to whether or not it would be appropriate of the court to grant declaratory relief. Then at **Section 8,** I discuss in detail the nature, scope and extent of HEC's principal obligations, and explain how they dovetail one with another. At **Section 9**, I identify the declaration, in outline only, which I consider appropriate.

2. THE CONTRACTUAL CHAIN

4. By a Materials Resource Management Contract, dated 28 June 2010, West Sussex County Council engaged Biffa Waste to design, build and operate a recycling facility at the site. One of the particular features of the completed project was that it would, through a process of anaerobic digestion, turn biodegradable waste into methane gas which would not only run the site but would also be utilised for export.

5. Biffa in turn contracted the design and construction of the waste treatment plant at the site to MW. This was known as the EPC contract and was dated 28 June 2010. The contract sum was just under £100 million. The works should have been complete by 10 January 2013. As a result of numerous delays, this date was not achieved, and the EPC contract was terminated on 6 December 2014.

6. Prior to the EPC contract being entered into, MW appointed HEC, pursuant to a letter of intent, to provide design services, including the design of the anaerobic digestion process. These are referred to in the documents as the process engineering services. Pursuant to the work done under the letter of intent, HEC completed a Basic Design Proposal which included (amongst other things) the EPC Delivery Plan. This was subsequently incorporated into the contracts referred to at paragraphs 4 and 5 above.

7. On 12 July 2010, MW appointed HEC to act as consultants. The work done under the letter of intent was subsumed into the Appointment. The express terms of the Appointment lie at the heart of this application. A full description of the background to the Appointment, and an outline of the contents of all the relevant documents that formed part of the Appointment, can be found in the agreed List of Relevant Facts, completed by the parties and attached to this Judgment as Appendix 1. I analyse some of the express terms of the Appointment in **Section 4** below.

3. THE ESSENTIAL DISPUTE BETWEEN THE PARTIES

8. Before turning to the terms of the Appointment in detail, it is sensible to outline in brief terms the essential dispute between the parties. This is the dispute that arose in the original adjudication, and was the dispute that was then outlined to me, with commendable clarity, by both counsel during the hearing.

9. MW say that they based their tender to Biffa on the Basic Design Proposal prepared by HEC. They say that, within 12 days of the entering into the Appointment, they found that HEC were proposing design changes/enhancements, which made the overall cost of the works much higher. MW say that this process (of design changes and increased cost) then continued throughout the life of the project. MW say that many of the changes/enhancements which were proposed did not comply with the

Appointment because HEC could have complied with their contractual obligations (both to take reasonable care and to comply with certain specific requirements, including the EPC Output Specification and the EPC Delivery Plan) without making these changes/enhancements. Instead they say that the changes meant that, although HEC may have complied with the obligation to take reasonable skill and care, they failed to comply with their obligations to comply with the EPC Output Specification and the EPC Delivery Plan. Thus MW say that HEC are liable to them for the costs of the changes/enhancements which did not comply with those specific documents/requirements.

10. HEC say that that is an incorrect construction of the Appointment, and that if the eventual developed/modified design was non-negligent, there could be no breach of contract on their part. They argue they were not obliged to stick rigidly to the Basic Design Proposal in circumstances where their professional advice was that there was a non-negligent modification of the design that was appropriate in all the circumstances. They also say that the terms of the Appointment envisaged design development and changes, and that MW's claims therefore fall to be considered by reference to the detailed provisions dealing with discrepancies, changes, comments and approvals on the ongoing design process.

11. In essence, the dispute concerns which of the parties bore the contractual risk of increased costs associated with what might be called the enhancement of the design beyond the parameters set out in the EPC Delivery Plan. Both parties accept that the starting point is HEC's obligation to act with reasonable skill and care, but MW say that, pursuant to the obligation to comply with the EPC Delivery Plan and the EPC Output Specification, if two non-negligent design solutions were available, and one was in accordance with the basic design as set out in those documents, and the other was an enhancement of it, HEC was either obliged to adopt the former or were liable for the costs consequences of adopting the latter. HEC say that they were not so fettered and that, provided that they complied with the regime concerned with design approvals and changes, the risk of additional costs being incurred as a result of design enhancements rested fairly and squarely with MW.

4. THE APPOINTMENT

12. The scope of the services to be provided by HEC was outlined in Schedule 11 of the Contract. The relevant part of that Schedule provided as follows:

> "**THE CONSULTANT Scope Of Works**
>
> **Design Requirement**
>
> 1. Produce all Process and Instrumentation Diagrams (PID's) and Process Flow Diagrams (PFD's) taking into account and integrating the PIDs of Eggersmann.
>
> 2. Produce the Mass and Energy Balance, taking into account and integrating the mass and energy balances of Eggersmann, including the process fluid physical properties.

3. Produce detailed specifications for packages and supplier list, identifying names of recommended suppliers, and identifying those that are single source.

4. Review and approve, any changes made to the above specifications by the Contractor.

5. Produce all General Arrangements (GA) drawings, including the review and verification of Eggersmann Design.

6. All drawings, specifications and calculations to undergo a complete HAZOP and FMEA review prior to "sign off". Any identified issues to be incorporated into the Consultant's design prior to reissue to the Contractor. HAZOP and FMEA are under the responsibility of the Contractor. The Consultant will provide reasonable assistance and support the Contractor.

7. Produce the overall Operating and Maintenance Manuals and As Built drawings, associated with the Consultant's scope of works in accordance with the Appointment. The suppliers shall be responsible for their specific O&M. however the overall process will be managed by the Consultant.

Further requirements.

1. Gas production / quality to be sufficient to operate the CHP engines, and in accordance with the manufacturers requirements.

2. De watered digestate to be in accordance with Schedule 16.

3. Effluent water production / quality to be in accordance with Schedule 16.

4. Utility consumption to be in accordance with Schedule 16.

5. Compliance with EPC Output Specification and EPC Delivery Plan."

13. Turning to the Appointment itself, clause 3 was a collection of somewhat miscellaneous obligations under the heading 'Continuation of Obligations and Project Documents'. These included:

> "3.2 The Consultant acknowledges that it has received and familiarised itself with copies of the EPC Contract.
>
> 3.3 The Consultant acknowledges that it is (and the Consultant shall be deemed to be) fully aware of the terms of the EPC Contract, including the obligations

and potential liabilities of the Contractor arising under the EPC Contract. The Consultant acknowledges that such liabilities are (and such liabilities shall be deemed to be) within the contemplation of the Consultant. The Consultant acknowledges that if it is in breach of this Appointment such breach could result in, amongst other things, a liability of the Contractor under the EPC Contract.

3.4 The Consultant shall not (and shall procure that no Consultant Party shall) by any act or omission on its part (other than an act which accords with the proper performance of the Consultant's other obligations under this Appointment):

3.4.1 constitute, cause or contribute to any breach by the Contractor of any of its obligations under the EPC Contract; or

3.4.2 lead to any diminution or loss of any rights, entitlements or other benefits of the Contractor under EPC Contract."

14. Clause 5 was entitled 'Warranties and General Obligations'. Clause 5.9 was headed' Design Obligations' and contained the following important provision:

"5.9.1 The Consultant accepts full responsibility for designing the Process Technology (including the selection of components for incorporation in the Process Technology) and the Consultant warrants to the Contractor that there has been exercised and will be exercised in the design of the Process Technology all the reasonable skill, care and diligence to be expected of properly qualified and competent design professional experienced in the design of works similar in size, scope nature and complexity to the Process Technology.

5.9.2 The responsibility of the Consultant for the design of the Process Technology as stated in Clause 5.9.1 (Design Obligations) extends to design comprised in the EPC Delivery Plan and the Consultant shall not be relieved of any such responsibility or from liability under its warranty as aforesaid by virtue of any such documents having been prepared, reviewed, approved or commented upon by or on behalf of the Contractor, the Employer the Authority or any other third party, or by virtue of the incorporation of any such documents within this Appointment. The Consultant's responsibility for the design of the Process Technology shall not extend to the detailed design of components

incorporated in the Process Technology save where otherwise stated in Schedule 11.

5.9.3 The Consultant hereby warrants that it has checked the design for the Process Technology as comprised in the documents referred to in Clause 5.9.2 prior to the date of this Appointment, in order to identify any discrepancies, inconsistencies, errors or inaccuracies within or between such design materials or between the design as so stated and any requirement of this Appointment relating to the Process Technology.

5.9.4 Where a discrepancy is identified within the EPC Output Specification or within the EPC Delivery Plan, or between any of the EPC Output Specification and/or the EPC Delivery Plan and/or any Legislation or Consent and to the extent that the same relates to the Process Technology the party discovering the discrepancy shall notify the other of the same. The Consultant shall inform the Contractor in writing of his proposed amendment to deal with the discrepancy and the Contractor shall either accept the proposed amendment or shall instruct the Consultant which of the discrepant provisions it wishes the Consultant to adopt. Where a discrepancy referred to in this Clause 5.9 (Design Obligations) arises from a Change in Law the provisions of Clause 32 (Change in Law) shall apply."

15. Clause 11 of the Appointment was entitled 'Principal Obligations'. For present purposes the relevant provisions are 11.3 and 11.4 which were in the following terms:

"11.3 Subject to the terms of this Appointment the Consultant shall design, commission and test the Process Technology:

11.3.1 in accordance with the EPC Output Specification and Schedule 16;

11.3.2 in accordance with the EPC Delivery Plan;

11.3.3 in accordance with the requirements of all Consents, Key Consents and Legislation;

11.3.4 in accordance with Good Industry Practice; and

11.3.5 specifying suitable components.

11.3.6 Not used.

> 11.4 The obligations in Clauses 11.1, 11.2, and 11.3 are independent obligations. In particular but subject to the Consultant's overriding obligations to exercise reasonable skill and care as more particularly provided in Clause 5.9.1:
>
> 11.4.1 the fact that the Consultant has complied with the EPC Output Specification but not the EPC Delivery Plan shall not be a defence to an allegation that the Consultant has not satisfied the EPC Delivery Plan provided that the EPC Output Specification shall take priority over the EPC Delivery Plan in the event of any discrepancy or inconsistency between them; and
>
> 11.4.2 the fact that the Consultant has complied with the EPC Delivery Plan but not the EPC Output Specification shall not be a defence to an allegation that the Consultant has not satisfied the EPC Output Specification."

16. It is convenient here to refer to Schedule 1 of the Appointment, which contained various definitions. The important ones for present purposes are as follows:

> "Basic Design Proposal" means the basic design proposals prepared by the Consultant for the Process Technology as contained in the EPC Delivery Plan and forming part of the Planning Application…
>
> "Process Technology" means the process engineering of a mechanical-biological treatment ("MBT") plant incorporating wet-anaerobic digestion ("AD") treatment…
>
> "Services" means the services to be provided by the Consultant as set out in Schedule 11."

17. The Appointment clearly envisaged that there may be extensive development of the Basic Design Proposal and there was a detailed regime for how the design was to be developed and the parties' rights and obligations in respect of that process. Clause 13 was in the following terms:

> "**13. DEVELOPMENT AND SUBMISSION OF DESIGN**
>
> **Procedure for Development and Submission of Detailed Designs**
>
> 13.1 The Consultant shall develop the Basic Design Proposal for the Process Technology to be provided under this Appointment into a fully detailed design

which complies with the EPC Output Specification and the EPC Delivery Plan.

13.2 The Consultant shall prepare and produce design data and such documents as shall be necessary or appropriate for the completion of the Process Technology.

Procedure for Commenting on the Designs

13.3 The Consultant shall, from time to time in accordance with the programme provide the Contractor with such of the developed Works Documents and other information the Consultant has produced or which was produced on behalf of the Consultant as is reasonable and necessary to enable the Contractor to assess and monitor the detailed design for the Process Technology and comment on its compatibility with the EPC Output Specification and the EPC Delivery Plan. The Consultant shall be deemed to have complied with its obligations under this Clause 13.3 if it has provided information required under it by means of a web based document sharing system in accordance with the design development programme contained within the EPC Delivery Plan (as may be updated from time to time).

13.4 The Contractor shall notify the Consultant in writing of any circumstances where the Works Documents as developed by the Consultant are inconsistent with the EPC Output Specification and the EPC Delivery Plan of which it becomes aware as a result of or during the Contractor's review of such documents. Such notification shall be provided to the Consultant as soon as is reasonably practicable in the circumstances after the Contractor receives the Works Documents and in any event within 15 Business Days after receipt of the relevant Works Documents. The Contractor shall, if such notification is given, provide the Consultant with detailed particulars of the inconsistency.

13.5 The Consultant shall have due regard to (but shall not be bound by) the Contractor's comments provided under Clause 13.4 (if any). The Consultant shall, as soon as is reasonably practicable in the circumstances after receipt of the Contractor's comments and detailed particulars provided under Clause 13.4, notify the Contractor in reasonable detail of the intended course of action that the Consultant proposes to adopt (if any) in relation to such comments.

> 13.6 No approval, proposal or comment in relation to any of the Works Documents by the Contractor or the Contractor's Representative or any party acting on behalf of the Contractor or any adviser to the Contractor shall affect or diminish the obligations of the Consultant under this Appointment.
>
> 13.7 The Consultant shall not, without the prior consent of the Contractor, develop or change the design so as to knowingly cause the cost of procuring, installing and commissioning the Process Technology pursuant to the EPC Contract to increase."

18. Hand-in-hand with the development of the detailed design went the ability of either party to make changes to the design. This was dealt with in clause 31. Although clause 31.1 allowed both MW (as contractor) and HEC (as consultant) to propose changes to the design, clause 31.2 prohibited MW from proposing changes which:

> "31.2.1 would cause any Key Consent or Consent to be revoked (or would require a new Consent or Key Consent to be obtained to implement the relevant change to the Process Technology which the Contractor is reasonably likely to be unable to obtain);
>
> 31.2.2 requires the Process Technology to be performed or a change to be implemented in a way that infringes Legislation or Guidance;
>
> 31.2.3 not used;
>
> 31.2.4 would materially and adversely affect the Consultant's ability to deliver the Services in a manner not fully compensated in accordance with this Clause 31;
>
> 31.2.5 would materially and adversely affect the health and safety of any person;
>
> 31.2.6 would require the Consultant to implement the change to the design of the Process Technology in an unreasonable period of time or is otherwise the subject of an Contractor Notice of Change which cannot reasonably be complied with;
>
> 31.2.7 would cause a delay to the Planned ATC2 Date of more than 3 Months or would materially alter the basis of the ATC1 Tests and/or the ATC2 Tests;
>
> 31.2.8 not used;
>
> 31.2.9 would represent a departure from Good Industry Practice; and/or

31.2.10 the Employer does not have the legal power or capacity to require implementation of."

There were no similar restrictions on the types of changes that could be proposed by HEC.

19. Clauses 31.4 – 31.24 dealt with the detailed procedure to be followed in respect of changes proposed by MW. Similar provisions applied to the changes proposed by HEC, and these were set out at paragraphs 31.25 – 31.37 of the Appointment. The important provisions were the following:

"31.26 The Consultant Notice of Change must:

31.26.1 set out the proposed Process Technology Change in sufficient detail to enable the Contractor to evaluate it in full;

31.26.2 specify the Consultant's reasons for proposing the Process Technology Change, including whether or not the change is required as a result of a Change in Law;

31.26.3 if the change is required as a result of a Qualifying Change in Law, indicate what sums, if any, will be payable by the Contractor;

31.26.4 indicate any implications of the Process Technology Change;

31.26.5 indicate, in particular, whether a variation to the Fee is proposed (and, if so, give a detailed cost estimate of the proposed variation to the Fee);

31.26.6 confirm that the Consultant considers that all necessary Key Consents and/or Consents have been obtained or indicate the process for obtaining such Key Consents and/or Consents where not obtained;

31.26.7 indicate if there are any dates by which a decision by the Contractor is critical; and

31.26.8 set out the timetable for implementing the proposed Process Technology Change.

31.27 The Contractor shall evaluate the Consultant's proposed Process Technology Change, in good faith, taking into account all relevant issues, including whether:

31.27.1 a change in the Fee will occur;

31.27.2 the Process Technology Change may affect the quality of the Process Technology or the likelihood of successful delivery of the Process Technology;

31.27.3 the Process Technology Change will interfere with the relationship of the Contractor or Employer with third parties;

31.27.4 not used;

31.27.5 the residual value of the Facility is reduced; or

31.27.6 the Process Technology Change materially affects the liabilities, risks or costs to which the Contractor is exposed.

31.28 As soon as practicable after receiving the Consultant Notice of Change (but in any event within 5 Business Days), the Parties shall meet and discuss the matters referred to in it. During their discussions the Contractor may propose modifications or accept or reject the Consultant Notice of Change.

31.29 If the Contractor accepts the Consultant Notice of Change (either without modification or with such modifications as are agreed):

31.29.1 the Parties shall consult and agree the remaining details as soon as practicable;

31.29.2 the Parties shall enter into any documents to amend this Appointment or any Project Document which are necessary to give effect to the Process Technology Change; and

31.29.3 the Consultant shall implement the Process Technology Change within the period agreed between the Contractor and the Consultant (acting reasonably) and specified in the Contractor's notice of acceptance.

…

31.31 If the Contractor rejects the Consultant Notice of Change, it shall not be obliged to give reasons for its rejection and the Consultant shall not be entitled to

> reimbursement by the Contractor of any of its costs save where the Consultant investigates or further develops a Consultant Notice of Change, in good faith, in response to the Contractor's acceptance of such notice pursuant to Clause 31.29 and the Contractor subsequently withdraws its acceptance of such notice.
>
> 31.32 Unless the Contractor's notice of acceptance specifically agrees to an increase in the Fee, there shall be no increase in the Fee as a result of an Process Technology Change proposed by the Consultant provided that unless otherwise agreed the Consultant shall not be obliged to implement such Process Technology Change where the Contractor has not agreed such an increase where the Consultant Notice of Change indicated that an increase in the Fee is necessary and such increase is not precluded by any other term of this Appointment.
>
> 31.33 If the Process Technology Change proposed by the Consultant causes or will cause the Consultant's net costs to decrease, (taking into account inter alia any costs incurred by the Consultant in implementing such changes) there shall be a corresponding decrease in the Fee on the basis that any cost saving shall be shared equally between the Parties.
>
> 31.34 The Contractor shall not reject a change to the design of the Process Technology proposed by the Consultant which is required in order to conform to a Change in Law."

20. Schedule 3 comprised the EPC Output Specification. That provided that HEC had to comply "with the Contractor's obligations under the EPC Output Specification to the extent that it relates to the Process Technology and the Services". It is unnecessary to set out the EPC Output Specification in any detail but it must be recorded that clauses 1.2, 1.6, 3.1.1, 3.2 and 4.3.1 of the Specification all say expressly, albeit in different ways, that 'the Contractor' (and therefore HEC for the purposes of the Appointment) were obliged to carry out the works in accordance with both the EPC Output Specification and the associated EPC Delivery Plan. Thus, by way of example only, clause 3.2 provided that:

> "The Contractor's responsibilities shall include, but shall not be limited to:
>
> (a) designing, construction, commissioning and hand over to the Employer the Facility that complies with the requirements within this EPC Output Specification and the EPC Delivery Plan."

21. Although there were some errors and inconsistencies in how the documents were described, it is common ground that the EPC Delivery Plan was attached to Schedule 6 of the Appointment. This contained a good deal of design information although, as previously noted, it was regarded by both parties as the basic design, which would then be the subject of detailed work and refinement. Attached to the EPC Delivery Plan was Appendix C, which was an index of the Process Equipment Specifications. It appears that the Specifications themselves formed part of the EPC contract documentation between Biffa and MW, and were not separately attached as part of Schedule 6 of the Appointment. However, although HEC rather boldly took the point in the adjudication that the specifications were therefore not part of the Appointment, that point has properly been abandoned. It was clear to both sides that the index was just a list of specifications, and it was also clear what those specifications were, given that the EPC contract documentation was available to HEC. They were therefore obliged to comply with those specifications.

5. THE ADJUDICATION

22. It is unnecessary to set out in detail the nature of the dispute that arose in the adjudication and the adjudicator's decision. An outline will suffice.

23. MW's claim in the adjudication concerned the decision by HEC to up-rate the agitators and increase the power of the motors that drove them. MW alleged that either the Basic Design Proposal was inadequate, because it understated the required power for the agitators, or alternatively, HEC's decision to up-rate the agitators, just 12 days after the Appointment was signed off, was a consequence of over-design which put HEC in breach of contract. HEC denied the claim, saying that the original design was adequate, and their decision to improve the rating of the motors was due to changes emanating from MW and/or that the cost consequences were not recoverable because the up-rated design was also non-negligent.

24. The adjudicator found that, on the evidence, there was nothing to suggest that the Basic Design Proposal was inadequate. Given that that was apparently agreed by both experts, that finding is unexceptionable. He found against HEC on the question of changes: he said that nothing was changed between the Basic Design Proposal and the provision of the next stage of the design, just 12 days later, which incorporated the more powerful motors. But he found that HEC's overriding contractual obligation was to produce a design which was non-negligent in accordance with clause 5.9.1 and that, since the modified/improved design was also non-negligent, no claim for breach of contract against HEC could arise.

25. It is worth setting out the stark consequences of this decision for MW. By the time they entered into the Appointment with HEC, they were committed to a fixed price with Biffa under the EPC contract. That contract was based on the EPC Delivery Plan. So, taking the example in play in the adjudication, it was based on agitators with a specified power. On the adjudicator's finding, even though the up-rated design was going to be more expensive for MW, and although they had no mechanism of recovering that additional expense under the EPC contract, they could not recover the extra cost from HEC because the enhanced design was not, of itself, negligent.

26. The adjudicator, Mr Peter Collie, produced a lengthy and thoughtful decision on 28 March 2014. The critical parts of the decision are concerned, first with the interplay

between the obligation to take reasonable skill and care and the obligation to comply with certain specific documents, such as the EPC Delivery Plan; and secondly, with the design development procedure set out in clause 13, culminating in the prohibition in clause 13.7 on HEC not knowingly causing the costs to increase. As to the relationship between the obligation to design with reasonable skill and care and the other provisions, the adjudicator said this:

> "81. The conclusion I draw from both reports is that the pre-contract design was adequate. This is an agreed position and I ascertained from the detailed calculations why both are able to say it is adequate. It is clearly at the bottom end of the range of adequate designs but nonetheless it is adequate. The final design might be described an optimum design, but it cannot be said to be outside the range of designs that a reasonably competent designer could design. I draw this conclusion from the fact that [HEC's expert] has demonstrated that final design moves the D/T to the optimum design point of 0.25 and the energy density further towards the middle of the range, rather than the bottom of the usual energy density range for that type of process.
>
> …
>
> 86. Thus it was clearly envisaged that the Basic Design Proposal would be developed in to a fully detailed design. Thus at the very least HEC were to review the Basic Design Proposal. If they reviewed the Basic Design Proposal and changed the basic Design Proposal to a design that is optimum, rather than adequate, they cannot be said to have breached either clause 5.9.1 or 13.1. It would only be a breach of clause 5.9.1 if the final design was outside the range of designs that a 'properly qualified and competent design professional experienced in the design of works similar in size, scope, nature and complexity to the Process Technology' could have produced. [The defendant's expert] says that it was in this range. [The claimant's expert] says that as nothing changed there is no justification for changing the Basic Design Proposal, but I do not read his evidence, taken as a whole, as saying the final design is outside the range that a reasonable and 'properly qualified and competent design professional experienced in the design of works similar in size, scope, nature and complexity to the Process Technology' could have produced.
>
> …
>
> 97. MW seek to persuade me that the obligations in clause 11 require HEC to meet the separate obligation set out in clause 11.3. What they are in effect saying is that HEC were to achieve the obligations by design that precisely achieves those obligations, no more and no less, than the requirement set out. To my mind that would be both a very onerous obligation and

> would in effect make the contract redundant because everything would have already been completed as far as HEC were allowed."

27. As to the operation of clause 13, and clause 13.7 in particular, the adjudicator held that clause 13.7 was "less than clear". He found at paragraph 105 that there was no prohibition on HEC developing or changing the basic design and, although it is not entirely clear from his decision, he appeared to conclude that the benchmark (i.e. the design from which HEC could not deviate) was not the Basic Design Proposal but the detailed design required by clause 13.1 (paragraph 109 of the decision). That is certainly how the parties have understood it.

28. The adjudicator's overall conclusion is at paragraph 106 of his decision:

> "If the design is carried out with reasonable skill and care, then the fact that it would cost M&W more to implement that design cannot be a breach of contract. To say otherwise makes HEC the guarantor of both the design and the price and I think it would require very clear words to place a consultant rather than an EPC contractor in that position."

6. THE FUTURE CLAIMS

29. At one point in his submissions, Mr Bowling, on behalf of HEC, complained that the court should not allow itself to be influenced by MW's references to future claims (in respect of which they argued that a final determination of HEC's contractual obligations would be very helpful) because these future claims were vague and hypothetical. I do not accept that submission. On the contrary, it is plain that MW have worked hard to indicate to HEC what the future claims might be and therefore how and why, on their case, it is important for the court to resolve the dispute as to the nature and scope of HEC's contractual obligations.

30. Thus, as long ago as 8 February 2013 (by letter mis-dated 8 February 2012), MW identified claims worth over €9 million Euros. These claims were identified by reference to a draft Statement of Case which set out in some detail the additional costs incurred by MW arising out of the detailed design by HEC. It is right to note that many of those individual elements were made up of allegations of over-design, specifically a failure to produce a design that complied with the EPC Delivery Plan or the EPC Output Specification. A detailed claim update was subsequently provided on 16 September 2013 which identified claims totalling €16.5 million Euros. Many of the individual items were concerned with specification changes and additional design costs, and again illustrate the importance of the underlying nature of HEC's obligations.

31. Finally on this topic, there is the witness statement from Mr O'Brien in these proceedings dated 17 October 2014 which again sets out the current state of the individual claims to be brought against HEC and again emphasises the significance of the underlying contractual obligations. The claims outlined in this way cannot be called hypothetical or vague.

7. THE UTILITY OF THE DECLARATIONS

7.1 The Law

32. Declaratory relief should be granted 'sparingly' by the courts (see ***Russian Commercial and Industrial Bank v British Bank of Foreign Trade Ltd*** [1921] 2 AC 438). A declaration should never be granted in circumstances where it would be, at best, hypothetical. In ***Maxwell v Department of Trade and Industry*** [1974] 1 QB 523, the claimant sought to complain about a Board of Trade investigation and report. Although the complaints were upheld, the court was unable either to set aside the report or declare it null and void. Accordingly, the claimant sought a declaration that natural justice had not been observed in the making of it. Lord Denning MR said at page 536:

> "Whilst I would not restrict in any way the court's jurisdiction to grant a declaration, the case must be very rare in which it would be right to make such a bare declaration in the air. This is certainly not a case for it."

33. The modern approach is, I think, properly summarised at paragraph 4-98 of ***The Declaratory Judgment (4th Edition)*** by Zamir and Woolf. The learned authors say:

> "In practice what would be determinative of whether relief is granted is the court's assessment of whether the declaration will serve some useful purpose. The court will not grant declarations which are of no value but, if a declaration will be helpful to the parties or the public, the courts will be sympathetic to the claim for a declaration even if the facts on which the claim is based or the issue to which it relates can be described as theoretical. However if a case falls within one of the five classes set out above the prospects of obtaining a declaration will be substantially reduced. It can therefore be said that there is a substantial risk of the grant of a declaration being refused unless:
>
> 1. There is a dispute between the parties;
>
> 2. The dispute arises from specific facts which are already in existence;
>
> 3. The dispute is still alive; and
>
> 4. Its determination will be of some practical consequence to the parties or the public."

34. It is thought that this approach can be seen in a number of modern TCC cases, including those concerned with adjudication. Thus, in ***Walter Lilly and Co Ltd v DMW Developments Ltd*** [2008] EWHC 3139 (TCC) I said at paragraph 22:

> "The question was also raised as to the purpose of granting the declarations, particularly given that the declarations that I have identified are of much narrower compass than the declaration originally sought. It is always a difficult question for the judge

> to decide whether or not what he is minded to do is ultimately going to be of any assistance to the parties. All I can say, having looked at the papers, is that it seems to me, potentially at any rate, that the granting of these declarations may be of some assistance to the parties in setting out more clearly the parameters of the dispute between them. I also consider that one of the benefits of these Part 8 proceedings is that it has led to a very clear and cogent case advanced by the defendant as to the alleged breaches of contract on the part of the claimant, in circumstances where no such case (certainly not one in this form) had previously been identified. Accordingly, it seems to me that, in response to the rhetorical question ('Is there any point in granting the declarations identified?'), the answer is Yes."

35. There are a number of cases in which the court granted a declaration after an adjudicator's decision which prevented the successful party from enforcing that decision. Thus, in ***Geoffrey Osbourne Ltd v Atkins Rail Ltd*** [2009] EWHC 2425 (TCC); [2010] BLR 363, Edwards-Stuart J granted a declaration to the effect that the adjudicator had made an error and therefore got the result of the adjudication completely wrong. And in ***TSG Building Services PLC v South Anglia Housing Ltd*** [2013] EWHC 1151 (TCC); [2013] BLR 484, Akenhead J granted South Anglia declarations as to the legitimacy of their action in terminating the contract which meant, in turn, that the adjudicator had been wrong to order them to pay a sum to TSG. ***Hyder Consulting (UK) Ltd v Carillion Construction Ltd*** [2011] EWHC 1810 (TCC), another case in which a declaration was sought in connection with adjudication, was an entirely different situation, concerned with the (unsuccessful) argument that the adjudicator should have sought the parties' views on his interpretation of the contract before issuing his decision.

7.2 Analysis

36. I am no doubt that the declarations sought in this case (or whatever declaration I deem is appropriate on the proper construction of this contract) would be of utility to the parties. Indeed I consider that the point is self-evident, given that they spent all day before the court arguing their very different interpretations of how the Appointment worked. There is a significant dispute between them, and these declarations will provide at least some assistance to the parties in resolving that dispute.

37. Secondly, this is not a hypothetical dispute. This is not a declaration which is sought, to use Lord Denning's words, "in the air". It is grounded in reality. It stems from one adjudication decision (with which MW wholly disagrees) and it is relevant to a whole raft of further adjudication claims which MW want to bring. It has a far-reaching and clear-cut relevance to both past and future disputes.

38. In that context, it is perhaps worth emphasising the extent to which construction adjudication has altered this part of the legal landscape. An adjudicator may come to a conclusion in respect of a relatively modest sum of money, but that decision, and potentially the reasoning too, will be binding on the party who lost. If that conclusion is based on an interpretation of the contract which the loser considers to be erroneous, then that party is entitled (indeed, may feel bound) to challenge it in whatever way he

deems appropriate. That can, of course, include an application to court for an appropriate declaration. Thus the process of adjudication has led, and will continue to lead, to an increase in cases in which the loser in the adjudication seeks declaratory relief from the court. That seems to me to be inevitable, given that the adjudicator's decision is binding unless and until the matter is finally resolved by the court.

39. Applying the four tests referred to in paragraph 33 above, it is plain that:

i) There is a dispute between the parties (and it is very likely that there will be a raft of further disputes);

ii) The dispute arises from the specific facts in the original adjudication, and the future claims raised in the letters and statements to which I have referred in paragraphs 29-31 above;

iii) The dispute is very much still alive: hence the arguments before me at the hearing; and

iv) The determination of the dispute will be of some (possibly great) practical consequences to the parties.

40. Mr Bowling rightly pointed out that HEC have said that they would not seek to argue in any subsequent adjudication that the second adjudicator was bound by Mr Collie's reasoning as to the proper interpretation of the Appointment. That was part of the argument in support of HEC's proposition that, on analysis, the declarations sought by MW had no real utility. But there are two difficulties with that stance.

41. First, whilst HEC would not argue that the second adjudicator was bound by the reasoning of the first, they would argue that his reasoning, or something very like it, was correct as a matter of construction. Thus precisely the same dispute that the first adjudicator and now the court have already heard argued out would be raised all over again, in the next adjudication(s). That would be unsatisfactory and a waste of costs.

42. Secondly, whilst HEC might not expressly be taking the point, the second adjudicator may still be concerned about whether or not he can come to a different conclusion on the interpretation of the Appointment. He may be concerned that it is a matter of jurisdiction, and therefore a matter of law, and not something which the parties can agree to waive. And even if the adjudicator's concerns do not extend that far, he will know that any question of overlap between the decision-making process in the original adjudication, and that in any subsequent adjudication, is far from straightforward, as illustrated by the decision of the Court of Appeal in ***Quietfield v Vascroft Construction Ltd*** [2007] BLR 67 and the later cases such as ***HG Construction Ltd v Ashwell Homes (East Anglia) Ltd*** [2007] EWHC 144 (TCC) and ***Jacques and Another v Ensign Contractors Ltd*** [2009] EWHC 3383 (TCC). In reality, it can often be difficult for a lay adjudicator to work out the effect of an earlier adjudicator's decision, and the extent to which he can or cannot open up matters that arose in that first adjudication.

43. Accordingly, for all the reasons that I have noted, I conclude that I ought to go on and consider the declarations sought in the present case. But I certainly accept Mr Bowling's submission to this (potentially important) extent. In the absence of any

specific allegations of breach, save for the claim that arose in the first adjudication, it would be dangerous for the court to make detailed declarations as to the way in which the Appointment was supposed to operate. Inevitably there comes a time when the factual matrix behind any claim for breach of contract is required in order for the court to reach a detailed conclusion as to the proper interpretation of that contract, and how it impacts on that claim. That necessary caution will inevitably have the effect that the declarations that I am prepared to give in this case will be at a higher level than MW may wish for, and therefore may be of less utility to them than would otherwise be the case. That is not, of course, a reason not to go on and consider/grant the declarations, but it is a practical limit on what those declarations can achieve.

8. HEC's PRINCIPAL OBLIGATIONS

8.1 Reasonable Skill and Care

44. I conclude that the starting point of HEC's obligations was to exercise reasonable skill and care in accordance with clause 5.9.1. To that extent at least, I have reached the same view as the adjudicator.

45. The reason why I consider that this obligation is the appropriate starting point is because all the other obligations under the Appointment are made either expressly or impliedly subject to it. Thus the obligations at clause 11.3 to design, commission and test in accordance with, for example, the EPC Output Specification and the EPC Delivery Plan are made "subject to the terms of this Appointment". That would of course include clause 5.9.1. Furthermore, clause 11.4 makes express the qualification that, although the obligations to comply with, for example, the EPC Output Specification and the EPC Delivery Plan are independent, they are all "subject to the consultant's overriding obligation to exercise reasonable skill and care as more particularly provided in clause 5.9.1."

46. The effect of this is straightforward. If any other obligation on the part of the consultant would mean that he would be acting in breach of his obligation to exercise reasonable skill and care in accordance with clause 5.9.1, then that other obligation is overridden by the obligation to exercise reasonable skill and care. Thus, for example, if, compliance with a particular part of the EPC Delivery Plan would make HEC's design negligent, then they would not be obliged to comply with that part of the EPC Delivery Plan. In the hierarchy of the principal obligations, the obligation to exercise reasonable skill and care is paramount.

8.2 Compliance With Other Requirements

47. The next question is the extent, if at all, to which the obligation to exercise reasonable skill and care was affected by what appear to be other clear obligations on the part of HEC, such as the obligation to design, commission and test in accordance with the EPC Output Specification and the EPC Delivery Plan. The adjudicator appears to have dismissed these obligations in their entirety. His conclusion was that, provided the design was not negligent, HEC could not be in breach of contract. He said that in terms in paragraph 106 of his decision. He also makes that plain in paragraph 86; whilst he there explains why, in his view, a change to the Basic Design Proposal which is optimum, rather than adequate, would not be a breach of clause 5.9.1, he

asserts that an optimum change would also not be a breach of clause 13.1, without explaining how or why he reached that critical conclusion.

48. In my view, the adjudicator was wrong to reach this conclusion. There are a number of reasons for that view.

49. First, HEC had clear and unequivocal obligations to comply with, for example, the EPC Output Specification and the EPC Delivery Plan. Those obligations are set out in unequivocal terms in clause 11.3 of the Appointment, and are littered throughout the other contract documents. Indeed it may be said that the Appointment is wearisomely repetitive on the point. Those repeated obligations cannot simply be ignored; they have to be construed as part of the contractual obligations owed by HEC to MW.

50. Secondly, I am in no doubt that, as a matter of proper contractual construction, these other obligations can be read alongside the over-riding obligation to take reasonable skill and care. HEC were obliged to design in accordance with reasonable skill and care: they were also obliged to comply with the EPC Delivery Plan and the EPC Output Specification. I have already said (paragraph 46 above) that if complying with some part of the EPC Output Specification or EPC Delivery Plan would thereby render HEC negligent, then they were *not* obliged to comply with that part of the EPC Output Specification or EPC Delivery Plan. But if they could comply with the EPC Output Specification and the EPC Delivery Plan *and* produce a design which was not negligent, then they were obliged to take reasonable skill and care to do so. That is what the words of the Appointment say.

51. I should add for completeness that I have not been asked to consider what might happen if the design complied with only one but not the other of these documents. But on the face of it, that problem seems to be covered by clause 11.3.1, which provided that, if there was a clash between the two, the Output Specification took precedence over the Delivery Plan.

52. My conclusion that HEC had to comply with their general obligation to take reasonable care *and* their specific obligations to design in accordance with the EPC Output Specification and the EPC Delivery Plan, is hardly earth-shattering. It is common for consultants to be under a basic obligation (the duty to exercise reasonable skill and care), but also to be obliged to comply with certain specific documents or requirements. In practice, the difficulties only come in contracts where both sets of obligations sit side by side, without any sort of hierarchy provision. But that is not this case. In this case it was clear, for the reasons that I have given, that the obligation to exercise reasonable skill and care trumped all else. The common difficulty therefore does not arise.

53. Of course I can see that, if the allegation is one of over-design, then (leaving out of account for the moment any consideration of the important provisions concerned with changes and design development) it might on the face of it appear odd to penalise the consultant for developing a more conservative design. That was certainly the adjudicator's view, and at paragraph 97 of his decision he said that this would be an onerous obligation and would make the contract redundant. However, I do not understand that last conclusion. I have explained how the specific obligations fit into the Appointment as a whole.

54. I also do not understand why it is onerous, particularly in the circumstances of an alleged over-design. Take the example that Mr Bowling gave during his oral submissions, where HEC had produced an earlier design, incorporated into the Basic Design Proposal, which was adequate but no more than that, and then changed that design so that it was more safely within the design envelope. The change meant that the design no longer complied with the EPC Delivery Plan. His argument was that such a course should obviously be open to HEC. But why should it be? HEC had produced the original Basic Design Proposal and, in the example of the agitators, there was no suggestion that this was anything other than an adequate design. If HEC subsequently produced a design that was not negligent, but failed to comply with the EPC Output Specification or the EPC Delivery Plan (because it up-rated the agitators), then they were in breach of the contractual obligations that required them to design in accordance with those documents. That is not particularly onerous: at root, it involves sticking to the terms of the Appointment as agreed between the parties.

55. For completeness, I should deal with two related arguments raised by Mr Bowling which I do not accept, and which do not affect my analysis set out above. First, he said that HEC had two separate obligations; one was to design, and the other was to advise. He submitted that the problems occurred if you ran these obligations together. In my view, HEC's obligations cannot be pigeon-holed in this way: that is not how they were defined or addressed in the Appointment. In any event, design and advice are just two elements of design development. HEC were obliged to carry out the services defined in the Appointment, and it was for them to ensure that they performed their obligations to the requisite standard and in a holistic way.

56. In addition, Mr Bowling maintained that the Appointment had to be construed in the knowledge that the Basic Design in fact represented about 20% of the total design work. I disagree: the precise stage which the design had reached when the Appointment was signed cannot possibly be an aid to its construction. Of course, the fact that the Basic Design had to be developed, and that modifications and/or changes might be proposed to that design, is highly relevant because it was an inescapable element of the Appointment itself (and I address that in the next Section of this Judgment), but the extent of the possible development/modification is not.

57. Accordingly, before moving on to consider any question of design development or changes, I have concluded that HEC were obliged, not only to exercise reasonable skill and care, but also to comply with the EPC Output Specification and the EPC Delivery Plan, because that is what the Appointment required them to do. Thus, in relation to the agitators, the up-rating of the motors meant that they did not comply with the EPC Delivery Plan. On the assumptions that the adjudicator was right to find both that the original design and the modified design were non-negligent, then I consider that HEC were *prima facie* in breach of contract because they failed to produce a design which was in accordance with the EPC Delivery Plan.

58. This conclusion can be tested against commercial reality. The adjudicator seemed to think that it would be inappropriate to make HEC liable for any additional cost consequences of their failure to comply with the EPC Delivery Plan. But why would that be so unfair? After all, HEC themselves came up with the Basic Design Proposal that was incorporated into the EPC Delivery Plan. Very soon after coming up with the Basic Design Proposal, and very soon after a contract had been agreed between

the parties on the basis of the Basic Design Proposal, they then proposed a design which departed from it, in circumstances where they might reasonably have known that the departure would give rise to additional cost, and in circumstances where they might reasonably have known that MW would not be able to recover that additional cost up the line against Biffa (assuming, for present purposes, that HEC was aware that MW had entered into a fixed price contract with Biffa, which is a factual dispute with which I am not presently concerned). In those circumstances, when HEC were in control of both the original and the subsequent design, why is it unreasonable to expect them to pay for the costs consequences of their failure to comply with the terms of the Appointment?

59. My conclusion on this point is plainly in favour of MW. But before it is possible to reach a concluded view as to whether, in the example of the dispute in the first adjudication, HEC were in fact in breach of contract, it is necessary to go on to consider the process of design changes and development under the Appointment. Depending on the facts (with which I am not presently concerned), I apprehend that this may ultimately be where the real disputes arise between the parties.

8.3 Design Development and Changes

60. All that I have said in relation to HEC's primary obligations (Sections 8.1 and 8.2 above) has not involved a consideration of clause 13 (Design Development) and clause 31 (Changes)[1]. These provisions clearly envisage that the Basic Design Proposal may change, either as part of the design development process or, just as likely, if either party decides that there should be a change. What impact do these provisions have on the primary obligations explained above? In my view, they could be very significant.

61. The first point to make, of course, is that the mere fact that the design was developed by HEC, or that changes to that design were proposed or adopted, did not mean that the developed/changed design did not have to comply with, say, the EPC Output Specification or the EPC Delivery Plan. The primary obligations, discussed above, still applied. Thus, if a design change was proposed and adopted, which was still within the requirements of the EPC Output Specification or the EPC Delivery Plan, there would be no claim. The real issue centres on a change to or development of the Basic Design Proposal which meant that it no longer accorded with either the EPC Output Specification or the EPC Delivery Plan. What was the position then?

62. It follows from my earlier analysis that I consider changes made by HEC during the design development process (clauses 13.3-13.7), which meant that the design was no longer in accordance with the EPC Output Specification or the EPC Delivery Plan, would *prima facie* constitute a breach of contract by HEC. That interpretation is confirmed by the express words of clause 13.7 which prohibits HEC from knowingly increasing the cost by changing the design.

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[1] Although Mr Bowling also attached significance to the term of the contract at 5.9.4 dealing with discrepancies, I do not consider that this provision is of any particular importance as the disputes currently stand. Discrepancies are specific: failures of adjustment between one contract document or another, or within one document itself. There was a procedure for dealing with them. Nobody has argued that any of the extant or future claims arise out of discrepancies. If and when they do, the point may need to be reconsidered.

63. On that specific point, the adjudicator appears to have concluded that the design referred to at clause 13.7 was not the design at the outset of the contract, but the design as it was developed. That is obviously wrong. The reference to "the design" at clause 13.7 could only be a reference to the design as it existed at the time that the Appointment was entered into, namely the Basic Design Proposal. Such a conclusion is the only one that accords with business common sense: there would be no point in having a provision about changing the design once it had been developed, because once the design had been developed it would no longer be (or need to be) changed. Mr Bowling realistically accepted that the reference to the design in clause 13.7 was indeed to the Basic Design in existence at the time that the Appointment was agreed.

64. However, the finding of a *prima facie* breach on the part of HEC in these circumstances is only the beginning of any analysis of their liability for the cost consequences of design development. That is in part because the prohibition on changing the design so as to increase the cost in clause 13.7 is qualified by reference to the prior consent of MW. In other words, if MW agreed to a change arising from design development then it would be open to HEC to argue that MW expressly consented to or approved the consequences. They may even say, in the alternative, that MW waived their right to claim the cost consequences of the particular design development in question, or are estopped from so doing, or are in some way to be taken to have acquiesced in the increase in cost. That would be a matter of fact to be looked at on an item-by-item basis.

65. Again, I do not consider that there is anything difficult or controversial about this. Let us assume that HEC, whilst developing the design, came up with a modification which meant that the design no longer complied with the EPC Delivery Plan because it had, in some material respect, been upgraded. HEC may say that MW were aware that the proposed modification was going to increase the cost and that they understood from their discussions that MW consented to that consequence. HEC may also say that, if MW had objected or raised the question of HEC's liability for the increased cost, they would have had the opportunity to revert to the original design. In other words, HEC could say that they altered their position (in modifying the design by agreement) when, if objection had been raised, they could have reverted to the original design.

66. Of course it is quite impossible for me to resolve any such disagreement because, as I have said, it will turn on the facts. The point of the above analysis is to demonstrate that it could hardly be said to give rise to some novel form of legal or factual dispute.

67. And precisely the same is true for any of the changes suggested under clause 31. Clause 31.37 makes clear that MW will not be liable to pay HEC for changes that arise out of a breach of contract. For the reasons that I have given, a failure by HEC to comply with, say, the EPC Delivery Plan would *prima facie* be a breach of contract. But if, on the facts, HEC can show that the change and its consequences were notified to and accepted at the time by MW, with MW's full knowledge of the effects, then MW may be taken to have evaluated the cost consequences under clause 31.27.6 and approved the change and its consequences under clause 31.29. Again there may be a debate about whether MW waived their right to rely on clause 31.37. Again, all of this will be a matter of fact.

68. I note that the adjudicator was of the view that clause 31 was irrelevant to the issue before him. Mr Bowling submits that he was wrong to take that view. I respectfully agree; clause 31 is potentially important to any consideration of the parties' rights and liabilities arising out of changes to the Basic Design. I should also add that I have not embarked on any sort of detailed analysis of the differences and similarities between clauses 13 and 31, and how – if at all – they dovetail together.

69. In other words, I consider that the finding in MW's favour of a *prima facie* breach if the developed/changed design did not comply with, say, the EPC Output Specification or the EPC Delivery Plan, is only the first half of the debate. The second half, namely issues of notice, acceptance, waiver and the like, whether or not by reference to clauses 13 and 31, may be where, in truth, the real debate between the parties lies. At one point in his submissions in reply, Mr Moran asserted that MW had not lost their right to make these claims for breach of contract. My response is that he may be right and they may not have done; but that is manifestly not an issue which I can decide in these Part 8 proceedings.

8.4 Summary

70. For the reasons that I have given, I consider that:

i) HEC's overriding obligation was to design exercising reasonable skill and care;

ii) HEC had additional specific obligations to comply with, for example, the EPC Output Specification and the EPC Delivery Plan. Those obligations were subject to the overriding obligation of exercising reasonable skill and care, so that if compliance with the EPC Output Specification or the EPC Delivery Plan was not possible without HEC being negligent, then they would not be obliged to comply with the EPC Output Specification or the EPC Delivery Plan;

iii) If, on the other hand, it was possible for HEC to comply with the EPC Output Specification or the EPC Delivery Plan by way of a non-negligent design, then in the first instance they were contractually obliged to take reasonable skill and care to do so;

iv) To the extent that there were modifications or changes to the design which did not comply with, say, the EPC Outline Specification or the EPC Delivery Plan, then under the Appointment HEC were *prima facie* liable to MW for the cost consequences of those non-complaint modifications or changes, **but** such a position would be subject to all issues of fact arising out of any alleged approval or consent, whether by reference to clauses 13 or 31 or any other form of waiver or acquiescence.

9. DECLARATIONS

71. I am not happy with the form of the declarations which are currently sought. The first may be capable of being modified and/or agreed; I do not believe that the word 'unnecessarily' is helpful in the second, and so on. Since I have given my views on the proper construction of the Appointment, it is, I think, a wiser course to invite the

parties to agree the precise form of the declaration(s) required to reflect this Judgment.

10. APPENDIX 1

List of Relevant Facts

1. At all material times:

   1.1 M+W was a contractor specialising in the construction of waste to energy plants.

   1.2 HEC was a consultancy practice specialising in the provision of engineering services associated with waste treatment and recycling technologies.

2. On 12 July 2010 the parties entered into a Process Plant Engineer's Appointment relating to the design, construction, installation, commissioning and testing of a waste treatment plant near Horsham, West Sussex ("the Appointment").

3. HEC's Process Engineering Services were to include the design, installation and commissioning of a waste treatment process plant and facility.

4. The project duly comprises mechanical-biological treatment (MBT) processes, including wet-anaerobic digestion (AD) processes which combine mechanical sorting and a two-stage, mesophilic wet anaerobic digestion.

5. The manner in which the plant works is as follows:

   5.1 Black household waste, as left over after householders have separated out recyclable materials, is delivered to the facility where it is shredded.

   5.2 The shredded waste passes over a series of conveyors and other sorting equipment, which separates out biogradable organic waste that easily rots (mainly food waste) from other materials.

   5.3 This sorting process also separates out metals which are sent for recycling.

   5.4 The remaining shredded material (i.e. paper and plastic) is used to produce refuse derived fuel (RDF) an environmentally-friendly alternative to fossil fuels.

   5.5 The biogradable organic waste that has been separated is broken down by bacteria in enclosed containers through a process known as anaerobic digestion, which produces two main products, biogas and digestate.

   5.6 In summary, the plant was to be designed such as to recover recyclables, produce RDF materials, recover energy from the combined heat and power (CHP) plant fuelled by the biogas and produce a refined / dried digestate for end use.

6. As to the role of the hydrolysis agitator and digester agitators (which are constituent parts of the anaerobic digestion process) essentially these 'stir' the digestate, to ensure

a homogenous substrate, capable (during anaerobic digestion) of producing biogas later in the process.

7. The 'Basic Design Proposal' (as defined in the Appointment and EPC Contract) was produced after a process conducted by HEC during 2008, 2009 and early 2010; prior to the EPC Contract being entered into between M+W and Biffa on 28 June 2010 and the Appointment being entered into between M+W and HEC on 12 July 2010.

8. HEC developed the basic design proposals over this period.

9. The EPC Output Specification is broken down into three parts and various appendices as follows:

   - Part 1: Overview of the Project Requirements
   - Part 2: Service Outputs
   - Part 3: The Employer's Specific Requirements
   - Appendices A-I

10. The EPC Output Specification also refers to the EPC Delivery Plan and expressly provides that the EPC Delivery Plan shall set out M+W's arrangements for the provision of the waste treatment facility, in response to the requirements contained within the 'Service Outputs' contained within Part 2 of the EPC Output Specification.

11. The Service Outputs in Part 2 of the EPC Output Specification contain details as to the Plant's requirements in relation to waste reception, transfer, treatment and disposal.

12. In summary, it contains the requirements (or 'Service Outputs') for the provision of a facility for receiving waste collected by Waste Collection Authorities (WCAs) and, if appropriate, the private sector and the transfer, treatment and disposal of Authorised Waste.

13. These represent a mixture of design requirements, performance requirements and service requirements.

14. Part 3 of the EPC Output Specification then sets out Biffa's specific requirements in relation to the delivery of a waste processing facility and reception hall that is capable of receiving up to 327,000 tonne per annum (tpa) of waste with Appendix A of the EPC Output Specification revealing a gradual increase of waste to be processed from roughly tpa (tonnage per annum) 200,000 to the max capabilities of slightly over 300,000 in 2035 and beyond.

15. The EPC Delivery Plan consists of the document entitled 'Overall Works Plan' as contained (erroneously) at Schedule 6 of the Appointment – namely Issue 11 dated 17 June 2010 forming Schedule 3, Part 2 to the Appointment.

16. A similar document (albeit Issue 12 dated 25 June 2010) formed Schedule 3, Part 2 to the EPC Contract.

17. The EPC Delivery Plan is broken down into seven sections and various appendices as follows:

1. Executive Summary

2. Process Description (including General Plant Concept, Plant Component details and Process Descriptions for the key component parts)

3. Architectural General Specification

4. Civil & Structural Engineering

5. Mechanical Systems

6. Electrical Systems

7. Fire Suppression

Appendices: 'A. Initial Surface Water Management Strategy'; 'B. Architectural Drawings'; 'C. Process Equipment Specifications'; 'D. Process Equipment Drawings'; 'E. CHP Specification'; 'F. CHP Drawings'; 'G. Electrical Design Specification'; 'H. Water Balance' & 'I. Pump Schedule'.

18. Therefore, whilst the EPC Output Specification agreed between M+W and Biffa details the 'outputs' which the waste treatment facility must meet as required by Biffa and ultimately, West Sussex County Council, the EPC Delivery Plan contains the process plant engineer's Basic Design Proposals in terms of the technical specifications and design details proposed by HEC to meet those requirements.

19. Appendix C of the EPC Delivery Plan agreed between M+W and Biffa in fact contains:

    19.1 A List/Index of process equipment specifications; and

    19.2 A more detailed Table of process equipment specifications.

20. A part of Appendix C concerned the power rating of the proposed agitators, which had been specified by HEC prior to the conclusion of the Appointment.

21. A number of disputes have arisen between the parties concerning, amongst other things, the extent of the design duties owed by HEC to M+W pursuant to the Appointment.

22. The first dispute between the parties concerned HEC's design for the agitators to the hydrolysis and digester tanks. This dispute was referred to adjudication between January and March 2014.

23. The dispute referred by M+W was in relation to the anaerobic digestion (and specifically the hydrolysis and digester tanks) and was concerned with a mismatch between the specification of certain plant to be provided in accordance with and as required by the Appointment and as finally designed by HEC.

24. In summary:

    24.1 Appendix C 'Process Equipment Specifications' of the EPC Delivery Plan specified motor ratings for the Agitators as follows:

    Hydrolysis Agitator: 60 KW;

Digesters 1-4 Agitators: 45KW;

Digester 5 Agitator: 60KW.

24.2 HEC, however, produced a final fully detailed design incorporating the following increased motor ratings:

Hydrolysis Agitator: 110 KW;

Digesters 1-4 Agitators: 75KW;

Digester 5 Agitator: 75KW.

25. The Adjudicator's decision was published on 28 March 2014 ("the Decision").

26. In the Adjudication M+W claimed damages of £598,761.85 in relation to HEC's alleged breach of contract and/or negligence under the Appointment in relation to the design and specification of the agitators.

27. M+W's case was pleaded at paragraph 8 of Referral in the following terms:

"8.1 Either: Subsequent to 28 June 2010, HEC designed and specified an installation in relation to the agitators in breach of contract and/or negligently that was in excess of that contractually required by the contract between Biffa and M+W and/or otherwise deficient (thus causing loss and damage to M+W).

8.2 And / or: HEC was in breach of contract and/or negligent in the production of the tender design and specifications in relation to the agitators prior to the execution of the EPC Contract (thus causing loss and damage to M+W)".

28. In either event, M+W claimed an entitlement to damages in respect of the extra cost it had to incur in completing the Plant in accordance with the final changed design of the agitators - compared to the cheaper specification provided by HEC at the tender stage of the EPC Contract.

29. In short, in dismissing M+W's claim the Adjudicator found in relation to the nature of HEC's design obligations (see paragraphs 81, 86 and 104 of the Decision) that:

29.1 There could only be a breach of clause 5.9.1 if the final design of the Process Technology was outside the range of designs that a properly qualified and competent design professional could have produced;

29.2 The obligation created by clause 5.9.1 was not constrained by the proviso that the final design should be in accordance with the matters referred to at clause 11.3, including the content of the EPC Delivery Plan;

29.3 If the Basic Design Proposal was changed to a design that was optimum rather than adequate HEC cannot be said to have breached clause 5.9.1 or 13.1; and

29.4 If, in compliance with its clause 5.9.1 duties, HEC developed the design in excess of the requirements of the EPC Delivery Plan it was entitled to do so.

30. M+W's case is that the Adjudicator's findings are over-simplified and wrong.

31. M+W has invited HEC to agree that the Adjudicator's findings are wrong, and to agree to the Court giving declarations which provide for an alternative construction advanced by M+W. HEC does not agree with M+W's construction, or with the granting of a hypothetical declaration about the proper meaning of the Appointment, and has therefore refused to do so.

32. M+W accepts that any declarations by the Court as to the proper construction of the appointment will not overturn or otherwise supervene the Adjudicator's Decision such as to permit either party to commence another adjudication over the same subject-matter.

33. After service of the proceedings HEC confirmed to M+W that the Adjudicator's construction of the Appointment is not binding in any subsequent dispute between the parties arising under the Appointment. At no point, whether prior to the commencement of proceedings or at all, did HEC say that it considered the Adjudicator's construction of the appointment in the Decision binding in any subsequent adjudication.

34. HEC's position is that the proper construction of the appointment, and its application to any particular dispute and what does or does not constitute a breach of its terms is a fact-sensitive question (and/or in arriving at the proper construction of the appointment the Court will be materially assisted by doing so in the context of a factual dispute).