Neutral citation number: [2024] EWHC 1666 (Ch)

CONTRACT – Whether contract formed by submission of tender bid and communication of that submission to offeror – Whether contract terminated for repudiatory breach – Measure of damages – Applicability of second limb of Hadley v Baxendale – Whether damages to be reduced by agreement to share profits

BL-2023-MAN-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
BUSINESS LIST (ChD)

MANCHESTER CIVIL JUSTICE CENTRE
1 BRIDGE STREET WEST
MANCHESTER, M60 9DJ

Thursday 27 June 2024

Before:
His Honour Judge HODGE KC
sitting as a Judge of the High Court

BETWEEN:

SUNDORNE PRODUCTS (LLANIDLOES) LIMITED

Claimant

-v-

GEMINOR UK LIMITED

Defendant

Hearing dates: 11 June 2024 – 19 June 2024

Mr NEIL BERRAGAN (instructed by **JMW Solicitors LLP**) appeared on behalf of the Claimant

Mr GREG PLUNKETT (instructed by **Jolliffe & Co LLP)** appeared on behalf of the Defendant

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APPROVED JUDGMENT

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JUDGE HODGE KC:

I: Introduction

1. This is my extemporary judgment following the trial, over seven court days between Tuesday 11 and Wednesday 19 June 2024 (preceded by one day's judicial pre-reading) of a Part 7 claim issued in the BPC in Manchester on 27 January 2023. The claimant is Sundorne Products (Llanidloes) Limited, which trades as **'Potters Waste Management'**. It is represented by Mr Neil Berragan (of counsel), instructed by JMW Solicitors LLP. I shall refer to the claimant as Potters. The defendant is Geminor UK Limited. It is represented by Mr Greg Plunkett (also of counsel), instructed by Joliffe & Co LLP. I shall refer to the defendant as **'Geminor'**.

2. The case concerns a dispute over an alleged contract for the treatment of refuse derived fuel (**RDF**) from domestic waste transported to Immingham from the Isle of Anglesey via a processing and baling plant in Bootle operated by a separate entity known as Gaskells (North West) Limited t/as Gaskells Waste Services (**Gaskells**) for onward shipment to a plant generating energy from waste (**EfW**) in Gothenburg in Sweden. The relevant events took place largely over the period from August 2016 to October 2017. The litigation raises issues of contract formation, repudiatory breach, and damages.

3. This judgment is divided into the following sections:

I Introduction

II Background

III Issues

IV Witnesses

V Contract formation

VI Breach

VII Damage

VIII Conclusions

However, this structure is adopted only for ease of exposition; and the contents of each section have informed the others.

4. In preparing this extemporary judgment, I have borne in mind the recent guidance issued by the Senior President of Tribunals on the giving of written reasons for decisions in the First-tier Tribunal. The underlying principles would seem to me to apply to the courts as well as to the tribunals. I do not propose to identify all of the evidence relied upon in reaching my findings of fact, or to elaborate at undue length upon my conclusions on any issues of law or to express every step of my reasoning. Rather I shall refer only to the main issues in evidence in dispute and explain how those issues essential to the court's conclusion have been resolved. I shall hope to be clear, crisp and concise. However, that does not mean that I have ignored the totality of the evidence in this case.

5. In preparing this extemporary judgment, I have read back through the daily transcripts of the evidence and the oral submissions, and I have re-read the helpful skeleton arguments of both counsel. Since the submissions of both counsel are fully set out in their skeleton arguments, and in the case of Geminor in the defendant's counter-schedule of loss, and they are recorded in the relevant daily transcripts for Days 6 and 7, I will not burden the reader by repeating them at length in this judgment.

II Background.

6. Before the trial, Mr Berragan had produced a revised detailed chronology, extending to some 44-pages, cross-referenced to, and incorporating extracts from, the relevant documents. Reference can be made to this chronology for a more detailed understanding of the history of this dispute, although it needs to be borne in mind that a few further relevant documents were produced as the trial progressed.

7. The essence of the dispute is set out in a non-controversial manner in the case summary. I have supplemented this by reference to the section of Mr Berragan's trial skeleton headed 'Background', which Mr Plunkett also accepted was non-controversial.

8. Potters is a limited company that specialises in waste management. Geminor is a limited company that specialises in the supply of waste products for energy recovery, known as energy from waste (or EfW). At the relevant time, Geminor essentially acted as a broker rather than an actual supplier.

9. On 4 August 2016, the Isle of Anglesey County Council (**the Council**) issued an invitation to tender. The parties began discussions with a view to submitting a joint tender to the Council. On 7 September 2016, Mr James Maiden (for Geminor) and Ms Debbie Potter (for Potters) both signed a written memorandum of understanding (or **MoU**).

10. At 11.52 on 9 September, Mr Carter emailed Mr Maiden, stating:

We need signed confirmation from you as evidence of the tender that you agree to provide us with the services as described.

11. Mr Maiden replied at 12.13:

Writing it at the minute, will be with you shortly. Along with signed MoU. Can you forward a copy of the completed bid, when done, for our review/record?

12. At 13.04 Mr Maiden emailed Mr Carter attaching (without further comment) a letter of support, the signed MoU and the Geminor Group 2015 Annual Report. All three of these emails were also copied to Ms Lindsay Davies and Ms Debbie Potter.

13. Potters submitted its tender bid to the Council before the deadline of 11 am on Monday 12 September 2016. The quoted price for the second option, of residual waste reception, haulage, and treatment, was £105.50 per tonne. The details of the proposed services were set out in the service delivery plans which comprised appendix 5 to the

tender submission. This was a 42-page document containing full details of the offer and identifying each of the participants.

14. Mr Carter forwarded the Council's email acknowledging receipt of Potters' tender submission to Geminor at 5 pm on Monday 12 September.

15. Residual household waste was to be collected on Anglesey and delivered to a reception and transfer station at Gaerwen. The waste would be loaded into HGVs operated by Potters and transferred by road from Anglesey to the materials recovery facility operated by Gaskells in Bootle. Gaskells were to process and sort the loose waste as appropriate, removing recyclables and shredding, if required, prior to processing by compacting in a baler and wrapping the bales produced. These RDF bales were then to be collected by Geminor's nominated haulier, ET Morris of Hull, which would transfer the bales by road to the port of Immingham in north-east Lincolnshire. From there the bales would be unloaded by DFDS Seaways (**DFDS**) and shipped to Gothenburg in Sweden. Geminor would then be responsible for removing the bales, splitting them, and transferring them to a thermal treatment plant operated by Renova AB.

16. In his written skeleton argument, Mr Plunkett invited me to consider three documents in a little detail. The first is the memorandum of understanding signed by Mr James Maiden (for Geminor) and Ms Debbie Potter (for Potters) on 7 September 2016. Relevant provisions are as follows:

BACKGROUND

The parties intend to jointly bid for the Isle of Anglesey County Council ('IoACC') Service Contracts/opportunities, namely: Residual Waste Haulage and Treatment Service and/or Residual Waste Reception, Haulage and Treatment. Should the Parties bid for the Services be accepted by IoACC the Parties will mutually operate the Services.

2.0 PURPOSE, RELATIONSHIP OF THE PARTIES

2.1 The purpose of this Agreement is to establish the principles governing the relationships of the Parties with each other, IoACC and third parties.

2.2 Nothing contained herein is intended to create a partnership or any other separate legal or corporate entity. No Party has the right to represent another Party or to enter into any commitment on behalf of another Party without such Party's prior written consent.

2.3 The Parties agreed to cooperate in the preparation and submission of the Proposal. In the event of the award of the contract to the Parties on terms accepted by each of the Parties in writing, to perform the Contract on the terms set out in this Agreement.

3.0 EXCLUSIVITY

3.1 The Parties agree to cooperate on a strictly exclusive basis and that if and when the Services is accepted by IoACC, Parties shall enter into the Contract upon conditions to be mutually agreed upon.

3.2 For the duration of this Agreement, each Party shall not submit a proposal for the Services bid without effort and agreement of both Parties.

4.0 SCOPE OF WORK

4.1 The scope of supplies and services required for the Services ('Scope of Work') shall be agreed upon at a later date.

5.0 PREPARATION AND SUBMISSION OF THE PROPOSAL

5.1 Each Party shall be responsible for preparing the content of the Tender for its Scope of Work and for ensuring that its scope of work is complete in all respects for the purpose of the Proposal. The Parties shall provide each other promptly with all information and assistance reasonably required for the purposes of the preparation of the Proposal.

5.2 Each Party shall bear its own costs arising in connection with the preparation of the Proposal, except as may be otherwise agreed in writing.

5.3 Each of the Parties shall sign or approve the Proposal in writing prior to its submission to the Client. The Proposal shall not be submitted unless it is so signed or approved by the Parties

...

7.0 PROJECT LEADER

Sundorne Products (Llanidloes) Ltd t/a Potters Waste Management is appointed as 'Project Leader' as the structure of the tender requires

...

10.0 CONSORTIUM AGREEMENT

10.1 The Parties shall negotiate together in good faith with the aim of entering into a consortium agreement (the 'Consortium Agreement') to define in more details of the Scope of Work of each of the Parties and the rights, obligations and liabilities of the Parties towards each other, the Client and third parties in accordance with the principles set out in this Agreement.

10.2 The Parties undertake to use their best efforts to conclude and sign the Consortium Agreement as soon as possible, prior to the submission of Proposal to IoACC but in any event prior to award and signature of a Contract with IoACC

...

13.0 EFFECTIVENESS

13.1 The Agreement shall become effective upon the date on which it has been signed by all Parties and shall expire if terminated in writing by all Parties or on the occurrence of any of the following events:

- *written notification from IoACC that IoACC does not intend to proceed with the Services with the Parties;*

- *the date of signature and effectiveness of Consortium Agreement between the Parties*

17. Mr Plunkett submits that Potters breached the terms of clauses 3.2, 5.3 and 10.2 of the memorandum of understanding. Mr Berragan points out that no consequences are pleaded as flowing from any such breach: It is not pleaded that Potters repudiated the memorandum of understanding or that Geminor accepted any such repudiation; and there is no counterclaim for damages nor any plea of set off.

18. The second document is an offer letter dated 'Thursday' 7 September 2016 to Mr Richard Carter of Potters and signed on behalf of Geminor by Mr James Maiden, Country Manager UK. (It is common ground that 7 September 2016 was a Wednesday.) This offer letter is headed **'Re: Offer for RDF to Recovery Isle of Anglesey Contract'**. It reads:

With reference to the Isle of Anglesey County Council (IoACC) contract we have now completed our logistical and recovery capacity modelling for this opportunity and are pleased to make the following offer for the supply of services to Potters Waste Management.

TO: Supply of R1 compliant recovery of waste to energy, inclusive of all logistical and regulatory costs, collected from Gaskells Waste Services Ltd, 17 Foster Street, Liverpool L20 8EX.

The key parameters of our proposal are laid out in the table below:

Waste Description	Destination	Transportation	Price per tonne (£)	Remarks
RDF baled, 12k tpa	Immingham – Gothenburg, Sweden	40ft curtainsider, cassettes	70.00	Price based on a 28 tonne load

The offer is based on an agreement which starts on 1 February 2017 (TBA) and ends the 21 July 2018.

Deliveries can start as of (TBA).

Our proposal is subject to the following conditions:

Payment terms are 14 days from invoice date, unless otherwise agreed in writing.

Interest on overdue payments will be charged according to legal provision according to UK law.

This offer is open for acceptance for 14 days from the date of writing.

VAT at the prevailing rate is additional to the above quoted rates.

Our proposal is subject to Geminor UK's standard terms and conditions of trade.

The price listed is based on the foreign currency exchange rates at the time of quoting. These rates are detailed below and form the currency baseline. The parties can request renegotiation of prices in the case where fluctuations in the exchange rate +/- 3%, from the currency baseline ...

We trust that we have interpreted your requirements correctly and that our offer is of interest to you.

We will be in touch shortly to discuss the means of progression. If you should require anything further, please do not hesitate to contact the undersigned.

19. The third document is Geminor's letter of support which (together with the signed memorandum of understanding) was sent by Mr Maiden to Mr Carter as an attachment to an email timed at 13.04 on Friday 9 September 2016, the last working day before the deadline for the submission of the tender offer to the Council. This letter, dated 9 September, 2016 was addressed to Mr Carter and signed by Mr Maiden. It is headed (in bold): **"Re Isle of Anglesey County Council - Residual Municipal Waste Processing and Recovery"**. The letter reads:

I write with regards to the above tender opportunity which is being bid jointly by Potters and Geminor.

I confirm that Geminor UK Limited will underwrite the offer of residual municipal waste generated by IoACC for a period of 18-months, commencing on 1st February 2017 with the option for 2 further extensions of 12 months each.

We understand that the volume of material to be recovered under this contract will be c. 17,000 tonnes per annum. We understand that the actual annual volume of material output may be subject to reduction as a consequence of recyclables being extracted from the residual stream and changes that IoACC plans to implement to its collection system.

The Geminor Group has contracted RDF offtake capacity for in excess of 1,100,000 tonnes per annum across 70 distinct off-taking facilities, with c. 400,000 tonnes annual export of RDF from the UK and Eire.

I look forward to working with you.

20. During the course of the trial, apparently on Friday 14 June 2024 (and thus after Mr Carter's evidence had been concluded), Geminor's solicitors gave additional disclosure of an email from Mr Carter to Lindsay Davies (of Geminor), and thus common to both parties, timed at 14.17 on 1 September 2016, of earlier drafts of:

(1) a memorandum of understanding, on Potters' headed note paper, addressed to Mr Maiden, confirming the intention of the Potter Group (a) to bid for the services to be conducted for one or both of the Council residual waste tenders, and (b) to work exclusively with acting as a sole sub-contractor in regard to the supply of energy from waste (EfW) treatment capacity and related services; and

(2) a letter of support from Mr Maiden to Potters confirming Geminor's co-operation with Potters in the public procurement process to secure a long term supply of 20,000 tonnes per annum for the duration of the proposed residual waste contract with the Council.

These two documents were described as 'initial MoUs'; and Ms Davies was invited to comment as she considered necessary.

21. In closing, Mr Plunkett indicated that had he known about these documents earlier, they would have featured prominently in his submissions. He relies upon the inclusion in the former document of the concluding words *"Detailed terms will be subject to further Contractual Agreement"*; and in the latter document to Geminor's confirmation *"that we agree to process wastes in accordance with our usual acceptance criteria (attached) (subject to a final contract)"*.

22. Under cover of an email timed at 17.51 on October 2016, the Council notified Potters that the tender had been accepted for waste reception, together with haulage and treatment services, subject to a mandatory standstill period until 24 October. On the following day Potters advised Geminor of this fact.

23. A draft consortium agreement was drafted by solicitors instructed by Geminor (Grindeys) on 21 October 2016; and Geminor submitted this to Potters on 24 October for Potters to review. Mr Carter sent an amended version of this draft to Mr Maiden (copying in Ms Davies) on 3 November, commenting*: "Please see attached. I think the tbc's would be better done face to face. Would you be able to come down to Welshpool from 16th onwards after Debbie returns from holiday?"*

24. In due course, a meeting took place between representatives of Geminor and Potters at the latter's offices in Welshpool on Monday 28 November to discuss amendments to the consortium agreement. However, the parties never reached final agreement upon its terms, and no further contract was signed between Potters and Geminor. It is Potters' case that, as the consortium agreement was never signed, the MoU continued to govern the contractual relationship between the parties in relation to the Anglesey contract, following the acceptance of the tender bid. Geminor's primary position is there was no contractual relationship at all between the parties.

25. Potters' case is that the following were express terms of the contract:

(1) In order to fulfil the Anglesey contract, Potters would transport the Anglesey waste to its sub-contractor Gaskells in Bootle, Merseyside, who would prepare bales of refuse derived fuel. Geminor (by its haulier) would collect the baled RDF from Gaskells for onward shipment at a rate of 12,000 tonnes per annum, for which Geminor would be paid £70 per tonne.

(2) The integrity of the bales would be checked at Immingham Docks and any badly wrapped bales that were deemed unsuitable for shipping would be quarantined and rejected. Should this eventuality occur, the bales would be returned to Gaskells for reprocessing.

26. Potters were being pressed by the Council to sign a formal contract for the Anglesey waste pursuant to their successful tender bid. This they did at some time between 15 and 19 December 2016. The initial contract period (subject to options to extend) was from 1 February 2017 to 31 July 2018. The contract incorporated the appendix 5 service delivery plans in Schedule 12.

27. By an email timed at 16.09 on 19 December, Mr Carter (of Potters) wrote to Mr Maiden and Ms Davies (of Geminor) asking whether Geminor had been able to amend their contract documents as discussed following their meeting at the end of November. I take this to be a reference to the consortium agreement. Mr Carter also notified Geminor that Potters had "now signed with Anglesey and also won the additional municipal buildings collection tender". Mr Maiden responded, somewhat testily, by email at 09.31 the following morning as follows:

The off-taker has not confirmed that they will take any further material, > 12K [greater than 12K], at the original price. As we discussed at our meeting. So you are at risk there.

Also, as a consortium we are supposed to agree our contract before you commit to IoA???? Our agreement clearly states this!!!!!

I am on leave until the new year ... I will discuss with you then.

28. At 3.03 pm on 21 December 2016, Mr Carter forwarded the emails from the Council by which they had clearly been chasing the signed contract. He replied:

See below in regard to contract signing.

Would you have had an alternative proposal other than to have signed the documents?

There is no documented response to this rhetorical question from Geminor. Mr Carter said that Mr Maiden did not reply to this email.

29. At paragraphs 57-60 of his witness statement, Mr Maiden recounts that he was *"shocked"* when he received Mr Carter's email of 19 December. It was Mr Maiden's opinion that Potters was treating Geminor like a sub-contractor rather than a joint partner.

30. There were delays before Geminor accepted any bales from Potters, which it only started to do in June 2017. After deliveries started, bales were rejected on the grounds of bale quality on two occasions. On 15 August 2017, one load was rejected at Immingham. This led to the temporary suspension of collections. Ms Sarah Gething (Gaskells' commercial manager) investigated the problem; and she provided a letter of apology, and assurances for the future, on the same day. She explained:

The person who should have been supervising the load was unavailable when the vehicle arrived and a different person was loading the material. All staff have been spoken to today and measures put in place to stop this from happening again.

As you are aware I am on annual leave at the moment but I have spoken to the relevant people on site and will take further action on my return.

I can assure you the bales due for collection moving forward will be of the correct quality.

Please confirm your intentions with regards the next scheduled load.

These assurances were accepted, and Geminor confirmed that collections would resume on Monday 21 August.

31. On 6 September 2017, DFDS notified concerns about bale quality dropping, but it confirmed on 7 September that it was prepared to accept the current bales, although it would reject further loads if they continued like this or deteriorated further. However, a full load was rejected later that same day Mr Gaunt (of DFDS) completed a case report, complaining of unstable, soft and damaged bales, unfit for the cassette upon which they were to be shipped, and exposed waste. He commented: *"bales not fit for shipment"*.

32. Collections were again suspended. Ms Gething again investigated, and she provided a detailed response by way of email to both Geminor and Potters, timed at 13.10 on 8 September, as follows:

Further to my earlier email I have now spoken to all concerned.

My findings are as follows:

- On the morning of Wednesday 6th September all prepared bales were checked by the Shift Supervisor

- During this check any bales that didn't meet the required specification were identified and segregated. They should then have been retreated e.g. rewrapped, broken and re-baled, etc.

- The operative tasked with retreating the substantive bales failed to carry out his job

- The shift supervisor failed to check the bales as they were being loaded

There is no excuse for this and therefore disciplinary proceedings have commenced. Disciplinary meetings will be held early next week.

Following this and the rejected load in August (while I was on holiday) I will make it my personal responsibility to check all bales that have been produced to ensure they are suitable prior to them being sent out.

I can only apologise for the inconvenience this has caused.

If you would like to discuss this further, please feel free to contact me.

Collections resumed again on 12 September 2017.

33. On 27 September 2017, DFDS again raised concerns about bales from three lorry loads which had already been loaded onto a cassette awaiting shipment to Gothenburg. Emails indicate that DFDS nevertheless regarded these bales as suitable for shipment. However, following email exchanges with Geminor, and acting on Geminor's instructions, on 28 September, DFDS rejected the three loads which had been placed on the cassette, together with a further six loads which had been delivered on 27/28 September and had already been loaded onto two further cassettes. These email exchanges are as follows:

<u>27 September</u>

An internal DFDS email, timed at 10.17, from Steve Gaunt to Mike Hughes:

Hi Mike,

Attached are photos of completed cassette of Liverpool bales, as shown in pics there are fluids leaking from bales and they are extremely smelly.

At 11.32, a reply from Mike Hughes:

Thanks Steve.

What's your thoughts? They going to be OK?

At 13.31, a response from Steve Gaunt:

Afternoon Mike,

Although the bales are smelly and fluids dripping I believe due to number of loads arriving they shall have a quick turnaround and depending on load requests from Renova they'll not be on terminal long.

If they stood too long on terminal I believe due to how compact they are the lashing will become loose and bales begin to collapse under their own weight. We loaded 3 full loads + 11 bales toa mega and payload reached 93.764 kgs, possibly due to water content within the bales.

28 September

Mike Hughes forwarded his email exchange with Steve Gaunt to James Maiden (of Geminor) at 10.21, stating:

Further update from yesterday, cassette pictures to follow

Only two minutes later (at 10.23), James Maiden replied to Mike Hughes (addressing his email also to Oliver Caunce and James Crouch of Geminor, and copying in Nick Holmes and Steve Gaunt of DFDS) as follows:

Mike

Given the below comments you have to surely reject these bales.

They are soft, liquids are leaching from them and not regular (lots of different sizing, shapes)

Clearly there must have been some earlier contact between Mr Hughes and Mr Maiden, but Geminor's response to Potters' request for further disclosure has been that there is nothing further to disclose.

At 11.13 am (and so some 50 minutes later) Mr Caunce sent an email to Mr Carter, copying in Ms Gething, Daniel Richardson (of DFDS), Mr Maiden, and Mr Crouch (of Geminor). This attached site photographs and port photographs, and reads:

There are several loads that we need to reject on the grounds of bale quality as not suitable for shipment. Please see attached:

Photos from the port of bales on the cassettes and as they arrive. The report from the port is that '... The bales are smelly and fluids dripping ... the lashing is becoming loose and bales beginning to collapse under their own weight ...'

Photos from the site: bales are soft, deformed and irregular in size and shape

These are not suitable for shipment.

We will suspend collections until further notice. Please investigate and provide a report.

At 12.26, Oliver Caunce emailed Steve Gaunt (with copies to Nick Holmes, James Maiden, Mike Hughes and James Crouch) as follows:

As discussed on the phone, all Liverpool/Gothenburg material on cassettes is to be rejected due to bale quality. It is clear from your report below and the photos provided that this material is not suitable for shipment on cassettes.

As there are 3 filled cassettes James (Crouch) will arrange for 9 trailers to collect. I appreciate there will be additional handling costs in unloading and re-loading.

34. At 17.25 on 4 October, Ms Gething sent a long email to Oliver Caunce and Richard Carter as follows:

I know Richard has been in touch with you since you have reported the issue with the bales but I would still like to apologise for the delay in my response.

We are disappointed that this situation has arisen and I have carried out a thorough investigation into the following possible causes to the recent incident.

- *Staff bypassing part of the process resulting in the bales 'sinking' and seeping*

- *A fault with the baler*

- *A fault with the wrapper.*

I have spoken to all staff involved in this process during the night and they are adamant that they have followed each step correctly. As you will be aware loads have started to be returned this week and I have opened some sample bales and at this point they do not indicate any bypass of the system and appear to be a consistent particle size and composition. I can assure you, however, all bales that have been returned will be opened to ensure consistency.

We have spoken to the baler manufacturer and asked them to point out potential areas for concern. CK International's engineer spoke with our Shift Supervisor and our Fleet Manager (who is responsible for all aspects of maintenance). The baler was recently completely serviced by CK engineers, irrespective, we have now retested all sensors, laser lines, magic eyes and reflectors and replaced the recent cutting blades. Following on from these discussions and testing we believe that some wear and tear to the housing on one of the bottom reflectors may have resulted in the misshapen/soft bales. Both housing and reflector have been replaced and everything else is in full working order.

We have checked all the springs on the tracking system to ensure it is aligned properly.

We have also had Gordion Strapping attend site on Friday to check the head unit to ensure it was tying properly. They confirmed it was in full working order however when we ran test bales through on Monday and Tuesday day shift a possible problem with supporting springs was identified that hadn't been there before. The supporting springs for the strapping system have been replaced and we have also replaced a bracket that is currently operational but will require changing in the near future so

we have planned to do this now to avoid future downtime. The baler and tying system are all now fully operational.

The wrapper has been checked and that is working correctly.

Whilst I believe the night shift are following the process I have decided to bring the operation on to days for the foreseeable future so we can see what is happening during each part of the process. I do not believe this will need to stay on days but I would like to supervise each stage before putting it back on to nights. This will confirm that the inherent process is operating correctly.

As you can no doubt see we have investigated all possibilities and eliminated all potential failures. I hope this is satisfactory and look forward to hearing from you.

35. At 12.24 on 6 October 2017, Oliver Caunce (of Geminor) sent an email to Richard Carter (of Potters), as follows:

This project has been escalated internally due to the persistent issues, breaches of bale quality and compliance risk.

The decision has been taken that we are to no longer accept this material. The reasons for this are as follows:

- *Persistent breach of bale quality leading to rejection;*

- *Bale quality deemed unsuitable for transhipping by shipping contractor;*

- *Delivery of unprocessed product in breach of Trans-frontier Shipment Consent;*

- *Delivery of unprocessed product is a compliance risk;*

- *Unprocessed product presents risks to a logistics chain;*

- *Persistent breach creates unnecessary administrative burden.*

On the numerous occasions in which you have breached the above the reported follow-up actions have not proven to prevent further breaches and has therefore led to a breakdown in confidence in your nominated processing subcontractor.

I propose we arrange a meeting to establish the next course of action.

There had been no prior request to Gaskells, or to Potters, to undertake any sampling and testing of processed or baled refuse.

36. The only other relevant communications are two emails from Richard Carter to James Maiden (both in the first supplemental bundle). The first is dated 27 October 2017 and reads:

At our meeting last Thursday you made your position clear in regard to not desiring to continue receiving bales from Gaskells.

Can you, as suggested, acquire from DFDS more detailed photographic evidence of the last shipments of bales that were consigned for rejection.

As discussed, the only evidence that we have currently is the photo of a single weeping bale, not the estimated 40 that you witnessed.

This evidence would be considered scant justification for us to terminate our agreement with Gaskells should they choose to challenge it.

Have you any feedback from Thorncliffe and WSR as regards the potential to use these as fallback processers?

37. The second email is dated 6 December 2017:

Obviously you are aware that we have received no further information from DFDS.

From our position, the only evidence that has been provided to support your decision to cease fulfilling your obligation remains to be a photo identifying a single leaking bale and a couple of misshapen bales.

This does not support your statement of having seen an unacceptable number of at least 40 leaking bales requiring the shipment cassette and surrounding area to be cleaned.

You chose to return the whole consignment of bales to Gaskells where they were seen not to be leaking and retaining their integrity. You were shown photographs of this.

I asked Oliver to identify bales that were considered as contract. This was not done. None of the bales were inspected at your site to determine if they contained unprocessed waste, as alleged.

The bale opened at Gaskells' facility after return showed that the contents had been processed. You were also shown a photograph of this.

When we met at your offices and subsequently on a number of occasions, you have promised to provide some corroboration of your position.

Please can you provide us with some tangible evidence to support your position.

38. Potters avers that by refusing to collect any further bales of RDF, Geminor is in repudiatory breach of contract. Geminor avers that there was no contractual relationship between the parties in the first place; and to the extent that there was, the alleged poor quality of the RDF bales produced by Gaskells amounted to a repudiatory breach.

39. Potters claims that, due to Geminor's alleged breaches of contract, it has had to re-arrange the disposal of RDF arising from the Anglesey contract by more expensive means, and/or to dispose of other additional waste by more expensive means, in order properly to perform the Anglesey contract, due to its limited access to EfW capacity. At the start of the trial, Potters claimed losses totalling £923,156.50, plus statutory interest on this sum (as opposed to the £989,362 originally claimed in the particulars of claim). By the time Mr Berragan had finished presenting his closing speech, the claim had fallen to £801,041.20, with an alternative claim for the greatly reduced sum of £357,831.60.

III Issues

40. In his written skeleton argument, Mr Berragan identifies the following determinative issues as arising from the statements of case:

(1) Whether Geminor entered into a contract with Potters to collect baled RDF from Gaskells over the period of the Anglesey contract (1 February 2017 to 21 July 2018) for a price of £70 per tonne. Mr Plunkett criticises this formulation for omitting any reference to any fixed tonnage of waste that the parties might have agreed upon, and whether this was to be per annum or over the entire life of the contract. That latter issue appears to have fallen away during the course of the trial. It is quite clear that everyone had in mind a figure of £70,000 per tonne **per annum**, and not for the entire life of the contract; and I so find.

(2) If there were such a contract, then what were the relevant express and implied terms? This issue really follows on from the first; and I will address it in the section of this judgment addressing the issue of contract formation.

(3) Whether Potters was guilty of a repudiatory breach or breaches of the implied terms of the contract so as to entitle Geminor to terminate the contract on 6 October 2017. It is, I think, common ground - and if it is not I so find - that by refusing to collect any more waste from Gaskells, if Geminor was not entitled to terminate the contract, then Geminor itself was in repudiatory breach.

(4) What is the measure of Potters' damages? Mr Plunkett suggests that this issue should have asked what, if any, financial loss Potters has suffered, and whether such loss is recoverable at law from Geminor.

41. Mr Plunkett reminds the court that, in general, a claimant in civil proceedings bears the burden of proof in establishing its case. He submits that Potters has failed to do so. More specifically, Mr Plunkett relies upon the following fundamental points:

(1) There was no contract between the parties which obliged Geminor to accept a fixed tonnage of baled Anglesey waste over the approximately 18 months contract period.

Other than the MoU, the terms of which it is said were breached by Potters, no concluded and binding contract was formed because it was subject to the consortium agreement being concluded and signed. In the absence of any signed consortium agreement, Mr Plunkett submits that Geminor was only prepared to take Anglesey waste on an ad hoc, or spot price, basis.

(2) If there was a contract for Geminor to receive a fixed tonnage of waste, Potters committed persistent, and serious, breaches of the implied terms of such contract relating to the RDF bales, with the consequence that Geminor was entitled to refuse to accept further deliveries of RDF from Gaskells and to treat the contract as having been repudiated by Potters. The decision to reject the bales had actually been taken by a third party (DFDS), who were not Geminor's agents. The seriousness of any breach is said to include the impact it has on third parties, and the damage to the reputation of the innocent party.

(3) Subject to liability being established, it is said that Potters can only recover any additional loss that it alone incurred in disposing of Anglesey waste via RDF and EfW. Potters has not in fact suffered any financial loss. As a matter of law, Potters cannot bring a claim to recover the costs and expenses that Gaskells incurred in disposing of its own waste, i.e. non-Anglesey waste. to landfill. Geminor's position is set out in its counter-schedule dated 28 May 2024 (in the first supplemental bundle). Mr Plunkett submits that the totality of the pleadings and evidence upon which Potters relies demonstrates clearly that this is really a claim on behalf of both the claimant and also Gaskells.

(4) Even on Potters' own evidence, Geminor was only obliged to accept 12,000 tonnes of Anglesey waste over the entire 18 months contract period with the Council.

IV Witnesses.

42. The trial bundle comprises almost 3,000-pages, contained within seven original, and two supplementary, hearing bundles. Over four days, the court heard from six witnesses of fact for Potters and five for Geminor. A seventh witness for the claimant (Mr Craig Rixon) was not required to attend court because he had left Gaskells'

employment as their site manager at the end of March 2017, and thus before any issues over the rejection of baled waste had arisen.

43. The court also heard (on Day 4 of the trial) from two expert witnesses in the field of waste management, disposal, and transportation: Mr Philip White, retained by Potters, and Mr Michael Brown, retained by Geminor. They had both been instructed to provide expert opinion evidence in relation to the quality of the bales produced by Gaskells, on behalf of Potters, and as to whether the bales were of sufficient quality to allow for onward transportation to Gothenburg. I accept that both gentlemen were appropriately qualified and experienced to opine on these matters. I found them both to be excellent, and reliable, expert witnesses.

44. Due to an unmoveable personal commitment on the part of one of the experts, their evidence was taken concurrently on Day 4 of the trial, before Geminor's last three witnesses had given their evidence. This meant that the clarification and testing of the experts' evidence was received in ignorance of the full evidence of two relevant witnesses of fact: Mr Gaunt and Mr Caunce.

45. At the end of the expert evidence, both counsel indicated that the preparation of a detailed agenda, and the taking of the experts' evidence concurrently, had enabled them to focus directly on the issues between the experts. They said that the process had worked well.

46. Mr Brown said that taking the expert evidence concurrently had felt a lot more efficient, and had saved time. Mr White thought that it had been a good way of doing things. He had previously given expert evidence many times in the traditional way, and taking the evidence concurrently had worked really well, provided one had two experts who were co-operating with each other (as I am satisfied was the case here).

47. As Mr Plunkett observed in closing, by the time their concurrent evidence had concluded, there was a great deal of harmony and agreement between the two experts. There was agreement that there had been no sampling and testing of waste at Gaskells' site after June 2016, and thus during the period when bales were being rejected. Both experts agreed that it would have been reasonable and sensible to have tested again

after the first two loads had been properly rejected. There was agreement as to the relevance of evidence that Gaskells' waste had been successfully collected and shipped on other occasions. Mr Brown had not had any such evidence available to him, and he had only looked at the quality of bales during Gaskells' performance of the Geminor contract. There was also agreement that Gaskells had not routinely implemented the screening and shredding of waste. There was agreement that bale wrappings could tear during movement between different locations. There was also agreement that the first two rejected loads had been correctly rejected due to poor bale quality.

48. I reject Mr Plunkett's submission that Mr White had changed tack, and had effectively hardened up his evidence, by the time he came to sign the joint statement. I accept Mr White's assurance that he *"maybe used slightly loose language"*. I accept that he has consistently been of the opinion that at least several of the nine, final lorry loads of waste could have been shipped successfully to Gothenburg. I find that Mr White's overall view was that the third rejected shipment of nine lorry loads of waste could have been successfully exported. Mr White said that there were some seven or eight bales in total which showed evidence of tears. Some of these could have been repaired, using heavy duty duct tape, leaving only between one and three bales which would need to be isolated and rejected, with the remainder of the nine lorry loads continuing on their journey overseas. It was common ground between the experts that there were no regulatory, or other compliance, hurdles that would have prevented that course.

49. Mr Brown would have advised the rejection of all nine lorry loads. Two separate lorry loads had recently been correctly rejected. There had been two separate recent warnings about poor bale quality, or bale quality slipping, involving two lorry loads on each of those occasions. Against that background, the discovery of more poor quality bales, at least one of which was leaking liquid waste, indicated a lack of consistent bale quality which invited a precautionary approach and the rejection of all nine lorry loads.

50. Apart from that precautionary principle, Mr Brown accepted that the photographs showed that at least two of the later lorry loads were capable of being shipped. But the presence of eight or nine damaged bales was sufficient reason for rejecting all nine lorry loads because DFDS was entitled to assume that the bales were all of a consistent, but poor, quality. However, Mr Brown did accept that, ultimately, those who were

responsible for actually shipping the waste were the persons best placed to decide whether it should be loaded on board the vessel for export to Gothenburg.

51. Ultimately, the real issue between the experts was whether, as a result of the precautionary principle identified by Mr Brown, all nine lorry loads should have been rejected. At the end of the expert evidence, I drew the following analogy, derived from a report of a recent motoring incident in Manchester:

The Judge: *It seems to me that the essence of Mr Plunkett's cross-examination, and a theme in his closing speech, may be this: If you are driving, say, a Jaguar along the M602 towards Manchester and you find the accelerator has jammed and you manage to slow it down once, you may put up with the car. If you find it happens again, and even more so if it happens three times in total, you just give up on the car. Is that a fair summary of the way in which you are approaching the matter, Mr Brown?*

Mr Brown: *I think that is a good analogy, if you are lucky enough to be driving a Jaguar, my Lord.*

The Judge: *I used to but I don't now, but not for that reason. Mr White, would you accept that that seems to be the way in which it is being put?*

Mr White: *I think it is the way the alternative position is being put, yes.*

As anticipated Mr Plunkett did indeed pray this analogy in aid in his closing speech.

52. I bear the opinions of the expert witnesses firmly in mind as part of the overall evidence in the case. Ultimately, however, the propriety of the rejection of all of the last nine lorry loads falls to be determined by reference to the totality of the evidence in the case.

53. I turn now to consider each of the witnesses of fact in turn.

54. **Mr James Potter.** He is the claimant's managing director. He had made a very short witness statement as recently as 1 May 2024, his first - and only - witness statement in the case. He gave evidence for almost two hours, either side of the luncheon

adjournment on Day 1. I have no doubt that Mr Potter was an honest witness who was seeking to assist the court to the best of his recollection. However, I am also satisfied that that recollection was extremely limited. This is because Mr Potter had gone through many years of treatment for cancer, involving, he told the court, ten operations, radiotherapy, chemotherapy and immunotherapy, starting in 2014. A constant refrain throughout Mr Potter's evidence was: "I don't know" or: "Ask Mr Carter", who had dealt with the Anglesey contract and had made the decisions about it. Although Mr Potter had verified the particulars of claim, he had done so on the basis of information supplied to him by Mr Carter and because, as Mr Potter said, he practically trusted Mr Carter with his life.

55. Mr Potter could not recall making any profit-sharing arrangement with Mr Gaskell, although had he done so he said that this would have also involved a sharing of any losses. Mr Potter confirmed Potters' case that Geminor had withdrawn from the Anglesey contract because it had underpriced the contract. Mr Potter confirmed that the other off-takers had had no spare capacity to dispose of RDF waste. He was firm in his evidence that none of the Anglesey waste had gone into landfill. Mr Potter was also clear that Gaskells had agreed to dispose of the Anglesey waste at cost price because they already owed money to Potters, but that Gaskells would get paid the full market price in due course, and whether Potters won or lost this case.

56. I accept Mr Potter's evidence to the extent that it is corroborated by the other witnesses and the contemporary documents. To the extent that Mr Potter's evidence differs from that of Mr Gaskell, I prefer Mr Gaskell's evidence.

57. **Mr Richard Carter.** He is Potters' business development manager. He gave evidence for about three hours on the afternoon of Day 1 and the morning of Day 2. Despite a testing cross-examination by Mr Plunkett, Mr Carter was not shaken in his evidence. I find him to be a competent businessman, and an honest and reliable witness, who was doing his best to assist the court. I accept Mr Carter's evidence.

58. Mr Carter had not been aware of any profit-sharing arrangement with Gaskells until he had seen Mr Gaskell's witness statement. Mr Carter confirmed that Mr Maiden had been very keen to ensure that everything had been done in a correct legal fashion,

involving the production and execution of contracts to avoid any misunderstanding. Mr Carter believed that Geminor's offer letter of 7 September would have been accepted verbally: He said he would have spoken to Mr Caunce over the phone. That is not supported by Mr Caunce, and I make no finding of fact to that effect.

59. Since the consortium agreement had never been concluded, Mr Carter said that the parties had been working together on the basis of the 7 September offer letter. Mr Maiden had never responded to the rhetorical question posed in Mr Carter's email response of 21 December 2016: *"Would you have had an alternative proposal other than to have signed the documents?"* This was a reference to the Anglesey contract, following the successful acceptance of the tender bid.

60. Mr Carter said that Potters had fully intended to conclude the consortium agreement but, in Mr Carter's words: *"Geminor chose to take umbrage and not pursue it"*. At paragraph 59 of his witness statement, Mr Maiden states that: *"The consortium agreement went no further due to the actions of the claimant."* However, Mr Carter's email, timed at 16.09 on 19 December 2016, inquiring whether Geminor had been able to amend their contract documents as discussed following their meeting on 29 December shows that the ball had clearly been in Geminor's possession since that time. I therefore prefer Mr Carter's analysis of the reason for the disappearance of the consortium agreement from any further active consideration to that proposed by Mr Maiden. Ironically, had Geminor pursued the consortium agreement, clause 10.5.1 of the draft, excluding liability for "*any indirect, special or consequential loss or damage"* might well have operated as a defence to the second limb of Potters' primary claim for damages in the present case.

61. Mr Carter did not accept that if there was a profit-sharing arrangement, then Potters was only going to receive £5, and not £10, profit per tonne. (I note, in passing, that those figures require considerable adjustment as a result of later changes to the underlying figures.) Mr Carter said this: "No, our company would have received £10 and then the company would be able to do with it whatever it chose to do." Later, Mr Carter explained that Potters was the entity which had incurred the debt and the liability, and so it was Potters which was bringing this claim, with Gaskells simply

providing the necessary information as a service provider. As will become apparent, I accept that analysis of the position.

62. Mr Carter explained that the revenue per tonne under the Anglesey contract had been £105.50, and not £102 per tonne as stated in the updated schedule of loss. Mr Carter also explained that the various costs incurred by Potters in performing the Anglesey contract had included an additional charge of £3 per tonne for the reception and transfer of waste from the reception centre at Gaerwen. That, again, had been omitted from the updated schedule of loss.

63. Mr Carter confirmed that he had checked the data underlying Potters' calculation of its losses. He was tested about the availability of alternative waste processors, or off-takers, and he was firm in his evidence that there was no spare capacity in the marketplace: *"We did go to Andusia and they didn't have any capacity spare, whether it be at £84 or any other price"*. Earlier Mr Carter had made the telling point: *"James Maiden will be aware of the difficulties in the marketplace at the time, you know, to such an extent that he was only prepared to give us 66 per cent of the capacity that we requested, and that was for a local authority contract that he was desperately keen to win."*

64. Mr Carter firmly refused to accept that the nine lorry loads had been properly rejected. He suggested that the leaking bale could have happened when DFDS had been transferring it on to the cassette. He said that one leaking bale was not a problem. He told the court that after this multiple rejection, dozens of lorry loads had been sent out from Gaskells' waste processing centre without being rejected.

65. Mr Carter was clear that all references to 12,000 tonnes had been to an annual figure and not to a figure over the life of the contract. When he had omitted in his witness statement to use the expression *'per annum'*, he had done so on the assumption that everyone reading it would understand that he was referring to 12,000 tonnes **per annum**. Everything in the industry was done on a calendar year basis. Mr Carter was clear that Geminor had agreed to accept 12,000 tonnes per annum; and at the meeting on 28 November 2016, Mr Carter had tried unsuccessfully to up that figure.

66. I accept all of Mr Carter's evidence.

67. **Mr John Gaskell**. He is the managing director of Gaskells. He gave evidence for a little over one and a half hours, either side of the luncheon adjournment on Day 2. As with Mr Carter, I find him to be a competent businessman and an honest and reliable witness who was doing his best to assist the court. I accept his evidence.

68. Mr Gaskell confirmed that between 2014 and 2018, Gaskells had sent out some 3,000 loads of baled waste, and there had only been two loads rejected, apart from the Anglesey waste rejections. Up until September/October 2017, some 281 loads had been delivered to DFDS, with no problems apart from the rejected Anglesey loads. Mr Gaskell said that he had reached his profit-sharing agreement with Mr Potter in mid to late 2016. Mr Potter must have forgotten about it. There had been no agreement to share losses.

69. Mr Gaskell confirmed that there was never any discussion about tonnage over the life of the contract. References were always to weekly, monthly, or annual tonnages.

70. Mr Gaskell confirmed that all the Anglesey waste had been treated and then had either been baled or sent out loose in lorries operated by Gwynedd. Mr Gaskell was clear that Potters was not claiming for the costs of disposing of the displaced Anglesey waste, but rather what it had cost Gaskells to get rid of the waste displaced because Geminor had breached its agreement over the Anglesey waste with Potters: *"The waste that we had to send out because we had to accommodate Anglesey, that's what this is all about. This is what Potters agreed to pay us."*

71. Towards the end of his evidence, Mr Gaskell explained that at the time of the Anglesey contract, Gaskells had owed Potters a considerable sum of money so Gaskells had just thought it fair to get the Anglesey contract over and done with. Then Covid arrived, and Mr Potter was undergoing cancer treatment, so it was not really appropriate for Gaskells to start pushing Potters when Gaskells already owed Potters a great deal of money. Gaskells had therefore reached two agreements with Potters. The first was in relation to the actual cost of getting rid of the Anglesey waste; the other related to Gaskells' own displaced waste. Gaskells sent the Anglesey waste as RDF to the

cheapest EfW outlets they had at the time, which meant that they could not send their own waste to those outlets. That meant that Gaskells had had to send that waste to landfill.

72. After Covid, at the back end of 2021 or early in 2022, Mr Gaskell had agreed with Mr Potter to recover Gaskells' further and consequential losses, representing the opportunity cost of having to send more of Gaskells' own waste to landfill. Those costs would be charged to Potters, and then Potters would repay them.

73. **Mr Connah Bishop.** In 2016, he was working at Gaskells as a weigh bridge operative, reporting to Ms Gething. He was interposed during Ms Gething's evidence, on the afternoon of Day 2, for less than ten minutes. Mr Bishop had not operated the baler himself; and his knowledge was derived from his observations whilst walking around Gaskells' site. He confirmed that if a bale did not look right, then it would not be loaded for shipment. I accept Mr Bishop's evidence, subject to its inherent limitations.

74. **Ms Sarah Gething.** She is Gaskells' operations manager. She gave evidence for about one and a quarter hours on the afternoon of Day 2. Again I find her to be a competent manager, and an honest and reliable witness, who was doing her best to assist the court. I accept her evidence.

75. Ms Gething was clear that she had never previously experienced so many rejections in such a short space of time. In her email responses at the time, she had been trying to appease Geminor and keep them on side. Because she had been on holiday at the time, she had had to accept the first rejection at face value. She accepted that there had been problems with the second rejected load, which she had investigated at the time and discovered that due proceedings had not been followed when the load was going out. This was the only rejection which had resulted in a written case report from DFDS.

76. Ms Gething had never believed for one second that the nine loads should have been rejected. Of the nine rejected loads that had been returned to Gaskells' yard after further handling by DFDS, and amounting to some 177 bales, no more than ten had been below standard. Ms Gething could not recall how many of those bales had been rewrapped before they were sent out again; but the bales had been returned on

10 October, and they were reloaded and sent out again on the following day. Some of the bales had been loaded by Andusia and actually delivered to DFDS. Ms Gething considered dealing with damaged bales to be all part of the haulage and treatment process. I accept all of that evidence.

77. **Ms Megan Caples**. She is a management accountant employed by Gaskells. She had prepared the spreadsheet which forms the basis for Potters' updated schedule of loss. She was called on the morning of Day 3. I had suggested that Mr Berragan might wish to take her through her short witness statement by reference to the digital version of the spreadsheet, so as to explain how the Excel spreadsheet worked. However, Mr Plunkett objected to that course. Having verified her witness statement, Mr Plunkett declined to ask her any questions in cross-examination. This had the benefit, from his point of view, of denying Mr Berragan any opportunity to re-examine Ms Caples. But it also meant that the court had no oral evidence from Ms Caples. That concluded Potters' factual evidence.

78. Geminor's first witness was **Mr James Maiden**. He had set Geminor up in the UK and had acted as its first country manager for the UK. He had left Geminor's employment in or around September 2022, before this litigation commenced, in order to explore a new business opportunity elsewhere He had been succeeded by Mr Oliver Caunce. Mr Maiden gave evidence for a little over three hours, either side of the luncheon adjournment on Day 3.

79. I do not consider Mr Maiden to be a reliable witness. However, during a skilful and testing cross-examination, Mr Berragan made as many inroads into Mr Maiden's evidence, and secured as many helpful admissions from him, as Mr Berragan could sensibly have hoped for. I accept Mr Maiden's evidence where it is supportive of Potters' case. Where it is in conflict with the evidence of Potters' own witnesses, I prefer the latter.

80. Mr Maiden explained that he had not been responsible for actually putting his evidence down on paper. I am satisfied that aspects of his written evidence are wrong. At paragraph 49 of his witness statement Mr Maiden had said that the email of 12 September, enclosing the completed service delivery plan, was the first indication

that Geminor had had that Gaskells were Potters' chosen materials recovery centre sub-contractor. In cross-examination, Mr Maiden at first reiterated that Gaskells had been brought into the Anglesey contract *"late in the day"* and *"after the fact"*. Mr Maiden was then confronted with an email from Lindsay Davies to Richard Carter, timed at 16.35 on 1 September, reporting that she was *"going to have to run these prices past James and have a discussion with him re Gaskells"*. In light of that email, and the reference to the collection of waste from Gaskells in Geminor's offer letter of 7 September 2016, which had actually been signed by Mr Maiden, he had to accept that he had known of Gaskells' involvement since 1 September; and that paragraph 49 of his witness statement was not true. Mr Maiden was unable to explain why he had made that false statement.

81. Mr Maiden explained that Geminor had been approached by a contractor based in north Wales with which it had had an existing strong relationship to see whether Geminor was interested in bidding for the Anglesey waste contract with it, but Geminor had had no capacity for any additional volumes of waste. At the time of the bid, Mr Maiden had agreed with Potters that the latter should be the lead bidder, with a view then to forming a separate SPV with Potters to contract with Anglesey. However, it is clear that whatever may have been the position originally, Mr Maiden appreciated, by the time the bid was submitted, that Potters alone would be contracting with Anglesey, in accordance with the Council's stated contractual requirements.

82. Mr Maiden accepted that Mr Carter had needed a commitment from Geminor on both price and quantities before Potters had submitted its tender bid. If the tender were successful, Mr Maiden had expected Geminor to be committed to both the price and the volume indicated. He accepted that Mr Carter would not have submitted a tender without that confirmation. Mr Maiden also accepted that he had known that Mr Carter had been going to submit a bid on Monday 12 September 2016. Mr Maiden's view was that once the tender deadline had passed, Potters would be bound by its tender bid.

83. Mr Maiden had arranged for Grindeys to be instructed to draft the consortium agreement under which Geminor would have been obliged to take all 17,000 tonnes of Anglesey waste, and that it was Potters that was to execute the contract with the Council. Mr Maiden accepted that in his 20 December 2016 email to Mr Carter, he had

impliedly accepted that Potters would be taking up to 12,000 tonnes of Anglesey waste at the original price. He accepted that Potters and Geminor had proceeded on the basis that Geminor was going to take 12,000 tonnes per annum at the agreed price. That had been Mr Maiden's understanding.

84. Mr Maiden could not recall any negative feedback about the 15 loads that Gaskells had taken in January 2017, at a price of £85 per tonne, after Gaskells had negotiated this down from an initial quote from Geminor of £89 per tonne. Mr Maiden accepted that Lindsay Davies had told Mr Carter on 9 September 2016 that any badly wrapped bales deemed unsuitable for shipping would be quarantined and rejected. I reject, as contrary to the documents, Mr Maiden's suggestion that Ms Davies had been referring to '*loads'* rather than *'bales'*.

85. Mr Maiden did not recall having done anything on receipt of the email from Mike Hughes, at 10.21 on 28 September 2017, providing a *"further update from yesterday"*, other than to send his response two minutes later at 10.23 stating: *"Given the below comments you have to surely reject these bales."* At paragraph 122 of his witness statement, Mr Maiden states: *"Within this email I agree that the bales should be rejected given the issues reported."* I do not consider this to be a fair representation of Mr Maiden's email, by which he was stating to Mike Hughes (on behalf of DFDS) that *"you have to surely reject these bales."* However, Mr Maiden continued to refuse to accept the proposition that he had taken the decision to reject the bales, rather than DFDS. Mr Maiden did accept that he had probably not known the number of lorry loads involved at the time of his email. He was reluctant to accept that the original three lorry loads, comprising some 80 bales, had been of a sufficiently regular shape and size to have been capable of being loaded on to a cassette. That was clearly the case.

86. Mr Maiden could not recall having spoken to Mr Caunce or to Mike Hughes after he had sent his email to Mr Hughes at 10.23; nor could he recall any discussions with Mr Hughes before receiving the 10.21 email. Mr Berragan notified the court that Potters' solicitors had been told that there were no missing email communications, despite the reference in the 10.21 email to a *"further update from yesterday"*. Mr Maiden accepted that he would have expected to have seen a formal case report

from DFDS confirming its rejection of the nine lorryloads. Mr Maiden also acknowledged that*: "It's not an entirely unusual situation for bales to be rejected, at the port ... from many different suppliers."*

87. I am satisfied that the court has not been given a full account of all that passed between Geminor and DFDS on or around 28 September 2017.

88. Mr Maiden confirmed that Geminor would have incurred no further costs as a result of returning the bales: the logistics costs would have been passed on to Potters. Although Mr Maiden recognised that the margins on the Anglesey contract had been low, he asserted that Geminor had not been losing money on the job: it was what he described as *"a penetrative pricing situation"*.

89. In re-examination by Mr Plunkett, Mr Maiden initially said that he thought that it had been understood that the price was agreed, being the £70 per tonne which they would apply to the Anglesey contract. Mr Maiden accepted that they were committed to the terms that governed the Isle of Anglesey contract. Shortly thereafter however, when asked by Mr Plunkett what his position was in relation to whether or not a contractual agreement had been in place, Mr Maiden said this:

As far as I was concerned, we were operating on a spot basis, because the ... an ad hoc basis. Because we'd ... we'd intended to be bound by the terms of the Anglesey contract as a, you know, equal partner in a consortium. When that, you know, failed to materialise for the reasons that have been gone into earlier today, we had a decision to make as to whether we said, okay, shall we walk away from this thing now and go no further with it? You know, the opportunity was still there for us to ship waste from Anglesey, significant amounts of work, time, cost on the basis of people time, bid production et cetera, had been put into it. So we decided that we would continue. But as far as we were concerned, at that point we were not committed to the terms of the Anglesey agreement which was the terms that we intended to be committed to throughout.

90. I am afraid that I simply cannot, and do not, accept that evidence. It is inconsistent with the contemporaneous documentary evidence. It is inconsistent also with the

inherent probabilities, and with Mr Maiden's expressed concern to achieve contractual certainty and a commitment over the bid from Potters.

91. The next witness was **Mr James Crouch**. At the relevant time, in 2017, he was employed by Geminor as a logistics associate. He is still employed by Geminor, currently as operations manager. His background is in logistics, and not in waste. He gave evidence on the afternoon of Day 3 for about 40 minutes.

92. Mr Crouch gave evidence that it was not always necessary to reject an entire load if there was an issue with a single bale. In such a case, the bale might be removed and put into a skip. Minor issues with a bale would not necessarily lead to it being rejected. If, however, there was clear evidence that there were several bales in the same condition, the whole load would be rejected. Mr Crouch could not recall any involvement with the rejected bales, other than being required to arrange for nine trailers to collect the rejected loads. His view had been that if matters could be improved, then the contract could continue.

93. Mr Crouch gave his evidence honestly, and I see no reason to reject it. However, that evidence contributes little to the resolution of the issues in this case.

94. Geminor's final three witnesses of fact all gave evidence on Day 5. The first was **Mr Steven Gaunt**, for less than one and a half hours in the morning. At the relevant time, he was employed by DFDS as a working foreman, receiving goods into the port of Immingham and handling them until their discharge from the port by ship, but also supervising a team of around ten warehouse operatives.

95. Mr Gaunt acknowledged that he had not been entirely responsible for his witness statement. At the outset of his evidence, I drew Mr Gaunt's attention to paragraph 31 of his witness statement, which reads: "The DFDS terminal is split into two sides. One is called Riverside the other is called Riverside." Mr Gaunt accepted that this was an error, because one side was called 'Dockside'. He said he had pointed this out, but it had not been corrected. At paragraphs 71-73 of the witness statement, there are also inconsistent references to *'Bruce Allen'* and *'Allen Bruce'*. The correct name was *'Bruce Allen'*. I am satisfied that *'Allen Bruce'* had been lifted unthinkingly by the

draftsman from the style of that name as set out in contemporaneous email addresses. That again had not been picked up or corrected. Again, it shows that Mr Gaunt was not entirely responsible for the drafting of his witness statement.

96. Mr Gaunt stated that if DFDS decided to reject a load, it would make out a case report. That was not done in relation to the nine final rejected loads. Mr Gaunt also confirmed that one split bale would not prevent the shipping of a load. There were ways one could deal with a single problem bale. Mr Gaunt had, however, rejected loads because of only one or two failed bales. He said that issues about bales were raised daily, and not just from Gaskells but from various sites. This, he said, was all part of the job.

97. Mr Gaunt was not sure whether any bales from Gaskells had ever split. The second rejection had been because the bales had been soft. Mr Gaunt accepted that the one torn bale that was plainly leaking as part of the third rejected consignment could have been damaged after it had been taken off the lorry that had transported it to the Port of Immingham. He accepted that that bale could have been repaired with heavy duty duct tape.

98. Mr Gaunt said that at the time of discharge, the first of the final three rejected lorry loads would have been fit for shipment. DFDS had not rejected the third series of loads. The earlier warning that DFDS had issued had been because DFDS had been making every effort to make the operation work: DFDS had been trying to prevent further bad loads from arriving at the port.

99. Mr Gaunt had been happy for the final rejected loads to be shipped. He could not recall any conversation with either Mr Caunce or Mr Maiden at the time of the third rejection. Mr Gaunt accepted that the evidence set out at paragraph 110 of his witness statement, (that in his opinion, the risk of shipping the bales was too great) had not been a true reflection of his opinion at the time of his emails of 27 September. Mr Gaunt said that he had no recollection of saying to anyone that any bales should be rejected. He accepted that between the time the first cassette had been loaded, and the email timed at 12.26 on 28 September, two further cassettes had been loaded with bales from a further six lorry loads. He accepted that, at the time they had arrived at the port, there had been no reason to reject them.

100. Mr Gaunt was clearly doing his best to assist the court almost seven years after the relevant events. However, I consider that his witness statement, which had clearly been prepared for him, was tendentious, and deliberately calculated to promote Geminor's case. Mr Berragan's skilful cross-examination secured as many helpful admissions as he could sensibly have hoped for from Mr Gaunt. I consider that the overall effect of Mr Gaunt's evidence establishes that it was not DFDS that had made the decision to reject the final nine lorry loads of Gaskells' processed Anglesey waste. I find that this must therefore have been a decision made by Geminor.

101. The next witness was **Ms Lindsay Davies**, who gave evidence before the luncheon adjournment for about 40 minutes. She had started working for Geminor in or around April 2016, and had been contracted to work three days a week as bid manager. She is no longer in Geminor's employment. In his closing speech, Mr Plunkett described Ms Davies as an excellent, and a truly independent witness. I do not share this assessment of her. During the course of Ms Davies's evidence, it became clear to me that she had little actual recollection of the events of 2016 to 2017. I accept, consistently with the contemporaneous documentation, Ms Davies's evidence that: (1) by the time the bid had been prepared, it was clear that Potters would be acting as lead bidder, and would be signing any resulting contract with Anglesey; (2) she could not recall any real issues with the bid that had been submitted; (3) she knew, on 1 September 2016, that Gaskells would be processing the waste; and (4) she appreciated that any consortium agreement would probably only be signed after Potters' bid had been accepted.

102. Mr Plunkett relied upon Ms Davies's evidence as demonstrating the overarching need for, and the importance of, a concluded, and signed, consortium agreement. I reject that analysis of the evidence as inconsistent with the contemporaneous documents. Nor do I accept Ms Davies's evidence that she had understood Geminor to have participated in the tender bid without having received any contractually binding commitment from Potters that Geminor would be providing the off-taker service. However, I also recognise that the test for contractual formation is an objective one: the parties' unexpressed intentions or opinions as to whether there is any binding contract are strictly irrelevant.

103. The final witness was **Mr Oliver Caunce**. He gave evidence for about one and three quarter hours on the afternoon of Day 5. His role in 2017 was as account development manager. He is now Geminor's Country Manager UK, having succeeded to Mr Maiden's position in or around October 2022. Mr Caunce is, therefore, effectively the person responsible for Geminor's defence to this claim. As such, it was he who signed the statement of truth verifying the defence.

104. I find Mr Caunce to be a most unsatisfactory witness. He was evasive, with a tendency to ramble, and prone to speculation and after-the-event reconstruction and rationalisation. He seemed to experience difficulty both in understanding, and also in answering, Mr Berragan's questions in cross-examination. Passages in Mr Caunce's witness statement followed almost verbatim the terms of Mr Maiden's witness statement; but Mr Caunce refused to accept that someone else had written his witness statement for him.

105. I do not find Mr Caunce to be a reliable witness. I cannot accept his evidence where it conflicts with the evidence of the witnesses called by Potters, or where it conflicts with the evidence of Mr Gaunt, as modified and explained during the course of his cross-examination.

106. Mr Caunce had not been involved in putting the bid together, or in submitting the tender to Anglesey, other than by way of calculating the costs which had fed into the model for the tender bid, and providing this costing information to Ms Davies. Mr Caunce refused to accept that Geminor had underbid for the Anglesey contract and wanted to get out of it, although he did accept that it was *"low margin"*. Later in his cross-examination, Mr Caunce accepted that there was not an unlimited capacity for the disposal of RDF waste through EfW off-takers, and that Potters would have had to find new EfW outlets after Geminor refused to accept any further waste from Gaskells, although he professed himself unable to comment on Potters' internal waste flows. Mr Caunce did not agree - although he did not expressly disagree - that there was a very real possibility that if Potters lost one outlet for RDF waste, it would not be able to send all the RDF waste it might wish to other EfW outlets. Mr Caunce commented that it was not for him to speculate (although he had been prepared to speculate on the contents of his telephone conversations with representatives of DFDS at the time of the

third series of bale rejections). Speculation, for Mr Caunce, was a selective exercise, permissible when it might benefit Geminor, but impermissible when it might benefit Potters.

107. Mr Caunce was not aware of any discussions with Mr Carter about fixing a spot price for dealing with the Anglesey waste. Nor could he recall any conversations with Mr Carter in which he had confirmed that Geminor would be acting on a spot, or ad hoc, basis.

108. At paragraph 74 of his witness statement, Mr Caunce stated that he was made aware of a third rejection of Gaskells' RDF bales on 28 September 2017, in an email from Mr Maiden to DFDS personnel and himself, timed at 10.23. Mr Caunce said that he had been shown a copy of this email at the time of making his witness statement. In cross-examination, he accepted that at that point the bales had not yet been rejected and that he had *"got ahead"* of himself in that paragraph of his witness statement. In closing, Mr Berragan submitted that once paragraph 74 falls away, Mr Caunce's witness statement provides no proper, or full, explanation of when these bales had been rejected, or of who had rejected them.

109. At paragraph 77 of his witness statement, Mr Caunce said: *"I do remember having a telephone conversation with Steve Gaunt of DFDS around this time however, the specifics of our conversation I cannot remember but we did discuss the quality of Gaskells' bales and Steve explained the need for them to be rejected due to their poor quality."* Mr Caunce then went on to refer to his email to Mr Carter timed at 11.13.

110. I am afraid that it is necessary to refer to the transcript of the whole of Mr Caunce's cross-examination on the issue of the rejection of the last nine trailer loads of Gaskells' waste, at pages 128 to 136 of Day 5 of the trial. I do not propose to burden this judgment by reproducing those pages. I have, however, borne them firmly in mind. It is clear that Mr Caunce had no real or present recollection of any telephone conversation with anyone at DFDS. Rather, he was prepared to engage in speculation and after-the-event reconstruction and rationalisation of how any telephone conversation with whoever it was at DFDS might have proceeded. There is, however. one telling, final exchange which I must reproduce:

Question: *I suggest that when you spoke to him he must have told you that he had filled another two cassettes, and as far as he was concerned they were suitable for shipping?*

Answer: *I disagree. Because they clearly weren't, which is why I rejected them.*

Question: *And you said to him 'You must reject those bales'.*

Answer: *No that is pure speculation from your side. I did not say that.*

Question: *It is deduction from the emails.*

Mr Berragan's last statement was comment rather than a question. But the mask worn by Mr Caunce had already slipped: *"... **which is why I rejected them**."*

111. It will be recalled that Mr Gaunt had been unable to recall any conversation with Mr Caunce at the time of the third rejection.

112. That concludes my review of the witness evidence. In light of that comprehensive review, I can, I hope, be brief in the remaining sections of this already over-lengthy extemporary judgment, especially since there is little between counsel on the applicable law apart from differences of emphasis.

V: Contract formation

113. I remind myself that the test for contractual formation is an objective one: the parties' unexpressed opinions as to whether there is any binding contract are strictly irrelevant. In deciding whether the parties have reached agreement, the courts normally apply the objective test.

114. The issue whether there was a relevant contract between Potters and Geminor turns upon the contemporaneous documents and the parties' conduct. Mr Berragan referred me to the leading judgment of Asplin LJ *in Mackie Motors (Brechin) Ltd v RCI Financial Services Ltd* [2023] EWCA Civ 476 at [37], citing earlier observations of Vos LJ in a 2016 authority. In summary:

(1) The most significant aspect of the consideration of whether to imply a contract is the court's consideration of all the circumstances and, in particular, of the conduct of the parties.

(2) For there to be a contract, there must be (a) an agreement on essentials of sufficient certainty to be enforceable; (b), an intention to create legal relations; and (c) consideration. Where (a) is shown, then (b) may commonly be assumed.

(3) If a contract is to be implied from the parties' conduct, then it is for the claimant to show the necessity for implying it. A contract will not be implied if the parties would or might have acted exactly as they did in the absence of a contract.

(4) The intention of the parties may be relevant in determining the existence of an implied contract. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create legal relations, and that the agreement was to the effect contended for.

(5) Where there is an express agreement on essentials of sufficient certainty to be enforceable, an intention to create legal relations may commonly be assumed. It is otherwise when the case is that a contract should be implied from the parties' conduct. It is then for the party asserting a contract to show the necessity for it.

115. It is common ground that Potters and Geminor intended to, and did, create legal relations in respect of the memorandum of understanding. In essence, Mr Berragan submits that the offer letter dated 7 September, and the letter of support dated 9 September 2016, were expressed as offers of further, or supplemental, terms. Read in context, these would enable Potters, as the lead bidder, to submit a tender within the deadline as the lead bidder, supported by the various other information and documents supplied by Geminor for the same purpose. Read together, these documents are said to contain the essentials with sufficient certainty to be enforceable. That they were of sufficient certainty is demonstrated by the parties' conduct subsequently in carrying out the agreement, under those terms. The fact that the parties also provided for the entry into a more detailed consortium agreement does not affect this analysis, since the

parties (and principally Geminor) abandoned their attempt to conclude this further supplemental agreement.

116. Mr Plunkett emphasises that, in general, a contract is made by the acceptance of an offer, or by the parties signing an agreement containing the agreed terms. Relying upon *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209, [2010] 2 All ER (Comm) 302, Mr Plunkett points out that the courts continue to regard offer and acceptance as being (usually) the correct method of analysing the making of a contract. Mr Berragan points out that acceptance of an offer can be communicated either in writing, or orally, or by conduct, or by a combination of any one or more of these three methods.

117. Mr Plunkett says that there is no real separation between the formation of the contract and the ascertainment of its terms because the offer and the acceptance must mirror each other exactly before a contract is concluded. An acceptance of an offer must usually be communicated to the person by whom the offer was made. For a contract to be legally binding, it must be certain and complete. Even a long-term relationship does not necessarily equate to a binding contractual relationship, as is demonstrated by the case of *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737.

118. In essence, Mr Plunkett submits that in this case the parties proceeded on the basis that there was no binding contractual agreement for Geminor to accept any fixed tonnage of Anglesey waste. Geminor did not have to make any long term commitment to take a specific tonnage. It could assist Potters by operating on an ad hoc basis, which might still have involved the receipt of many thousands of tonnes. Potters would have had the ability, if it so desired, to use another contractor in place of Geminor. In all walks of commercial life, suppliers provide services on a continuing basis, often over a substantial period of years, to the same customer; but this does not mean that the supplier is contractually obliged to continue to supply their services. The supplier is free to walk away; and the customer is free to decline to engage the supplier.

119. Geminor was quite willing to be bound by a contract in due course; but its terms had yet to be agreed. It was Geminor who had initiated the execution of the memorandum

of understanding, and also instructed solicitors to prepare the draft consortium agreement for signature. That is because Geminor needed to know where it stood contractually. Geminor's position was that everything was subject to contract, i.e. it was subject to signing the consortium agreement. There was no intention to create a legal relationship of the nature contended for by Potters. The insistence on the part of Geminor for contractual certainty, in the form of a signed, written consortium agreement drafted by lawyers, negates the suggestion that Geminor had entered into a binding contract based on an exchange of emails. If, after it was awarded the Anglesey waste contract, Potters had abandoned Geminor and used another RDF off-taker instead, Geminor would have had no contractual remedy against Potters.

120. Mr Plunkett relies upon the leading judgment of Lewison LJ in *Joanne Properties Ltd v Moneything Capital Ltd* [2020] EWCA Civ 1541. At [12], Lewison LJ observed that whether two persons intend to enter into a legally binding contract is, of course, to be determined objectively. But the context is all important. In that case, the most important feature of the context was the use of the phrase *'subject to contract'*. At [34], the judge provided a useful summary:

As the cases show, where negotiations are carried out 'subject to contract', the mere fact that the parties are of one mind is not enough. There must be a formal contract, or a clear factual basis for inferring that the parties must have intended to expunge the qualification. In this case, there was neither.

121. Lewison LJ also drew a useful distinction at [25]-[26] under the heading *'Incomplete agreements':*

If parties do intend to enter into a legally binding agreement, there is a different question that sometimes arises: namely whether the agreement they have reached is an incomplete agreement. Typically, this question arises when the parties have agreed some of the terms (or the main terms) of a contract, but have left other terms to be agreed later. This, however, is a different principle from the effect of negotiations 'subject to contract'.

I have borne this distinction firmly in mind.

122. I have no hesitation in preferring Mr Berragan's submissions to those of Mr Plunkett. I am entirely satisfied that the parties concluded a binding contractual agreement, with the intention of thereby creating legal relations. They did so by a combination of the memorandum of understanding, the 7 September offer letter, and the 9 December letter of support. By proffering these documents to Potters, in my judgment Geminor made an offer to contract on the terms of the offer letter, namely, to collect 12,000 tonnes per annum of RDF waste from Gaskells' Bootle site at a price (subject to currency fluctuations) of £70 per tonne, over a period running from 1 February 2017 to 21 July 2018.

123. That offer was accepted by Potters, within the 14 days acceptance period, when Potters submitted the tender bid before the 11 am deadline on Monday, 12 September, and then communicated that submission to Geminor later that same day.

124. Mr Plunkett challenges Mr Berragan's submission that the communication to Geminor of the submission of the tender to the Council constituted an acceptance of the offer letter dated 7 September. He acknowledged in closing that there was not a great deal that he could say about that *"... because you're either with me or you're against me on that point. But it really is a basic legal proposition and I say you should come down on the side of my contentions."* I am afraid that I prefer Mr Berragan's legal analysis and submissions.

125. In his reply, Mr Berragan referred to Mr Plunkett's suggestion that one could not accept an offer by conduct, in this case by first of all submitting a tender and then communicating that fact. In Mr Berragan's submission, one plainly could. In this context, Mr Berragan suggested one could draw a useful analogy with an *'if'* contract, or what used to be called a unilateral contract. In other words, on analysis, what was being said was, *"if you submit this tender, then we will agree to provide these services"*. And of course that was in the context of everyone fully anticipating that the tender would be submitted. The old example used to be: *"If you walk to York, I will give you £20. If I set off walking, you can't then call me back."*

126. I accept Mr Berragan's analysis and submissions. Clearly, the acceptance of the offer needed to be communicated by Potters to Geminor; but that was achieved when Potters communicated the fact of the submission of the tender bid to Geminor.

127. In my judgment, Mr Plunkett can derive no assistance from his *'subject to contract'* argument, for the reasons that Mr Berragan provided in closing at pages 37 to 41 of the transcript of Day 6. In summary:

(1) The *'subject to contract'* point is not pleaded. There is no allegations that negotiations were expressly conducted *'subject to contract'*.

(2) This is pure opportunism on the part of Mr Plunkett, representing Geminor. No witness has expressly placed reliance upon any letter expressed to be *'subject to contract'*, or has given evidence that they had thought that all negotiations were proceeding on a *'subject to contract'* basis.

(3) The two documents on which Mr Plunkett places late reliance were merely draft documents, sent by Mr Carter to Mr Maiden, with a view to their being signed and exchanged But nothing happened to them. Most importantly, however

(4) The parties clearly did enter into the memorandum of understanding, which it is common ground was intended to create legal relations and have contractual effect. Geminor also issued the letter of offer, and the letter of support. None of these documents was expressed to be *'subject to contract'*. If earlier negotiations had been conducted on a *'subject to contract'* basis, the signing of the memorandum of understanding provided the contract to which they had been working. Any *'subject to contract'* qualification was effectively expunged by the entry into the memorandum of understanding, and also by the issue by Geminor of the offer letter and the later letter of support.

128. Mr Plunkett also places reliance upon alleged breaches of the memorandum of understanding. However, I find that there was no breach of either clause 3.2 or 5.3. The correspondence clearly demonstrates that Geminor knew, and accepted, that Potters would be submitting a bid before the tender deadline expired at 11 am on Monday,

12 September. Indeed, Mr Maiden expressly requested a copy of the completed bid for Geminor's records in the first of his emails of 9 September 2016.

129. If there were any technical breach, it was clearly waived. In any event, there are no consequences that would flow from any technical breach of the memorandum of understanding. Any breach was clearly not repudiatory; nor if it was, was any breach accepted as putting an end to the memorandum of understanding. The parties continued to work, albeit slowly, towards the production of a consortium agreement.

130. Much the same applies to any alleged breach of clause 10.2, relating to the failure to sign a consortium agreement before Potters signed the contract with Anglesey, confirming the acceptance of its tender bid. In any event, I find that the responsibility for the failure to complete the consortium agreement rests with Geminor rather than Potters. Furthermore, even if there were a breach of clause 10.2 of the memorandum of understanding, it was never relied upon by Geminor as a repudiatory breach which it then accepted as putting an end to the memorandum of understanding.

131. That document continued to be governed by the provisions of clause 13.1. Since none of the events provided for in that clause ever occurred, the memorandum of understanding remained in full force and effect. That document was not just a stepping stone on the way to a future contract; it actually constituted a contract in and of itself.

132. My finding that there was a binding contract between the parties is entirely consistent with the following:

(1) Mr Maiden's concern, articulated at paragraph 24 of his witness statement, of the need to protect Geminor's position against any attempt by Potters to shut it out from participation in the Anglesey contract once the tender bid had been accepted.

(2) The lack of any urgency attending the attempts to agree upon a consortium agreement.

(3) Mr Maiden's implicit recognition, in his email of 20 December 2016, of an obligation to accept up to 12,000 tonnes of RDF waste, and to do so at the original price.

(4) The complete absence of any attempt to negotiate a spot price for the Gaskells' Anglesey waste after December 2016, even when collections started to be made from about June 2017. This is in stark contrast to the negotiations that led to Geminor agreeing a figure of £85 a tonne (negotiated down from £89 per tonne) to collect 15 loads of RDF baled waste, not from Anglesey but from Gaskells, in January 2017.

133. I am satisfied that there was sufficient certainty as to the terms of the supply contract. Any further detail was capable of being supplied by the implication of any necessary supplemental terms.

134. I agree with Mr Plunkett that the precise content of any implied terms of the contract is a matter of little moment. As Mr Berragan points out, the test for the implication of a contractual term is whether that term is necessary and/or obvious in order to give business efficacy to the contract. It is not enough that the term may be a reasonable one.

135. I am content to accept the experts' agreed formulation that the baled waste:

(1) should be of the necessary structural integrity to enable it to be loaded and transported;

(2) should be adequately wrapped to prevent the escape of waste material;

(3) should not emit odours;

(4) should not leak fluid;

(5) should not pose a risk of environmental harm during transport or storage;

(6) should not expose Geminor or its sub-contractors to the risk of regulatory action; and

(7) should not expose Geminor or its subcontractors to the risk of civil or criminal proceedings.

136. Mr Berragan accepts that bales needed to be of a suitable shape and size to be handled and transported. Conventionally, that meant that they should be roughly square in section, rather than round, although that did not need to be exact; and that they should weigh approximately 1.1 tonnes. Mr Berragan also accepts that there was an implied term that the parties would co-operate to ensure the effective performance of their agreement and of the Anglesey contract.

VI Breach

137. Mr Berragan submits that the relevant test is whether any breaches of contract by Potters were sufficient to deprive Geminor of substantially the whole benefit which it was intended it should obtain from the contract. Mr Berragan emphasises that that is a high bar. The highest level relevant authority is the decision of the House of Lords in the case of *Federal Commerce & Navigation Co Ltd v Molena Alpha ('The Nanfri')* [1979] AC 757. There, Lord Wilberforce said (at page 779C) that *"to amount to repudiation a breach must go to the root of the contract."*

138. Mr Plunkett invites the court to bear in mind that the phrase *"which will deprive the party not in default of substantially the whole benefit of the contract"* may be apt to mislead because, on a first reading, one might assume that, in order to terminate a contract for breach, nearly all of the benefit of the contract has to have been lost. Mr Plunkett submits that a clearer formulation is whether a party has been "*deprived of a substantial part of the benefit for which it contracted"*. Mr Plunkett emphasises the words *"deprived of a substantial part"*. Put that way, Mr Plunkett submits that the threshold test enabling termination for repudiatory breach to occur is much lower.

139. I note that at page 779 letters C to D, Lord Wilberforce considered that:

The difference in expression between these two last formulations does not ... reflect a divergence of principle, but arises from and is related to the particular contract under consideration. They represent, in other words, applications to different

contracts of the common principle that, to amount to repudiation a breach must go to the root of the contract.

140. The experts agree that it was appropriate for DFDS to reject the single lorry loads referred to as the first and second loads on 15 August and 8 September 2017. However, it is common ground that Geminor resumed collections of waste from Gaskells processing site after these dates. The issue of repudiatory breach, therefore, does not arise in relation to those two deliveries, save as part of the commercial background. That context also includes the various matters identified at paragraph 89 of Mr Berragan's skeleton argument, as expanded during the course of his oral closing. I bear those matters in mind. Where the experts are not agreed is as to whether it was appropriate to reject all nine lorry loads of the final series of consignments on 27 and 28 September 2017.

141. I find considerable force in Mr Berragan's closing submissions that:

(1) The only sensible conclusion that can be drawn from the combination of the emails, the photographs, and the oral evidence is that DFDS was prepared to ship all nine loads, on three cassettes, and that it was Geminor, acting through Mr Caunce, that instructed DFDS to reject all those nine loads.

(2) Even if it could be said that there was some justification for rejecting the original three loads that were loaded on to the first cassette, that was not something that DFDS had been advocating.

(3) Nor could that, of itself, justify rejecting a further separate six loads about which no issue had been raised.

(4) On that footing, Geminor's witnesses have deliberately tried to mislead the court by stating expressly, and clearly, that it was DFDS alone that had made the decision to reject the nine lorry loads.

142. I am satisfied, on the evidence, that it was not DFDS that decided. entirely independently, and based upon its own assessment of the quality of the bales, that it

was appropriate to reject all nine lorry loads of the final series of consignments on 28 September 2017.

143. At best, I find that DFDS was heavily influenced in its decision by the views and representations of Geminor. Indeed, I am satisfied that those views and representations, entertained and made by Geminor, were determinative of the decision to reject. Regrettably, the court is hampered in discerning a clear, and full, picture of what actually transpired between Geminor and DFDS on 27 and 28 September by what I am satisfied are: (1) disclosure failures on the part of Geminor; and (2) a lack of candour on its part and on the part of its witnesses.

144. On the balance of probabilities, I agree with the views of Mr White, Potters' expert, that the third rejected shipment of nine lorry loads of waste could, and should, have been successfully exported. I find that there were some seven or eight bales of waste, in total, which showed evidence of tears. Some of these could have been repaired using heavy duty duct tape, leaving only between one and three bales which could, and should, have been isolated and rejected, with the remainder of the nine lorry loads continuing on their journey overseas. In arriving at this finding, I have borne in mind Mr Brown's competing precautionary, and cautious principle and approach.

145. What is clear is that it was not DFDS that made the decision to reject all nine lorry loads of waste. That is clearly evidenced by the lack of any rejection form, the need for which was acknowledged by Mr Gaunt in his oral evidence. I find the absence of such a form to be telling.

146. On that footing, I find that there is no question of any repudiatory breach of contract.

147. Assuming, however, that I am wrong, and that the rejection of all nine lorry loads was justified, I am satisfied that the consequent breach of the implied terms of the contract between Geminor and Potters was not a repudiatory breach which went to the root of the contract, and which justified Geminor in refusing to accept any further baled waste from Gaskells' site. I am satisfied that the presence of seven or eight, or even nine, potentially non-conforming bales amongst nine lorry loads, and 177 bales in total, does not justify the conclusion that Gaskells was refusing to produce conforming bales, or

that Potters had evinced an intention not to comply with its obligations under the agreement, or otherwise deprived Geminor of a substantial part of the benefit of its contract with Potters.

148. In arriving at that conclusion, I bear in mind that:

(1) The service proposals envisaged that any badly wrapped bales would be rewrapped by Gaskells and returned for re-shipment. That had been recognised by Ms Davies. Even if the entire loads were properly rejected, there was nothing to prevent the eight or nine offending bales being rewrapped, and the loads returned for re-shipment in due course. The cost associated with any returning any loads would, of course, be passed on to Potters. Mr Maiden confirmed that Geminor would have incurred no further costs as a result of returning the bales: the logistics costs would have been passed on to Potters.

(2) In line with their implied duty of co-operation, the parties were expected to work together to resolve any operational issues. A contract of this nature requires some measure of *'give and take'*. Bales can become torn during the handling process; and dealing with poorly wrapped bales is all part and parcel of the shipment process.

(3) Ms Gething's detailed email report of 4 October 2017, to which Geminor never adequately responded.

(4) Tere is no counterclaim, or claim to set off any damages incurred as a result of these alleged serious breaches. Nor is there any allegation, or indication, of any financial loss to Geminor at all. The cost of returning the nine lorry loads was passed on to Potters. Indeed, it (mistakenly) featured as a head of damage in Potters' updated schedule of loss (abandoned by Mr Berragan on the last day of the trial). As Mr Berragan observed in closing, in the commercial context, if there is no financial loss, or no significant financial loss, that must be a strong indication that any breach of contract is not repudiatory. Clearly, that is not determinative; but it is a relevant feature.

VII: Damage.

149. Even though Potters' schedule of loss had been updated as recently as the middle of March 2024, it contains a number of glaring errors, more of which emerged during the course of the trial. These Mr Berragan sought to address by producing, on the morning of the last day of the trial, both a revised schedule of loss, setting out his primary claim for damages on what he described as *'a hybrid basis'*, claiming both direct and indirect losses (within both limbs of *Hadley v Baxendale* (1854) 9 Exch 341), and an alternative calculation seeking to recover only direct losses (within the first limb). The effect of this has been to reduce the primary claim from £908,355 to £801,41.20. Mr Berragan also abandoned the claim to recover three invoices for the cost of returned loads in the total sum of £14,801.50.

150. On the same morning, Mr Plunkett also produced his own calculation of loss, based on the assumption that all the Anglesey waste had gone to EfW. This produced a loss of profit of only 58p per tonne.

151. The adjustments that have needed to be made to the updated schedule of loss are, I think, as follows:

(1) Revenue per tonne: £105.50 rather than £103.

(2) An additional cost of £3 per tonne for the reception and transfer of waste at the Gaerwen transfer station.

(3) A figure of £74.37 (agreed by Mr Plunkett during closing submissions on Day 6), rather than £70 for collection costs, to reflect the currency adjustment agreed in the letter of offer.

(4) A total tonnage of 17,220, rather than 17,868, to reflect the actual tonnage contracted under the Anglesey contract that was not in fact collected by Geminor.

152. Potters is entitled to be placed in the position in which it would have been if the contract had been performed by Geminor. This would have involved Geminor in taking an additional 17,220 tonnes of waste at the agreed rate of £70 per tonne, adjusted to reflect currency fluctuations.

153. The waste which Geminor failed to collect all had to be disposed of as refuse derived fuel to an energy from waste outlet. After Geminor refused to collect any more consignments of waste from Gaskells' facility at Bootle, after 28 September 2017, Potters continued to transport the waste to Gaskells, and Gaskells continued to process and bale the waste. Gaskells then made arrangements for the baled refuse derived fuel to be collected and disposed of via two other energy from waste outlets. One was Andusa, which collected baled waste. The other was Gwynedd Skip and Plant Hire Limited, which collected unbaled waste in loose form. There may have been other contractors. Those were outlets with which Gaskells already had arrangements for disposing of RDF generated from other waste sources. However, there was a limit to the total tonnage of RDF which each outlet could take. As a consequence, Gaskells had to divert some of its own waste to landfill, which would otherwise have been collected by Andusa or Gwynedd, as RDF, to generate energy from waste. Sending this waste to landfill was more expensive than sending it as RDF for EfW, not least because of the landfill tax which was thereby incurred.

154. The costs incurred by Gaskells in disposing of the waste which Geminor should have collected therefore include two elements, which are separated out in Mr Berragan's revised schedules of loss. They are:

(1) The actual cost of disposal of RDF from Anglesey via energy from waste outlets; and

(2) The additional costs, over and above those that would have been incurred had the waste been disposed of as RDF, of diverting Gaskells' own waste to landfill because of the lack of available EfW capacity.

155. Mr Plunkett has vigorously challenged the basis for calculating damages in this way. However, I am entirely satisfied, notwithstanding Mr Plunkett's carefully presented submissions, that the evidence of Mr Gaskells and Mr Carter, and the unchallenged evidence of Ms Megan Caples, has sufficiently proved the claim for damages that Potters has advanced on its hybrid basis.

156. Although it has taken some time, and effort, to arrive at accurate final figures, I am satisfied, on the evidence, that the true loss suffered by Potters as a result of Geminor's repudiatory breach of the agreement to collect the Anglesey waste up to a figure of 12,000 tonnes per annum, at a price of £70 per tonne (adjusted for currency fluctuations) is as set out in Mr Berragan's revised, updated schedule of loss.

157. There are, however, a number of potential defences advanced by Mr Plunkett that I need to address.

158. The first is whether the second limb of the hybrid claim is too remote. The general rule is that loss is too remote if the type of loss in question could not reasonably have been contemplated by the defendant as a serious possibility at the time the contract was made, assuming, of course, that at the time the defendant had thought about the breach.

159. Mr Plunkett submits that it was not reasonably foreseeable, or in the reasonable contemplation of Geminor, as a serious possibility, that in the event of its breach of contract, Potters would enter into new contractual arrangements whereby Gaskells would substitute its own non-Anglesey waste and send it off to landfill in order to create sufficient capacity to accommodate the RDF waste which, consistently with its contractual obligations, Geminor should have collected and delivered at the Port of Immingham, for onward shipment to the energy from waste facility in Gothenburg in Sweden.

160. Mr Plunkett submits that it was not within the reasonable contemplation of the defendant, as a serious possibility, that Gaskells would deposit such waste in Potters', and other third parties', landfill sites, and that Gaskells would then charge Potters for the additional costs of doing so, leaving Potters to seek to recover such losses from Geminor.

161. I am satisfied, on the evidence, that this was within the reasonable contemplation of Geminor, as a serious possibility, at the time it submitted its letter of offer on or around 7 September 2016. The fact is that Geminor knew of the limited capacity for the disposal of refuse derived fuel to generate energy from waste at the time. That was the very reason it had limited its obligation to collect Anglesey waste to only 12,000

tonnes per annum, rather than the 17,000 tonnes per annum which was the capacity desired by Potters. I am satisfied that the second category of damage is not too remote.

162. The next point raised by Mr Plunkett is that Potters incurred no liability to Gaskells as a result of Geminor's repudiatory breach of its contract with Potters. Mr Plunkett submits that if there is any liability on the part of Potters to pay anything to Gaskells, it is because Potters chose to enter into a new contractual arrangement with Gaskells. He says that this is wholly independent of Geminor's breach of contract. He says that the reality, which has only become apparent in recent months, as further disclosure has been given, and Potters has served further evidence, is that Potters and Gaskells were effectively operating as joint venturers, or partners, once Geminor withdrew its collection services in October 2017. He says that, most probably, Potters and Geminor had been in such an existing relationship even before this date.

163. I am entirely satisfied that this arrangement was entered into as a result of the need to address Geminor's repudiatory breach of its contract with Potters by declining to continue to accept waste deliveries from Gaskells' Bootle treatment centre, and in order to mitigate Potters' losses. I am satisfied that that was a reasonable course for Potters to have taken in order to address the loss of capacity that followed from Geminor's decision to refuse to collect any further waste.

164. Mr Plunkett's next point is that Potters has not yet paid Gaskells for these services; and that, since the contract ran from roughly October 2017 to the middle of July 2018, any claim by Gaskells to recover such losses now would be statute barred.

165. I am entirely satisfied that Potters has acknowledged its liability to Gaskells in respect of these sums, such that it is no longer in any position to raise any limitation defence. In any event, a defence by way of a plea of limitation is something that needs to be raised in the pleadings by way of defence to any claim by Gaskells against Potters. Clearly, Potters is under a duty to mitigate its losses; but that does not extend to pleading a limitation defence that would interfere with an existing, and long-standing, commercial relationship between two commercial entities. I am entirely satisfied that it would not be reasonable to require Potters to plead a limitation defence to any claim by Gaskells, even if such a defence wer still available to it.

166. Mr Plunkett then says that any profit was to be divided 50/50 between Potters and Gaskells, and that it is not open to Potters to seek to recover that moiety of the profits that would have been enjoyed by Gaskells. In my judgment, that submission is not properly available to Mr Plunkett.

167. Geminor's liability in damages is for the full amount of the loss of profit and consequential losses that Potters has incurred as a result of Geminor's repudiatory breach of contract. What Potters then choses to does with any damages it may recover is nothing to the point, as Mr Carter recognised. It is for that reason that Mr Berragan cannot properly submit that the profit share is part of the costs of performing the Anglesey contract. The arrangement with Gaskells was for a share of the profits which Potters would have made had Geminor complied with its contractual obligations. What Potters then does with those profits is entirely a matter for itself. If I can be excused resort to Latin, it res inter alios acta.

168. So, for those reasons, I reject all of Mr Plunkett's suggested defences to Potters' damages claim. I am satisfied, notwithstanding all the points that Mr Plunkett has so forcefully made, that Potters, through the evidence of Mr Carter, Mr Gaskells and Ms Caples, has sufficiently evidenced and established its claim to damages on the basis of the hybrid, revised calculation of loss produced by Mr Berragan on the last day of the trial.

169. In short, I find that Potters is entitled to recover damages on its primary, and hybrid, basis in the total sum of £801,041.20.

170. As Mr Berragan acknowledged towards the end of his reply, it may well be that the fact that Potters has not yet been invoiced by Gaskells for a substantial part of that loss, and has therefore not yet had to pay it, may prove to be relevant when the court comes to consider the point from which interest on damages falls to be paid. But I do not consider that the fact that monies remain outstanding as between Potters and Gaskells affects the quantum of the award of damages against Geminor.

171. For the sake of completeness, although it is unnecessary to do so, I should make it clear that, had I rejected Mr Berragan's primary claim for loss on a hybrid basis, I would

have accepted his alternative basis for claiming damages for the direct loss only sustained as a result of the inability to send all of the Anglesey waste through Potters. I am satisfied that it is open to Potters to claim loss on the alternative, direct basis. Indeed, that was the basis upon which Geminor had originally understood the original schedule of loss to have been calculated.

172. Mr Berragan took me to the decision of the Court of Appeal in the case of *Perestrello E Companhia Limitada v United Paint Company Ltd* [1969] 1 WLR 570. In particular, he invited my intention to passages towards the end of the judgment of the court, delivered by Lord Donovan. It is sufficient for me to refer, first, to page 579 between letters E and G:

Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendants in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assist him in computing a payment into court.

The limits of this requirement are not dictated by any preconceived notions of what is general or special damage, but by the circumstances of the particular case. 'The question to be decided does not depend on words, but is one of substance'.

Later, at page 580 between letters C and D, Lord Donovan said this:

What amounts to a sufficient averment for this purpose will depend on the facts of the particular case, but a mere statement that the plaintiff claims 'damages' is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act and of which the defendant is entitled to fair warning.

173. I am satisfied in the present case that the defendant, Geminor, has had fair warning of a claim for damages which would extend to the alternative basis of what has been referred to as the 'direct loss' only. Therefore, had I not given judgment for £801,041.20, I would have given judgment for the alternative sum of £357,831.60. I make it clear that both of those sums have been sufficiently made out on the evidence

in this case, despite the valiant efforts that Mr Plunkett has made to seek to reduce those amounts.

174. That concludes, finally, this extemporary judgment, apart from setting out, in section VIII, my conclusions.

VIII: Conclusions

175. I find that there was a binding agreement between Potters and Geminor. The relevant terms of that agreement required Geminor to collect 12,000 tonnes per annum of baled waste from Gaskells' site in Bootle and to transfer it to Immingham, for onward transportation to Gothenburg, at a price of £70 per tonne (subject to the agreed currency fluctuations).

176. I find that there was no repudiatory breach of contract on the part of Potters, and that, by refusing to collect further waste after 28 September 2017, Geminor was itself in repudiatory breach of that contract.

177. I find that the appropriate measure of damage for that breach is £801,041.20. Had I not accepted Potters' primary claim on damages, I would have assessed damages at £357,831.60.

178. As was discussed when the hearing concluded last Wednesday, since Mr Berragan is not able to be here today for the handing down of this judgment, I adjourn all consequential matters.

179. I grant an extension of time for any application for permission to appeal; and I also extend the time for appealing to 21 days after that consequentials hearing, subject to any further order of the court.

180. **Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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