

THE HIGH COURT

COMMERCIAL

[2023] IEHC 66

Record No. 2019/ 4140 P

BETWEEN

BIOMASS HEATING SOLUTIONS LIMITED

PLAINTIFF

- AND -

GEURTS INTERNATIONAL BV

DEFENDANT

Judgment of Mr. Justice Quinn delivered the 8th day of February 2023

(Modular trial and further discovery)

1. This action is listed for hearing on 16 May 2023. This judgment relates to two pre-trial applications which were heard together.
2. The defendant has applied for an order pursuant to O. 36, r. 9 of the Rules of the Superior Courts, O. 63 A, r. 5 of the Rules of the Superior Courts and/or pursuant to the

inherent jurisdiction of the court directing that the proceedings be conducted by way of a modular trial, in particular that the first module identify the applicable terms and conditions in respect of each of the twelve contracts the subject of the proceedings.

3. The plaintiff has applied for an order directing the defendant to make further and better discovery of documents falling within two of the categories set out in an order for discovery made on 16 February 2022, and in the alternative an order pursuant to O. 31, r. 21 of the Rules of the Superior Courts striking out the defendant's defence and counterclaim for failure to make discovery.

4. The plaintiff is based in Co. Limerick and operates an agritech biomass fuel business which supplies patented units ("BHSL Units") to farmers which convert untreated poultry manure to energy. It sources heat exchangers from the defendant

5. The defendant is based at Leiden in the Netherlands. It manufactures heat exchangers which transfer heat from one substance to another

6. The plaintiff claims that defects in the design and manufacture of the products supplied by the defendant caused serious failures when installed in units it supplied to its customers' poultry farms in the UK and that this resulted in substantial losses to the plaintiff. The defendant says that it manufactures heat exchangers, but does not design "systems".

The case as pleaded

7. In its statement of claim the plaintiff recites that the parties had been in contact since 2010 about the possibility of the defendants supplying the plaintiff with heat exchange systems for incorporation into its units. The plaintiff alleges that it was at all times agreed that the defendant would be solely responsible for the design of the heat exchange systems and that the defendant represented that it had the capacity and skill to do so.

8. The heat exchangers produced by the defendant were incorporated into BHSL Units, which were intended to operate by converting the heat generated from the burning of poultry

manure into heat in the form of hot water or steam used to provide heating at the poultry farms and to produce electricity.

9. The plaintiff says that it identified to the defendant its specific requirements as to such matters as temperature and rate of flow of the air in the systems and as to the temperature and pressure required to be achieved. It says that the defendant at all times represented to it that it had specialist knowledge and expertise in the design and manufacture of heat exchange systems and that the plaintiff relied on the defendant having such specialist knowledge and expertise.

10. In paragraph 8 the plaintiff pleads that the following were “the express and/or implied terms of the agreement” and that the defendant warranted the following: -

- (i) That it had the necessary skill to design and manufacture the heat exchange systems to the plaintiff’s specifications;
- (ii) That the defendant would exercise all reasonable care, skill and diligence in designing and manufacture of the heat exchange systems;
- (iii) All materials and components used by the defendant would be as per the design specification;
- (iv) That the heat exchange system supplied by the Plaintiff would be certified by Lloyd’s Register as being in compliance with the requirements of the Pressure Equipment Directive;
- (v) That the defendant would ensure that the design and manufacture of the systems would conform to the plaintiff’s requirements;
- (vi) That in the event of any change of design or variation being necessary in respect of the heat exchange systems, such design or variation would be a suitable response to the contract requirements;
- (vii) That the heat exchange systems would be fit for purpose;

- (viii) That any additional terms in the plaintiff's purchase orders would be express terms of the agreement between the parties;
 - (ix) That the goods and services supplied would comply with the terms of the Sale of Goods and Supply of Services Act 1893 to 1980.
- 11.** In its Reply to the Defence the Plaintiff pleads that it was agreed "and/ or understood" by the parties that the law applicable to the contract was the law of Ireland.
- 12.** The plaintiff pleads in the alternative that the defendant owed to the plaintiff: -
- (i) A duty of care to exercise due skill, care and diligence in designing and manufacturing the heat exchange systems;
 - (ii) Other duties of care consistent with the express and/or implied contractual terms and conditions and/or representations and warranties.
- 13.** The units which gave rise to these proceedings were the subject of three separate orders.
- 14.** On 6 November 2015, the plaintiff ordered a system which was incorporated in BHSL Unit 14 supplied by the plaintiff to Uphouse Farm, Norfolk, England.
- 15.** On 8 June 2016, the plaintiff ordered two systems. One was installed in BHSL Unit 15 supplied by the plaintiff to Ridby Court Poultry Farm, Hertfordshire, England, The second system was intended to be used in BHSL Unit 12 but was used for spare parts after issues arose in the operation of others.
- 16.** On 1 November 2016, the plaintiff ordered seven heat exchangers which were incorporated in BHSL Units 16, 17, 18, 19, 20 and 21 supplied by the plaintiff to four other farms in England.
- 17.** The total value of these orders, excluding VAT, was €666,797.
- 18.** The plaintiff says that the heat exchangers supplied by the defendant were defective as a result of which it suffered substantial loss, damage and expense.

19. The statement of claim provides particulars of the alleged defects and describes, unit by unit, “major failures in the heat exchange systems incorporated by the plaintiff into BHSL Units 14 to 21 which it installed in the farms of various customers in the United Kingdom”.

20. The failures are described as resulting in “banks of tubes failing” and failures in various components of the completed units. The units were installed in the plaintiff’s customers’ farms on a series of dates between October 2016 and March 2017. It is said that the failings were not materially remedied until various later dates running from December 2017 through to February 2018.

21. The plaintiff says that due to the underperformance of the units caused by the defects in the systems supplied by the defendant, the plaintiff breached its contractual obligations to its customers and that this resulted in compensation being paid to those customers.

22. The statement of claim gives particulars of “Loss, damage, inconvenience and expense” totalling €3,657,147. The subheadings of this amount are listed as follows: -

- Work by third party contractors – €291,393;
- Additional/replacement parts - €191,737;
- Additional/replacement parts purchased from the defendant - €314,495;
- Costs for travel, accommodation, car hire due to delays - €259,689;
- Staff hours on site - €165,108;
- Management time and costs - €248,726;
- Customer claims against the plaintiff - €808,170;
- Exchange rate losses to 31 May 2018; - €84,677
- Interest on unpaid project payments to 31 May 2018 - €122,424.

23. The plaintiff also claims loss of profits estimated at €1 million.

24. The plaintiff claims damages for breach of contract, breach of warranty, negligence, breach of duty (including breach of statutory duty), misrepresentation and negligent misstatement.

Defence delivered 13 December 2019

25. In its defence, the defendant makes a number of preliminary objections.

26. The defendant pleads that the proceedings are time barred, and that the plaintiff failed to act in the period prescribed in its contractual terms.

27. Secondly, the defendant pleads that the law of the Netherlands applies to the dispute. It relies for this plea firstly on its General Terms and Conditions which it asserts were incorporated into the agreement between the parties and secondly on Article 4.1. (a) of Regulation EC no. 593/2008 on the law applicable to contractual obligations (OJ L 199, 31.7.2007, p.). It says that particulars of Dutch law will be furnished.

28. Thirdly, the defendant relies on an exclusion of warranty contained in the manual provided with the heat exchangers which it quotes as follows: -

“Seller assumes no liability for not following the instructions in this manual, for damage and/or performance reduction as a result of improper transport and/or improper storage, and/or improper erection, and/or improper operation or maintenance by the buyer and/or owner nor for erosion, corrosion or fouling, ... nor any goods which shall be subject to misuse, neglect, accident, repairs or alterations by other than sellers’ employees, nor for damage which was not due to reasons solely attributable to the seller.

If other warranties conditions (sic) were contractually agreed it is mandatory to monitor and to continuously record the composition of media and the result of the heat exchanging process. Moreover Buyer/ Owner has the obligation to invite the supplier in writing if the heat exchangers is opened during the warranty period for

inspection or maintenance. If in negligence of those conditions, the full warranty will expire on the delivered materials.”

29. The defendant admits that it designs and manufactures heat exchangers, but not heat exchange systems.

30. The defendant denies having made the representations alleged in the statement of claim or any representations regarding its expertise in the design and manufacture of heat exchange systems.

31. The defendant denies that the relationship between the parties is governed by the representations and contractual terms described in the statement of claim, particularly those described at para. 8. It asserts that the heat exchangers were supplied subject to the defendant’s General Terms and Conditions. It pleads that when it accepted the plaintiff’s offer to purchase heat exchangers, its order confirmation referenced its General Terms and Conditions, and it says that those terms and conditions expressly excluded the plaintiff’s or any other terms and conditions.

32. Key features of the terms and conditions which the defendants say govern the transactions include the following: -

- In para. 2 (c) that any defect discovered by the buyer must be notified to the defendant within ten days of receipt.
- It further provides “non – observance of these obligations shall entail the extinction of all rights in connection with any ‘defects’”.
- In Clause 7, that in the event of any defects in the material or workmanship of the goods supplied, the defendant would repair or replace such goods within six months from the date in which they were put into operation “but no longer than twelve months from the date of shipment, whichever was the earlier”.

33. Clause 8 is headed “Limitation of Liability”

“(a) Seller’s liability for damages and/or losses, regardless of what the cause thereof may be, shall be limited to repair or replacement of the defective part or parts of the Goods as aforesaid. Without prejudice to the foregoing and for the avoidance of doubt, it is expressly noted and mutually agreed upon that Seller shall not be liable to Buyer and/or Owner for damages and/or losses arising out of or connected with delays (other than mutually agreed liquidated damages), curtailment of plant operations, process failure, pollution and environmental damage, occupational disease and toxic torts, conditions at Owner’s job site, loss of profits, loss of profits, loss of productivity, other cost removing any parts or equipment to be repaired or replaced, transportation and/or installation charges in connection with the repair, replacement nor shall Seller be liable for any contingent liability and/or consequential damages and/or losses, however caused.

(b) Seller’s cumulative liability in the aggregate for all obligations such as but not limited to warranties guarantees, liabilities, penalties and indemnifications, under the purchase order or at law, whether express or implied, including but not limited to those of merchantability and/or fitness for a particular purpose is limited to ten percent (10%) of the price.

(c) Buyer and/or Owner shall defend hold harmless and indemnify Seller against any liability for damages vis-a-vis third parties (including but not limited to, Owner in case Buyer is not the Owner) who claim to have suffered any loss or damage in connection with/or resulting from any agreement between Seller and Buyer or any Goods delivered, or services rendered by Seller pursuant thereto.

(d) Claims for damages from Buyer against Seller shall be barred and be null and void after twelve (12) months have elapsed from the day on which the damage occurred or could have been discovered”.

34. Paragraph 15 of the General Terms and Conditions provides that: -

“This Proposal and any agreement resulting there from shall be construed and given effect according to the law of the Netherlands”.

35. Paragraph 18 provided as follows: -

“Any dispute arising between Seller and Buyer will, if it cannot be settled amicably, be brought before the appropriate judge in the District Court of the Hague”.

36. The plaintiffs reliance on terms and conditions pleaded in its paragraph 8 and the defendant’s reliance on its own terms and conditions and the exclusions summarised above, present a classic “battle of the forms”, which will be central to the hearing of the action. The phrase “battle of the forms” was used by the parties in submissions. I doubt if the identification of governing terms and conditions will be as simple as this phrase suggests, but I adopt it for shorthand in this judgment.

Liability

37. The defendant admits that in the first heat exchanger delivered which is the subject of these proceedings, it made a mistake in relation to the correct placement of a distributor pipe inside a steam drum within the heat exchanger. It says that that issue was negligible and was resolved for all heat exchangers supplied thereafter. It denies responsibility for the failures which the plaintiff alleges occurred in the units delivered thereafter.

38. The defendant pleads contributory negligence in relation to the design and manufacture of the BHSL Units by the plaintiff.

Counterclaim

39. The defendant counterclaims for a sum of €967,238.91 for unpaid invoices together with statutory interest pursuant to provisions for the payment of such interest in the Dutch Civil Code.

40. The plaintiff pleads that if any amount is due and owing in respect of the invoices, it is entitled to set off against that amount such sums as are owing to it in respect of damages for defective product and services.

Proceedings in the Hague

41. On 9 July 2018, before these proceedings commenced, the defendant commenced a proceeding against the plaintiff in the District Court of the Hague claiming the total sum of €967,238.91, comprising €559,023 for the heat exchangers and spare parts supplied and an amount of €408,215 for resolving the faults of installations and “the optimisation thereof”. The defendant invoked para. 15 of its General Terms and Conditions concerning Dutch governing law, and para. 18 to invoke the jurisdiction of the court at the Hague.

42. BHSL applied for a declaration that the court at the Hague had no jurisdiction. The court upheld that objection and declared that it did not have jurisdiction to hear the claim.

43. The court considered the test for jurisdiction pursuant to Article 25 of Brussels Recast (Regulation (EU) 1215/2012 of the European Parliament). In its judgment of 8 May 2019, the court cited case law of the ECJ and summarised the position as follows: -

“Under the old EEX Treaty (being Brussels 1 (OJL 299, 31/12/1972 P. 0032 – 0042)) the ECJ ruled that the adoption of a forum choice clause as referred to in Article 17 of the old EEX Treaty (now Article 25 of Brussels 2) requires agreement between the parties, which means that the parties must have effective, clear and must have meticulously expressed consensus on the choice of forum”.

44. The court continued: -

“It is not in dispute that the parties have been doing business with each other since at least 2009/2010, with Guerts supplying heat exchangers designed by it to BHSL for the benefit of the power stations for chicken farmers developed by the latter. Guerts states that BHSL has never protested against the applicability of its General Terms and Conditions stated by Guerts in its quotations and/or order confirmations.

However, it has neither been stated nor proved that BHSL knew or received the General Terms and Conditions from Guerts. For this reason, it cannot be assumed that the choice of forum clause was the subject of consensus between the parties as referred to above. Guerts’ argument that parties have agreed on a choice of forum in a form that is accepted by the parties that have become common practice between the parties, because BHSL has never protested in the longstanding trade relationship between the parties, is therefore not valid either. The parties have not agreed on a valid choice of forum as referred to in Article 25 of Brussels 2”.

45. The court also rejected an argument by reference to Article 7 of Brussels 2, concerning the place for performance of the obligation the subject of the claim.

46. The judgment stated that in determining the question of jurisdiction by reference to the Brussels Regulation, *“the court does not have to conduct extensive evidence proceedings with regard to disputed facts that are relevant to both the jurisdiction in question and the main proceedings.”*

47. In opposing the application for a modular trial, the plaintiff submits that the issue of governing law and applicable terms and conditions is *res judicata*, having been determined by this decision. There are two difficulties with that submission. Firstly, it is clear that the court was deciding one question only, being the question of jurisdiction, and not a question of applicable law. Secondly, insofar as the court determined the matter by a finding that there had been no clear agreement on the choice of forum of the Hague, the court noted expressly

that it had not conducted an extensive examination of evidence with regard to disputed facts. When this case comes to trial, it will still be a matter for the plaintiff to prove the terms of the contract it pleads, and for the defendant to meet that case and prove terms it relies on. I cannot find that this basic proof requirement is displaced by the decision of the court of the Hague. That “battle of the forms” can only be resolved after hearing evidence of relevant witnesses and full submissions in this court.

Progress of these proceedings

48. The chronology of these proceedings, including certain events which occurred before they were commenced, is directly relevant to my conclusions as to the modular trial.

49. The history of the matter long predates the commencement of these proceedings. Although the parties had been engaged with each other from as early as 2010, the heat exchangers the subject of these proceedings were ordered in November 2015, June 2016, and November 2016.

50. The first “major failure”, as it is described by the plaintiff, occurred on 22 December 2016 in respect of Unit 14, which had been installed at Uphouse Farm, Norfolk, England.

51. The next “major failure” occurred on 3 February 2017 in respect of Unit 15, which had been installed at Ridby Court Poultry Farm, Hertfordshire, England. For Units 16 to 21, various dates of failures are cited. It is alleged that the failings were not materially remedied until various dates, running from July 2017 through to February 2018.

52. On 9 July 2018 the defendant commenced the “debt” proceedings in the Hague.

53. On 8 May 2019, the court at the Hague delivered its ruling declining jurisdiction.

54. On 24 May 2019 the plenary summons was issued in these proceedings.

55. On 1 August 2019, the statement of claim was delivered.

56. On 14 October 2019, these proceedings were entered to the Commercial List of this Court.

- 57.** On 13 December 2019, the defendant delivered its defence and counterclaim.
- 58.** For a period from February 2020 to November 2021 the parties were engaged in a “standstill”. The factors causing the standstill were twofold, namely restrictions associated with the Covid – 19 pandemic and efforts to mediate the dispute. Unsuccessful mediations were held on 9 February 2020 and on 20 September 2021.
- 59.** On 16 February 2022 orders for discovery were made.
- 60.** On 13 July 2022, the parties exchanged affidavits of discovery.
- 61.** On 18 July 2022, the court fixed a trial date for the proceedings in early May 2023, later amended to 16 May 2023, the date currently standing as the trial date. On that date, McDonald J. also directed that any motions arising from the discovery should be made returnable for 24 October 2022.
- 62.** In respect of discovery matters, the defendant sought and obtained time extensions on two separate occasions. There are described by the plaintiff as or part of a “pattern” of delay applications by the defendants.
- 63.** Firstly, the original time for making discovery was limited to 1 June 2022. On 2 June 2022, an application was made by the defendant for an extension of a period of eight weeks. On that application, counsel for the plaintiff submitted that the period of eight weeks was excessive, and that a period of four weeks would be sufficient. Following submissions from both parties the court granted an extension of six weeks and the discovery was duly exchanged on 13 July.
- 64.** Secondly, neither party brought any motion arising from the discovery returnable for the court fixed date of 24 October 2022. On 24 October 2022, Twomey J. extended the period for the bringing of such motions such that they be issued returnable for 21 November 2022.

65. Availing of this extension, the plaintiff issued its motion for further discovery on 16 November 2022. The defendant issued no motion for further discovery. It issued also on 16 November 2022, the motion for a modular trial.

Modular trial

66. The defendant's application is for an order directing a modular trial and in particular that the first module "identify the applicable terms and conditions in respect of each of the 12 contracts the subject of the proceedings".

67. The reasons given by the defendant are as follows.

68. Firstly, that the question of the identification of the applicable terms and conditions is capable of being determined in a discrete module.

69. Secondly, that even at a unitary trial, the determination of what terms and conditions govern the relationship between the parties will necessarily be the first issue to be determined.

70. Thirdly, the defendant says that the determination of such a module has the potential to be dispositive of the plaintiff's liability claims in respect of products delivered to it. It refers to a letter which its solicitors, Matheson, wrote on 21 October 2022 proposing the modularisation of the proceedings. In that letter, the defendant stated that if the court were to determine that Dutch law is applicable, then the effect of Clause 8 (b) of its General Terms and Conditions would be to limit its liability to 10% of the price of the Dutch law governed orders. In that eventuality, the defendant would agree to accept liability in respect of the Dutch law governed orders, limited to 10% of the price. That liability could be set off against the amounts owing to it by the plaintiff. It says that this would mean the issue of liability in respect of those orders would no longer have to be considered by the court, thus saving a significant amount of time at the trial.

71. This proposition appears to be based on the assumption that if the court held that the defendant's terms and conditions applied and if the defendant admitted liability of up to 10% of the price, the plaintiff would simply pay the relevant invoiced amount net only of a deduction of 10%. There were limited submissions on this point, but it was by no means clear that this formula would finally dispose of the matter.

72. Nonetheless the defendant submits that were it to concede liability in respect of the damages claimed against it, on the basis that they were limited to 10% of the price this would at least shorten the trial itself.

73. Fourthly, the defendant submits that the plaintiff is unable to demonstrate that it would suffer any true prejudice if a modular trial were ordered apart from the loss of the trial date.

74. The defendant makes the following submissions on the question.

75. Firstly, that the matter of the governing terms and conditions is *res judicata*, having regard to the decision of the court in the Hague. It submits that the decision of that court was grounded on a finding that the defendant's terms and conditions had not been validly incorporated into the contract between the parties.

76. Secondly, that the proposed module would be dispositive of issues as to contract if, and only if, the court found that the defendant's terms and conditions governed all of the contracts the subject of the proceedings. It submits that even the evidence contained in the affidavit grounding the defendant's application for the modular trial does not go so far as to say that every contract is subject to those terms and conditions. The grounding affidavit of the defendant's solicitor Mr. Casey says that documents reviewed to date "*provide evidence that the majority, if not all, of the agreements pursuant to which the supplied goods were provided are subject to Geurt's General Terms and Conditions*". He continues by stating that the review is ongoing with the aim of completing it before the first module is heard.

77. The plaintiff submits that should the court hold in Module 1 that any of the contracts are not governed by the defendant's General Terms and Conditions, Module 2 will still need to consider all of the liability issues as a matter of Irish law.

78. Thirdly, the plaintiff submits that this application is the latest in what it describes as a "pattern of applications, the objective of which has been to delay the case".

79. Fourthly, the plaintiff submits that if the court directs a modular trial, it will suffer prejudice in that the trial date, fixed as long ago as July 2022, would be lost which would be unfair to it having regard to the long history of the proceedings.

Principles applying to the discretion

80. The parties referred the court to the authorities on the exercise of the discretion to order a modular trial, including *Cork Plastics (Manufacturing) v. INEOS Compound UK Limited* [2008] IEHC 93, *Ryanair DAC v. SC Vola RO SRL* [2020] IEHC 308, *Nolan v. Dildar Limited* [2020] IEHC 243, *McCann v. Desmond* [2010] 4 IR 554, *Weaving Macro Fixed Income Fund Limited v. PNC Global Investment Servicing (Europe) Limited* [2012] 4 IR 681, *Inland Fisheries Ireland v. O'Baoill* [2015] IESC 45, *B v. Wexford County Council* [2021] IEHC 205, *Ryanair DAC v. Skyscanner Limited & Ors* [2022] IEHC 696, and *Novartis Pharma AG v. Eli Lilly Nederlands BV* [2021] IEHC 814.

81. I have considered the descriptions of the principles given in these judgments. It is not necessary to repeat here the analysis made in all those cases, and I shall state succinctly the principles relevant to the determination of this application.

82. Firstly, the default position is that the court should conduct a unitary trial.

83. Secondly, orders 36 and 63A confer on the court a discretion to direct a modular trial.

84. Thirdly, the onus is on the moving party to satisfy the court that the interests of the administration of justice are served by directing a modular trial.

85. Fourthly, if the matter is capable of being disposed of by separate modules, and if a module can be identified which is capable of being determined independently of the balance of the trial, the court must consider whether directing such a module to be heard separately will or may generate efficiencies and benefits in terms of the saving of court time and expense and other benefits such as the facility for the parties and the court to focus on discrete issues in each module.

86. Fifthly, if such benefits are discernible the court needs to consider whether they are of sufficient weight as to justify departure from the default position of a unitary trial. This is a balancing exercise.

87. Sixthly, in exercising the court's discretion, it should take account of such factors as: -

- (a) This history of the case, including the pace at which it has moved this far.
- (b) Delay in bringing the application or any other delay considerations in the context of the proceedings as a whole;
- (c) Prejudice to a party pressing for a unitary trial;
- (d) Whether the application has truly been brought in the interests of saving court time and cost and expense or for some other purpose such as the strategic interests of the applicant;

Res judicata

88. The plaintiff submits that the question as to the terms and conditions applicable is now *res judicata* having regard to the decision of the court in the Hague.

89. I have referred to this question at paragraph 47 above. The court in the Hague was concerned only with the matter of jurisdiction and determined that question without having conducted "extensive evidence proceedings with regard to disputed facts that are relevant to both the jurisdictional question and the main proceedings". Undoubtedly, the judgment turned on a finding by the court of the Hague that the defendant had not discharged the onus

of establishing that the parties had “effective clear and must have meticulously expressed consensus on the choice of forum”. (sic)

90. The plaintiff refers to the judgment of Barniville J. (as he then was) in Point Village Development Limited v. Dunnes Stores ULC [2021] IEHC 628.

91. Barniville J. adopted the four requirements which must be established for the doctrine of res judicata to apply as enunciated by Kelly J. (as he then was) in McCannon v. President of Ireland : -

“

(a) previous decision of a judicial tribunal of competent jurisdiction

(b) that decision must have been a final and conclusive judgment

(c) there must be an identity of parties;

(d) there must be an identity of subject matter.”

92. It was not disputed that the court in the Hague was a court of competent jurisdiction, at least for the question before it, namely that of determining jurisdiction pursuant to Articles 25 and 7 of Brussels 2.

93. Although the decision was made on an interlocutory application, or its equivalent, it was treated by the parties as final and conclusive on the question before that court.

94. As regards identity of subject matter, Barniville J. in Point Village expanded that “in order to establish an issue estoppel, it is not necessary to establish that there is an exact identity of causes of action involved, merely an identity of issues”.

95. The plaintiff submits that because the finding that the requirements of Article 25 for a “meticulously expressed consensus on the choice of forum” was grounded on the absence of express agreement”, that is a conclusive and final determination by a competent court that the defendant’s General Terms and Conditions were not the basis of the contract.

96. The causes of action in this case are in contract, breach of duty (including breach of statutory duty), breach of warranty, negligence, misrepresentation, and negligent

misstatement. It is clear from the statement of claim and the defence that the parties are in vigorous disagreement as to the terms and conditions of the contract or contracts and as to the governing law. It may be that this “battle of the forms” will be largely informed by the documents, which means not only the respective parties terms and conditions, but also all documents, of which I was informed there has been extensive discovery, such as quotes, order confirmations, invoices and correspondence by email and otherwise. But it is difficult to envisage this first question being determined by the court of trial without hearing the evidence of persons engaged in the relationship, and full submissions. The decision of the court in the Hague was limited to the question of its jurisdiction. As presented to this court it did not engage a trial and consideration of “extensive evidence with regard to disputed facts that are relevant to both the jurisdictional question and the main proceeding” (paragraph 2.6 of the Hague court judgment).

97. Undoubtedly there was a measure of overlap between the finding of the Hague Court and the first question to be determined in these proceedings. But the issue requiring determination in these proceedings is a wider question of what were the terms of the contract, and a finding in the context of an application limited to the question of jurisdiction, and without a consideration at a plenary trial of substantive evidential questions cannot preclude a full examination of the evidence to determine all the terms of the contract between these parties.

Benefits of a modular trial

98. The first question to be decided by the court will be which terms and conditions apply to the contract. The issue is squarely at the centre of the case from the very outset having regard to the pleadings. Determination of this issue will inform a number of questions: -

- (a) Whether Dutch law or Irish law governs the case;

- (b) A subset of (a) is the applicability of the Dutch Civil Code relied on in the counterclaim for amounts invoiced.
- (c) Whether the defendant can rely on the exclusions and limitations of liability stated in its General Terms and Conditions.
- (d) The extent, if any, to which the non-contract claims (negligence breach of duty, including statutory duty and others) are limited by those terms and conditions.

99. The plaintiff says that if any of the contracts are not governed by the defendant's General Terms and Conditions, the case will not be simplified or shortened in the manner suggested by the defendant. That submission in turn begs questions as to how many different contracts were entered into and whether they are reconcilable.

100. There is some force in this submission. However, the court will be required at the outset of any trial to determine the question of the governing terms and conditions.

101. At first pass, an outcome by which different terms and conditions are found to apply to different units of production would seem unattractive and unnecessarily complex. The parties do not eliminate this possibility, although the defendant says that it will submit that its General Terms and Conditions apply to all the contracts. Should that more complex finding be the outcome of a first module, it would still inform the preparation for and conduct of a second module. In that scenario, the saving of time in the second module would be less. But the court and the parties will still be better informed for such a second module.

102. At one level it might be said that determining the governing terms and conditions as a discrete exercise is a first step in every breach of contract case and it cannot be said that every breach of contract case is suitable for modularisation. Nonetheless, it seems to me that in this case, the issue of which terms and conditions apply is so central to the direction of this case and so contentious both as a matter of fact and of law, that the outcome of a module to

determine that question will inform both the trial itself and all preparations therefore to such an extent that significant savings of time and cost are achievable by directing a modular trial.

Prejudice and related considerations

103. The only prejudice cited by the plaintiff is that it will lose the trial date of May 2023.

104. The parties agree that if a modular trial is now ordered the unitary trial cannot proceed in May 2023. It would not be realistic to expect that a first module, which itself will require exchange of witness statement and submissions, will be heard and determined in sufficient to a time to achieve the purpose which I have described earlier namely, to shorten or at the very least inform the preparations for the balance of the trial.

105. The question of prejudice is linked inexorably to the analysis of the timing of this application, which in turn requires consideration of the overall history. The plaintiff submits that the court should take account of the facts that the trial date was fixed in July 2022 and yet this application was only issued in November 2022. It submits that there is a pattern of applications by the defendant seeking to delay the trial.

106. While the proceedings were pending before the court at the Hague, it was not open to the plaintiff to commence these proceedings. Furthermore, it very promptly commenced these proceedings (24 May 2019) after delivery of the judgment of the court in the Hague, on 8 May 2019. As against this, the issues concerning defects started to emerge as early as December 2016 and it was only in July 2018 that the Dutch proceedings were commenced.

107. The “pattern of delay” cited by the plaintiff is a reference to the two separate occasions on which applications were made for extensions of time associated with discovery which I have discussed earlier (see paras. 62 – 65 above). The effect of those applications was to extend by a short number of weeks the timeframe relating to discovery of documents. The plaintiff itself availed of the extension of time for bringing applications for further discovery.

108. The standstill of 2020 – 2021, which ran for a period of 21 months, was clearly attributable to positions adopted by both sides. Nonetheless, it was a major factor contributing to the fact that the case has been so long in the commercial list before it would come to trial. In the life history of this case, I do not regard the short extensions sought and obtained by the defendant relating to discovery, at least one of which was partially agreed to, as amounting to a “pattern” of the type described by the plaintiff.

109. Where a trial date has been fixed and would be lost by ordering a modular trial, there is undoubtedly a measure of prejudice to a party such as a plaintiff which asserts that it wishes to proceed. In weighing the balance in this case, I have taken account of the following:

- (a) the result of the first module will inform the manner of preparation and conduct of the balance of the trial to such an extent that it is likely to
 - (i) Facilitate a saving in time and cost for all parties; and
 - (ii) Generate focus on the central issues in the case in a sequential manner.
- (b) Any prejudice to the plaintiff by the deferment of the balance of the trial is mitigated by the fact that the issue for determination in the first module is an important one which requires to be determined first, on any view of this case
- (c) The pace of these proceedings and the history of the engagement of both parties is such that the plaintiff cannot claim that this application and its timing is a mere delaying tactic by the defendant. For example, it has not been suggested to me that the proceedings in the Hague were motivated by anything other than the objective of pursuing collection of invoiced amounts.

110. These factors are sufficiently strong to weigh the balance in favour of ordering a modular trial.

Defining the first module

111. The notice of motion seeks an order for a modular trial “to identify the applicable terms and conditions in respect of each of the 12 contracts”. That is the first question to be determined and I shall order such a module.

112. In the course of submissions reference was made to the possibility that the question of the governing law of the transaction, which on its face is a matter which would be governed by determining whether the defendant’s terms and conditions applied, may still fall for determination independently of the “battle of the forms”. Reference was made to the Rome Regulation (op cit).

113. In the Reply the plaintiff pleads that it was at all times understood by the parties that the law applicable to the contract was the law of Ireland. No document containing contractual terms to that effect was opened by the plaintiff on this application. Similarly, the defendant’s case that the law applicable is the law of the Netherlands appears from para. 2 of the defence to be not confined to relying on its General Terms and Conditions.

114. In ordering a modular trial, I do so on the basis that it should be possible in a first module to determine both the question of applicable terms and conditions and any remaining question, should there be one, of whether Irish or Dutch law applies to the relationship or parts thereof.

115. It may prove to be as simple as stating that if the defendant’s General Terms and Conditions apply, Dutch law applies. But I would not countenance a result where a first module would not resolve also the question of governing law. Before the order on this application is perfected I shall hear the parties as it may be appropriate to refine the form of the module from that identified in the notice of motion.

Discovery

116. The plaintiff seeks an order for further and better discovery in respect of two of the categories of discovery ordered. In broad terms the complaints regarding the discovery made by the defendant are as follows: -

- (i) That the search terms used by the defendant in its electronic discovery were inadequate and that this caused the omission of relevant documents which ought to have been discovered. Under this heading the plaintiff cites a number of examples, to which I shall turn later;
- (ii) paucity of documents relating to exchanges between the defendant and its external consultants;
- (iii) failure to discover original calculations upon which the defendant's design of the products supplied was based;
- (iv) failure to identify the dates of certain calculations and the plaintiff's units to which they relate.

117. The parties are in agreement as to the general principles to be applied before the court would make an order for further discovery.

118. The leading case on the subject, and which is still relevant even in the context of modern e – discovery, is the judgment of Kenny J. in *Sterling Winthrop Group Limited v. Farbenfabriken Bayer* [1967] IR 97.

119. Kenny J. summarised the test as follows: -

“Although the rules of court have never provided for an application by either party for an order that the other party should make a further affidavit of discovery—other than Or. 31, r. 20 (3)—the Courts in Ireland and England have always had power to order that either party should make a further affidavit. Such an order will not be made when the application is based solely on an affidavit alleging that the other party has documents in his possession relevant to the action which have not been disclosed

by the first affidavit. The Court will, however, order a further affidavit of documents when it is satisfied

(a) from the pleadings,

(b) from the affidavit of discovery already filed,

(c) from the documents referred to in the affidavit of discovery, or

(d) from an admission by the party who has made the affidavit of discovery

that the party against whom the order is sought has other documents in his possession relating to the issues in the action which have not been disclosed by the first affidavit.

The Court will also order a further affidavit when there are grounds, derived from the documents discovered, for suspecting that there are other relevant documents in the possession of the party who has made the affidavit or where there are reasonable grounds for believing that the person making the affidavit of discovery has misunderstood the issues in the case and has, in consequence, omitted documents from it”.

120. In his conclusion, Kenny J. added the following: -

“... the Court should not order a further affidavit of documents unless it has been shown that there are other relevant documents in the possession of the defendants or that the person making the affidavits has misunderstood the issues in the action or that his view that the documents are not relevant is wrong”.

121. In *Hireservices Limited v. An Post* [2020] IECA 120, Murray J. expanded as follows:-

“It is a matter for the party seeking the order to establish that there has been a default so as to raise ‘a reasonable suspicion that the party who had already made an affidavit had other documents relating to the matters in question in his possession’ (Lyell v. Kennedy (No. 3) (1884) 27 Ch.D. 1 , 20)”.

122. Recent case law endorses the proposition that where documents are stored electronically, a number of principles will apply to e – discovery as follows: -

- (i) That the use of keywords in electronic searches is acceptable,
- (ii) Even in a case where it may be demonstrated that documents have been omitted as a consequence of the use of certain search terms, this fact of itself does not establish that the process followed, and the search terms used were inappropriate;
- (iii) Proportionality and reasonableness inform the assessment of the manner in which the search terms have been identified. The question will be whether the party making discovery has made a reasonable and proportionate search of all documents in his possession. That exercise requires that the designer of the search and of the search terms has made an honest and diligent judgment as to the terms to be utilised, informed by an understanding of the obligations on a party making discovery and having regard to the facts and the issues which are in dispute in the case.

123. In *Agents’ Mutual Limited v. Gascoigne Halman Limited & Ors.* [2019] EWHC 3104, Mr. Justice Marcus Smith put it as follows: -

“The whole point of keywords is to reduce an unmanageable universe of documents to one susceptible of a manual search. In this case the keyword and date parameters reduced an unmanageable 2 million documents to a manageable 30,000. Were relevant documents missed? Some may have been. But that is not the question. The question is whether a reasonable and proportionate search has been undertaken. Part of that process is reducing the unmanageable document universe to a universe that can be (in this case) manually reviewed through an electronic process. The issue is as

Morgan J. described it in Digicel (St. Lucia) Ltd. v. Cable & Wireless plc. [2008]

EWHC 2522 ch. At 80: -

‘If one were to adopt the ‘leave no stone unturned’ approach to disclosure then one would be more ready to add keywords to those originally used by the defendants. However, it will usually be wrong in principle to adopt that approach, and, in my judgment, it would be wrong to adopt that approach in the circumstances of this case. One therefore has to consider the proportionality of adding an additional keyword. For that purpose one has form some sort of view as to the possible benefit to the claimants of adding the keyword and the possible burden to the defendants of doing so. The burden to the defendants will principally consist of the burden of manually reviewing a large number of irrelevant documents’.

124. Although the issues on this application focused principally on categories 4 and 5, which I shall detail below, it is informative to have regard to the six categories of discovery, all of which were ordered by consent, and which may be summarised as follows: -

Category 1

Documents recording the terms upon which the defendants supplied the contract products to the plaintiff.

Category 2

Documents recording the precise nature of the products to be supplied, including the defendant’s experience and expertise in respect of the production and the provision of such products.

Category 3

Documents recording or evidencing all engagement between the plaintiff and the defendant in respect of the following: -

- (i) The design and production of the products to be incorporated into the BHSL Units;
- (ii) Calculations underlying the design and/or operation of the products;
- (iii) Specifications to be met by the products;
- (iv) The plaintiff's requirements in respect of the products;
- (v) Factors affecting or likely to affect the performance of the products;
- (vi) The design of the BHSL Units;
- (vii) The specification of the component parts of the BHSL Units;
- (viii) The assembly commissioning implementation and testing of BHSL Units;
- (ix) The actual performance of the products once incorporated into the BHSL Units and the performance of those units as a whole including the performance issues and failures outlined in the statement of claim;
- (x) The steps to be taken and actually taken to address performance issues in respect of the products incorporated within the BHSL Units, including the performance issues and failures outlined in the statement of claim.

Category 4

To the extent not already discovered in response to Category 3, (emphasis added) documents recording and/or evidencing the design of the products supplied by the defendant to the plaintiff in respect of BHSL Units 7 to 10 and 14 to 21 and the design of those units (including any revisions or changes in respect of those designs) including (but not limited to) all documents recording and/or referring to and/or evidencing: -

- (i) The manner in which those products would interact with and form part of the wider BHSL Units into which they were to be incorporated;
- (ii) The manner in which the design of the products changed between those which were installed in units 7 to 10 and those which were installed in units 14 to 21;
- (iii) The manner in which the design of the products changed once the issues set out in the statement of claim began to occur;
- (iv) The materials from which the products were to be produced and/or from which they actually produced;
- (v) All calculations which informed and were relevant to, the design, and or operation of the products (including any revisions or changes in respect of the design or the relevant calculations), “including but not limited to the following design calculations which have been specifically sought by the plaintiff’s expert engineer” by reference to the BHSL Unit in which the relevant products were installed:
 - (a) BHSL Unit 7 Wimpstone (original design and replacement bundles) – pressure drop calculation on the water side of the heat exchanger;
 - Surface area calculation;
 - Flow rate calculation;
 - (b) For each of Units 8 – 10 and 14 -21, the following : -
 - pressure drop calculation on the water side of the heat exchanger;
 - Surface area calculation;
 - Flow rate calculation

- (vi) The specification of the component parts of all the BHSL Units.

Category 5

Documents created on or before 30 September 2020 recording and/or evidencing the performance, lack of performance and/or failure of the BHSL Units (into which the defendant's units were incorporated) set out in the statement of claim and the measures taken and works done in an attempt to remedy those issues.

Category 6

Documents evidencing and vouching the defendant's counterclaim for €967,238.91 plus interest pursuant to the Dutch Civil Code.

Defendant's discovery

125. The defendant's discovery was made by an affidavit of Maria Agatha Bernadette Heilig sworn 12 July 2022.

126. Ms. Heilig's affidavit contains the usual averments that she understands the obligation on a party making discovery and that the defendant does not have in its possession, custody, power or procurement any further documents or electronically stored information save that recited in the first and second schedule to the affidavit. She makes also the usual form of averment in relation to the second part of the first schedule regarding documents in respect of which privilege is asserted.

127. Ms. Heilig describes the methodology and approach adopted by the defendant.

128. She says that the defendant's IT team conducted data collection of electronically stored information and the defendant's legal team extracted a forensic copy of data sources to compile the defendant's document universe. The sources comprised emails and documents from shared file servers, and that the data was gathered from both the email inboxes of relevant employees and from the project or sales files pertaining to all projects carried out for the plaintiffs since December 2009.

129. Ms. Heilig describes the manner in which the defendant identified potential custodians and then conducted an analysis of the email inboxes of its employees from 8 December 2009 onwards.

130. Ms. Heilig describes the manner in which hard copy files were gathered by the defendant, initially in the context of preparation for the related proceedings in the Netherlands. She continues: -

“7. Those files contained copies of documents which were already available in digital form and have been reviewed as part of the defendant’s discovery. The documents which were not already available in digital format comprised calculations made using a now – outdated calculation program, which were only available in printouts. The printed versions of these calculations have been added to the information disclosed to the plaintiff.

8. Any physical files were collected in the manner described above. A later search of all available hardcopy files belonging to the defendant was conducted during the data collection stage to determine whether any other hard copy files were available in the defendant’s archive.

9. All documents were then assessed for potential relevance by reference to the categories of discovery by Roland Van Den Nouland, Geurts International BV company lawyer with input from other members of Geurts International BV on the technical documentation.

10. Various search terms and combinations thereof have been applied to the documents within the document universe in order to ensure that only documents potentially relevant to the categories of discovery were reviewed. The search terms, including the search formulae applied to the document universe, were as follows”.

131. The search terms used by the defendant were applied under two headings.

132. Firstly, two terms “BHSL” and “Biomass” were applied to the “Project and Sales Files.”

133. Secondly, in respect of the email inboxes of employees of the defendant, three categories of terms were used. 44 names used were descriptive of the plaintiff or persons employed by the plaintiff such as: Jack@biomass.ie, declan@biomass.ie, “Michael McEnergy” “Michael”, “McEnergy”, “Bio”, “Biomass”, “BHSL”.

134. The names of the customers of the plaintiff were used, being: “Uphouse”, Ridby Court”, “Seisdon”, “Pillaton”, “Baxter” and “Williams”.

135. Four terms which are described by the defendant in submissions as “functional terms” were used, being the following: “Spare bundle”, “bundle”, “tubes”, and “FBC”.

136. The plaintiff makes a number of objections in relation to the limitations of the four functional words used in this exercise, to which I shall return.

137. Ms. Heilig states that the data collected was exported to the digital services group at Matheson, solicitors for the defendant. Once received by Matheson, the documents were accumulated centrally for the purpose of determining whether they fell within the categories of discovery.

138. Ms. Heilig then describes the manner in which the defendant undertook de – duplication, data analytics, a foreign language documents review, a “liner review” categorisation of documents and redactions.

The plaintiff’s objections

139. The application is grounded on an affidavit sworn on behalf of the plaintiff by Margaret Davin on 15 November 2022.

140. Ms. Davin refers firstly to Category 4 and states as follows: -

“22. The plaintiff’s review suggests that many of the documents which would be expected to form part of this category have not been provided, particularly much of

the internal documentation relating to the designs and its development over time and the various calculations sought under para. 5 which are of particular importance to the plaintiff's case.

23. Rather, the review discloses that the documentation falling within this category is only provided to the extent that includes a reference to "BHSL" or "biomass" or emails which refer to one of BHSL's employees or agents, or the relevant projects. This deficiency would appear to stem from the search terms which have been used as part of the initial search process adopted by the defendant".

141. Ms. Davin then refers to the list of search terms which were recited in the defendant's affidavit of discovery and continues: -

"24. I say and am advised that while the above search terms may have been adequate to capture the documents sought in response to Category 3 [which refer to the engagement between the plaintiff and the defendant in respect of matters such as the design and production of the units to be incorporated into the BHSL units and the calculations underlying the design and operation of those products], these search terms were not sufficient to capture other documents (in particular the defendant's internal documents related to the design process and the requested calculations).

25. Internal design revisions do not appear to have been provided unless same were either provided to BHSL directly or BHSL was mentioned in the document itself.

27. Our review also indicates that many of the expected internal communications relating to the design process and revisions and calculations are missing".

142. Ms. Davin refers to correspondence which preceded the issue of the motion and in particular to a reply from Messrs Matheson of 10 November 2022 on this subject which referred to "some 229 emails which contain internal communications between Geurts and employees".

143. Ms. Davin continues: -

“The vast bulk of these emails originate from emails initially sent by BHSL or one of its employees which were therefore captured by the search terms used”.

144. The plaintiff’s complaint is that only emails and communications which can be traced to communications with the plaintiff, which are captured by Category 3, have been identified under this heading and many internal emails have not been captured. In essence, the complaint appears to amount to a complaint to the effect that the four “functional terms” were inadequate, being: - “bare bundle”, “bundle”, “tubes” and “FBC”.

145. Ms. Davin states in her conclusion: -

“I say and believe that it would appear to be very likely that there are further documents in the possession of the defendant which come within Categories 4 and 5 of the Geurts discovery order and have not been discovered to date. These deficiencies in the discovery made, as explained above, would appear to stem from the manner in which the defendant has searched for and assembled the documents, in particular the search terms which it has used as part of the initial search process”.

146. She continues: -

“44. The documents in question are of crucial importance to the plaintiff in advancing its case since they relate to the design of the products supplied by the defendant, the ultimate lack of performance and failure of the BHSL units into which those products were incorporated and the steps taken to remedy same. Without prejudice to the generality of the foregoing, there is a particular importance attaching to the calculations which underpin the design of the products and the plaintiff’s expert engineer has specifically asked to receive these”.

147. In making this very general criticism of the four “functional” search terms used by the defendant, the plaintiff has made no submission as to what further or other terms ought to have been applied.

148. The defendants say that the search terms used were adequate. In a replying affidavit Ms. Heilig states the following: -

“17. For example, the search terms “spare bundle”, “bundle” and “tubes” were used. These terms represent key component parts of the defendant’s products. As such, any design document, communication and pressure drop calculation (internal or otherwise) (as sought in Category 4), and any document and/or evidencing “internal measures taken and the works done in an attempt to remedy” (internal or otherwise) (as sought in Category 5) including these terms held by the identified custodians and relating to a project undertaken on behalf of the plaintiff, would be captured in the defendant’s search.”

149. The defendant says that the combined effect of applying the search terms “BHSL” and “biomass” to the project files, the 44 names of persons relative to the plaintiff, together with the names of each of the plaintiff’s customers, thereby identifying the relevant project in each case, over a period from 2009 onwards, in conjunction with the four “functional terms” is that any design document, communication and calculation or other communication relating to a project undertaken on behalf of the plaintiff will be captured by its search.

150. The defendant also says that if these names and other identification methods and search terms were not applied it could be exposed to an obligation to make discovery of all communications concerning design of its range of products for a period of over 10 years, even unrelated to products supplied to the plaintiffs’ requirements.

151. At one level, one could have some reservations about the use of only four “functional” terms. Nonetheless the plaintiff’s case rests on the proposition that its particular

specifications have not been met. A wider scope of discovery which would entail internal material relating to the generic design of the defendant's products, even unrelated to the plaintiff, would be excessive. Therefore, on this first question, the plaintiff has not discharged the onus of establishing that the methodology employed by the defendant in the identification of search terms is so flawed as to meet the tests identified by Kenny J. in *Sterling Winthrop* or even the more recent tests identified in case law concerning e – discovery (see *Hireserve Services Limited v. An Post and Agents Mutual Limited v. Gascoigne*, (op. cit)).

152. With certain exceptions, which in my conclusion do not go to the generality of the methodology adopted by the defendant, I am not persuaded that the examples cited in the plaintiff's grounding affidavit demonstrate a flaw in the methodology for making discovery which the defendant has described, such as would warrant a general order requiring further discovery to be made. I shall turn now to these examples, because some of them illustrate particular omissions, on which I shall direct the swearing and filing of a Supplemental Affidavit of Discovery.

153. The first two examples cited relate to Category 4 and the second two relate to Category 5.

The first example – Category 4

154. The plaintiff refers to an internal exchange of emails in the defendant's discovery which it describes as an example of missing internal communications. On 31 March 2017, Annica Posthumus – Meyjes emailed Alexander de Breis with certain queries in relation to BHSL Unit 21.

155. This email is headed "Question regarding pressure drop for project Williams FO 21". Ms. Meyjes draws to the attention of Mr. de Breis an issue concerning "a pressure drop problem over the eight water bundles of the water unit that you checked on Wednesday". She

refers to certain estimates of pressure loss, and continues “Did you select the nozzle size or did HTRI calculate it? I couldn’t find your HTRI calc”.

156. On 2 April 2017, Mr. de Breis replied stating “I saved it in the project folder (I think a project from 2015) can be found under: “G/projects/2016/16-10-13biomass2xFBC750/04 Documents/02Datasheets”.

157. The plaintiff complains that the “calculations and datasheets” referenced in this exchange were not included in the discovery provided. Ms. Davin states that when this was point made in correspondence to Messrs Matheson they replied on 10 November 2022 referring to 22 calculations and datasheets provided. She says that they post – dated the email of 2 April 2017 and could therefore clearly not be the datasheets and calculations referred to in Mr. de Breis’ email of 2 April 2017.

158. I agree this is an unacceptable answer. In submissions it was said that there are no attachments missing from emails discovered. Nonetheless, the position regarding data sheets and calculations referred to in the email of 2 April 2017 should be explained and verification should be provided, if necessary by reference to document identification numbers in the discovery, that the calculations and datasheets referred to in those emails, have been discovered.

159. The question of calculations is a central part of the plaintiff’s complaint and I shall return to that subject later.

160. Ms. Davin says that the defendant has not discovered the “project folder” referred to by Mr. de Breis in his reply.

161. Insofar as the plaintiff complains that there has not been discovered to it the “project folder” referred to by Mr. de Breis, the defendants submit that the concept of a “project folder” is not one which falls under discovery obligations in that it had no obligation to discover a particular “project folder”. It submits that if documents were contained in any

“folders” of any of the defendant’s employees, and which met the selected search terms used to trace material relevant to the categories of discovery, they were included in the discovery. I accept that submission as a description of how information is assembled. The term “folder” or “project folder” can have different meanings to different parties in terms of how information is assembled. The important point is that any documents, whether contained in particular “folders” or otherwise, are said on oath to have been included in the discovery and there is no evidence to demonstrate that there exists a particular format of “folders” the contents of which the defendant has omitted to discover.

The second example - Category 4

162. The plaintiff refers to an email of 11 July 2017 from Ms. Meyjes to three of her colleagues, Mr. Brass, Mr. Kamsma and Mr. Wever, which again uses the phrase “original design folder”.

163. Ms. Meyjes refers to having found a flow diagram “in the original design folder”. She refers also to having “done my calculations and recommendations based on operating the bundles in series”.

164. The plaintiff relies again on the reference to an “original design folder”. It says that the folder has not been furnished. Ms. Davin says that many of the attachments to this email are modified designs “and clearly cannot be the original design.”

165. In her replying affidavit, Ms. Heilig states that 22 calculations/datasheets “from this specific folder were discovered by the defendant”. She therefore says that the methodology ensured that any relevant documents were discovered. She does not address the complaint regarding the absence of originals of these designs pre modification.

166. Category 4 as ordered extends not only to revisions of designs from time to time, but also to the original design of the products supplied by the defendant to the plaintiff in respect of all of the BHSL units. The defendant has not answered the valid objection that modified

designs were discovered without the corresponding original designs. I shall direct that this be addressed in the supplemental affidavit. By this judgment, I am not finding that the defendant has failed to include all documents recording or evidencing design of the products supplied. But the position regarding pre-modification must be verified. It may, again, only be necessary for the defendants to identify the documents which meet this apparent lacuna, or explain why such documents cannot now be produced.

Third example – Category 5

167. In relation to Category 5, the plaintiff says that documents provided generally make an express reference to BHSL or biomass, or a connected term. Ms. Davin says: -

“37. While some documents have been provided, it generally appears that the documents provided either make an express reference to “BHSL”, “Biomass” or some connected term. However, where no such reference is made in the document itself, very little responsive documentation has been provided. Internal Geurts correspondence and external correspondence with consultants Geurts may have used in relation to the repairs to the units, such as Stoom Boiler BV and Saajk (which may have used the email address goedbloed-gte@filternet.nl) in particular appears to be missing. In response at Point 5 of its 10 November letter, Matheson simply notes that “several” such emails have been discovered without ever addressing whether all such emails responsive to the relevant categories have been discovered.”

168. By way of example, Ms. Davin cites an email of 18 April 2017 from Ms. Meyjes to her colleagues Mr. Slump and Mr. Adrianse concerning the subject of recommended changes to units. A series of proposed recommendations are discussed in this email arising apparently from a request from the plaintiff for recommendations for all of the units.

169. Ms. Davin states that no internal reply to that email has been included in the discovery.

170. The response made on this subject is that the defendant asserts that the absence of an internal email response to any particular such email is not evidence of a failure to produce.

171. Although on its face the email of 18 April 2017 would appear to require a reply, I cannot find that the non – production of a particular email in response is of itself evidence of failure to make adequate discovery under this heading.

Fourth example – Category 5

172. Ms. Davin refers to an email of 1 May 2017 from Ms. Meyjes to Mr. Adrianse cc Ms. Heilig which is of some note in terms of its references to the plaintiff and potential issues to follow and is therefore worth quoting: -

*“Good morning Vico and Marieke,
I would just like to mention the high workload and potential financial risk regarding the biomass heat exchanger units. They have decided to send the bundles of four units, each with eight bundles, back to the factory to install three nozzles on each bundle. They are also ordering four new air pre - heaters (size plus 1,000mm x 1,000mm x 1,000mm). With the new air pre – heaters they highlighted the following.*

“It is very important that the original design and temperatures (including a fouling factor) that have been promised to our clients are met and if possible exceeded. Geurts must confirm that the revised design will achieve this” [I understand these two sentences to be an extract from a communication from the plaintiff].

Biomass has one last opportunity to modify the units and if they do not deliver what was promised then they are looking at lawsuits from the farmers. All the modifications are urgent.

Best regards”.

173. Ms. Davin complains that she has been unable to see in the discovery a direct reply to this email.

174. The response made by the defendant is that there are a number of replies to this email included within the discovery, but in the category of documents in respect of which privilege is asserted. It is said that the continuance of the email chain within the defendant on this subject is with Mr. van den Nouland, the internal lawyer within the defendant's group. This is not surprising in light of the references to "lawsuits".

175. No challenge to the claims of privilege has been made.

176. It is not denied that no discovery has been made of a direct reply from the initial recipients of this email. Again, that of itself does not evidence a failure of discovery. It may require some explanation at trial, but it is clear from the submissions made to this court that there followed a chain of correspondence on which privilege is claimed.

Language of search terms

177. 611 of the documents discovered by the defendant had been translated from the Dutch language into English. In making the discovery, the defendant utilised the names of parties and customers of the plaintiff, but for the four functional search terms, only English language terms were used.

178. It was submitted on behalf of the defendant that in circumstances where there is ample evidence of internal communications even within the defendant, of the use of the English language, there can be nothing objectionable about the use of English language search terms.

179. The plaintiff referred the court to the text of the Good Practice Discovery Guide published by the Commercial Litigation Association of Ireland in which reference is made to the requirement to consider whether foreign languages would play a significant part in the documents subject to discovery.

180. The first language of the defendant and of its employees and consultants is Dutch. It was therefore surprising that the search terms applied were all in the English language. This calls into question the level of assurance that internal communications within the defendant concerning the search terms identified will sufficiently match the issues identified in the discovery categories. The defendant submitted that when the 44 names and 6 project names are combined with the four functional terms, even in English, it is “inherently probable” that all relevant documents will be identified. Again, there is some force in that submission but I am not persuaded that the use of search terms not in the first language of the party making discovery is an appropriate approach. I shall therefore direct that this be remedied by applying the appropriate Dutch words, in addition to the English language search process already undertaken.

181. In selecting appropriate search terms in the Dutch language, I do not expect the defendant to confine itself to simply finding four Dutch words corresponding to the four functional terms already used in English. The onus is on the defendant to apply itself to the task of identifying, in its first language of Dutch, all and any search terms appropriate and necessary to discharge its discovery obligations.

Exchanges with external consultants

182. The plaintiff complains that the defendant’s affidavit of discovery does not suggest that searches were conducted to trace correspondence with external consultants and does not describe whether the assistance of such consultants was sought in identifying relevant documents.

183. This complaint is said to be substantiated by reference to a paucity of emails between the defendant and external consultants. The plaintiff submits that there is a “concerning imbalance in the approximately 30 emails between Geurts and Stoom Boiler BV which have

been discovered”. It is said that only three of the emails between the defendant and Stoom Boiler are from Geurts, with the remainder being from Stoom Boiler *to* Geurts.

184. A further submission is made by reference to a particular report from Stoom Boiler. The plaintiff says that it is unable to detect whether that report has been discovered because it was attached to an internal email within the defendant or attached to an email received from Stoom Boiler.

185. At first pass, these submissions are vague. The relative “paucity” of emails between the defendant and the external consultants proves nothing in itself. However, the absence of the names of the consultants from the long list of search terms is surprising.

186. It may very well be that the defendant has frequent engagement with those consultants on projects unrelated to the plaintiffs. But it is equally possible that engagement with the consultants on design or functional issues relevant to the issues in these proceedings would occur in communications which do not name the plaintiff or its customers. It should be possible to address this by either or both of the following;

- (a) Adding their names to the search terms in such a fashion which confines the material to the design and functional issues in dispute in the proceedings;
- (b) Providing a description of efforts made to obtain the assistance or co-operation of the consultants in complying with the defendant’s discovery obligations.

187. I shall direct that the defendant address this issue in its supplemental affidavit.

Original calculations

188. The plaintiff complains that the discovery includes certain scanned information and certain Microsoft Excel files which are described as “output summaries” based on calculations carried out by the defendant but which are not the calculations themselves.

189. The plaintiff says that early calculations were performed by the defendant on a package called “xDesign”. Later calculations were performed in what is referred to as a “HTRI” format.

190. In respect of the early calculations on xDesign, Ms. Heilig has sworn in para. 7 of the affidavit of discovery as follows: -

“The documents which were not already available in digital format comprised calculations made using a now outdated calculation programme which were only available in printouts. The printed versions of these calculations have been added to the information disclosed to the plaintiff”.

191. In later submissions it was clarified on behalf of the defendant that this description of “a now outdated calculation programme” related only to the xDesign.

192. Ms. Davin in her second affidavit sworn 13 December 2022 says the following: -

“The defendant has discovered a number of these calculations in a scan format rather than in the original xDesign format. I say and am advised that provided these calculations are accessible to the defendant in the original xDesign format they should have been provided in that format”.

193. The plaintiff’s affidavits and submissions do not disprove the basic assertion made by the defendant that the calculations made in xDesign were only available in printouts and have been included in the discovery.

194. In relation to the more recent calculations carried out on the “HTRI” program, the position is less simple.

195. The defendant in its submissions says that both the xDesign and the HTRI files were discovered as scanned PDF’s or Excel documents “as they were not otherwise digitally available nor capable of being exchanged in their original native formats”. That submission is not borne out by the affidavit of Ms. Heilig and is inconsistent with the defendant’s separate

submission (paragraph 14(9)) that it was the xDesign calculations which were on a now outdated calculation programme and therefore were provided in PDF and Excel format.

196. The plaintiff refers to a number of emails in which references are made to “simulations” or “calculations” which are described in the emails, to have been made “in HTRI” or by the consultant “Sjoak” on one occasion as having been checked “with my HTRI ACE program”.

197. The plaintiff also refers to a document which was produced by the defendant in a supplemental affidavit of discovery. Ms. Davin says that this “is in fact a PDF copy of an output summary of the type generally provided in an excel format”. Ms. Davin swears that “a review of the metadata associated with that document indicated that it was produced as recently as 10 November 2022 from a file named “Calculation.RO.XLS” which would be an Excel output summary which would in turn have been produced from a calculation in HTRI format.”

198. It is only the xDesign programme which is said to be outdated and it is not contested that the HTRI format is a commonly used program. I am persuaded that the failure to produce original or “native” HTRI files and the production of calculations derived therefrom or made in such programmes only in Excel format or as PDF scans requires at the very least, further explanation, or that those HTRI files should now be discovered.

199. I shall therefore direct that the supplemental affidavit of discovery include all calculations performed in the HTRI format, including the HRTI files themselves, and not confined to Excel output summaries and scanned copies. If the defendant is truly unable to make discovery of those files in this format, a complete explanation for the evolution of this problem should be provided.

Dates of calculations

200. The plaintiff protests that the defendant has provided various calculations without reference to the dates on which the calculations were carried out and the specific BHSL units to which they related.

201. The defendant submits that this complaint seeks to impose on it an obligation which does not arise under its discovery obligations but relates only to the manner of presentation of discovered documents.

202. Whilst this may be unsatisfactory in terms of preparations for a trial, it is not open to the court on this application to direct that the defendant re – present this data to meet the plaintiff’s requirements. I would add that the court will expect that in preparation for a trial and a clear presentation to the court of core documents the parties would engage on such an issue.

Supplemental discovery

203. In summary, there will be an order directing the defendant to make a supplemental affidavit of discovery addressing the following: -

- (a) The data sheets and calculations referred to in the exchange of emails on 31 March 2017 and 2 April 2017 (see paragraph 158 of this judgment)
- (b) Where not already discovered, documents recording original designs of which later modifications have been discovered; (paragraph 166)
- (c) Application of appropriate Dutch language search terms (paragraphs 180 and 181)
- (d) An explanation of the engagement with external consultants and any further documents arising therefrom (paragraphs 186 and 187)
- (e) Discovery of calculations on the HTRI programme in their original and native form (paragraph 199)

Conclusion

204. There will be an order directing a modular trial of the proceedings, and an order requiring the defendant to make a supplemental affidavit of discovery. For the reasons explained in paras. 112 to 115 above, it will be necessary to hear the parties before the orders are perfected.

205. Category 1 of the discovery required to be made by the defendant concerned all documents recording and/or evidencing the terms on which the defendant supplied the contract products to the plaintiff. Category 3 required discovery of documents evidencing engagement between the parties in respect of the design and production of the products and matters relating to calculations, specifications and other matters.

206. No application for further and better discovery was made in relation to Categories 1 or 3. From that I conclude that although there are certain matters outstanding in relation to discovery pursuant to this judgment, no discovery is outstanding which would affect the first module. Accordingly, it will be possible to proceed with the hearing of that module on the date fixed for the hearing of the trial itself namely 16 May 2023. I shall hear the parties as to the appropriate directions required in preparation for that hearing.