***Energy Works Hull v M+W [2022] EWHC 3275 (TCC) (20 December 2022)[[1]](#footnote-1)***

**Abstract**

The Claimant had validly terminated an EPC contract to design and build an energy-from-waste plant in Hull, where there were delays for which the Defendant was not entitled to an extension of time. Consequently, the Claimant was entitled to liquidated damages for delay and damages upon termination in excess of £117 million. Further, the Claimant was entitled to damages of at least £2,152,021.55 in respect of its major defect claims. Contribution claims in respect of those defect claims, made by the Defendant against a Third Party, were successful in part. The Third Party was successful in its counter-claim for unpaid milestone payments.

**Summary of Facts**

Under an EPC contract, the Defendant, MW High Tech Projects UK Limited (“M+W”), agreed to design and build an energy-from-waste plant in Hull for the Claimant, Energy Works (Hull) Limited (“EWH”), for £153,897,518. The plant was intended to process and then gasify refuse-derived fuel (“RDF”) in order to generate a sustainable source of electricity.

Almost 11 months after the contractual date for completion, the gasifier plant had still not been commissioned and work had been suspended. EWH purported to terminate the EPC contract pursuant to clause 44.1(c), or alternatively at common law. The principal issue in the main proceedings was whether EWH was entitled to terminate the EPC contract or M+W was entitled to an extension of time such that EWH’s notice took effect as a termination for convenience.

* EWH sought damages from M+W and M+W Group GmbH in the sum of £131,362,885.23.
* M+W counterclaimed for a final payment alleged to be due in the sum of £24,395,158.94.

EWH’s claim included the sum of £9,943,504.40 in respect of alleged defects in the works. In the event that M+W was found liable for defects in the gasifier, it sought a contribution from the Third Party, Outotec, who, in turn, denied liability and counterclaimed for unpaid sums totalling US$16,857,314.86.

**Held – Pepperall J**

**Delay & Termination Claims**

Subject to an outstanding causation issue, EWH was entitled to liquidated damages for delay and damages upon termination of the EPC contract in excess of £117 million.

**Suspension of works** – M+W was not entitled to suspend commissioning of the plant. Absent some repudiatory breach on the part of EWH, and no such breach was alleged, M+W was not entitled to refuse to accept deliveries or to suspend commissioning. If M+W believed that EWH had breached the contract in some way short of repudiation, then M+W’s obligation was to continue to perform its own contractual obligations (paras 73- 83).

**Extension of time** – M+W was not entitled to any extension of time:

* EWH was in breach of contract in failing to deliver RDF that met the specifications for heavy metals and fines on various days in October and November 2018 and in failing to deliver RDF that was capable, when processed and blended, of passing the Fuel specification for net calorific value in November 2018 (see paragraphs 101-129).
* M+W’s other allegations of breach of contract were dismissed (see paragraphs 84-100 & 130-174.)
* In any event, the claimed periods of delay were not caused by the alleged or established breaches of contract (paras 175-266).
* M+W notified some but not all of its claims (paras 267-290).
* The extension of time claims therefore failed (paras 41-45 & 291-293).

**Termination under clause 44.1(c)** – By 4 March 2019, the Delay Damages Cap had been surpassed and EWH was entitled to and did terminate the EPC contract for Contractor’s Default pursuant to clause 44.1(c) (para 294).

**Termination at common law** – By 4 March 2019 the works had been delayed to such an extent that M+W’s breach went to the root of the contract. Consequently, even if EWH had not validly terminated pursuant to clause 44.1(c), EWH was nonetheless entitled to and did terminate the EPC contract at common law by reason of M+W’s repudiation (see paragraphs 295-304).

**Defect Claims**

EWH was entitled to damages of at least £2,152,021.55 in respect of its major defect claims.

**Noise issues** – M+W was in breach of contract in failing to ensure that the on-site noise levels were within the absolute limits set out in Schedule 15, and that the plant complied with the Environmental Permit in that emissions were free from noise and vibration at levels likely to cause pollution outside the site (paras 477-532).

**Slagging** – EWH had failed to prove, on the balance of probabilities, that the slagging was caused by a design flaw, rather than operator error, or because of the characteristics of the Fuel (paras 533-587).

**The fuel-feed system** – M+W was in breach of contract in relation to the fuel-feed system, insofar as:

* work on the metering Bin Switches and Bin Level Transmitters was incomplete (paras 600-602);
* defects in the Quad Screws were caused by manufacturing or design issues (paras 603-606);
* the breathers were either defective or poorly installed such that they did not prevent water ingress to the gearboxes (paras 607-608).

**Demineralised water plant** – M+W was in breach of contract to the extent that the demineralisation plant was designed on the basis of a simple error as to whether the quoted hardness was measured in mg/l of calcium or calcium carbonate (paras 612-634).

**Inadequate corrosion protection** – There was clear evidence that, in breach of contract, certain external steelwork was either not painted at all or was inadequately painted (paras 635-659).

**Blocked bed cones** – it was impossible to separate this issue from the issue of slagging. Consequently, the rejection of EWH’s case on slagging was fatal to EWH’s claim in relation to blocked bed cones.

**MPT plant separation efficiency** – Whilst the court accepted M+W’s argument that the magnetic separators were not defective, it found that M+W had failed to carry out and complete the works in accordance with the terms of the contract such that the plant did not meet the separation efficiency test (paras 673-694)

**Other Claims**

M+W Group GmbH was liable under the parent company guarantee (paras 696-697).

In light of the findings in relation to the EOT and termination, M+W’s counterclaim was dismissed (para 698).

**Third-Party Proceedings**

Outotec’s liability for defects was limited by clauses 37 and 45.2 to those matters properly notified under the subcontract (paras 715-727).

M+W’s contribution claims in respect of:

* noise issues failed for want of notification;
* the slagging and blocked bed cones failed because M+W was not liable to EWH;
* the inadequate corrosion protection claim was dismissed as being hopeless in respect of causation (paras 728-741, 750-756).
* the fuel-feed system succeeded in part, and Outotec was ordered to provide a 100% contribution in respect of such losses (see paragraphs 742- 749).

Subject to the defence of abatement, Outotec’s counterclaim in respect of milestones 7, 8, 9, 10 and 11 succeeded in the total sum of $6,858,466.71 (see paragraphs 757-806). M+W was entitled, in principle, to rely on the defence of abatement to reduce such liability.

Outotec’s counterclaim to recover liquidated damages deducted from the milestone payments was dismissed, but the claim for recharges succeeded (see paragraphs 823-852).

*Full judgment available at:* [*https://www.bailii.org/ew/cases/EWHC/TCC/2022/3275.html*](https://www.bailii.org/ew/cases/EWHC/TCC/2022/3275.html)

1. Stephen Dennison KC, Felicity Dynes, Sanjay Patel and Mathias Cheung (instructed by Fenwick Elliott LLP) for the Claimant; Jonathan Acton Davis KC, **William Webb**, Ebony Alleyne and **Thomas Saunders** (instructed by Clyde & Co. LLP) for the Defendant; **Adrian Williamson KC** and **Paul Bury** (instructed by Walker Morris LLP) for the Third Party. [↑](#footnote-ref-1)