Neutral Citation Number: [2026] EWHC 94 (Comm)

Case No: LM-2024-000186

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21/01/2026

Before :

PAUL MITCHELL KC

- -

Between :

ACTINON PTE LIMITED	**Claimant**
- and -	
CHAR BIOCARBON INC	**Defendant**

- -
- -

Mr Karl Anderson (instructed by **Wedlake Bell**) for the **Claimant**
Mr William Day and Ms Gretel Scott (instructed by **DLA Piper**) for the **Defendant**

Hearing dates: 14 February 2025, 21 July 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 January 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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PAUL MITCHELL KC

PAUL MITCHELL KC:

Introductory

1. These proceedings arise from an "Exclusive Licence Agreement" dated 18 August 2021 ("**the Agreement**"). Over the course of two hearing dates, I heard two applications:

   i) The Claimant's application for summary judgment in relation to a sum which it says has been acknowledged as due from the Defendant; and

   ii) The Defendant's application for reverse summary judgment in relation to another contractual head of claim brought by the Claimant.

2. The Defendant began to fall behind with payments due under the Agreement in January 2022; after a period of negotiations, the Claimant eventually terminated the Agreement in June 2023. Proceedings were issued on 10 July 2024 and the Claimant applied for summary judgment on 11 October 2024, before the Defendant had entered a defence. On 24 October 2024, the Defendant filed a Defence and Counterclaim; in that statement of case, it averred for the first time that certain pre-contractual representations made by the Claimant were untrue and sought an order from the court rescinding the Agreement on the grounds of these alleged misrepresentations.

3. The Claimant's application turns on the law relating to the affirmation of a contract, waiver by estoppel, and estoppel by convention. The Defendant's application concerns the construction of the Agreement.

Facts

4. The Claimant is a company incorporated in Singapore which carries on business in engineering design and the provision of consultancy services in energy management and clean energy systems. The Defendant is a company incorporated in Canada. It is a wholly-owned subsidiary of CHAR Technologies Limited, a public limited company listed on the Toronto stock exchange ("**CHAR Tech**").

5. On or about 18 August 2021, the parties executed the Agreement, which contained an English law and exclusive jurisdiction clause in favour of the courts of England and Wales. The recitals recorded that the Claimant, as licensor, was the owner of two other companies, Anergy Pte Ltd ("**Anergy**") and Anval International Pte Ltd, and also of "the Anergy Brand" and "the Anergy Products". The latter two items were defined in Clause 1:

   i) "Anergy Brand" was "any instance where the Anergy name or logotype is used in physical or digital form…"

   ii) "Anergy Product" was "any waste transformation process that is based on Anergy's High Temperature Pyrolysis Technology". The definition extended over several paragraphs to show what was included and what excluded.

6. The recitals also recorded that the Defendant, as licensee, was a wholly-owned subsidiary of CHAR Tech, described as "a Canadian-based public cleantech

development and services company which utilises Anergy's High Temperature Pyrolysis Technology and has successfully deployed the same in North America". I refer hereafter to "High Temperature Pyrolysis" as "**HTP**".

7. By Clause 3.1:

> "Licensor hereby grants to Licensee, and Licensee accepts, subject to the terms and conditions hereof, an exclusive, non-transferable, personal, revocable for cause, license to sell, supply, design, manufacture, have manufactured, install, operate, maintain and service Anergy Products in the Territory during the Term, and to use the Anergy Brand in association with Anergy Products"

8. The "Term" was defined in Clause 5:

> "This Agreement shall come into effect on the Effective Date [defined as 1 July 2021] and shall continue in force for an initial period of three (3) years, and shall thereafter be renewed for periods of one (1) year each, provided that the Minimum Royalty for that Year [defined as the 12-month period starting on 1 July of each year and ending on 30 June of the following year] has been received by Licensor prior to renewal, unless terminated earlier in accordance with this Agreement ('Term')"

9. Clause 8 contained "Financial Provisions" (original emphasis in the quotation below):

> "8.1 In consideration of the rights granted under Section 3.1, Licensee shall pay to Licensor during the Term of this Agreement the greater of the amounts in Section 8.2(a) and Section 8.2(b) below:
>
> (a) royalty ("Royalty") at the rate of 5.0% of Gross Revenue for each Year during the Term; or
>
> (b) a non-refundable minimum royalty ("Minimum Royalty") for each Year of the Term as illustrated in Annex A hereto.
>
> 8.2 Licensee will pay to Licensor the Minimum Royalty according to the following schedule:
>
> (a) The Minimum Royalty for the first three (3) Years will be paid in Year 1 (i.e. 2021) on an equal quarterly basis, with the first payment to be made upon signing this Agreement and the subsequent three (3) payments to be paid on the first day of each subsequent quarter (i.e. 1 October 2021, 1 January 2022 and 1 April 2022); and
>
> (b) The Minimum Royalty for each Year of the Term from Year 4 onwards shall be paid on an equal quarterly basis two (2) years prior (e.g. the Minimum Royalty for Year 4 (2024) will be paid on 1 July 2022, 1 October 2022, 1 January 2023 and 1 April 2023).
>
> …

> 8.4 All royalties and any other sums payable under this Agreement shall be paid in United States Dollars in cleared funds to such bank account or in such other manner as Licensor may specify from time to time to Licensee without any set-off, deduction or withholding of taxes, charges and other duties…
>
> 8.5 If Licensee fails to pay in full to Licensor any undisputed fees, royalties or other sums payable under this Agreement by their respective due dates, Licensor shall have the right to charge interest at the rate of nine percent (9%) above the United States Prime Lending Rate on such outstanding sums, calculated from such due date until the date such outstanding amount is paid in full to Licensor"

10. The Minimum Royalty for Year 1 was shown in Annex A as being $500,000; for Year 2, $1,000,000; and for Year 3, $1,500,000. The aggregate of those three years' Minimum Royalty was thus $3,000,000; and this was due to be paid in four equal instalments of $750,000 each: the first upon signature of the Agreement, and then the other three on 1 October 2021, 1 January 2022 and 1 April 2022.

11. The Minimum Royalty for Year 4 was shown in Annex A as being $2,000,000. Annex A also provided that all the stated values would be adjusted for an annual inflation increase based on United States Consumer Price Index data for the year in question.

12. Clause 15 dealt with termination:

> "15.1 Either Party shall be entitled forthwith to terminate this Agreement immediately by notice in writing if:
>
> (a) the other Party fails, or refuses, to perform or comply with any one or more of its obligations under this Agreement (including, but not limited to, non-payment of any sum payable under this Agreement), and, if that default is capable of remedy, the defaulting Party fails to remedy such default within thirty (30) days after written notice of such default has been given to the defaulting Party by the non-defaulting Party…"
>
> 15.2 Licensee may terminate this Agreement by giving thirty-six (36) months' advance written notice of termination to Licensor.
>
> …
>
> 15.4 Upon the expiry or earlier termination of this Agreement:
>
> …
>
> (c) Licensee shall promptly pay all amounts due under this Agreement to Licensor…"

13. Clause 19 was a no waiver provision:

> "The failure or delay by a Party in enforcing an obligation, or exercising a right or remedy under this Agreement shall not be construed or deemed to be a waiver of that obligation, right or remedy. A waiver of a breach of a term under this

> Agreement shall not amount to a waiver of a breach of any other term in this Agreement and a waiver of a particular obligation in one circumstance will not prevent a Party from subsequently requiring compliance with the obligation on other occasions. Any waiver by a Party of any right under this Agreement shall be made in writing and signed by the authorised representative of such Party"

14. Clause 21 was an entire agreement clause:

> "This Agreement contains the entire agreement between the Parties hereto regarding the subject matter hereof, and supersedes all prior agreements, understandings and negotiations regarding the same…"

15. Finally, Clause 23 was a dispute resolution clause:

> "23.1 Informal Resolution
>
> In the event of any dispute, controversy or claim arising out of or in connection with this Agreement, the Parties shall, in the first instance, attempt to resolve such dispute informally through direct consultation.
>
> 23.2 Mediation
>
> If such efforts taken under Section 23.1 above fail, then the Parties shall refer the matter to mediation in London to be conducted in accordance with the rules and procedures of the International Chamber of Commerce".

16. As noted above, payments of the aggregate Minimum Royalty for Years 1 to 3 inclusive were due in four equal instalments of $750,000. The Claimant appears to have raised invoices for these sums (there is a schedule of invoices in the hearing bundle but not copies of the invoices themselves, and the Defendant accepts that at least some invoices were sent to it). In respect of the first payment of $750,000 due on 18 August 2021, the Defendant paid $749,956 on 7 August 2021; in respect of the second $750,000 due on 1 October 2021, it paid $749,965 on 12 October 2021.

17. A schedule of invoices rendered and payments received prepared by the Claimant in October 2022 shows that the Claimant apparently treated the first two payments made by the Defendant as being in the full amount of $750,000 each.

18. After 12 October 2021, the Defendant did not pay any of the invoices rendered to it in full at the due date. It did, however, continue to make payments to the Claimant. On dates unknown to me, the Defendant also made payments to Anergy in the sum of $451,508 (or possibly $467,923: both figures appear in documents generated by the Defendant); the Defendant has stated in correspondence that Anergy, Actinon and it agreed that the sums paid to Anergy should be treated as paid to Actinon. As is clear from the letter from Yuen Law dated 19 April 2023 to which I refer below, the Claimant appears to accept that $451,508 is indeed to be taken into account.

19. On or about 1 July 2022, the Claimant sent the Defendant an invoice for the first quarterly payment of the Minimum Royalty for Year 4, in the sum of $500,000.

20. The Claimant also sent the Defendant invoices every month from March 2022 to August 2022 claiming interest on late payment in respect of the third and fourth tranches of the aggregate Minimum Royalty for Years 1 to 3 inclusive, which tranches were invoiced

on 22 December 2021 and 29 March 2022. Finally, on 24 August 2022 the Defendant invoiced for an "adjustment for inflation", presumably pursuant to the terms of Annex A of the Agreement.

21. The total amounts invoiced by the Claimant between August 2021 and September 2022 were as follows:

    i) Minimum Royalties for Years 1 to 3 inclusive: $3,000,000

    ii) Interest on outstanding Minimum Royalty tranches for Years 1 to 3: $128,290

    iii) "Adjustment for inflation": $119,098

    iv) First tranche of the Minimum Royalty payment for Year 4: $500,000.

    v) Total sum invoiced: $3,747,388.

22. The payments made by the Defendant were as follows:

Date payment made	Amount paid ($)
07/08/2021	749,956
12/10/2021	749,965
30/03/2022	226,973
08/04/2022	58,169
04/05/2022	32,808
26/05/2022	134,932
08/06/2022	50,619
21/07/2022	338,591
25/08/2022	59,395
16/09/2022	53,519
Total paid[1]	2,454,927

23. As can be seen, although some payments were made, the total amount of the Minimum Royalty due for Years 1 to 3 was not made in accordance with the schedule contained in Clause 8.2(b): payments were not made on the dates or in the amounts due.

24. There is no suggestion from either party that the Agreement was in any way varied such that the payments made represented the fruits of a revised arrangement. Rather, the Defence and Counterclaim admits, at paragraph 58, that $2,455,187.90 (i.e., $255.90 more than assessed by the Claimant) was paid "in respect of invoices dated 20 August 2021 to 6 July 2022".

[1] The total shown here reflects the precise sums paid; for simplicity I have not included in the table any figures to the right of the decimal point.

25. On the face of it, there is a shortfall between the $3,000,000 Minimum Royalty due for Years 1 to 3 inclusive and the sum paid by the Defendant. The shortfall against the full sum invoiced is obviously greater still.

26. Between 12 January 2022 and 28 June 2022 there were a number of WhatsApp exchanges between the Claimant's Chief Executive Officer, Mr Michael Martella and the CEO of CHAR Tech, Mr Andrew White. These exchanges covered not merely the relationship between the Claimant and the Defendant but also between Anergy and the Defendant and Anergy and CHAR Tech. During the course of the exchanges, Mr White made various statements reassuring Mr Martella that certain sums of money would be paid. The Claimant contends on this application that the WhatsApps contain relevant admissions, but having read all the WhatsApps, while I can see that they contain what might be relevant evidence at a trial, I consider that their meaning cannot safely be determined without the benefit of cross-examination of Mr Martella and Mr White. I accordingly say no more about them in this judgment.

27. On 28 August 2022[2], the Defendant's Mr Andrew White emailed the Claimant's Mr Michael Martella and Mr Jimmy Quek, saying:

> "This e-mail is to serve as notice of termination of our exclusive license agreement, executed on the 18th of August, 2021. I'd like to reiterate CHAR's intention to continue to foster our long term relationship with Actinon and Anergy, and our intent is to provide a term sheet to negotiate an amended agreement that better aligns with all of our respective business models. I expect to have this to you in the coming weeks, and I think it all work well for all parties. We look forward to a continued productive and fruitful relationship"

28. On 18 October 2022, the Claimant sent a formal letter of demand for payment to the Defendant. The letter referred to the Agreement and set out the invoices rendered and the sums received. The figure given for the sums paid by the Defendant was $2,003,423, i.e., it took no account of the $451,508 paid directly to Anergy as described in paragraph 18 above. If that sum is added on to the $2,003,423, the total (after rounding) is $2,455,932, i.e., very nearly the sum which the Claimant claims the Defendant has paid in respect of the invoices rendered between August 2021 and September 2022.

29. The Claimant's letter of demand read, in part:

> "We regret to advise that if full payment of USD 1,743,964.78 is not received by us by 31 October 2022, or you have not provided us with a committed repayment plan that we are agreeable to within this timeframe, the matter will be referred to our external collection agency for further action"

30. The Defendant responded to this letter of demand with a "confidential draft" letter on 27 October 2022. By that letter, the Defendant challenged the Claimant's calculations in a number of respects:

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[2] The email was sent from Canada on 27 August 2022 but received by the Claimant in Singapore on 28 August 2022.

> "1. Your calculation of the balance includes royalties and interest on royalties attributable to 'Year 4' of the term of the Licence Agreement. However, notice of termination was given under the Licence Agreement on August 27, 2022; accordingly, no such fees are owing.
>
> 2. Your calculation does not reflect advances, currently totalling $467,923.24, that Actinon directed CHAR to make to Anergy in lieu of making payments of licence fees directly to Actinon, pursuant to a verbal agreement made by Mike Martella and our Chief Executive Officer, Andrew White ("the Anergy Advances"). The Anergy Advances should be set off against the licence fee account balance.
>
> 3. Your calculation includes interest on an amount of licence fees equal to the Anergy Advances. As CHAR is not charging interest to Anergy for the Anergy Advances (which were made at Actinon's request), it is inappropriate for Actinon to purport to charge interest to CHAR on the corresponding licence fee amount.
>
> After adjusting for the above items, the actual account balance would be in the order of US$500,000, before accounting for the matters outlined below."

31. The "matters outlined below" all comprised alleged breaches by the Claimant of the Agreement. Included among these were the following:

> "3. Anergy's output modelling software is inaccurate and unsuitable for its intended purpose, which has required CHAR to develop its own replacement software, at significant cost…
>
> Although CHAR is prepared to exercise all available legal remedies, if necessary, we hope that the current dispute can be resolved amicably. CHAR continues to believe that Actinon's kiln design is well-suited to our needs, and we remain interested in an ongoing relationship with Actinon on terms that would be beneficial to both parties"

32. On 7 December 2022, the Defendant wrote to the Claimant in the following terms:

> "Our auditors [a company called DMCL]… are engaged in an annual examination of our financial statements. In connection therewith, please advise them whether or not there is a balance due to you as of September 30, 2022, and if there is a balance, please furnish them with a statement of the items making up such a balance".

33. On 25 January 2023, the Claimant informed the Defendant that the balance outstanding at 30 September 2022 was $1,292,456. In a covering email to the Defendant, the Claimant's Jimmy Quek referred to activity statements and a worksheet attached to his email which explained the composition of the debt and said:

> "As discussed in the call, the variance between our amount relates to the different approach either side adopts in the computation methodology of interest on late payment and the other item being the adjustment for inflation amount which is still pending CHAR's confirmation and acceptance. I will be happy to work together on how we can close the gap on the interest on late payment amount as well as the

> amount on adjustment for inflation should CHAR also not agree with it. Hope the details provided will address your concern and closure on your audit with this item…"

34. On 31 January 2023, CHAR Tech published its consolidated financial statements to its shareholders. These contained an independent auditor's report prepared by DMCL. The statement recorded that CHAR Tech was listed on the Toronto stock exchange's "Venture Exchange" and that its shares were traded under the symbol "YES.V"; the company's subsidiaries, whose accounts were included in the statement, were noted to include the Defendant. Note 1 to the financial statement addressed the nature of the group's business and relevant information regarding its ability to continue as a going concern; it was recorded that the company had not yet achieved profitable operation and that it had incurred "significant losses to date resulting in a cumulative deficit of [CAD] 15,713,000" and that "the Company's continued existence is dependent upon the achievement of profitable operations or the ability of the Company to raise alternative financing".

35. Note 7 to the financial statements addressed intangible assets and goodwill. The first two paragraphs of that note provided as follows:

> During the year ended September 30, 2021, the Company signed an exclusive technology licensing agreement ("the Agreement") with Actinon PTE LTD, the parent company of CHAR's principal kiln technology supplier, Anergy Pte Ltd ("Anergy"). CHAR has the technology rights to all the equipment intellectual property, including patents and designs, which will allow the Company to more efficiently lead the engineering, procurement and manufacturing of the entire HTP system. The effective date of the Agreement is July 1, 2021 and is effective for 3 years. Pursuant to the exclusive license agreement, the Company is obligated to make minimum advance royalty payments of US$3,000,000, over the first 3 years.
>
> The minimum royalty payment required is US$500,000 in year 1, US$1,000,000 in year 2 and US$1,500,000 in year 3. The payments for the first three years of the Agreement are to be paid as follows: US$750,000 in 2021 and US$2,250,000 in 2022. The Company paid Actinon US$750,000 during the year end September 30, 2021 and US$1,253,502 during the year ended September 30, 2022… During the year ended September 30, 2022, the Company extended the royalty agreement for an additional year for USD 500,000 which has been accrued in the consolidated financial statements. The Company has accrued liabilities $2,047,524 related to the Agreement as at September 30, 2022… for royalties payable".

36. There was no mention in the consolidated financial statements of the fact that on 28 August 2022, the Defendant had written to the Claimant in the terms recorded above at paragraph 27 and there was nothing stated about what the Defendant believed had been the effect of that letter. The reference to the Defendant's having extended the Agreement for an additional year, and having accounted for the costs of so doing, is consistent with the Defendant believing the Agreement to be effective at least until the conclusion of Year 4.

37. Although nothing turns on it in the context of this application for summary judgment, I note the following for completeness:

    i) It is stated in Note 7 that the Defendant paid the Claimant US$1,253,502 in the year to 30 September 2022. The sum admitted in paragraph 58 of the Defence and Counterclaim to have been paid in that period is in fact ($2,455,187 less $749,956 =) $1,705,231. If one subtracts the $451,508 said to have been paid directly to Anergy from $1,705,231, the result - $1,253,723 – is very close to the sum stated in Note 7 as having been paid in the year to 30 September 2022.

    ii) The Minimum Royalty for Year 4 was $2,000,000, not $500,000; but that sum was to be paid in four equal instalments, only one of which fell within the year to 30 September 2022.

38. No further payments having been made after 16 September 2022, the Claimant instructed solicitors in Singapore, Yuen Law LLC. On 19 April 2023, Yuen Law wrote directly to the Defendant, stating that on 28 August 2022 the Defendant had given 36 months' notice of termination of the Agreement pursuant to Clause 15.2 and demanding payment of the sums said to be outstanding as at the date of the letter:

> "Based on our client's accounts, the amount of $4,298,888.00 ('Outstanding Sum') remains due and payable from you, breakdown as follows:
>
> | Description | Amount (USD) |
> |---|---|
> | Outstanding Balance as at 30 September 2022 | 1,743,965.00 |
> | LESS Project prepayment | -451,508.00 |
> | Interest on Late Payment (30 September 2022 to 28 February 2023) | 89,574.00 |
> | Royalty payable for Termination of Agreement (36 months' notice) | 2,916,849 |
> | Total Outstanding Sum | 4,298,880.00 |
>
> …
>
> 4. TAKE NOTICE that if you do not make the full payment of the Outstanding Sum of $4,298,880.00 within the next seven (7) days, being 26 April 2023, to our client or us as our client's solicitors, our client shall, at their discretion and without further notice:
>
> a. Make statutory demands against previously agreed amounts of the Outstanding Sum as of 30 September 2022;
> b. Formally issue a Notice of Default and to terminate the Agreement under Clause 15.1(a) of the Agreement; and/ or
> c. Refer any outstanding matters to mediation pursuant to Clause 23.2 of the Agreement"

39. By 26 April 2023, the Defendant had instructed DLA Piper to represent it. On that day, DLA wrote to Yuen Law asking various questions regarding the sums claimed in the letter of 19 April 2023. The letter concluded with a general reservation: "in the meantime, our client's rights and remedies remain expressly reserved".

40. On 1 June 2023, Yuen Law replied to DLA Piper observing that "despite our client's multiple attempts at amicable resolution as follows, your client has failed to respond substantively to the same… even though it is clear that there is a significant amount owing". Enclosed with Yuen Law's letter was a notice from the Claimant pursuant to Clause 15.1(a) of the Agreement ("**the Notice**"). In the Notice, the Claimant stated that:

    i) The total Minimum Royalty sum payable, taking no account of adjustments for inflation, was $5,000,000 (this being the aggregate of the sums due for Years 1 to 4 inclusive).

    ii) The total sum that had been paid by the Defendant was $2,454,932 (this was the sum stated in an annex referred to in the notice, but the notice itself said the sum paid was $2,489,932, i.e., $35,000 more). The amount of unpaid Minimum Royalties was said to be $2,545,068, i.e., $5,000,000 less $2,454,932.

    iii) A sum was said to be due for "inflation adjustment of minimum royalties" in the sum of $181,200

    iv) Interest was demanded on all unpaid amounts in the sum of $335,572.02.

41. Demand was accordingly made for the total sum of $3,061,040; and notice given that if that sum was not paid within 30 days, then pursuant to Clause 15.1(a) the Agreement would be terminated immediately.

42. On 30 June 2023, DLA Piper replied to the Yuen Law letter and the Notice of demand. I refer to this letter hereafter as "**the DLA Letter**". Insofar as relevant, the DLA Letter provided as follows:

> "2. We note you seek to terminate on the grounds of non-payment. Our client accepts your termination notice with immediate effect from 1 July 2023 but disputes your client's basis and/ or calculation for payment.
>
> 3. Our client does not accept that it is required to pay you the sum of USD 3,061,840.02.
>
> a. The 'Term' of the contract was 3 years. The contract does not automatically extend beyond this date. The contract is brought to an end immediately following your client's election to terminate under Clause 15.1(a). Your client was therefore entitled to receive the Minimum Royalty of USD 3,000,000 for the three year period ending 1 July 2024.
>
> b. Our client believes that a sum of USD 90,820 is payable in respect of accrued interest. Our client has previously explained in writing the basis for this calculation.
>
> c. No inflation adjustment is payable. The Minimum Royalty amount payable by our client was due in the first 'Year' of the Term. The

adjustment for inflation is expressed to be an annual adjustment, and accordingly should only be made in respect of amounts payable after the first Year.

d. To date, our client has paid your client the sum of USD 2,003,502. We understand this sum is undisputed between the parties.

e. Our client has also previously made a payment of USD 401,508 to Anergy as directed by your client in lieu of making payments of licence fees directly to Actinon under the Licence Agreement. This was expressly agreed pursuant to a verbal agreement made by Mike Martella and our Chief Executive Officer, Andrew White and subsequently corroborated between Mr White and Jimmy Quek

4. Based on the above, our client would owe your client the sum of USD 635,810.00.

5. As our client has previously explained, our client has a counterclaim against your client which exceeds the amount it owes to your client.

6. Firstly, your client has failed to comply with the terms of the Licence Agreement in a number of ways… [these were then particularised]

…

8. Our client has also suffered substantial losses in relation to the HitachiZosen Inova (HZI) Project. As your client is aware, prior to entering into the Licence Agreement, our client had developed a project opportunity with HZI. The Actinon model, as presented by Anergy, showed an output of 165 kg/hr of H_2 on 18 August 2021. Our client signed up HZI and signed the exclusivity agreement with Actinon. By 12 November 2021, the hydrogen output dropped to 18 kg/hr. By 28 September 2022, the hydrogen output dropped to 3 kg/hr. Our client was left trying to make a project work with the output reduced by 98%. The project has been stalled since September 2022, and, in reality, the project has been lost. Our client paid Anergy $AUD 1,837,344.75. This does not include consequential losses and/ or our client's loss of profits. In addition, our client paid third party consultants for support in California based on the Actinon model.

9. Our client's rights in relation to its claims against your client and/ or Anergy are expressly reserved"

43. On 4 July 2023, CHAR Tech issued a press release on its website, which read in relevant part:

"TORONTO, July 04, 2023 (GLOBE NEWSWIRE) – CHAR Technologies Ltd ('CHAR Technologies' or 'the Company') (TSX Venture Exchange YES) is pleased to provide an update on its Thorold Renewable Natural Gas & Biocoal project ('the Facility'), a commercial high temperature pyrolysis facility to convert wood waste into renewable natural gas and biocarbon. Major equipment and

components have been ordered and a balance of plant engineering firm has been selected to have this phase completed on schedule and budget to begin biocarbon production in late 2023.

…

To ensure the Facility remains on schedule, and now with a growing number of projects in development, CHAR has reduced supply chain and project delivery risks by transitioning to a network of North American based equipment suppliers.

As part of the supply chain transition, on August 28th, 2022, CHAR Biocarbon Inc ('CHAR Biocarbon'), a wholly-owned subsidiary of the Company, served 36 months' advance written notice to terminate the Exclusive License Agreement with Actinon Pte Ltd (the parent company of Anergy, a Singapore based supplier of kiln equipment to the Company) dated August 18th, 2021 ('the Licence Agreement'). Subsequently, the Company has received a notice of immediate termination effective July 1st, 2023, in respect of, and an allegation of additional licence fees owing under, the licence agreement. CHAR disputes Actinon's allegation of additional licence fees, and will take such action as it deems appropriate to protect its rights and interests".

44. On or about 24 January 2024, CHAR Tech published its consolidated financial statements for the year to 30 September 2023. The cumulative deficit at the year end was now CAD 24,142,189 (up from CAD 15,713,010 the previous year). Note 7 was also in similar terms to the previous year:

"During the year ended September 30, 2021, the Company signed an exclusive technology licensing agreement ("the Agreement") with Actinon PTE LTD, the parent company of CHAR's principal kiln technology supplier, Anergy Pte Ltd ("Anergy"). CHAR Tech had the technology rights to all the equipment intellectual property, including patents and designs. The effective date of the Agreement is July 1, 2021 and is effective for 3 years. Pursuant to the exclusive license agreement, the Company was obligated to make minimum advance royalty payments of US$3,000,000, over the first 3 years.

The minimum royalty payment required is US$500,000 in year 1, US$1,000,000 in year 2 and US$1,500,000 in year 3. The payments for the first three years of the Agreement are to be paid as follows: US$750,000 in 2021 and US$2,250,000 in 2022. The Company paid Actinon US$750,000 during the year end September 30, 2021 and US$1,253,502 during the year ended 30 September 2022. These payments covered the first two years of the contract and part of year 3 that ends on September 30, 2024. The amount of $3,669,408 royalty payments was recorded as an intangible asset in the consolidated statements of financial position as at September 30, 2021. The Company has accrued liabilities of $898,343 related to the Agreement as at September 30, 2023... for royalties payable.

The contract was terminated by both parties effective July 1, 2023. As a result, the Company would have approximately $675,000 USD outstanding to complete the payment for the initial 3-year contract term, if deemed necessary. This financial liability is reflected in the consolidated financial statements, under accounts

> payable and accrued liabilities, representing the net balance after accounting for the accrued liabilities related to the years where amounts were accrued but CHAR no longer has to pay due to the terms of the agreement. The liability is netted against these accrued balances, indicating the outstanding obligation amidst the contract termination. This adjustment reflects the uncertainty regarding the enforceability of the remaining payment, given the early termination of the contract and the partial fulfilment of the original payment terms…"

45. Although Note 7 is not entirely easy to follow, what is perfectly clear from it, as well as the numbers stated in the accounts under the heading "Accounts Payable and Accrued Liabilities… Royalties Payable", is that CHAR Tech was telling its shareholders in January 2024 that it believed "if deemed necessary" the Defendant would have to pay the Claimant some $675,000 to complete payment of the Minimum Royalty owing for Years 1 – 3 inclusive.

46. On 4 March 2024, the Claimant submitted a request for mediation to the ICC pursuant to Clause 23.2 of the Agreement. The Defendant agreed to participate in a mediation on 28 March 2024; and a mediation then took place in July 2024.

47. Clearly the mediation was unsuccessful, as these proceedings were issued on 10 July 2024. By them, the Claimant seeks:

    i) Payment of the liquidated sum (i.e., a debt) of $3,742,759.05, alternatively damages in the same amount, in respect of the Defendant's alleged "failure to pay Minimum Royalty (adjusted for inflation) and contractual interest, in breach of clauses 8.1, 8.2, 8.5, 15.4(c) and/ or Annex A of the [Agreement]".

    ii) Damages in respect of allegedly lost profits flowing from an alleged breach of Clause 6.4 of the Agreement. This head of claim is not relevant to the application for summary judgment and I say no more about it.

48. The proceedings were served on the Defendant on 21 August 2024. On 30 August 2024, CHAR Tech published a further press release on its website. The press release was mainly devoted to CHAR Tech's results for Q3 2024, but it also contained statements about various relevant events, including the litigation commenced by the Claimant against the Defendant:

> "As previously press released on July 4th, 2023, on August 28th, 2022, [the Defendant] served advanced [sic] written notice to terminate its Exclusive Licence Agreement with Actinon Pte Ltd… On June 30th, 2023, CHAR Biocarbon received a notice of immediate termination effective July 1st, 2023, in respect of, and an allegation of additional licence fees owing under, the licence agreement. Subsequently, CHAR Biocarbon has received a claim from Actinon Pte Ltd in respect of the foregoing. The Company views the claim as frivolous unparticularized damages, continues to vigorously dispute Actinon's claim of additional license fees owing under the license agreement, and will take such action as it deems appropriate to protect its rights and interest. All options are being considered and CHAR Biocarbon will respond in due course".

49. On 11 September 2024, the Defendant served a request for further information of the Particulars of Claim pursuant to CPR Part 18. The request focussed on details of how

the sums claimed by the Claimant under the Agreement were calculated and further details of its claimed losses attributed to the Defendant's alleged breach of Clause 6.4 of the Agreement.

50. On 12 September 2024, DLA Piper emailed the Claimant's solicitors, Wedlake Bell, to say "Without waiver of privilege, CHAR is considering bringing a counterclaim but no decision has yet been made on this". The Claimant answered the Part 18 request on 26 September 2024. There was some correspondence between the parties regarding security for costs, with the Defendant suggesting that the Claimant should provide information on its financial standing and the Claimant saying that there was no point in doing this until the Defendant had revealed its hand on the mooted counterclaim. Wedlake Bell (the Claimant's current solicitors) observed in a letter dated 26 September 2024:

> "Although that threatened counterclaim has been woefully unparticularised in correspondence to date, it appears to be your client's position that its threatened counterclaim arises out of the parties' commercial relationship and/ or the exclusive licence agreement. In particular, your letter raises (baseless) complaints as to, for example, the delivery of price lists and the provision of technical support under the exclusive license agreement. Against that background, there is plainly a strong possibility that, if your client issues a counterclaim against our client in the terms indicated in your letter of 30 June 2023, the Court will be faced with two claims arising out of the same issues such that security will not be ordered…"

The Claimant's application for summary judgment

51. On 11 October 2024, the Claimant made its application for summary judgment. In the application notice it sought judgment on the issue whether the Defendant is contractually obliged to pay it $635,810 (i.e., the sum referred to in DLA Piper's letter dated 30 June 2023) and an order that the Defendant pay that sum. The reasons given for the order sought were:

> "The Defendant has acknowledged that the sum of USD 635,810 is payable to the Claimant under the terms of the Agreement but has refused to date to pay those sums.
>
> The Defendant at one stage suggested that it has a counterclaim which would extinguish the sums owed to the Claimant. However, the Agreement expressly provides that sums due to the Claimant under the terms of the Agreement are to be paid without any set-off".

52. On 24 October 2024, the Defendant filed its Defence and Counterclaim. For the first time in the entire course of the relationship between the parties, and unprefaced in any pre-action correspondence, the Defendant contended that it had been induced to enter the Agreement by misrepresentations allegedly made by "Mr Martella and other representatives of the Actinon Group". The members of the "Actinon Group" are not

defined in the Defence and Counterclaim; it is averred simply that the Claimant and Anergy are part of that group.

53. The case pleaded by the Defendant is as follows.

54. On various occasions, "including as particularised" in the Defence and Counterclaim:

> "Mr Martella and other representatives of the Actinon Group repeatedly stated and/ or implied to Mr White and other representatives of the CHAR Tech Group that (1) the Equipment supplied by the Actinon Group would produce commercially viable levels of hydrogen (the **Hydrogen Performance Representation**) and (2) the Actinon Group held valid intellectual property rights, in respect of the Equipment, covering North America (the **North America IP Representation**) (the **Representations**)"

55. The express or implied representations are particularised at paragraphs 13 to 24 of the Defence and Counterclaim:

i) The first set of statements is said to have been made in connection with "a proposal by the Actinon Group to design, construct and supply" to the Defendant on a turnkey basis a plant in California operated by a company known as HZI. A series of statements is pleaded as having been made between 23 February 2021 and 21 June 2021. The statements are attributed sometimes to people described as members of the Actinon Group, sometimes simply to "the Actinon Group". The import of the statements is alleged to have been that "Equipment supplied by the Actinon Group would be capable of producing commercially viable levels of hydrogen". It is not averred that the statements were made specifically to the Defendant; rather, they are said to have been made to Mr Andrew White, identified as CEO of CHAR Tech, and a Mr Friedenthal, identified as being "of the CHAR Tech Group".

ii) The second set of statements is said to have been made on 14 June 2021 in connection with "a proposal by the Actinon Group to design, construct and supply" to the Defendant, again on a turnkey basis, a plant in Minnesota operated by a company known as Dem-Con. The statements are said to have been made by a Mr Jong: the entity for which he spoke is not identified. It is not averred that the statements were made to the Defendant; rather, they are said to have been made to Mr Friedenthal.

iii) The third set of statements is said to have been made on 14 and 15 June 2021 by Mr Jong, this time in connection with a proposal for the supply to the Defendant on a turnkey basis of a plant at a site in Redding, California. Further statements are said to have been made by "the Actinon Group" in a proposal made to someone (either the Defendant or possibly CHAR Tech; no recipient is identified)

iv) The final set of statements are said to have been made between 13 and 16 July 2021. It is said that in this period, Mr Martella proposed that "CHAR Tech Group and Actinon Group should enter an exclusive licence agreement" and

"expressly referred to the commercial hydrogen production capabilities of the Equipment".

56. It is said that the Defendant entered the Agreement on 18 August 2021 in reliance upon the alleged Representations.

57. It is later pleaded that in around November 2021, "the Actinon Group" supplied to the Defendant a spreadsheet which "reduced gross hydrogen levels to 18.9 kg per hour and listed the net hydrogen levels as '*TBA*'". It is said that on 16 November 2021, Mr White asked Mr Matthew Martella (brother of Michael Martella, the CEO of the Claimant) to explain the change in hydrogen production figures. Mr Matthew Martella is alleged to have said that the figures provided to the Defendant "before entry into the Exclusive Licence Agreement were a result of a 'calculation error'".

58. The Defendant next pleads that at some point (it is not stated when) "it became apparent that the 'calculation error' applied to all hydrogen production figures previously given by the Actinon Group to the CHAR Tech Group and that this was not a matter that could be remedied, alternatively which could not be remedied within a 30 day period". There is no plea that the Defendant invited the Claimant to remedy the situation, whether within 30 days or at all.

59. From the fact that there was a difference between the data supplied before the Agreement was executed and the data supplied afterwards, it is averred that the "Hydrogen Performance Representation" was false. On the basis that it entered the Agreement on the faith that the "Hydrogen Performance Representation" was true, the Defendant avers that it is entitled to and seeks an order for rescission of the Agreement.

60. The Defence and Counterclaim does not aver that the "IP Representation was false". Rather, the Defendant avers that on 21 August 2019, Anergy and another company called Anergy Australia Pty Ltd "purported to assign a large number of intellectual property rights to Bellinge Holdings Pty Ltd"; and it reserves its position regarding the nature and extent of intellectual property rights owned by the Claimant at the date the parties entered the Agreement.

61. It is also pleaded by the Defendant that on a proper construction the Agreement is to be understood as a contract for the sale of goods and/ or services; and that implied into it were terms that the HTP kilns and Anergy products sold or supplied to the Defendant "would correspond with the description provided by the Actinon Group prior to contracting" and that such products would be of satisfactory quality and fit for purpose. Further, the Defendant pleads that implied into the Agreement was a term that the HTP kilns and Anergy products sold or supplied to it "would produce commercially viable levels of hydrogen".

62. In the counterclaim section of its Defence and Counterclaim, the Defendant seeks rescission of the Agreement and repayment of all sums it has paid to the Claimant; alternatively damages in lieu of rescission pursuant to Section 2(1) of the Misrepresentation Act 1967. No claim is pleaded seeking damages for breach of the terms said to have been implied into the Agreement as to quality/ fitness for purpose/ ability to produce "commercially viable levels of hydrogen".

63. In view of its Defence and Counterclaim, the Defendant resisted the Claimant's summary judgment application on the following bases:

    i) Its primary case was that an order should be made at trial rescinding the Agreement for misrepresentation.

    ii) It had a real prospect of establishing at trial that:

        a) The Hydrogen Performance Representation was made;

        b) It relied upon the Hydrogen Performance Representation;

        c) The Hydrogen Performance Representation was false;

        d) There was (to quote Mr Day and Ms Scott's skeleton argument from February 2025) "no affirmation or equivalent estoppel or lapse of time following discovery of the calculation error and hence falsity".

64. It is also relevant to note here the Defendant's pleaded case regarding the effect of its email terminating the Agreement on 28 August 2022. At paragraph 6.3 of the Particulars of Claim, the Claimant averred that on 28 August 2022 the Defendant had served 36 months' notice of termination pursuant to Clause 15.2 of the Agreement. Despite the terms of the press release from 4 July 2023 (above paragraph 43), at paragraph 57 of the Defence and Counterclaim the Defendant pleads this:

> "Paragraph 6.3 is denied save that it is admitted Mr White wrote to Mr Martella on 27 August 2022 to give notice of termination of the Exclusive Licence Agreement on behalf of CHAR. In particular:
>
> (1) It is denied that this notice was given pursuant to section 15.2 of the Exclusive Licence Agreement such that the Exclusive Licence Agreement would terminate on 28 August 2025. In the circumstances pleaded in section D1 above [i.e., the case on misrepresentation], and subject to CHAR's counterclaim for rescission, CHAR was entitled to and did terminate the Exclusive Licence Agreement immediately at common law, alternatively under section 15.1 of the Exclusive Licence Agreement.
>
> (2) It is further denied that, as at 27 August 2022, Actinon had any right to be paid "*Minimum Royalty*" in respect of "*Year 4*": in circumstances where the "*Minimum Royalty*" had not been prepaid by 1 July 2022 in accordance with section 8.2(b) the "*Term*" would end on 30 June 2024…"

65. In the counterclaim section of the Defence and Counterclaim, the Defendant seeks declarations that:

    i) The Agreement was "validly terminated" by it on 27 August 2022;

    ii) No sum is payable in respect of the Minimum Royalty for Year 4 on the proper construction of Clause 5 and 8 of the Agreement.

66. In his skeleton dated 13 February 2025, Mr Anderson had focussed on the following propositions:

    i) The Defendant undoubtedly owed at least the sum acknowledged as due in the DLA Letter, i.e., $635,810;

    ii) Even if the Claimant had made the Hydrogen Performance Representation and it were false, until and unless the Court granted an order rescinding the Agreement, the obligations already accrued under the Agreement remained intact and the no set off provisions in Clause 8.4 prevented the Defendant from setting off against the sum due from it the sums that would be paid back to it by the Claimant following rescission.

    iii) The Defendant's counterclaim for rescission or damages in lieu thereof was bound to fail because the Defendant had repeatedly affirmed the Agreement after it became apparent, on its case in November 2021, that the Hydrogen Performance Representation was false.

67. At the hearing on 14 February 2025, Mr Anderson placed a great deal of weight on the DLA Letter, which he described as possibly "the most important document in the hearing bundle". As he developed his submissions, it became clear that they were going somewhat beyond the pleaded Reply and Defence to Counterclaim: Mr Anderson was arguing that the DLA Letter stood as evidence from which the court could infer, on a summary judgment application, that the Defendant was aware that it had a right to rescind the Agreement, but in fact there was no averment in the Reply and Defence to Counterclaim that the Defendant was so aware.

68. After hearing argument regarding what inferences may be drawn from the fact that a party is represented by lawyers at the time that it takes a step that is arguably affirmatory of a contract, I decided to adjourn the hearing so that the Claimant could amend its pleadings and put the issues which arose from the DLA Letter squarely before the court. I gave directions, including regarding the provision of further evidence if the parties were so advised. I also directed that the Defendant's reverse summary judgment application be listed to be dealt with at the same time as the adjourned hearing of the Claimant's application so that efficient use could be made of court time.

69. Between the adjourned and the second hearing, the Claimant amended the Reply and Defence to Counterclaim, and the Defendant amended its Reply to Defence to Counterclaim in response. Both parties filed further evidence in support of their positions on the two applications to be heard on 21 July 2025.

The Claimant's amended defence to counterclaim

70. The Claimant's amendments, which covered more ground than arose from the DLA Letter, were consented to by the Defendant. The Claimant has always denied that the Hydrogen Performance Representation was made; averred that if it was made it was not false; and asserted that even it were made, it was made by Anergy and not by the Claimant. It also denied that the Defendant relied on any such representation. The Claimant's case in answer to the counterclaim for rescission is now as follows.

71. First, it says that the Defendant lost any right it might have had to seek rescission of the Agreement because it affirmed the Agreement, knowing at the time of each affirmation that it purportedly had a right to rescind. The acts of alleged affirmation break down into the following categories:

    i) Acts undertaken by the Defendant before June 2023 that suggested it believed the Agreement was effective, such as making payments of Minimum Royalties, giving notice to terminate the Agreement on 28 August 2022, admitting that at least some money was due in the draft letter sent in October 2022, and referring, in CHAR Tech's consolidated accounts for the years to 30 September 2022 and 2023, to the Agreement, the sums owed under it, and (in the 2022 accounts) the fact that the Defendant had extended the Agreement for a fourth year.

    ii) DLA's act in sending the DLA Letter is said to be affirmatory because:

        a) In the DLA Letter, the Defendant accepted the notice of termination sent on 1 June 2023;

        b) Admitted that a debt of $635,810 had accrued to the Claimant pursuant to the terms of the Agreement;

        c) Threatened a counterclaim arising out alleged failures by the Claimant to comply with the terms of the Agreement.

    iii) Finally, the Defendant's agreement to participate in a mediation, and actual participation in a mediation in July 2024, is said to be an affirmatory act.

72. The Claimant's amended Reply and Defence to Counterclaim also gives particulars of the Defendant's alleged knowledge that it had a purported right to rescind the Agreement on each occasion that it undertook an affirmatory act:

    i) In relation to each allegedly affirmatory act, the Claimant alleges that "it is to be inferred" from various facts that the Defendant had knowledge of its purported right to rescind.

    ii) Of the various instances, two in particular should be mentioned here: the Claimant avers that it is to be inferred that DLA Piper must have advised the Defendant of its purported right to rescind at some point before DLA Piper sent its letter to Yuen Law on 26 April 2023, alternatively before it sent the DLA Letter.

73. By way of alternative to its case that the Defendant affirmed the Agreement, the Claimant also pleads that the Defendant is estopped from exercising any purported right to rescind that it might have. It pleads that all the allegedly affirmatory acts constitute implied representations/ representations by conduct on the part of the Defendant to the effect that it was continuing to treat the Agreement as being on foot; and that it relied on these implied representations to its detriment by:

    i) Continuing to make the exclusive license provided by the Agreement available to the Defendant;

ii) Not pursuing potential alternative licensing agreements in North America;

iii) Issuing its application for summary judgment on 24 October 2024 in respect of part of the Minimum Royalties due on the basis that both parties had accepted at that date that the Agreement had been validly terminated on 1 July 2023.

74. Although it was not expressly pleaded, Mr Anderson also submitted that the Claimant's attending the mediation in July 2024 constituted detrimental reliance on the representations alleged to have been made by the Defendant.

75. In its Amended Reply to Defence to Counterclaim, the Defendant's position in relation to the allegedly affirmatory acts and its alleged knowledge of its purported right to rescind is that:

i) It did not have actual knowledge of its right to rescind at the date of each alleged affirmatory act;

ii) As a matter of law, only actual knowledge would suffice for the purposes of an informed election/ affirmation; and that even if constructive knowledge suffices, it should not be fixed with such knowledge, nor did it deliberately turn a blind eye to the possibility of a right to rescind.

76. As to the DLA Letter and the fact that the parties attended the mediation in July 2024, the Defendant's case is:

i) The DLA Letter focussed on the Claimant's claim to $3,061,840; DLA Piper stated that the Defendant "did not accept that it owed Actinon anything because it had a counterclaim against Actinon"; and the DLA Letter expressly reserved the Claimant's rights against the Defendant and Anergy. It is also pleaded that the Defendant was entitled to investigate how much the Claimant claimed to be due as part of considering its rights and remedies.

ii) The mediation took place pursuant to Clause 23.2 of the Agreement, which was separable and would survive rescission of the Agreement. It is pleaded that the Defendant's "agreement to mediate cannot therefore amount to an affirmation of the Exclusive Licence Agreement (in the same way as a request for arbitration or commencement of proceedings under a jurisdiction agreement would not amount to affirmation)".

77. The Defendant also expressly indicated that it would waive privilege in its communications with DLA Piper concerning the current dispute between 10 April and 30 June 2023; alternatively that it would waive privilege between 10 April and the date of the mediation "to the extent relevant".

78. Perhaps not surprisingly in view of that approach, there was then a dispute between the parties regarding what privileged material was to be made available for the adjourned hearing of the Claimant's summary judgment application. The dispute was exacerbated by the fact that when the Defendant provided material in relation to which privilege was waived, that material was in parts heavily redacted purportedly on the basis that the redactions were of "parts of the Communications which do not relate to the Dispute".

79. For the purposes of this judgment, it is useful to refer only to some of the correspondence passing between the Defendant and DLA Piper in the period immediately before the sending of the DLA Letter, as follows:

80. On 26 June 2023, DLA Piper prepared a first draft response to the Notice. At that stage, the Defendant sought to dispute the Claimant's basis of termination with a view to disputing the basis of the calculations made by the Claimant. DLA Piper's Mr Sohail Ali had carriage of the draft, and in his covering email dated 26 June 2023 to the Defendant, he observed, among other things, that the effect of Clause 8.4 was to prohibit the setting off of any sums against the Minimum Royalties.

81. There was then a call on 27 June 2023 between some members of the Defendant and Mr Ali. DLA Piper has stated in a letter dated 1 May 2025 that there are no attendance notes of any calls with the Defendant in the period covered by the waiver of privilege, but Mr Ali referred to what was discussed on the call in an email he sent on 28 June 2023:

> "Based on our call yesterday, we want to accept their termination notice. This potentially puts us in a slighter better position given they can terminate immediately on 30 days written notice. Absent their termination, we are required to give 36 months' notice – termination would be effective Aug 2025.
>
> The minimum term of the contract is 3 years, i.e. up until July 2024. The rule under English law is that if a party is alleging breach of contract (which is what Actinon are asserting in the termination notice) they would be entitled to be put in the position as if the contract had been performed. If the contract had been performed, then at the very least they would be entitled to receive the Minimum Royalty up until the end of Year 3.
>
> I think it may be preferrable to agree to this in lieu of relying on our own 36 months' notice, which entitles them to seek payment up until this date. Does this make sense?" [original emphasis]

82. Earlier on 28 June 2023, the Defendant's CEO, Mr White, had sent DLA Piper what he called a "bit of a ledger with some extra detail/ context". In that ledger, Mr White showed the net amount "strictly based on contract" that the Defendant owed the Claimant. He calculated this as the Minimum Royalty for Years 1 – 3 ($3,000,000) plus interest ($90,820) less payments made to the Claimant ($2,003,502) less payments made to Anergy but credited as payments to Actinon ($451,508) = $635,810.

83. The next part of the ledger particularised what Mr White termed "Additional Adjustments". These comprised:

i) The sum of $864,190. Mr White argued that the Defendant had paid the whole Minimum Royalties due for Years 1 & 2 and also some of the Minimum Royalty due for Year 3. He said that since the Agreement had been terminated on 1 July 2023, this meant that the Defendant "lost the rights associated with these pre-payments" and "we feel refunding the pre-payments is appropriate". The $864,190 was said to be the difference between the sum actually prepaid (i.e.,

$2,455,010) and the Minimum Royalties for Years 1 & 2 ($1,500,000) plus interest on late payments in respect of those Minimum Royalties only (being $90,820).

ii) Mr White also included a placeholder for what he called "Model Development Costs". He explained that "their model was terrible and produced unreliable outputs that could not be replicated in real life. This model was a crucial element of the license agreement. We hired 2 FTEs and 1 consultant to build, from scratch based on real world data we were generating, a more robust and accurate model".

iii) The third substantive "additional adjustment" was in relation to what Mr White described as "Induced Payments to Anergy for HZI Project". The suggested adjustment here was $1,228,393. What Mr White said to explain this was as follows:

> "Prior to signing the license agreement, we had developed a project opportunity with HZI (HitachiZosen Inova). The Actinon model, as presented by Anergy, showed an output of 165kg/hr of H_2 on August 18th, 2021. We then signed up HZI and signed the exclusivity agreement with Actinon. By November 12th, 2021, the hydrogen output dropped further to 18kg/hr. And by September 28th, 2022, the hydrogen output number dropped even further to 3kg/hr. We were now trying to make a project work with the output reduced by 98%. This was the fault of an innocent modelling error (and what we later found to be an overall bad model that was sold to us) or it could have been done deliberately to get us to sign up to the license agreement. The amounts here are our specific spend to Anergy (Actinon's subsidiary with whom we contract for kiln design and fabrication) specifically for the project. I have only included cash out, no internal labour hours. I also have not included the lost revenue, nor the reputational cost"

iv) The final additional adjustment amount was "TBD". It related to "Third Party Costs for HZI Project". The description of this head of expenditure was as follows:

> "These were paid to third party consultants for permitting and other support in California (which we only believed we had a viable project based on the initial Actinon model/ IP)"

84. As is self-evident, the facts stated in Mr White's third and fourth "additional adjustment" explanations clearly disclose the possibility at least of some kind of claim against someone - Anergy, which is said to have "presented" the allegedly flawed "Actinon model"; and/ or the Claimant, either of which might be the person that made or presented a flawed model "deliberately to get us to sign up to" the Agreement.

85. Having considered Mr White's ledger, Mr Ali gave advice in writing by email. In relation to the sum of $864,190, he said:

> "I note the explanation. My concern is that they will say that for the purposes of calculating the termination amount they are entitled to take into account the amount

> they would have received had the contract been performed (i.e. at least until the expiry of the 'Term'). I suggest we exclude from the calculation amount"

86. In relation to interest, he asked whether the Defendant accepted that it owed the Claimant interest on licence fees, as the table suggests that it did whereas its letter of 27 October 2022 suggested interest was disputed.

87. In relation to the potential claims arising from the allegedly flawed hydrogen output model, Mr Ali's advice was this:

> "Induced Payments to Anergy for HZI Project/ Third party costs for HZI project. I think this would form part of a damages claim as opposed to giving rise to a right of set-off for sums due to Actinon. We would need more details to understand the basis of the claim but we can reference it in the letter to give them something to think about if they are minded to bring a claim"

88. He concluded his advice as follows:

> "The reality is that we will probably be accepting we owe them a sum of money. However, we will be saying we have our own separate claim for losses suffered in respect of the HZI Project and modelling development costs. In effect, therefore, the net result is we are owed money. Is that a fair summary?"

89. Mr White replied to this saying "My comments below in blue. Overall a fair summary, I'll let Lewis [Smith, Chief Commercial Officer of CHAR Tech] and the team weigh in on the position you laid out, but it sounds logical to me". In his replies to Mr Ali, Mr White said:

    i) Of interest, "Yes, we do accept under the contract we owe them interest. The 27 Oct letter disputed the amount of interest charged… The outstanding dispute on interest is that the calculation periods are irregular and they are trying to charge an extra 'overnight' interest for each period… This has yet to be resolved";

    ii) He accepted Mr Ali's advice that the $864,190 could not realistically be claimed;

    iii) He made no comment at all on the advice that any claim in relation to the HZI project would form part of a further damages claim as opposed to giving any right of set off for sums due from the Defendant to the Claimant.

90. Mr Ali then produced a further draft of the DLA Letter, this one being much closer to the version ultimately sent. That draft was reviewed by various people at the Defendant, and there were some adjustments made to the wording regarding inflation adjustment. By 29 June 2023, the letter was in its final form as set out earlier in this judgment.

91. Over the course of the same period, DLA Piper also advised the Defendant/ CHAR Tech regarding the wording of the press release that was ultimately issued on CHAR Tech's website on 4 July 2023 (above, paragraph 43). The first draft shared with DLA Piper announced the service of the Claimant's Notice and explained the service of the Defendant's termination notice on 28 August 2022 in this way:

> "CHAR had already delivered notice to terminate the licence agreement in August 2022. This termination was part of a plan to better align the Company's technology arrangements with its business and technology needs, supported by its growing internal capabilities, and to reduce supply chain and project delivery risks by transitioning to North American-based suppliers rather than relying on a single overseas manufacturing facility. Under the terms of the licence agreement, CHAR's notice of termination would have been effective three years after delivery.
>
> CHAR has pre-existing supplier relationships and arrangements in place, and the internal technical and engineering resources necessary to meet its technology and product delivery needs and continue the execution of its business strategy and does not anticipate any impact on its ongoing business operations of the current dispute"

92. Upon receiving this, Mr Ali asked for a copy of the original August 2022 notice sent by the Defendant to ensure that the press release was consistent with whatever had been said in that notice. He observed "My view is always less is more for something of this nature and so unless you think there is a commercial/ legal reason for you to spell out your reasons for terminating I would tend not to go into the detail of why you terminated".

93. Mr Lewis Smith replied to Mr Ali enclosing a copy of the email of 27 August 2022, saying:

> "The reasons for termination are there for commercial purposes. We want the market to understand that this outcome has positive aspects, since simply announcing the termination of the licence could be misleadingly negative. However, if there is risk of prejudice to our legal position with Actinon, we will need to balance that against the commercial factors (as well as considering any input from DLA Toronto on the securities regulatory aspects)"

94. Mr Ali subsequently suggested amendments to the draft press release. In particular he suggested deleting the explanation given for the Defendant's notice terminating the Agreement on 28 August 2022, stating "I suggest we delete unless we need to include this. The termination notice is silent and we may want to keep our powder dry on the reasons for termination if we ultimately want to try and argue we were fed up with Actinon and their failures…".

95. As can be seen from the press release which was ultimately published, the Defendant chose not to follow Mr Ali's advice on this point and left as the explanation for the reason it sent its notice on 28 August 2022 that this was part of its planned supply chain transition. It also added into the issued press release the statement that when it had given notice on 28 August 2022, this was a contractual 36-month notice; but that 36-month period had been truncated by the service of the Notice by the Claimant.

The law

Summary judgment

96. I gratefully adopt the summary recently provided by Mr Andrew Hochhauser KC, sitting as a Deputy High Court Judge, in *Lee v National Westminster Bank Plc* [2024] EWHC 1811 (Comm):

> "23. There was little dispute as to the principles to be applied to the applications. The power to award summary judgment is to be found in CPR 24.2, which, so far as material, states that:
>
> > 'The court may give summary judgment against a claimant or a defendant on the whole of the claim or on a particular issue if-
> >
> > (a) it considers that -
> >
> > (i) that claimant has no real prospect of succeeding on the claim or issue; or
> >
> > (ii) that defendant has no real prospect of successfully defending the claim; and
> >
> > (b) there is no other compelling reason why the case or issue should be disposed of at a trial.'
>
> 24. The relevant principles were summarised by Floyd LJ in *TFL Management Services Limited v Lloyds TSB Bank Plc* [2014] 1 WLR 2006 at [26] to [27]. In that passage, Floyd LJ referred to an earlier decision of Lewison J (as he then was) in *Easy Air Limited (Trading as Open Air) v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15], where he summarised the principles in the following way:
>
> > '…the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
> >
> > i) The court must consider whether the claimant has a 'realistic' as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
> >
> > ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
> >
> > iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*;
> >
> > iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
> >
> > v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725"

25. I also remind myself of the following:

(1) the criterion 'real' is not one of probability, it is the absence of reality: see Lord Hobhouse in *Three Rivers District Council v Bank of England (Number 3)* [2003] 2 AC 1, [158];

(2) an application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial of the issues having regard to all the evidence: see *Apvodedo NV v Collins* [2008] EWHC 775 (Ch);

(3) in relation to the burden of proof, the overall burden of proof rests on the applicant to establish that there are grounds to believe the respondent has no real prospect of success and there is no other compelling reason for trial. The standard of proof required of the respondent is not high; it suffices merely to rebut the applicant's statement of belief"

Law applicable to the Claimant's application

Waiver by election and waiver by estoppel

97. The parties were agreed that a person who has a right to rescind a contract due to a misrepresentation by its counterparty may nevertheless elect to affirm the contract. An election to affirm is only established where the party entitled to rescind uses clear and unequivocal words to affirm the contract; where those words are communicated to the counterparty; and, most relevantly for present purposes, where the party entitled to rescind knows that it has such a right.

98. At the adjourned hearing before me in July, both parties referred to the decision at first instance of Dias J in *URE Energy Ltd v Notting Hill Genesis* [2024] EWHC 2537 (Comm). That decision was under appeal at the date of the hearing, with the appeal itself heard on 8 and 9 October 2025 and the judgment given on 10 November 2025, with neutral citation number [2025] EWCA Civ 1407.

99. The Court of Appeal upheld the decision of Dias J. Males LJ, with whom Zacaroli and Miles LJJ agreed, considered at length the principles that underlie waiver by election and the conceptually adjacent principles governing waiver by estoppel. Given that many, if not all, the authorities referred to by Males LJ in his judgment were cited by Mr Anderson and Mr Day, I have found the Court of Appeal's judgment at [59] – [61] particularly helpful in its restatement of the applicable principles:

> "59. The differences between election and estoppel have been explained in a number of cases, for example by Lord Goff in *The Kanchenjunga* [1990] 1 Lloyd's Rep 391. In summary, he said that election arises when a party has a choice between two alternative courses of action (typically, but not necessarily, whether to terminate a contract or continue performance) and, with knowledge of the facts giving rise to that choice, acts in a way which is only consistent with having made a choice between them. The election, once made, is final, and does not depend on any reliance by the other party. Indeed, the electing party may not realise that it is making an election, but if it acts unequivocally one way or the other, it will be held to have done so.
>
> 60. Lord Leggatt drew together the leading authorities on election in *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corpn* [2020] UKPC 23, [2021] 1 WLR 5741:
>
> > '18. There is no dispute about the legal principle. As stated by Lord Diplock in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 883, waiver by election arises:
> >
> > > 'in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did.'
> >
> > 19. Lord Goff of Chieveley further explained the principle in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corpn of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391, 398, where he said:

> 'Election itself is a concept which may be relevant in more than one context. In the present case, we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so. His decision, being a matter of choice for him, is called in law an election. … In particular, where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him - for example, to determine a contract or alternatively to affirm it - he is held to have made his election accordingly … [An election] can be communicated to the other party by words or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms … Once an election is made, however, it is final and binding.' (citations omitted)

20. More recently, in *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147; [2008] Bus LR 931, para 38, Rix LJ said:

> '[Election] generally requires knowledge of the facts giving rise to the choice on the part of the party electing, and knowledge of the choice having been made on the part of the other party. Those are the conditions which make the doctrine mutually fair. It typically arises where the parties to a contract have to know where they stand. Thus the choice has either to be communicated unequivocally by the party electing to the other party or else the objective circumstances have to be such that the effluxion of time by itself constitutes that communication. Since the election is the choice of the party electing, it is his conduct which is decisive. Once made the election is final and irrevocable.'

21. The principle of waiver by election is not needed to explain why a decision to terminate a contract, once communicated, is final and irrevocable. A valid termination has the legal effect of discharging both parties (from then on) from their obligations under the contract. Those obligations could only be reinstated by making a new contract. But the principle is needed to explain why a party who communicates unequivocally an intention to continue with performance thereby loses the right to terminate the contract (in so far as the right was based on facts then in existence and known to the electing party). What is fundamental to the principle of waiver by election and crucial for present purposes is that it is only capable of applying where a choice must be made between two alternative and inconsistent (in the sense of mutually exclusive) courses of action, such that adopting one of them necessarily entails forsaking the other.'

61. Estoppel, on the other hand, arises where a party makes an unequivocal representation by words or conduct, whether or not it realises that it is doing so, on which the other party relies to its detriment. As Lord Goff explained in *The Kanchenjunga* at 399 col 2:

> 'Election is to be contrasted with equitable estoppel, a principle associated with the leading case of *Hughes v Metropolitan Railway Co* (1877) 2 App Case 439. Equitable estoppel occurs where a person, having legal rights against another, unequivocally represents (by words or conduct) that he does not intend to enforce those legal rights; if in such circumstances the other party acts, or desist from acting, in reliance upon that representation, with the effect that it would be inequitable for the representor thereafter to enforce his legal rights inconsistently with his representation, he will to that extent be precluded from doing so.
>
> There is an important similarity between the two principles, election and equitable estoppel, in that each requires an unequivocal representation, perhaps because each may involve a loss, permanent or temporary, of the relevant party's rights. But there are important differences as well. In the context of a contract, the principle of election applies when a state of affairs comes into existence in which one party becomes entitled to exercise a right, and has to choose whether to exercise the right or not. His election has generally to be an informed choice, made with knowledge of the facts giving rise to the right. His election once made his final; it is not dependent upon reliance on it by the other party. On the other hand, equitable estoppel requires an unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the [representee] as will render it inequitable for the representor to go back upon his representation. No question arises of any particular knowledge on the part of the representor, and the estoppel may be suspensory only. Furthermore, the representation itself is different in character in the two cases. The party making his election is communicating his choice whether or not to exercise a right which has become available to him. The party to equitable estoppel is representing that he will not in future enforces legal rights. His representation is therefore in the nature of a promise which, though unsupported by consideration, can have legal consequences; hence it is sometimes referred to as promissory estoppel.'

100. Most of the debate before me was around the degree to which the party said to be making an election between remedies could be presumed to be aware that it actually had two alternatives between which it was making a choice. This arose in the particular context of analysing the DLA Letter, but before I turn to that important document I consider the rest of the Claimant's case that the Defendant chose to affirm the Agreement.

101. As I have set out above, the Claimant's pleaded case turns on a number of instances before the DLA Letter, in relation to each of which the Claimant pleads that "it is to be inferred" that the Defendant had knowledge of a right which was inconsistent with its allegedly affirmatory action. Mr Anderson submitted that on the facts before me, it was possible safely to decide on a summary basis that there was no real prospect of the Defendant establishing that it did not have knowledge of its right to rescind on the various occasions that it did the acts said to be affirmatory.

102. In my judgment, the fact that the Claimant must invite the court to infer knowledge on the part of the Defendant makes summary judgment a very difficult proposition in

circumstances where the Defendant resolutely denies that the inference can fairly be drawn: cf *Leeds City Council v Barclays Bank plc* [2021] EWHC 363 (Comm), [2021] QB 1027 per Cockerill J at [169] – [175]. I accordingly decline to do so in relation to the pre-DLA Letter alleged acts of affirmation.

103. The position regarding the effect of the DLA Letter, however, is different.

104. I accept that as a matter of law, where a party had a legal adviser at the time that it did an act which is said to be affirmatory of a contract, a rebuttable presumption arises that the party had received appropriate advice: see *Peyman v Lanjani* [1985] Ch 457, CA per Stephenson LJ at 487D, and *URE Energy Ltd* in the Court of Appeal at [85]. I accept also that where the allegedly affirming party wishes to rebut the presumption, he has little choice but to waive privilege in the advice that he was in fact given: *URE Energy Ltd* in the Court of Appeal at [85].

105. I accept also, as submitted by Mr Day, that only actual knowledge on the part of the allegedly affirming party will do: it is not possible to attribute to that party the knowledge likely held by its legal advisers, such that the party is given constructive knowledge of the right it is said to be giving up: *Insurance Corp of the Channel Islands v The Royal Hotel Limited* [1998] Lloyd's Rep IR 151 per Mance J at [161] col 2, and in particular Mance J's pithy conclusion that it is wrong to suggest "that means of knowledge without knowledge itself could suffice".

106. The debate before me centred around the proposition that the Defendant must have known it had a right to rescind the Agreement: the Defendant's entire defence of the summary judgment application turned on the proposition that it had a right to rescind, and the Claimant inevitably joined issue with that. It is important, however, not to lose sight of the fact that it has always been part of the Claimant's case that the Defendant's acceptance of the Claimant's termination of the Agreement amounted in itself to affirmation.

107. Usually in cases where one party is alleging that the other has affirmed a contract and thereby waived rights arising under or in connection with that contract, the party said to have waived rights has done something which suggests he is content to be bound by the terms of the contract/ is content not to enforce some right he has under the contract. In this case, however, the Defendant accepted that the Agreement had been terminated by the Claimant because of the Defendant's own earlier breaches of the Agreement.

108. I repeat what Males LJ said in *URE Energy* at [59]: "election arises when a party has a choice between two alternative courses of action (typically, but not necessarily, whether to terminate a contract or continue performance) and, with knowledge of the facts giving rise to that choice, acts in a way which is only consistent with having made a choice between them".

109. On 1 June 2023, when the Notice was served the Defendant had a choice. It could pay the demanded sums; it could refuse to pay the demanded sums and refuse to accept the notice of termination; or it could refuse to pay the demanded sums and accept the notice of termination. As can now be seen from the material in relation to which privilege has been waived, it was clearly advised by DLA that it had the alternatives of choosing to accept termination, or not to accept termination.

110. The Defendant chose to accept that the Agreement was terminated because (as can be seen from the advice given by Mr Ali referred to above at paragraph 81) accepting the Claimant's termination brought the Agreement to an end with effect from July 2023, whereas rejecting the Claimant's termination left the Defendant within the 36-month notice period it had started by sending its email of 28 August 2022. In short, by accepting the Claimant's termination of the Agreement, the Defendant put itself in a position where it could argue that the Agreement ended in July 2023 rather than August 2025.

111. In my judgment, in stating "Our client accepts your termination notice with immediate effect from 1 July 2023", DLA Piper, acting with the full knowledge and approval of the Defendant, unequivocally informed the Claimant that it accepted that the Agreement had come to an end and thus, by obvious implication, did not intend to exercise such putative rights as it might have had to keep the Agreement in force until August 2025. The Defendant did this to seek to create an advantage for itself. In my judgment, in so doing, the Defendant must thereby have affirmed the Agreement; one cannot accept that a contract has been terminated and seek thereby to alter the balance of rights between the parties, without a logically prior and inevitable acceptance that the contract was in force immediately before it was terminated.

112. It may well be, as the Defendant maintains in its evidence and in Mr Day's submissions, that the Defendant did not know when the DLA Letter was sent that it had a purported right to rescind the Agreement. In my judgment, on the peculiar facts of this case, it does not matter whether it knew of that particular purported right or not. The Defendant was in the position of having to make a choice between two inconsistent courses of action (accept the notice of termination/ do not accept the notice of termination) and it made an unequivocal choice to accept that the Agreement was terminated. As Lord Leggatt said in *Delta Petroleum (Caribbean) Ltd* at [21], cited by Males LJ in *URE Energy,* "the principle of waiver by election is not needed to explain why a decision to terminate a contract, once communicated, is final and irrevocable".

113. Mr Day argued that since paragraph 9 of the DLA Letter contained a general reservation of the Defendant's rights, so the Agreement could not have been affirmed by anything in the DLA Letter. I disagree. In my judgment, the general reservation of rights cannot have the effect of rendering the earlier unequivocal statement that termination of the Agreement was accepted somehow equivocal: as Lord Leggatt said in *Delta Petroleum*, the decision to terminate, once communicated, is final and irrevocable.

114. In case I am wrong in my analysis that the Defendant affirmed the Agreement by choosing to accept that the Claimant had terminated it on the basis that the Defendant was in breach of its terms, I turn in any event to consider whether, as the Claimant contends, the Defendant has failed to rebut the presumption that it was in receipt of appropriate legal advice regarding its right to seek rescission of the Agreement before it approved the sending of the DLA Letter.

115. In my judgment, it is not possible to say at this stage, without the benefit of further disclosure and cross-examination, that the Defendant has no real prospect of showing that it did not know it had a putative right to seek rescission. There is no specific advice on the point; and while it may, on the face of it, seem remarkable that, given the fact

pattern stated in Mr White's ledger (paragraph 83(iii) above), the Defendant was not told that it might have rights arising from an operative pre-contractual representation, it is really not possible to draw any conclusions now. I refer again to Cockerill J's observations in *Leeds City Council*, cited above at paragraph 102.

116. Turning to whether the Defendant is estopped from asking a court to consider rescission, the Claimant submitted that the applicable law relating to waiver by estoppel and estoppel by convention is accurately set out by Calver J in *Active Media v Burmester* [2021] EWHC 232 (Comm) at [238] – [239]. As Calver J observes in those paragraphs, it is crucial in both types of waiver for the party who allegedly relied on statements made by the allegedly waiving party to show reliance. The evidence from Mr Martella is not to the effect that he read the DLA Letter as in effect a promise by the Defendant not to rely on such rights as it might have arising from alleged pre-contractual statements that proved to be inaccurate. Rather, Mr Martella's evidence, at paragraph 19.2 of his Second Statement dated 15 November 2024, is this:

> "Whilst §8 of the letter refers to the HZI project and hydrogen output, there is no suggestion in that paragraph (or in the letter at all) that: (i) CHAR terminated the Agreement in August 2022 for misrepresentation; (ii) Actinon had made any misrepresentations (of any nature); or (iii) CHAR was entitled to rescind the Exclusive Licence Agreement and/ or claim damages in lieu of rescission"

117. Mr Martella is sceptical of the Defendant's claim to have been the victim of any misrepresentation; and he did not read the DLA Letter as containing any representations by the Defendant to the effect that it would not rely on any purported right to seek rescission. In view of Mr Martella's evidence, I do not consider that the Claimant would be able to make out a case that it relied on what was said in the DLA Letter to form the view that the Defendant would not seek to argue that there had been a pre-contractual misrepresentation. Accordingly, I would have declined to grant summary judgment on the basis that the Defendant is estopped from seeking rescission of the Agreement.

118. In conclusion on the Claimant's application for summary judgment, therefore, in my judgment:

i) The Defendant has admitted that it is prima facie liable to pay the Claimant $635,810. That admission was freely made and (while not accepted by the Claimant as the full sum due) has been calculated on a perfectly rational basis.

ii) Accordingly, there is no real prospect of the Defendant's defence in relation to at least $635,810 succeeding at trial.

iii) The Defendant affirmed the Agreement on 30 June 2023 when it elected to accept the Claimant's termination of the Agreement on the grounds of the Defendant's earlier breaches thereof.

iv) The Defendant accordingly has no real prospect of obtaining an order at trial rescinding the Agreement. In consequence, it has no real prospect of an order awarding damages in lieu of rescission (see *SK Shipping Europe Ltd v Capital*

VLCC 3 Corp [2022] EWCA Civ 231, [2022] 1 CLC 552, [2022] 1 Lloyd's Rep 521, CA per Males LJ at [86]).

v) Even if the Defendant had a counterclaim for breaches of contract on the part of the Claimant before the Agreement was terminated, the Defendant would be prevented by Clause 8.4 from setting off against sums due from it sums that might be due to it. The Defendant does not, however, bring any monetary counterclaim other than for rescission/ damages in lieu, and so the issue does not arise.

vi) Even if the Court at trial could award damages to the Defendant which were greater than the sums ordered to be paid by the Defendant, that would not mean the Claimant is not entitled to an order now that the sums owing to it be paid.

119. I turn now to the Defendant's application for reverse summary judgment.

Law relating to contractual interpretation

120. In *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2020] EWCA Civ 1645, Carr LJ (as she then was) said this:

> "17. The well-known general principles of contractual construction are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900*; Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.
>
> 18. A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:
>
> > i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;
> >
> > ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a

> contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;
>
> iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;
>
> iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;
>
> v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;
>
> vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.
>
> 19. Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated".

121. Those are the principles I shall apply below.

122. The Defendant applies for a declaration that no sum in respect of Minimum Royalty for Year 4 of the Agreement is due or payable by the Defendant to the Claimant on the

proper construction of Clauses 5 and 8 of the Agreement (i.e., the declaration sought on this question in the Defence and Counterclaim). Mr Day's argument was as follows.

123. First, the "Term" of the Agreement is defined as continuing for three years from the Effective Date and "thereafter" to be "renewed for periods of one (1) year each, provided that the Minimum Royalty for that Year has been received by Licensor prior to renewal, unless terminated earlier in accordance with this Agreement".

124. There is thus, he said, a clear distinction between the fixed initial period of three years, for which (per Clause 8.2(a)) the Minimum Royalty must be paid in advance, and subsequent years. For years 4 and onwards, Mr Day said, the Minimum Royalty could be paid in advance; but if it was not, then the Term would not be extended.

125. Mr Day argued that his construction made commercial sense, in that the royalty payments were made in consideration of the rights granted by Clause 3.1 (i.e., the grant of the license); and if the Term expired at the end of Year 3 when minimum royalties for Year 4 had not been paid, then if any sum were due to the Claimant in respect of Year 4, such sum would be paid in consideration of nothing.

126. The Claimant's position was as follows.

127. Under Clause 8.1, the Defendant was obliged to pay the greater of royalties from its own sales or the Minimum Royalty for each year of the Term.

128. Clause 8.2(b) provided that the Minimum Royalty for each Year of the Term from Year 4 onwards shall be paid on an equal quarterly basis two (2) years prior (e.g., the Minimum Royalty for Year 4 (2024) will be paid on 1 July 2022, 1 October 2022, 1 January 2023 and 1 April 2023).

129. The Agreement was terminated on 1 July 2023. By that time, the entire Minimum Royalty for Year 4 had accrued.

130. This being a short point of construction, I consider it appropriate to decide now how Clauses 5 and 8 should be construed.

131. In my judgment, the effect of Clause 5 was automatically to renew the Agreement every year after the initial period of three years. The obligation to pay Minimum Royalty for each renewal year accrued two years before the year in question. Once the obligation to pay had accrued, the Minimum Royalty for the Year in question became payable in accordance with the schedule (i.e., quarterly); and if the full Minimum Royalty was not paid in full before the Year in question was going to start (1 July), then the Agreement would not renew. That would not mean the Minimum Royalty for that Year would not be payable; it would mean that it remained payable but the Agreement had automatically determined.

132. That seems to me to make obvious commercial sense: this was an agreement licensing technology and an associated brand over a minimum period of three years, but also with a 36-month notice period for any termination. Given the length of the contractually permitted termination period, even if the Defendant gave notice at the beginning of Year 2, there would still be an entire year during which it would have the benefit of the license (Year 4). The Agreement provided a mechanism to ensure the Minimum

Royalty for Year 4 was paid so that the Defendant had in fact paid in advance for the license it had a contractual right to use.

133. I accordingly dismiss the Defendant's cross application for reverse summary judgment.

134. After the draft of this judgment was circulated, the Defendant sent short submissions seeking permission to appeal. In those submissions, the Defendant observed that I had dealt with the construction of the Agreement shortly and had not engaged in a textual analysis of the Agreement. The Defendant said that I did not give reasons for rejecting its submissions as to the distinction between clauses 8.1 (which it says provides for timing of payment) and 8.2 (which it says provides for the accrual of a right to be paid), nor its submissions on the relationship between clause 8 and clause 5 and the meaning of the word "provided" in clause 5.

135. I have treated the Defendant's observations in those submissions as an invitation to me to clarify or amplify my reasons in relation to the question of construction of the Agreement. In case this matter goes further, I consider it would be wrong to decline to give such amplification.

136. I have summarised above the Defendant's argument regarding Clauses 8.1 and 8.2. In greater detail, the argument was this:

i) The Defendant's obligation to pay the Claimant contained in Clause 8.1 is expressed as being temporally limited: "Licensee shall pay to Licensor during the Term of this Agreement".

ii) The schedule of payments of Minimum Royalty for "each Year of the Term from Year 4 onwards" contained in Clause 8.2(b) envisages payments of that Minimum Royalty two years in advance on a quarterly basis.

iii) Both Clauses 8.1 and 8.2 thus make no provision for payments of any kind outside "the Term".

iv) The "Term" itself is defined in Clause 5 as that period during which the Agreement is in force, starting on the Effective Date, continuing for an initial three years and thereafter being renewed for periods of one year at a time "provided that the Minimum Royalty for that Year has been received by Licensor prior to renewal".

v) The word "provided" in Clause 5 was said by Mr Day to have been a condition precedent to renewal of the Agreement. He put it this way in oral submissions:

> "So what section 5 is setting up is a distinction between a three-year initial term, annual renewals thereafter, subject to a condition precedent that the minimum payment has been received for that subsequent year, and all that subject to a proviso about earlier termination. So what section 5 is contemplating is two different ways that the term will end: the first is if not renewed, and the second if terminated at any time. The term is not renewed if, as I say, the minimum royalty is not paid for the upcoming year. 'Provided that' creates a conditional link. And that is just a factual question in any case as to whether the minimum royalty

has been received, effectively as a downpayment on the year covered by the extension"

vi) In short, Mr Day's argument ran, if the Agreement was not renewed because the Minimum Royalty for Year 4 had not been paid before Year 4 began, therefore the Agreement came to an end; and since no payments were due save during the Term of the Agreement, therefore no payment could possibly be due in respect of Year 4 because "Year 4" could only exist if the Agreement was in force.

137. Mr Day then argued that support for his proposed construction of Clauses 8 and 5 was to be found in the following points:

i) First, he contended that the royalty payments provided for in Clause 8.1 were in consideration of the licensing rights granted by Clause 3.1. If, he said, the Defendant had not paid the Minimum Royalty for Year 4, then the Agreement would determine at the end of Year 3; thus the license granted by Clause 3.1 would have determined; and thus it follows that no payment of Minimum Royalty for Year 4 could be due because any such payment would be in consideration not of rights granted by Clause 3.1 but rather in consideration of nothing at all.

ii) Second, he said that the purpose of Clause 8.2 was to give the Claimant two years' notice that the Agreement was going to come to an end rather than being renewed "so that it had plenty of time to renegotiate with the Defendant and/ or make arrangements for alternative licensees in the territory" covered by the Agreement.

iii) Third, he contended that if the intention had been to provide for some form of penalty clause or liquidated damages clause, the parties would have drafted the Agreement in different terms: his point was that if a payment was due for Year 4, then the obligation to make such payment was "hidden" within "drafting expressly directed at renewal of the Agreement for year 4".

iv) As to the Claimant's proposed construction of Clause 8.2 (that the effect of it was to make the Minimum Royalty for Year 4 due and payable quarterly with the first quarter being that quarter two years prior to the commencement of Year 4), Mr Day said that this conflated the timing of payments with the time that the obligation to make the payment accrued. He put it this way in his skeleton: "Just as money can be due but not yet payable, so too can money be payable but not yet due (i.e., be an option to pay)".

v) He argued that the "fatal problem" with the Claimant's proposed construction was that it made no sense of what he called the proviso in Clause 5. This proviso, he insisted, meant that the Agreement did not automatically renew at the end of Year 3 until and unless the Minimum Royalty for Year 4 had been fully paid.

vi) Finally, he said that the existence of Clause 15.2 (the 36-months' notice of termination clause) could not be used to "re-write" clauses 5 and 8; that the meaning the Defendant ascribed to those clauses did not cut across the express provisions of Clause 15.2; and in any event, this was "the bargain struck by the

> parties by the words they chose in this case, and it is not for the Court to change it".

138. I do not accept the arguments made by Mr Day, for the following reasons.

139. First, Clause 8.2 provides that the Minimum Royalty for Year 4 shall be paid during the course of Year 2. Year 2 is during the Term of the Agreement. Thus, the obligation to pay the Minimum Royalty for Year 4 accrues during the currency of the Term of the Agreement. Clause 8.1, which requires payment of the Minimum Royalty during the Term, does not prevent payment of the Minimum Royalty for Year 4 if the Agreement has come to an end at the conclusion of Year 3, because even in that event the Minimum Royalty for Year 4 would have fallen due to be paid during Year 2.

140. Assume the Defendant had paid the Minimum Royalty due for Years 1 to 3 inclusive in accordance with Clause 8.2(a), i.e., in four tranches with the last of those paid on 1 April 2022; and then assume that it did not pay the Minimum Royalty for Year 4, which should have been paid between 1 July 2022 and 1 April 2023. The Agreement would still be in force on 1 July 2023 (i.e., the beginning of Year 3); indeed, it would continue in force until 1 July 2024 unless the Claimant took steps to determine it for breach of Clause 8.2(b) pursuant to Clause 15.1(a).

141. The Claimant would perhaps have been able, over the course of the period from the date the Defendant started to be in default (on this example, from 1 July 2022) until the date the Agreement did not renew (1 July 2024) to find a replacement licensee; but it would have only two years in which to achieve that goal. The Defendant, however, had agreed to give the Claimant at least three years' notice of determination of the Agreement: see Clause 15.2.

142. It would doubtless have been possible for the Defendant to have given 36 months' notice on the very day the Agreement came into force, thereby limiting the term of the Agreement to the 3-year period provided for in Clause 5. The wording of Clause 5, with its reference to an "initial" three-year period, and the express provisions for renewal, however, all must be taken to show that the parties' intention was that the term of the Agreement would probably exceed three years; and that the period of notice the Defendant would give the Claimant if it wished to bring the Agreement to an end was three years.

143. Clause 5 does not in my judgment contain provisions that permit termination of the Agreement by some additional method to those stated in Clause 15. Rather, it provides the basis upon which the Agreement may be renewed. The effect of non-payment of the Minimum Royalty for Year 4 by the end of Year 2 might very well result in the Agreement not being renewed at the end of Year 3; but non-payment does not in itself amount to contractual notice from the Defendant that it wished to bring the Agreement to an end at the conclusion of Year 3. Notice may be given formally pursuant to Clause 15.2; non-payment, while it certainly amounts to a firm indication that the pre-condition for renewal of the Agreement is not going to be met, does not amount to notice.

144. When, therefore, the Defendant received invoices for the Minimum Royalty for Year 4 over the course of Year 2, those invoices were in relation to the anticipated renewal of the Agreement at the end of Year 3; a renewal which, absent service of 36 months'

notice of termination at the appropriate time, was expected to take place and for which the Defendant had agreed to pay in advance.

145. Furthermore, pursuant to Clause 15.4(c), upon the expiry or earlier termination of the Agreement, the Defendant was obliged to pay all amounts due under the Agreement to the Claimant. That must include the payments due in respect of Year 4, which had fully accrued over the course of Year 2.

146. As Mr Anderson submitted, and I accept, a contract will be interpreted so far as possible in such a manner as not to permit one party to it to take advantage of his own wrong (relying on Lewison, *The Interpretation of Contracts*, 8th Edition, para 7.108 and the cases there cited). The construction advanced by Mr Day is a paradigm example of one that seeks to permit a party to take advantage of its own wrong: he is saying that by not paying the Year 4 Minimum Royalties – in breach of contract – the Defendant thereby secured for itself a lawful termination of the Agreement in a shorter notice period than it had contracted to give; and furthermore, submits that this breach of contract also had the effect of rendering the Year 4 Minimum Royalties not due for payment at all because Year 4 would never arrive. Such an outcome would be truly remarkable; and it also ignores the effect of Clause 15.4(c).

147. Although it is not a relevant aid to construction, it is nevertheless appropriate to note that among the pieces of advice in respect of which privilege was waived were these, from Mr Ali on 26 June 2023. On that date, he had prepared the first draft of the DLA Letter. That draft asserted that since the Minimum Royalty had not been received, "it follows that the contract would not automatically roll over for a further year". Mr Ali made a comment in the margin of that first draft, accompanied by a further note in the covering email to the Defendant by which he sent that draft for review. The margin note and the email comment read as follows:

> "Upon reflection, I think this is a weak argument. I think the intention is that we have to pay the minimum royalty per year in order to get the benefit of the extension. I suspect a court would have little sympathy at our attempt to rely on our failure to pay the minimum royalty payment to argue that the contract should not be extended beyond 1 July 2024 and allow us to take the benefit of a short termination period. It's the best argument I think we have unless you are able to dispute their figures"
>
> "As it stands, the letter tries to rebut Actinon's basis for termination on the grounds that the minimum royalty payment has not been received. As I note in the letter I am not sure this is a particularly strong argument given that the purpose of the minimum royalty payment is to give Actinon the ability to refuse an extension beyond the initial term if the minimum payment was not received. I don't think it's a particularly attractive argument for us not to make this minimum payment and then seek to argue that the contract should/ would not be rolled over allowing us to bring forward the date for calculating the termination payment. However I think we can run it. Of course if we have better arguments to dispute the termination calculation then we should look to incorporate"

148. In the DLA Letter as sent, the argument that non-payment of the Minimum Royalty for Year 4 resulted in the Agreement being terminated on 1 July 2024 was not even made. Rather, as discussed above, the Defendant's position was that the Agreement was

determined on 1 July 2023 by service of the Notice. Like the case on misrepresentation, the contention regarding the effect of non-payment of the Year 4 Minimum Royalty appeared for the first time in the Defence and Counterclaim.

149. Finally, I note that, although reference was made in argument to liquidated damages and penalties, no case has been pleaded by the Defendant to the effect that the Year 4 Minimum Royalty amount is not due because the obligation to pay it amounts to a penalty.

150. Paragraph 149 concludes the additional paragraphs I have added since circulating the original draft judgment.

151. The Defendant's case that the email of 28 August 2022 was not a notice pursuant to Clause 15.2, but rather a notice of immediate termination pursuant to Clause 15.1, still remains to be determined at trial. If that case succeeded, it might have some impact on the assessment of whatever sum might be due in relation to Year 4. It may be that the Defendant's choice to affirm the Agreement by way of the DLA Letter has estopped it from contending after the date of that letter that the Agreement was indeed terminated on 28 August 2022. I have not heard argument on this, however, and so say no more about it here.

Conclusion

152. Mr Day submitted that if I were minded to grant the Claimant's application, I should not order any sum to be paid now because such sums may be relevant to the quantum or timing or form of any security for costs; and "the Claimant is at risk of not complying with costs orders and should not receive an unfair tactical advantage by recovering these monies before the Defendant has had an opportunity to have its security for costs application heard".

153. In my judgment, I should make an order that the sum I have found due and owing be paid now. I have found that this money is due and there is no defence to it. There is no remaining money counterclaim against the Claimant that could result in an order for damages; even if there were, any sum that might later be awarded against the Claimant could not be set off against the sum I have found to be due.

154. I do not know if there are good grounds for making an order for security for costs, but it seems to me that if I were not to order payment now, I would effectively be pre-judging the outcome of the application for payment of security. Furthermore, the Defendant is still bringing a counterclaim for declaratory relief; and the annual accounts for the group of which it forms part for the year to 30 September 2024 again show a cumulative deficit (up to CAD 32,475,342 from CAD 24,142,830 in the year to 30 September 2023). It may be that the Claimant, as defendant to the counterclaim, might seek to resist an order that it pay security for costs or make an application for security of its own costs. It may be that the court declines to make any order.

155. I do not consider that the Claimant gains any unfair tactical advantage in receiving now from the Defendant sums that the Defendant itself acknowledges are due (albeit smaller than the sums the Defendant hopes to recover in the counterclaim). On the contrary, in my view it would be giving the Defendant an unfair tactical advantage to delay further the payment of the sum due.

156. I invite the parties to draw up an order and if possible to agree costs. If agreement cannot be reached, a short hearing will be listed to deal with consequential matters.