Vertex Data Science Ltd v Powergen Retail Ltd [2006] APP.L.R. 06/09

JUDGMENT : Mr Justice Tomlinson: Commercial Court. 9th June 2006

1. The Claimant, to whom I shall refer as "Vertex," is a wholly owned subsidiary of United Utilities plc, which is as its name suggests a utility company. Vertex is the customer management outsourcing division of United Utilities. It provides customer service activities to clients in the commercial, utilities and local and central government sectors. Relevantly for present purposes the sort of services which Vertex provides include opening and closing accounts, billing customers, collecting revenue, managing enquiries and complaints and all associated back office, administrative and postal handling services.

2. The Defendant, to whom I shall refer as "Powergen," is a company within a group of companies which generates and supplies electricity. It is an indirect subsidiary of the German utility company E.On AG. For present purposes the relevant activity of Powergen is its supply of electricity to domestic customers within the UK.

3. In October 2002 Powergen acquired the business of TXU, an energy company formed from the merger of Norweb Energy and Eastern Energy and became a supplier of electricity to customers in the north west and eastern parts of England. Earlier in 2002 TXU had entered into an outsourcing contract with Vertex covering its customers in the north west. Thus it was that Vertex and Powergen first came into contact with each other. Their relationship thereafter has been unhappy.

4. Vertex currently supplies to Powergen outsourcing services of the type which I have described pursuant to a Master Services Agreement ("MSA") dated April 2005. As I shall shortly describe this MSA replaces an earlier agreement made in July 2003 which itself represented a renegotiation of a contract which had earlier been entered into between TXU and Vertex.

5. The MSA is a complex contract. With its associated and integral "Transaction Documents" it runs to 173 pages. The MSA took effect upon signature in April 2005 and the expiry date is May 2012. However there is provision for termination by either party after four years. In the event that Powergen exercises this option Vertex is entitled to no compensation for termination or for goodwill although Powergen is obliged to reimburse certain undepreciated agreed investment costs. A senior officer of Vertex has described the MSA as bringing about between Vertex and Powergen a "very complex, multilayered commercial relationship." "In such a complex project" he continues "there are many hundreds of services, projects, informal requests and de facto variations ongoing at any one time." A study of the contract and a reading of the evidence deployed on this application bears out these observations and demonstrates that the relationship between Vertex and Powergen created by the MSA requires close and continuing cooperation at an operational level on a daily basis. Vertex cannot perform its functions under the MSA without the continuing active cooperation of Powergen. Although mutual cooperation and mutual goodwill are different concepts, I find it difficult to conceive that the cooperation required for successful performance of the MSA could be achieved without mutual goodwill. The evidence also demonstrates, in my judgment, that the relationship between Vertex and Powergen has broken down at both operational and management levels.

6. On 24 March 2006 Powergen served upon Vertex notice of termination of the MSA. In that notice Powergen set out a timetable pursuant to which the provision of services by Vertex would cease. In the notice Powergen sets out details of what it alleges are material breaches of the MSA by Vertex which invest Powergen with the right of termination. Although the notice does not say so, Powergen also relies upon some of the alleged shortcomings in the performance of Vertex as amounting to an over-arching repudiatory breach of the MSA which Powergen is entitled to accept and has accepted as terminating the same.

7. Vertex disputes the entitlement of Powergen to terminate the contract, or any part of it. Vertex says that if Powergen is not restrained from acting on its notice of termination and/or restrained from taking any steps to prevent or hinder Vertex from performing its functions under the MSA Vertex will suffer irretrievable and unquantifiable loss for which an award of damages will be an inadequate remedy. By this application Vertex seeks an interim injunction restraining Powergen from acting on its notice of termination or taking any steps to prevent or hinder Vertex from performing its functions under the MSA. By its Claim Form Vertex seeks a declaration that the Purported Termination Notice was and is invalid and of no effect and a permanent injunction in like terms is now sought on an interim basis. Vertex also seeks an expedited trial and has made clear its willingness to cooperate in enabling such a trial to take place in the event that, in the light of injunctive relief being granted, Powergen wishes to have the matter dealt with on that basis.

8. Prior to the hearing before me Powergen conceded for the purposes of that hearing that there is a serious issue to be tried on the question whether it is entitled to terminate the MSA. That notwithstanding, and notwithstanding also that the court will strive to secure the performance of contractual obligations rather than countenancing their breach, it must be obvious that this is a contractual relationship of a kind which is inherently inappropriate for injunctive relief or specific performance. On this application for interim relief a threshold question is whether Vertex has a real prospect of obtaining at trial the permanent injunction which it seeks. It is only if I am satisfied on that score that I should go on to consider the balance of convenience – see ***American Cyanamid v. Ethicon*** [1975] A.C 396 at p.408 per Lord Diplock.

9. It is relevant first to consider the background against which the MSA was made. Its precursor was as I have said an agreement of July 2003. That in turn represented a renegotiation of the previous contract between Vertex and TXU. The contract of July 2003 had an expiry date of October 2012 with a minimum term of four years. It is said by Vertex that the "exit charge" payable by Powergen in the event of it opting for termination after four years was £11.5 million. The anticipated revenues to Vertex under this agreement were of the order of £100

million per annum according to Vertex, £140 million per annum according to Powergen. The value of the 2002 contract to Vertex had been, according to Vertex, of the order of £1.159 billion over ten years.

10. By as early as April 2004 the parties were in dispute. Serious issues arose, to the extent that in November 2004 Powergen served notice on Vertex that it regarded it as in material breach of the MSA. There was an extended period of negotiation between the parties in the course of which the July 2003 MSA was extensively renegotiated. During the course of the negotiations Powergen, in order to protect its position, served Notice of Termination on 28 February 2005. The 7 April 2005 MSA which was finally agreed is dramatically reduced in scope and value as compared with its predecessors. It is true that Vertex achieved an extension of the minimum term. This remained nominally four years, but now running from April 2005 rather than July 2003, an effective extension therefore of nearly two years. However the exit charge formula is completely different, now providing as I have already mentioned for reimbursement by Powergen to Vertex of certain undepreciated investment costs. Neither side has attempted to put a figure on what this might be and perhaps it is not presently possible so to do. Overall the length of the contract is in fact marginally shorter than before with the expiry date now 31 May 2012. The effective extension in the minimum term of the agreement is more than counterbalanced by the reduction in anticipated revenues under the new agreement. These are about £28 million per annum according to Powergen, or £30 million per annum according to Vertex, reducing to about £24 million per annum from 2006 onwards. The comparison between the 2005 and 2003 contracts bears out the contention of Powergen that the reduction in value of the contract reflected the seriousness of Powergen's concerns about the ability of Vertex to perform as an outsourcing partner. A Vertex Board Minute of 4 February 2005 reflects a recognition that *"key decision makers [at Powergen] have a low opinion of Vertex service quality and value for money."*

11. Underlying the MSA are nine individual transaction documents governing the individual outsourcing services to be supplied by Vertex to Powergen. The nine Transaction Documents and the broad areas which they cover are: -
    1. Cash control – processing of postal payments, suspense management, missing payments.
    2. CPI – visits to obtain information when a customer fails to pay.
    3. Data Management – x-raying, sorting, categorising and scanning of all incoming postal mail, and handling of outgoing mail from the Data Management location.
    4. India Services – responding to inbound customer calls, and various back office activities.
    5. IT Services – providing a range of IT services to three UK sites which transferred to Powergen in March 2006.
    6. Powergen IS Services – draft schedule providing detail for the IT Services document.
    7. Print and Fulfilment – secured printing and mailing production service for customer-facing documents such as bills, correspondence and statements (including any promotional inserts).
    8. Sales – sales services to acquire and regain customers.
    9. Staywarm – services for handling all Staywarm customer accounts.

12. The subsequent disputes between the parties have largely concerned the India services which include front and back office customer services to be provided from Vertex's call centre facilities in India, and the Staywarm services. The Staywarm services comprise the provision by Vertex of an end-to-end service for all Powergen customers using the Staywarm product, which is designed for elderly and vulnerable families who desire the security and peace of mind of a fixed-rate tariff for their energy use. Vertex points out that the India services and Staywarm represent only two out of nine areas of activity but the reality is that they represent 60% of the contract by value. They are also of particular significance in terms of their ability to damage Powergen's reputation in the event that the services are not performed satisfactorily. It is of the essence of the arrangements that a Powergen customer making contact with or having other dealings with these service providers is under the impression that he or she is dealing directly with Powergen.

13. I take the following account of how matters developed from Powergen's skeleton argument. I recognise that this is a partisan account and that Vertex dispute that the matters about which Powergen complained were serious or as serious as alleged or that they amounted to breaches on the part of Vertex of its contractual obligations. Nonetheless the account in the next six paragraphs is largely factual and for present purposes I am more concerned with the picture it paints of the relationship between the parties than I am with the question whether Powergen's complaints were (a) justified and (b) indicative of conduct by Vertex which justified Powergen's eventual notice of termination.

14. Within a short time of conclusion of the 2005 MSA, problems emerged with both the India and Staywarm services. These included serious concerns about the management and performance of Vertex's Indian operations (Elliott (1) para 111 – 115), as well as disputes over Vertex's management of debt owing from Staywarm customers (Elliott (1) para 92). The parties initially sought to resolve these matters at an operational level, but were unable to do so. Matters became so bad in India that an "*Intensive Care Plan*" had to be put in place in an attempt to improve Vertex's performance there, but the necessary improvements did not materialise (Elliott (1) paras 114 – 115; D2/402-7). By October 2005, the disputes between the parties had escalated to Powergen's Head of Operational Support, Ms Julie Dodd, who formally complained to her counterpart at Vertex, Mr Singleton, by letter dated 17 October 2005 (D1/223 -4; C1/350).

15. This led to a meeting between the operational teams to discuss the India and Staywarm issues, held on 25 October 2005 (revised minutes at D2/421-5). One of the main matters in dispute at this meeting was Vertex's responsibility for clearing the backlog of Staywarm debt that had built up prior to and since commencement of the 2005 MSA: Vertex maintained that it was not responsible for managing this debt, whereas Powergen

contended that this was an essential part of the end to end service that Vertex was obliged to provide under the Staywarm Transaction Document (para 17 of the minutes at D2/422). In relation to India, Vertex accepted that "*more improvement was required*" and that the service provided to Powergen had "*not been satisfactory*" (paras 38 and 43 of the minutes at D2/424; Elliott (1) para 118). Vertex was warned that Powergen was reviewing its options in relation to the continued provision of inbound customer services from India (minutes para 38).

16. Vertex raised concerns at the meeting on 25 October 2005 about the "*level of angst*" that Powergen's correspondence was causing between the two organisations: see para 11 of the minutes at D2/421-2. However, the problems between the companies persisted. Vertex continued to deny any contractual responsibility for clearing the backlog of Staywarm debt (D1/230, 239 and 241); and serious problems continued to be encountered with the India operation (Elliott (1) paras 121-4).

17. Mr Elliott met with Vertex on 14 November 2005 in a further attempt to resolve the problems between the two organisations (Elliott (1) para 52-4); meeting notes at D2/347-8 and D2/tab 3). Whilst there is an issue as to precisely what was said at this meeting, there is no doubt that both Staywarm and India were discussed and that the parties failed to resolve the issues between them

18. A further meeting was held with Vertex on 8 December 2005, but this too did not result in resolution of the parties' dispute (Elliott (1) para 60-61). At the end of this meeting, Powergen served Vertex with notice of Vertex's material and persistent breach of the Staywarm Transaction Document (PJE-1 at 231-2). In this notice, Powergen informed Vertex that as a result of its failure to manage Staywarm debt in accordance with its obligations under the 2005 MSA, Powergen was taking over management of the backlog of Staywarm debt (PJE-1 at 232). Powergen had no alternative given Vertex's refusal to accept responsibility for managing this debt, much of which was becoming increasingly old and at risk of being deemed irrecoverable as a result of a new billing code taking effect from 1 July 2006, which will effectively prevent energy suppliers from recovering debts more than two years old or, after 1 July 2007, more than one year old (Elliot (1) paras 18 and 62).

19. Following service of this notice, the dispute between the parties was escalated and the bona fide discussion procedures in clause 19.2 of the 2005 MSA utilised in an attempt to resolve the Staywarm issues. This did not, however, prove fruitful; and further material breaches by Vertex of the 2005 MSA occurred in respect of Staywarm Losses (see Elliott (1) paras 93-100) and Vertex's unauthorised processing of Powergen personal customer data on its Floor Manager system in India (Elliott (1) paras 134-40).

20. I should add in relation to Floor Manager that Vertex's response in relation to this allegation is that Powergen had known for some time about its use of the Floor Manager system and made no complaint about it until 10 March 2006. It is also said that the information contained on Floor Manager is limited to account information from which it is not possible to identify the customer. Powergen says that the data transferred to Floor Manager includes unique customer reference numbers for Powergen customers. Powergen says that whilst it knew that Vertex was utilising the Floor Manager system to monitor its performance under the MSA it did not know that Vertex was transferring data which constituted personal data within the meaning of the Data Protection Act 1998. Powergen says that the dismissive attitude which Vertex has adopted to this issue is a matter of serious concern to Powergen.

21. In November 2005 Powergen engaged CM Insight, ("CMI"), a customer management consultancy, to assess the performance of Vertex's Indian call centres. The Vertex India call centre operations have been described by CMI as amongst the worst they have ever come across. Vertex challenges the independence from Powergen of CMI on the basis that it has hitherto worked closely with Powergen on its transfer of all accounts from Customer 1 to ICE 2. I do not see why this connection should of itself be assumed to compromise the independence still less the integrity of CMI. Vertex also complains that the fact of this work being undertaken was not at the time disclosed to it and nor was the report provided to it notwithstanding two requests therefor once Vertex learned of its existence in February 2006. The report was in fact disclosed to Vertex for the first time in Powergen's evidence for this application. It seems to me that these complaints tell me more about the breakdown of the relationship between the parties than they assist me in evaluating what weight to give to the CMI report, which is damning about Vertex's performance which it describes as poor. Vertex has itself provided a report by a consultancy called "RXperience – the big picture for call centres" which is in turn critical of the methodology and conclusions of CMI. It is accepted that CMI's proprietary methodology (which is itself criticised) concludes that the customer experience encountered by customers who contact Vertex is significantly worse than that of customers who contact Powergen but it is said that there is no evidence that this plays a significant role in customers' decisions to leave Powergen. Overall however it is said that CMI's conclusions with respect to the overall performance of Vertex's India operations and its performance by comparison with Powergen's UK operations are not justified by the methodology and evidence identified in the CMI report. Underlying this dispute as it seems to me is a fundamental question whether Powergen can legitimately complain about, or regard as non-contractual, a level of service which, whilst not in accordance with the Regulations and Good Industry Practice to which, by clause 4.2.1 of the MSA, Vertex must adhere, is nonetheless not actually in breach of a Service Level Agreement ("SLA") because the SLA lacks a criterion which measures the relevant shortcoming in performance. Furthermore the fact that there can be disagreement as to the appropriate quality assessment tool whereby "customer experience" is to be measured is indicative that this is a contract specific performance of which the court would find it difficult to monitor and should be slow to direct.

22. In view of the acceptance that there is a serious issue to be tried on the question whether Powergen is entitled to terminate it is unnecessary that I should set out all the relevant clauses of the MSA. I note however that there is a distinction drawn between circumstances which may justify termination of an individual Transaction Document and circumstances which may justify termination of the MSA as a whole, and that there is also a distinction drawn between material breach and persistent breach. Thus clause 12 provides: -

"Subject to Clause 12.3 this Agreement or, in the case of a right of termination under Clause 12.1.1 or 12.1.2 as a consequence of a material breach by Vertex of any Transaction Document, the relevant Transaction Document may be terminated by notice in writing with immediate effect (or with such greater period of notice up to twelve calendar months as the Party giving notice shall decide):

12.1.1 by either Party if the other commits a material breach of its obligations under this Agreement which is not capable of being remedied and the Parties acknowledge that without limitation the following shall constitute such a material breach:

12.1.1.1. the matters identified as a material breach by Vertex in any SLA; and

12.1.1.2. where the Maximum Liquidated Damages have been paid or become payable in any Contract Year and Vertex has either (i) failed to provide Powergen with a recovery plan which if implemented will enable Vertex to deliver within a period of 90 days not less than the minimum acceptable performance for the relevant Services set out in Section 2 of the relevant Transaction Document, or (ii) fails to implement successfully such a recovery plan within that period of 90 days.

12.1.2 by either Party ("the innocent party") if the other ("the at fault party") commits a material breach of its obligations under this Agreement which is capable of being remedied but has not been remedied by the at fault party within a reasonable period determined by the innocent party, having been given notice by the innocent party in writing to do so, specifying the breach and the period for remedy."

23. Powergen alleges material breach of the Losses SLA in the Staywarm Accounts Transaction Document, amounting to a material breach of Vertex's obligations under clause 12.1.1 of the MSA which is not capable of being remedied. Losses in this context means loss of customers. Powergen also alleges a failure to collect £11million of debt under the Staywarm Accounts Transaction Document. This is said to be a material breach of Vertex's obligations under clause 12.1.2 of the MSA which is capable of being remedied but has not been remedied by Vertex within a reasonable period after having been given notice so to do. Then there are allegations relating to the failure of Vertex to perform in relation to India voice-facing activity and in particular failure to provide services set out in paragraph 1.3.1 of the India Services Transaction Document with all reasonable care and skill and/or in compliance with Good Industry Practice. This is said to be a material breach of Vertex's obligations under clause 12.1.1 of the MSA. Vertex is said to have shown itself to be incapable of remedying this breach. The allegation of unauthorised and unapproved use of the call centre computerised management system known as Floor Manager, which contains customer details belonging to Powergen, which is also used for other customer accounts and which is alleged to have little or no security in place to ensure the protection of Powergen customer data, is said to constitute a failure to comply with the Regulations, as required by clause 4.2.1 of the MSA, and is also said to be a breach of various specific clauses in the MSA dealing with the use and processing of personal data. There is an omnibus allegation of failure to use reasonable care and skill in the performance of Vertex's service obligations under the MSA and the Staywarm Accounts Transaction Document in respect of its failure to comply with the Losses SLA and its failure to collect £11 million of debt. Notice is also given of persistent breach of the MSA by Vertex in relation to the Staywarm Accounts Debt backlog evident since July 2005 and the issue in relation to India voice-facing activity evident since June 2005.

24. The core obligations of Vertex imposed by the MSA of which Powergen alleges it is in breach are thus clauses 4.1 and 4.2 which, so far as relevant, provide: -

"4.1 Vertex undertakes to Powergen at all times during the period of this Agreement that it will provide the Services and perform all of Vertex's other obligations under this Agreement with all reasonable care and skill.
4.2 During this Agreement Vertex shall also (subject always to Clause 6.6):
4.2.1 Comply with the Transaction Documents (including any applicable SLAs), the Regulations and Good Industry Practice;
4.2.2 Comply with all statutory requirements and the requirements of all relevant statutory non-statutory bodies relating to the provision of the Services….."

It is also relevant to notice clause 4.3 which provides: - *"Vertex shall not be liable to Powergen for any failure to provide the relevant Services or discharge its other obligations under this Agreement to the extent such failure is attributable to any failure by Powergen to meet its obligations under clause 5.1."*

The contract imposes relevant obligations upon Powergen as follows: -

"5. Powergen's Obligations
5.1 During this Agreement Powergen shall:
5.1.1 ……..
5.1.6 be responsible for the completeness, suitability, legal compliance, accuracy and timely delivery to Vertex of all necessary pricing, regulatory and other information relating to the supply of energy services to enable Vertex to perform the Services in accordance with the terms of this Agreement;

5.1.7 be responsible for the completeness, suitability, legal compliance, accuracy and timely delivery to Vertex of the following where necessary to enable Vertex to perform the Services in accordance with the terms of this Agreement:

5.1.7.1 Access to and use of the computer hardware and software owned by Powergen……..

5.1.8 bring to the attention of Vertex any facts, circumstances, opinions or other information made known to Powergen which it might reasonably consider to be material to the performance by Vertex of its obligations hereunder including without limitation giving as much advance notice of any likely media interest in Powergen or its products (specifically Staywarm) and the nature and anticipated impact of such an interest;

5.1.9 work with Vertex to identify new initiatives to reduce the cost to serve whilst maintaining compliance with any relevant SLA aspiring to perform the Services in accordance with any agreed key performance indictors

5.1.10 provide such management information as may be specified in any Transaction Document or as may be required for the purposes of contract management and the reviews set out in clause 7 and as may otherwise be reasonably required for Vertex to prepare its own internal budgets and plans. ……..

5.3 Powergen shall form a service team which shall be responsible interfacing with Vertex client management team. Powergen shall notify Vertex of the members of the Powergen Service Team and of any changes to the Powergen Service Team."

25. Furthermore in its Particulars of Claim Vertex pleads as follows: -

"5. Insofar as there were other respects not specified in clause 5.1 of the MSA in which the Defendant's cooperation (or lack of it) with the Claimant was capable of impacting upon the ability of the Claimant to perform its obligations under the MSA:

5.1 It was an implied term of the MSA that the Defendant would provide all such cooperation as the Claimant reasonably required of it for such purposes.

5.2 It was a further implied term of the MSA that the Claimant was not to be liable to the Defendant (and, in particular, the Defendant was not to be entitled to terminate the MSA) to the extent that any failure by the Claimant to discharge its obligations under the MSA was attributable to any failure by the Defendant to comply with the implied terms set out in paragraph 5.1 above.

10.2 There was no material breach of the Losses SLA, alternatively the Defendant was and is not entitled to rely thereupon, because:

(1) The Defendant had caused and/or contributed to the alleged material breach asserted against the Claimant through the failures to provide management information and to remedy deficiencies in the Defendant's ICE 2 computer system which are identified by the Claimant's Managing Director, Thomas Drury, in paragraph 149 – 163 of his Witness Statement in this action dated 5th April 2006… . ……..

11.6 Alternatively, there was no material breach of the Staywarm TD for the purposes of clause 12 of the MSA, alternatively the Defendant is not entitled to rely thereupon because:

(i) The Defendant caused or contributed to the Claimant's inability to collect Staywarm debt, in particular by:

(a) failing to supply the Claimant with task lists which either identified the full extent of a customer's debt or which identified the age of the debt which had accrued (and in particular which identified debt aged over ninety days);

(b) refusing to permit the Claimant access to the Defendant's ICE 2 system in order to ascertain the necessary information for itself;

(c) functionality deficiencies in the Defendant's ICE 2 system, and

(d) taking away from the Claimant, as aforesaid, responsibility for the collection of Staywarm customer debt which had accrued prior to 1st June 2005."

26. Finally I should set out the clauses of the contract which provide for limitations on the damages recoverable for breach and deal with dispute resolution.

"11. Liquidated Damages and Limitation of Liability

11.1 Where a sum is expressed to be payable or due under this Agreement or any Transaction Document as "Liquidated Damages" or "LDs", that sum is payable by way of liquidated damages and:

11.1.1 each of the Parties agrees that such sum is fair and reasonable in all the circumstances and represents a genuine pre-estimate of the loss that will be suffered by the other in respect of the breach of this Agreement which gives rise to their payment; and

11.1.2 subject to Clause 11.8 the Parties agree that payment of such sum shall be the sole and exclusive remedy arising out of the breach of the breach of this Agreement which give rise to their payment.

11.1.3 Nothing in Clause 11.1.2 and 11.2 shall be construed as preventing Powergen from terminating this Agreement in accordance with Clause 12.1 or 12.2.1 and nothing in Clauses 11.1.2 or 11.7 shall be construed as preventing Powergen from claiming or recovering as a direct loss damages from Vertex for loss of customers pursuant to Clause 11.8.

11.2 Unless expressly stated otherwise reference in a Transaction Document to a Liquidated Damages Cap shall be to the cap on Vertex's potential liability for Liquidated Damages in respect of the relevant Transaction Document in any month (subject always to Clause 11.9.3).

11.3 Subject to Clauses 11.4, 11.5, 11.6 and 11.8 and save where any provision of this Agreement expressly provides for an indemnity which extends beyond such loss, each Party agrees and acknowledges that no Party (in this Clause 11, "the Party Liable") or any of its officers, employees or agents shall be liable to the other Party for loss arising from any breach and which at the date of this Agreement was reasonably foreseeable as not unlikely to occur in the ordinary course of events from such breach or in respect of:

11.3.1 physical damage to the property of the other Party or its respective officers employees or agents; and/or

11.3.2 the liability of such other Party to any other person for loss in respect of physical damage to the property of any other person.

11.4 Nothing in this Agreement shall exclude or limit the liability of the Party Liable for death or personal injury resulting from the negligence of the Party Liable or any of its officers, employees or agents.

11.5 Nothing in this Agreement shall exclude or limit the liability of the Party Liable for any loss or liability arising in respect of fraud or statements made fraudulently.

11.6 Nothing in this Agreement shall exclude or limit the liability of Vertex for any loss or liability arising from Vertex's refusal to provide the Services or a materially significant part thereof.

11.7 Subject to Clauses 11.4, 11.5, 11.6 and 11.8 and save where any provision of this Agreement provides for an indemnity which extends to any such loss, neither the Party Liable nor any of its officers, employees or agents shall in any circumstances whatsoever be liable to the other Party for:

11.7.1 any loss of profit, loss of revenue (other than all sums directly payable hereunder), loss of use, loss of contract or loss of goodwill;

11.7.2 any indirect or consequential loss; or

11.7.3 loss resulting from the liability of the other Party to any other person howsoever and whensoever arising save as provided in Clauses 11.3.1 and 11.3.2.

11.8 In the event that Powergen terminates this Agreement pursuant to Clauses 12.1 or 12.2.1 shall be entitled to claim from Vertex as a direct loss damages in the sum of (i) £275 for each Staywarm Customer; and (ii) £1,540 for each SME Customer that Powergen has lost substantially as a result of a breach of this Agreement by Vertex.

11.9 Subject to Clauses 11.4, 11.5 and 11.6 the maximum liability of each Party in respect of this Agreement (save in respect of Powergen's obligation to pay the Charges), whether in contract (including under any indemnity), tort, (including negligence) or otherwise, shall not exceed:

11.9.1 £8,000,000 on claims arising during each Contract Year;

11.9.2 £12,000,000 in aggregate; and

11.9.3 (subject to Clause 11.9.1) £1,000,000 in respect of Liquidated Damages during each Contract Year.

11.10 The Parties acknowledge that the limitation of liability in Clauses 11.8 and 11.9 are reasonable, have been subject to extensive negotiation and, in the case of Vertex, are determined by reference to the Charges."

"Dispute" is defined in the Definitions and Interpretation section as "means any claim, cause of action, dispute, disagreement, failure to agree, right to sue and the like concerning the Parties' rights, obligations, and remedies under this Agreement, which Dispute shall be resolved in accordance with Clause 19." Clause 19 itself provides: -

"19. Resolution of Disputes

19.1 Scope : Save and to the extent that it is otherwise herein expressly agreed, all Disputes shall be settled in accordance with this clause.

19.2 Bona fide Discussion

19.2.1 All Disputes shall, upon either party giving written notice to all other referring to this clause 19.2, first be referred to bona fide discussion as follows:

19.2.1.1 If the Dispute concerns a disputed invoice it shall first be referred to each of the Parties' Chief Financial Officers;

19.2.1.2 All other Disputes shall be referred to nominated representatives of the Parties set out in Clause 19.2(d).

19.2.2 If and to the extent that the matter is not resolved pursuant to clause 19.2(d) of this Agreement within twenty business days of first written notice by either party to the other invoking the provisions of this clause 19.2, the matter will be referred to the senior representatives referred to in clause 19.2(d) who must meet within ten business days to attempt to resolve the matter. If the matter is not resolved at that meeting, then subject as set out therein the provisions of Clauses 19.3 and 19.4 shall apply.

19.2.3 Any agreement settling a Dispute pursuant to this Clause 19.2 shall be recorded in writing and signed on behalf of each of them whereupon it shall be binding on the Parties.

19.2.4 The respective nominated representatives and senior representatives of each of the Parties referred to in Clause 19.2 are:

Vertex Powergen

Nominated Representative in Andrew Dutton John Gunter

The First Instance

Senior Representative Tom Drury Nick Horler

or, in any such case, such other senior office holder of a Party as that Party may notify in writing from time to time to the other Party.

19.3 Expert determination

19.3.1 Any Dispute in which:

19.3.1.1 the factual basis of the Dispute (as opposed to the interpretation of or contractual consequences flowing from the facts) are not contested by either party; and

19.3.1.2 the issues in the Dispute lie within the expertise of either:

(A) a technical IT expert; or

(B) a technical Operations expert; or

(C) a chartered accountant

shall be referred to expert determination by an expert agreed between the parties or in default of agreement appointed at the request of either Party, in the case of a technical expert by the President or Vice President for the time being of the Chartered Institute of Arbitrators and in the case of an accountancy expert by the President for the time being of The Institute of Chartered Accountants in England and Wales or any successor body provided that if Powergen has given notice to Vertex under Clause 6.4 that it disputes any item(s) of any Charge or other sum then such disputed item(s) shall not be so referred to an expert until 30 days after Vertex's receipt of the notification in respect of the disputed item(s); and

19.3.2 If a Dispute relates to or contains the issue as to whether any Dispute falls within this clause 19.3 or if an expert appointed pursuant to this clause decides that a Dispute contain legal disputes which fall outside his to her area or expertise either Party shall have the right to have that Dispute referred to arbitration ("Arbitration") in accordance with Clause 19.4.

19.3.3 The provisions of Clause 19.3 shall not apply to any Dispute which relates to any proposed Change or series of Changes which has a positive or negative financial impact of less than £100,000.

19.3.4 Any independent expert appointed pursuant to this Clause 19.3 shall act as expert and not as arbitrator, adjudicator or mediator.

19.3.5 The expert will have due regard to and be guided by the principles and parameters encapsulated in this Agreement.

19.3.6 The decision of the expert shall be final and binding on the Parties save in the case of fraud or manifest error.

19.3.7 The Parties shall promptly supply to any independent expert (as applicable) all such assistance documents and information as may be required for the purpose of determination of any reference and both Parties shall use all reasonable endeavours to procure the prompt determination of such reference.

19.3.8 If the expert shall fail to come to a decision within one hundred and twenty business days of his appointment or if an expert has not been appointed within sixty business days of either Party's request for an expert to be appointed, either Party shall have the right to have the dispute submitted to Arbitration in accordance with Clause 19.4.

19.3.8.1 The expert's fees for so acting shall be borne by the Parties in equal shares or as the expert shall determine. The expert may so determine if:

(A) the Party ordered to pay the fees, costs or expenses acted improperly, unreasonably or negligently in bringing or opposing the reference or in the manner in which it conducted the reference;

(B) this Agreement specifies that any costs, fees and expenses incurred in respect of an expert determination should be borne other than equally.

19.4 Arbitration

Subject to Disputes which are determined under clause 19.3, if and to the extent that any Dispute has not been resolved under Clause 19.2 then either Party shall have the right to have that Dispute referred to Arbitration in accordance with the following provisions:

19.4.1 The Arbitration shall be conducted by a sole arbitrator to be agreed between the parties or, in default of agreement within 7 Business Days after either party has given notice to arbitrate to the other summarising the issues in the Dispute and inviting the other party to agree an arbitrator, to be appointed by the London Court of International Arbitration ("LCIA") or the person to whom the LCIA has from time to time delegated the power to make such appointments. The rules of the LCIA shall not govern the arbitration unless the parties agree otherwise.

19.4.2 The seat of the arbitration shall be in London, England and the language of the arbitration shall be English.

19.4.3 The powers given to the arbitral tribunal:

19.4.3.1 under the provisions of section 30 Arbitration Act 1996 to rule on its own jurisdiction; and

19.4.3.2 under the provisions of section 48(5) Arbitration Act 1996 to grant injunctions, order specific performance and to make declarations; and

19.4.3.3 to award compound interest pursuant to the Arbitration Act 1996 s.49 except in the case of fraud or breach of fiduciary duty are excluded.

19.4.4 The parties agree that the powers of the arbitral tribunal shall include:

19.4.4.1 under section 35(2) Arbitration Act 1996 to order consolidation of proceedings and concurrent hearings; and

19.4.4.2 the power under section 39 Arbitration Act 1996 to order on a provisional basis any relief which it would have the power to grant in a final award.

19.4.5 All documents produced in the course of the Arbitration shall be confidential to the arbitrator, the parties and their professional advisors, and all hearings shall be held in private. However, nothing in this paragraph shall prevent the disclosure of documents to witnesses, and the attendance of witnesses at hearings on like terms as to confidentiality and to the extent necessary for the fair disposal of the proceedings. No public statement shall be made with regard to any arbitral proceedings save to the extent agreed between the Parties.

19.4.6 The arbitrator's decision shall be in writing and shall state his reasons for his decision. The decision of the arbitrator shall be final and binding on all parties and shall carry interest from the date of the award until the date of payment at the rate applicable to a judgment of the English court at the date of the award. The costs of the arbitration will be in the discretion of the arbitrator.

19.5 Notwithstanding the foregoing provisions of this Clause 19, nothing in this Agreement shall a Party, with the consent of the other Party from attempting to settle any Dispute by mediation in accordance with such procedure as the Parties may agree.

19.6 The Parties agree that neither of them shall take any legal action against each other in relation to any matter arising from or in connection with this Agreement, save that nothing in this Agreement shall prevent a Party from applying to the court: (i) for interim relief pending the resolution of a dispute in accordance with the provisions of this Agreement; (ii) to enforce the decision of the expert or the arbitrator; (iii) to overturn a decision of the expert or the arbitrator on the basis that it is manifestly incorrect or fraudulent; (iv) to prevent either party from becoming time-barred due to the expiry of any statutory or contractual limitation period; or (v) to seek relief in relation to a genuine dispute between the Parties which is not capable of being referred to this Clause 19 for resolution.

19.7 This Clause 19 shall not apply to any dispute or matter that is covered by paragraph 8 of Appendix 6 (Pensions Disputes)."

27. Powergen's first argument on this application is that by reason of clause 19 of the MSA Vertex has no right to permanent injunctive relief and on 28 April 2006 it sought a stay of Vertex's claim pursuant to s.9(4) of the Arbitration Act 1996. It follows, says Powergen, that as Vertex has agreed to submit disputes to arbitration, and agreed that the arbitrator shall have no power to grant injunctive relief, so Vertex is attempting to evade its bargain by seeking both an interim and a permanent injunction from the court.

28. Vertex complained at the hearing that this is a new contention, not previously foreshadowed in the correspondence or in the evidence. Vertex's Particulars of Claim contain the following paragraphs: -

"18. Clause 19 of the MSA contains provisions referring certain disputes to resolution by an expert, and certain other disputes to resolution by arbitration. However:

18.1 by Clause 19.4.3, the powers given to an arbitrator under s.48(5) of the Arbitration Act 1996 to grant injunction, order specific performance and/or make declarations were excluded; and

18.2 Clause 19.6 permits the parties to apply to this Honourable Court in order (amongst other things) to seek relief in relation to a genuine dispute between the Parties which is not capable of being referred for resolution in accordance with the mechanisms provided for in Clause 19.

19. The present action is a claim falling within Clause 19.6 of the MSA. It is not within the power of an arbitrator to grant the relief sought herein, and the claim is accordingly not capable of being referred to an arbitrator for resolution.

20. The Claimant may also, however, in due course claim damages for breach of the MSA and/or other sums due thereunder, in the alternative and/or in addition to the present claim. The Claimant reserves the right to claim these damages and/or other sums in arbitration proceedings, to be commenced in accordance with Clause 19.4 of the MSA."

That notwithstanding, Vertex says that it did not appreciate that Powergen would join issue with it over the proper construction of clause 19. Vertex did not however seek an adjournment of the hearing in order to enable it to place before the court further evidence allegedly relevant to the factual matrix in the light of which the contract should be construed. Vertex did contend that I do not have to resolve the question of construction at this stage. It is, submits Vertex, sufficient for its purposes that I conclude that Vertex has a triable case that a final injunction might be ordered by the court. I do not think that this can be right. If the effect of clause 19 is that Vertex has agreed not to apply to the court for injunctive relief I should by granting such relief on the basis that the contrary proposition is arguable and must be decided at trial thereby irretrievably have deprived Powergen of the benefit of an important and substantial part of the bargain which it struck. In my judgment the proper construction of the arbitration clause is a point which I can and should finally resolve now. If satisfied that the parties have agreed not to resort to the court for permanent injunctive relief in circumstances such as those which here obtain, the court ought not in my judgment to grant interim injunctive relief.

29. The nature of a dispute which either party has the right to be required to be referred to arbitration is widely defined. It includes any cause of action and any dispute concerning the parties' remedies under the agreement. The opening words of clause 19.6 provide a comprehensive and overriding agreement not to resort to the court save as provided in five sub-paragraphs of which only the last can in my judgment be relevant. Clause 19.6(i) reflects s.44 of the Arbitration Act 1996, which includes express reference to the granting of an interim injunction. However if the arbitrator has no power to grant an injunction – as here he does not, see clause 19.4.3.2 – and if on a true construction of the agreement the parties have agreed not to apply to the court for a permanent injunction, then the present application cannot be said to be a claim for interim relief pending the resolution of the dispute in accordance with the provisions of the agreement. Pursuant to the agreement, on this hypothesis, a permanent injunction cannot be sought and so the interim relief is equally unavailable. Vertex can in my judgment justify this application only if clause 19.6(v) on its true construction permits it to be made. Vertex says that the dispute is not capable of being referred for resolution pursuant to clause 19 because it is a claim for declaratory relief, a permanent injunction and, in effect, specific performance. This approach is dependent upon characterising the dispute in terms of the remedies sought, rather than the cause of action sought to be enforced. The wide definition of dispute makes such a characterisation possible.

30. The result for which Vertex contends, as foreshadowed in paragraph 20 of its Particulars of Claim, is undoubtedly clumsy. It contemplates seeking damages in arbitration should it fail to obtain a permanent injunction from the

court at trial. It also however contemplates seeking damages in arbitration in addition to any permanent injunction which it may obtain from the court at trial. The difficulties into which this suggested division of responsibilities lead the parties are well illustrated by paragraph 6.4 of Vertex's skeleton argument for this application which reads: -

"Were Vertex making a claim for damages arising from the purported termination of the MSA, it would have been able to agree (subject to the Court) a regime with Powergen whereby an arbitrator resolved that damages claim, on the basis that his findings would be put before the Court in order to enable it to consider the claims for final relief made in this action."

31. The difficulty with this approach is that Powergen would be under no obligation to agree to such a regime. Like Bingham LJ in ***Ashville Investments v. Elmer Ltd*** [1989] QB 488 at 517 "*I would be very slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of proceedings.*"

32. The arbitration agreement in clause 19 of the 2005 MSA is widely different from that which appeared in the 2003 agreement. Lord Grabiner suggests that in the light of the history of dispute and renegotiation it is unsurprising that the parties should have agreed that damages should be the only remedy for breach of the 2005 MSA. Mr Mill for Vertex contends that to the contrary in the light of Powergen having proved itself so unreliable a contracting partner it would have been foolish indeed for Vertex to have given up so significant a weapon in its armoury. Of course these arguments are difficult to evaluate without knowing the relative bargaining strength of the parties when they made the 2005 MSA. On balance I should have thought that the result of the renegotiation speaks for itself and that Vertex cannot have regarded itself as having had a strong hand. There may be other considerations of which I am unaware. Of equal if not greater importance, I doubt if Vertex would have been advised that it enjoyed a strong prospect of obtaining injunctive relief in the event that Powergen attempted to terminate the Agreement, though doubtless any advice would have been tempered by an inability to foresee every eventuality in which such relief might be sought.

33. Powergen contends that the wording of clause 19.6(v) and in particular the words "not capable of being referred" reflect the words of s.9(4) of the Arbitration Act 1996 and contemplate the existence of some external barrier to implementation of the arbitration clause, for example, a breakdown in the mechanism for constituting the tribunal. They do not apply where one party's claim would be bound to fail or where particular remedies are unavailable to the arbitrator and they pray in aid what was said by Mustill LJ in ***Societe Commerciale de Reassurance v. Eras International*** [1992] 1 Lloyd's Rep 579 at 610: -

"As we understand it, the proposition advanced is that parties cannot have intended to submit claims to arbitration of a kind which, if the chosen tribunal were to entertain them, would be bound to fail. We do not agree. Parties not infrequently find that by choosing a foreign substantive or procedural law their rights are less than they would have been if they had made a different choice or had allowed the contract to remain silent….By including an Illinois arbitration clause Clarksons acquired all the advantages and assumed all the disadvantages of Illinois law, both substantive and procedural. If they wanted a different set of advantages and disadvantages they should have chosen some other forum, or chosen none at all."

At 611, Mustill LJ said:

"Section 1 of the Arbitration Act, 1975 requires the Court to grant a stay, unless there is no dispute between the parties, or the arbitration agreement is "null and void, inoperative or incapable of being performed." These words do not apply here. Nothing has gone wrong with the arbitration agreement. All that has happened is that the parties have discovered that the remedies available to the arbitrator are in one respect more narrow than those which, but for the agreement, could have been awarded by the English Court. We can see no ground here for refusing a stay.

At first sight this result seems harsh but the impression is misleading. It is not a question of Clarksons being deprived of a right by the grant of a stay. On the contrary, the parties have agreed that all their rights shall be fixed in Illinois according to the procedures (and by implication the substantive law) in force in that state. If the stay is refused the consequences will be that by acting in breach of their agreement, in pursuing their claim against Howdens in the English Court, Clarksons have obtained for themselves the possibility of a right and remedy which they would not have possessed if they had acted as their agreement required. In the face of this we can see nothing unjust in holding Clarksons to their agreement, in accordance with the spirit of the Act of 1975 and the New York Convention on which it is based."

34. The reasoning of Mustill LJ was followed and applied in ***Wealands v. CLC Contractors*** [1999] 2 Lloyd's Rep 739, where the Court of Appeal held in the context of a domestic arbitration that if (as the claimant contended) the arbitrator had no power to award contribution under the Civil Liability and Contribution Act 1978 the parties had foregone the right to claim contribution against each other. Mance LJ said at para 21: -

"The philosophy of the New York Convention has been underlined, and extended to domestic arbitrations, under the 1996 Act. The reasoning in the Eras EIL actions is both binding on us and compelling in the present context. There is nothing in the 1978 Act to prevent parties foregoing by agreement any right which they might otherwise have to seek contribution. If (as the defendant, in the present forensic context, submits) an arbitrator appointed under cl. 18(1) would lack the power to award contribution, that is the consequence of the parties having agreed to submit their disputes to arbitration. It is not a reason for refusing a stay. Nor does it provide any basis for treating one aspect of their dispute, that involving any claim for contribution which the defendant wishes to pursue, as falling outside the scope of the arbitration clause or reserved to the Court."

35. Attracted as I was by Lord Grabiner's argument I cannot accept it. It seems to me that the language of clause 19.6(v) focuses more on the nature of the dispute than on the breakdown of the dispute resolution machinery. I cannot rule out that reasonable parties may have decided that, whilst they wished to have the opportunity to refer their disputes to arbitration, they were unprepared to entrust the arbitrator with certain powers, s.48 of the Arbitration Act 1996 providing an express framework against the background of which they were free to agree that the arbitral tribunal should lack the powers which they in fact enumerated in clause 19.4.3.2. That of course would not without more lead to the conclusion that the powers denied to the arbitral tribunal must of necessity be reserved to the court. However the language of clause 19.6(v) is in my judgment more consistent with an express reservation of the power of the court in this regard than it is with a saving of the power of the court in the event of failure of the dispute resolution machinery. My conclusion involves, I think, that a party could quite easily render the arbitration clause inapplicable by seeking declaratory relief. No doubt the court will be astute to exercise its case management powers and would strive to give effect to the word "genuine" as qualifying the type of dispute which is reserved to the determination of the court. Overall however I conclude that, having regard to the wording of clause 19.6(v), the parties have not by agreeing to subject their disputes to an arbitrator whom they have expressly deprived of the power to order specific performance, make declarations and grant injunctions, agreed also that those remedies should simply be unavailable. I reach this conclusion with reluctance and hesitation because it ascribes to the parties an intention which I do not regard as entirely sensible. However the parties must be the judges of what it was sensible for them to agree, circumstanced as they were in 2005, not me. On balance I have concluded that the result for which Vertex contends is more consistent with the words used to express the parties' bargain than is the result contended for by Powergen.

36. I turn then to consider whether Vertex has any realistic prospect of obtaining an injunction at trial. In this regard Vertex contends that Powergen has no genuine ground for complaint about Vertex's performance of the MSA and has merely come up with pretexts on which to claim an entitlement to terminate. Vertex suggests that Mr Elliott, who joined Powergen as Director, Customer Service and Operations only in July 2005, adopted a new customer services strategy pursuant to which Powergen would be dealing directly with its customers. The notice of termination was, submits Vertex, given simply in order to facilitate implementation of Powergen's policy decision to take customer service activities in-house.

37. A substantial quantity of evidence has been placed before the court in support of the parties' rival positions. It consists both of long and detailed witness statements and a considerable body of documentation including correspondence exchanged between the parties. I cannot hope to review it in detail here consistently with giving to the parties a reasonably prompt ruling on an application for interim relief. For the most part of course the evidence simply throws up issues which cannot be resolved at this interlocutory stage. I would however merely observe that it is not inconceivable that a new strategy may have been born out of a realisation that the existing arrangements were damaging to Powergen's reputation and business. It is also not inconceivable that Vertex's performance may in fact be damaging to Powergen's reputation and business without amounting to a breach of Vertex's contractual obligations.

38. This last point is I think of some significance because it by no means follows that simply because Vertex may ultimately show that Powergen enjoys no right to terminate the agreement so necessarily Powergen must be overstating the position when it says that it has lost all confidence in Vertex's ability properly to service its customers. It is perfectly possible that the terms of the SLAs permit a level of performance which is, objectively, unsatisfactory. A nice point may arise as to the inter-relationship between Vertex's obligation to perform with all reasonable care and skill and its obligation to comply with the Regulations and with Good Industry Practice and the level of performance called for by the SLAs, particularly in areas where the SLAs are silent. Notably the SLAs are silent in relation to important aspects of the Staywarm function, where there was to be a review and baselining exercise which, in view of the deterioration in the parties' relationship, has not taken place. I have already indicated one aspect in which the India Services SLA fails to provide the yardstick against which an important aspect of performance can be measured.

39. Vertex says that belated assertions by Powergen that the relationship has irretrievably broken down lack credibility. Powergen contends that much of what Vertex has to say on this score amounts simply to pointing out that the parties have at all times and at all levels managed to remain civil towards each other. Vertex relies heavily on the decisions of the Court of Appeal in ***Lauritzencool AB v. Lady Navigation*** [2005] 2 Lloyd's Rep 63 and ***Regent International Hotels (UK)Ltd v. Pageguide Ltd*** The Times 13th May 1985, Court of Appeal (Civil Division) Transcript No. 164 of 1985. In the first of those cases the Court of Appeal considered the principles which should be applied in relation to an application to restrain the termination of a long-term agreement, where the practical effect of the injunction may be to compel performance of a contract which involves the provision of services and cooperation between the parties. After reviewing the authorities, Mance LJ, with whom Thomas and Judge LJJ agreed, concluded that: -

    (1) There is no general principle that injunctive relief will not be granted in respect of a contract for services if the practical effect will be to compel performance. Although injunctive relief would or might indirectly compel performance, that is irrelevant so long as it does not directly decree it.

    (2) Commercial arrangements between independent companies involving the employment of no named individuals where the services are not "personal" in nature can be distinguished for these purposes from contracts which

involve very personal skills or talents. In the event of injunctive relief, business concerns can be expected to make the arrangements work in their own interests, and sort out any complaints subsequently, if necessary.

40. In ***Regent Hotels*** the Court of Appeal upheld a very similar order, restraining the defendant in that case from terminating a long-term contract for the management of the Dorchester Hotel.

41. I regard the approach of Vertex in this regard as unrealistic. The decision in ***Lauritzencool*** turned on the finding of the judge as to the workability of the time charter relationships in the event of negative injunctive relief effectively compelling the owners to leave their vessels in the Lauritzen pool. The owners in such circumstances had simply to continue to manage the vessels and to order their Masters and crew to comply with the charterers' directions as to employment of the vessels. The discretionary element lay above all in accounting for the pool as a whole but the financial disputes between the parties and the allegations of anti-competitiveness did not touch upon the workability of the time charters themselves. Time charters are very straightforward instruments pursuant to which an owner simply agrees to employ his vessel in accordance with the directions of the charterer by means of agreeing that his Master and crew shall comply with the charterer's directions as to employment. The relationship is a very impersonal one, requiring no further cooperation than compliance with orders by the owners and maintenance by them of the vessel in accordance with parameters agreed in the charterparty. The charterparty will spell out the nature of the orders which the charterers are entitled to give and will prescribe the ambit of the owners' obligations as regards maintenance and other matters. Owners and charterers need never and typically will not meet. The **Regent Hotels** case was a case where the Court of Appeal evidently concluded that it was seriously arguable that Pageguide had no intention of performing the agreement even when entering into it. The identity of the beneficial interest behind Pageguide had been suppressed when the purchase from Regent was negotiated and completed. The day to day management and operation of the hotel rested with the Regent companies who were given autonomous and independent control over specific delegated functions. There was no need for constant supervision or cooperation – see per Ackner LJ at pp.19 – 20 of the transcript.

42. The Court of Appeal in the **Regent Hotels** case considered that there was a serious issue to be tried whether Pageguide had in fact lost confidence in the Regent companies. On the facts of that case that is hardly surprising. On the evidence before me whilst I readily accept that there are as is common ground real issues to be tried on the question whether Powergen is entitled to terminate the MSA I do not regard it as seriously in doubt that Powergen has lost confidence in Vertex. Vertex appreciated that Powergen had a low opinion of Vertex service quality before even the renegotiated April 2005 MSA was entered into. There is a dispute as to what was said at an important meeting on 14 November 2005 but a contemporary note of that meeting prepared by Mr Davis seems to me to reflect that Powergen continued to hold that view. The allegation of misuse of access to Powergen customer details and the response to it is indicative of mutual confidence having broken down. It seems to me unrealistic to contend that this loss of confidence has not filtered down to operational level. This was no doubt what Mr Coleman of Vertex had in mind when he referred to "the level of angst" caused in both organisations by the increasingly formal tone of the correspondence exchanged between them. However what is to my mind critical is that it is plain that the agreement requires extensive mutual cooperation if it is to work and there is scope for real and genuine disagreement as to what is the nature of the cooperation required from Powergen in order to enable Vertex properly to perform its obligations. I have already referred to the express terms of the agreement in that regard and to the implied terms pleaded by Vertex in its Particulars of Claim. It is a feature of the dispute that, particularly in relation to Staywarm, as reflected in the Particulars of Claim, Vertex blames its alleged inability properly to perform upon alleged failures by Powergen in rendering the necessary cooperation or on functionality deficiencies in Powergen's own computer systems. The following passage from Powergen's skeleton argument is I think entirely non-controversial: -

> *"(1) Under the 2005 MSA, Vertex was to provide a range of services to Powergen's customer services division, encompassing the printing and despatch of bills, statements and promotional material; handling receipt of incoming customer mail; processing and banking of all postal payments; end-to-end servicing of Staywarm customers; and a range of front and back office services from India.*
>
> *(2) Effective delivery of these services required the parties to interface with each other at a number of levels (Elliott (1) para 44). This was a matter of contractual obligation as well as practical necessity. Clause 5.3 of the 2005 MSA required Powergen to form and maintain a services team (whose members were to be notified to Vertex) for the express purpose of interfacing with Vertex's client management team (C1/190). An equivalent reciprocal obligation was imposed upon Vertex by clause 4.4 of the 2005 MSA, which required Vertex to have regard to "the need of Powergen to maintain continuity of service from the client management team" (C1/189). Each party was required to notify the other of changes made to the composition of its operational team (clauses 4.4 and 5.3).*
>
> *(3) In addition to these managerial processes, the 2005 MSA necessitated close co-operation between the two companies in relation to computer systems and IT. Clause 5.1.7.1 of the 2005 MSA expressly required Powergen to give Vertex "access to and use of the computer hardware and software owned by Powergen" (C1/189). Pursuant to this obligation, Powergen maintained direct computer feeds between its systems in the UK and Vertex's operations in England and India. Whether based in England or India, Vertex agents had direct access to the customer records held on Powergen's servers in the UK (Elliott (1) para 46). This requirement to interface at a systems level has created a number of problems between Powergen and Vertex, including disputes between the parties as to the functionality of Powergen's ICE system, Vertex's entitlement to transfer personal data from ICE to*

Vertex's own systems and the impact of the migration of customer records from Vertex's Customer 1 system to ICE upon Vertex's ability to perform the services under the 2005 MSA.

(4) Constant monitoring of Vertex's performance was required, entailing regular exchange of management information between the two companies (cf Powergen's obligation under clause 5.1.10 of the 2005 MSA to provide such management information as might be required for contract management);

(5) The closeness of the parties' relationship is reflected in the Staywarm Transaction Document which refers to a requirement for "day to day operational contact" between the two organisations (C1/336) and stresses the need for "openness" between the parties in relation to the measurement and assessment of Vertex's performance (C1/335);

(6) The agreement contained a change procedure designed to facilitate changes to be made to the nature and scope of the services and introduce an essential element of flexibility into the parties' arrangements (see e.g. Elliott (1) paras 149(e) and (f)). As Vertex has asserted in correspondence, in a contract of this kind there were "many hundreds of services, projects, informal requests and de facto variations ongoing at any one time" (D1/238).

(7) Vertex's reply evidence emphasises the close inter-action required between the operational teams, especially in relation to Staywarm. According to Vertex, this includes:

(i) working with Powergen's operational staff on a regular basis to monitor and manage delivery of the services provided by Vertex and Vertex's and Powergen's contribution to those services (Robinson para 13);

(ii) regular meetings and communications (by email/telephone) to discuss the information and assistance that Vertex requires from Powergen in order to provide the MSA services to Powergen (Robinson para 13);

(iii) regular meetings "to discuss the work that Vertex and Powergen are doing" (Robinson para 16);

(iv) the operational teams speaking to each other almost every day as they "worked together on preparing training, putting reporting structures in place and otherwise setting up processes to manage the work" (Robinson para 24);

(v) Powergen monitoring Vertex's performance and requiring action whenever issues arise "as they inevitably will from time to time when large numbers of employees are engaged in working in various areas using complex systems and procedures" (Robinson para 25)."

43. Powergen also asserts that the breakdown in the relationship is clear from the following: -

"(1) Powergen had to bring management of the backlog of Staywarm debt in-house because Vertex refused to accept responsibility for managing this debt under the 2005 MSA (Elliott (1) para 149(a));

(2) Weekly operational and commercial review meetings have been abandoned due to the inability of the parties to progress the matters in dispute between the (Elliott (1) paras 9(h) and 149(b));

(3) Vertex's refusal to acknowledge and address its failings in a co-operative and constructive manner is a continuing bone of contention with the Powergen operational team (Elliott (1) para 9(i) and 149 (c));

(3) Frequent changes to Vertex's operational management teams (both in the UK and India) have further undermined Powergen's confidence in Vertex's competence (Elliott (1) para 121);

(4) The continuing frustration felt by Powergen's team is reflected in emails and correspondence exchanged with Vertex. For example:

(i) Ms Dodds' response to continued failures in Vertex's India operation: "words fail me – and that doesn't happen often" (D2/388)

(ii) Mr Merrick's response to continued failures in India: "I am at the point of complete and utter despair and am forced to seriously question the control the management in this section has over the operation" (D2/400)

(iii) Ms Fairhall's warning that "a number of things have reached crisis point" in India (D2/417);

(iv) Ms Dodds' letter of 17 October 2005 referring to Powergen's continuing "concerns over a number of issues regarding India particularly around the voice work and the overall ability to manage the contact centre in a professional and efficient manner" (D1/223-4);

(v) Powergen's demand for an "extremely unprofessional" agent to be stopped from taking calls (D2/ 444-5);

(5) Vertex has adopted an obstructive approach to regulatory audits carried out by Powergen pursuant to clause 21 of the 2005 MSA (Elliott (1) para 150(a); the account given of the Indian audit in paras 107 to 114 of Mr Singleton's witness statement is disputed by Powergen). Following the February 2006 audit, Vertex initially refused to respond constructively to Powergen's audit findings or co-operate with the audit team in implementing the audit recommendations (Elliott (1) para 150(b))). Vertex eventually provided a response last week, containing a series of unsubstantiated assertions about its compliance with the audit recommendations (Singleton para 119). These need to be investigated; and until they are Powergen remains concerned about the adequacy of Vertex's response.

(6) Vertex has started adopting an unreasonable attitude towards submission of change requests under the 2005 MSA, insisting that these be made for minor variations which would ordinarily have been dealt with on a commercial and flexible basis without the need to implement formal contractual processes. To compound matters, when change requests have been submitted in recent months, Vertex has unreasonably delayed implementing the requests (Elliott (1) paras 149(d) and (e)). This has strained the workability of the contract, to breaking point.

(7) Vertex has adopted an increasingly legalistic approach with Powergen's operational team, which is not a sensible or constructive manner in which to operate this kind of business relationship. This includes insisting on attendance

of lawyers at operational team meetings, despatching legal personnel to India to control the flow of information to Powergen's internal auditors and refusing to deal with day to day operational matters without input from solicitors (Elliott (1) paras 9(h) and 150)."

44. I recognise that Vertex does not accept that its conduct is in these passages correctly or fairly characterised. However that there have been serious difficulties on the ground concerning the level and extent of mutual cooperation required cannot plausibly be gainsaid. Vertex's own evidence demonstrates the range and depth of the disputes as summarised by Powergen at paragraph 39(2) of its skeleton argument as follows: -

"(2) ……. see e.g. Drury (1) para 89-91 (complaints by Vertex operational staff about adequacy of Powergen task lists and systems – allegedly not resolved); para 94 (complaints by Vertex's operational team that it did not have the necessary information from Powergen and were 'running blind); para 105 (inability to agree baselining for Staywarm SLAs because of the parties' dispute over debt); paras 110-112 (further complaints about the adequacy of Powergen's task lists); para 117 (dispute about business as usual debt and deficiencies in Powergen computer systems); para 151 (alleged failure by Powergen operational manager to provide sufficient information to Vertex about Staywarm Losses); para 155 (Vertex's alleged inability to manage Staywarm Losses because of lack of information from Powergen); para 163 (alleged failure by Powergen to respond to operational problems concerning Staywarm); Drury (2) para 17 (dispute in relation to Staywarm debt); para 19 (breakdown in negotiations between senior management concerning Vertex's responsibility for holding queue debt); para 29 (dispute re Staywarm Losses); para 86 (alleged caused for Vertex by the ICE migration and resultant 'churning' of Staywarm accounts); Robinson para 73 (Vertex had to contend with deficiencies in ICE functionality and lack of reporting and management information from Powergen)."

45. So far as concerns collection of Staywarm debt Vertex appears to accept no contractual responsibility at all unless and until the relevant SLAs are put in place. Paragraph 11.4 of its Particulars of Claim reads: - *"In any event, it is denied (if it is intended to allege) that there was any breach of any express obligation under the Staywarm TD in respect of the collection of debts, as there were no agreed SLAs in respect thereof, and it is denied (if it be alleged) that there was any implied obligation upon the Claimant under the Staywarm TD to use reasonable care and skill in the performance of its obligations thereunder."*

46. In these circumstances I do not consider that it is appropriate to grant injunctive relief which will have the effect of compelling the parties to work together. Nor do I consider that the terms of the contract are sufficiently precisely defined to indicate to Powergen precisely what is required of it if it is not to prevent or hinder Vertex from performing its functions under the MSA. In this regard I derive considerable guidance from the decision of the House of Lords in ***Co-Operative Insurance Society Limited v. Argyll Stores (Holdings) Ltd*** [1998] AC 1. As Lord Hoffmann pointed out, at page 17, the question of certainty must be decided on the assumption that the court might have to enforce the order according to its terms. I note also the distinction drawn by Lord Hoffmann at page 13 between orders which require a defendant to carry on an activity, such as running a business over a more or less extended period of time, and orders which require him to achieve a result. The present case cannot in my judgment be characterised as one in which Powergen would simply be enjoined to bring about a result. Furthermore I do not myself regard it as an argument in favour of injunctive relief that the parties have so far been able by agreement to hold the ring pending determination of this application. There is a world of difference between pragmatic compromise and performance enjoined by order of the court under pain of all the sanctions available for contempt. Given that the parties are agreed that the trial of this matter would occupy of the order of three to four weeks of court time, and given the evidence which would have to be marshalled therefor, it is unlikely that a trial could realistically take place before next year and the court could not in any event easily accommodate it before the end of January 2007. There has already been dispute and uncertainty as to what is required of both sides in order to make the arrangements work. In the light of the history it would in my judgment impose an intolerable burden upon the employees of Powergen simply to expect them to make the arrangements work in circumstances where it would be unclear to them whether they were in fact doing all that was required if sanctions were to be avoided. Whilst I accept in the spirit in which it was meant Mr Mill's assurance that his clients would not be astute to hurry back to court to allege that Powergen was in contempt, given the complexity and extent of the cooperation required of Powergen if Vertex is to be able properly to perform this would be a situation in which, as envisaged by Lord Hoffmann at page 17 of his speech in the ***Co-operative Insurance*** case, the injunction would only work if no one inquired too closely into what it requires of Powergen. Such an order should not be made and I decline to make it.

47. This conclusion renders it unnecessary for me to consider the balance of convenience. At the outset of his written submissions on this point Mr Mill refers to the following well-known passage in the judgment of Sachs LJ in ***Evans Marshall and Co v. Bertola SA*** [1973] 1WLR 349 at p.379: - *"The standard question in relation to the grant of an injunction, "Are damages an adequate remedy?", might perhaps, in the light of the authorities of recent years, be rewritten: "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?"*

48. To this citation I would add the following passage from the dissenting judgment of Millett LJ in the ***Co-operative Insurance case,*** [1996] Ch. 286 at p.305: - *"The equitable jurisdiction should not be exercised in a manner which would defeat the commercial expectations of the parties at the time when they entered into their contractual obligations."*

49. This passage must I think be regarded as having received the implicit approval of the House of Lords where Lord Hoffmann speaks, at page 15 of the report, of the purpose of the law being to satisfy the expectations of the

party entitled to performance. These sophisticated parties included in their contract clause 11 which excludes liability for loss of profit, loss of contract and loss of goodwill and imposes a cap on each party's liability in the aggregate sum of £12 million. Of course there will be issues as to the proper construction and applicability of these provisions and Vertex also contends, somewhat implausibly as it seems to me, that they are unfair and as such unenforceable. However that may be, it is not immediately obvious to me that it would be unjust for Vertex to be confined to such remedy in damages as is determined to be the extent of the bargain which it struck. In view of my earlier conclusion I do not need to grapple with the question what is the precise ambit and extent of the decision of the Court of Appeal in ***Bath and North East Somerset District Council v. Mowlem plc*** [2004] BLR 153. That was an extraordinary case on the facts where the contractor, Mowlem, sought indefinitely to delay completion of the high profile Millennium Bath Spa project, a project which was intended and expected to confer significant benefits upon the local economy. At paragraph 15 of his judgment Mance LJ said, in relation to that contract: - *"The agreement on liquidated and ascertained damages is not an agreed price to permit Mowlem [to breach its contract], and it does not preclude the court granting any other relief that may be appropriate."*

50. I have already concluded that other relief is not here appropriate and I do not have to decide whether the approach of the Court of Appeal in that case precludes the court from concluding in this that it is not unjust that Vertex should be confined to its remedy in damages.

51. Vertex alleges that it will suffer loss, particularly reputational loss, of a character which cannot be precisely ascertained and cannot be adequately compensated in money. I can understand that a determination that Powergen is entitled to terminate the MSA will have a negative impact upon Vertex's ability successfully to compete for new business. However I have difficulty in following how the grant or refusal of an interim injunction will make any real difference in this regard. I should have thought that the damage is effectively already done. It is Vertex's case that in bids for work in the public sector Vertex is obliged to disclose any contract which has been terminated for cause. It produces by way of example the form of application for inclusion on Birmingham City Council's Select Tender List (C2/545). That form asks, at Section E, under the rubric Contract Performance: -

"Have any of the following circumstances occurred on any contract involving your firm during the last 3 years:

- *A financial deduction or liquidated damages imposed;*
- *A contract terminated or your employment determined (terminated);*
- *A contract not renewed for failure to perform to the terms of the contract;*
- *Withdrawal from a contract prematurely;*
- *Outstanding claims or litigation against your company?*

If yes, please provide full details on a separate sheet."

52. As I understood it the suggestion was made that, if an interim injunction were granted preventing Powergen from acting on its notice of termination, this would enable Vertex between now and the trial to complete forms such as this without reference to its dispute with Powergen. I need only say that I find that a surprising suggestion. It may be that Vertex relies upon Powergen as a "key reference client" when bidding for outsourcing work but I do not consider that it formed a part of the commercial expectation of either Vertex or Powergen when entering into the contract that the Court would lean in favour of granting injunctive relief to Vertex so that Vertex could use its relationship with Powergen as a marketing tool.

53. When assessing the potential damage to Powergen in the event that an injunction is granted and it is subsequently held that Powergen had in fact been entitled to terminate it is in my judgment worth bearing in mind that Powergen would by an injunction be prevented from dealing directly with its customers in a manner in which it says it wishes to do. It is well known, and the evidence bears out, that competition in the utilities provision field is increasingly intense. It is obvious, and the evidence again bears out, that a key determinant in customer loyalty is the manner in which utilities providers deal with complaints and enquiries. A higher standard is these days expected, and is imposed by regulation, than was perhaps sometimes tolerated in the days of monopoly provision. It would to my mind be a bold step to prevent Powergen from dealing with its customers as it wishes in circumstances where it plausibly asserts that the current arrangements adversely affect its reputation as an utilities provider.

54. It follows from the foregoing that I am by no means satisfied that the balance of convenience so strongly favours the grant of an interim injunction as Vertex contends. I recognise that my tentative conclusion in that regard is coloured by my belief that this is a situation in which injunctive relief is simply inappropriate and unworkable. In those circumstances it is no doubt better that I should express no concluded view upon a hypothesis which does not, in my judgment, arise.

Ian Mill Q.C and Robert Howe (instructed by Clifford Chance LLP) for the Claimant
Anthony Grabiner Q.C. and Craig Orr (instructed by Freshfields Bruckhaus Deringer) for the Defendant