Neutral Citation Number: [2024] EWHC 1435 (TCC)

Claim No. HT-2024-000004

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

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

Date: 12 June 2024

Before:

SIMON LOFTHOUSE KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

B E T W E E N :

PEVENSEY COASTAL DEFENCE LIMITED

Claimant

– and –

ENVIRONMENT AGENCY

Defendant

- -

- -

_____

APPROVED JUDGMENT

_____

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 12 June 2024 at 10.30am

Introduction

1. These are Part 8 proceedings brought by the Claimant ("PCDL") against the Environment Agency ("the Agency"). The proceedings seek determination of a point of construction in a PFI contract dated 5 May 2000 ("the Agreement"). Under the Agreement PCDL (referred to in the Agreement by the abbreviation, PFIC) provides services to deliver sea defences at Pevensey Bay, Eastbourne, Sussex. The Agreement was for a period of 25 years. It commenced on 1 June 2000 and expires on 1 June 2025.

2. The Agreement was amended by a Change Agreement dated 8 April 2020. Amongst other matters, this amends Schedule 12 to the Agreement. Reference to the Agreement in this judgment are to the Agreement as amended by the Change Agreement.

3. The issue for determination in the proceedings ("the Issue") has been defined in slightly different terms by the parties as follows:

PCDL:

> *On a proper construction of the FDSA does Schedule 12 permit PCDL to claim for Relevant Cost on a retrospective basis in respect of the circumstances in paragraph 1.2(g)?*

The Agency:

> *If there was a material increase in the frequency of storm events in the second decade of the FDSA compared with the first decade, does Schedule 12 of the FDSA permit PCDL to claim, after the end of the second decade, an additional payment in respect of Flood Defence Services and/or Service Requirements which PCDL performed in the second decade of the FDSA?*

4. PCDL answer their proposed issue "Yes", the Agency answer their proposed issue "No". In reality, there is no material difference between the issues.

5. Regardless of the absence of material difference, the parties were unable to agree on the wording. In those circumstances the Court will decide. As I indicated in argument, I will adopt the formulation advanced by the Agency as more precisely reflecting the case advanced by PCDL.

6. The 2 witness statements before me introduce the dispute and exhibit relevant documentation. I do not need to refer to them further.

The Agreement

7. I set out below some of the terms of the Agreement to which reference has been made:

> *3.1* ***Expiry Date***
>
> *(a) Unless terminated earlier in accordance with their respective provisions, this Agreement and all other Project Agreements (except the Direct Agreements) and, without prejudice to their rights and remedies in respect of prior breaches of, or accrued rights and liabilities under this Agreement or any other Project Agreements, all rights of the parties under this Agreement and the other Project Agreements (except the Direct Agreements) will expire on the Expiry Date.*
>
> *(b) The Expiry Date of this Agreement shall be 25 years from the Effective Date, save where the Agency's Option to Extend is exercised.*
>
> *7.5 In the event of any fraudulent misstatement of any information relevant to the Project by the Agency or any person for whom the Agency is responsible, the discovery of such fraudulent misstatement shall be dealt with as a Change to which the provisions of Schedule 12 of this Agreement shall apply and PFIC's sole remedy in respect of such fraudulent misrepresentation shall be an extension of time and/or payment of compensation (as appropriate) in accordance with the provisions of that Schedule.*
>
> *15.1* ***Service Level Requirements***
>
> *PFIC shall provide the Flood Defence Services on and from the dates set out in the Development Programme and, without limitation, shall provide:*
>
> *(a) the Existing Service Levels from and including the Effective Date;*
>
> *(b) the Improved Service Levels by no later than the Required Completion Date; and*
>
> *(c) the Ultimate Service Levels by no later than the Secondary Completion Date.*
>
> *all in accordance with the provisions of this Agreement and in particular Schedules 4 (Service Requirements) and 5 (PFIC's Proposals).*
>
> *15.2* ***Change***
>
> *Without prejudice to Clause 29 and subject to the requirements of any procurement Laws, during the Contract Period the Agency may request PFIC to make a Change in accordance with Schedule 12 (Change Procedures) and any applicable Laws.*

15.3 Subject to Clause 33 (Force Majeure) PFIC shall not be entitled to any relief from its obligations set out in Clause 15.1 or otherwise, expect in the circumstances specified in, and in accordance with, the provisions of Schedule 12.

*29 **Change Procedures***

29.1 The parties shall each comply with the provisions of Schedule 12 (Change Procedures) in relation to any Change proposed or arising during the Contract Period.

*30.1 **PFIC's Liability for Plant etc. and Sea Defences***

Save where otherwise expressly provided, throughout the Contract Period PFIC shall be responsible for:

….

(b) the condition, restoration and maintenance of the Sea Defences (other than the Existing Outfalls) in accordance with this Agreement including, without limitation, any patent or latent defect in the condition of the Existing Sea Defences and the materials, workmanship, design and construction of the Improved Sea Defences;

(d) any action, claim, loss, cost, charge or expense arising out of or in connection with (a) or (b) above.

8. Relevant definitions are set out in Schedule 1 as follows:

***Change** means an alteration or addition to or omission from the Service Requirements, any other variations in the quality or quantity or method of delivery of the Flood Defence Services, the Works or the Project*

***Change Procedures** means the procedures described in Schedule 12 (Change Procedures)*

***Effective Date** has the meaning ascribed to it in Clause 2.2(b)*

***Relevant Cost** means cost suffered or incurred (at the relevant time or in the future) by PFIC as a result of a Proposal as determined by Schedule 12 (Change Procedures) to this Agreement*

***Storm Event** means a Weather Event where the sum of the Water Level and Significant Wave Height exceeds 6.5 metres.*

9. The Service Requirements are set out in Schedule 4. These provide by way of Introduction:

1.1.1 The Agency's aim for the Pevensey Bay Frontage is to develop a sustainable policy for the management of the Pevensey Bay Sea Defences that is economically justified, environmentally appropriate and which, while recognising the significant value of assets (both monetary and environmental)

that are at risk, takes due regard of the natural processes within the sediment sub-cell and the effects of and to adjacent coastal defences.

1.1.2 The principal objectives to achieve the Agency's aim are:-

(a) management of the Sea Defences in sympathy with the natural processes;

(b) provision of appropriate Sea Defences, where their need has been identified and justified, that are technically sound, economically viable and environmentally acceptable;

(c) provision of best value to the public purse;

(d) consistency of approach to the overall management of the Sea Defences within the sub-cell by liaising with Relevant Authorities in the production of Beach Management Plans;

(e) *formalized comprehensive monitoring to inform future management decisions and reviews; and*

(f) maximisation of recreational and environmental opportunities.

10. Schedule 11: Calculation of Charges and Deductions provided at Part 4 : Cost of Restoring the Key Physical Features :

"…

*4.2 If there is a Weather Event which is both a Non-Protection Level Event as defined by Table 3.8 and Curves shown in Figure 3.8 and a Protection Level Event as defined by Table 3.12 and Curves shown in Figure 3.12 ("**a Shingle Loss Event**"), then the Agency shall, reimburse PFIC for PFIC's reasonable costs properly incurred in obtaining and delivering shingle to the Frontage in order to replace the shingle permanently lost from the Frontage (as determined in accordance with Schedule 11 and paragraphs 4.8 to 4.10) (the "**Permanent Shingle Loss**")*

4.3 On the occurrence of Breach or Erosion as a result of a Non-Protection Level Event defined by Table 3.12 and Curves shown in Figure 3.12, the Agency shall reimburse PFIC for the reasonable costs to PFIC properly incurred in complying with its obligations under paragraphs 2.3.4 and 2.5.4 of Schedule 4 (Service Requirements), provided that PFIC shall take all reasonable steps to minimise any such costs. The Agency shall have the right not to reimburse PFIC in accordance with Schedule 11 paragraph 4.2 on the grounds of unaffordability but if the Agency intends to exercise such right then it shall reduce the Service Levels by giving a Notice pursuant to Schedule 12 paragraph 1.2(c) and 1.5.

4.4 When PFIC, acting reasonably, considers that a Shingle Loss Event has occurred, PFIC may, as soon as reasonably practicable, (and, in any event, not later than three months) after the occurrence of the relevant event) give the Agency written notice that it considers a Shingle Loss Event has occurred

*providing an estimate of the volume of shingle lost (the "**Estimated Shingle Loss**") and an estimate of PFIC's reasonable costs properly incurred of obtaining and delivering replenishment beach material to the Frontage to replace the Permanent Shingle Loss (the "**Estimated Shingle Cost**"). PFIC's entitlement to reimbursement under this Part 4 is conditional upon PFIC giving notice to the Agency within three months of the occurrence of the relevant Shingle Loss Event.*

11. The Change Procedures are set out in Schedule 12. Relevant clauses include the following:

1.1 ***Introduction***

(a) Subject only to Clause 33 (Force Majeure) this Schedule specifies:

(i) the circumstances and terms on which PFIC may be, and in certain circumstances shall be, granted relief from its obligations specified in Clause 15.1 and otherwise in this Agreement; and

*(ii) the circumstances and terms on which changes can be, and in some circumstances shall be, made to the Service Requirements, the quality, quantity or method of delivery of the Flood Defence Services, the Works or the Project (a "**Change**")*

1.2 ***Changes in Circumstances***

The following shall be the circumstances referred to in Schedule 12 paragraph 1.1:

…..

(b) A breach of this Agreement by the Agency or any agent, employee, contractor or other person for whom the Agency is responsible;

(c) A Change proposed by the Agency;

…..

(g) material increase or decrease in Storm Events, or a Sea Level Rise different from the Assumed Sea Level Rise, each as determined in accordance with Schedule 12 paragraph 4;

(q) Failure by a Statutory Undertaker to carry out works or provide services;

(r) Any failure or shortage of power, fuel or transport;

….

(t) Any official or unofficial strike, lock out, go slow or other dispute generally affecting the dredging and construction industry or a significant sector of it;

1.4 Notwithstanding any other provisions of this Schedule 12, the only relief that may be permitted to PFIC in the circumstances specified in Schedule 12, paragraph 1.2(n) – (s) shall be an extension of time for the performance of its obligations pursuant to this Agreement.

1.5 ***Procedure***

*(a) Subject to Schedule 12 paragraph 1.3 and paragraph 5, either party may notify (a "**Notice**") the other of the occurrence of any event specified in Schedule 12 paragraph 1.2 or of any other circumstance which such party wishes to be regarded as a circumstance to be treated as though it were a circumstance specified in Schedule 12 paragraph 1.2 (a "**Proposal**"). The Notice shall be given as soon as reasonably practical and in any event within 7 days of the occurrence of any circumstances giving rise to the need for the Notice to be given.*

(b) Where the Applicant is PFIC, the Notice shall provide reasonable details of the following):

(i) the reasons for the Notice and the date from which the Proposal is likely to impact upon or will impact upon the Project;

(ii) the impact, where relevant, of the Proposal on the Development Programme and a programme and method statement for any proposed works including a method for certifying completion of any such works;

(iii) (save in relation to events under paragraph 1.2(n) to (s) where this is not relevant) an assessment as to whether a Relevant Cost or Relevant Saving is likely to be involved together with an estimate of any such Relevant Cost or Relevant Saving stated as an adjustment to the current Monthly Charges and as a single lump sum in final settlement together with a breakdown of how that estimate has been calculated and a reconciliation with the Financial Model;

(iv) any other impact the Proposals may have on the Project or PFIC's ability to provide the Flood Defence Services in accordance with this Agreement together with PFIC's proposals as to how to deal with the same;

(v) any amendment to this Agreement and/or any other Project Agreement required as a result of the Proposal;

(vi) mitigation measures being undertaken in accordance with Schedule 12 paragraph 3.5.

1.6 ***Objections to Proposals***

(a) Within 30 days after receipt of either the Notice or, if later, the provision of the evaluation by PFIC of the Proposal given by the Agency in accordance with paragraph 1.5 above, the recipient of the Notice shall either accept or reject the Notice giving details of the grounds for any objection and where appropriate, suggesting alternative proposals.

(c) If either party considers that verification of a Relevant Cost or Relevant Saving will be required by way of long term monitoring, it will give notice to that effect to the other party within the 30 days referred to in Schedule 12 paragraph 1.6(a) and the provisions of Schedule 12 paragraph 2 (monitoring of costs/savings) shall apply.

(e) Where PFIC gives a Notice pursuant to Schedule 12 paragraph 1, the Agency will evaluate the Proposal in good faith and will not refuse to agree to the implementation of any Proposal which is:-

((i) – (xi))

Subject to the foregoing, the Agency will have the right to refuse a Proposal which would compromise the delivery of the Flood Defence Services or result in an unacceptable diminution of the quality of such Services.

(f) To the extent that in the Agency's reasonable opinion a reduction in Service Levels would obviate the necessity for any given Proposal, the Agency shall have the right to reduce the Service Levels to that extent by serving a Notice pursuant to Schedule 12 paragraphs 1.2(c) and 1.5

1.10 ***Implementation***

Upon agreement or determination in accordance with the Disputes Resolution Procedure of a Proposal, PFIC (or, as the case may be, the Agency) must procure that the Proposal is implemented in accordance with the terms of that agreement or determination. For the avoidance of doubt, the Proposal must be implemented at the cost so agreed or determined notwithstanding that the actual cost of implementation may be higher than such cost.

3. ***DETERMINATION OF REVISED CHARGES***

3.2 The Agency may elect in consultation with PFIC either to pay for a Relevant Cost by way of a lump sum or by way of an adjustment to the Monthly Charges. If the Relevant Cost is to be paid by way of a lump sum then such lump sum shall have added to it an amount equal to 10% of the Relevant Cost. If the relevant Cost is to be paid by an adjustment to the Monthly Charges then the Relevant Cost shall be used as an input into the Financial Model and the adjustment to the Monthly Charge shall be the relevant output of the Financial Model.

3.5 ***Mitigation and Reasonableness***

(a) Each party must take all reasonable steps to avoid or mitigate any delays to the implementation of the Project or otherwise, the amount of any Relevant Cost, and to maximise the amount of any Relevant Saving. The parties will co-operate with each other to this end.

…..

4. ***CHANGE IN FREQUENCY OF STORM EVENS AND/OR SEA LEVEL RISE***

4.2 Within 56 days of each of the tenth and the twentieth anniversaries of the Effective Date, PFIC may (and will if required by the Agency) submit to the Agency a report summarising Storm Events that have occurred from the Effective Date to the tenth anniversary of the Effective Date or from the tenth Anniversary of the effective Date until the twentieth anniversary of the Effective Date (as appropriate) and provide PFIC's reasonable view (which must be

supported by the written opinion of an independent expert in the relevant field) as to whether there has been a material increase or decrease in the frequency of Storm Events during that period as compared to the period from either 1 January 1990 up until the Execution Date or from the tenth anniversary of the effective Date until the twentieth anniversary of the Effective Date (as appropriate).[1]

4.3 Without prejudice to Schedule 12 paragraphs 1 and 2, PFIC will only be entitled to claim a Relevant Cost due to there having been a material increase or decrease in Storm Events if it demonstrates (by production of such supporting information as the Agency may reasonably require) to the reasonable satisfaction of the Agency that:

(a) any increase in loss of shingle in the Frontage (as determined by reference to the ABMS records and any other surveys for the two respective periods referred to in Schedule 12 paragraph 4.2 and records submitted by PFIC in accordance with this Agreement) was directly caused by an increase in frequency of Storm Events;

(b) PFIC has otherwise complied with its obligations under this Agreement including, without limitation, its obligation to monitor and maintain the Key Physical Features of the Sea Defences in accordance with PFIC's Proposal.

4.6 Notwithstanding any other provisions of this Schedule, the Agency and PFIC hereby agree that an increase or decrease in the frequency of Storm Events resulting in a Relevant Cost or Relevant Saving for the ten year period commencing on the Effective Date less than or equal to £100,000 in aggregate shall not entitle either party to claim a Relevant Cost or Relevant Saving under this Schedule.

Interpretation of contracts: the law

12. Unsurprisingly, there is no issue as to the applicable law which I take as summarised by Lord Hodge in *Wood v. Capita Insurance Services* [2017] AC 1173 as follows:

"[10] The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that 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. In Prenn v Simmonds [1971] 1 WLR 1381, 1383H–1385D and in Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated

1 This is a paragraph amended by the Change Agreement. The Change Agreement explains the change as correcting an error in that the intention is to allow comparison of the first decade of FDSA with 1990 to 2000 and then the second decade (2010 – 2020) with the first decade (2000 – 2010).

judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912–913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision" (2008) 12 EdinLR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

[11] Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the Rainy Sky case [2011] 1 WLR 2900, para 21f. In the Arnold case [2015] AC 1619 all of the judgments confirmed the approach in the Rainy Sky case: Lord Neuberger of Abbotsbury PSC, paras 13–14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the Rainy Sky case, para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 , paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the Arnold case, paras 20, 77.Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

[12] This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

[13] Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to

> *reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in Sigma Finance Corpn [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions."*

The parties' submissions

13. Mr Alexander Nissen K.C., who appears on behalf of PCDL, submits that the Agreement provides for PCDL to claim Relevant Cost on a retrospective basis (as PCDL's formulation of the proposed issue reflects). He draws attention to paragraph 4.2 to Schedule 12 and the investigation as to whether there "*has been*" a material increase or decrease in the frequency of Storm Events. In the context of consideration as to what has happened in the past, Mr Nissen highlights paragraph 4.3 to Schedule 12 which provides PCDL would only be entitled to claim a Relevant Cost due to there having been a material increase or decrease in Storm Events. In noting that such costs would largely have been incurred by the time of the Report envisaged by paragraph 4.2, he submits that the Agency's position makes no commercial sense in depriving PCDL of those costs.

14. This submission is one of five reasons advanced by Mr Nissen as to why there is no limitation of PCDL's entitlement to costs suffered or incurred in years *after* the material increase in Storm Events had actually occurred. I summarise below the balance of those reasons as set out in the skeleton argument of Mr Nissen and Mr David Sheard and on which Mr Nissen expanded orally:

    a. The definition of Relevant Costs includes "*costs suffered or incurred (<u>at the relevant time or in the future</u>) by [PCDL]…"* (PCDL's emphasis added). It is submitted this clearly covers costs already incurred as well as costs which may be incurred in the future and if it was only permissible to include costs suffered or incurred after the Proposal envisaged by paragraph 1.5 to Schedule 12 then it would give no meaning to the costs suffered or incurred "at the relevant time";

b. Paragraph 4.6 of Schedule 12 and its reference to a Relevant Cost or Relevant Saving resulting from an increase or decrease in the frequency of Storm Events provides specifically in respect of the first decade that the Relevant Cost to which PCDL is entitled is Relevant Cost for the first decade and that such costs will necessarily have been incurred by the time that any material increase in the frequency of Storm Events would have been identified in accordance with paragraph 4.2 of Schedule 12;

c. It is only once the existence or otherwise of a material increase in frequency of Storm Events has been determined to exist that the event specified in Schedule 12, paragraph 1.2(g) will have arisen. If the claim for Relevant Cost was limited to future cost, and excluded past cost, the recoverable amount of Relevant Cost would be impacted by the random nature of the determination process in which PDCL provides such supporting information to the Agency as it may reasonably require, and this is an uncommercial outcome. Similarly, the right to recover any Relevant Cost would on the Agency's construction, limit recovery until after completion of the dispute resolution procedure provided by paragraphs 4.4 and 4.5 of Schedule 12 as it would only be costs after the entitlement was established which would be future costs;

d. Finally, reference is made to other provisions of the Agreement which, Mr Nissen submits, envisage the recovery of historically-incurred costs. Reliance was placed on:

    i. Paragraph 1.2(b) to Schedule 12 which provides that a breach of the Agreement by the Agency can be a Change in Circumstances. Mr Nissen submits that parties would not wish to limit the Relevant Cost recoverable as being dependent on whether the breach caused continuing loss or was

itself continuing and exclude recovery for loss which had already been caused;

ii. Schedule 12, paragraph 1.2(t) where, similarly it is submitted that the consequences of such a strike are likely to be felt at the time at which it occurs which will necessarily pre-date any Notice/Proposal and that the same could be said of the delay consequences of a power failure under paragraph 1.2(r);

iii. Clause 7.5 of the Agreement providing a sole remedy for fraudulent misstatement as an extension of time and/or payment of compensation in accordance with the provisions of Schedule 12 and that it cannot have been intended that compensation was limited to prospective future losses.

15. By reference to those examples PCDL submits that if costs already incurred at the time at which any Notice/Proposal is submitted are recoverable then the same would apply to paragraph 1.2(g).

16. Ms Sarah Hannaford K.C., who appears for the Agency makes two main submissions. Firstly, that the construction for which PDCL contends disregards the regime for a Proposal in Schedule 12 in relation to the circumstances in paragraph 1.2(g). Secondly, that such a construction for the purpose of paragraph 1.2(g) would require the Court to re-write the terms of Schedule 12 so as to exclude paragraph 1.2(g) from the regime for a Proposal and/or to convert Schedule 12 into a regime for payment of past costs, rather than a regime for identifying future changes.

17. In reality, the two submissions are related. Ms Hannaford submits that the necessity to rewrite Schedule 12 is impermissible as a matter of contractual construction and would also

involve a fundamental change in the balance of risk to which the parties agreed in the Agreement.

18. Ms Hannaford identifies provisions in Schedule 12 which, in her submission, would have to be disregarded if paragraph 1.2(g) permitted recovery of Relevant Cost on a retrospective basis. These include paragraphs 1.5(b)(i), (*the date from which the Proposal is likely to impact or will impact)*, 1.5(b)(iii), (an assessment of whether a Relevant Cost or Relevant Saving *is likely to be involved"* together with "*an estimate*" of the same), 1.5(b)(iv) (any other impact the Proposal *may have* on the Project or PCDL's ability to comply with the Agreement) and 1.5(b)(vi) (mitigation measure "*being undertaken")*.

19. The words italicised are Ms Hannaford's emphasis. They are emphasised in the context of what the parties accept to be mandatory language of the procedure in Schedule 12 (paragraph 1.5(b) refers). This procedure allows the Agency:

    a. to accept or reject the Proposal (paragraph 1.6(a) and (e))
    b. to give notice requiring long term monitoring to verify a Relevant Cost or Relevant Saving (paragraph 1.6(c))
    c. To reduce the Service Levels if it would obviate the necessity for the Proposal (paragraph 1.6(f))

20. Further to this procedure, PDCL can either withdraw the Proposal if the Agency objects (paragraph 1.7) or implement the Proposal in accordance with the Agency's agreement (or determination in accordance with the Dispute Resolution Procedure) (paragraph 1.10).

21. Subject to an obligation on the parties to mitigate both delay and Relevant Cost (paragraph 3.5(a)), paragraph 3.1 provides that payment of any Relevant Cost shall be on *completion* by PDCL of "*all steps required to be taken in order to implement the relevant Proposal*" or earlier if agreed by the Agency.

22. Again, the words emphasised in italics are submitted to be inconsistent with a retrospective claim for payment.

Analysis

23. The Agreement is not a model of clarity. The parties, understandably, focussed on those clauses which supported the constructions for which they contended. As is apparent from the summary of the parties' submissions there is clearly tension between different provisions in the Agreement, some of which tend to suggest recovery of retrospective cost whilst others appear more relevant to addressing matters in the future,

24. Adopting the iterative process described by Lord Mance JSC in *Sigma Finance Corporation* set out above in the extract from *Wood v. Capita Insurance Services* I have attempted to ascertain the objective of the Agreement.

25. In the course of argument, I highlighted the provisions of paragraph 1.1.2 to Schedule 4. As recited above, these set out the principal objectives to achieve the Agency's aim which is to develop a sustainable policy for the management of the Pevensey Bay Sea Defences that is economically justified and environmentally appropriate and which takes due regard of the natural processes within the sediment sub-cell and the effects of and to adjacent coastal defences as set out above.

26. Mr Nissen observed that these provisions simply reflected the objectives of the Agency. Ms Hannaford did not place particular reliance on the same. I agree that the provisions do not provide an answer to the question of construction before me: however they do illustrate the Agency's recognition that the situation may change over a 25 year period and that provision needs to be made to address that change. I do not understand either party to contend otherwise. What divides them is whether, in addressing this dynamic situation, recovery can also be made on what PCDL describe as a retrospective basis.

27. Central to the difference between the parties is the definition of Relevant Cost. As set out above, in the context of paragraphs 4.2 and 4.3 to Schedule 12, Mr Nissen submits that Relevant Cost can be claimed for costs already incurred (the retrospective basis to which PCDL's formulation of the issue refers). Ms Hannaford submits that the Change Procedures in Schedule 12, to which any claim for a Change in Circumstances under paragraph 1.2(g) is subject, are not appropriate to such retrospective claims and that the Agreement cannot properly be construed to permit such retrospective claims. As I have noted, examples are given by the parties which are said to support each construction.

28. The definition of Relevant Cost refers to cost *suffered or incurred* but makes clear this can be *at the relevant time or in the future*. The context to Relevant Cost is that it must be suffered or incurred *as a result of a Proposal.* This suggests, as a matter of chronology, that the Proposal precedes the Relevant Cost because the Agreement views the Proposal as causative of the Relevant Cost. This is difficult to reconcile with a definition which also appears to embrace costs being suffered or incurred at a time other than in the future. The reconciliation is to be found by reading the Proposal as a document in which it is contended there has been a circumstance within the meaning of paragraph 1.2 of Schedule 12 and also contains further information as to how matters may be addressed in the future. Paragraph 1.5(b) of Schedule 12 illustrates there is a distinction between Notice and Proposal, however the reference to costs incurred as a result of the Proposal makes more sense than costs incurred as a result of the Notice. Further, reference to the Proposal also supports a view that the costs under consideration can be those in the future if the matters in the Proposal are accepted.

29. There was some argument before me as to the natural meaning of *proposal*. Mr Nissen drew my attention to the definition in the Shorter Oxford English Dictionary "*the action or an act of stating or propounding something"*. I was not greatly assisted by this. It is clear that a

proposal can relate to costs already incurred: "*I propose to pay your costs"*, just as much as to costs still to be incurred.

30. Looking at paragraph 1.5(a) to Schedule 12, it is clear that the Notice is required promptly. It must be given as soon as reasonably practicable and in any event within 7 days of the occurrence of the event which is sought to be treated as a circumstance. This is consistent with the ability to manage future expenditure as a central element of the Agreement.

31. As Mr Nissen readily accepts, the construction contended for by PCDL requires a number of provisions in Schedule 12 to be of no effect, in particular many of those mandatory provisions setting out the Procedure at paragraph 1.5 to Schedule 12. These are mandatory provisions agreed by the parties to apply to a Proposal, the Proposal in turn being defined as the cause of the cost being sought to be claimed.

32. Similarly and as Ms Hannaford submits, the parties addressed their mind to the applicability or otherwise of provisions of the Procedure. There are specific exceptions carved out, such as at paragraph 1.5(b)(iii) where the requirement to provide an assessment is stated not to apply to events under paragraphs 1.2(n) to (s), with paragraph 1.4 limiting relief to time not money. Having noted that some mandatory provisions would not apply to certain circumstances and addressed this, it is noteworthy that the parties have not said that the provisions of 1.5(b)(i), 1.5(b)(iii), 1.5(b)(iv), all of which I consider are forward looking, do not apply to paragraph 1.2(g). Likewise, it must be recognised that the option to accept or reject the *implementation* of the Proposal (paragraphs 1.6(a) and (e) refer) is difficult to reconcile with a contended entitlement to costs already incurred or to reduce the Service Levels *if it would obviate the necessity for the* Proposal (paragraph 1.6(f)).

33. I can also see no clear commercial justification in allowing retrospective costs to be claimed for the first 20 years in which the Agreement is operative but not for the final 5 years. As I observed in argument, the last five years being most distant from the Effective Date will

therefore be the least predictable. As such it is noteworthy that no provision was made for similar recovery under paragraph 1.1(g) for that period. Of course, it may be said that the amount of investigation required and in particular the 10-year period for assessment was significant and, as a matter of chronology, could not be undertaken given the last period was only 5 years. However, I have heard no evidence on this or whether it would have been possible to divide the 25-year period up into, perhaps two 8-year periods and one 9-year period. In argument I asked the parties whether there was any admissible factual matrix as to how the initial Service Requirements were ascertained.

34. I understand there is no relevant factual matrix and that the Agreement does not assist on this. I therefore leave such considerations out of account save to note that if PCDL's submission is correct, the parties must be taken to have agreed to provide compensation for the circumstance in paragraph 1.1(g) but to have limited that compensation to only part of the period covered by the Agreement and did not, despite the dynamic situation to which I have referred, provide recovery for last 5 years.

35. Having noted the absence of clear commercial justification, I recognise that is not the purpose of interpretation to remake what may be seen as a bad bargain and I also recognise that a provision may be a negotiated compromise or that negotiations were not able to agree more precise terms. In relation to the failure to exclude provisions that might not apply to the circumstances in paragraph 1.2(g), there is a saving that this is limited to reasonable details. As Mr Nissen observed, it would not be reasonable to provide details which are not applicable because they do not arise. Whilst that is a strained interpretation, if the proper construction of the Agreement is that it permits recovery of retrospective costs then it follows that certain of provisions must be taken to be inapplicable to the circumstances in paragraph 1.2(g).

36. It is accepted that elements of PCDL's claim on its construction of paragraph 1.2(g) are recoverable under separate parts of the Agreement. By its email of 12th September 2022 PCDL in making a proposed settlement offer in respect of its claim for increased frequency of Storm Events and increased shingle losses set out a calculation of which the following is an extract:

> *"For 1/6/10 to 31/5/20*
>
> *Total increase in losses:* *129,537m^3*
>
> *Already paid for in relation to 2013/4 and 2015/6 1:50 Events:* *51,032m^3"*

37. The volume of 51,032m^3 is a credit against the claim reflecting recovery pursuant to the provisions of Schedule 11.

38. Given the inapplicability of many of the provisions of Schedule 12, paragraph 1.5(b) to claims under paragraph 1.2(g) it is also noteworthy that the parties did not set out a separate regime for recovery of those elements not caught elsewhere.

39. The provisions of Schedule 11 anticipate that the Agency has an option to decide how to deal with a dynamic situation. It may choose to alter the services to provide in the future thereby limiting its expenditure. This ability to plan and budget for the future also finds expression in Schedule 12 in the ability to reduce Service Levels to obviate the necessity for any Proposal (paragraph 1.6(f) refers).

40. It is this ability to consider the dynamic situation and both plan and budget for the same in the future which, in my judgment, is a central element and intent of the Agreement. In the course of Mr Nissen's submissions I questioned whether the purpose of paragraph 1.2(g) was to allow a "re-baselining" to that effect. Perhaps understandably it was a description which was rejected by Mr Nissen and embraced by Ms Hannaford. I accept Ms Hannaford's submission that the wording of paragraph 1.1 of Schedule 12 (and in particular paragraph

1.1(ii) which is relevant to the present analysis) suggests it is not intended to relate to payments for past events but to the management of future obligations.

41. By reference to the losses claimed then, on the case advanced by PCDL, there would be no ability to manage those costs which are sought under paragraph 1.2(g) because they had already been incurred and were payable. Further, the situation would not be brought to the attention of the Agency until the end of the 10-year period in accordance with the provisions of Schedule 12. This is not consistent with a central element and intent of the Agreement as I interpret the same.

42. However, as I have already observed, Schedule 11 does provide for recovery of costs already incurred, however the relevant period is significantly less. Notice needs to be given within three months. As such, decisions can be taken as to how such matters are to be addressed although, as to timescale, I note that paragraph 4.6 of Schedule 11 states that any methodology agreed under paragraph 4.5 above shall:

> *"(a) include provision for a period of monitoring the volume of shingle on the Frontage which shall, unless the parties otherwise agree, be for a period of no longer than four (4) years."*

43. This reflects paragraph 4.5 which provides:

> *"Within 28 days of receipt by the Agency of PFIC's notice under paragraph 4.4 above, the Agency and PFIC will meet and in good faith make efforts to agree a reasonable method for determining whether there has been a Shingle Loss Event and, if so, the Permanent Shingle Loss (if any) in accordance with paragraph 4.6 below."*

44. Thus far, my analysis suggests that the intent of the Agreement is that retrospective costs are not recoverable under paragraph 1.2 (g) to Schedule 12. However, given the competing clauses one has to look at the Agreement and such an exercise cannot ignore the provisions of paragraph 4.6 to Schedule 12. On a natural reading this expressly recognises that the Agreement provides for a Relevant Cost (or Relevant Saving) where there has been an increase or decrease in the frequency of Storm Events for the first ten-year period

commencing on the Effective Date but provides that where that cost is less than £100,000 neither party is able to claim a Relevant Cost or Relevant Saving under Schedule 12.

45. Ms Hannaford submits that this does not deal with the period in respect of which PCDL makes its claim. That is correct. Nevertheless, it goes directly to the proper interpretation of Schedule 12 and in particular, the extent of recovery for the circumstances provided at paragraph 1.2(g). Similarly, the fact that it is a prohibition not an entitlement is not an answer. The prohibition recognises that, but for the prohibition, a Relevant Cost may be recoverable in respect of the first 10 years.

46. The terms of paragraph 4.6 taken with the definition of a Relevant Cost as a cost suffered or incurred at the relevant time or in the future support a conclusion that the parties did intend there to be provision for recovery in circumstance of paragraph 1.2(g) of costs already incurred in the 10 year period determined in accordance with the provisions of Schedule 12. The parties expressly directed their minds to the period and determined that the circumstance 1.2(g) in the Proposal would cover a ten-year period. In turn this supports my conclusion that the costs claimed for the second ten-year period are similarly recoverable (if established).

47. On that construction, the ability to manage the costs potentially payable by the Agency is limited to future costs and although liable, they will not be able to manage cost already incurred. However, that applies to all circumstances if, as I conclude, Relevant Costs are taken to include costs in addition to those suffered or incurred in the future. The recognition of the past circumstances will still allow management of future costs even if, as I have concluded, the costs of those past circumstances are recoverable in principle. Further I can see no good reason, and Ms Hannaford was unable to identify any, why a claim by an innocent party for the cost consequences of a breach should be limited to future costs only. As I have noted above, this is one of a number of examples where PCDL as the innocent

party would be limited to compensation only for future effects. That is a conclusion which would require clear words and is not one to which I am driven on the proper interpretation of the Agreement as a whole.

Conclusion

48. It follows that, for the reasons set out above, I answer the issue:

> *If there was a material increase in the frequency of storm events in the second decade of the FDSA compared with the first decade, does Schedule 12 of the FDSA permit PCDL to claim, after the end of the second decade, an additional payment in respect of Flood Defence Services and/or Service Requirements which PCDL performed in the second decade of the FDSA?*

Yes.

49. It also follows that I do consider that Schedule 12 permits PCDL to claim for Relevant Cost on a retrospective basis in the manner in which it has sought to claim.

50. I will deal with costs and any consequential matters at a hearing to be fixed should they be incapable of agreement.

Simon Lofthouse K.C.