Neutral Citation Number: [2019] EWHC 1769 (TCC)

Case No. HT-2019-000047

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

Rolls Building
Fetter Lane
London, EC4A 1NL

Before
Miss Joanna Smith QC sitting as a Deputy Judge of the High Court

B E T W E E N:

NETWORK RAIL INFRASTRUCTURE LIMITED

Claimant

and

ABC ELECTRIFICATION LIMITED

Defendant

Mr Piers Stansfield QC (instructed by Eversheds Sutherland (International) LLP) for the Claimant
Mr David Sears QC (instructed by Trowers & Hamlins LLP) for the Defendant

Hearing date: 26 June 2019

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated authentic.

Introduction

1. In these Part 8 proceedings, the Claimant, Network Rail Infrastructure Limited ("**Network Rail**") seeks declarations as to the interpretation of a contract with the Defendant ("**ABC**"), an incorporated joint venture between Alstom Transport UK Holding Limited, Babcock Rail Limited and Costain Limited ("**Costain**").

2. The uncontroversial background facts are as follows:

   2.1 By a contract dated 20 December 2012 ("**the Original Agreement**"), Network Rail engaged Costain to carry out works for Phase 3B of the West Coast Power Supply Upgrade Project Phase 3 ("**the WCPSU**"). Phase 3B involved a section of the West Coast Main Line ("**the Line**") running between Whitmore in Staffordshire and Great Strickland in Cumbria.

   2.2 The Original Agreement incorporated the terms of the ICE Conditions of Contract, Target Cost version, First Edition ("**the ICE Conditions**") subject to a schedule of standard amendments used by Network Rail known as NR12 ("**the NR12 Amendments**").

   2.3 By a Deed of Novation dated 31 March 2014, the Original Contract was novated from Costain to ABC. Thereafter, by a Deed of Variation executed by ABC on 22 September 2014 and by Network Rail on 19 January 2015 ("**the DOV**"), the works to be carried out by ABC were varied so as to include works within Phase 3A of the WCPSU, involving a section of the Line running between North Wembley in Greater London and Whitmore.

3. References in this Judgment to "**the Contract**" will be to the Original Agreement as novated and as varied by the DOV. References to "**the Works**" will be to Phase 3B of the WCPSU and the limited parts of Phase 3A which ABC was obliged to carry out pursuant to the Contract.

The Dispute

4. ABC is entitled to payment by Network Rail under the Contract based in part on the Total Cost ABC incurs in carrying out the works less any Disallowed Cost.

5. Pursuant to clause 1(1)(x) of the Contract, "*Total Cost means all cost (excluding Disallowed Cost and items covered by the Fee) incurred by the Contractor for the carrying out of the Works…*".

6. Pursuant to clause 1(1)(j)(iii), Disallowed Cost means (amongst other things to which I shall return later):

   "*any cost due to negligence* ***or default*** *on the part of the Contractor in his compliance with any of his obligations under the Contract* ***and/or due to any negligence or default on the part of the Contractor's employees, agents, sub-contractors or suppliers in their compliance with any of their respective obligations under their contracts with the Contractor***".

   The words in bold were inserted into the ICE Conditions pursuant to the NR12 Amendments.

7. By its Part 8 Claim Form and Details of Part 8 Claim, Network Rail seeks declarations as to the meaning of Disallowed Cost in clause 1(1)(j)(iii) and in particular, as to the meaning of the word 'default'.

8. ABC makes no complaint about the use of the Part 8 procedure for this claim, but it disputes Network Rail's entitlement to a declaration in the terms sought. If the court is minded to make a declaration, it is ABC's case, as set out in its Acknowledgement of Service, that any declaration should give the word 'default' a different meaning from that advanced by Network Rail.

9. Witness statements have been served in the Proceedings, from Mr Matthew Shotton on behalf of Network Rail and from Mr Stephen Nichol on behalf of ABC. Whilst I have read and had regard to their contents, they add little to the issue of interpretation that I must decide, and very little reference was made to them during the course of the oral submissions. It is agreed between the parties that this Part 8 Claim does not involve a substantial dispute of fact.

The Exercise of the Discretion to Grant Declaratory Relief

10. It is common ground that the court has a discretionary power to grant declarations, whether or not any other remedy is claimed (CPR 40.20), and that its power is to be

exercised (i) with caution in considering whether or not to grant a declaration as to the proper construction of a contract and (ii) in accordance with established principles.

11. My attention was drawn to the notes to CPR 40.20.2 of Volume 1 of the White Book and in particular to page 1308 which makes it clear by reference to *FSA v Rourke [2002] CP Rep 14* that "*When considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose, and whether there are any other special reasons why or why not the court should grant the declaration*". Since the date of the hearing in this matter, these factors have been expressly referred to and followed by Birss J in *Pfizer Limited v F. Hoffmann-La Roche AG [2019] EWHC 1520 (Pat)* at [61]. I did not understand either party to suggest that there were any additional factors that I needed to take into account.

12. Before turning to consider these factors, I shall begin by addressing the question of interpretation which lies at the heart of this dispute.

The Law on Interpretation

13. There have been a number of recent cases at the highest level dealing with the principles of construction and these are well known and not in dispute. I was referred in particular to *Rainy Sky SA v Kookmin Bank [2011] UKSC 50; [2011] 1 WLR 2900* per Lord Clarke at [21]-[23]; *Arnold v Britton [2015] UKSC 36; [2015] AC 1619* per Lord Neuberger at [14]-[23] and *Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] AC 1173* per Lord Hodge at [10]-[15]. I have regard to these statements of principle when interpreting the Contract in this case.

Network Rail's Case

14. Mr Stansfield QC, on behalf of Network Rail, submits that a "*default on the part of the Contractor in his compliance with any of his obligations under the Contract"* in clause 1(1)(j)(iii) of the Contract includes any failure by ABC to comply with its obligations under the Contract. This construction is based on the plain and obvious meaning of the language used: the ordinary meaning of the word 'default' is, or includes, he says, a failure to fulfil a legal requirement or obligation.

15. Consistent with this approach, paragraph 11 of the Details of Part 8 Claim asserts that "*…on a proper construction of the Contract, any cost incurred due to ABC's failure to comply with its obligations under the Contract by ABC is a Disallowed Cost*."

16. The true interpretation of clause 1(1)(j)(iii) is of considerable importance to Network Rail, not least in circumstances where the completion of the Works is (as is common ground) very late. In an interim assessment of sums due to ABC, the Employer's Representative has categorised various sums as Disallowed Cost on the basis that they were incurred due to ABC's breaches in failing to complete the Works with due expedition, without delay, and, by the time for completion, contrary to clauses 41(2) and 43 of the Contract. The Disallowed Cost amounts to over £13 million.

17. It is against this background that Network Rail seeks declarations that:

    (1) the defined term 'Disallowed Cost' in the Contract includes any cost due to a failure by ABC to comply with its obligations under the Contract;

    (2) a cost incurred due to a failure by ABC to comply with the terms of the Contract, including the following, is a Disallowed Cost:

        (a) any failure by ABC to start the Works on or as soon as reasonably practicable after the Works Commencement Date and/or thereafter to proceed with the works with due expedition, contrary to clause 41(2);

        (b) any failure by ABC to substantially complete the works within the stated time for completion (or such extended time as may be allowed under clause 44 or revised time agreed under clause 46(3)) calculated from the Works Commencement Date, contrary to clause 43.

ABC's Case

18. Mr Sears QC, on behalf of ABC, accepts that the ordinary and natural meaning of the word 'default' is 'a failure to fulfil an obligation'. In his witness statement in support of ABC's case, Mr Nichol acknowledges that in its approach to Disallowed Cost to date, Network Rail has sought to apply clause 1(1)(j)(iii) of the Contract in a manner consistent with the declarations sought in these proceedings. However, ABC submits that it cannot have been the parties' intention at the time of entering into the Contract

that Network Rail should be allowed to deduct any cost incurred by ABC as a result of any failure to fulfil its contractual obligations.

19. Instead, ABC contends that (i) when viewed against the background of other relevant clauses in the Contract; (ii) when consideration is given to the overall purpose of the clause and of the Contract (specifically in this case, a Target Cost Contract) and (iii) when regard is had to commercial common sense, it is plain that the word 'default' was intended to carry a narrower meaning.

20. Unhelpfully, ABC's approach to precisely what this narrow meaning should be has fluctuated over time, with a new interpretation being advanced by Mr Sears during the course of the hearing.

21. Originally, ABC appears to have arrived at a similar view to that taken by Network Rail as to the meaning of the word 'default'. Indeed, it informed Network Rail in 2017 that it considered and had been advised, that the word 'default' in clause 1(1)(j)(iii) bore its ordinary meaning, i.e. any breach of contract by ABC. This is apparent from an Advice provided to ABC by Fladgate LLP dated 8 May 2017, in respect of which privilege appears to have been waived.

22. Since then, however, ABC has argued (in its Protocol Letter of Response dated 10 July 2018) that the word 'default' "*must mean a serious significant and material failure to comply with the requirements of the Contract*", alternatively that it "*constitutes a wilful, significant and material failure to comply with [the Contractor's] obligations under the Contract*" (ABC's Acknowledgement of Service dated 1 March 2019), alternatively that it constitutes a '*wilful, deliberate, persistent and material failure' to comply with the Contractor's contractual obligations*." (ABC's Summary of its Position)

23. Finally, after an invitation from me at the hearing to clarify ABC's case, Mr Sears advanced a yet further contention, namely that if, contrary to its primary case, the court is minded to grant a declaration, then such declaration should be to the following effect:

"*The term 'Disallowed Cost' in the Contract includes any cost incurred due to default on the part of the Contractor if, and only insofar as, the default constitutes a wilful*

and deliberate failure to comply with his obligations under the Contract" (*emphasis added)*.

As I understood his submissions, Mr Sears now abandons any suggestion that the words "serious", "significant and material" and "persistent" should be included, although he does appear to maintain that a wilful and deliberate failure will inevitably be significant.

24. Whilst I accept Mr Sears' submission that the changes in ABC's case are not relevant to the exercise of interpretation that I must undertake in resolving this dispute, nonetheless, ABC's various changes of position seem to me to illustrate the difficulty it has encountered in identifying precisely how the word 'default' should be narrowed so as to reflect what it now says must be the objective intentions of the parties. This in turn might tend to suggest that the other provisions of the Contract on which ABC relies do not provide a clear or obvious answer. I form my own view on this later in this Judgment.

The True Interpretation of Clause 1(1)(j)(iii)

25. In my judgment, Disallowed Cost in clause 1(1)(j)(iii) includes any cost due to any failure by ABC to comply with its obligations under the Contract. In arriving at this conclusion, I accept Network Rail's submissions that, applying the principles of construction set forth by the Supreme Court in the three cases to which I have referred above, the word 'default' in this clause carries its natural and ordinary meaning.

26. My detailed reasons for arriving at this conclusion are set out below.

The Meaning of the Language Used

27. The language of clause 1(1)(j)(iii) is clear and unambiguous. Mr Sears confirmed that ABC does not contend that its language is unclear, and he also accepted that the fact that the word 'default' was inserted by the NR12 Amendment gives rise to the presumption that the parties intended to add something to the existing clause.

28. It is common ground that the natural and ordinary meaning of the word 'default' is a failure to fulfil a legal requirement or obligation. I would need very clear evidence from the remaining provisions of the Contract, its factual matrix and commercial

context to conclude that it means something different. As Lord Neuberger said in *Arnold v Britton* at [17] and [18], "*The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language used…the clearer the natural meaning the more difficult it is to justify departing from it*". As I set out in detail below, I have been unable to identify any satisfactory or sufficient basis to reject the ordinary meaning of the word 'default'.

29. The meaning for which ABC contends, namely a 'wilful and deliberate' failure to fulfil a legal requirement or obligation is a meaning that would only usually be achieved by the addition of extra words. There are no additional words in clause 1(1)(j)(iii), or anywhere else in the Contract, to indicate that this is what the parties to the Contract really meant by the word 'default'. None of the other six limbs of the definition of Disallowed Cost in clause 1(1)(j) of the Contract requires an assessment of ABC's state of mind. Further, standing back, I agree with Mr Stansfield that the concept of a wilful and deliberate breach would be a very unusual concept to incorporate into a payment provision designed to assist the Employer's Representative to identify the Total Cost. Indeed, the idea that the Employer's Representative would have to enquire into ABC's state of mind in relation to each and every breach of contract before it could determine whether such breach gave rise to Disallowed Cost would lead (at best) to uncertainty and (at worst) to an almost unworkable cost mechanism. Absent use of the words 'wilful and deliberate' it is difficult to see how the court can conclude that the parties nevertheless meant to give the word 'default' such a restrictive and narrow meaning.

30. I reject ABC's submission that the provisions of clause 65 of the Contract provide "*the best indicator of what the parties intended by the insertion of the word 'default'*".

    30.1 Clause 65 is a termination provision headed '***Default of Contractor***'. Although Mr Sears does not rely on sub-clauses (1)(a)-(d), dealing with assignment by the Contractor without written consent, sub-contracting of the Works in breach of clause 3(3) and bankruptcy/administration (which he acknowledges are "*probably not helpful when trying to understand what will constitute a 'default'*"), he draws my attention to sub-clauses (1)(e)-(i) as follows:

"... if the Employer's Representative certifies in writing to the Employer with a copy to the Contractor that in his opinion the Contractor

(e) has abandoned the Contract without due cause or

(f) without reasonable excuse has failed to commence the Works in accordance with Clause 41 or

(g) has suspended the progress of the Works without due cause for 14 days after receiving from the Employer's Representative written notice to proceed or

(h) has failed to remove goods or materials from the Site or to pull down and replace work for 14 days after receiving from the Employer's Representative written notice that the said goods materials or work has been condemned and rejected by the Employer's Representative or

(i) despite previous warnings by the Employer's Representative in writing is failing to proceed with the Works with due diligence or is otherwise persistently or fundamentally in breach of his obligations under the Contract,

then the Employer after giving 7 days notice in writing to the Contractor specifying the event relied on may enter on the Works and any other parts of the Site provided by the Employer and expel the Contractor therefrom without thereby avoiding the Contract or releasing the Contractor from any of his obligations under the Contract."

30.2 Mr Sears contends that these sub-clauses are plainly concerned with breaches or 'defaults' of the Contractor arising in circumstances where it is acting, in his words, "*without reasonable excuse or in contravention of an instruction*" given by the Employer's Representative. He submits that each of these 'defaults' therefore constitutes a wilful and deliberate (in his skeleton he added, 'serious significant and material') failure to comply with the requirements of the Contract and that the insertion of the word 'default' by amendment into clause 1(1)(j)(iii) must have been intended to capture defaults of a similar type. He

submits that it is only defaults of the type envisaged in clause 65 that the parties are to be taken to have had in contemplation when agreeing to the NR12 Amendment to clause 1(1)(j)(iii).

30.3 In my judgment there are a number of significant difficulties with this argument.

30.4 First, there is no basis in the Contract for the suggestion that the parties intended the word 'default' as it appears in clause 1(1)(j)(iii) to find its true meaning in the provisions of clause 65. The word 'default' is not used anywhere in the text of clause 65 itself.

30.5 Second, the word 'default' appears only in the heading to clause 65. In circumstances where clause 1(3) of the Contract expressly provides that "*The headings and marginal notes in the Conditions of Contract shall not be deemed to be part thereof or be taken into consideration in the interpretation or construction thereof or of the Contract*", I reject the suggestion that I can look at this clause for a "clue" to what the parties intended by the amendment to clause 1(1)(j)(iii).

30.6 In post-hearing notes dealing with the effect of a term which states that headings are not to affect the interpretation of a contract, the parties have drawn my attention to a number of authorities. Mr Sears submits that these authorities are "*not to the point*" because in fact he relies on the language of clause 65 itself (and not on the heading) as an indicator of the kind of 'default' which the parties had in mind when agreeing the amendment to clause 1(1)(j)(iii). However, at the same time he goes on to contend that his approach is consistent with the approach taken by the court in *SBJ Stephenson v Mandy [2000] FSR 286* and *Doughty Hanson & Co v Roe [2007] EWHC 2212* (both cases in which the court had to construe a term to the effect that clause headings were "*for convenience only and shall not affect construction*"). In the latter case, Mann J expressed the view at [71] that "*the heading is descriptive of what the provision is about (that is doubtless the convenience – see SBJ Stephenson v Mandy…*)". Mr Sears says that, taking this approach, ABC relies on the heading to clause 65 "*as a signpost, for convenience, to inform the reader what the clause is about, namely the 'default' of the contractor*".

30.7 I reject Mr Sears' submission that I should adopt the approach taken in these two cases. Clause 1(3) of the Contract is in different terms and makes no reference to the headings being "*for convenience*". Further, I agree with Mr Stansfield that I should prefer the later first instance decision in *Gregory Projects (Halifax) Ltd v Tenpin (Halifax) Ltd [2009] EWHC 2639* (on the basis that it appears to have been reached after consideration of the earlier decisions in *SBJ Stephenson* and *Doughty Hanson* – see *Colchester Estates v Carlton Industries [1986] 1 Ch 80*, per Nourse J at 85) and that I am bound by the decision of the Court of Appeal in *Rathbone Brothers Plc v Novae Corporate Underwriting [2014] EWCA 1464.* In *Gregory Projects*, Lewison J identified that the cases (including those on which Mr Sears relies) were divided on whether a heading should be taken into account, but concluded at [28] "*Where, as here, the contract says in terms that headings "shall not affect the interpretation" it seems to me that respect for party autonomy means that the headings cannot be allowed to alter what would otherwise have been the interpretation of the clause in question*". In *Rathbone Brothers*, the Court of Appeal upheld the decision of Burton J that reference to a heading for the purposes of construction was not permitted, saying that "*the heading cannot be used to cut back on the clear language used in the clause*".

30.8 Whilst Mr Sears is right that these decisions were both specifically concerned with the question of whether a heading can be used to interpret the clause to which it is attached, nonetheless I can see no sensible basis for the proposition that a heading to one clause in a contract may be used, however obliquely, as a guide to the construction of an entirely different clause, where the parties have agreed (as they have in this Contract) that headings are not to be taken into account in the interpretation or construction of the Contract. Further and in any event, it seems to me that ABC is in reality seeking to use the heading of clause 65 to suggest that when the parties refer in the Contract to a 'default' they were intending to refer to the types of default identified in clause 65 itself, a proposition which does seem to me to involve construing the provisions of clause 65, an approach which cannot be countenanced in light of the authorities to which I have just referred.

30.9 It is difficult to see how Mr Sears could begin to make out his case as to the relevance of clause 65 and, in particular, as to the fact that the kinds of 'default' identified therein must have been the only kinds of default contemplated by the parties when agreeing to the NR12 Amendment, if the heading to clause 65 is ignored, as the parties have agreed it should be.

30.10 Third, and in any event, there is no common-sense reason for thinking that the concept of default in clause 1(1)(j)(iii) was intended to be the same as the concept of default insofar as that concept is used in clause 65 (whether regard is had to the heading of clause 65 or not). Indeed, it is not at all clear why the ability to deduct Disallowed Cost should be in any way equivalent to the right to terminate the Contract. Whilst it is hardly surprising that breaches of Contract giving rise to the entitlement to terminate are (at least) serious breaches, it does not to my mind follow that breaches of a similar type are the only breaches which entitle the deduction of Disallowed Cost, the consequences of which are likely to be much less serious. Common sense suggests a broader and less stringent test; a test which is more in line with the natural and ordinary meaning of the word 'default'.

30.11 Fourth, I agree with Mr Stansfield that the suggestion by ABC that a failure to act without reasonable excuse or in contravention of an instruction is the same for these purposes as a 'wilful and deliberate' failure (so as to justify the conclusion that the word default in clause 1(1)(j)(iii) means only 'wilful and deliberate' default) is extremely surprising. Seen in the context of delay, a reasonable excuse will give rise to an extension of time and, absent a reasonable excuse, there will be a default. But that default need not be 'wilful and deliberate' on the ordinary meaning of those words (see *De Beers UK Limited v ATOS Origin IT Services UK Limited [2010] EWHC 3276 (TCC)* per Edwards-Stuart J at [206]). Furthermore, it is entirely unclear how it is said that the contravention of an instruction fits with a scenario in which the Contract is in delay or indeed what the relevance of an instruction might be in circumstances where the Contract must be completed by a particular date. ABC's own reading of clause 65 does not begin to support the construction of the word 'default' for which it contends in clause 1(1)(j)(iii).

31. Mr Sears drew my attention to clause 39 of the Contract which includes use of the word 'default' and suggested that in this clause too, the ordinary and natural meaning of that word must give way to a narrower meaning restricted by reference to the words 'wilful and deliberate'. I reject this argument, which finds no support in the clear and unambiguous language of the Contract.

    31.1 Clause 39 is concerned with the power of the Employer's Representative to instruct the removal and replacement of unsatisfactory work and materials not in accordance with the Contract. Clause 39(2) provides that:

    "*In case of default on the part of the Contractor in carrying out such instruction the Employer shall be entitled to employ and pay other persons to carry out the same and all costs consequent thereon or incidental thereto as determined by the Employers' Representative shall be recoverable from the Contractor by the Employer and may be deducted by the Employer from any monies due or to become due to him and the Employer's Representative shall notify the Contractor accordingly with a copy to the Employer*".

    31.2 If Mr Sears is right in his construction, then this provision would only permit the Employer to employ and pay another contractor to remove and replace unsatisfactory work and materials where ABC had wilfully and deliberately failed to comply with an Instruction. Aside from the potential for disputes over whether any failure on the part of ABC has in fact been wilful and deliberate, the clause would not operate in circumstances where ABC (for whatever reason) forgot to comply or indeed where it took steps to comply but did so incompetently. In my judgment a lacuna of this sort cannot sensibly have been what the parties intended. The more natural interpretation of this provision, consistent with the natural and ordinary meaning of the word 'default' is that, whatever the circumstances giving rise to a failure to carry out the instruction, the Employer is entitled to employ a third party to complete the works and to recover the costs of so doing from ABC.

32. Mr Sears made a similar submission about the use of the word 'default' in clause 43A(4) of the Contract, which precludes an extension of time in the event of delay of the type identified in this provision "*to the extent that any such event, cause or circumstance is caused by the Contractor's default or the effects of any such delay are*

capable of being mitigated by the Contractor". However, there is nothing in this provision which supports the proposition that the Contractor's default should be 'wilful and deliberate', or indeed that it should look for its meaning to the wording of clause 65. In circumstances where the delay events identified in clause 43A would appear, at least in the ordinary course, likely to have been caused by others (including, by way of example, "default by Employer"), clause 43A(4) appears to be a sweep up provision, designed to ensure that ABC cannot benefit from an extension of time in circumstances where it has caused the delay event and must take proper steps to mitigate the effects of any delay. In my judgment it lends no support to ABC's argument.

33. Finally, on the specific meaning of the word 'default', Mr Sears suggested for the first time during his oral submissions that the word 'default' would carry a restricted meaning wherever it appeared in the Contract. I have not been asked in these Part 8 proceedings to construe the meaning of 'default' as it appears in every provision of the Contract and Network Rail has had no opportunity to consider every example of its use. In the circumstances I certainly do not intend to make any findings on general usage and I note that (as appears from clause 43A) the word 'default' is used on at least one occasion to refer to the conduct of the Employer. However, I simply observe for present purposes that it would be extremely surprising indeed if on each of the various occasions that the word 'default' is used in this Contract it was intended to mean 'wilful and deliberate default' notwithstanding that there is nothing in the Contract to support such an unusual and unnatural meaning.

The Clause in its Contractual Context

34. Looking at clause 1(1)(j)(iii) in its context and against the background of the Contract as a whole, I can see no proper basis for concluding that the parties must have intended the word 'default' in that provision to carry a different meaning from its ordinary and natural meaning, much less that I could properly arrive at the conclusion that the parties intended the word 'default' to be restricted in its meaning by reference to 'wilful and deliberate' conduct. I address ABC's submissions in the following sub-paragraphs:

34.1 ABC contends that if default in clause 1(1)(j)(iii) covers any failure to fulfil an obligation under the Contract, as Network Rail contends, then clauses 1(1)(j)(i) and 1(1)(j)(ii) of the Contract (which also form part of the definition of Disallowed Cost) would be rendered otiose. These clauses provide that Disallowed Cost includes:

"*(i) the cost of work of repair amendment reconstruction and rectification or making good defects where such work is carried out to parts of the Works supplied or carried out by sub-contractors and is required under the term of the sub-contract to be at the sub-contractor's expense*

(ii) the cost of repair amendment reconstruction rectification and making good defects after the date of substantial completion which in the opinion of the Employer's Representative is necessary solely due to the use of materials or workmanship not in accordance with the Contract"

34.2 In addition, Mr Sears points out that these clauses make very specific provision for the detailed circumstances in which non-compliance with contractual obligations will give rise to Disallowed Cost. In relation to clause 1(1)(j)(i), only where the cost of such work is required under the term of the sub-contract to be at the sub-contractor's expense, and in the case of clause 1(1)(j)(ii), which is mirrored in clause 49(3), only where costs are incurred after the date of substantial completion. Accordingly, he says, the parties cannot have intended the words in clause 1(1)(j)(iii) to cover <u>any</u> cost due to <u>any</u> failure on the part of the Contractor to comply with its obligations under the Contract: first because such a reading would render other provisions of the Contract redundant and second because the parties were plainly concerned to identify detailed circumstances which would give rise to Disallowed Cost.

34.3 Mr Sears relies in particular on the following extract from the speech of Lord Neuberger in *Arnold v Britton* at [17]: "*Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in the contract. And again, save in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision*". As I understand it, Mr Sears says that the court should not look at the provisions of clause 1(1)(j)(iii) alone, but in

conjunction with the other provisions of clause 1(1)(j) on which the parties must have focussed at the time of agreeing the NR12 Amendments. He points out that clause 1(1)(j)(iii) appears in close proximity to clauses 1(1)(j)(i) and 1(1)(j)(ii) which, on Network Rail's interpretation, it rendered otiose. Mr Sears submits that because clauses 1(1)(j)(i) and 1(1)(j)(ii) were not deleted, the parties must be taken to have intended the word 'default' in clause 1(1)(j)(iii) to have a restricted meaning.

34.4 As to redundancy, I accept Mr Stansfield's submission that sub-clauses 1(1)(j)(i) and 1(1)(j)(ii) are part of the ICE Conditions, whereas the word 'default' has been added to clause 1(1)(j)(iii) by the NR12 Amendments. There is always potential for an amendment by way of an addition to a contract to render another part of it redundant and that may just be the inevitable consequence of the amendment. It is in my judgment unsurprising that an amendment agreed in the NR12 Amendments may have rendered certain terms of the ICE Conditions unnecessary or superfluous. Furthermore, I accept that the court must be cautious in interpreting an amendment by reference to pre-existing parts of a standard form contract, which may not be a helpful indicator as to the parties' intentions in agreeing upon the amendment.

34.5 Indeed it would appear that the parties were not overly concerned at the prospect of duplication in this Contract in any event, as is clear from the fact that Disallowed Cost under clause 49(3)[1] will fall within the definition of Disallowed Cost in both clause 1(1)(j)(vi) ("*any such cost identified in the Contract as a Disallowed Cost or as part of the Fee or which does not form part of the Total Cost*") and clause 1(1)(j)(ii).

34.6 I also accept Mr Stansfield's submission that the mere fact that a natural interpretation of a contract term could render another term redundant is an insufficient basis for the adoption of an unnatural construction, especially where a standard form is involved (See *Beaufort Developments v Gilbert Ash [1999] 1 AC 266*, per Lord Hoffmann at page 274B, *Mutual Energy v Starr Underwriting*

[1] 49(3) *"…the cost of all work carried out by the Contractor under sub-clause (2) of this Clause after the date of substantial completion that in the Employer's Representative's opinion is necessary due to the use of materials or workmanship not in accordance with the Contract or to neglect or failure by the Contractor to comply with any of his obligations under the Contract shall be a Disallowed Cost"*.

Agents [2016] EWHC 590 (TCC) [2016] BLR 312, per Coulson J at [35] and *Spire Healthcare v Royal & Sun Alliance Insurance [2016] EWHC 3278*, per HHJ Waksman QC at [15]). These cases appear to me to contain general statements of principle to which I must have regard and paragraph [16] of HHJ Waksman QC's judgment in *Spire Healthcare*, to which Mr Sears expressly drew my attention, does not assist ABC. That paragraph makes it clear that the redundancy argument has a role to play in the exercise of contractual interpretation but that "*It all depends upon the construction issue in question, the effect of the alternative interpretation and the contractual context as a whole*". In my judgment the other factors in this case to which I must have regard point so plainly towards the use of the natural and ordinary meaning of the word 'default' that the redundancy argument is insufficient to tip the balance. Further, and in any event, it can provide no assistance on the question of what exactly the parties intended the word 'default' to mean if they did not intend it to carry its natural and ordinary meaning.

34.7 Further, I am not persuaded that the extract from Lord Neuberger's speech in *Arnold v Britton* on which Mr Sears relies in fact provides him with the support he seeks to extract from it. Lord Neuberger is there emphasising the fact that, absent unusual circumstances, the parties must be taken to have been focussing on the issue covered by the provision itself, in this case that Disallowed Cost would include costs incurred by reason of the default of the Contractor, and are to be taken to have meant what they said.

34.8 In my judgment, Mr Sears' point about individual clauses making specific provision for circumstances giving rise to Disallowed Cost does not take matters further. Disallowed Cost as defined in the Contract includes seven limbs (clause 1(1)(j)(i)-(vii)), only one of which is concerned with Disallowed Cost as identified elsewhere in the Contract. The parties plainly did not intend Disallowed Cost to be restricted only to cost identified elsewhere in the Contract. Insofar as clause 49(3) makes express provision for Disallowed Cost, that is perhaps unsurprising in circumstances where the requirement to carry out works of repair, amendment, reconstruction and rectification or making good of defects was based on the instruction of the Employer's Representative.

34.9 Finally Mr Sears sought to rely on the provisions of clause 39(2) (already set out above) in support of the proposition that the parties could not have intended any cost due to any failure to comply with the obligations under the Contract, because clause 39 is, he said, an example of a clause that contemplates 'default' whilst not making provision for the costs of that default to be treated as Disallowed Cost. However, as became clear during the course of argument and as I understood him to concede, costs incurred by the Employer under this provision do not fall within Total Cost and so do not need to be treated as Disallowed Cost.

35. Absent a clear indication from other provisions of the Contract that the word 'default' in clause 1(1)(j)(iii) is to carry a special meaning, the construction for which ABC contends can only involve the necessary addition of words designed to restrict the ordinary and natural meaning of 'default'. But, as I have already said, I can find nothing in the Contract to assist on precisely what those words should be. Before accepting an unusual interpretation restricted by the addition of words which would need to be read in to the Contract the court would need to be satisfied, not only that the parties had made a mistake in referring to a 'default' without qualification, but also as to precisely the words that they had intended to use (see *Arnold v Britton* per Lord Hodge at [78]). My analysis above shows that there is nothing in the Contract to support the proposition that the parties intended the word 'default' to be restricted purely to wilful and deliberate failure to comply with the obligations under the Contract.

The Purpose of the Contract

36. I am not persuaded that the fact that this is a Target Cost Contract affects the approach I should take to interpretation.

37. Mr Sears submitted that the "*apparent intention*" of the parties in a contract of this type is that the risk of cost increases due to, for example, defective work, will be shared between them. He pointed to clauses 39 and 49 (both referred to above) and suggested that these clauses clearly showed the intentions of the parties as to the

distribution of risk. He also sought to rely upon clause 8(7)(a)[2] which he described as a significant clause; it cannot have been the parties' intention, he argued, that Network Rail should escape all risk of increased costs resulting from a failure to carry out the Works in an economic and efficient manner. This would negate the pain/gain share mechanism (as provided for in clause 60 of the Contract and which depends upon the relationship between the Target Cost and the Total Cost). Mr Sears also pointed to the Good Faith provisions in the Contract and said that his interpretation was entirely consistent with the overarching ethos of collaboration.

38. However, as Mr Stansfield submitted, the intention of the parties is apparent from all of the terms of the Contract, including the provisions of clause 1(1) as to the meaning of Disallowed Cost which, in my judgment, make it plain that the Contractor was intended to bear the risk of his own breach of Contract. Disallowed Cost is deducted from the Total Cost before the Contractor's Share is calculated and I agree that, in the circumstances, it is difficult to see how the application of the Contractor's Share has any bearing on the proper interpretation of Disallowed Cost, much less how it supports a conclusion that the parties intended clause 1(1)(j)(iii) only to apply to breaches of Contract that were wilful and deliberate. I agree with Mr Stansfield that there may be risks which the parties factored in to the Total Costs which do not involve defective work or delay on the part of the Contractor and that, in the circumstances, it would not be right to conclude that the mere fact that this is a Target Cost Contract leads inevitably to the conclusion that the parties agreed to share the risk of a breach of the Contract provisions by the Contractor such that the word 'default' in clause 1(1)(j)(iii) must carry something other than its natural meaning.

Commercial Common Sense

39. I reject ABC's submission that as a matter of commercial common sense and/or commercial reality, the word 'default' cannot have been intended to cover any failure by ABC to comply with its contractual obligations, no matter how small and insignificant. To my mind, the words of clause 1(1)(j)(iii) are clear. This is not a situation in which I am dealing with two conflicting interpretations in an ambiguous

[2] 8(7)(a) "*The Contractor shall carry out and complete the Works in an economic and efficient manner and shall not at any time engage greater resources for the Works than are reasonably required for the carrying out and completion of the Works in accordance with the Contract*".

clause, where it may often be appropriate to adopt the interpretation which is most consistent with business common sense. As Lord Clarke made clear in *Rainy Sky SA v Kookmin Bank* at [23] "*Where the parties have used unambiguous language, the court must apply it*." The same point applies insofar as Mr Sears maintained the suggestion that a wilful and deliberate default must mean a 'significant' default such that the parties cannot have intended any cost to be captured by the clause. If the parties had wished to limit Disallowed Cost under clause 1(1)(j)(iii) to cost of a particular level, they could have done so. I agree with Mr Stansfield that importing a requirement for costs to be 'significant' into this provision would be likely to create ambiguity and not certainty. It would not be consistent with the natural meaning of the words used or with commercial common sense.

40. Mr Sears accepted that the Contract was not to be construed with the benefit of hindsight and that commercial common sense cannot be invoked retrospectively. ABC may now take the view that the commercial consequences of Network Rail's interpretation of clause 1.1(j)(iii) are disastrous but, as Lord Neuberger said in *Arnold v Britton* at [19] and [20] "*The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language…a court should be slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight*".

The Claim for Declaratory Relief

41. Turning back to the factors to which the court must have regard in the exercise of the discretion to grant declaratory relief, I did not understand Mr Sears to make any particular submissions as to the justice to Network Rail or to ABC. However, in light of my decision as to the true interpretation of clause 1(1)(j)(iii), it seems to me that justice supports the grant of declaratory relief in favour of Network Rail, subject to the question of whether such declaratory relief would serve a useful purpose and whether there are any other special reasons why the court should not grant relief. In this context I have some sympathy with Mr Stansfield's argument that the need for this declaration has arisen because of ABC's change of position as to the true interpretation of clause 1(1)(j)(iii).

42. ABC contends that the declarations sought would serve no useful purpose because they are in broad terms and are highly fact dependent. It submits that, even if granted, the declarations sought will not establish any actual entitlement for Network Rail to make a deduction. Any such entitlement will depend upon, not only establishing the contractual right, but also establishing that all the costs which it seeks to deduct were incurred as a result of culpable delay on the part of ABC. A full trial will be required to resolve the issues of fact that will inevitably arise and the making of a declaration in these proceedings will save neither time nor money.

43. Further, ABC identifies two special reasons why the court should not grant the declarations sought. First, it points out that (as Mr Nichol confirms in his statement) the use of ICE Conditions subject to NR12 Amendments is widespread in contracts in the rail sector. However, these contracts may be made and operated in different factual contexts. ABC says that a declaration as to the meaning of the Contract in this case may have potentially significant and unknown consequences in relation to other similar contracts. Second, it says however that because NR12 is not a standard form (but simply a schedule of amendments incorporated by Network Rail into the ICE Conditions), this is not a case where the proposed declaration will create any certainty in relation to the meaning and widespread operation of one of the recognised standard forms of contract.

44. I have considered these arguments with care, but I am satisfied that this is an appropriate case in which to make the declarations sought and that the factors identified on behalf of ABC do not militate against that conclusion.

45. I accept Mr Stansfield's submissions that in circumstances where, as ABC acknowledges, Network Rail has sought to apply clause 1(1)(j)(iii) in a manner consistent with its interpretation and Network Rail relies on that interpretation to justify a deduction of over £13 million for "*ABC Delay – Staff*", the declarations sought would plainly serve a useful purpose. Network Rail relies on breaches of clauses 41(2) and 43 in making its deduction. Whilst there may well be ongoing disputes of fact between the parties to these proceedings which may ultimately require some form of dispute resolution, the determination of the threshold question of whether Network Rail is entitled to make a deduction on grounds of simple non-compliance with contractual obligations is very likely to assist the parties to resolve

some of the issues between them without necessarily resorting to further legal proceedings (a point that I understood Mr Sears to concede during the hearing). I agree with Mr Shotton when he says in his witness statement that a combination of the court's view on the question of interpretation of clause 1(1)(j)(iii) and subsequent agreement between the parties as to its application, or determination of its application in adjudication, is likely to be the most cost effective and efficient means of resolving future disputes between the parties.

46. I am not persuaded by the suggestion that I should refrain from granting a declaration on interpretation in relation to this Contract for fear of the possible impact on other contracts. Whilst I have no doubt that my decision on the interpretation of the NR12 Amendment may be relevant to other contracts, that does not seem to me to be a valid reason for refusing to make the declarations sought. First, in giving this judgment I have decided the issue of interpretation in any event (and was not invited to do otherwise) and I am not clear why the granting of a declaration in Network Rail's favour will make matters worse. Second, I fail to see how a declaration as to the interpretation of the NR12 Amendments to this Contract will adversely affect the position for other similar contracts. If their factual backgrounds are different then no doubt there would be scope for different construction arguments by reference to their individual circumstances. If their terms, amendments and factual background are the same, then certainty will be achieved by my decision as to the meaning of the very specific amendment with which this case is concerned. Third, there seems to me to be no way of determining the true and proper interpretation of a contractual provision in proceedings of this type, or indeed in a Part 7 trial, without potentially affecting others, whose contracts may contain similar words and phrases. As Mr Shotton says in his statement, "*this court has frequently expressed views on the interpretation of standard forms of contract and, far from being a disadvantage, the additional certainty created by the decisions of this court regarding the interpretation of those terms is one of the main benefits of using a standard form*". Whether or not it is correct to regard the NR12 Amendments as a "standard form contract" does not seem to me to make any difference.

47. In all the circumstances, the justice of this case requires the court to grant declarations in the terms sought. I shall hear further from the parties as to consequential matters if these cannot be agreed on paper.