



Neutral Citation Number: [2019] EWHC 2497 (TCC)

Case No: HT-2019-000184

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 25/09/2019

**Before :**

**MRS JUSTICE JEFFORD DBE**

**Between :**

**DOOSAN ENPURE LIMITED**

**Claimant**

**- and -**

**INTERSERVE CONSTRUCTION LIMITED**

**Defendant**

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**Mr Crispin Winser** (instructed by **Pinsent Masons LLP**) for the **Claimant**  
**Mr Riaz Hussain QC** (instructed by **Fieldfisher LLP**) for the **Defendant**

Hearing dates: 18 July 2019

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**Approved Judgment**

**Mrs Justice Jefford:**

1. This matter arises out of a Joint Venture Agreement (“the JVA”) dated 23 March 2016 between the claimant, Doosan Enpure Limited (“Doosan”), and the defendant, Interserve Construction Limited (“Interserve”). The JVA was entered into for the purpose of carrying out upgrade works at the Horsley Water Treatment Works in Northumberland for Northumbrian Water Limited (“NWL”). The parties to the JVA duly entered into a contract with NWL for those works. That contract (“the Contract”), for which no date appears to have been given, was made on the NEC3 form with Option C: (Target contract with activity schedule).
2. Work began in March 2016. Monthly interim payments have been made by NWL to the JV by payments into the Joint Venture Account (“the JV Account”). The practice of Doosan and Interserve has been to submit a consolidated application for payment to NWL consisting of a spreadsheet with, amongst other things, tabs setting out Doosan’s costs and Interserve’s costs. Payments have then been certified in similar form by Turner and Townsend, as Project Manager, under the Contract. The parties have then produced an Allocation Spreadsheet setting out the sums to which each party is entitled from the payments made by NWL. Up until October 2018, payments out of the JV Account were then also made monthly and in accordance with the Allocation Spreadsheets. Those payments related to NWL’s Payment Certificates nos. 1 to 30. When Doosan asked Interserve to sign the Allocation Spreadsheet in respect of Payment Certificate no. 31, Interserve declined to do so. By letter dated 20 November 2018, Interserve set out its position as follows:

*“.... The commercial and programme information provided by yourselves and consequential impact on costs and time raise concerns that your Works Part Costs including potential damages will exceed your Adjusted Works Part Target Costs. This was discussed at the JV meeting on 7<sup>th</sup> November 2018 ...*

*It was agreed at this meeting that there were a number of key issues which were impacting on this position and that certain actions would be undertaken in order to try and resolve these.*

1. *[Doosan] claim against NWL for delay and disruption associated with compensation events. ....*

2. *[Doosan] internal changes have not been presented to [Interserve] with detailed substantiation to allow agreement. [Doosan] are to provide the required information.*

3. *[Doosan's] latest programme indicated a significant delay to completion of the works of 34 weeks. ... Further meetings are ongoing and it is essential that we get this programme under control to limit ongoing costs and exposure to increasing associated damages.*

4. *Additional power requirements. Any impact of this has not been taken into account within the current projected costs. However this is potentially a large cost issue and [Doosan] agreed to undertake further investigation [to] find a potential solution and make a proposal to NWL.*

*Consequently based upon current information and until the above issues are resolved we raise the matter to the JV committee in accordance with Clauses 8.8 and 8.9 of the JV Agreement recommending that the interim payments are suspended.”*

3. Since then no payments have been made to either Doosan or Interserve out of the JV Account. That led to Doosan issuing the present proceedings by a Claim Form dated 5 June 2019. The Particulars of Claim allege that £5,312,359.71 is due for payment to Doosan in accordance with the Allocation Spreadsheets but that Interserve, in breach of clauses 8.6 and 8.7 of the JVA, has prevented payments being made and/or that Interserve, in breach of clauses 8.8 and 8.9 of the JVA, has unilaterally suspended payments to Doosan in circumstances where its request for suspension of payments has been rejected by the JV Committee.

4. Paragraph 26 of the Particulars of Claim set out the relief sought as follows:

(i) Paragraph 26.1: “A declaration that, on the proper construction of the JVA, interim payments can only be suspended with the unanimous agreement of the JV Committee”.

(ii) Paragraph 26.2: “A declaration that, by refusing to authorise the release from the JV Account of interim payments to [Doosan], [Interserve] is in breach of the JVA.”

(iii) Paragraph 26.3: “An order requiring [Interserve] to authorise the release of the sum of £5,312,359.71 to [Doosan] from the JV Account.”

(iv) Paragraph 26.4: “Alternatively, an order that [Interserve] pays to [Doosan] the sum of £5,312,359.71 as a debt or by way of damages for breach of the JVA.”

5. At the same time as issuing the Claim Form, Doosan made this application for summary judgment and for permission, pursuant to CPR Part 24.4(1)(i), to make the application prior to the filing of the acknowledgment of service or defence. That permission was granted and directions given by Fraser J. by an order dated 10 June 2019. The order made express provision for the parties to have permission to apply to set aside or vary the directions on 2 working days' notice.
6. Doosan's position was that its claims for relief involved a short or relatively short point of construction which could be determined on a summary basis and ought to be determined on that basis in the interests saving time and cost.
7. I heard this application on 18 July 2019. At the conclusion of the hearing, I gave judgment in Doosan's favour, with brief oral reasons, and reserved a fuller written judgment. This is that judgment.

### ***The Contract***

8. There was an issue between the parties as to whether the terms of the Contract with NWL were relevant to the construction of the JVA but some terms were undoubtedly relevant because definitions were carried over into the JVA.
9. Clause 11.2 includes the following defined terms (terms in italics being identified in the Contract Data):

“(8) The Fee is the sum of the amounts calculated by applying the *subcontracted fee percentage* to the Defined Cost of subcontracted work and the *direct fee percentage* to the Defined Cost of other work.

...

(20) The Activity Schedule is the *activity schedule* unless later changed in accordance with this contract.

(23) Defined Cost is

  - the amount of payments due to Subcontractors for work which is subcontracted without taking account of amounts deducted for .....

and

- the cost of components in the Schedule of Cost Components for other work less Disallowed Cost.

(25) Disallowed Cost is cost which the *Project Manager* decides

- is not justified by the *Contractor's* accounts and records,
- should not have been paid to a Subcontractor or supplied in accordance with his contract,
- was incurred only because the *Contractor* did not
  - follow an acceptance or procurement procedure stated in the Works Information or
  - give an early warning which this contract required him to give

and the cost of

- correcting Defects after Completion,
- .....

(29) The Price for Work Done to Date is the total Defined Cost which the *Project Manager* forecasts will have been paid by the *Contractor* before the net assessment date plus the Fee.

(30) The Prices are the lump sum prices for each of the activities on the Activity Schedule unless later changed in accordance with this contract.

10. The Schedule of Cost Components referred to in (23) as an element of the Defined Cost is, in summary, a schedule of elements of cost incurred directly by the Contractor to provide the works.

11. The payment provisions are set out in section 5 as follows:

**“Assessing the amount due 50**

50.1 The *Project Manager* assesses the amount due at each assessment date. The first assessment date is decided by the *Project Manager* to suit the procedures of the Parties and is not later than the *assessment interval* after the *starting date*. Later assessment dates occur

- .....

- at Completion of the whole of the *works*.

50.2 The amount due is

- the Price for Work Done to Date,
- plus other amounts to be paid to the *Contractor*,
- less amounts to be paid by or retained from the *Contractor*.

....

50.5 The *Project Manager* corrects any wrongly assessed amount due in a later payment certificate.

...

## **Payment 51**

51.1 The *Project Manager* certifies a payment within one week of each assessment date. The first payment is the amount due. Other payments are the change in the amount due since the last payment certificate. ....

...

## **Defined Cost 52**

52.1 All the *Contractor's Costs* which are not included in the Defined Cost are treated as included in the Fee. Defined Cost includes only amounts calculated using rates and percentages stated in the Contract Data and other amounts at open market or competitively tendered prices with deductions for all discounts, rebates and taxes which can be recovered.

52.2 The *Contractor* keeps these records

- accounts of payments of Defined Cost,
- proof that the payments have been made,
- communications about and assessments of compensation events for Subcontractors and
- other records as stated in the Works Information.

52.3 The *Contractor* allows the *Project Manager* to inspect at any time within working hours the accounts and records which he is required to keep.

## **The Contractor's share 53**

53.1 The *Project Manager* assesses the *Contractor's* share of the difference between the total of the Prices and the Price for Work Done to Date. The difference is divided into increments falling within each of the *share ranges*.....

53.2 If the Price for Work Done to Date is less than the total of the Prices, the *Contractor* is paid his share of the saving. If the Price for Work Done to Date is greater than the total of the Prices, the *Contractor* pays his share of the excess.

53.3 The *Project Manager* makes a preliminary assessment of the *Contractor's* share at Completion of the whole of the *works* using his forecasts of the final Price for Work Done to Date and the final total of the Prices. This share is included in the amount due following Completion of the whole of the *works*.

53.4 The *Project Manager* makes a final assessment of the *Contractor's* share using the final Price for Work Done to Date and the final total of the Prices. This share is included in the final amount due.

....”

12. The Contractor's share percentages and share ranges are set out in the Contract Data. Where the share range percentage is less than 80%, the Contractor's share is nil; where it is from 80% to 100% it is 50%; the same percentage applies (somewhat oddly) between 100% and 110%; but where the share range percentage is greater than 110%, the Contractor's share is 100%. In other words, if the costs are more than 110% of the target, the entire cost is borne by the Contractor.
13. Convolved though these provisions may appear, their intention is clear. During the course of the works, the Contractor is paid by reference to the Price for Work Done to Date which reflects what the Contractor has paid and which falls within the definition of Defined Cost plus the Fee. The Prices operate as the target cost. Following completion of the works, there is a comparison of the Price for Work Done to date with that target and an assessment of the extent to which the Contractor will benefit from any saving (against the target) or bear the cost of any overrun. That is the pain/gain sharing nature of the contract and the allocation of pain and gain occurs after the completion of the works and not on an interim basis. That, in my view, is clear from clause 53.3. There is no other provision for the assessment of the Contractor's share at

any earlier stage. On behalf of Interserve, Mr Hussain QC did not accept that position and argued that there was nothing in these clauses that prevented the pain/gain share being applied at an interim stage. There is, however, no indication in the Contract of any mechanism by which it could be so applied. It was argued that it was not necessary for me to decide the construction of the Contract, but, to the extent I have set out, its meaning seems to me to be clear.

### ***The Joint Venture Agreement***

14. The JVA reflects the pain/gain sharing regime and, on Doosan's case, similarly provides for that allocation to be undertaken following completion and not before.
15. In the JVA, Doosan is referred to as DEL and Interserve as ICL. Clause 1 of the JVA includes the following definitions:

**“Adjusted Works Part Target Cost** means, in relation to a Works Part, that part of the Target Cost as finally adjusted under the Contract or in accordance with this Agreement (Schedule 4) which applies to that Works Part;

...

**Contract** means any contract which may result from the Purchaser's acceptance of the Tender, ....;

**Defined Cost** has the meaning assigned to [it] in the Contract;

...

**Purchaser** means Northumbrian Water Limited ....

...

**JV** means the contractual joint venture to be established by ICL and DEL for the Project in accordance with the terms of this Agreement;

**JV Account** means the bank account to be opened in the name of the JV;

...

**JV Committee** means the committee of the JV to be established pursuant to Clause 7.1;

**JV Commercial Manager** means the individual appointed from time to time as the JV's commercial manager in accordance with clause 9;

...

**JV Partner Consent** means the consent of both DEL and ICL as confirmed by the unanimous decision of the JV Committee in accordance with the terms of this Agreement;

...

**Target Cost** is the total of the Prices which has the meaning assigned to it in the Contract;

...

**Works** means the works to be carried out by the JV under any Contract;

**Works Part** means that part of the Works (including any design thereof) which DEL or ICL (as the case may be) is responsible for carrying out and completing, and for the rectification of defects therein, under the terms of this Agreement as identified in Schedule 3 of this Agreement;

**Works Part Costs** means, in relation to a Party, the Defined Cost incurred by that Party in providing its Works Part as specified in Schedule 4 in accordance with the Contract;

**Works Part Target Cost** means, in relation to a Works Part, that part of the Target Cost which applies to that Works Part as specified in Schedule 4 in accordance with the Contract.

16. Before setting out further the clauses in which these defined terms appear, I make the following observations:
- (i) The concept of the Works Part and Works Part Costs and Works Part Target Costs do not derive from the Contract because, under the Contract, there is no division of works between the JV partners. The allocation of works into Works Parts appears in Schedule 3 to the JVA.
  - (ii) The Prices under the Contract operate as the target cost. Similarly under the JVA, the Target Cost is defined by reference to the Prices in the Contract.
  - (iii) Although the term is used elsewhere in Schedule 4 there is no definition of Final Target Cost. The Adjusted Works Part Target Cost, however, is the Target Cost (ie the Prices) “as finally adjusted under the Contract or in accordance with this Agreement (Schedule 4) which applies to that Works Part”. Interserve argues that the word “finally” applies only to the adjustment under the Contract, whereas Doosan argues that it applies to both limbs of this definition.

17. Clause 5 sets out the obligations of the parties and includes the following provisions:
- “5.1 It is acknowledged that the Parties are jointly and severally liable to the Purchaser for the fulfilment of the obligations and the discharge of the liabilities imposed upon the Joint venture by the terms of the Contract .....
- 5.2 As between the Parties, each Party shall be liable to the other for the satisfactory performance in accordance with the Contract of all the JV’s obligations relating to the Works Part to be undertaken by it, and accordingly (save as expressly provided otherwise in this Agreement) that Party bears all commercial, technical and other risks arising from such Works Part or connected therewith insofar as the risks and liabilities arising are as a result of failure of that Party and shall (save as aforesaid) indemnify the other Party against the consequences of a failure to so perform such obligations in the manner and subject to the limits established by this Agreement.
- 5.3 Each Party is to notify the other Party as soon as reasonably practicable where it considers the other Party is failing to fulfil its obligations in accordance with this Agreement and where this failure is likely to result in the Party incurring additional costs and resultant change to the Works Part Target Cost in accordance with Schedule 4. Each party will be under the obligation to mitigate where reasonably practicable costs associated with the other Party’s default under this Agreement or the Contract.
- 5.4 If any claim is raised by the Purchaser (except for liquidated damages as Clause 5.5 below) or any third party in connection with the Contract, then the party responsible for the Works Part giving rise to the claim is responsible and shall defend, indemnify and hold harmless from all obligations the other Party. ....
- 5.5 In the event of liability of the JV for liquidated damages or other damages for delay in completing the Contract, the basis for determining responsibility between the Parties will be the schedule attached in Schedule 3 Appendix 1. These damages will be the responsibility of and paid by the Party causing the delay in proportion to the degree that each Party caused or contributed to the delay.”
18. Clause 7 is headed “Management of the JV”. At clause 7.5.1 it provides that all decisions of the JV Committee meetings must be agreed unanimously by the Committee Members in attendance, with the exception of matters specified in Schedule 2 as requiring JV Partner Consent. The matters requiring JV Partner Consent include any decision determination or action taken by the JV Committee in accordance with clause 8.

19. Clause 8 is headed “Project Costs, Payment and Working Capital” and is central to the present dispute:

“Principles

.....

8.4 All monies due to or received by the JV or either of the Parties from the Purchaser in respect of any Contract or any Works shall be due to the JV and shall be paid directly into the JV Account.

Payment

8.5 Each party shall prepare and submit to the JV Commercial Manager interim statement (**Interim Cost Statements**) separately identifying the Works Part Costs incurred by that party for submission to the JV Contracts Manager.

8.6 The parties shall receive interim payments from the JV in reimbursement of the Works Part Costs incurred by each party as shown on the parties’ Interim Cost Statements. Works Part Costs shall be reimbursed in accordance with the principles set out in Schedule 4.

8.7 Interim payments shall be made to the parties on dates and at intervals as determined by the JV Committee as and when sufficient funds are available in the JV Account.

8.8 Where it appears to one Party on the basis of the other Party’s Interim Cost Statements that the Works Part Costs to be incurred by the other Party over the course of the Project are likely to exceed its **Adjusted Works Part Target Cost**, the first Party may request that the JV Committee suspend or reduce the level of interim payments to the other Party to take account of the anticipated cost overrun. Where the JV Committee is unable to reach agreement, the matter may be referred for resolution under clause 21.

8.9 Where it appears to one Party on the basis of the other Party’s Interim Cost Statements that the Works Part are in delay in accordance with Schedule 3 and this is likely to delay completion to the Contract resulting in potential deduction of damages, the first party may request the JV Committee suspend or reduce the level of interim payments to the other Party to take account of the anticipated damages. Where the JV Committee is unable to reach agreement, the matter may be referred to resolution under Clause 21.

...

### Final payments

8.11 At completion of the Project, each Party shall prepare and submit a final statement of the Works Part Costs expended by that Party (a **Final Cost Statement**).

8.12 Subject to clause 8.13, within 28 days of receipt of the final payment by the Purchaser, the Parties shall be reimbursed by the JV in respect of the Works Part Costs shown on their Final Cost Statement in accordance with the principles identified in Schedule 4.

8.13 The final payment to or from a Party shall be calculated in accordance with the principles set out in Schedule 4. ....”

20. Clause 21 provides a dispute resolution procedure in which reference to the Executives (as defined) is followed by mediation, failing which the dispute is referred to this court.
21. Schedule 3 describes the allocation of works between Interserve and Doosan which is fully detailed in Appendix 1. Paragraph 4 of this Schedule also provides that the scope and timing of the works accepted by the Purchaser and the Parties “as a base line for any internal change is as detailed in Appendix 1 & 2”. The following paragraphs recognise that the interfaces and interactions may change as a result of delay or changes in either party’s Works Part. The parties agree to keep each other informed and to take steps to mitigate delay. There is an express provision that if the “innocent” party is requested to do so, it will make reasonable efforts to prevent or minimise delay against reimbursement of its direct costs from the party in delay.
22. Schedule 4 is also central to this dispute and application and it is necessary to set it out in full. In doing so, I add paragraph numbers for ease of reference which also reflects what was done in the course of the hearing:

“[1] **Works Part Target Cost** to be identified in respect of each Works Part (i.e. that part of the initial overall Target Cost which relates to that Works Part); this may be by reference to the Target Summary as appropriate showing £20,775,820.74 for the DEL Works Part and £16,102,625.19 for the ICL Works Part.

[2] The Contract payment mechanism contains a provision which entitles the JV to pain share/gain share in accordance with the Contract.

[3] Once the JV Contractors pain share/ gain share amount has been calculated (hereafter referred to as the “Share”), the JV shall review the Share and apportion the Share between each JV party in relation to the JV parties Works Part.

[4] In order to apportion the Share, the JV will determine the apportionment of the Works Part Costs for each JV Party and the Final Target Cost for each JV party so that the Share can be apportioned accordingly such that the Party receives the Share of the pain or gain which is the difference between that Party’s Adjusted Works Part Target Cost and the allowable costs incurred by that Party.

[5] In the event of a disagreement as to the apportionment of the Share, the calculations will be referred to the JV Committee for resolution and agreement. Subject always to the paragraphs below, each party shall be liable for its own overspend/ under spend for its work part and any claims from the Purchaser or third party or delay damages as Clause 5.4 and 5.5 respectively.

[6] The procedure to be followed for applications for interim and final payment shall follow the Contract procedures.

[7] The JV Commercial Manager will maintain a comprehensive list of internal unrecoverable changes as the works proceed in respect of each Party’s Works Part. (An unrecoverable change is a change that will not result in an increase to the Target Cost in accordance with the Contract but has resulted due to failure to fulfil its obligations by the by one of the Party’s (sic) resulting in the other Party incurring cost as Clause 5.3). The Commercial Manager shall regularly review the list of internal unrecoverable changes with the Contracts Manager and agree their category, value and the Adjusted Works Part Target cost for each Party.

[8] Similarly should either party request the other party to alter their works Part to provide something outside of the Works Part for the other parties (sic) benefit, the requesting party will pay the reasonable costs incurred in providing such change to the other parties (sic) Works Part by the Contracts Manager agreeing the appropriate adjustment to the Adjusted Works Part Target Cost.

.....”

***The parties’ positions***

23. As set out above, interim payments under the JVA and out of the JV Account are dealt with under clause 8. Clause 8.5 provides for each party to prepare and submit Interim Cost Statements. There was some issue raised by Interserve on this application as to

what these were and how they were either defined or identified with the suggestion that there was a lack of clarity in Doosan's case as pleaded and/or that there were no documents which could be relied on as an Interim Cost Statement.

24. The position was, in fact, relatively straightforward. As I have described above, each party submitted an application as described in clause 8.5 which formed part of the consolidated application up the line. That was, therefore, the party's Interim Cost Statement. Those were submitted to Turner & Townsend, as Project Managers, and, under the Contract, Turner & Townsend assessed and certified sums due to the JV in respect of those applications. The format used for submissions (in electronic form) included a tab for Interserve costs and a tab for Doosan costs and the certified sums similarly maintained that distinction. In consequence, one could readily see what had been certified in respect of the costs incurred (or Defined Cost) by each of the JV partners. The same was not true of the Fee payable for which some further calculation would have to be made. The parties then produced and agreed an Allocation Spreadsheet which identified what was due to each of them.
25. It was Doosan's case that, in accordance with the first sentence of clause 8.6, it was the amount in each party's Interim Cost Statement that was then to be paid to the relevant JV partner. In fact, what was paid up until October 2018 was the amount certified by Turner & Townsend and Doosan's claim in this action is based on amounts certified thereafter. It was, therefore, the case that in practice the parties had treated the amount of the Interim Cost Statement referred to in cl. 8.5 as the amount certified in respect of any Interim Cost Statement. The Allocation Spreadsheets reflected that certification and were signed by both parties. Neither party sought to resile from that position and, in particular, Doosan had no case that it was in fact entitled to be paid the greater amount that it may have claimed in any Interim Cost Statement.
26. On the face of it, therefore, Doosan's case was simple and was that it was entitled to be paid out of the JV account the amount (or the certified amount as explained above) in its Interim Cost Statement.
27. Interserve's case was, in effect, that the operative words of clause 8.6 were to be found in the second sentence and that Doosan was only entitled to be reimbursed in

accordance with the principles in Schedule 4. Accordingly the amount to be paid had to be adjusted in accordance with those principles. As it was put in the witness statement of Mr Preston, Interserve's solicitor, in defence of this application, the principles in Schedule 4 mean that reimbursement of cost is made "net of internal changes, delay damages and other adjustments".

28. This was, of course an application for summary judgment. Both counsel reminded me of the test to be applied. Interserve did not have to show that they were right on the construction of the JVA only that they had a realistic prospect of success. On the other hand, if the application turned on a short point of construction that would not be assisted by further evidence or examination at trial, the court should grasp the nettle and decide the issue of construction in the interests of saving the parties time and money.
29. Further, reliance was placed on the principles of contractual construction set out in *Re Sigma* [2009] UKSC 2, *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, *Arnold v Britton* [2015] UKSC 36, and *Wood v Capita Insurance Services Ltd.* [2017] UKSC 24. I do not set these out in this judgment but I bear them in mind.

***The issue of construction: discussion***

30. As a matter of the natural reading of the words of clause 8.6, in my judgment, the most obvious meaning is that the operative words of clause 8.6 are the first sentence and not the second sentence. That first sentence provides that the parties are to receive interim payments in reimbursement of "the Works Part Costs" as shown on the Interim Cost Statements. The Works Part Costs is the Defined Cost incurred in providing the Works Part "as specified in Schedule 4 in accordance with the Contract". The reference to Schedule 4 may well be an error and intended to be a reference to Schedule 3. In any case, Schedule 4 does not specify either the Works Part or the Defined Cost. The Defined Cost is that in the Contract and is, in summary, the Contractor's costs plus the Fee.
31. The second sentence, on any view, poses a difficulty in construction. If Interserve were right, then what was to be reimbursed, on an interim basis, would not necessarily be in accordance with the Interim Cost Statement or be the Defined Cost but would rather be

“in accordance with the principles set out in Schedule 4”. Not only does that contradict the first sentence but Schedule 4 makes no obvious reference to principles applicable to interim payments. There is no principle set out that reimbursement is net of internal changes, delay damages and “other adjustments”.

32. In Schedule 4, the paragraphs [1] to [5] are patently about what happens at the end of the project in terms of pain/gain. That is consistent with the position under the Contract.
33. The only provision that either party was clearly able to point to as a “principle” was that in the paragraph numbered [6]. That makes some sense and gives the sentence some meaning because it clarifies that the applications for interim payments are to be made on the same basis as under the Contract.
34. At one point in the argument, Mr Hussain QC submitted that clause 5.3 was the basis of the claims that would be advanced in defence. I deal with the reference to that clause in the paragraph numbered [7] below. As a free-standing basis for a claim by Interserve against Doosan, the submission is unsustainable. Clause 5.3 is about notification and mitigation and nowhere in Schedule 4 does it feature as a “principle” on the basis of which an adjustment is to be made to the sum paid to a party from the JV Account on an interim basis. The references to clauses 5.4 and 5.5 may be more promising from Interserve’s point of view but they appear in Schedule 4 in the context of the apportionment of the Share between the parties to indicate that a particular party’s liability for damages under these clauses falls outside the operation of the Share mechanism. Again I do not see that as establishing some principle to be applied in the context of the making of interim payments from the JV Account which does not involve the payment of a debt from one JV party to the other.
35. The subsequent paragraphs [7] and [8] were the real focus of argument at the hearing. As Interserve’s argument was developed, it was these paragraphs that Mr Hussain QC relied on for the “principles” applicable to interim payments. However, Interserve’s case as to what these principles were and how they would apply was not clearly set out. That obfuscation should not and does not deter me from construing the contract if I can do so properly without further factual context.

36. Under paragraph 7 what was argued was that, if Doosan caused Interserve to incur additional costs (falling within clause 5.3), the paragraph had the effect that some adjustment in the sums paid out to Doosan on an interim basis had to be made. It was not at all obvious how that was said to operate nor is it what the paragraph provides:
- (i) Under this paragraph, the JV Commercial Manager maintains a list of internal unrecoverable changes as the works proceed.
  - (ii) The definition of unrecoverable change is one that will not result in a change to the Target Cost (ie will not result in a change to the Prices under the Contract) but is the product of one party's default in its obligations causing the other to incur costs. The effect of one party incurring such a cost (without a corresponding increase in the Target Cost) would be to decrease the likelihood of a gain and increase the likelihood of pain. Thus the Target Cost for each party in respect of its Work Part is to be adjusted under the Agreement.
  - (iii) This is expressly referred to in the definition of Adjusted Works Part Target Cost and it is apparent that the agreement of the adjustments is intended to be carried out during the course of the works and not only on completion. What, in my judgment, that contemplates is that the extent of the adjustments to the Works Part Target Cost will be agreed on an ongoing basis so that they can be taken into account when the "Final Target Cost" comes to be ascertained and paragraph [4] applied.
37. Interserve's argument was, however, that that somehow also meant that a corresponding deduction was to be made from the amount payable on an interim basis to the other JV partner and/or that the pain/gain mechanism was to be applied at an interim stage. That is not what the paragraph says and, whilst one can see why that might have been provided for, it is impossible to spell it out of paragraph 7.
38. One point made in support of that argument was that the Adjusted Target Cost for the Works Parts would have to be adjusted so that the total for both Works Parts always added up to the Target Cost under the Contract. Whilst I can accept the logic of that argument, it does not mean that, if the "guilty" party's Works Part Target Cost is

subject to a downward adjustment, the payment it receives on an interim basis is similarly reduced by the same amount. Rather it means that the “guilty” party’s risk of pain increases and chance of gain decreases.

39. For Doosan, Mr Winser’s primary point was that none of this was relevant to interim payments and that as a matter of construction these matters were to be dealt with at the conclusion of the project (as under the Contract). It is right that paragraph 7 contemplates an ongoing process of agreement of value and Target Cost but, in my view, Mr Winser was right to say that that is part of the process that leads to the eventual agreement of the “final” Target Cost. The difficulties in applying this so-called principle to interim payments do not then arise.
40. In another identification of the principles in Schedule 4, Mr Hussain QC submitted that the Adjusted Works Part Target Cost operated as a ceiling on the amount payable to a party from the JV Account. Thus if the Adjusted Works Part Target Cost had been reached, the JV partner was not entitled to any further monies out of the JV Account because that party would never recover more than the Adjusted Works Part Target Cost. That argument is unsustainable because it is completely at odds with the structure of the JVA (and indeed the Contract) in which there is a reckoning, at the end of the project, of costs incurred as compared with Target Cost and a sharing of the relevant pain and gain. Further, as Mr Winser submitted, there are two express provisions of the JVA in clauses 8.7 and 8.8 which deal with the scenario in which one JV partner considers that the other will exceed its Works Part Target Cost and can ask the JV to agree to suspend payments. There would be no need for such a provision if the Target Cost operated as a ceiling.
41. Similar submissions were made by both parties in respect of paragraphs [8] and [9] and again it seems to me that, whilst the provisions contemplate that adjustments to the Works Part Target Costs will be agreed as the works progress, that does not amount to an agreement that the pain/gain sharing mechanism will be applied in some way on an interim basis or that corresponding deductions from interim payments will be made.
42. In my judgment, therefore, Doosan is right in its construction of clause 8.6.

43. I should add this. Mr Hussain QC submitted that the proceedings were premature because Interserve had not yet served its Defence. The implication of that submission was that there would be something in a Defence which might change or elucidate this position. This dispute first arose, at latest, in November 2018. It was then the subject of inter party and inter solicitor correspondence in which both Doosan and Interserve were able to set out their positions. Proceedings were not issued until June 2019: by this time Doosan's case was clear and there had been ample opportunity for Interserve to formulate its own case and gather relevant evidence.
44. As I have set out above, an application was made for permission to commence Part 24 proceedings before acknowledgment of service. Permission was granted in an order that permitted either party to apply to set aside or vary the order on 2 days' notice. No time limit on the making of such an application was imposed. If Interserve had thought that the Part 24 proceedings were unfair and/or that the timetable did not allow them properly to advance their defence, they could have applied for the order to be set aside or varied. They did not do so.
45. In reality the matters that Interserve wanted to put before the court at a trial were matters going to the substance of their case that there fell to be deducted from payments to Doosan the amounts that Interserve relied on in the "JV Internal Change Register" whether by adjustment of the Works Part Target Costs or under clauses 5.4 and 5.5. In other words, these were matters going to the validity of those claims and not to the construction of the contract. As Mr Winser submitted, the effect of my giving summary judgment on the declarations sought was not to preclude ICL from raising any of those matters in the final reckoning - however Interserve said they should be taken into account - but rather that they could not be relied on to make deductions from payments due to Doosan at an interim stage.
46. Further, I note that Mr Hussain QC drew to my attention various provisions of the JVA, including clause 8.6 and clause 7.5.1, which provided that the JV was to agree dates for payment and that decisions under clause 8 required unanimity. I asked whether he sought to argue that no payment could be due to a party without the express agreement of the other and that was an argument that, unsurprisingly, he disavowed.

### *Clause 18*

47. Mr Hussain QC's fallback position relied on clause 18 of the JVA which provides as follows:

"18.1 Notwithstanding that the Parties may be jointly and severally liable under the Contract and notwithstanding any other term of this Agreement, it is the intention of this Agreement that each Party's responsibility and liability individually or to third Parties (including the Purchaser) shall be limited to its respective Works Part and its performance in connection with this Agreement. Subject to the provision of [Schedule 4 (risk sharing/allocation)], each Party (the "Indemnifying Party") shall therefore indemnify, defend and hold the other Party (the "Indemnified Party") harmless from and against any loss, claim, cost, expense, or other liability ("Losses"), incurred by the Indemnified Party arising from or as a result of the execution by the Indemnifying Party of its Works Part and the rectification of defects therein, or its failure to execute the same, including in respect of:

[a list including defects, liquidated damages arising from failure to pass performance tests and any other breach of the Agreement follows]"

48. It was Interserve's case that the adjustments it sought to make to interim payments and/or some of them were also matters in respect of which it was entitled to an indemnity under clause 18 and that accordingly these amounts could be the subject of a cross claim and equitable set-off against sums otherwise due to Doosan.

49. This case had not been the subject of previous correspondence and nor was it canvassed in the witness statements. It was first raised in Mr Hussain QC's skeleton argument on this application. That was not in itself a reason to discard it or regard it with suspicion. However, there is a fundamental problem with this alternative case. As Mr Winsor pointed out, and as I have said at paragraph 34 above, this is not a case in which a claim was being made for payment by Interserve to Doosan (although that was an alternative order sought) but rather for payment out of the JV account. There was not, therefore, on Doosan's primary case a claim for monies from Interserve against which any claim to an indemnity could be set off.

50. In so far as Interserve's case involved the proposition that there was to be some sort of accounting under the JVA in respect of the indemnity under clause 18, that was simply not provided for in the JVA.
51. Further, it was submitted that if Interserve's argument were right, it would fly in the face of the provisions of the JV under clause 5.3 and Schedule 4. Where one JV partner considers the other to be in breach, clause 5.3 provides for notification which may lead to the identification of an internal unrecoverable change leading to the adjustment of the Works Part Target Cost (under Schedule 4). Together these provisions deal with how costs incurred by one party as a result of the other party's default are to be accounted for in the (on Doosan's case) final reckoning. The indemnity provisions of clause 18 had, it was submitted, nothing to do with this. In my judgment, that submission is right. Clause 18 is not concerned with payments out of the account either on an interim or final basis but with liabilities of the one party to the other. If the position were otherwise, there would be two sets of provisions dealing with the same issues inconsistently within the JVA.

***Estoppel by convention***

52. Doosan had also pleaded an alternative case that Interserve was estopped by convention from making adjustments to interim payments based on direct costs. For the purposes of this application, Doosan accepted that this case was not capable of being the subject of summary judgment.

***The declarations sought***

53. The declaration sought under paragraph 26.1 of the Particulars of Claim was not the subject of further argument. It was common ground between the parties that interim payments could only be suspended by the unanimous agreement of the JV Committee and there was no question that such unanimous agreement had not been reached.
54. For the reasons I have given, in my judgment, Interserve had no defence to the claim made by Doosan for declaratory relief under paragraph 26.2 of the Particulars of Claim. This issue turned on a point of construction and the opportunity for Interserve to further articulate its defence and put before the court further evidence of its cross-claims or

adjustments would make no difference and was not a good reason for the matter to proceed to trial. I, therefore, granted the declaration sought.

55. Paragraph 26.3 of the Particulars of Claim posed slightly more difficulty. In seeking an order that Interserve authorise payment from the JV account it appeared to seek an order for specific performance or a mandatory injunction but with very little detail as to who was to be ordered to do what. I invited the parties to agree the terms of the appropriate order, indicating that a further declaration might be more appropriate. The parties in due course agreed the terms of a declaration and I granted a declaration that Doosan was entitled to the release of the sum of £5,312,359.71 from the JV Account (representing Doosan's share of interim payments made by NWL in respect of Certificates 31 to 38 inclusive).
56. Accordingly, it was not necessary for me to consider further the terms of paragraph 26.4 of the Particulars of Claim.
57. The Particulars of Claim also made a claim for interest. Neither of the parties addressed the issue of interest in its skeleton. It seemed to me to raise a number of issues. Firstly, as I have said, this was not primarily a case in which Interserve was being asked to pay monies to Doosan but rather to authorise their release from the JV account. It was, at the least, questionable, on what basis Interserve should be liable to pay interest to Doosan. The JVA itself made, so far as I can see, no provision for the payment of interest. Secondly, the JVA provided no set dates for payment which could, if there were some entitlement to interest, be taken as the starting point for payment. Reliance on the Late Payment of Commercial Debts (Interest) Act 1998, therefore, seems to me to have been misconceived (albeit I heard no argument on the matter). In any case, I would not have and did not give summary judgment on any claim for interest and Mr Winser indicated that, in the light of the judgment given, that claim would not be pursued and the proceedings were effectively at an end.