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[2021] EWHC 640 (TCC)

Case No: HT-2019-000061

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

Business and Property Courts
Rolls Building
London, EC4A 2NL

Date: 23rd March 2021

Before :

THE HONOURABLE MR JUSTICE FRASER

- - - - - - - - - - - - - - - - - - - -

Between :

BECHTEL LIMITED **Claimant**

- and -

HIGH SPEED TWO (HS2) LIMITED **Defendant**

and

BALFOUR BEATTY GROUP LIMITED,
VINCI CONSTRUCTION (UK) LIMITED
VINCI CONSTRUCTION GRANDS PROJETS
and SYSTRA LIMITED

Interested Party

- -

JUDGMENT (No.2)
Costs of the Interested Party

- -

Michael Bowsher QC and Ligia Osepciu (instructed by **Hogan Lovells LLP**) for the **Claimant**
Anneliese Blackwood (instructed by Pinsent Masons LLP) for the **Interested Party**
The Defendant did not appear and was not represented

Hearing date: 17 March 2021

Mr Justice Fraser:

Introduction

1. This judgment is in respect of an application for costs by the winning bidder, Balfour Beatty Group Ltd, Vinci Construction (UK) Ltd, Vinci Construction Grands Projets SAS and Systra Ltd, in a sizeable procurement competition for a very substantial contract. I shall refer to this consortium as BBVS. The litigation as a whole concerned a procurement challenge brought by Bechtel Ltd ("Bechtel") against High Speed Two (HS2) Ltd ("HS2") in respect of the award of the contract to become the Construction Partner to build Old Oak Common. This is one of the two Southern stations for Phase 1 of the HS2 high speed rail link, the other being Euston. BBVS is an interested party in the litigation in circumstances that are described more fully below.

2. BBVS won the procurement competition, which was conducted in 2018. Bechtel came second. On 5 February 2019 HS2 notified the parties of the outcome of the competition. On 1 March 2019 Bechtel issued its claim form, which imposed the automatic suspension under Regulation 110(1) of the Utilities Contracts Regulations 2016 ("UCR 2016") preventing execution of the contract between HS2 and BBVS as the winner of the competition. That suspension was lifted (in the event by consent, and on certain terms) by the court by Order dated 26 August 2019, the application having been issued by HS2 on 1 July 2019. Thereafter, HS2 and BBVS entered into the contract for Old Oak Common on 16 September 2019. Works under that contract have therefore been underway since then.

3. On 4 March 2021 I handed down judgment following the liability trial, the neutral citation for that judgment being [2021] EWCH 458 (TCC). BBVS did not take part in that trial. The result of the judgment was that the claim by Bechtel against HS2 failed on liability, and therefore was dismissed. Bechtel has indicated its intention not to seek permission to appeal, which meant that the only outstanding consequential matters remaining to be dealt with in the litigation were costs.

4. Costs budgeting would not have applied automatically to this litigation, but HS2 sought at an early stage (and obtained) the imposition of costs budgeting, due to concerns about the potential level of costs expenditure by Bechtel. Bechtel opposed this, but having heard the contested application, and by the terms of an order that I made on 5 July 2019, costs budgeting was imposed. The parties' costs budgets were approved in the sum of £1.476 million for HS2's costs, and £1.886 million for Bechtel.

5. Due to the presence of different without prejudice offers between these two parties, and the terms of the liability judgment itself, there was a disagreement between HS2 and Bechtel about the correct order to be made on costs, the correct basis of detailed assessment and the correct level of payment to HS2 on account of its costs. Bechtel accepted in principle that it should pay HS2's costs. However, and very sensibly, prior to the hearing all of those differences were resolved by these two parties' legal advisers, and it was not necessary for HS2 to appear at the hearing of consequential matters. By way of consent order, Bechtel agreed to pay HS2 £1.55 million in full and final settlement of the claim for costs by HS2. It is not necessary to explain why that figure is slightly higher than the approved budgeted figure, because it was reached by agreement of the parties.

6. However, BBVS had been joined to the litigation in 2019 as an interested party. After the substantive judgment was handed down, effectively bringing the litigation to an end, BBVS issued an application, supported by two witness statements of Mr Fletcher (the partner in charge of the case), seeking payment of some of its own costs from Bechtel. The parties could not agree the relevant order in this respect and so I heard that application, at which both parties appeared by counsel. BBVS made clear that they were not seeking all of their legal costs incurred in the proceedings, but costs in two particular categories.

7. I had observed at [134] in the liability judgment that bidding on a project such as this one for Old Oak Common was "time-consuming, expensive and important". The pleadings and correspondence between HS2 and Bechtel made clear that Bechtel's own bid costs were in the region of £3,500,000. Put together with the costs Bechtel has agreed to pay HS2, and its own costs incurred in the litigation, the total expenditure by Bechtel on the procurement competition and the litigation taken together is likely to be in the region of approximately £7 million (if not more).

8. The costs being claimed by BBVS in this application are somewhat more modest. It claimed its costs under two heads, namely (1) £170,030 for complying with the confidentiality ring provisions and protecting its own confidential information; and (2) £12,794 arising out of dealing with the plea by Bechtel for a declaration of ineffectiveness in respect of the contract it entered into with HS2 to build Old Oak Common. Ineffectiveness was one of the remedies being sought by Bechtel in the substantive litigation. Thankfully the quantum (though not the principle) of that latter item was agreed by the parties, in the sum of £12,760, prior to the hearing.

9. It is sometimes the case that points of importance and wider interest arise in respect of insignificant sums of money. This is one of those occasions. Certainly costs of just under £13,000 are wholly insignificant in this case when compared with the cost of the station itself at £1.054 billion; the cost of the bidding by Bechtel alone at £3.5 million; the fee and profit which BBVS will be paid as the Construction Partner (the precise figure is contained in Confidential Appendix II, but is a sizeable sum); and the costs of the litigation as a whole. Even the higher amount of costs claimed regarding BBVS' confidential information of £170,000 are not large in the context of the case as a whole, or the value of the contract itself. However, those observations should not be taken as being unduly critical of Bechtel and/or BBVS for taking a firm stand on their rights, and strongly contesting the final costs order at the very end of what has been very substantial litigation. Perhaps litigation costs have become the continuation of commercial competition by other means.

10. As it happens, there are some important points of principle that arise upon this application, in respect of which there is only limited direct authority. That is the explanation for this reserved judgment on what might appear, otherwise, to be relatively minor matters of costs.

11. Procurement litigation under the UCR 2016 (and similar Regulations such as the Public Contracts Regulations 2015 or PCR 2015) is heard in the TCC, but procurement litigation sometimes starts life in the Administrative Court, and some litigation starts in both courts. This is recognised both in Appendix H to the Technology and Construction Court Guide (2nd edition, 5th revision), which deals with public procurement cases, and part 5.7 of the Administrative Court Judicial Review

Guide 2020. The instant case only proceeded under the Regulations, but I consider that the same issues may arise in procurement proceedings other than those solely under the Regulations. Accordingly, I have regard below to the provisions dealing with interested parties and costs in part 23.6 of the Administrative Court Guide, not in order to apply them, but rather to consider whether the principles that I take from the authorities, are consistent with them.

12. There is one procedural difference between proceedings relating to procurement that are issued in the Administrative Court, and those issued under the Regulations in the TCC, so far as interested parties are concerned. In the former, under CPR Part 54.6 and Part 54.7 the claimant must identify a person directly affected by the claim as an interested party and serve the Claim Form upon that person. Under CPR Part 54.8(4)(1) the defendant can also identify potentially interested parties in its Acknowledgement of Service, and this will be considered by the court at the stage of considering the application for permission to apply for judicial review. There is no similar obligation upon claimants under the Regulations bringing a procurement challenge in the TCC, not least because all such challenges will affect the winning bidder (or all the other bidders, if the challenge is brought before the result of the competition). The involvement of interested parties under the latter proceedings brought under CPR Part 7 in the TCC will always require an order of the court, and that is the route whereby winning bidders become involved in such proceedings as interested parties.

The involvement of BBVS

13. The order granting BBVS the status of interested party was made by Stuart-Smith J (as he then was) in his Order dated 1 July 2019, in the following terms:

> "1. The applicant, Balfour Beatty Group Limited, VINCI Construction Grands Projets, VINCI Construction (UK) Limited and Systra Limited, together BBVS, is joined as an Interested Party to the proceedings for the purpose of issues concerned with the disclosure or inspection of BBVS' confidential information.
>
> 2. Pursuant to paragraph 1:
>
> 2.1 BBVS is to be given advance notice of
>
> 2.1.1 any application for disclosure or inspection, or any proposal or request for disclosure, of documents containing BBVS's confidential information
>
> 2.1.2 any application or proposed order or agreement between the main parties (or any of them) concerning the terms on which the disclosure of BBVS's confidential information should be made, including but not limited to the creation or amendment of any confidentiality ring.
>
> 2.2 BBVS shall be permitted to make submissions to the Court in relation to any of those issues."

14. This clearly prescribes the involvement of BBVS, and specifies the extent to which it was entitled to participate in the proceedings from that date. Confidential information had earlier been defined in the Order of Waksman J dated 1 May 2019 as including information belonging to any member of the BBVS consortium.

15. BBVS was also, in an Order that I made dated 5 July 2019, given permission to participate both in the CMC of that date, and also the application by HS2 to lift the automatic suspension. Further directions in respect of that, which had an impact upon BBVS as the interested party, were made on the occasion of the CMC but drawn up in a second Order, which was sealed on 10 July 2019. Other orders in respect of the confidential information were made by O'Farrell J on 24 July 2019, and by His Honour Judge Russen QC sitting as a Judge of the High Court on 26 August 2019 and 1 September 2020. Each of those last two orders concerned other bidders and did not concern or affect BBVS.

16. The two heads of costs claimed by BBVS, which I have set out at [8] above, must be considered separately. The same outcome will not automatically occur on the application for each of those. However, before doing that, it is necessary to consider the relevant principles that should be applied in a situation such as this one.

The principles

17. Ms Blackwood for BBVS submits that the court has the power to order Bechtel to pay such costs pursuant to section 51(3) of the Senior Courts Act 1981. The statutory provision states that "The court shall have full power to determine by whom and to what extent the costs are to be paid". "Costs" means costs of legal proceedings in the Court of Appeal, High Court and county courts, the subject of section 51 as a whole. Section 51(1) states that subject to the provisions of the statute, other enactments and to rules of court, the costs are in the discretion of the court.

18. Ms Blackwood submits that this is reinforced by paragraph 61 of Appendix H to the TCC Guide. Appendix H deals with procurement cases. That passage specifically confirms that "An interested party can recover or be required to pay costs[9]". She relies on the case of ***Bolton MDC v Secretary of State for the Environment*** [1995] 1 WLR 1176. That is a decision of the House of Lords in a planning appeal, concerning the costs of a developer. It is the subject of footnote 9 to the sentence from paragraph 61 of the TCC Guide that I have quoted.

19. She submits that an interested party is entitled to recover its costs where there is a separate issue on which it was entitled to be heard, or where the interested party has an interest which requires separate representation.

20. The decision in ***Bolton*** related specifically to a planning appeal where the Secretary of State had been successful in defending his decision. Lord Lloyd of Berwick stated (at 1177H) that "it seemed desirable that something should be said about multiple representation in planning appeals before the House". At pages 1178F to 1179D he stated the following:

> "What then is the proper approach? As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and the practice, however widespread and long-standing, must never be allowed to harden into a rule. But the following propositions may be supported:
> (1) The Secretary of State, when successful in defending his decision, will normally be entitled to the whole of his costs. He should not be required to share its award of costs by apportionment, whether by agreement with other parties, or by further order

of the court. In so far as the Court of Appeal in the *Wychavon District Council* case may have encouraged or sanctioned such a course, I would respectfully disagree.

(2) The developer will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary of State; or unless he has an interest which requires separate representation. The mere fact that he is the developer will not of itself justify a second set of costs in every case.

(3) A second set of costs is more likely to be awarded at first instance, than in the Court of Appeal or House of Lords, by which time the issues should have crystallised, and the extent to which there are indeed separate interests should have been clarified.

(4) An award of a third set of costs will rarely be justified, even if there are in theory three or more separate interests.

On the facts of the present case the Secretary of State is clearly entitled to the whole of his costs. The only question is whether the Manchester Ship Canal Co should also receive their costs. In my opinion they should. I accept that the issues were all capable of being covered by counsel for the Secretary of State. But the case has a number of special features.

First, the case raises difficult questions of principle arising out of the change of Government policy…The Secretary of State was concerned not only to support his decision, but also to explain and defend his wider policy. If the appeal had gone the other way, the case would in all likelihood have gone back to him for re-determination de novo. To that extent he had to remain aloof from the parties. On the other hand, the developers were concerned only with the outcome of this particular appeal. They were entitled to take the view that on the facts of this case they had a sufficiently independent interest requiring protection so as to justify a separate representation.

Secondly, the scale of the development, and the importance of the outcome for the developers, were both of exceptional size and weight.

Thirdly, this was an unusual case in the sense that the opposition came, not from the local authority, but from eight neighbouring authorities supported financially by a consortium of major commercial interests.

For these reasons, I consider that the developers…are in this case entitled to their costs in this House and below…"

(emphasis added)

21. It must be remembered that procurement challenges, by their very nature, will always involve the rights of the winning bidder, to a certain extent. Save for situations where proceedings are commenced before the competition is concluded, the court is usually faced with a claim by an unsuccessful bidder, who challenges the outcome of the competition. By definition, there will be a successful bidder, whose status as the winner may depend upon the outcome of the legal proceedings. Not all proceedings automatically involve claims that the result of the competition should be set aside, or that the contract should be declared ineffective, and some claims proceed simply as claims to recover damages, but the majority of such cases will potentially impact upon the winning bidder's rights.

22. Bechtel drew my attention to one of the few other decisions on this subject, and one in the procurement field. In ***Group M UK Ltd v Cabinet Office*** [2014] EWHC 3863 (TCC) Akenhead J gave judgment on an application by an interested party for its costs of appearing on an substantive application by the Cabinet Office to lift the automatic

suspension for the award of a media contract. The winning bidder, Carat, a division of Dentsu Aegis Network Ltd, had (as expressed at [4] in the judgment) attended on the substantive application, made submissions and successfully supported the application by the Cabinet Office to lift the suspension.

23. Akenhead J granted the application for costs by Carat, and made certain observations in performing the necessary summary assessment. Bechtel rely in particular upon one of these, at [4](x) in the judgment, where Akenhead J made a distinction between different types of costs. This was between costs reasonably incurred by a party purely in defence of its own interests (the example used was the costs of a noting brief), which generally ought not to be recoverable; and costs reasonably incurred by an interested party in providing assistance to the court on a matter to be determined. In the latter situation, the judgment states that the court would be more likely to exercise its discretion to award costs, depending upon the other circumstances of the case.

24. However, there is limited assistance for Bechtel from the judgment in ***Group M*** on this application. This is because in that case the interested party, Carat, had been given permission to participate, had submitted its own evidence, and had attended and made submissions, on the substantive application to lift the automatic suspension. That can be seen from [4](iv), [4](v) and [4](vi) of the judgment. It was in respect of that involvement that Carat sought its costs. In the instant case, BBVS has not participated at all in any of the substantive hearings, and its involvement as an interested party arises (to date) as a result of the Order of 1 July 2019, and the Order that I made on 5 July 2019 (which I refer to at [13] and [15] above respectively). In my judgment therefore, the case of ***Group M*** cannot simply be generally applied to the costs application brought by BBVS, and BBVS are in a different position to that of Carat in that case. BBVS do not seek to recover costs in respect of the application to lift the suspension, which was not heard in any event.

25. I draw the following principles from the court's power to order costs, and the decision in ***Bolton***, which I consider are of general application to costs applications by interested parties in procurement challenges. They are as follows:

    1. The court evidently has power to order costs under the statute, and such costs are discretionary. The power must however be exercised in accordance with the Civil Procedure Rules, and in particular CPR Part 44 which deals with costs (and Part 44.2 dealing with the court's discretion as to costs).

    2. Ordinarily, an interested party (who for these purposes will usually be the winning bidder) must be able to show that there is a separate issue on which he was entitled to be heard, that is to say an issue not covered by the contracting authority; or that he has an interest which requires separate representation, in order to recover costs.

    3. The mere fact that a party has won the bid does not automatically entitle him either to become an interested party in the litigation, or indeed, to recovery of his costs if the challenge by the claimant fails.

    4. The court will, for procurement proceedings under the Regulations, when granting a winning bidder the status of interested party, have made an order in this respect. That order will clearly state the extent to which that interested party is entitled to

participate. The order formalises the involvement of the interested party in the proceedings. This is a matter of active case-management. Simply because an interested party is involved at one stage of the proceedings does not entitle that party to participate in later stages of the same proceedings.

5. Simply having been made an interested party by way of such an order does not automatically, of itself, entitle the interested party to its costs.

6. There may be specific and unusual features of any particular case upon which an interested party may rely when it seeks an order for its costs in these circumstances. There can be no exhaustive list of these prescribed in advance. The court will, when exercising its discretion, take all the relevant factors into account, but the presence of one or more of these unusual features will make it more likely that an interested party can obtain a costs order in its favour.

26. One example of the principle at [25](4) being applied is an application to lift the automatic suspension. A court may very well grant a winning bidder the right to participate in an opposed application to lift the automatic suspension, including lodging its own evidence, attending the hearing by counsel and making its own submissions. This is what occurred in ***Group M***. That would not, however, of itself, entitle that interested party to maintain the same degree of involvement and/or seek costs in respect of the whole of the remaining proceedings.

27. In my judgment (and as might be expected, given the care with which such Guides are prepared) these principles are consistent with the provisions in part 23.6 of the Administrative Court Guide. This states at 23.6.1:

"The Court does not generally order an unsuccessful claimant to pay two sets of costs of the substantive claim (typically the costs incurred by the defendant and an interested party), although the Court may order two sets of costs to be paid, in particular where the defendant and the interested party have different interests which require separate representation[228]. If the claimant is acting in the public interest rather than out of personal gain then it is less likely that the court will order the second set of costs."

28. Footnote 228 is to ***Bolton MDC v Secretary of State for the Environment*** [1995] 1 WLR 1176.

29. The principle at [25](2) will also form part of the consideration by the court when an application is made by someone to be added to procurement proceedings as an interested party.

30. Turning to the issue of whether there are any specific and unusual features, guidance can be found from the case of ***Bolton***. In that case, the House of Lords observed there were a number of special features present. Their Lordships specifically identified that due to the subject matter of the case, the developers were entitled to take the view that on the facts they had a sufficiently independent interest requiring protection that justified separate representation. Lord Lloyd also, as a second factor, referred to the scale of the development, and the importance of the outcome, being of exceptional size and weight. Thirdly, the case was unusual because the opposition came not from the local authority (as would be expected) but from eight neighbouring authorities,

supported financially by a consortium of major commercial interests. These features justified the developer being successful in obtaining an order for its costs.

31. In the instant case, the following specific and unusual features exist, which will not be present in most procurement challenges:

    1. The scale of the project that was the subject matter of the procurement was of exceptional size. The contract sum was in excess of £1 billion and the duration of it was to be eight years. Originally in the procurement competition itself the Programme Target was to be 26 December 2026 but that date was moved to a later one. This is a very sizeable infrastructure project.

    2. The project is extremely high profile, and the reputational impact on BBVS would have been considerable, had liability been established and remedies granted to Bechtel.

    3. A major element of the challenge brought by Bechtel was that the BBVS tender was "abnormally low" and that the project could not be properly staffed or administered by BBVS on the basis of the resources included in BBVS' MRS, that formed part of its tender. This required detailed consideration of, and evidence in respect of, the Fee submitted by BBVS as its answer to Question J002 in the Commercial Envelope, which included the profit percentage. This was confidential information of the most commercially sensitive type.

    4. The wider HS2 project will involve other procurement competitions going forwards. Information of the nature identified relating to BBVS's Fee will, or could be, relevant to parts of subsequent bids on other parts of the wider Phase One project (and also Phase Two), either by the BBVS consortium as a whole, or by the constituent members. Such confidential information relates not only to future bidding on other projects generally in the course of business, but could relate to future bids that BBVS itself, any of the four companies individually, or any combination of them, may make on the HS2 project itself going forwards.

32. I also consider that BBVS was entitled to take the view that, on the facts, they had a sufficiently independent interest so far as their confidential information was concerned, requiring protection, that justified separate representation.

33. One of the points made by Bechtel is that both it and HS2 were subject to costs budgeting, which is correct (this was imposed by the court following a contested hearing on that point). Bechtel maintain that it would be unfair to order any costs payable to BBVS as the latter was not subject to the same costs regime. Although that point has some immediate attraction, in reality Bechtel did nothing about this point at any stage in the litigation. Costs budgeting was imposed on HS2 and Bechtel on 5 July 2019, only a few days after BBVS became involved as an interested party. The court could have been asked to impose it on BBVS too, and had that been done, then this nettle could have been grasped at an earlier stage. BBVS was represented at the CMC of 5 July 2019. Although as a matter of generality, it is somewhat unsatisfactory for one party not to be subject to costs budgeting when HS2 and Bechtel both were, I do not consider this point to be fatal to the application by BBVS for costs, given BBVS' extremely limited involvement (made clear in the Order of 1 July 2019). Costs budgeting was not automatically required, and the order of 5 July 2019 imposing it

did not address the costs of BBVS at all. Accordingly, this point does not assist Bechtel. Additionally, the amount of costs sought by BBVS is at a sufficiently modest level that costs budgeting would not have had a material impact upon them in any event.

34. Finally, I ought to make clear that I do not consider that the specific way Bechtel put its case on liability concerning BBVS' bid, and the potential inadequacy of its resources in the MRS, impacts particularly upon the exercise of the discretion on costs at all. Ms Blackwood made submissions that almost amounted to seeking qualitative disapproval by the court of this aspect of Bechtel's case, in so far as it had criticised BBVS's bid, and therefore the impact upon BBVS of the claim was greater than it would otherwise would have been. I am not persuaded by that submission. As a matter of fact, all that Bechtel did in this respect was to take HS2's own internal criticism of BBVS' bid in terms of the resources in the MRS (for which BBVS scored only "Concerns" for Question E001 by HS2's own evaluators), and relied upon those criticisms to advance its own case against HS2. Bechtel was entitled to do this. HS2 is, in any event, under an obligation of transparency under UCR 2016 and its own evaluators had made these criticisms of BBVS' resources in the evaluation records. I do not consider it has any particular impact upon, or assists to any particular extent in, the exercise of discretion on the correct costs order on this application.

The application by BBVS

35. I turn therefore to the costs sought by BBVS under the two heads, namely (1) the costs of complying with the confidentiality ring provisions and protecting its own confidential information; and (2) the costs of considering or dealing with the plea by Bechtel for a declaration of ineffectiveness in respect of the contract to build Old Oak Common (one of the remedies being sought by Bechtel). Application of the principles above leads to the following.

36. The costs sought by BBVS in respect of (1) relating to its confidential information are plainly included within the participation of BBVS as an interested party, as set out in express terms in the Order of 1 July 2019 agreed by the parties and approved by the court. I consider the existence of such an order to be a requirement for an interested party in the position of BBVS to recover its costs. I note that no costs are sought in respect of BBVS' permission to participate in the application to lift the automatic suspension, the order in respect of which is referred to at [15] above.

37. Given the particular features of this case, which I have explained at [31] above, it was entirely justified, and both legally and commercially sensible, that BBVS incur its own legal costs in this respect. Confidential information must be protected, and confidentiality provisions in cases such as this can become highly complicated. Further, the necessity for Confidential Appendix II to the substantive judgment makes it clear that the confidential information in this case was one of the central elements of the evidence. It was also clearly provided for in the Order of 1 July 2019.

38. I consider that BBVS is entitled to recover its costs of (1) in its application, and those costs should be subject to detailed assessment on the standard basis, if the quantum of them cannot be agreed.

39. However, turning to the costs claimed under (2), namely those considering, or dealing with, the plea by Bechtel for a declaration of ineffectiveness in respect of the contract to build Old Oak Common, these fall to be considered differently. They are in an entirely separate category. This is because there was no order of the court permitting BBVS to participate in that aspect of the case in any respect. It was not an interested party in the wider sense in the litigation; its involvement as interested party was as set out in the Order made by Stuart-Smith J (as he then was) regarding confidentiality; and the Order made by me on 5 July 2019 in respect of BBVS's involvement in the application by HS2 to lift the automatic suspension (in respect of which no order for costs is sought).

40. Even if I am wrong in my conclusion at [36] above that the existence of an order is a requirement for BBVS to recover this head of costs, then the absence of such an order is a powerful factor to be taken into account when considering the exercise of the court's discretion.

41. Bechtel did include, as one of its remedies, a claim for a declaration of ineffectiveness in respect of the contract entered into by HS2 and BBVS. Such a declaration, if granted, would have had an extraordinary impact upon BBVS, and also upon the entire HS2 project as a whole. However, BBVS' role in that would have been as the exact counter-part to the interests of HS2 itself. I am not committing to any particular outcome on any application by BBVS to seek to widen its participation in the proceedings going forwards, had one come to be made. The stage for such an application would have been after liability had been established in Bechtel's favour, such that the proceedings would then have evolved to consider remedies in a second trial. All that I will say is that there is no guarantee that BBVS would have been given any wider participation rights as an interested party, than those that already available under the Order of 1 July 2019. It is far from certain that BBVS would have been permitted to take part in a second trial. Any relevant witnesses from BBVS could have been called by HS2 itself.

42. Both HS2 and BBVS would have had matching rights and interests in contesting such a remedy. There would therefore have been no "separate issue" under the first part of the principles I have listed at [25](2) above. BBVS could, potentially, have argued that it had "an interest which required separate representation" to justify further involvement, but I am not persuaded that such an application would have succeeded, and I am not persuaded that such "an interest" would in any way be different from the interests of HS2.

43. Ms Blackwood sought to bolster the claim by BBVS for this head of costs by reliance upon Regulation 115 of the UCR 2016 (there is a similar provision in Regulation 100 of the PCR 2015). This states that:

> "115. **General interest grounds for not making a declaration of ineffectiveness**:
>
> (1) Where the Court is satisfied that any of the grounds for ineffectiveness applies, the Court must not make a declaration of ineffectiveness if—
>
> (a) the utility or another party to the proceedings raises an issue under this regulation; and

(b) the Court is satisfied that overriding reasons relating to a general interest require that the effects of the contract should be maintained."

44. However, this rather overlooks the fact that the proceedings had simply not reached the stage of liability being established, or of BBVS either applying for, or being made, an interested party in respect of the declaration of ineffectiveness, the other aspect to BBVS's costs application. Accordingly, there was no order of the court in this respect. Nor had BBVS "raised an issue under this regulation" as the stage for doing so had simply not been reached, even in a preliminary way.

45. There is no doubt that it was entirely sensible for BBVS to have taken its own advice in respect of this remedy being sought by Bechtel, and there is equally no doubt that the level of costs claimed by BBVS in respect of this is modest. My finding in this respect is not intended to suggest otherwise. However, I adopt the expression of Mr Bowsher QC for Bechtel, who described this as part of "the costs of doing business generally".

46. I therefore do not consider that BBVS is entitled to recover its costs of (2) in its application. I dismiss that part of the application, and accordingly the matter of payment to BBVS in the agreed sum does not therefore arise.

Conclusions

47. The application by BBVS for its costs as an interested party succeeds on (1) the costs of complying with the confidentiality ring provisions and protecting its own confidential information. Those costs are to be subject to detailed assessment on the standard basis, if not agreed. Its application for costs under limb (2) of the application fails.

48. The only potentially outstanding item therefore, in this complicated litigation, is the costs of the hearing before me on 17 March 2021. I encourage the parties simply to agree this point, and submit an order for approval. There is, of course, always the temptation for parties to continue fighting to the bitter end, and beyond. I venture the optimistic hope that commercial good sense will prevail and another hearing will not be necessary.