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Case No: HT-2020-000352

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

Rolls Building
Fetter Lane,
London, EC4Y 1NL

Date: 22/01/2021

Before :

MR JUSTICE KERR

- -

Between :

WESTMINSTER CITY COUNCIL	**Claimant**
- and -	
SPORTS AND LEISURE MANAGEMENT LIMITED	**Defendant**

- -
- -

Mr James Goudie QC and Mr Joseph Barrett (instructed by **Westminster City Council**) for the **Claimant**
Mr Jason Coppel QC (instructed by **Anthony Collins Solicitors**) for the **Defendant**

Hearing date: 21 December 2020

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE KERR

Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time of hand-down is **2.30pm** on **22 January 2021**

Mr Justice Kerr:

Introduction

1. The parties in this case need to know where losses arising from closure of leisure facilities during the current coronavirus pandemic will fall, under the terms of their ongoing contract (**the contract**) for the provision by the defendant (**SLM**) of leisure facilities in the area of the claimant (**the council**). To that end, the council has issued the present claim under Part 8 of the Civil Procedure Rules, seeking declaratory relief as to the true meaning and effect of the contract.

Facts

2. The council placed a notice in the Official Journal of the European Union (**the OJEU notice**) on 21 February 2015. The OJEU notice referred to Directive 2004/18/EC which governs the award of public service contracts, among other contracts. A tendering exercise was to be held. The OJEU notice described the services under the contract as "part B" services. The services to be provided were recreational, cultural and sporting services in the council's area.

3. The contract was to be awarded for a 10 year period, with an option to extend it for a further five years. The winning bidder would be required to provide sport and leisure facilities and manage the eight indoor and outdoor sites then in operation (there are now more), as well as developing a new one at Chelsea Barracks and engaging with the council on construction and reconfiguration of services during the currency of the contract.

4. Although the OJEU notice referred to the 2004 Directive and the then Public Contracts Regulations 2006 (since replaced by the Public Contracts Regulations 2015), it also stated that it was placed voluntarily. It is common ground that the contract is in the nature of a concession contract, in the sense that the contractor is entitled to keep the revenue from customers at the leisure facilities, in return for payment of a fee.

5. The main terms of the contract were largely pre-ordained by the draft contract documents used in the subsequent tendering exercise, though bidders were able to raise comments and seek clarifications. Mr Raj Mistry of the council referred to the contract being a concession contract under the Concession Contracts Regulations 2016 (made pursuant to a different 2014 EU Directive); but those regulations came into force after the OJEU notice was placed.

6. Neither party suggested that anything turned on the terms of the European and domestic legislation applicable at various times. I only mention it for completeness. It is common ground that the questions for the court are of interpretation of the written terms of the contract and that the applicable principles are ordinary domestic law principles of interpretation, unaffected by any statutory provisions.

7. SLM manages 198 leisure centres pursuant to contracts with 61 local authorities, including the council. It was successful in the tendering exercise. The contract was entered into on 23 June 2016 and became effective from 1 July 2016. It consisted of 56 clauses and 19 schedules. The financial projections at the time were such that the contract was expected by the council and SLM to be profitable. Some expansion of services was envisaged.

8. SLM's evidence is that this contract was modelled on similar ones used by numerous local authorities and using wording derived from standard terms emanating from Sport England. Mr Duncan Jefford of SLM produced a copy of what he called the standard Sport England leisure operating contract. That evidence was contentious; the council's position was that Sport England's standard contract was irrelevant to the interpretation of this contract.

9. The relevant features and provisions of the contract here are as follows. SLM undertakes to deliver "the Services", as defined, at each of "the Facilities". SLM, as contractor, undertakes as follows in clause 7.1:

> "… the Contractor shall deliver the Services. The Contractor shall at its own cost be solely responsible for procuring that the Services are performed to the following standards (the 'Service Standard' ….
>
> 7.1.1 the Services at each Facilities [sic] are provided in accordance with all the requirements of this Agreement, the Services Specification, the Contractor's Proposals, Good Industry Practice, any accreditation schemes … and all the Authority's Policies and Legislation …. ."

10. By clause 7.1.2.9, the Services must at all times be performed "so as to maximise Actual Income at each of the Facilities and minimise Actual Expenditure". And clause 7.1.3 provides that the "Service Standard" includes that the Facilities are "open, operable, well maintained, accessible and available to Users during all the agreed hours appropriate to any particular Facilities as set out in the Service Specification or as otherwise agreed".

11. SLM agreed to lease from the council certain premises which are "Facilities" used to provide the Services (clause 6). There are detailed provisions about provision of equipment, service standards, repairs, maintenance and the like. SLM undertakes to carry out "Planned Enhancement Works" (clause 15.1) in accordance with a programme of capital works agreed with the council. Sharing the cost of such works is a matter for negotiation and agreement.

12. There are then further detailed provisions about employees, quality assurance and performance monitoring. The provisions about payment are found in Part 5 and include the following:

> "26 PAYMENT PROVISIONS
>
> 26.1 The Contractor shall pay the Authority the Management Fee calculated as further detailed in Schedule 13 (Payment and Performance Management system). The Management Fee shall be payable in twelve (12) instalments accruing daily and payable monthly by BACS in arrears. The Management Fee shall be subject to any adjustments or variations in accordance with the provisions of the Agreement …. ."

13. Clause 26.2 through to clause 26.8 make provision for administering the process of calculating, invoicing for and paying in instalments the management fee and for referring any dispute about the amount to the dispute resolution procedure provided for under the contract. The definition of "Management Fee" is found in schedule 1, along with other definitions. It is defined as:

> "the net fee payable by the Contractor to the Authority in consideration of the right for the Contractor to use the Facilities and provide the Services in accordance with this Agreement 'as shown in line 110 of the Total Tender sheet of the Pricing Tables (Schedule 4)'…".

14. The "Pricing Tables" are those set out in schedule 4. These include the "Total Tender". Line 110 of the Total Tender is part of a spreadsheet prepared by SLM and submitted as part of its bid for the contract. It is long, detailed and complicated. Income and expenditure projections are calculated under headings in a table for each of the nine leisure facilities, for each contract year. Capital expenditure and an element of surplus or contingency (i.e. profit) is also included. These projections are used to calculate the "line 110" figure, which is the "Management Fee" payable by SLM to the council for each contract year.

15. The total for the first 10 years is around £39.7 million, with an annual average of £3.975 million. For years 11 to 15, if the contract lasts that long, the total is £23.65 million, representing an average for each of years 11 to 15 of £4.733 million. The "Total Tender" spreadsheet figures are arrived at by aggregating similar separate calculations for each centre (i.e. leisure facility). For some centres in some of the contract years, the projected management fee figure is negative and expressed as a minus number. However, the total is always positive and never less than £900,000 in any contract year.

16. Clause 27 provides, in part:

> "27 INCOME
>
> 27.1 Charges to Users
>
> The Contractor shall charge Users for using the Facilities in accordance with paragraph section 3.2 of the Services Specification. It shall be entitled to retain all receipts from Users of the Facilities including receipts from any ancillary services. The Contractor shall bear all risks in relation to such receipts, including the volume of Users and any bad debts.
>
> ….
>
> 27.3 Profit Share
>
> The provisions of Schedule 16 shall have effect."

17. Schedule 16 is entitled "Scheme for Surplus Share". Broadly, it provides (see paragraph 1.5) for any "Surplus", i.e. excess of income over expenditure in a particular contract year, to be apportioned as to one third to the council, one third to SLM and one third to a "Development Fund". The latter fund, as its name suggests, is

to be spent on sports development or enhancement works (paragraph 2.2). Any balance left in the fund at the end of the contract goes to the council (paragraph 2.6).

18. Defaults and termination are dealt with in Part 6. The provisions are fairly standard. Included among them is clause 32, a force majeure clause, which I mention because neither party suggested that the coronavirus pandemic or its consequences was a force majeure event. The definition of such an event focusses mainly on acts of war or terrorism. Where such an event occurs, if it continues for six months, either party may terminate the contract (clause 32.7).

19. Part 7 of the contract lies at the heart of this case. It comprises clauses 37, 38 and 39, which deal with changes to contract including those arising from changes in the law. The whole of clauses 37, 38 and 39 is set out in the appendix to this judgment. It is common ground that those clauses, or parts of them or of some of them, prescribe the consequences of relevant changes in the law such as those which have recently prevented leisure facilities from opening and impaired normal trading and continue to do so.

20. "Authority Changes" and "Contractor Changes" are the territory of, respectively, clauses 37 and 38. An "Adjustment" (sometimes with and sometimes without a capital letter) to the Management Fee is defined in schedule 1 as "the change in financial terms between the Parties as the result of an Authority Change or a Contractor Change". Adjustments to the Management Fee can arise from changes of the kinds provided for in clauses 37 to 39.

21. As shown in the appendix to this judgment, clause 39 deals with changes in the law. A "Change in Law", as defined in schedule 1, must come into effect after the date of the contract. A "Qualifying Change in Law" must be one "which was not foreseeable at the date of this Agreement". The three kinds of Qualifying Change in Law are a "Discriminatory Change in Law"; a "Specific Change in Law"; and a "General Change in Law".

22. A General Change in Law is one which is not a Specific Change in Law or a Discriminatory Change in Law. A Discriminatory Change in Law is a change, "the terms of which apply expressly to … the Services and not to similar projects; and/or … the Contractor and not to other persons". A Specific Change in Law is a change "which specifically refers to the provision of a service the same as or similar to the Services or to the holding of shares in companies whose main business is providing a service the same as or similar to the Services".

23. Part 8 of the contract is headed "Conflict of Interest". Within it, there is a dispute resolution provision at clause 44. It provides for the parties first to try to reach agreement. If that fails, the matter is referred to non-binding mediation. An issue may be referred to an expert by either party if mediation does not resolve it. The expert may give a binding decision, acting as an arbitrator. Instead of arbitration, the parties may refer a matter to the exclusive jurisdiction of the courts of England, as has happened in this case.

24. Such are the relevant provisions in the contract. The operation of the contract for the first few years was unremarkable. It was, indeed, profitable for SLM, as expected, apart from losses due to non-recurring expenditure by SLM in the 2019-20 financial

year. The council received its management fee. Then, from early 2020, the coronavirus known as Covid-19 spread in this country and elsewhere, as is well known.

25. As a result, restrictions on activities were imposed, preventing leisure facilities from opening at all at various times, while at other times they were able to open only subject to restrictions. These closures were required under various sets of regulations, the details of which I need not set out. In consequence, the contract ceased to be profitable and became loss-making. Revenue from customers dwindled and, during periods of enforced closure, dried up altogether.

26. It is common ground (subject to a possible debate later about what constitutes "Guidance") that the enforced closures and restrictions were "Specific Change[s] in Law" and as such, not being foreseeable at the date the contract was entered into, also "Qualifying Change[s] in Law" within the definitions of those expressions in schedule 1 to the contract. The question arose how the loss of customer revenue should be dealt with between the parties.

27. Negotiations took place. Revised financial arrangements were agreed in April 2020. The management fee was waived by the council, unless SLM were to receive government funding support for the same. The council agreed to make certain payments to SLM to meet its salary costs. Further interim arrangements were agreed in July 2020; the council again waived its management fee and made further payments in respect of staff costs and SLM's losses.

28. However, the parties were unable to agree on the allocation of risk under the contract. The council wrote to SLM on 24 September 2020 stating that "there is no contractual obligation on [the council] to compensate for any costs or losses when putting into effect any Specific Changes in Law"; and that it intended to seek a declaration that the management fee could reduce as far down as zero but could not, on a correct interpretation, enter negative territory such that the council would be required to pay a "reverse" management fee to SLM.

29. The council issued its claim on 28 September 2020. It seeks declarations:

> "that on the proper construction of the Contract a Qualifying Change in Law that is a Specific Change in Law:
>
> (1) Does not reduce the Management Fee to below zero; and
>
> Does not oblige the Claimant to make any payment by way of reverse or negative Management Fee or at all, to the Defendant".

30. In its acknowledgment of service, SLM sought different declarations, embodying the principle that, on the correct interpretation of the contract, "the Defendant should not be financially worse off as a result of a Specific Change in Law"; and further declaratory relief to the effect that the required adjustment to the management fee resulting from a Specific Change in Law is to be based on a specific arithmetical calculation which may produce a negative management fee, i.e. an amount payable by and not to the council.

31. Directions were given and witness statements with accompanying exhibits were filed and exchanged. I allowed an additional late statement from Mr Duncan Jefford for reasons I gave briefly during the hearing, which took place remotely. Restrictions on many activities remain and are severe. Leisure facilities generally are closed at present, apart from limited offers such as online exercise classes not requiring physical attendance of customers.

Submissions

32. The bundle of authorities was refreshingly short. It was common ground that the applicable principles are conveniently found in the judgment of Lord Hodge JSC in *Wood v. Capita Insurance Services Ltd* [2017] AC 1177, at [10]-[13] and the authorities and writings he reviewed in that passage when explaining, in particular at [13], the role of "textualism" and "contextualism" in construing contract terms: they are "not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation"; the extent to which each assists the court in its task varies from one case to another.

33. There was a disagreement over whether, if the terms of the contract were ambiguous, the *contra proferentem* principle could assist SLM. I was referred *Chitty on Contracts*, 33rd edition at 13-095 to 13-096. SLM submitted that it could benefit from the principle, referring me to Lord Mustill's judgment of the board in *Tam Wing Chuen v. Bank of Credit and Commerce Hong Kong Ltd (in liquidation)* [1996] 2 BCLC 69, at 77:

> "… a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not".

34. The council countered with the observation in *Chitty* at 13-095 that the doctrine is a "last resort" whose application to negotiated contracts has been doubted and one that is "more often cited … than … applied"; and referred to Fraser J's recent observation in *Haberdashers' Aske's Foundation Trust Ltd v. Lakehouse Contracts Ltd* [2018] EWHC 558 (TCC), at [85], quoted in a footnote, that:

> "… there is precious little, if anything, of this doctrine remaining in commercial cases."

35. On the construction of the contract, Mr James Goudie QC, appearing with Mr Joseph Barrett, made submissions which I paraphrase as follows:

(1) The contract does not oblige the council to indemnify SLM in respect of any losses in excess of the Management Fee, which can reduce to zero but not below zero.

(2) The Management Fee is defined (in schedule 1) as payable "by the Contractor to the Authority", not vice versa. It cannot become payable by the council to SLM.

(3) Likewise, clause 26.1 requires SLM to pay the Management Fee and does not provide for it to receive it; the rest of clause 26 addresses the mechanism for payment, making provision only for payment one way, not either way.

(4) There is no basis for SLM's contention that the contract obliges the council to indemnify SLM in respect of all losses arising from a Specific Change in Law.

(5) The contract is a concession agreement. Thus, SLM agreed "at its own cost" to be "solely responsible for procuring that the Services are performed" to the "Service Standard" (clause 7.1).

(6) Likewise, clause 27.1 addresses allocation of commercial risk, allowing SLM to retain all receipts from users but requiring SLM to "bear all risks in relation to such receipts, including the volume of Users and any bad debts".

(7) Clause 39 is straightforward. The parties are to agree the way in which any Qualifying Change in Law is effected (clause 39.4).

(8) SLM is required to bear the costs of any General Change in Law; there is no change to the Management Fee in such a case (clause 39.5.1).

(9) If there is a Specific Change in Law, the parties, acting reasonably, may agree a change in the Management Fee; or, "if applicable and agreed by the Authority" (the council), a capital payment (clause 39.5.2).

(10) The Specific Change in Law is to be "put into effect" (clause 39.5.2) as if the council had issued an Authority Notice of Change. This means clause 37.9 is incorporated by cross-reference.

(11) Clause 37.9 (Implementation of Change) then requires the parties to "implement the Change" which must also be "recorded and formalised by the use of the Change Note template" (which is set out in schedule 9).

(12) Under clause 39.5.2, there are only two potential responses to a Specific Change in Law: a change to the Management Fee; or a "capital payment" but only if both "applicable" and "agreed by the Authority".

(13) SLM's interpretation attempts to add non-existent wording to clause 39.5.2 and is inconsistent with the nature of a concession agreement in which the relationship is defined by the contractor assuming and bearing the risks of running the concession in return for retaining all or part of the revenue.

(14) If SLM's interpretation were correct, the drafter would have replicated symmetrically in clause 39.5.2 the wording of clause 39.5.1, so as to allocate the costs of effecting a Specific Change in Law to the council (the Authority), just as clause 39.5.1 allocates them to SLM (the Contractor).

(15) Clause 39.5.2 does not import the whole of the Authority Notice of Change process in clause 37. The Authority has a choice whether to propose such a change and can withdraw a proposed change, but has no choice where the change is forced by external circumstances, i.e. a Specific Change in Law.

(16) The brief cross-reference to clause 37 in clause 39.5.2 does not bear the weight SLM seeks to place on it. The significance of the cross-reference is only that the Change in Law must be "put into effect" as if the Authority had issued a Notice of Change under clause 37.

(17) The financial consequences of the Change in Law being "put into effect" are then also set out but are restricted to agreed changes to the Management Fee - but not so as to reverse the direction of payment – and a capital payment only if "applicable" and "agreed by the Authority".

(18) Clause 39.5.2 says nothing about the process by which agreement is to be reached; it is not the detailed clause 37 process. Clause 39.5.2 says only that any financial changes "shall be reasonably agreed between the parties".

(19) The requirement that the parties conduct themselves "reasonably" is a matter for the dispute resolution procedure in the event of a suggestion that a party is behaving unreasonably.

(20) SLM's interpretation reasons backwards from the desired result at the expense of gross distortion of the meaning of the provisions and asks the court to rewrite the contract, without relying on any implied term that SLM should not be worse off as a result of a Specific Change in Law.

(21) The Sport England standard contract is irrelevant; it makes completely different provision from that made in this contract. It is of no assistance to the court or to SLM.

36. SLM's submissions on construction of the contract were presented by Mr Jason Coppel QC, whose main points I paraphrase in the following way:

(1) Clause 39.5.2 provides for the financial losses arising from a Specific Change in Law to be the same as those resulting from an Authority Notice of Change under clause 37. The council's contrary core submission is wrong.

(2) Whereas the commercial risk of giving effect to a General Change in Law is placed by clause 39.5.1 on SLM as Contractor, in the case of a Specific Change in Law the losses are to be borne by the council, "as if the Authority had issued a[n] Authority Notice of Change …" (clause 39.5.2).

(3) The practical steps to implement a Specific Change in Law are ordained by clauses 39.3 and 39.4, not 39.5. The latter clause applies "[f]ollowing agreement … as to the way in which the Qualifying Change in Law is to be effected" (opening words of clause 39.5).

(4) Clause 39.5.2 addresses the financial consequences of practical steps already agreed under clauses 39.3 and 39.4. The financial impact of the practical steps can only be assessed once the practical steps are known.

(5) It would be odd to leave entirely at large, for negotiation and agreement or the dispute resolution procedure, the financial consequences of a Discriminatory or Specific Change in Law, while allocating to the Contractor the full costs of effecting any General Changes in Law.

(6) By contrast, clause 37, incorporated by the reference to it in clause 39.5.2, provides a commercially sensible yardstick for adjustment to the financial terms of the contract, to inform the dispute resolution process; otherwise the only

guidance in the dispute resolution process is the uncertain obligation to act "reasonably", which is not capable of independent determination.

(7) The symmetry between clause 39.5.1 (losses from a General Change in Law are borne by the Contractor) and clause 39.5.2 (losses from a Specific Change in Law are borne by the Authority) is achieved by importing, in the latter case, the clause 37 procedure conveniently already in place.

(8) The reference in clause 39.5.2 to changes in the Management Fee is to changes to it resulting from operating the clause 37 procedure. The requirement that changes to the Management Fee be "reasonably agreed" mirrors and supplements with an obligation of reasonableness the requirement in clause 37.4.1 to "discuss and agree the issues set out in the Contractor's Response" to a proposed Authority Notice of Change.

(9) The fact that an Authority Notice of Change is a matter of choice for the council and may be withdrawn does not mean those parts of clause 37 apt for a Specific Change in Law case should not be operated. While in such a case withdrawal under clause 37.7.2 may not occur, the main parts of clause 37 can be and must be operated.

(10) The words "put into effect as provided in Clause 37 and 38" do not undermine SLM's interpretation of the contract. Putting into effect a Change in Law may mean adjusting not just the services provided but also the financial arrangements between the parties. There is no reason to confine "put into effect" to the practical arrangements.

(11) The undisputed evidence of Mr Jefford is that the vast majority of leisure centre operation contracts adopt standard Sport England terms under which the local authority bears the loss resulting from a Specific Change in Law. Those standard terms require the contractor to submit a revised financial model to ensure the contractor is not made worse off by the change in law.

(12) The relevance of the standard Sport England terms is that there is imputed to the parties knowledge of standard commercial practice within the industry and an intention to follow it rather than depart significantly from it, in the absence of clear words signifying a departure from it.

(13) If it is necessary to rely on the *contra proferentem* principle, it should impel the court to prefer an interpretation of ambiguous words against the *proferens*, i.e. the council, whose standard wording was pre-ordained in the tendering exercise; especially where the construction for which the council contends is also contrary to standard industry practice.

(14) In operating clause 37, an "Adjustment" to the Management Fee may reduce it to below zero so that it becomes a negative amount, payable by the council to SLM and not the other way round. An adjustment is broadly defined, without limitation, as "the change in financial terms between the Parties as the result of an Authority Change or a Contractor Change".

(15) The definition of "Management Fee" refers to the "net" fee payable and that it is as shown in line 110 of the Total Tender sheet in the Pricing Tables in schedule 4. The net fee is an outturn figure based on an arithmetical calculation and the figure can in principle be or become a negative one, as demonstrated by the actual negative figures for some management fee payments at some centres for some of the contract years.

(16) While the definition refers to a payment by the Contractor to the Authority, that definition describes the situation at the start of the contract but it can be superseded by an Adjustment causing it to become a payment the other way, by and not to the Authority.

(17) The possibility of a negative Management Fee payable to SLM is allowed by the terms of clause 37.3.7 which acknowledges that the Contractor's revised "Estimate", i.e. "the estimated change in the Management Fee" (see clause 37.2.1) shall "see clause 37.3.7) "set out any adjustments required to the Management Fee".

(18) The standard Sport England terms are again relevant. On the evidence, many local authorities were already paying a fee to their leisure centre operators, while others have started to do so as a result of "Specific Change in Law" provisions. The parties, again, may be taken to have intended to follow normal industry practice unless clear contrary words are used. The *contra proferentem* principle also applies if the words are ambiguous.

(19) Alternatively, if the council is right that the Management Fee cannot be reduced to below zero, clause 37.10 read together with clause 39.5.2, between them provide for a payment to be made to SLM. In clause 39.5.2 it is called a "capital payment", while in clause 37.10 it is called a "lump sum payment".

(20) These expressions are not defined; to give effect to the purpose of clause 39 "capital payment" in clause 39.5.2 should be given the non-technical meaning "one off payment from the council's capital"; which comes to the same thing as a lump sum and is exemplified by the agreed payments made in 2020 by the council to offset SLM's losses and meet its salary costs.

Reasoning and Conclusions

37. Keeping firmly in mind the approach set out in Lord Hodge JSC's judgment in *Wood v. Capita Insurance Services Ltd*, I start by noting that this contract is sophisticated in its content and was clearly drawn up in a standard form with the assistance of skilled professionals. The language used is of great importance. The drafting is not bad for the most part but does not display surgical linguistic precision. There are weaknesses.

38. For example, clause 39.5.2 refers back to clause 38 as well as to clause 37 "as if the Authority had issued a [sic] Authority Notice of Change". Clause 38 deals with "Contractor Changes" not "Authority Changes". The latter are the province of clause 37. Mr Coppel suggested the reference to clause 38 was an error.

39. Mr Goudie suggested that the reference picks up clause 38.8, providing the same administrative mechanism for recording the changes (a schedule 9 "Change Note"

unless agreed otherwise) as that found in clause 37.14. I think that Mr Coppel's suggestion is more likely to be the explanation, but either way the unexplained cross reference to clause 38 is not good drafting.

40. Next, subject to considering carefully the actual language used, I bear in mind that the contract is, very broadly, modelled on terms commonly used in local authority contracts for the supply of leisure services to the public, such as those found in the standard Sport England terms referred to by Mr Jefford of SLM. As a general proposition, the purpose of such terms is (among other things) to allocate risk as between the authority and the contractor where the law changes.

41. However, while the Sport England standard terms are broadly what Lord Hodge JSC called "similar provisions in contracts of the same type", I do not think they are of much, if any, assistance to the court or SLM. The reason is that they prompt but do not answer the question how these parties decided to strike the balance when allocating risk to each party in this particular case. The terms of this competitively tendered contract are quite nuanced in allocating risk.

42. The standard Sport England terms provide for a balance of risk to be struck where the law changes mid-contract, but do not dictate how to strike it. I do not accept that they demonstrate an "industry norm", as Mr Coppel called it, of allocating all risk of a General Change in Law to the contractor and all risk of a Specific Change in Law to the authority. There are clear differences as well as similarities between this contract and standard Sport England terms. The latter are adjustable and only a starting point for negotiation.

43. With that factual context in mind, I consider by reference to the language used the first question of construction I have to decide. The issue dividing the parties is: how much of clause 37 is imported into clause 39.5.2 where that sub-clause applies? Specific (or Discriminatory) Changes in Law "shall be put into effect as provided in Clause 37 … as if the Authority had issued a [sic] Authority Notice of Change…".

44. The following matters are common ground. First, the parties both say that *some* but *not all* of clause 37 is brought into play where there is a Specific Change in Law. Mr Goudie accepts that clause 37.9 is imported and requires the parties to "implement the Change" and to do so using the "Change Note template" (although, in another example of imprecise drafting, clause 37.14 requires the Change Note template to be used "unless otherwise agreed").

45. Mr Coppel, for his part, accepts that parts of clause 37 are not apt to be pressed into service where a Specific Change in Law is required by clause 39.5.2 to be "put into effect as provided in Clause 37…". Since an Authority Notice of Change may be withdrawn (see clause 37.7.2) while a Specific Change in Law compels change, SLM accepts that the withdrawal provision at 37.7.2 does not apply where there is a Specific Change in Law. (No more could the deemed withdrawal provision at 37.8.1 apply in such a case).

46. Next, it is also common ground that a Specific Change in Law may generate some change to the financial arrangements in favour of the contractor. While each party submits that inexorable commercial logic tends to place the financial risks of a Specific Change in Law on the other party, the council does not contend that all losses

from a Specific Change fall on the contractor in every case, even though the contract is by its nature a concession agreement.

47. Mr Goudie accepts that there can be reduction to the Management Fee, provided it does not drop below zero; and that "if applicable and agreed by the Authority", a "capital payment" may be made as a matter of reasonable agreement between the parties. That much is inescapable from the language of clause 39.5.2 and is not surprising; although the contract is a concession contract allowing SLM to keep all the revenue, profits are shared (clause 27.3 and schedule 16).

48. I do not myself think that there is any inexorable commercial logic pointing in favour or against either party's suggested construction of clause 39.5.2. It is a matter of balance, negotiation and drafting. A General Change in Law is a risk that naturally falls on a contractor, since it is an ordinary vicissitude of business life. A Specific (or Discriminatory) Change in Law is less naturally so.

49. Even short of force majeure, it may destroy the business viability of the contract in a wholly unforeseeable manner. That explains why even on the council's case the Management Fee may drop as far as zero and a capital payment may in narrow circumstances be paid to the contractor. And in my judgment, that does not rule out more expansive financial change to the contractor's advantage if the contractual language used has that effect.

50. On the other hand, Mr Coppel is not necessarily correct to submit that the financial outcome should be exactly the same as it would be if it were the authority proposing the change pursuant to clause 37, rather than the change being externally mandated by a Specific Change in Law. The former is a matter of choice for the authority; the latter is not.

51. The reasoning thus far supports the proposition that the answer, in this case, must be found by a careful examination of the words used in the contract, imperfectly drafted as they are. The contextual factors cut both ways and the textual factors are likely to be decisive. I therefore need to take a closer look at the submissions on the actual language used in the contract.

52. I accept Mr Coppel's submission that clause 39.5.2 applies "*[f]ollowing* [my emphasis] agreement … as to the way in which the Qualifying Change in Law is to be effected" and that it must therefore address the consequences of practical steps already agreed. He rightly says it is clauses 39.3 and 39.4, not 39.5, which provide for the reaching of agreement on necessary practical steps and that their financial consequences can only be assessed once it is known what they are.

53. I do not accept Mr Goudie's argument that clause 39.5.2 provides exhaustively what the financial consequences of a Specific Change in Law will be and that the sub-clause incorporates by reference only clause 37.9 and not any other part of clause 37. There is no good reason to confine the cross-reference in that way. The cross-reference is to clause 37 as a whole. As Mr Coppel observed, clause 37.9 does not appear in splendid isolation; it comes into play after a dialogue ordained by clauses 37.2, 37.3, 37.4 and, if there is a dispute, 37.6.

54. On the other hand, I do not accept Mr Coppel's submission that the incorporation by reference of clause 37 goes as far as to compel the outcome that "the Contractor should not be worse off as a result of the implementation of the Authority Change". Those words appear parenthetically in clause 37.5 in the course of dealing with the subsidiary issue of subcontracting and the obtaining of value for money. I do not think SLM can elevate them to the level of a general principle dictating the outcome of a Specific Change in Law.

55. In my judgment, the most natural reading of the language used in its factual context is that the cross-reference to clause 37 in clause 39.5.2 imports the process, but not the outcome, of the Authority Notice of Change procedure. I think the incorporation of that process means that it must be followed as far as possible (apart from the possibility of withdrawal) but that the contract takes a neutral stance as to what the financial consequences of following it should be.

56. Those financial consequences are mentioned at various points in the provisions setting out the clause 37 process; see clause 37.2.1 ("… the estimated change in the Management Fee…"); clause 37.3.4 ("any impact on income generation"); 37.3.5 ("any capital expenditure ... required …); 37.3.7 ("… any adjustments required to the Management Fee (or, if applicable and agreed by the Party making the payment, a capital payment)"; and 37.10.1 ("… either a lump sum payment or an adjustment to the Management Fee").

57. Clause 37.4 and 37.5 refer to appropriate financial disciplines being observed and evidenced by the use of competitive tendering for subcontracts. They help to inform the outcome but do not prescribe what it should be. That is a matter for negotiation and either agreement or dispute resolution. I accept that where the change is the choice of the authority the contractor should not, as a general proposition, be worse off.

58. Where the authority chooses to serve an Authority Notice of Change, the contractor should certainly not be worse off merely because a particular subcontract, properly tendered, proves expensive. But as already noted, the provision (clause 37.5) preventing a thrifty contractor from being penalised where the Authority leads the change cannot be read as a general principle operating where a Specific Change in Law compels the change.

59. My rejection of Mr Coppel's general proposition that a contractor should necessarily be "no worse off" where there is a Specific Change in Law does mean the dispute resolution procedure has to operate with only a broad concept of reasonableness to guide it. Any expert arbitrator will therefore have to deal with a dispute on that broad basis. But that does not make the dispute resolution procedure inoperable. As Mr Goudie pointed out, no one suggests the contract's provisions are void for uncertainty in that (or any other) respect.

60. I will come back to the language of clause 37 and 39.5.2 shortly, in order to consider what kinds of financial provision can be made in consequence of a Specific Change in Law. As a prelude to that exercise, I turn to consider the question whether SLM is right to submit that the Management Fee can become a negative figure, payable to and not by SLM.

61. In my judgment, SLM's contention that the Management Fee can drop below zero and become payable by the council to SLM must be rejected. The definition of the Management Fee as a payment to and not by the Authority is absolutely clear. I also accept Mr Goudie's submission that clause 26.1 requires SLM to pay, not receive, the Management Fee; and addresses the mechanism for payment, making provision only for payment one way, not either way.

62. Both the definition and clause 26.1 are inconsistent with SLM's proposition that the Management Fee can become payable to it. Nor is there is any good reason to accept that the definition only bites at the start of the contract and may be superseded by subsequent variations to the Pricing Tables and in particular line 110 in the Total Tender table. A definition written in shifting sands would need to be expressed as such using clear words of qualification, absent here.

63. That conclusion is not altered by the point that some of the leisure centres featured a negative outturn figure for management fee in line 110 of the table for that individual centre, for some of the contract years. Even if a particular centre had featured (which is not the case) a negative management fee figure for each of the possible 15 contract years, still the definition in schedule 1 means that the overall or "net" figure must be payable to and not by the council.

64. In my judgment, the clear definition of "Management Fee" also entails that it cannot drop below zero for any contract year, even if (which has not happened yet) the line 110 figure in the Total Tender table for all the centres combined were to be expressed as a minus number. In my judgment, if and when that happens, the amount payable will, as Mr Goudie submits, be zero for that contract year but nothing will be payable by the council to SLM.

65. On a plain reading of the clear words of the contract, I reject Mr Coppel's interpretation of "Management Fee". At the most, the Management Fee can be zero for a particular contract year. In more colloquial terms, it can be "waived" as has already happened in the spring and summer of 2020. I return, finally, to clause 37, read with clause 39.5.2, to consider what other kinds of financial provision can result from a Specific Change in Law.

66. SLM's alternative contention was that, if payment of the Management Fee cannot be reversed, clause 37.10, read with clause 39.5.2, provide for a payment to be made to SLM, in 39.5.2 called a "capital payment" and in 37.10 a "lump sum payment". These terms, Mr Coppel submitted, are not defined in the contract, bear a non-technical meaning and are effectively interchangeable (as illustrated by the lump sum payments of salary made by agreement in 2020 during the pandemic).

67. I have come to the conclusion that this contention is correct and should be upheld. In my judgment, it flows both from the imprecise and non-technical approach to drafting and from the structure of and specific words used in clauses 37 and 39.

68. As already indicated, the manner in which a Specific Change in Law is processed is, as far as possible, by operating the Authority Notice of Change procedure in clause 37. The first stage of the latter process is the Authority setting out the "change in the Services required" and estimated change in the Management Fee "in accordance with Clause 37.3.7 (the 'Estimate'").

69. Clause 37.3 then regulates the "Contractor's Response". It includes an estimate of impact on income generation (37.3.4); of any capital expenditure required (37.3.5); and of any adjustments required to the Management Fee (37.3.7). There is then a passage "[f]or the avoidance of doubt" which, though not indented, might well have been for it appears to be relevant not just to 37.3.7 but to preceding parts of 37.3 also.

70. That passage acknowledges that "the Estimate may result in an increase or decrease in the Management Fee (or, if applicable and agreed by the Party making the payment, a capital payment)". When it comes to implementing the financial changes, clause 37.10.1 clearly refers back to the Contractor's Response and to "any Adjustment" made in it and agreed and provides that the parties "shall agree either a lump sum payment or an adjustment to the Management Fee".

71. The possibility of the Contractor's Response leading to a "capital payment" is clearly acknowledged in 37.3; and 37.10.1 clearly refers back to the Contractor's Response yet refers to a "lump sum payment" rather than to a "capital payment". The expression "lump sum payment", however, does not appear in 37.3; "capital payment" does. The best explanation of that is that the drafter did not intend to differentiate sharply between a capital payment on the one hand (as in 37.3) and a lump sum payment on the other (as in 37.10.1).

72. The financial outcome of an Authority Notice of Change, it is clear, may include payment of a lump sum by the authority to the contractor. A lump sum, in this drafter's imprecise phraseology, at least overlaps with, if it is not fully co-terminous with, a capital payment. If that is right, as I believe it is, what is called a lump sum payment in 37.10.1 can also be an outcome of a Specific Change in Law, even though the phrase used in 39.5.2 is "capital payment", followed by language that largely mirrors that used in 37.3.

73. In argument, Mr Goudie contrasted a capital payment with a lump sum payment. A paradigm capital payment would be, for example, money used to construct a building; while a lump sum connoted aggregation of, or capitalised, payments of sums bearing the character of revenue or outgoings, such as periodic salary payments. But I think, for the reasons just given, that distinction attributes too sophisticated and precise use of language to the drafter of this contract.

74. For completeness, I add that I do not find it necessary to have any regard to the *contra proferentem* principle of construction. Whether or not it has any part to play in the present context is not a point I need to decide, since the *contra proferentem* principle, if it is anything, is one of last resort and I am clear in my mind that the issues of construction I have had to decide in this case can be satisfactorily resolved by applying the approach of Lord Hodge JSC in *Wood v. Capita Insurance Services Ltd*, without the need to go beyond them.

75. In conclusion, the correct interpretation of this contract is in my judgment and for the reasons give above the following, in summary:

    (1) A Specific Change in Law requires the parties to operate the clause 37 process, adapted so that it addresses the Specific Change in Law which cannot be withdrawn.

(2) The outcome is determined by agreement between the parties acting reasonably or as determined under the dispute resolution procedure; the outcome is not necessarily that the Contractor is "no worse off"; nor that the Contractor bears all the losses from the Specific Change in Law.

(3) The financial consequences of a Specific Change in Law cannot include Management Fee becoming payable to the Contractor instead of vice versa; the Management Fee cannot be less than zero for any contract year.

(4) The financial consequences of a Specific Change in Law can include reduction of the Management Fee as far as (but not below) zero and can include payment of a lump sum by the Authority to the Contractor.

76. I will consider with counsel what form of declaratory relief, if any, is appropriate in the light of that answer to the questions asked in this claim. I conclude by thanking the parties for their assistance and counsel for their clear and helpful submissions.

APPENDIX: CLAUSES 37-39 OF THE CONTRACT

"PART 7-CHANGES

37 AUTHORITY CHANGES

37.1 The Authority has the right to propose Authority Changes in accordance with this Clause 37. Where the Authority Change involves the closure of a Facility or the opening of a new Facility, then the provisions of Clause 37.11 shall also apply. If the Authority requires an Authority Change, it must serve a notice ("Authority Notice of Change") on the Contractor in accordance with Clause 37.2 (Authority Notice of Change). The Authority shall not be entitled to propose Authority Change which requires the Services to be performed in a way that infringes any law or is inconsistent with Good Industry Practice or would otherwise be unlawful.

37.2 Authority Notice of Change

The Authority Notice of Change shall:

37.2.1 set out the change in the Services required in sufficient detail to enable the Contractor to calculate and provide the estimated change in the Management Fee in accordance with Clause 37.3.7 (the "Estimate"); and

37.2.2 require the Contractor to provide to the Authority within fifteen (15) Working Days of receipt of the Authority Notice of Change an estimate of the likely effects of the proposed variation ("Contractor's Response").

37.3 Contractor's Response

As soon as practicable and in any event within fifteen (15) Working Days after having received the Authority Notice of Change, the Contractor shall deliver to the Authority the Contractor's Response or confirmation as to when the Contractor's Response is to be provided to the Authority. The Contractor's Response shall include the opinion of the Contractor on:

37.3.1 whether relief from compliance with obligations is required, including the obligations of the Contractor to meet the requirements set out in the Services Specification during the implementation of the Authority Change;

37.3.2 any impact on the provision of the Services including whether the proposed change is in contravention of Clause 37.1;

37.3.3 any amendment required to this Agreement and/or any Contract Document as a result of the Authority Change;

37.3.4 any impact on Income generation;

37.3.5 any capital expenditure that is required as a result of the Change;

37.3.6 any regulatory approvals which are required; and

37.3.7 an Estimate which shall set out any adjustments required to the Management Fee. For the avoidance of doubt the Parties hereby acknowledge that the Estimate may result in an increase or decrease in the Management Fee (or, if applicable and agreed by the Party making the payment, a capital payment). The Estimate should be broken down clearly showing all the requisite elements of the adjustments and should be priced in accordance with the amounts set out in the Pricing Tables. Where there are no directly relevant prices and rates in the Pricing

Tables any Estimate should be based on the principles of the prices and rates contained within the Pricing Tables. The Estimate shall not include any amount by way of compensation for loss of projected profits.

37.4 Discussion

37.4.1 As soon as practicable after the Authority receives the Contractor's Response, the Parties shall discuss and agree the issues set out in the Contractor's Response, including:

37.4.1.1 providing evidence that the Contractor has and as applicable has used reasonable endeavours to oblige its Sub-Contractors to, including where practicable the use of competitive quotes, minimise any increase in costs or decrease in income and maximise any reduction in costs or increase in income;

37.4.1.2 demonstrating that any expenditure that has been avoided, has been taken into account in the amount which in its opinion has resulted or is required under Clause 37.3.4.

37.4.2 In such discussions the Authority may modify the Authority Notice of Change, and if the estimated increase or decrease in expenditure in respect of the Authority Change is expected to exceed fifty thousand pounds (£50,000) (indexed in line with the Index) and it is practical for the Contractor to do so, the Authority may require the Contractor to seek and evaluate competitive tenders for any capital works relevant to the Change. In each case the Contractor shall, as soon as practicable, and in any event not more than ten (10) Working Days after receipt of such modification, notify the Authority of any consequential changes to the Estimate.

37.5 Value for Money

If the Contractor does not intend to use its own resources to implement any Authority Change it shall comply with Good Industry Practice with the objective of ensuring that it obtains best value for money (taking into account all relevant circumstances including, in particular, the requirements that the Contractor should not be worse off as a result of the implementation of the Authority Change) when procuring any work, services, supplies, materials or equipment required in relation to the Authority Change.

37.6 Disputes

If the Parties cannot agree on the contents of the Contractor's Response, then the dispute will be determined in accordance with the Dispute Resolution Procedure.

37.7 Confirmation or Withdrawal of Authority Notice

As soon as practicable after the contents of the Contractor's Response have been agreed or otherwise determined pursuant to the Dispute Resolution Procedure, the Authority shall:

37.7.1 confirm in writing to the Contractor the Contractor's Response (as modified); or

37.7.2 withdraw the Authority Notice of Change.

37.8 Failure to Confirm Authority Change

37.8.1 If the Authority does not confirm the Contractor's Response (as modified) within twenty (20) Working Days of the contents of the Contractor's Response having been agreed or determined, then the Authority Notice of Change shall be deemed to have been withdrawn.

37.9 Implementation of Change

In the event that the Contractor's Response has been confirmed by the Authority, then the Parties shall implement the Change. Each such Change shall be recorded and formalised by the use of the Change Note template set out at Schedule 9.

37.10 Method of implementing Adjustments

> 37.10.1 Where the Authority agrees to any Adjustment set out in the Contractor's Response the Authority and Contractor shall agree either a lump sum payment or an adjustment to the Management Fee.

37.11 Where the Authority Change consists of the addition of a new Facility (whether in direct replacement for a previous Facility or not) or the closure of a current Facility, this will not be an Authority Change if:

> 37.11.1 The Contractor submitted a price or fee for the new Facility / reflected the closure of the current Facility in its pricing shown in the Pricing Tables, and
>
> 37.11.2 The plan for closure or opening as appropriate has not changed in scope from when the relevant price was submitted in the Pricing Tables (examples of a change in scope are a smaller or larger centre opening or a partial closure instead of a total one), and
>
> 37.11.3 The closure or opening as appropriate takes place on the date assumed within those Pricing Tables.

In all other circumstances the opening or closure shall be an Authority Change, however in such circumstances the price for the closure or the opening included within the Pricing Table shall form the basis of the agreement between the Parties as set out in clause 37.10.1. Conversely where Clause 37.11.1 applies, but the Facility does not open, then this will be an Authority Change but one without any financial implication except to the extent that any existing payment is affected by that Authority Change eg a Facility that was due to close does not do so.

37.12 Where the Pricing Tables include the carrying out of Planned Enhancement Works by he Contractor, then the implementation of these Planned Enhancement Works shall not be an Authority Change if:

> 37.12.1 the Contractor submitted a price or fee for the Planned Enhancement Works within its pricing shown in the Pricing Tables, and
>
> 37.12.2 the Planned Enhancement Works as priced within the Pricing Tables has not changed in scope from when the relevant price was submitted in the Pricing Tables and described in the Contractor's Proposals, and
>
> 37.12.3 any partial closure of the relevant Facility as a result of such Planned Enhancement Works takes place at the time indicated in the Pricing Tables or in the Contractor's Proposals, and
>
> 37.12.4 (where the pricing for the Planned Enhancement Works assumed the availability of Authority Prudential Borrowing from the Public Works Loan Board of 6.3%) the availability of Authority Prudential Borrowing is still available on the terms issued by the Contractor within its proposals for Planned Enhancement Works

In all other circumstances the Planned Enhancement Works shall be an Authority Change (including where the Planned Enhancement Works do not proceed at all) so that any adjustment to the Management Fee from that shown in the Pricing Tables can be calculated.

37.13 In the event of closure of any Facility, the Contractor may need to make some Staff redundant. The Authority will not meet any of the Contractor's costs relating to those redundancies. The Contractor shall use best endeavours to mitigate these redundancy costs by maximising its internal procedures for redeployment.

37.14 Unless agreed otherwise, the Authority Change shall be recorded formally using the Change Note template at Schedule 9.

38 CONTRACTOR CHANGES

38.1 If the Contractor wishes to introduce a change in the Services ("a Contractor Change"), it must serve a notice ("Contractor Notice of Change") on the Authority.

38.2 The Contractor Notice of Change must:

38.2.1 set out the proposed change to Services in sufficient detail to enable the Authority to evaluate it in full;

38.2.2 specify the Contractor's reasons for proposing the change to the Services;

38.2.3 request the Authority to consult with the Contractor with a view to deciding whether to agree to the change to the Services and, if so, what consequential changes the Authority requires as a result;

38.2.4 indicate any implications of the change to the Services;

38.2.5 indicate, in particular, whether a variation to the Management Fee is proposed (and, if so, give a detailed cost estimate of such proposed change); and

38.2.6 indicate if there are any dates by which a decision by the Authority is critical.

38.3 The Authority shall evaluate the Contractor Notice of Change in good faith, taking into account all relevant issues, including, without limitation, whether:

38.3.1 a change in the Management Fee will occur;

38.3.2 the change affects the quality of the Services or the likelihood of successful delivery of the Services;

38.3.3 the change will interfere with the relationship of the Authority with third parties;

38.3.4 the financial strength of the Contractor is sufficient to perform the changed Services;

38.3.5 the residual value of the Equipment or Facilities is reduced; or

38.3.6 the change materially affects the risk or costs to which the Authority is exposed.

38.4 As soon as practicable after receiving the Contractor Notice of Change, the Parties shall meet and discuss the matters referred to in it. During their discussions the Authority may propose modifications or, subject to Clause 38.3, approve or reject the Contractor Notice of Change.

If the Authority approves the Contractor Notice of Change (with or without modification), the implementation of the relevant change to the Services shall be commenced within five (5) working Days of the Authority's acceptance. Within this period, the parties shall consult and agree the remaining details as soon as practicable. Each such Change shall be recorded and formalised by the use of the Change Note template set out at Schedule 9.

38.5 If the Authority rejects the Contractor Notice of Change, it shall not be obliged to give its reasons for such a rejection.

38.6 Unless the Authority's acceptance specifically agrees to a decrease in the Management Fee, there shall be no decrease in the Management Fee as a result of a change to the Services proposed by the Contractor.

38.7 If the change to the Services set out in the Contractor Notice of Change causes or will cause the Contractor's costs or those of a Sub-Contractor to decrease then there shall be an equivalent increase in the Management Fee. At its absolute discretion, the Authority may agree that the Management Fee will not increase to the full extent of the saving delivered by the Contractor under the Contractor Change.

38.8 Unless agreed otherwise, the Contractor Change shall be recorded formally using the Change Note template at Schedule 9.

39 CHANGE IN LAW

39.1 The Contractor shall comply with all and any Legislation, amended Legislation or re-enacted Legislation which comes into force at any time during the Contract Period and shall ensure that the Services are provided in accordance with the same.

39.2 The provisions of Schedule 17 shall apply in relation to NNDR to the exclusion of the provisions of this Clause 39.

39.3 If at any time during the Contract Period either Party becomes aware of a Qualifying Change in Law which in its reasonable opinion will result in:-

39.3.1 a necessary change in the Services;

39.3.2 a variation or amendment to the terms of this Agreement;

39.3.3 the procurement of new or additional Equipment; and/or

39.3.4 an amendment, revision, modification or refurbishment of the Facilities or any part of the Facilities

that Party shall issue a notice in writing to the other giving full details of the Qualifying Change in Law and the resulting effect.

39.4 As soon as practicable after receipt of any notice from either Party under Clause 39.3 above, the Parties shall discuss and agree the issues referred to in the notice and shall agree the way in which the Qualifying Change in Law should be effected and the steps which may be reasonably taken by the Contractor to mitigate the effect of the Qualifying Change in Law.

39.5 Following agreement between the Parties as to the way in which the Qualifying Change in Law is to be effected:

39.5.1 the Contractor shall bear the costs of effecting any General Changes in Law and there shall be no changes to the Management Fee as a result; or

39.5.2 any Specific Changes in Law or Discriminatory Changes in Law shall be put into effect as provided in Clause 37 and 38 as if the Authority had issued a Authority Notice of Change and any changes to the Management Fee (or, if applicable and agreed by the Authority, a capital payment) shall be reasonably agreed between the Parties.

39.6 Both Parties shall consult with each other to agree the resultant changes required to the Services Specification or other Contract Documents to govern the performance of the Change in Law."