



Neutral Citation Number: [2024] EWHC 1560 (TCC)

Case No: HT-2024-000187

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION (TCC)**

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

Date: 21/06/2024

Before :

**MRS JUSTICE JOANNA SMITH DBE**

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Between :

**ENVIRONMENT AGENCY**

**Claimant**

- and -

**HIGH SPEED TWO (HS2) LIMITED**

**Defendant**

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**Estelle Dehon KC and Riccardo Calzavara** (instructed by **the Environment Agency**) for the  
**Claimant**

**Richard Kimblin KC and Daniel Henderson** (instructed by **Winkworth Sherwood**) for the  
**Defendant**

Hearing date: 17 June 2024

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## **Approved Judgment**

This judgment was handed down remotely at 10.00 am on 21 June, 2024, by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**Mrs Justice Joanna Smith:**

1. By an application dated 21 May 2024, the Environment Agency (“**the EA**”) applies for an interim injunction under section 44(3) of the Arbitration Act 1996. The matter came before me on 7 June 2024 and was adjourned to a full on notice hearing upon the provision by the Defendant, High Speed Two (HS2) Limited (“**HS2**”) of an undertaking to “hold the ring” pending a full hearing. Since then further evidence has been served by both sides and at the on notice hearing of the application the court was provided with a hard copy bundle running to in excess of 1700 pages of evidence and exhibits. Unfortunately this bundle had not been available in a complete form in advance of the hearing.
2. Given the extensive evidence served in connection with the application and the detailed nature of the submissions, I reserved my decision so as to enable me to digest the evidence in more detail. This is my judgment on the application which I have produced as quickly as possible. HS2 has been prepared to extend its undertaking pending receipt of this judgment, for which I am grateful.
3. The EA was represented at the hearing by Ms Dehon KC and Mr Calzavara, while HS2 was represented by Mr Kimblin KC and Mr Henderson. I am most grateful to counsel for their helpful written and oral submissions.

**The Background to the Application**

4. The application concerns works which HS2 propose to carry out in connection with Phase One of the HS2 rail network (“**Phase One**”). Authorisation for the construction of Phase One flows directly from primary legislation in the form of the High Speed Rail (London - West Midlands) Act 2017 (“**the HS2 Act**”). HS2 is the nominated undertaker for the purposes of the HS2 Act, vested with power to build and operate Phase One.
5. It is common ground, that the provisions of the HS2 Act provide a bespoke consenting regime specific to Phase One which has the effect of disapplying the ordinary legislative framework (contained in the Water Resources Act 1991) which applies to the abstraction of water. Thus the HS2 Act creates its own regime of “Protective Provisions” contained in Schedule 33, whose purpose is to protect “the interests of certain persons who may be affected by other provisions of this Act” (see section 48 of the HS2 Act).
6. Those whose interests are to be protected include the EA, whose interests arise pursuant to the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017/407 (“**the WFD Regulations**”) and section 6(2) of the Environment Act 1995. Under regulation 3 of the WFD Regulations, the EA must “determine an authorisation” (i.e. decide whether to grant, vary or revoke, or impose conditions on a licence for an abstraction under the Water Resources Act 1991) so as to prevent

deterioration of the surface water status or groundwater status of a body of water or otherwise to support the achievement of the environmental objectives set for a body of water.

7. Schedule 33, paragraph 51 of the HS2 Act creates the concept of “*category 1 specified work*” which:

*“means so much of any permanent or temporary work or operation authorised by this Act (which includes, for the avoidance of doubt, any dredging and any geotechnical investigations that may be undertaken) as is likely to:*

*(a)...*

*(b) affect the flow, purity or quality of water in any main river or other surface waters or ground water, or*

*(c) affect the conservation, distribution or use of water resources”.*

8. Prior to constructing any category 1 specified work, HS2 must submit to the EA, as “drainage authority” under Schedule 33, plans and particulars for the EA’s approval. The EA must determine any such application within 56 days, which it may do subject to “such reasonable requirements or conditions” as it may impose for the protection of water resources or in the discharge of its statutory environmental duties. Approval must not be unreasonably withheld. HS2 must then give the EA 14 days’ notice prior to commencing any category 1 specified works. Any works must be constructed in accordance with approved plans, and to the EA’s reasonable satisfaction. Absent that, the EA may require HS2 to remedy the same. Any dispute arising between the EA and HS2 is to be determined by arbitration.
9. The EA seeks an injunction prohibiting HS2, including by its contractor, Balfour Beatty VINCI (“**BBV**”) from carrying out earthworks at Glasshouse Wood Cutting, Dalehouse Lane, Kenilworth, Warwick, Warwickshire CV8 2JZ (“**Glasshouse Wood**”) and at Stonehouse Cutting, Stoneleigh Road, Warwick, Warwickshire, CV8 2LH (“**Stonehouse**”) (collectively “**the Cuttings**”) until the earlier of the grant of consent by the EA to those works under the HS2 Act or the date of determination of arbitral proceedings commenced by the EA on 6 June 2024.
10. The Cuttings are located within water bodies designated by the EA as being of “poor” status, specifically the Warwickshire Avon – Coal Measures Coventry Water Body and the Warwickshire Avon – PT Sandstone Warwick/Avon Confined Water Body. As described in the EA’s evidence, a designation of poor status means that a number of surface watercourses that require groundwater are failing and that the amount of groundwater abstraction exceeds available groundwater resource. Ms Lindsey Sayner, a Chartered Civil Engineer employed by the EA, explains in her first statement that the

groundwater in the location of the Cuttings is under pressure from multiple sources, including from public water supply abstraction, and is at risk of deterioration and serious damage.

11. As described in its skeleton argument, the EA seeks to prevent HS2 from undertaking earthworks at the Cuttings (until the grant of consent or arbitral determination) which “will intersect two highly vulnerable water bodies”. The EA says that the proposed works “will necessitate...permanent consumptive abstraction [of the groundwater] (i.e. taking from groundwater and returning to surface water), expected to be akin to a public water supply abstraction, for the life of the railway”.
12. The EA considers that HS2 requires its consent to carry out these earthworks and that HS2 has failed to demonstrate that the earthworks are not likely to affect the “flow, purity or quality of...ground water” or affect the “conservation, distribution or use of water resources” such that they cannot be said to amount to “category 1 specified work” for the purposes of Schedule 33, paragraph 51 of the HS2 Act.
13. HS2 acknowledges that there is a strong likelihood that the *full* excavation works necessary at the Cuttings will intersect the water table and involve permanent interaction with groundwater. Accordingly, it acknowledges that, in due course, it is likely to need to follow the Schedule 33 procedure in order to obtain the EA’s approval to those works. It also acknowledges that this cannot be achieved in the current earthworks season (running from April to October).
14. However, appreciating that the Schedule 33 procedure may take some time to complete, and in conjunction with BBV, HS2 has proposed a two stage approach to the earthworks to be undertaken at the Cuttings, pursuant to which the necessary excavation works will be split into two phases, to be undertaken consecutively. HS2 refers to these as the “**dry dig**” and the “**wet dig**”. HS2 is proposing to carry out the dry dig in the current earthworks season on the basis that the dry dig does not amount to category 1 specified work and that there is therefore no need for HS2 to follow the Schedule 33 procedure. HS2 considers that it would be efficient, as part of the overall railway delivery timetable, to make progress with the dry digging as soon as possible and to use the excavated material to form nearby HS2 embankments.
15. In May 2024, BBV therefore dug trial pits at the Cuttings (designed to ascertain where groundwater might be found) and, informed by those trial pits, BBV commenced work at Glasshouse Wood, but not Stonehouse, shortly thereafter. After a brief pause in the works during the week commencing 20 May 2024 to allow for discussions between the parties, the works recommenced at Glasshouse Wood on 3 June 2024. They were then stopped pursuant to the undertaking given by HS2 to the court on 7 June 2024.

16. HS2's evidence explains that both Cuttings are located over principal aquifers and that "within an aquifer there may be an unsaturated zone at shallower depths above the resting groundwater table". HS2 proposes that the dry dig will be carried out in the unsaturated zone at both Cuttings (in other words the portion of subsurface which sits above groundwater levels) and that (subject to further observations of trial pits) it will be restricted to the level of one metre above the highest recorded groundwater level by reference to groundwater data extending back to 2016 obtained from groundwater monitoring wells installed along the length of the Cuttings. Mr Joe Brigly, a Water Resources and Flood Risk Specialist employed by HS2, explains in his statement that because the excavation is to be carried out in the unsaturated zone, it can be undertaken without the need for groundwater drainage in place such as dewatering systems or pumped abstraction.
17. The express purpose of the dry dig is thus to avoid interacting with groundwater or intersecting the water table in any way. In order to avoid interacting with perched groundwater (i.e. smaller tables of groundwater sitting above the prevailing groundwater level) HS2 and BBV have proposed a series of process controls, to which I shall return in detail later. The excavation of trial pits, which are allowed to sit open for 48 hours to allow for the ingress of groundwater if encountered and which are then used to inform the requirement to revise cut levels, is one aspect of these controls.
18. Against this background, the parties have been unable to reach agreement as to the carrying out of the dry dig works. The EA contends that the dry dig and the wet dig works cannot be "disaggregated" in the manner proposed by HS2, essentially because they are "interdependent". It submits that "[t]aken together, there is no dispute that the works are category 1 specified works". Further and in any event, the EA's position is that it does not accept that the dry digs are not likely to affect "the flow, purity or quality of...groundwater" or the "conservation, distribution or use of water resources" and further it does not accept that this is solely a question for HS2 to determine in any event.
19. Accordingly, the EA says that it is entitled to injunctive relief to prevent the continuation/commencement of the dry digs at the Cuttings. The EA has identified three issues which it seeks to refer to an arbitrator, but which for present purposes it contends give rise to serious questions to be tried. It argues that the balance of convenience is firmly on the side of the injunction being granted.

### **Jurisdiction**

20. Before I can consider the questions that arise in connection with the application for an injunction, I must first deal with the question of whether the EA's application meets the threshold conditions laid down by section 44(3) of the Arbitration Act 1996.
21. The relevant provisions of section 44 provide as follows:

***“44.— Court powers exercisable in support of arbitral proceedings.***

*(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.*

*(2) Those matters are—*

*(a) the taking of the evidence of witnesses;*

*(b) the preservation of evidence;*

*(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—*

*(i) for the inspection, photographing, preservation, custody or detention of the property, or*

*(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;*

*and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;*

*(d) the sale of any goods the subject of the proceedings;*

*(e) the granting of an interim injunction or the appointment of a receiver.*

*(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.*

*(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.*

*(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively*

*(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order”.*

22. Both parties referred me to *Cetelem SA v Roust Holdings Ltd* [2005] 1 WLR 3555 on the proper construction of and approach to the grant of injunctive relief under sections 44(2)(e) and 44(3) of the 1996 Act. In that case, the Court of Appeal (at [35] per Clarke

LJ) accepted submissions from counsel to the effect that “the whole purpose of the Act is to make provision for consensual resolution of disputes and to provide only a very limited role for the court”<sup>1</sup>. He repeated this point at [71]:

*“The whole purpose of giving the court power to make such orders is to assist the arbitral process in cases of urgency before there is an arbitration on foot. Otherwise it is all too easy for a party who is bent on a policy of non-cooperation to frustrate the arbitral process. Of course, in any case where the court is called upon to exercise the power, it must take great care not to usurp the arbitral process and to ensure, by exacting appropriate undertakings from the claimant, that the substantive questions are reserved for the arbitrator or arbitrators”.*

23. At [46]-[47] the Court of Appeal held that, on its true construction, section 44(3) of the 1996 Act was intended to limit the power of the court in urgent cases to the making of orders which it thinks are necessary for the preservation of evidence or assets. There is no prohibition on the court making an order under section 44(3) which may incidentally involve the preliminary determination of an issue, although “[w]hether it is appropriate for a court to make an order in such circumstances may be an important matter to take into consideration in deciding how to exercise the discretion conferred by the section but is not a matter which goes to the jurisdiction of the court” (at [48]).

24. At [49], Clarke LJ went on to consider the scope of the orders available to the court on an application under section 44(3):

*“49. It is also important to note that section 44(3) is not restricted to orders for the preservation of evidence or assets. Under the subsection “the court may...make such orders as it thinks necessary for the purpose of preserving evidence or assets”. As I see it, the effect of subsection (3) is that the court may make any order which it could make under subsection (1) provided that it thinks that it is necessary for that purpose. It may thus make an order about any of the matters set out in subsection (2), provided that it is “necessary for the purpose of preserving evidence or assets”.*

25. In this case, it is common ground that there are no arbitral proceedings on foot in the sense that no arbitrator has yet been appointed by the parties. Furthermore, the HS2 Act does not, in any event, imbue any arbitrator with the power to make an interim injunction (an order that the court may make pursuant to section 44(2)(e) of the 1996 Act). However, there is a dispute over whether the order sought by the EA is “urgent” and whether it is “necessary for the purpose of preserving...assets”. It is not suggested by the EA that injunctive relief is necessary for the purpose of preserving evidence.

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<sup>1</sup> See also section 1 of the Arbitration Act 1996.

26. Both sides rely on the lengthy negotiations that have been taking place between the parties in support of their respective submissions on urgency.
27. Doing my best to summarise what has happened as neutrally as possible, HS2 has been aware that Phase One had the potential to cause what the EA describes as “WFD deterioration” and that derogations under Regulation 19 of the WFD Regulations<sup>2</sup> may be required since as early as 2014. For approximately the last year, the parties have been engaging in detailed negotiations about the proper approach to Schedule 33 and as to the technical position at the Cuttings. In March 2023, the EA reminded HS2 of its position on both “exemptions” from consents under Schedule 33 of the HS2 Act and on “disaggregation” of works. Since then the parties have been liaising with a view to resolving the issue.
28. Since mid-March 2024, the EA has been aware that HS2 intended to commence work at the Cuttings in accordance with the statutory scheme, absent earlier resolution. On 5 April 2024, HS2 provided the EA with information on the proposed dry dig works at the Cuttings. On 10 April 2024 the EA received an Opinion from counsel (which it disclosed to HS2) advising that treating the proposed dry digs separately from the wet digs “amounts to impermissible disaggregation of the works” such that the EA’s approval would be required for the entirety of the works. On 9 May 2024 HS2 wrote to the EA confirming a start date for ‘dry digging’ of 13 May 2024. No arbitral proceedings were commenced until 6 June 2024.
29. HS2 submits that this chronology does not speak of urgency – the EA has been content to negotiate rather than to take action for some considerable time and has only very belatedly commenced arbitration proceedings. The EA, on the other hand, points to the fact that it was only when HS2 refused to provide an undertaking that it would not commence works at the Cuttings on 9 May 2024, and then dug trial pits at the Cuttings (observed by the EA’s Compliance Officer, Mr Adrian Grundy, on 13 May 2024) that the need for urgent relief became clear. The decision was taken to seek an injunction on 15 May 2024. HS2 was advised of this decision on 17 May 2024 and the application was issued on 21 May 2024.
30. I am inclined to accept that while the parties were negotiating and there remained hope that the issue between them would be resolved without the need for recourse to arbitral proceedings, the EA was justified in “sitting tight” in the hope that it could avoid an escalation of the dispute and the inevitable entrenching of positions that would likely accompany any escalation. Once it became clear that this would prove impossible, I accept that the EA acted swiftly to apply for injunctive relief, shortly thereafter also commencing arbitral proceedings. I also accept that the case is therefore “one of

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<sup>2</sup> Derogations under Regulation 19 have also been referred to as “exemptions”. Regulation 19 provides for certain circumstances in which a failure to prevent deterioration in the status of a body of, *inter alia*, groundwater is not a breach of the environmental objectives identified under regulation 12. I understand this to be what is meant by “derogations” or “exemptions” under Regulation 19.



urgency”, at least in the sense that works have just commenced and the EA wishes to stop those works. However, in my judgment that is not sufficient to get over the jurisdictional hurdle and I agree with HS2 that the question of urgency is to be understood in the context of the order that is being sought. Thus it must be shown that it is urgent that an order about matters listed in section 44(2) is made and, for the purposes of section 44(3), the court must be satisfied that the order sought is “necessary for the purpose of preserving...assets”.

31. There was some debate between the parties as to what is meant by “assets” in this context. The EA’s case in its skeleton is that “the asset is the natural world, and particularly the at-risk water”. It says that it is entitled to an order designed to preserve the at-risk water. Alternatively, the EA argues that the purpose of Schedule 33 is to introduce provisions protecting the interests of, *inter alia*, the EA. For the protection of those interests to be meaningful, the EA contends that it should be entitled to seek an injunction preventing its interests, including its interests under the WFD Regulations, from being adversely affected.
32. HS2, on the other hand, points to the “very limited role” of the court under the 1996 Act (as confirmed by the Court of Appeal in *Cetelem*) and to the necessity that the court should avoid interfering with, or usurping, the arbitral process. In one sentence in its skeleton it contends that “it is a stretch too far to seek to contend that the water bodies are in some way assets of [the EA]”. On his feet, Mr Kimblin submitted that “assets” in this context need to be things with a particular financial value and he pointed out that groundwater is something in which many people may have interests. He rejected the suggestion that the EA has any special or particular interest in groundwater as an “asset”.
33. Neither side was able to direct me to any authority on section 44(3) to assist on this point, but a close reading of *Cetelem* shows that the Court of Appeal was inclined towards a wide reading of the words. In *Cetelem* itself the Court of Appeal was concerned with a right to purchase shares which it held to be “an asset” within the meaning of section 44(3), observing that “Parliament intended to give the court powers to assist the arbitral process which are wide enough to include [an order designed to preserve the right to purchase shares]” (at [61]). Furthermore, it is clear from Clarke LJ’s judgment that the Court of Appeal considered the meaning of “an asset” to be broad. Thus the Court of Appeal considered that:
  - a. “assets” are not limited to tangible assets but can include choses in action, which are not to be limited to particular types of choses in action (at [57]);
  - b. a contractual right may be an asset within the meaning of section 44(3) (at [57]);
  - c. “...given the fact that the purposes of section 44(3) is to permit orders for preservation of assets, and given the limitations on the operation of the subsection...there is no good reason for construing the meaning of assets narrowly” (at [57]);

- d. there is no reason to limit “assets” within section 44(3) to the defendant’s assets (at [58]);
  - e. there is no reason to limit the meaning of “assets” to the paradigm case of a freezing order where a party is seeking to preserve assets against which an order can be enforced (at [59]);
  - f. by way of example, the court might order the sale of perishable cargo such as fish under section 44(3) if the court thought it was necessary to do so to preserve the value of the fish – the asset being the value of the fish rather than the fish itself (at [65]).
34. For reasons to which I shall come in a moment, it is not necessary for me to make a final decision about this. However, for present purposes, my view in the absence of any other citation of authority is that, given the EA’s statutory environmental duties, the statutory regime to which it is subject under the HS2 Act and the inclusion of provisions in Schedule 33 as to the resolution of disputes thereunder by way of arbitration, it is difficult to see why the court’s powers under the 1996 Act should not be wide enough to include an order designed to preserve, for example, the EA’s interests under Schedule 33 and/or the WFD Regulations.
35. While I think it unlikely that the “asset” for these purposes is “the natural world” or (in this case) the groundwater, I am inclined to the view that “the asset” is the “interests” of the EA which are identified in the WFD Regulations and protected by Schedule 33. The order sought by the EA in these proceedings is intended to prevent earthworks at the Cuttings which it is said would be contrary to those interests.
36. Assuming I am right about that, it is possible to characterise these proceedings as seeking an order for the preservation of assets under section 44(3) of the Arbitration Act 1996. However, that does not address the central question of whether the order sought is “necessary” to preserve assets. On close analysis of the evidence, I consider that it is not.
37. On 9 May 2024, HS2 wrote to the EA identifying the control measures that it intended to take in carrying out the dry dig. These are summarised in paragraph 47 of Mr Brigly’s statement as follows:

*“(a) Before any substantive works commence, 3 metre trial pits will be excavated every 50 metres. These trial pits will remain open to determine absence of groundwater. If groundwater is detected, works will not proceed in that area.*

*(b) Excavation of the cutting will only start once the trial pit records have been assessed by the BBV water Coordinator and BBV is satisfied that there is no groundwater in the pits. If groundwater is detected, works will cease.*

*(c) On completion of the 3 metre layer excavation, trial pits will be repeated, and the assurance process repeated. If groundwater is detected, works will cease.*

*(d) If groundwater is identified, additional trial pits will be done to determine the extent of the wet area. The wet area will not be excavated. Information will be escalated and assessed, and the extent of works determined by BBV.*

*(e) Discharge and treatment of the surface water ingress will be in accordance with the existing consents and surface water management strategies agreed with the Environment agency. Records will be kept on a regular basis, for control and compliance.*

*(f) An inspection regime will be followed, which includes a daily inspection report on the cutting prior to commencing the works, photographs and records to be taken at the end of every shift to record the level of excavation and characteristics of the excavation. Further, throughout every shift the site supervisory team will visually inspect the excavation, and will spot check levels throughout the day”.*

38. In her first statement in support of the EA’s application, Ms Sayner confirms at paragraph 56 that it is her view that the dry dig does not exist for any purpose in isolation, cannot be disaggregated from the wet dig, and she goes on to say that “[t]he cuttings are likely to cause further WFD deterioration in waterbodies which currently have ‘poor’ status for groundwater balance status or dependent surface water”. At no point in her first statement does she suggest that the dry dig alone (as opposed to “the cuttings”) will likely cause WFD deterioration and at no point does she address whether, and if so why, the controls proposed by HS2 are unsatisfactory. By way of example, she does not suggest that the digging of a trial pit, the identification of groundwater and the backfilling of that trial pit is itself an operation that is likely to cause WFD deterioration.
39. The furthest Miss Sayner goes on the subject of the dry dig alone in her first statement is to say (i) at paragraph 53 that “[e]xcavations up to and around groundwater **can** alter the unsaturated pathway” (**emphasis added**) and that “perched lenses of groundwater that have accumulated above the main water table all contribute to recharge and are part of the groundwater system”; and (ii) at paragraph 58 that undertaking dry digs “**may** on its own contribute to WFD deterioration”, that it “**may** preclude mitigation actions that should be considered as part of the Regulation 19 WFD derogation for the full activity” and that it “**risks** changing baseline conditions to the extent that there will not be data to base the Regulation 19 assessment on, which could make the final works unconsentable” (**emphasis added**).

40. The upshot of this evidence as I read it is that, subject to the question of whether the entirety of the required earthworks should, for the purposes of consent under Schedule 33, be viewed together, Ms Sayner is unable to say that the dry digs that have been proposed (and have been commenced at Glasshouse Wood) are (in themselves) likely to affect the EA's interests (including its interests in preventing WFD deterioration, maintaining the flow, purity or quality of groundwater or the conservation, distribution or use of water resources) such that it is "necessary" to obtain an order to preserve them.
41. Mr Grundy's first statement detailing his site visits also does not suggest that an order is "necessary". In summary, on 13 May 2024 at Glasshouse Wood he observed four trial pits containing water and four that were dry. On 14 May 2024 he observed excavations taking place but he does not suggest in his statement that he saw any groundwater and his photos showing the depth of the excavations do not record the presence of groundwater. On 13 May 2024 at Stonehouse, Mr Grundy observed four trial pits which all contained groundwater. On his 15 May 2024 site inspection these had all been backfilled in accordance with the controls identified above. Thus Mr Grundy's first statement certainly evidences that groundwater has been found at both Cuttings in certain areas when trial pits have been dug, but it also evidences that the controls put in place by HS2 are being followed.
42. As for HS2's evidence, Mr Brigly confirms that the data suggests that the dry digs may not encounter groundwater but that due to his understanding of the geology he considers it likely that groundwater could be encountered in upper layers of material where it has not been identified by the monitoring data. This is consistent with the fact that trial pits have already encountered groundwater. Mr Guy Dowdeswell, Construction Groundwater lead at BBV, confirms this view, explaining in his statement that there is anticipated to be "a level of discontinuity" between groundwater found in shallow layers of sandstone and the deeper confined sandstone which is more representative of the main groundwater body from which the majority of groundwater abstraction occurs.
43. However, Mr Dowdeswell explains that the proposed dry cut line has been positioned at an elevation considered to be "extremely conservative" based on the available data. Mr Brigly confirms that it is not unusual in dry works to encounter areas of unexpected groundwater. He goes on to say that "the controls in place would prevent any likely effect...on the groundwater if it were encountered during the works, the ultimate control being that anywhere where groundwater has been encountered on site as part of the dry dig works...works have stopped without any affect on the groundwater, demonstrating the controls in place are effective". This is reflected in the technical submission made by HS2 to the EA on 5 April 2024 in respect of both Cuttings which records that "If *any* groundwater (superficial/'perched' or otherwise) is encountered during the proposed excavation, then the works will stop immediately..."
44. Mr Brigly explains that:

- a. at Stonehouse Cutting south, groundwater was encountered in trial pits and that accordingly “no dry digging was proposed in this location”. Mr Brigly goes on to say that “[t]he groundwater which has been encountered within the trial pits has not been abstracted or altered in any way and the trial pits have been backfilled without any affect on the flow, purity or quality of the groundwater [nor] any affect on the availability of water resources for other abstractors”. As at the date of his statement, Mr Brigly confirms that no further trial pits or excavation works are being undertaken by BBV at this site;
  - b. at Stonehouse Cutting north, BBV has not encountered any groundwater in the 20 trial pits undertaken on 17 May 2024 or in the 13 trial pits undertaken on 5 June 2024. He explains that the intention is therefore to restart the work and to excavate the top 3 metres of dry material at this location. In line with control measures, trial pits will be repeated following this initial excavation to ascertain whether groundwater will be encountered in the next 3 metre band.
  - c. At Glasshouse Wood, BBV identified some trial pits containing groundwater and some which were dry (which were at a higher elevation than the lower wet trial pits). This enabled BBV to identify an area in which it could excavate dry material down to a depth of 3 metres. He explains that BBV water specialists have demarked exclusion zones on the site as part of the site controls, as is evidenced by photographs attached to his statement. Mr Brigly confirms that “[t]he first 3m depth phase (phase 1) of the dry dig was completed on site by 5<sup>th</sup> June with no groundwater encountered in the excavation”. He goes on to explain that on 5 June 2024 more trial pits were dug to identify whether the subsequent three metre depth of material would remain dry. Upon it being discovered that these pits were all wet, the exclusion zone on site was extended. Mr Brigly says that on recommencement of the works, further trial pits will be necessary to identify a phase 2 dry dig area.
45. Mr Dowdeswell explains that the use of trial pits at the Cuttings avoids extending investigations into the groundwater table at saturated ground and that detailed monitoring of the trial pits takes place daily to ensure that the excavation works remain unlikely to affect groundwater. At paragraph 11 of his statement he says this:
- “The proposed dry digs will not extend below the groundwater table into the saturated ground and therefore will not result in any further loss of groundwater from the waterbody, because there will be no dewatering. In this respect BBV’s dry digs will not cause further deterioration of the waterbody status.”*
46. It seems to me to be of considerable significance that the EA’s reply evidence does not seek to gainsay this statement. In her second statement (amongst other things), Ms Sayner complains that the EA has not been provided with sufficient information about the proposed dry dig works and that many documents that have been provided by HS2 are incomplete. She explains that the EA has asked for further technical information which has also not been provided. She refers the court back to paragraph 58 of her first

statement (to which I have referred above) saying that, in that paragraph, she has highlighted “the cumulative impacts” of the excavation works and the risks and implications to the Regulation 19 derogation process “which **can** arise from conducting the dry dig works”. Once again, Ms Sayner does not suggest that these impacts, risks or implications are likely to, or will, arise.

47. At paragraph 39 of her second statement, Ms Sayner says this:

*“The EA is aware of the control measures proposed at Glasshouse Wood and Stonehouse Cutting. In response I comment that **the full works** are excavating into groundwater, risking WFD deterioration and requiring detailed assessment” (emphasis added).*

48. I pause to observe that this reference to “the full works” is quite plainly a reference to the dry dig and the wet dig works together. Ms Sayner does not comment on whether, if the controls identified above are adhered to by HS2 and BBV, there is still a risk of WFD deterioration by reason of the dry digs alone, much less assert that there is such a risk.

49. Ms Sayner does observe that digging trial pits until groundwater is observed “is a significant issue” which she says “impacts on the baseline monitoring before models and receptors have even been agreed” and “precludes potentially significant mitigation”. However, Ms Sayner says nothing further about the controls proposed by HS2. Specifically she does not say that the proposed dry dig works (or the digging of trial pits) are likely to cause deterioration to the two water bodies beneath the Cuttings, that they are likely to affect the flow, purity or quality of groundwater or that they are likely to cause dewatering or otherwise affect the conservation, distribution or use of water resources. She also does not say that putting a stop to those works is “necessary” for the purposes of preserving the EA’s assets, whether those be identified as “the natural world”, “the at-risk water”, the EA’s interests under the WFD Regulations, the HS2 Act or something else. Indeed one looks in vain for any confirmation to that effect in the EA’s evidence. I do not consider the evidence in her first statement to the effect that there “may” be issues with mitigation actions and baseline conditions to be remotely sufficient to persuade me that there is a necessity to make the order sought.

50. Certainly, in my judgment, it is wrong to say on the evidence that the dry dig works (which is all that HS2 is proposing at present) will “intersect two highly vulnerable water bodies” or that they will “necessitate...permanent consumptive abstraction” of groundwater, as the EA suggested in its skeleton argument. In this sense it does appear to me that the EA’s primary focus has been on the works that will ultimately be undertaken, rather than on the works that are currently being proposed. Whether it is correct to say that the works can be “disaggregated” or not for the purposes of paragraph 51 of Schedule 33 appears to me to be neither here nor there for present purposes. When considering the primary jurisdictional question, I must consider whether the case is one

of urgency and whether it is necessary to grant the order sought so as to preserve assets. On the available evidence I cannot see that this case is one of urgency or that it is necessary to make the order sought so as to preserve assets.

51. For the avoidance of doubt, I should add that in reaching this decision I have borne in mind the EA's evidence that BBV has previously continued with works after the water table has been encountered (including an admission to that effect in a letter from Sir Jon Thompson, Executive Chair of HS2, dated 26 February 2024). However, I note the assurance in that letter as to improved performance on the part of BBV, together with the evidence (including from Mr Grundy) that the controls that have been put in place by HS2 are being complied with. Although I accept the EA's submission that the court has not been shown any instruction to BBV as to the implementation of these controls, it also has no reason on the available evidence to suppose that they are not being adhered to (or will not in future be adhered to) at the Cuttings. In this regard, I accept HS2's submissions that the evidence of what has happened at the Cuttings to date is persuasive.

### **Conclusion**

52. In the circumstances, I do not consider that the EA has surmounted the jurisdictional hurdle of section 44(3) of the Arbitration Act 1996. Given this decision, there is no need for me to go on to consider any of the arguments arising in relation to the grant of injunctive relief. These arguments (particularly on the subject of whether there is a serious issue to be tried) raise questions which the arbitrator will be required to deal with in due course and I am mindful of the need to avoid usurping or interfering in the arbitral process more than is required in order to determine this application.
53. For the reasons I have given, the application is dismissed and my present view is that costs should follow the event. If the EA wishes to argue that any different order should be made on costs, I will determine the question on paper and the parties should please liaise between themselves as to the exchange of short written submissions. In any event, I invite the parties to prepare the necessary order reflecting my decision.
54. By way of postscript, I observe that it is extremely unfortunate that these two bodies, both ultimately funded by the taxpayer, have been unable to resolve the issues that arise in this case; issues of which they have been aware for some considerable time. In my judgment it is now crucial that the extant issues between the parties are resolved as soon as possible and I would urge both parties to cooperate in seeking an expeditious resolution through the arbitral process.