



Neutral Citation Number: [2024] EWHC 687 (TCC)

Case No: HT-2024-000044

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
KING'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Rolls Building
Fetter Lane
London
EC4A 1NL

Before:

MRS JUSTICE COCKERILL DBE

Between:

AFFINITY WATER LIMITED

Claimant

- and -

HIGH SPEED TWO (HS2) LIMITED

Defendant

Paul Darling KC and Charles Morgan (instructed by **the Claimant's in house legal team**)
for the **Claimant**

James Leabeater KC and Daniel Khoo (instructed by **FieldFisher LLP**) for the **Defendant**

Hearing date: 29 February 2024

APPROVED JUDGMENT

Mrs Justice Cockerill:

INTRODUCTION

1. The High Speed 2 rail link has been in the process of construction for some years. It is a massive infrastructure project. As is well known, it has involved much acquisition of land. What is maybe not so well known, but is logical on reflection, is that it intersects with and can involve major disruption to apparatus belonging to a multitude of utilities - such as electricity and water suppliers.
2. This is an application brought by one of the utility companies whose apparatus comes into contact with the construction being executed by and for the Defendant (“HS2”). Affinity Water Limited (“AW”) is a utility company with an area of supply which includes the London Borough of Harrow.
3. AW has a range of statutory duties under the Water Industry Act 1991 of which perhaps the most important is the general duty under s.37:

“... to ensure that all such arrangements have been made—

 - (a) for providing supplies of water to premises in that area and for making such supplies available to persons who demand them; and
 - (b) for maintaining, improving and extending the water undertaker’s water mains and other pipes,

as are necessary for securing that the undertaker is and continues to be able to meet its obligations under this Part.”
4. This is an application for summary judgment in AW's claim against HS2 concerning the approach of a pair of HS2’s tunnel boring machines (“TBMs”) to a large water main vested in AW and located underground in the vicinity of Rabournmead Drive, Ruislip (“the Main”).
5. In essence AW contends that the contractual arrangements in place between the parties are such that HS2 is obliged to pay for the diversion of the Main. The parties have been in discussion about the Main for years, but with the TBMs due to reach the Main in a few weeks, it is clear that they cannot agree.
6. HS2 says that all the investigations to date demonstrate that the risk of any damage caused by tunnelling is negligible. AW says that the risk is small, but the consequences are so appalling that it wants the Main to be diverted and that under the contractual arrangements between the parties HS2 is obliged to pay for diversion. It therefore seeks summary judgment on its claim that it is entitled to bypass the Main by creating a temporary overland rider main despite the absence of instructions from HS2 to do so and orders that it may recover its costs of so doing from HS2. It also wants a final injunction restraining HS2 from proceeding with tunnelling works until the AW Works have been completed.
7. A hearing of the summary judgment application hearing has been brought on with great expedition following a direction from O’Farrell J.

Evidence

8. AW has adduced three witness statements. The first, from Ms Ruth Luxford, is solely concerned with initial disclosure. There are two more substantive statements from Mr Ben Hayward. The first sets out the basis on which AW contends that it is entitled to summary judgment, and the second responds to some of HS2's witness evidence.
9. HS2 has served four statements:
 - 1) Mr David Pugh, senior commercial manager, who was responsible on HS2's side for negotiating the relevant contracts. He addresses various matters which HS2 say are relevant to and admissible by way of background factual matrix evidence on the key contracts.
 - 2) Mr Mark Lemmon is HS2's lead tunnelling engineer. He speaks to the risks posed by the tunnelling works; the ground movement risk assessments carried out in relation to the Main; and the risks posed to the TBMs and third party property if AW's application is successful.
 - 3) Mr Carl Ainley, also an engineer, is Senior Project Manager of the utilities division at HS2 and as such responsible for utility works on the HS2 project, including in relation to AW assets. He addresses the operation of the relevant contracts and the likely duration of AW's proposed works.
 - 4) Mr Eddie Woods is a tunnelling expert. He explains HS2's concerns about the works AW intends to carry out.

BACKGROUND

10. The Main, which is vested in AW, carries water from the Iver Water Treatment Works to the Harrow Reservoir and is the primary conduit of water supply to the Harrow area. HS2 is a private company tasked with delivering the High Speed 2 rail project ("the Project").
11. Part of the Project involves tunnelling works ("the Northolt Works") to create the Northolt Tunnels section of the train line between London and Birmingham using TBMs. These TBMs are expected to pass beneath the Main. AW contends that there is a risk of injury to the Main from ground settlement as the TBMs pass underneath it. This application has been expedited because the TBMs may reach the zone of influence around the Main by 10 March 2024.
12. The High Speed Rail (London-West Midlands) Act 2017 ("the 2017 Act") permitted HS2 to acquire or obtain possession of land in order to carry out necessary works for the Project, which involve extensive works in or around existing infrastructure. While the bill was passing through Parliament, AW lodged a petition of objection which expressed concerns over the effect of the Northolt Works on its infrastructure and sought an indemnity for any costs or damage resulting from them.
13. In consequence, and in consideration of that petition being withdrawn, three agreements came into being:

- 1) The Secretary of State entered into the Protective Provisions Agreement (“PPA”) with AW on 27 May 2016. This provided for the execution of an Asset Protection and Monitoring Agreement (“APA”) between AW and HS2;
 - 2) The APA was executed on 2 November 2017. Schedule 4 of the APA contains a list of “APA Works” which HS2 is obliged to carry out or to procure;
 - 3) The Design and Construction Agreement (“DCA”) was executed at the same time between the same parties. The DCA provides the contractual framework by which HS2 engages AW to undertake “DCA Works”.
14. One major aim of the APA and DCA is to preserve AW’s ability to perform its statutory functions, including its statutory duties under the Water Industry Act 1991. Their detail is immaterial for present purposes; AW would clearly be in breach of most or all of them if the Main ceased to function for a significant period of time.

THE AGREEMENTS

The PPA

15. The PPA was entered into on 27 May 2016. Recital (C) states that:

“The Undertaker and the Promoter are entering into this Agreement for the purposes of addressing concerns expressed by the Undertaker as to the potential effects of the construction and operation of the authorised works on its interests.”

16. At clause 3.1 (“Withdrawal of objection”) the PPA provides that:

“In consideration of the terms of this Agreement (and their correct implementation) the Undertaker shall withdraw its petition in relation to the Bill ...”

17. Clause 5.1 imposed an obligation on the parties to seek to ensure that there was no material deterioration in the resilience of public water supplies as a result of the HS2 Works.

18. Clause 9 provides that:

“The Promoter and the Undertaker acknowledge that they have consulted and cooperated to assess the preliminary impact of the proposed Authorised Works on the Undertaker’s statutory operations and that they will continue to engage in the development of the requirements identified in the Technical Appendices.”

19. Clause 11.1.17 defines “Technical Appendices” by reference to Appendix 1, which includes the Design Principles document in the same form as appears at Schedule 9 to the APA.

20. Clause 18 provided for the bearing by the promoter of the cost to AWL of, inter alia, making good “Detriment”, defined in clause 1.1.519 so as to include any material impact adversely affecting AWL’s ability to discharge its statutory functions.

The APA

21. The APA is a detailed and precise agreement executed as a Deed which, together with its Schedules and Appendices, runs to 218 pages. In the “Background” section, Recital (C) states:

“Through previous assessments and agreements between AW and HS2, AW has identified apparatus that is affected or is likely to be affected by Phase 1 and determined that protective measures are required. AW and the Secretary of State for Transport have agreed the Protective Provisions Agreement to address the concerns expressed by AW regarding the potential effects of the proposed Phase 1 on the Apparatus and the Sources, the resilience of public water supplies, and AW's ability to service its customers.”

22. Clause 1.1 defines “APA Works” as “*The works to be carried out or procured by HS2 pursuant to this Agreement as briefly set out in the Schedule of APA Works.*”
23. Clause 2 provides (where relevant) as follows:

“2 HS2 OBLIGATIONS

2.2 HS2 shall observe and perform its obligations in accordance with the terms of this Agreement including carrying out actions or providing information as soon as reasonably possible following reasonable request from AW from time to time. If any Costs are incurred by AW as a result of any breach of contract or negligence by HS2, then HS2 shall pay to AW all Costs incurred by AW as a result of HS2's breach or negligence.

2.3 HS2 will design, carry out and complete or procure the carrying out or completion of the APA Works in accordance with the Design Principles and exercising the reasonable skill, care and diligence as may be expected of a properly qualified and competent person engaged in carrying out works of a similar size, scope and complexity to the APA Works.

2.4 HS2 shall design, carry out and complete or procure the carrying out or completion of the APA Works in accordance with:

(c) AW’s Requirements, including such other conditions or further works:

- i) As AW may reasonable consider necessary to prevent, address, alleviate or comply with (as applicable) an AW Operation Issue”

24. Clause 7.4 states that “*HS2 is responsible for developing and carrying out the APA Works, and identifying the Necessary Consents and the requirements for any information from AW.*”
25. Clause 7.6 provides:

“7.6 Without prejudice to AW's other rights under this Agreement, where HS2 fails to fulfil any of its obligations under clause 2.2 and/or this clause 7 and such failure has a material adverse effect on the Sources, Apparatus, any land and property of AW or the ability of AW to perform its function as a statutory water undertaker or the ability to perform its statutory functions:

(a) AW may (acting reasonably) issue a notice stating the steps to be taken to address the issue and requiring HS2 to remedy the situation within a specified time, taking into account these circumstances; and

(b) in the event that HS2 is not able to or does not comply with the notice, AW shall take such steps as it reasonably considers appropriate to address the position and HS2 shall indemnify AW in respect of all resulting Costs.

HS2 shall carry out or procure that the APA Works are carried out to AW's reasonable satisfaction.”

26. Clause 8 headed “MONITORING DURING CONSTRUCTION” states “*From the Commencement Date to the date of Completion, HS2 will comply with the monitoring and protective provisions set out in Schedule 3 Part A.*”
27. Clause 13 (“Variations”) is a detailed and elaborate set of provisions filling 3 pages of the APA. Affinity says that this is highly relevant to the question of whether the obligations to be found in the APA are provisional and whether they can be altered in the manner which HS2 suggests. See in particular clause 13.2 (c), (d) and (f).
28. Clause 33.3 and 33.4 are “no waiver” provisions; Affinity says that these, the provisions concerning variations and many other provisions in the APA all assume that the works to be carried out are defined by the APA.
29. Schedule 3 is headed “Monitoring”, paragraph 7 being “*GROUND MOVEMENT AND INTERRUPTION TO SUPPLY*”:

“Settlement Assessment Model

7.1 Before the commencement of any HS2 Works the Parties agree that HS2 shall prepare a Draft Settlement Assessment Model which addresses the following issues as applicable to the whole of the Apparatus and any land and property of AW prior to the Completion of the said works:

An assessment to identify all AW assets within the zone of influence of the works and examine the impact of ground movements on these assets. The assessment shall consider the nature and asset condition of the AW assets and incorporate the asset specific protection and mitigation requirements of AW. ...

7.2 The HS2 assessment process shall follow three phases but will commence at the appropriate stage to the extent that each stage is necessary:

Phase 1 - A 'greenfield' movement assessment;

Phase 2 — An assessment of the impact of the Phase 1 ground movement on AW assets using moderately conservative assumptions with respect to an asset's behaviour and its ability to resist movements;

Phase 3 - A detailed analysis, with reassessment of the Phase 1 and 2 assumptions and parameters and taking into account the construction methodology and sequence....

7.6 No part of the following below ground HS2 Works shall be commenced until the Final Settlement Assessment Model has been agreed in accordance with this paragraph 7 of Schedule 3:

tunnelling and associated works including portal, shaft and cross passage construction;”

30. Schedule 4 to the APA, provides a long list in the form of an Excel Spreadsheet detailing the location and nature of the sites for APA or DCA Works, the nature of the works (Divert, Protect, Remove or Assure), budget, additional information and designation (APA, DCA or TBD).
31. The Main appears in the list as a DCA Works item, and the box for “Divert” is checked. There is a C3 Budget Estimate of “359000”. The “Additional information and comments” column states “75mx900mm divert”.
32. Schedule 5 (“HS2 Phase 1 Delivery Programme”) shows the works to be carried out. These works include design and construction work to be done in relation to the Main. The date range for works on the Main is stated to be from 31 July 2017 to 25 March 2020.
33. Schedule 9 contains the Design Principles stated in clause 2.3. The relevant paragraph is paragraph 2:

“2. Existing Water Main crosses above HS2 Tunnel and would be affected by Settlement

It anticipated that works would fall into one of the three categories below. Analysis would need to be carried out in advance to understand the combined effect that settlement, ground conditions and tunnel construction methodology will have on the existing pipe material in order to classify the works on each asset in to the categories below.

Options

Where assessment of the risk or consequence of the existing service failing due to settlement is significant the existing asset should be replaced by a flexible pipe capable of coping with the expected differential settlement. These replacements would be carried out in HPPE or other materials or solutions that provide a flexible pipeline that will accommodate the predicted settlement: material Selection

would be based on upon the specific circumstances and ground conditions relevant to each site. The extent of the replaced sections would depend upon the settlement analysis and the effect / risk of failure of the existing pipework /material.

Where risk of catastrophic failure risk of an asset is perceived to be low and there is no risk of significant damage from a burst, an alternative approach would be to set up leakage monitoring on the existing asset to detect failure.

Do nothing —Existing Pipe is flexible and settlement will not cause this asset to fail.”

The DCA

34. The DCA was executed between AWL and HS2 on the same day as the APA, 2 November 2017. It too is a detailed and precise agreement executed as a Deed which, together with its Schedules and Appendices, runs to a further 177 pages.
35. Recital (C) here is materially identical to Recital (C) in the APA.
36. Recital (D) states:

“This Agreement is the contractual framework to enable the instruction of Work Orders for the DCA Works to be undertaken by AW on behalf of HS2. It is intended that the Initial Work Order will be instructed by HS2, after signature of this Agreement pursuant to clause 7.10 hereof, to cover the reasonable project management and other initial costs of AW as agreed between HS2 and AW prior to the date hereof. HS2 may instruct subsequent Work Order Requests on or after the date of this Agreement. The instruction of all Work Order Proposals (following a Work Order Request) will be subject to approval through HS2's governance and assurance processes.”
37. Recital E(iii) in similar terms to recital E(3) in the APA.
38. Clause 1.1 defines “DCA Works” as “*The works and services to be carried out by AW under this Agreement as set out in the Schedule of DCA Works.*” HS2 is obliged to pay the costs of DCA Works (clause 8.9).
39. Clause 3 sets out the “Scope”:
 - “3.1 This Agreement provides a mechanism for:
 - 3.1.1 the engagement of AW to undertake the DCA Works;
 - 3.1.2 to provide the procedures necessary to ensure the timely delivery of the DCA Works;
 - 3.1.3 the principles under which the DCA Works are instructed and payment of Cost is made; and

3.1.4 ensure that, save to the extent that the DCA and/or APA expressly provide otherwise, there is no material deterioration of the public water supply and no cost impact on AW's customers".

40. Clause 4.1 acknowledges the "paramount importance" of both the successful and timely completion of HS2 Phase 1 and "the protection of the Utility's Apparatus, ... , the resilience of public water supplies, preventing any costs relating to the DCA Works being passed on to the Utility's customers, and the Utility's ability to perform its statutory functions.
41. Clause 5 defined HS2's obligations including provision to AW of "*where appropriate Work Order Requests and approvals in sufficient time for [AW] to be able to mobilise and deliver the Approved Work Order request provided that where HS2 has not issued a Work Order Request in accordance with the AW Master Programme, the Utility may require HS2 to serve such Work Order Request as soon as reasonably possible following demand.*"
42. Clause 5.3 provides:

"Without prejudice to clause 5.2, HS2 shall be responsible for coordinating the DCA Works with the other Phase 1 works (including the APA Works) to be carried out by HS2 or its contractors or other utilities and/or undertakers so as to avoid any adverse impact on AW's Apparatus aquifers and groundwater sources (including the Sources) and the resilience of public water supplies."
43. Clause 6 defines AW's obligations which include complying with the Design Principles and using reasonable skill and care. Clause 6.1.1 states that in "*carrying out or procuring the carrying out of the DCA Works, AW shall in relation to any design, comply with the Design Principles and shall use all reasonable skill and care expected of a qualified and competent utility company*".
44. Clause 6.4 provides that the "*instruction of DCA Works will only be initiated and authorised through Approved Work Orders. Notwithstanding any provision in this Agreement to the contrary, AW shall not be under any obligation to carry out any DCA Works until instructed and authorised to do so under the relevant Approved Work Order.*" An Approved Work Order means "*a Work Order issued by HS2 in response to a Work Order Proposal which has been approved by HS2 and AW pursuant to clause 7.17*".
45. Clause 6.6.1 states that AW "*shall notify HS2 as soon as reasonably possible after becoming aware of any matter which could affect a Date for Completion*". These procedures were implemented in practice by a system of "XD Forms": AW could warn HS2 of a matter ("Form XD2 (Part 1)") and HS2 decided whether to accept or reject the warning and whether to issue any new work orders ("Form XD2 (Part 2)").
46. Clause 7 sets out "Project Procedures". It provides for a Project Plan which "*sets out the indicative programme and methodology for Phase 1*". Clause 7.3 described the AW Master Programme which sets out the indicative programme for the implementation and completion of all the DCA Works and the APA works.

47. All of clauses 7.2, 7.3 and 7.4 mention the possibility of amendments or modifications to Project and/or Master Plan.
48. Clause 7.6 provides:
- “HS2 and AW agree to work collaboratively to proactively manage risk, with the intention of avoiding risk or, where avoidance is not possible, mitigating any impacts on AW arising as a result of the HS2 Works so far as reasonably possible.”
49. Clause 7.10 onwards provides for “Instruction of Work Orders”. These procedures were implemented in practice by a system of “XE Forms”, comprising;
- 1) Form XE1 (Part 1) “Utility Work Order Request” by this form HS2 would request a utility to provide a quotation for specified works ;Form XE1 (Part 2) “Consideration of Utility Proposal”; by this form, following receipt of the requested quotation, HS2 would either instruct the utility to proceed or indicate its decision not to instruct the works;
 - 2) Form XE3 “Utility Work Order Proposal”; by this form, upon receipt of a Form XE1 (Part 1), the utility would provide its requested quotation for the work specified within the XE1.
50. There is then a system for agreeing the Work Order Proposals. Clause 7.17 provides that *“If HS2 does not accept the Work Order Proposal within (60) days, the Work Order Request and the Work Order Proposal shall lapse and the process outlined in clause 7.10 to this clause 7.17 may be repeated as many times as necessary until a Work Order Proposal has been so approved.”*
51. Clause 29 contains a detailed dispute resolution scheme running via good faith meeting (clause 29.2), and mediation (clause 29.4).
52. Schedule 1 (“Schedule of APA and DCA Works”) is identical to Schedule 4 to the APA.
53. Schedule 2 (“HS2 Phase 1 Delivery Programme”) is identical to Schedule 5 to the APA.

EVENTS

54. Some background to the agreements was referred to. The first relevant email was sent on 11 October 2016 from HS2 to AW attaching an Excel spreadsheet (the precursor of Schedule 4) containing comments on the anticipated works. In relation to the Main, AW commented in column Y *“Very large and critical main!”*. HS2’s comment was *“Agreed – hopefully will be shown to not require diversion once settlement determined”*. It was also listed as *“Contestable”*. This email appears to come as part of a debate about how various works or potential works are to be treated, in terms of whether they were to be HS2 works or AW works.
55. The next email is one of 21 July 2017 from AW to HS2, again attaching an Excel spreadsheet. The email notes that *“Contestable”* and *“Non-contestable”* have now

become “APA” and “DCA” respectively. The entry for the Main in this version is identical to that appearing in Schedule 4, i.e. it is now categorised as “DCA”, and comments have been removed. No explanation is given for the change from APA to DCA.

56. The last pre-contractual email I have seen was sent on 10 October 2017 from AW to HS2, with “final Annexure” attached after a meeting that day. The entry for the Main is identical to that attached in the email of 21 July 2017 and Schedule 4. The APA and DCA were executed thereafter on 2 November 2017. It is accepted for the purposes of the argument before me that the comments section remained in the Schedule 4 spreadsheet.
57. HS2’s risk assessment process under clause 7.2 of Schedule 3 of the APA (the Draft Settlement Assessment Model) requires up to three phases of assessment of AW assets within a “zone of influence” of listed works to identify whether risks posed by tunnelling required mitigation activities including to protect third party assets.
58. A Phase 1 assessment in relation to the Main and its zones of influence was carried out in September 2017 and showed the Main as a “pass”, i.e. HS2 considered that the Main would not be harmed by the Northolt Works.
59. On 18 May 2020, AW sent HS2 an email outlining its concerns about possible damage to the Main. Later the same day, an HS2 internal email was sent regarding AW’s concerns. The email states that *“the current status for this asset, which based on the impact assessments carried out by both Affinity and SCS is for protection.”* It acknowledges that AW was almost certain to *“want something in place (overland rider?)”*. HS2 was concerned with demonstrating that *“all possible steps had been taken prior to whatever decision is finally made”*, including further investigation into the Main, but the tenor of the email also shows that HS2 was unconvinced that any works were required.
60. A Phase 2 assessment was conducted in September 2020. Again, the Main passed.
61. The first version of the Phase 3 assessment was carried out in January 2021. The Main passed. However, AW continued to express concerns and noted that the Phase 3 assessment assumed that the Main was in good condition.
62. On 30 March 2021, a document titled “Approval in Principle” (“AIP”) and described on its front page as “an agreement in principle” was signed by the parties. It outlines investigations to be carried out on the Main and states that the proposed mitigation is either *“Leakage monitoring and surface monitoring the asset”* or *“Installation of a new 900mm diameter steel main”* i.e. a full permanent diversion. It provides that the *“solution detailed in this document is the agreed solution to be taken forward to implementation between the parties. If new information becomes available which results in an alternative solution to be taken forward, this will need to be assessed and agreed by both parties.”*
63. In May or June 2021, AW’s contractor carried out or arranged for the investigations. The Main was found to be in good condition and ground conditions were as anticipated. HS2 says that these findings confirmed the assumptions used in the Phase 3 assessment and therefore led to the monitoring solution outlined in the AIP.

64. On 28 September 2021, AW served a Form XD2 (Part 1) on HS2 stating that despite confirmation of the Main being in good condition, it remained concerned about the consequences if the Main was damaged and considered that the Main should be “dualled”. AW did not believe that monitoring by itself would remove the risk.
65. On 11 November 2021, HS2 responded with a Form XD2 (Part 2). It stated that it “*will work with AW to reach a mutually agreed outcome*” but maintained its position that the risk of the Northolt Works affecting the main “*is extremely small and therefore dualling/bifurcation is not required*”.
66. In the intervening period, HS2 liaised with Dr New, an engineer appointed by AW to advise it. They agreed monitoring points for the Main, which have now been fitted as agreed between the parties.
67. On 25 July 2022, AW sent HS2 a notice stating that it considered HS2 to be in breach of clause 2.2 of the APA because the consequences of the Main’s potential failure had “*not been adequately addressed through the Draft Settlement Assessment Model*”. AW required HS2 to refrain from commencing the Northolt Works until (a) AW had agreed the Final Settlement Assessment Model, (b) HS2 had reduced the risk of interruption to AW’s customers to a level acceptable to AW, and (c) HS2 had provided a “*satisfactory trigger action management plan covering actions to be taken in the event that the actual ground movement impact is greater than anticipated*”. The notice also provides that if HS2 failed to take the requested steps, AW would within 14 days “*Design and install a temporary surface main to be used for the period whilst the tunnelling activity passes the Roubournmead Main and until such time as the settlement has been seen to cease*”.
68. A further revision of the Phase 3 assessment dated 28 July 2022 was drawn up which considered the information in the June 2021 investigations. The Main passed.
69. An External Monitoring document was issued on 2 August 2022 which contained details of the monitoring plan for the Main.
70. On 19 October 2022, AW served a Form XE3 containing details of the proposed AW Works. AW says this was an invitation to HS2 to issue a Form XE1 (Part 1) instructing AW to perform the detailed design works for the AW Works – the email states “*I look forward to receiving the XE1 from your contractor*”. This was for the design as opposed to the construction of the AW Works.
71. In response, HS2 apparently informally instructed and paid for the design works for the AW Works. Mr Hayward states in his first witness statement that HS2 did “*thereafter eventually informally approve such works which [AW] then executed and for which [HS2] made payment during 2023*”. I have not been shown any contemporaneous documentation evidencing HS2’s approval, but on 12 June 2023, HS2 seems to have supplied a Form XE1 (Part 1) to provide a quotation for designing the AW Works.
72. A Risk Assessment dated 28 March 2023 assessed the risk to the Main as “Low” after considering previous assessments of the Main and the monitoring measures in place.
73. On 28 March 2023, AW submitted to HS2 a Form XE3 seeking HS2’s approval of AW’s proposal to construct the AW Works. It is unclear whether HS2 formally

responded to this Form.

74. A Contractor's Technical Note approved on 11 April 2023 took into account new information about the Main and affirmed the conclusions of the Phase 3 assessment.
75. Dr New's report of June 2023 confirmed that HS2's assessments of the low likelihood of damage to the Main were accurate, as were the potentially severe consequences of such damage. He concluded that this situation is a "*difficult balance between the occurrence of a very unlikely event coupled with a very significant consequence*".
76. AW issued a Note on 22 June 2023 summarising the reports of Dr New and a Mr Hughes, a tunnelling expert, and restated its position that the AW Works must be carried out because of the potentially severe consequences.
77. On 24 July 2023, HS2 sent an email to AW stating that it disagreed with the proposal to carry out the AW Works. This was because the likelihood of the risk eventuating was low and the proposed AW Works could create a greater risk than the Northolt Works. I note that on the risk matrices attached to the email, the one titled "*Typical Risk Matrix using Low-High likelihood*" appears to be mistaken: it indicates a very high likelihood and very low severity which is assessed as "low" risk, but the correct scoring of very low likelihood and very high severity would place it in "medium" risk. For the "SCS Risk Matrix Scoring", no colour key has been provided to indicate the categories of risk.
78. On 3 August 2023, AW sent HS2 another notice stating that it considered HS2 to be in breach of clause 2.2 of the APA. This notice is materially identical to the one of 25 July 2022. By this stage AW were proposing a different solution to the original full permanent diversion. The works now being put forward (the "Amended Works") are for a temporary plastic diversion along a different route.
79. Several rounds of correspondence and discussions followed with no agreement ultimately being reached. HS2 say that the Amended Works are a worse solution than the original proposal. They consider them to be more risky than doing nothing. They say that whatever other consents AW manage to get TfL will not provide its consent.
80. Both parties are pressing on with their own plans. HS2 are proceeding to tunnel towards the Main. They are due to arrive there in March. AW has contracted for the Amended Works. They are scheduled to take some considerable time – on any view at least three months, and HS2 estimates considerably longer.
81. The claim was issued just over 3 weeks ago on 5 February 2024. On 13 February O'Farrell J considered an application for expedition of the application for summary judgment and ordered this hearing.
82. AW alleges that HS2 is in breach of the APA and DCA in failing to instruct AW to carry out what are known as the Amended Works, namely "*the design and construction by the Claimant of a temporary "overland rider main", enabling the isolation and bypass of the vulnerable section of the Main by a temporary overland pipe for the duration of the presence of the TBMs within the zone of influence around the Main (in the region of 50 to 100 metres)*".

83. It seeks summary judgment on its claim for declaratory/injunctive relief essentially to the effect that:
- 1) HS2 must stop tunnelling within 100m of the Main until completion of the Amended Works;
 - 2) AW is entitled to proceed with the Amended Works and HS2 is obliged to indemnify AW against the costs thereof.

ISSUES

84. This being a summary judgment application, all of the liability issues present on the basis of a test of whether HS2 has a "real", as opposed to a "fanciful" prospect of success on its arguments. If it has a real prospect of success the application fails.
85. The first issue is whether I can conclude that HS2 has a contractual obligation to divert the Main. Here the key question is whether the provisions of Schedule 4 of the APA mean that HS2 is under a duty to divert or procure a diversion of the Main come what may and whether it is "fanciful" to suggest otherwise e.g. to suggest that on the true construction of the contract the designation of "divert" is provisional upon further assessment and discussion between the parties. The second question is whether there is a real prospect of succeeding in arguing that HS2 is not liable for the costs of the Amended Works.
86. A subsidiary issue is whether, even if HS2's obligation is absolute, it is realistically arguable that AW is bound by the AIP and/or its subsequent actions to accept that a monitoring-only solution is appropriate.
87. As to relief, AW does not ask for an interim injunction. Its application is for a final injunction, but there are nonetheless issues as to whether that should be granted. Those issues concern (primarily) delay, but also such matters as timing, the quality of what is now proposed to be done and the effects of stopping the TBMs in an unplanned way.

THE APPLICATION

88. The essence of the main argument is that on the true construction of the contracts HS2 was obliged to carry out the diversion because that is what Schedule 4 says; and that it is in breach of contract in various respects because it has refused to do this. This is set out in paragraph 29 of the Particulars of Claim:

"Pursuant to the APA and the DCA, the Defendant accordingly became obliged to procure the timeous execution by the Claimant of the Original Diversion Works via the mechanisms of the DCA, at the expense of the Defendant."

89. The "Original Diversion Works" are defined in paragraph 11 of the Particulars of Claim by reference to Schedule 4 Spreadsheet. That shows and AW alleges they amount to "*the diversion of a section of the Main*".

90. AW's position is that under the APA HS2 undertook a contractual obligation to carry out a diversion of the main. AW says that this is clear on the true construction of contract with or without the context of factual matrix. Consequently it says that there is no issue to be tried other than that point of construction on entitlement to diversion. On that analysis it says that the engineering evidence is irrelevant and also the likelihood/consequence risk analysis does not arise.
91. HS2 alleges that matters are not so clear and there is a triable issue on the correct construction of the agreements, and in particular the Schedule 4 notations against the full sweep of the contractual arrangements and in particular once the factual matrix is factored in.
92. I accept those submissions. AW may be right about the construction of the contracts. That is certainly a possibility, though I do find their current primary approach, putting the obligation as one which is part of the "APA Works", with that being an umbrella term covering both APA Works and DCA Works, unattractive.
93. On this point, it seems to me that the spreadsheet indicates clearly that there are two sorts of works, There are the APA Works which take place under the APA agreement, and for which HS2 is responsible. These reflect works classified as contestable in the earlier spreadsheet of 11 October. The terms go from "contestable/non-contestable" to "HS2 Self Lay/AW" to "APA/DCA". And then there are the DCA Works -the works designated by the DCA in column X, and reflecting the not contestable designation in the 11 October spreadsheet. That the two are distinct and that APA is not an umbrella term can be seen by looking at the times when the two terms are used together within the agreement. For example at clause 2.11, clause 13 and elsewhere in the APA there is reference to "APA Works and DPA Works".
94. That of course does not prevent there being an obligation. It merely means that any obligation would arise under the DCA, not the APA. The DCA is structured rather differently. Works under it are triggered by a Work Order Request to be sent by HS2. Mr Leabeater KC submits that accordingly there is no obligation as regards a diversion until a request has been sent and approved. That may be right, but there is plainly a debate to be had about this. Can HS2 simply avoid paying for all DCA Works by not submitting or agreeing requests? That seems highly doubtful. Mr Darling KC contends that the provision in Clause 7.17 shows that ultimately there has to be approval, and that this itself reflects the underlying obligation for which he contends.
95. These are interesting points and I do not need to reach a concluded view on the individual approaches to the minutiae to reach a conclusion either way on the main issue. However certainly the need to consider the DCA and its structure challenges the very simple contractual approach for which AW contends, which amounts to pointing to the APA and Schedule 4. It is clear from any reading of the contracts that Schedule 4 does not provide an absolute answer to what needs to be done. The provisions of the DCA make it clear that at the very least there is design work and approval work to be done after the Schedule has been appended to the contract. That such work is complicated is clear from the structure put in place, including the need for repeated iterations, as well as the repeated references to co-operation between the parties. On the former point this can be well seen in Clause 7 of the DCA which puts an obligation and a scheme within the parameters of a fluid structure which anticipates developments and

makes considerable provisions for change in the form of its provisions for refusal of a Work Order and its subsequent recasting.

96. There are further indications in the contractual documentation which support this. Both the APA and DCA expressly anticipated that further design and analysis would be required before any substantive work was carried out under either agreement. Both the APA and the DCA said that the Works should comply with the Design Principles. The Design Principles (sch.9 to the APA) were drafted by AW. The document, or an earlier version, was previously appended to the PPA between AW and the Secretary of State of Transport. Where HS2 was to tunnel under AW assets, the Design Principles made it clear (as one would expect) that:
- “Analysis would need to be carried out in advance to understand the combined effect that settlement, ground conditions and tunnel construction methodology will have on the existing pipe material in order to classify the works on each asset in to the categories below.”
97. Consistently with this approach, the design obligations of both parties were subject to obligations of reasonable care and skill: on HS2 in relation to APA Works (cl.2.2) and on AW in relation to DCA Works (cl.6.1).
98. Both the APA and the DCA contained lengthy technical schedules setting out matters and processes that had to be carried out and considered in relation to design issues: eg the Technical Assurance Plan at schedule 10 to the APA and schedule 6 to the DCA.
99. Another feature in the APA which is in tension with the simple "Schedule 4 alone" approach is the role of the Settlement Assessment model (upon which AW relies). There is a question about exactly what purpose this part of the contract serves – a question which may need to consider the role of the "Agreed in Principle" documents. However just focussing on the wording of the Schedule, within it is provision for HS2's risk assessment process to have up to three phases of risk assessment to be carried out to identify whether risks posed by tunnelling required mitigation activities to protect third party assets.
100. Then there are the repeated references in the DCA which portray the project and its details as a work in progress. I have cited the early provisions above. But one can add more. So clause 5.1.1 covers monthly updates to route or design *“including updates or revisions to the Project Plan”*. Clause 5.1.2 starts with *“where appropriate”* suggesting that a Work Order Request may not always be needed. Under the DCA, preamble D stated that the instruction of all Work Order Proposals would be subject to approval *“through HS2's governance and assurance processes”*.
101. This fluidity is seen also in the APA. As already noted the Schedule 4 spreadsheet contains a column at column X headed *“APA / DCA / TBD following design”* indicating that further design work was anticipated. There is also an argument to be had about what is meant by column Y of the spreadsheet which I am told (without contradiction) was in the final as well as the 11 October spreadsheet. The comment from HS2 was *“hopefully will be shown not to require diversion once settlement determined.”* It is certainly arguable that HS2 are right that this dovetails with their construction, though AW's approach is also possible.

102. Mr Darling in reply contends that regardless of what might be said about other parts of the contract, the argument must come back to Schedule 4. He submits that the argument poses this question: is Schedule 4 setting out obligations or is it simply a shopping list from which the parties can pick and choose? He submits it is absurd to suggest the latter - that this highly detailed specific list was not intended to encapsulate obligations.
103. I would tend to agree with him to some extent – plainly there is an intention for works to be done. The Schedule is not a dead letter. But in my judgment it does not follow that it would be correct to construe each line of Schedule 4 as encapsulating a specific obligation to do that which falls within the action columns of the spreadsheet (divert etc), set against the wider context of the contract which has so many hallmarks of details being subject to change, development and consideration.
104. Accordingly a reading of the contractual documentation alone persuades me that there is a realistically arguable case that there was no contractual obligation to divert the Main in the APA and/or the DCA.
105. This preliminary conclusion can be tested/iterated by reference to the wider context and commercial purpose. Obviously this aspect of the case is at an early stage, but some points have been made in the evidence. When one takes these wider context and purpose facets into consideration they dovetail in with and reinforce my conclusion.
106. The contextual/matrix evidence includes the following allegations (a number of which do not seem to be controversial):
- 1) The agreements were entered into in 2017. At that time no significant assessments had been carried out. There was a provisional agreement as to the route and in principle agreement as to what this was likely to entail. At the time the contracts were entered into only a concept design was available and it was not possible to know with any precision what works would be required. Mr Pugh for HS2 gives evidence on this. He says that at the time the APA and DCA were executed, neither party had “*carried out any detailed design or technical analysis of the work that might be required to any particular utility asset*”. Schedule 4 was therefore merely an “*indicative categorisation ... made on the basis of high-level assumptions*”;
 - 2) The overarching contractual purpose was to put into place protective provisions for both sides, a framework by which assessments could be carried out and works designed;
 - 3) The areas of land that HS2 could acquire or possess pursuant to the 2017 Act was a point of some significance. This was limited by reference to the plans described in the agreements. Indicatively categorising assets was to understand what land might be required, should the "land take" powers need to be exercised. One consideration was that if insufficient land was identified then, prior to the 2017 Act obtaining Royal Assent, HS2 would have had the opportunity to amend the plans whereas, following Royal Assent, HS2 would have needed to engage in a time-consuming process to secure the relevant land. There is evidence that for this reason, an "if in doubt, list" approach was taken. In the case of pipelines, HS2's evidence suggests that was done by describing works that might be required as “divert”.

107. There is a dispute on at least some of this evidence. But that is a dispute which I cannot decide by way of summary process. Therefore for present purposes the exercise of construction has to proceed on the basis that these allegations are true and are admissible factual matrix. If admitted they do very clearly only go to reinforce the view to which I had provisionally come by reading the contract documents.
108. Mr Leabeater tried to persuade me that the AW case would not even pass the interim injunction merits test. I would not concur with that. There are plainly points which are arguable. But AW does not seek an interim injunction. It seeks summary judgment; and the case for AW is very well short of the summary judgment threshold.
109. That conclusion is ironically also consistent with AW's approach in terms of the nature of the application. One might normally expect such relief to be sought by way of interim injunction. But this has not been done here. The reason given is frank and revelatory – AW did not want to give an undertaking in damages as would have been required as the price of an interim injunction unless the circumstances were truly exceptional. Given that such an undertaking only bites if the provider of it loses their case in the end, this approach tends to indicate that AW has greater doubts over the merits of its case than it has urged me to have.
110. My primary conclusion that the construction issue is arguable is sufficient to dispose of the application.
111. However I should just record that even if I had been persuaded of the merits of AW's construction argument I would have concluded that this matter was not suitable for summary disposal.
112. That is because even if I concluded that Schedule 4 did encapsulate an obligation it does not follow this would be a case unsuitable for trial. There are (at least) two reasons for this. Both arise out of the fact that I am being asked to make orders which would result in the execution of "the amended proposal" (which is not the proposal in the document which is part of the contract). That raises a question of whether they are the contractually appropriate works, a question which HS2 says turns on whether they are necessary and reasonable.
113. The first point is that AW pleads this by way of an assertion that they are the necessary works pursuant to the Design Principles. On this basis, one needs to consider the interplay of the Design Proposals with the provisions of Schedule 4. It may be that Schedule 4 is essentially qualified or completed by the Design Principles process because of the invocation of the Design Principles as part of what the party charged with the works has to do. To the extent that the Design proposals are invoked or relevant there is a dispute both on how they are to be construed but also (relatedly) on how in fact the risk is to be categorised. The key dispute here is whether the risk is in probability terms tiny but of enormous consequence, or so tiny that despite its consequence it counts as "negligible"? Those two possibilities arguably lead to different outcomes via the Design Proposals; AW would probably say even the negligible risk requires a diversion, whereas HS2 would say it falls within the second or third options. The scope for debate on this is illustrated by the practically different results to which one can come by minor factual distinctions as illustrated by the risk assessment document to which I was taken (a document appended to Mr Woods' statement). These are not issues to decide in isolation away from the evidence. Where issues could turn on

minor distinctions of fact and expert evidence the issue is plainly not suitable for summary determination.

114. There is also an issue about whether the amended proposal is reasonable – in the sense of being an improvement over the HS2 solution. There is a good deal of evidence before me on this, and it is clear the HS2 will (to put it mildly) say that the Amended Works are far from being an improvement on their careful tunnelling approach. If that is the case it indicates that one would be considering a multi factorial issue which would need to include a significant number of factual and expert inputs – as to both approaches. There is also a dispute regarding consents, which are a factor for consideration.
115. AW of course contends that it is not necessary to enter into this debate because HS2 has failed to agree proposals and AW is now proceeding without their agreement. This itself however leads to an issue as to whether what is being done is a contractual solution apt to be enforced by a final injunction arising out of the contractual arrangements.
116. Overall it is hard to see quite how the proposed Amended Works (which are not the original works and are not agreed) could be so obviously a matter of obligation that I should grant summary judgment on their execution and HS2's obligation to pay for them.
117. On this basis I do not need to consider what the result would have been as a matter of discretion had I concluded that the first hurdle was cleared by AW. Given the conclusions to which I have come answering these questions would be an artificial exercise.