

Neutral Citation Number: [2013] EWHC (TCC)

Case No: HT-13-54

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22nd April 2013

Before:

MR JUSTICE AKENHEAD

Between:

RWE NPOWER RENEWABLES LIMITED

- and -

J N BENTLEY LIMITED

Fiona Parkin QC and Simon Crawshaw (instructed by **Kirsty Hession**) for the **Claimant**

Marion Smith (instructed by **Freeth Cartwright LLP**) for the **Defendant**

Hearing date: 11 April 2013

JUDGMENT

Mr Justice Akenhead:

1.

By a written contract dated 22 March 2010 ("the Contract"), RWE Npower Renewables Ltd ("RWE") engaged J N Bentley Ltd ("JNB") to carry out civil engineering work in relation to the Black Rock Hydro Scheme in the North of Scotland. This scheme was located in the catchment of the River Glass, adjacent to the Black Rock gorge, close to Evanton, north of Inverness and Dingwall. Water was to be extracted from the River Glass through an intake weir which would then feed into a ("penstock") pipeline approximately 3.5 km long; the pipeline was to lead to a powerhouse where the turbines and other equipment (the "Hydro Plant") was to be located. Energy was to be extracted from the water flow converting into electricity which was then to be delivered to the local grid, with the water being returned through a tailrace back into the river; this was to generate a nominal 3400 kW. JNB was to be involved in providing amongst other things the powerhouse buildings structure, an overhead crane for the powerhouse, all the penstock pipelines and the tailrace. JNB was not to provide the Hydro Plant (which was to be provided by Andritz Hydro GmbH ("Andritz") or the grid and grid connection related equipment which was to be provided and installed by SSE (formerly Scottish and Southern Energy).

2.

The parties have fallen out in relation to various delays which have occurred in the completion of the project. A major issue between them which has been referred to adjudication relates to the proposed imposition of liquidated damages for an allegedly culpable failure on the part of JNB to complete Section 2 of the work on time, relating to the completion of the penstock pipeline. There are said to be discrepancies or ambiguities between different parts of the different contract documents and issues are raised as to the precedence of the contractual documents in resolving any such discrepancies or ambiguities.

The Contract

3.

The Contract is dated 22 March 2010 but it is not clear whether it was actually signed on that date. JNB and others were invited to tender in about November 2009 for the civil engineering works and they were provided with a number of documents including "Works Information" in two Sections, General and Technical, to the latter of which were appended contract drawings and specifications and "Site Information" to which was appended various documents such as site investigation and a geological assessment together with hydrological information. Another document, entitled "Contract Data Part 2", was to be filled in by the tenderer. The NEC 3 Engineering and Construction Contract conditions (June 2005 with amendments June 2006) were to be applicable. Draft Bills of Quantities were provided to be filled in by the tenderers.

4.

The Contract itself is in short form with JNB covenanting with RWE to carry out the works in accordance with the contract and RWE agreeing to pay JNB the contract price of £4,026,100.03. Clause 2 however is of importance:

"The following documents are deemed to form and be read and construed as part of this Agreement in the following order of precedence:

- Contract Data part one (other than Option Z)
- the additional conditions of contract (Option Z)
- the conditions of contract (main Option B of NEC3 Engineering and Construction Contract June 2005 (with amendments June 2006)
- Post tender clarifications 1-25
- Works Information
- Site Information
- Contract Data part two
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Contractor's offer (including returnable schedules) dated 14 December 2009"

Most of these documents, in particular Contract Data Parts 1 and 2, are necessary to enable the NEC3 conditions to work in practice. For instance, they will identify the starting and completion dates, the date of payment, liquidated damages, retention amounts and the like. Clause 11.1 of the NEC3 conditions explains that the "terms identified in the Contract Data are in italics and defined terms have capital initials".

5.

I will refer to these documents in their "order of precedence". First, the Contract Data Part 1 starts in Paragraph 1 by identifying that:

"The Conditions of Contract are the core clauses for main Option B, dispute resolution Option W and secondary Options X5, X7...of the NEC3 Engineering and Construction Contract June 2005 (with amendments June 2006)."

Paragraph 1 identified amongst other things that the "Works Information" was in "Part 2 of this document", the "Site Information" was in "Part 3 of this document" and that the law of the contract was the law of England and Wales.

6.

Paragraph 3 of Contract Data part 1 deals with time, identifying that the "starting" and "access" dates were 22 March 2010 and requiring JNB to "submit a first programme for acceptance within 2 weeks of" 22 March 2010. There then follows:

"The key dates and conditions to be met are

condition to be met key date

...3. Completion of pipeline testing 24 November 2010

4. Powerhouse wind and weather tight 9 December 2010

5. Completion of intake 22 November 2010"

7.

There was later set out in the same document provisions relating to sectional completion and liquidated damages:

"Option X5

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The completion date for each section of the works is

section description completion date

1 Completion of the powerhouse, including 14 February 2011 Installation of the overhead crane, sufficient to allow installation of the SSE switchgear. The powerhouse is secure, wind and watertight

2 Completion, including testing, of the intake, 27 May 2011

penstock pipeline and tailrace and the

powerhouse (including building services),

to allow Hydro Plant to be installed

3. Completion of all work not included in 4 October 2011

sections 1 and 2

Option X7

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Delay damages for each section of the works are

section description amount per day

1 Completion of the powerhouse, including £1,000.00 Installation of the overhead crane, sufficient to allow installation of the SSE switchgear. The powerhouse is secure, wind and watertight

2 Completion, including testing, or the intake, £2,544.00

penstock pipeline and tailrace and the

powerhouse (including building services),

to allow Hydro Plant to be installed

3. Completion of or work not included in £600.00

sections 1 and 2”

8.

Third in the order of precedence were the NEC3 Conditions themselves. It needs to be borne in mind that much of the language of these conditions is in the present tense, although that factor does not seem to impact upon contractual interpretation in this case. Relevant clauses were:

(a) The definition clause:

“11.1 In these conditions of contract, terms identified in the Contract Data are in italics and defined terms have capital initials...

11.2 (2) Completion is when the Contractor has

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done all the work which the Works Information states he is to do by the Completion Date and...

If the work which the Contractor is to do by the Completion Date is not stated in the Works Information, Completion is when the Contractor has done all the work necessary for the Employer to use the works and for Others to do their work...

(4) The Contract Date is the date when this contract came into existence...

(9) A Key Date is the date by which work is to meet the Condition stated. The Key Date is the key date stated in the Contract Data and the Condition is the condition stated in the Contract Data unless later changed in accordance with this contract...

(10) Others are people or organisations who are not the Employer, the Project Manager, the Supervisor, the Adjudicator, the Contractor or any employee, Contractor or Supplier of the Contractor...

(19) Works information is information which either

- specifies and describes the works or
 - states any constraints on how the Contractor Provides the Works
- and is either

- In the documents which the Contract Data states it is in or

- In an instruction given in accordance with this contract."

(b) Clause 17.1 addresses ambiguities and inconsistencies:

"The Project Manager or the Contractor notifies the other as soon as either becomes aware of an ambiguity or inconsistency in or between the documents which are part of this contract. The Project Manager gives an instruction resolving the ambiguity or inconsistency."

(c) Clauses 18 and 19 deal with illegality, impossibility and acts of prevention:

"18.1 The Contractor notifies the Project Manager as soon as he considers that the Works Information requires him to do anything which is illegal or impossible. If the Project Manager agrees, he gives an instruction to change the Works Information appropriately."

19.1 If an event occurs which

- stops the Contractor completing the works or
 - stops the Contractor completing the Works by the date shown on the Accepted Programme
- and which

- neither Party could prevent and

- an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it,

the Project Manager gives an instruction to the Contractor stating how he is to deal with the event."

(d) Clause 20.1 requires the Contractor to provide "the Works in accordance with the Works Information". Clause 25.3 states in relation to Key Dates:

"If the Project Manager decides that the work does not meet the Condition stated for a Key Date by the date stated and, as a result, the Employer incurs additional cost either

- in carrying out work, or

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by paying an additional amount to Others in carrying out work

on the same project, the additional costs which the Employer has paid or will incur is paid by the Contractor. The Project Manager assesses the additional costs within four weeks of the date when the Condition for the Key Date is met. The Employer's right to recover the additional cost is his only right in the circumstances."

(e) Clause 30 deals with time:

"30.1 The Contractor does not start work on the Site until the first access date and does the work so that Completion is on or before the Completion Date.

30.2 The Project Manager decides the date of Completion. The Project Manager certifies Completion within one week of Completion.

30.3 The Contractor does the work so that the Condition stated that each Key Date is met by the Key Date."

Clause 31 deals with the programme stating that if "a programme is not identified in the Contract Data, the Contractor submits the first programme to the Project Manager for acceptance within the period stated in the Contract Data."

(f) Clause 60 deals with "Compensation events" which are events which can give rise to an entitlement to extension of time and to compensation. Compensation events include by Clause 60.1(5) where the "Employer or Others" do not work within the times shown on the Accepted Programme.

(g) Option X5.1 states

"In these conditions of contract, unless stated as the whole of the works, each reference and clause relevant to

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the works,

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Completion and

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Completion Date

applies, as the case may be, to either the whole of the works or any section of the works"

(h) Finally Option X7.1 provides for the Contractor to pay

"Delay damages at the rate stated in the Contract Data from the Completion Date each day until the earlier of

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Completion and

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the date on which the Employer takes over the works."

Next were the "Post tender clarifications" which refers to questions or points ("TQs") put to JNB after it submitted its initial tender in December 2009, the answers provided by it and the "conclusions" made or assumed by RWE. TQ16 is the most relevant and relates to a change in circumstances relating to the date to be programmed in for Andritz to provide the Hydro or turbine components to the site; originally this had been intended to be in September 2010 but it had to be put back until the end of May 2011. JNB had submitted a programme with its original tender which showed the September 2010 date. Accordingly TQ16 (dated 5 March 2010) asked JNB to submit an updated programme together with any cost adjustment to accommodate the fact that the turbine components were to be transported to the site on 31 May 2011 and that JNB would be required to carry out the related works of concreting the two turbines and generators provided by Andritz into position between 10 June and 6 July 2011. JNB's response dated 12 March 2010 (and recorded on TQ16) was to say that it had revised its "programme in accordance with the requirement to accommodate the above dates and milestones" enclosing its new programme (Rev B) and identifying various minor financial adjustments. The "Conclusion" recorded only that the "revised programme should show 6th April 2010 and not 22nd of March 2010 for the provision of Pipelines - Layout plans and long sections."

10.

There then follows the Works Information out of which a major part of the issue between the parties arises. At Paragraph 2.3.2, the scope of works is summarised as including amongst other things the "manufacture, installation and testing of penstock pipeline and associated facilities". Paragraph 6.2 headed "Completion" states as follows:

"Section 1 Completion of the powerhouse, including installation and commissioning of the overhead crane, sufficient to allow installation of the Hydro Plant and SSE switchgear. The powerhouse is secure, wind and watertight.

Completion of section 1 is defined as completion of the following items of the works:

- completion of the powerhouse and building structure including foundations, floors, walls, doors and other wall penetration.
- all of the powerhouse overhead crane including testing and commissioning such that it can be used to install the hydro plant.
- all of the permanent access tracks.
- the penstock pipeline downstream interface with the powerhouse is completed and all testing associated with the interface has been completed.

Section 2 Completion, including testing, of the intakes, penstock pipelines and tailrace, and the powerhouse (including building services, to be completed to allow the hydro plant to be tested and commissioned.

Completion of section 2 is defined as completion of the following items of the works:

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all of the intakes and associated facilities;

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all of the penstock pipelines and associated facilities, except the surface reinstatement;

-

all of the tailrace;

-

all of the tailrace screen;

-

all of the supply, installation and testing of communications cable between the powerhouse and the intake;

-

all of the powerhouse and building services;

Section 3 Completion of all of the works not included in Sections 1 and 2

Completion of section 3 is defined as completion of the following items of the works:

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completion of all of the works not included in sections 1 and 2 including casting in of the hydro plant and all reinstatement and restoration of the Site.”

I will revert later to the verbal differences between Paragraph 6.2 of the Works Information and the wording in Option X5 and X7 in Contract Data Part 1.

11.

Contact Data Part 2 is headed "Data provided by the Contractor" and it lists for instance specific key personnel to be deployed on the project and states:

“The programme identified as "Black Rock Hydro Scheme Tender Programme-Rev C" is submitted for acceptance and is capable of being developed into the Accepted Programme”

This referred to the final pre-contract programme submitted by JNB on 18 March 2010. The document also refers to and incorporates the finally revised bill of quantities which contains the rates and prices finally submitted by JNB also on 18 March 2010. The bill with schedules runs to 27 pages. Over half of the contract price related to the provision of the pipeline with detailed quantities provided which were priced by JNB.

12.

The Schedules to the Bill of Quantities were largely filled in by JNB and identified amongst other things what its proposals for carrying out the work would be. In Schedule 10 it provided outline construction proposals including in relation to the "Construction of the Penstock Pipeline" stating that this would "be completed in three distinct sections, which will be carried out in tandem, utilising varying techniques dictated by ground conditions". These three sections were listed as including the "Powerhouse to track crossing (chainage 0-550m)".

13.

The original programme submitted with the tender shows in bar chart form all work which JNB and its own sub-contractors would be doing as well as the work to be done by the Hydro contractor,

Andritz. This showed the penstock pipeline work being completed well before the time when Andritz is shown as beginning to deliver and install the Hydro equipment. It shows the work to be done by JNB grouting in such equipment are taking place after the completion of the Andritz work.

14.

The Rev C programme broadly shows the dates identified in TQ16. It also shows the penstock pipeline work and intake being completed some six months before the commencement of the Andritz activities. The grouting in works are shown overlapping the Andritz work.

The Proceedings and the Arguments

15.

RWE "lost" the adjudication. The adjudicator, Mr Wilmot-Smith QC, issued his decision on 25 January 2013. He pointed to the differences in the wording relating to sectional completion in the Contract Data Part 1 and the Works Information and considered that it would be "an unusual construction of this contract which permitted an employer to deduct liquidated damages by reference to the definition of completion of a specific section of work which was different to that which is set out in the section of the contract which provides the damages for delay." He considered that the Contract Data Part 1 document should have precedence over the Works Information, holding that completion of Section 2 of the Works takes place "when there is completion, including testing of, the intake penstock pipeline and tailrace and the powerhouse (including building services) to allow the Hydro Plant to be installed" (Paragraph 55) but this takes place "when the work is completed to the stage such as to allow the Hydro Plant to be installed" (Paragraph 54). He went on to find, (which it is at least currently common ground) that the penstock pipelines were not completed until 25 October 2012 and that completion of Section 2 of the Works was otherwise achieved on 21 February 2012. It is common ground that the Court is not in any way bound by the adjudicator's decision.

16.

On 28 February 2013, RWE issued Part 8 proceedings in the TCC seeking, so far as is material, a declaration and decision:

"...that Completion of section 2 of the Works is defined by paragraph 6.2 of the Works Information, Part 1 as completion of the following items of work:

- all of the intakes and associated facilities;
- all of the penstock pipelines and associated facilities, except the surface reinstatement;
- all of the tailrace;
- all of the tailrace screen;
- all of the supply, installation and testing of communications cable between the powerhouse and the intake;
- all of the powerhouse and building services."

17.

What has been argued relates only to whether or not completion of the penstock pipelines and associated facilities had to be achieved before Section 2 of the Works was completed. There has been no real analysis of the other items of work listed in Paragraph 6.2 of the Works Information.

18.

In essence, RWE argues that one needs at least initially to seek to construe the Contract overall and that one does not have to deploy the "precedence" arrangements referred to in the signed Contract because there is no material ambiguity on analysis between the various documents. It points in the Contract Data Part 1 document to the Key Date for the completion of pipeline testing of 24 November 2010 and the completion date for Section 2 of 27 May 2011 in support of its contention that Section 2 must be construed as requiring completion of all the pipeline because pipeline testing cannot be completed until all the pipelines are themselves installed. It argues that, although there are some verbal discrepancies between the Works Information definitions of Sections 1 and 2, taken overall it is clear at the very least that the pipelines were always intended to be completed within Section 2. It also relies on the original tender and Rev C programmes which show completion of the pipeline occurring significantly before the time when Andritz was programmed to deliver the Hydro equipment.

19.

In contrast, JNB argues that there are clear and largely irreconcilable verbal differences between the Works Information and the Contract Data Part 1 document in relation to the definitions of what, primarily, Section 2 is supposed to comprise. Thus, it is argued that (properly interpreted) the Contract Data Part 1 document only requires completion of such of the pipeline as is necessary to allow the Hydro Plant to be installed whilst the Works Information at Paragraph 6.2 requires completion of amongst other things the pipelines to allow the Hydro Plant to be tested and commissioned. There is no doubt, it is argued, that the Works Information does call for the pipelines to be fully completed whilst the Contract Data Part 1 document does not. The difference, it is said, is explicable by the changes introduced by TQ16 and by the belated introduction in the days leading up to the signing of the contract of liquidated damages rates for the Sections. Given the differences between the two documents, the precedence provisions are engaged and the Contract Data Part 1 definition applies.

Discussion

20.

Both parties' Counsel referred in their skeletons to very well-known cases about contractual interpretation, such as **Investors Compensation Scheme Ltd v West Bromwich Building Society**[\[1998\] 1 WLR 896](#), **Rainy Sky SA v Kookmin Bank**[\[2011\] 1 WLR 2900](#) and **Barclays Bank v Luxembourg SARL**[\[2010\] EWCA Civ 1248](#). It is unnecessary to set these out in detail. One needs to determine objectively what a reasonable person with all the background knowledge reasonably available to the parties at the time of the contract would have understood the parties to have meant and one is looking to adopt the more rather than less commercial construction.

21.

I have not dealt above with the history of the negotiations following the submission of the tender. There is no doubt that there was from the start of the tender process an understanding that there would be sectional completion in three sections, the original tender documentation included references to Option X5 in the draft Contract Data Part 2 document, those three sections being not

wholly dissimilar to those ultimately resolved upon; indeed JNB filled in proposed completion dates against the three sections. However, there were no sectional delay damages identified and, belatedly, on 18 March 2010 RWE through Mr Wrightson its Head of Procurement e-mailed JNB to the effect that sectional delay damages were required; that idea was not opposed as a matter of negotiation. On 22 March 2010, Mr Wrightson suggested two Sections with quoted rates of damages; albeit that this was acceptable at to JNB, this idea was withdrawn within minutes and the suggestion made that there would have to be three sections. Later that day, Mr Wrightson sent the final version of Contract Data Part 1 with X5 clearly incorporated and with three sets of delay damages for the three Sections. This was what was accepted.

22.

It is however fair to assume that these two commercial parties must be taken to have read and understood what they were signing up to. There is no suggestion that this is a case for rectification. Contractual interpretation should not be swayed in the case of a commercial contract between two commercial parties by sympathy for one side or the other which may have inadvertently signed up to something which it later regrets.

23.

Generally, where a contract comprises a number of contract documents, one needs to look at all the contract documents to determine the meaning on any given topic. Put another way, one looks at the whole contract to interpret it. Of course, in commercial contracts there can be ambiguities; often, on analysis, apparent ambiguities are not ambiguities at all. Sometimes those contracts make no provision for what is to happen where there are irreconcilable ambiguities and the Courts over many years have adopted mechanisms to overcome them, such as the contra proferentem principle.

24.

In this case, the parties did make some provision in Clause 2 of the signed contract and provided for an "order of precedence" in the various documents with Contract Data Part 1 being the first and the Works Information and Contract Data Part 2 being well down the order. But the order of precedence is effectively prefaced by the words that all the documents are "deemed to form and be read and construed as part of this Agreement". Accordingly, this is a contract which is to be construed in the usual way by reference to all the documents forming part of the Contract. It is only if there is an ambiguity or discrepancy between two or more contract documents that one then needs to have regard to the order of precedence. I did not understand from Counsel that there was any material disagreement with this conclusion. It is obviously right. One can take an example where the Contract Data Part 1 document required the powerhouse to be painted white but the Works Information required it to be painted black. That is on its face an irreconcilable ambiguity and the contract would be construed as requiring white paint. What one can not and should not do is to carry out an initial contractual construction exercise on each of the material contract documents on any given topic and then, so to speak, compare the results of that exercise to see if there is an ambiguity. If it is possible to identify a clear and sensible commercial interpretation from reviewing all the contract documents which does not produce an ambiguity, that interpretation is likely to be the right one; in those circumstances, one does not need the "order of precedence" to resolve an ambiguity which does not actually on a proper construction arise at all.

25.

With that in mind, I turn to reviewing what is in reality the true issue between the parties which is whether or not the penstock pipeline was contractually required to be completed within Section 2. If one first reviews the wording in Option X5 in the Contract Data Part 1 document, it is obvious that the

"description" is and must be a shorthand one because it does not describe in detail what is encompassed. That is not surprising as the Works Information, Bills of Quantity and the drawings were clearly intended to provide a significantly more detailed description. The Contract Data Part 1 document itself states that the works "are the construction of the civil works...as more comprehensively set out in Part 2 Works Information". The wording arguably in practice could mean two things: it could mean either that the intake, penstock pipeline, tailrace and powerhouse were to be completed (and tested) and that would allow the Hydro Plant to be installed or that merely sufficient of the intake, penstock pipeline, tailrace and powerhouse work had to be completed (and tested) to enable the Hydro Plant to be installed.

26.

There are a number of strong pointers in favour of the interpretation that the entire penstock pipeline had to be completed. A particularly strong one is the Key Date for completion of pipeline testing being 24 November 2010 compared with the completion date for Section 2, 25 May 2011; both these time requirements are spelt out in the same Contract Data Part 1 document. One can not in logic complete pipeline testing until the pipelines are fully installed. The mutual intention or expectation of the parties therefore (within the document which is first in order of precedence) was that JNB would be completing the pipeline and its testing some six months before completion of Section 2. The parties agreed that this was a Key Date. The fact that there was a limited contractual remedy for breach (see Clause 25.3) is neither here nor there because the expressed mutual intention was that the pipeline and its testing would be completed well before the end of Section 2. A second Key Date is the completion of the intake by 22 November 2010. Another accompanying pointer is the Rev C programme expressly referred to in the Contract Data Part 2 document which is entirely consistent with that.

27.

One then turns to the Works Information and there are undoubtedly differences between the wording relating to Sections 1 and 2 in that document and in the Contract Document Part 1 document. A good example relates to Section 1 which talks in the Works Information about completing the powerhouse "sufficient to allow the installation of the Hydro Plant and SSE switchgear", whilst the Contract Data Part 1 document talks about completion of the powerhouse "sufficient to allow installation of the SSE switchgear". That could well be said (and the point was not fully argued out) to give rise to an irreconcilable ambiguity between the two documents so as to trigger the precedence arrangement so that the more precedent document determines the required level of completion of the powerhouse. However, the fact that there may be some irreconcilable ambiguity relating to Section 1 (which does not really appear to feature in any dispute between the parties) does not directly at least assist in determining whether there is an irreconcilable difference relating to Section 2. At most, it provides some contractually historical background which demonstrates that there was some alteration between the time when the earlier and later documents were drawn up; this is amply supported by the e-mail traffic in March 2010.

28.

One then turns to the global differences between the two documents in relation to Section 2, which can be demonstrated as follows (with the square bracketed words being the words in the earlier document):

"Completion, including testing, of the intake[s], penstock pipeline[s] and tailrace, and the powerhouse (including building services) to be completed to allow the Hydro Plant to be [tested and commissioned] installed."

Neither Counsel has attached any importance to the words "intakes" and "pipelines" becoming singular in the Contract Data Part 1 document; indeed, the difference appears to be immaterial.

29.

On analysis therefore, the only other change is that the Hydro Plant does not have to be by, the end of Section 2, at the stage or in a position at or in which it can or will be tested and commissioned. As JNB had no responsibility to test and commission the Hydro Plant, it is a relatively immaterial verbal alteration.

30.

I have formed the very clear view that, properly analysed, there is no material ambiguity between the descriptions of Section 2 in relation to the pipelines or intake in the two contractual documents. My reasons are as follows:

(a) The contractual and factual background was that sectional completion in three Sections was always intended to be part of the obligation of JNB. What was primarily missing until the 11th hour was any provision for liquidated damages for late completion of any Section but this was accepted by JNB in the short period after receiving RWE's proposals.

(b) Materially, both the tender and Rev C programmes expressly envisaged all the penstock pipelines being completed and tested well before the arrival of the Hydro Plant equipment and contractor. The Contract set as a Key Date the completion of pipeline testing. JNB's own "Contractors Proposals", incorporated in the contract (at Schedule 10 to the priced Bill of Quantities) envisaged the completion of the penstock pipeline in three distinct segments to be carried out in tandem; put another way, there was no hint or suggestion that there was to be some extremely small element of pipeline to be constructed independently of these three segments at the entry point to the powerhouse.

(c) Additionally, another specified Key Date was the completion of the intake by 22 November 2010, itself also some six months ahead of the Section 2 completion date.

(c) One must commercially read (within the Contract Data Part 1 document) the description of Section 2 in the Option X5 paragraph at the very least in the context of the expressed Key Date requirements for completion of pipeline testing and indeed the intake some six months before the completion date of Section 2.

(d) If one then adds into the interpretation mix not only the Rev C programme (which also expresses the mutual understanding that all the pipeline work and testing will be completed well before the Section 2 date for completion) but also the Works Information description of what is required for Section 2, one can be left in no real doubt that the parties mutually intended that all the pipeline and intake work would be completed and tested before Section 2 can be considered to be complete.

(e) The parties agreed that Completion (which by X5.1 included Completion of Sections) occurs "When the Contractor has done all the work which the Works Information states he is to do by the Completion date" (Clause 11.2(2) of NEC3). The parties agreed therefore that it is to the Works Information that they should look to determine what had to be achieved within each Section.

(f) The "description" of each Section given in the Contract Data Part 1 document is on its face obviously only a brief or shorthand description of the work involved in each section. The parties could not have assumed that each and every item of work required to be done within Section 2 was spelt out in the 23 word description in that document. The parties therefore must be taken contractually to

have assumed that the necessary work was spelt out elsewhere (and obviously not within the Contract Data Part 1 document).

(g) The verbal differences between the two general descriptions of Section 2 between the two supposedly competing contractual documents are not substantial.

(h) It is of some interest is that there is a difference in wording between the description of Sections 1 and 2 in the Contract Data Part 1 document. Section 1 talks about completion of the powerhouse "sufficient" to allow installation of the SSE switchgear whilst Section 2 does not talk about completion "sufficient" to allow the Hydro Plant to be installed. There is some precision within the Section 1 description because it says that the powerhouse must be "secure, wind and watertight" in effect as the condition required to enable doubtless expensive and sensitive electrical grid connection equipment to be installed. There is no such precision within the description in Section 2. It is and would not be clear from any of the contract documents how much of the intake, penstock pipeline and tailrace had to be completed to secure completion of Section 2. Indeed it is hard to see why any part of the tailrace which is downstream in the river would need to be started let alone completed before the Hydro Plant itself was installed.

Decision

31.

I have heard little or no argument however about the extent to which the remainder of the work (other than the pipeline and intake works) as described in Paragraph 6.2 of the Works Information might clash with the wording in the Contract Data Part 1 document. Whilst I have the impression that the scope of the underlying dispute between the parties relates to alleged delays in the completion of the pipeline and its impact upon the completion of Section 2, I am not alive to all the ramifications of that dispute. I therefore decline to extend any declaration to anything other than the completion and testing of the penstock pipelines and by analogy the intake. I am however prepared to make a declaration that to achieve Completion of Section 2 of the Works JNB was required to complete and test the intake and the penstock pipeline. I understand that it is common ground that Completion of Section 2 was achieved on 25 October 2012, because it was not until then that the penstock pipeline was completed and tested.