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Dynniq v Lancashire CC



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Dynniq v Lancashire CC

- Term maintenance contract – NEC 3 Conditions with bespoke amendments
- Arbitration clause
- Part 8 TCC claim



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Structure of Contract

- Pricing Option A – Priced Contract with Price List
- “The Prices are the amounts stated for an item in the Price List...”
- Contract included “the Service Information” – which includes Method of Measurement and the Contractor’s Price List.
- Terms
- Amendments



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Relevant Terms

“In the Price List the sub-headings and item descriptions identify the work covered by the respective items, read in conjunction with the matters listed against the relevant marginal headings “Item coverage” in Chapter IV of the Method of Measurement for Highway Works, these Preambles and the amendments to the Method of Measurement immediately following these Preambles. The nature and extent of the work is to be ascertained by reference to the Drawings, Specification and Conditions of Contract. The rates and prices entered in the Price List shall be deemed to be the full inclusive value of the work covered by the several items including the following, unless expressly stated otherwise:...”



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Relevant Terms

- “Traffic safety and management within and/or adjacent to the Affected Property as described by Clause 117 of MCHW Traffic safety and management shall only be separately measured under Series 101 when instructed on a Task Order by the Overseeing Organisation for the exclusive use by or for the benefit of the Overseeing Organisation or one or more third party.”
- “Operatives for the Contractor as described in Clause 171AR. Operatives for the Contractor shall only be separately measured when instructed on a Task Order by the Overseeing Organisation.”



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Series 100

- “Traffic safety and management shall only be measured under Series 100 when instructed on a Task Order by the Overseeing Organisation for the exclusive use by or for the benefit of the Overseeing Organisation or one or more third party.”



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Principles of Interpretation

“...now well known” from “a plethora of cases in the House of Lords and the Supreme Court”:

- Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38
- Rainy Sky SA v Kookmin Bank [2011] UKSC 50
- Wood v Capita Insurance Services Ltd [2017] UKSC 24



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Principles of Interpretation

- “...some practitioners and legal commentators, with nothing better to do, have sought to exploit certain fine linguistic differences between the various judgments in those cases but, in my view, they all point in the same general direction.”



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Inconsistent Provisions / Precedence Clauses

- Lewison (5th edition - para. 9.13) the court “is reluctant to hold that parts of a contract are inconsistent with each other”
- See *Alexander v West Bromwich Mortgage Co Ltd* [2016] EWCA Civ 496:
 - “Where there is an inconsistency clause, one should therefore approach the question of inconsistency without any pre-conceived assumptions. One should not strive to avoid or to find inconsistency. Rather one should ‘approach the documents in a cool and objective spirit to see whether there is inconsistency or not’”
- What amounts to inconsistency?
- Bespoke amendments: *Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [\[2003\] UKHL 12](#)



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Redundancy

- Arguments based on making provisions redundant or “mere surplusage” face “a high hurdle in law”



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Interpretation

- Was the first sentence of para 2 (xxviii) inoperative?
- Was Lancashire confusing “items” with “coverage”?
- What if an item appears within the coverage of another item?
- Was para 2 (xxviii) “mere surplusage”?



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Interpretation

- Surplusage: was the first sentence of the clause stating what was already clear elsewhere in the contract?
- What about the rest of the clause?



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Connect Plus v Highways England (No. 2)

- [2018] EWHC 140 (TCC)
- DBFO contract
- Contractual interpretation, post-contractual agreements, expert determination, estoppel



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Interpretation

- “Critical Incident Adjustment”: payment triggered by “Relevant Critical Incident”

Critical Incidents



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Network Management Manual:

“Critical Incidents are unforeseen events that seriously impact upon the Highways Agency and its ability to deliver its ‘safe roads, reliable journeys, informed travelers’ objective. Importantly, the police, other emergency services or local authorities may not consider these types of incident as important as the Highways Agency.

Critical incidents also include incidents of which ministers wish to be informed.

It should be noted that critical incidents might be, or become, Major Incidents.”



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Critical Incidents

“Only category 1 or 2 responders may declare if a Critical Incident has occurred. If the DBFO Co believes that a Critical Incident has or may become a Major Incident then it shall notify the police immediately.

The following are deemed to be Critical Incidents:

...”



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Critical Incidents

- Critical Incident is defined by cl 1.2 and para 1 of section B of Pt 6 of Sch 25 as—

“an incident declared as such by or on behalf of the Secretary of State in accordance with applicable emergency procedures.”



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Critical Incidents

- CP: “Critical Incidents” defined in NMM. CP was obliged to comply with the NMM and produce its contingency plans in accordance with the NMM.
- HE: “Critical Incidents” are those declared as such by secretary of state.



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Critical Incidents

“The applicable emergency procedures are not defined for this purpose. However, the NMM incorporated into the DBFO Contract contains procedures for dealing with emergencies and Critical Incidents are defined expressly in the NMM. Therefore, the reference to the applicable emergency procedures must be a reference to the NMM”



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Critical Incidents

- “Although determination of the impact of any event might be a matter of fact and degree and give rise to disputes, a decision as to whether any event falls within the definition of Critical Incident is capable of objective ascertainment. There is no reference to any exercise of discretion by the Secretary of State...”
- What is the significance of the “deemed list”?
- “CP's interpretation would render otiose the definition set out at the beginning of para 7.3.2. That is unlikely...”



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Critical Incidents

“para 2.1.2 of Pt 2 of Sch 9 of the DBFO Contract and para 18.3 of Pt 3 of Sch 8 which provide that, in the event of any inconsistency between the NMM and an express provision of the DBFO Contract, the express provisions of the contract prevail. However, as set out above, Sch 25 and the NMM can be interpreted so that there is no inconsistency between them and therefore, this issue does not arise.”

Estoppel



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- Estoppel by convention / representation
- Referred to the usual authorities
- “There must be a shared assumption or understanding communicated between the parties in question. The party claiming the benefit of the convention must have relied on the assumption. It must be unconscionable or unjust to permit the other party to assert the true position. The estoppel by convention can come to an end and will not apply to future dealings once the common assumption is revealed to be erroneous.”



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Estoppel

- “The DBFO Contract has a duration of 30 years and it would not be just to restrict either party to an imperfect understanding of its terms.”
- “In any event, any estoppel could not be relied on to affect the proper construction of the DBFO Contract for the future. Therefore, it would not affect any declaration as to the parties' ongoing contractual rights and obligations.”



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Thank you

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