

Case No: HT-2017-000274

Neutral Citation Number: [2017] EWHC 3173 (TCC)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT

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

Date: 7 December 2017

Before:

THE HON MR JUSTICE COULSON

Between:

Dynniq UK Limited
- and -
Lancashire County Council

Claimant

Defendant

Mrs Frances Pigott (instructed by Mr Leighton Williams of the Claimant, via Direct Access) for the Claimant

Mr Jonathan Ward (instructed by the Defendant's Legal Department) for the Defendant

Hearing date: 7 December 2017

Judgment

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1. By a claim form issued under CPR Part 8 and dated 2 October 2017, the claimant seeks various declarations as to the proper meaning of two particular parts of the service contract between the parties dated 24 September 2015. The contract concerns the maintenance of traffic signal installations and associated equipment, and the construction of new or replacement traffic signal installations and equipment, in Lancashire.
2. The dispute between the parties as to the proper interpretation of the contract arose in the early months of 2016. The parties have endeavoured to resolve their differences without recourse to formal dispute resolution procedures, with the result that these Part 8 proceedings were only commenced in October 2017. The parties have formally agreed that the TCC should resolve the dispute between them.
3. I set out the relevant terms of the contract in **Section 2**. In **Section 3**, I set out briefly the relevant principles of interpretation. In **Section 4**, I set out my understanding of how the contract was intended to work and my interpretation of the relevant provisions. In **Section 5**, I address the claimant's arguments in greater detail.

2. THE CONTRACT

4. The contract, in the form of a Deed, was made on 24 September 2015. It had actually come into force on 1 April 2015. It is due to last five years, so it is currently halfway through its projected term.
5. It was referred to as a Term Service Contract, and it incorporated the NEC 3 Term Service Contract conditions. The Deed identified a number of specific options that applied to this particular contract.
6. Thus the Pricing Option was identified as Option A, described in the NEC 3 Contract as "Priced Contract with Price List". Relevant parts of Option A included the following:

"Identified and defined 11

terms 11.2 (17) The Price for Services Provided to Date is the total of

- the Price for each lump sum item in the Price List which the Contractor has completed and
- where a quantity is stated for an item in the Price List, an amount calculated by multiplying the quantity which the Contractor has completed by the rate.

(19) The Prices are the amounts stated in the Price column of the Price List. Where a

quantity is stated for an item in the Price List the Price is calculated by multiplying the quantity by the rate.

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20.5 The Contractor prepares forecasts of the final total of the Prices for the whole of the service in consultation with the Service Manager and submits them to the Service Manager. Forecasts are prepared at the intervals stated in the Contract Data from the starting date until the end of the service period. An explanation of the changes made since the previous forecast is submitted with each forecast

...

The Price List 54

54.1 Information in the Price List is not Service Information.

54.2 If the Contractor changes a planned method of working at his discretion so that the item descriptions on the Price List do not relate to the operations on the Accepted Plan, he submits a revision of the Price List to the Service Manager for acceptance.

54.3 A reason for not accepting a revision of the Price List is that

- it does not comply with the Accepted Plan,
- any changed Prices are not reasonably distributed between the items in the Price List or
- the total of the Prices is changed.”

7. The other relevant Option was X19, in respect of Task Orders. The relevant part of that Option stated as follows:

“Identified and defined X19

Terms X19.1 (1) A Task is work within the service which the Service Manager may instruct the Contractor to carry out within a stated period of time.

(2) A Task Order is the Service Manager's instruction to carry out a Task.

(3) Task Completion is when the Contractor has done all the work in the Task and corrected Defects which would have prevented the Employer or Others from using the Affected Property and Others from doing their work.

(4) Task Completion Date is the date for completion stated in the Task Order unless later changed in accordance with this contract.

Providing the Service

X19.2 A Task Order includes

- a detailed description of the work in the Task,
- a priced list of items of work in the Task in which items taken from the Price List are identified,
- the starting and completion dates for the Task,
- the amount of delay damages for the late completion of the Task and
- the total of the Prices for the Task when Option A or C is used or the forecast total of the Prices for the Task if Option E is used.

The Service Manager consults the Contractor about the contents of a Task Order before he issues it.

When a Task Order is issued

- the priced list of items for the Task is inserted in the Price List, and
- the work involved is added to the Service Information.”

8. Schedule 9 of the Contract was entitled “Units and Method of Measurement.” This document identified how the services provided by the claimant would be measured and paid for by the defendant. The Preamble contained, at paragraph 2, a lengthy list

of that which the relevant rates and prices were deemed to include. I set out the introductory words and some examples from the list as follows:

“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:

- (i) Labour and costs in connection therewith
- (ii) The supply of materials, goods, storage and costs in connection therewith including delivery to Site. Taking delivery of materials and goods supplied by others, unloading, storage and costs in connection therewith.
- (iii) Plant and costs in connection therewith.
- (iv) Fixing, erecting and installing of placing of materials and goods in position.
- (v) Temporary Works...
- (xii) Checking, inspecting, examining, measuring and verifying goods, materials and workmanship including supplying results, reports and certificates...
- (xxiii) Preparation and supply of detailed working of fabrication drawings.
- (xxiv) Preparation supply of method statements...
- (xxviii) Traffic safety and management within and/or adjacent to the Affected Property as described in 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...
- (xxxii) 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.”

It is sub-paragraph (xxviii) which is at the heart of the current dispute. The contract defined the defendant as “the Overseeing Organisation”. Clause 117 of the MCHW was a reference to clause 117 of the Method of Measurement for Highway Works, issued by Highways England, which deals with Traffic Safety and Management.

9. Plainly, a number of these provisions highlight the importance of the Price List. That List was Schedule 11 of the contract. It was divided into a number of “Series” documents. Series 100 was entitled “Traffic Safety and Management”. It comprised 81 separate items concerned with lane closures, temporary traffic signals, temporary diversion of traffic and the like. Unlike every other element of the Price List, Series 100 started with a Note in the following terms:

“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.”

That is the other provision in the contract in issue before me today.

3. THE PRINCIPLES OF CONTRACT INTERPRETATION

10. The rules of construction are now well-known: there has been a plethora of cases in the House of Lords and the Supreme Court in recent years in which the relevant rules have been repeatedly set out, including *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36; and *Woods v Capita Insurance Service Limited* [2017] UKSC 24. As I have pointed out elsewhere, 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. What matters is the objective meaning of the language used, to be derived from the natural usual meaning of the words in the contract, when seen against the background/context of the contract. Where there are rival interpretations, one test is to consider which interpretation is more consistent with business common sense.
11. In the present case, on the question of inconsistent provisions, Mr Ward has drawn my attention to the Court of Appeal decision in *Alexander v West Bromwich Mortgage Company* [2016] EWCA Civ 496. In that case, Hamblen LJ said:

“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’...”
12. As I note below, the claimant’s case involves a submission that the first part of sub-paragraph (xxviii) of the Preamble should be deleted as being unworkable or contrary

to other parts of the contract; another part of its case is that the rest of that sub-paragraph, and the Note, only repeated what other parts of the contract already said and were, to that extent, pure surplusage. It is a well-established principle that the court should endeavour to give effect to all parts of the contract and to treat no part of it as inoperative or surplus: see Macquarie Internationale Investments Ltd v Glencore UK Ltd [2010] EWCA Civ 697. In Antigua Power Co Ltd v The A-G of Antigua and Barbuda [2013] UKPC 23, Lord Neuberger said arguments based on surplusage “are rarely of much force”.

13. I bear all those principles and authorities in mind when I construe the contract in this case although, for the reasons noted in **Section 3** below, I do not consider that the proper interpretation of this contract gives rise to any real difficulties at all.

3. THE PROPER INTERPRETATION OF THIS CONTRACT

14. It is convenient to deal with two points at the outset. In relation to sub-paragraph 2 (xxviii), set out at paragraph 8 above, Mr Ward pointed out that there ought to have been a full-stop after the reference to clause 117 of the Method of Measurement (“MCHW”), and before the next words starting “traffic safety and management...” That seemed to me unarguably right: the clause makes no sense without that full-stop. Although that was not a point with which Mrs Pigott had raised in her skeleton argument, she accepted, in answer to the question from the court, that such a full-stop was required.
15. Secondly, by reference again to sub-paragraph (xxviii), Mr Ward said that the reference should have been to Series 100 (paragraph 9 above) not Series 101. Although Mrs Pigott had sought to rely on this alleged discrepancy in her written submissions, she wisely decided not to pursue it orally. The reference was clearly just a slip; there is no Section 101.
16. With those modifications by way of introduction, I consider that this contract works in the following way.
17. When the defendant requires a particular service in respect of the maintenance of traffic signal installations, or the construction of a new or replacement installation, the defendant issues the necessary Task Order. The work that is the subject of that Task Order is then measured and priced in accordance with the Price List and the total becomes the sum due and payable to the claimant under the contract for performing the work in that Task Order. All of the prices in the Price List are deemed to include each of the matters referred to in paragraph 2 of the Preamble and numbered (i)-(xxxix) inclusive.
18. What about traffic safety and management? In my view, sub-paragraph 2 (xxviii) of the Preamble, and the words of the Note at the start of Series 100, can have only one meaning: that the costs of traffic safety and management are generally deemed to be included in the prices in the other parts of the Price List. In other words, in respect of the usual Task Order, there cannot be a separate measurement and charge for traffic safety and management, because that work will be deemed to have been included in the other prices in the Price List. That may be unusual, and out of line with the normal way in which this sort of work is measured and paid for, but that is what this contract stipulated.

19. Moreover, there is an express exception to that. Traffic safety and management will be separately measured and payable “when instructed on a Task Order...for the exclusive use by or for the benefit of [the defendant] or one or more third party.” That exception appears not only in sub-paragraph 2 (xxviii) in the Preamble, but also in the Note at the start of the Series 100 section of the Price List. Thus, on those occasions where traffic safety and management is not incidental to the work in the Task Order, but is instead the substantive subject of the Task Order itself, it will be measured and paid for separately. I refer to that as ‘the exception’ in the remainder of this Judgment.
20. Moreover, it seems to me to make perfect sense for that exception to be repeated at the start of Series 100. It is explaining why separate prices have been sought for traffic safety and management in circumstances where, according to sub-paragraph 2 (xxviii) of the Preamble, such items are generally deemed to have been already included in the prices in the other parts of the Price List. The reason why there is a separate list of traffic safety and management prices at Series 100 is because they are needed to measure and price a Task Order “for the exclusive use by or for the benefit of the Overseeing Organisation or one or more third party” (i.e. the exception). The Note also emphasises that the arrangements in respect of traffic safety and management are out of the ordinary.
21. In my view, that is the clear and unequivocal meaning of the words used in the contract. That is the interpretation urged upon me by Mr Ward, on behalf of the defendant.
22. The claimant contends that traffic safety and management items were always to be measured and paid for separately, in every case, so that the exception is no such thing, and is simply a repetition or re-statement of the position found elsewhere in the contract. Although I deal with the claimant’s arguments in support of that position in more detail in **Section 5** below, I am bound to say generally that I consider that such an interpretation flies in the face of the words used in both sub-paragraph 2 (xxviii) and the Note at the start of the Series 100 Price List.
23. It may be that one explanation for the difficult task that the claimant has set itself can be found in paragraph 15 of the witness statement of Mr Leighton Williams, a member of the claimant’s Legal Department. He states quite candidly in his witness statement that:

“There is no indication that the content of the Note was noted by the claimant during the tender period, and no query or clarification was raised. There was no indication from the defendant that it was going to rely on the Note to refuse to pay for traffic safety and management measured against the 81 line items which the defendant had insisted be completed for traffic safety and management, or that it would insist that the cost of traffic safety and management was to be treated as included within the price for non-routine traffic maintenance.”

In my view, this comes as close as can be to an admission that, at the time of the tender, the claimant simply failed to read the relevant provisions, and so simply assumed that this was a standard form of contract without these bespoke amendments. There is a vague suggestion that the defendant did not emphasise this change. All of

that may be unfortunate, and may explain how and why the dispute arises at all, but it cannot affect the interpretation of the words used.

24. Although, on one view, that is sufficient to deal with this Part 8 claim, out of deference to Mrs Pigott's careful analysis, I go on to consider the claimant's detailed submissions in **Section 5** below.

5. THE CLAIMANT'S DETAILED SUBMISSIONS

5.1 The Declarations

25. In the claim form, the claimant seeks the following declarations.

“(a) A declaration that the meaning and effect of sub paragraph 2 (viii) and therefore the Note is:

(i) Traffic safety and management items are measured and paid separately and in addition to traffic signal maintenance items;

(ii) The claimant is therefore entitled to claim from and to be paid by the defendant for traffic safety and management measures in addition to traffic signal maintenance works;

(iii) A separate price will be claimed from and paid by the defendant for the cost of providing any stand-alone ‘one-off’ traffic safety and management measures when instructed for the benefit of the Overseeing Organisation or a third party, for example a statutory undertaker.”

26. I can deal with declaration (a)(iii) straightaway. On the face of it, that seems to me to be only a slightly different way of putting the exception to which I have referred at paragraphs 18 and 19 above (a view which Mr Ward confirmed). I do not consider that the words “stand-alone” or “one-off” are necessary. Those words do not appear in sub-paragraph 2 (xxviii) of the Preamble to the Method of Measurement or the Note at the start of the Series 100 Price List. Moreover, it needs to be emphasised that the exception applies only where the traffic safety and management is the substantive subject of the relevant Task Order. But beyond that, it is a curiosity of the claimant's claim that, despite my wholesale rejection of their arguments, one of the declarations they seek is close to what I consider to be the correct interpretation of the contract.

27. The declarations at (a)(i) and (ii), however, cannot be granted. There is no basis in the contract for traffic safety and management items to be measured and paid for in addition to the prices in the Price List (excluding Series 100). Those prices are deemed to set out the cost of all traffic signal maintenance work, whether routine or otherwise. The whole purpose of sub-paragraph 2 (xxviii) of the Preamble, and the Note at the start of Series 100, is to make clear that traffic safety and management

will *not* be measured and paid for separately as part of that work, unless the exception is satisfied. That is the clear meaning of the contract.

5.2 Is The First Sentence of Sub-Paragraph (xxviii) Inoperative?

28. Mrs Pigott, on behalf of the claimant, submitted that the first sentence of paragraph 2 (xxviii) was inoperative because it was contrary to other provisions of the contract. To that end, she showed me parts of the Specification, which identified what was involved in traffic safety and management. She also showed me parts of the standard Method of Measurement for Highway Works, which stated that, ordinarily in a contract of this sort, traffic safety and management was an item to be measured and paid for in the usual way, and would not be deemed to be included in other rates and prices.
29. During this part of her submissions, Mrs Pigott maintained that the present dispute was all about non-routine traffic signal maintenance, which is dealt with in Appendix 12/73 of the Specification. But I disagree with that: there is nothing in either sub-paragraph (xxviii) or the Note at the start of Series 100 which makes any specific reference to non-routine traffic signal maintenance.
30. Her review of these other contract documents led on to Mrs Pigott's argument that the defendant's interpretation confused "items" with their "coverage", and that paragraph 2 of the Preamble is a list of ingredients (coverage) for items that the claimant is deemed to have allowed for in the rates in its Price List. Those, she says, could not include for traffic safety and management, because that is an 'item' in itself, an 'item' in its own right. So, she argued, the first sentence of paragraph 2 (xxviii) is unworkable and contrary to the other provisions in the contract.
31. In my view, there is a clear answer to that. Sub-paragraph 2 (xxviii) and the Note emphasise that, in this contract, a different approach to pricing is required, certainly compared to how it might usually have been done. These are bespoke provisions relating to this contract. They are explaining that something which is usually a separate item is, on this occasion, generally deemed to be included in the other parts of the Price List, unless the exception applies. There is no lack of clarity in the words, and the bespoke amendments will (if there is a clash, which I doubt) take precedence over the standard form of the Method of Measurement (see **Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)** [2004] 1 AC 715).
32. Originally, I thought that this argument might have arisen because sub-paragraph (xxviii) was not worded in the same way as other items in paragraph 2. Those are all elements of cost which are expressly deemed to be included in the coverage; sub-paragraph (xxviii) is effectively identifying a possible exception to that. Although it might have been rather clumsily done, I consider its meaning is plain. Furthermore, I note that sub-paragraph (xxxii) is in precisely the same form: the Operatives are deemed to be included, unless the exception ("when instructed on a Task Order") comes into play. There is therefore a consistency of approach in paragraph 2 to the items there listed.
33. In her oral submissions, Mrs Pigott suggested that, if the first sentence was intended to have the effect contended for by the defendant, it would have meant that changes were required to the Price List in accordance with clause 11.2 (12) of the NEC

standard terms. I disagree: there is no question of needing to change the Price List. The Note at the start of Series 100 made clear, if it was not already, the limited circumstances when these rates and prices would be relevant.

34. Finally as to the first sentence in sub-paragraph (xxviii), Mrs Pigott complained that the clause was inoperative because ‘Affected Property’ was not defined in Clause 117, In my view, Mr Ward was right to say that that was based on a misreading of the words; it is the traffic safety and management that is defined in Clause 117, not Affected Property. Affected Property was defined in the Deed, as part of the Contract Data, as “the highway network within the area of Lancashire County Council boundary, other than motorways and trunk roads maintained by the Highways Agency”. No difficulty arises, or can arise, from that definition.
35. Accordingly, I reject the submission that the first sentence of sub-paragraph (xxviii) is to be deleted or ignored because it is unworkable. Such a submission faces a high hurdle in law. I find that the sentence is clear and quite capable of being operated. In addition, as noted below, it is entirely consistent with the rest of sub-paragraph (xxviii), and the Note at the start of Series 100.

5.3 Is The Remainder of Sub-Paragraph (xxviii), and the Note at The Start of Series 100, Mere Surplusage?

36. Mrs Pigott’s second argument was that the rest of sub-paragraph (xxviii) and the entirety of the Note at the start of Series 100, were mere surplusage because the terms of the contract meant that the claimant was entitled to be paid for all traffic and safety management anyway. Thus, she said, the fact that these provisions expressly stated that traffic safety and management would be paid for in the one particular circumstance, which I have called the exception, added nothing; it was to be measured and paid for in every situation when it was provided.
37. The first difficulty is that this argument has the effect of making the rest of sub-paragraph (xxviii) and the Note otiose. That would be a construction the court would naturally strive to avoid, for the reasons noted above.
38. Secondly, it is an argument that was based on the submissions which I have already rejected at **Section 5.2** above. On my construction, the first sentence of sub-clause (xxviii) meant that traffic safety and management was not generally recoverable as a separate item under this contract.
39. Thirdly, I consider that the submission completely ignores the word “*only*” which is used in both provisions. If something is *only* measured and paid for in one defined situation, it cannot be a proper construction of the contract to say that it will be measured and paid for in all situations.
40. This also provides an answer to that part of Mrs Pigott’s skeleton argument, which included the submission that clauses 11.2(17) of Option A envisaged that the sum due “where a quantity is stated for an item in the Price List [would be] an amount calculated by multiplying the quantity which the Contractor has completed by the rate”. She said that that covered all claims for traffic safety and management because that was an item in the Price List. But that of course ignores the words “shall *only* be separately measured...when...” There is no difference or clash between clause

11.2(17) and paragraph 2 (xxviii): in this instance, clause 11.2(17) would operate on the basis that traffic safety and management would not be included, save where the exception applied.

41. Mrs Pigott also argued that a separate measurement was not the same thing as payment. So she submitted that a separate measurement might be required in this situation, but payment was dealt with elsewhere and would be recoverable in the usual way. I reject that submission as contrary to common sense. It was clearly the intention of sub-paragraph (xxviii) and the Note that measurement and payment were to be treated in the same way. That was why the Note came right at the outset of the relevant part of the Price List; indeed, that was why the exception in sub-paragraph (xxviii) was repeated in the Series 100 Price List in the first place.
42. Mrs Pigott also suggested that it was unclear what was meant by “exclusive use”. I disagree; it must have been intended to refer to a situation where the defendant wanted the work done for its own particular purposes, or those of a third party, as opposed to the standard situation where the defendant was just the Overseeing Organisation.
43. But even if the operation of the words ‘exclusive use’ are more problematic than I think, so what? That is not the question that the court has been asked to consider. It would be quite impossible for me to conclude that traffic safety and management was always payable when there was non-routine signal maintenance work (the claimant’s case), just because it is asserted that the phrase “exclusive use” might be difficult to operate in practice. That seemed to me to be an example of the approach which Hamblen LJ said in Alexander the court should not adopt.
44. Finally, it was suggested that the defendant’s interpretation would require the rectification of the contract. Other than the uncontroversial full stop and the change from Series 101 to Series 100, I reject that submission. I have already explained how and why the defendant’s interpretation is the correct one. Indeed, I take the view that this particular boot is on the other foot: on the claimant’s case, the words “traffic safety and management shall only be separately measured...” either need to be deleted altogether, or they need to be added to, to make clear that all other circumstances in which traffic safety and management was used were also to be measured under Series 100. Thus it is the claimant who requires to rectify the contract, not the defendant.
45. Accordingly, for those reasons, I reject the claimant’s submissions. In my view, the defendant’s interpretation is to be preferred. I refuse the declarations at (a)(i) and (ii). With suitable amendments I am not averse to granting the third declaration, although I consider that the better course is to use the language of the second sentence of sub-paragraph (xxviii) and/or the Note.