



“Always follow the terms of the Contract”

North Sea Ventilation Ltd v Consafe Engineering (UK) Ltd, TCC 20 July 2004.

British Nuclear Fuels entered into a sub-contract with Consafe Engineering (UK) to design, fabricate, install and commission a plutonium waste system in Cumbria.

Disputes arose between the parties in relation to alleged additional works. Consafe denied North Sea had any entitlement to additional payment. One of the grounds cited being that Consafe had failed to follow the mechanism stated in the Sub-Contract for the issue and valuation of variations. Consafe also sought to advance a cross claim for liquidated and ascertained damages for late completion.

Clause GC35 of the Sub-Contract required that any changes in the works had to be given in writing by Consafe, and if North Sea were of the opinion that it affected the nature of the work, contract price or programme, it was to submit its proposal within 10 days. The clause further stated that if North Sea implemented the variation without Consafe's written approval of its proposal, or written instructions to proceed, then it was to be deemed that the instruction did not constitute a change.

In that the parties had implemented an additional works register, and that progress reports had been submitted, North Sea argued that the Consafe had ceased to rely on the strict application of the provisions of the Sub-Contract and thereby had waived its rights.

Of the 32 disputed variation items only 1 was disputed on the grounds of lack of notification under GC35 alone, and was therefore one of many factors to be considered. It was held that the burden of proof was upon North Sea to evidence cogent and consistent positive conduct to show that the written terms were displaced, and this it had failed to do. A variation could not be evidenced by a party's inactivity, silence or failure to insist on the strict application of the written clause.

With regard to the cross claim for liquidated damages, the Sub-Contract provided for graduated sums increasing in proportion to the seriousness of the breach, and which the Judge commented was commonplace in commercial contracts. It was held that the burden was once again with North Sea to prove that the liquidated damages provision of the subcontract amounted to a penalty clause. The Judge was satisfied, however, that there was no oppression in the contract provision and that the clause was enforceable.

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