The decision in *Network Rail Infrastructure Limited v ABC Electrification Limited [2019]* in the Technology and Construction Court is a clear example of the Court’s overarching principle of giving effect to the “ordinary and natural” meaning of contractual provisions.

**Background**

Network Rail Infrastructure Limited (“Network Rail”) entered into a contract in 2012 (the “Contract”) with an incorporated joint venture between Alstom Transport UK Holding Limited, Babcock Rail Limited and Costain Limited (“Costain”) to carry out works to the West Coast Main Line. The Contract was novated from Costain to ABC Electrification Limited (“ABC”), and subsequently amended by a Deed of Variation in 2014 in order to vary the works to be carried out by ABC.

The Contract incorporated the terms of the ICE Conditions of Contract, Target Cost version (First Edition), subject to a schedule of standard amendments used by Network Rail, known as NR12.

**Dispute**

The Contract provided for payment to ABC based in part on the Total Cost incurred by ABC less any Disallowed Cost. These were both defined terms. A dispute arose between the parties as to the interpretation of clause 1(1)(x) of the Contract, which stated:

“Total Cost means all cost (excluding Disallowed Cost and items covered by the Fee) incurred by the Contractor for the carrying out of the Works...”

Pursuant to clause 1(1)(j)(iii) of the Contract, “Disallowed Cost” meant:

“any cost due to negligence or default on the part of the Contractor in his compliance with any of his obligations under the Contract and/or due to any negligence or default on the part of the Contractor's employees, agents, sub-contractors or suppliers in their compliance with any of their respective obligations under their contracts with the Contractor”.

The term “default” had been introduced as a result of the NR12 amendments.

Network Rail therefore sought a Part 8 declaration as to the meaning of “Disallowed Cost” in clause 1(1)(j)(iii) and in particular, the meaning of “default”.

**“Natural and ordinary” meaning**

ABC argued that the additional words inserted by the NR12 amendments meant that a “wilful and deliberate” failure to fulfil a legal requirement or obligation is required.

The Court rejected ABC’s argument as there were no additional words in clause 1(1)(j)(iii), or anywhere else in the Contract, to indicate that the word “default” meant a “wilful and deliberate” failure.

The Court held that Disallowed Cost in clause 1(1)(j)(iii) includes any cost due to any failure by ABC to comply with its obligations under the Contract. In arriving at this conclusion, the Court accepted Network Rail’s submissions that, the word “default” carries its natural and ordinary meaning.

The Court cited Arnold v Britton [2015], where Lord Neuberger held that:
“The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language used…the clearer the natural meaning the more difficult it is to justify departing from it”.

This was also followed in the more recent case of Wood v Capita Insurance Services Ltd [2017].

It was therefore accepted that the natural and ordinary meaning of the word “default” was a failure to fulfil a legal requirement or obligation. The Court stated that it would need very clear evidence from the remaining provisions of the Contract, its factual matrix and commercial context to conclude that it means something different.

In this case, there was no such satisfactory or sufficient basis to reject the ordinary meaning of the term.

**Contractual context**

Before accepting an unusual interpretation restricted by the addition of words which would need to be read in to the Contract, the Court would need to be satisfied:

(i) the parties had made a mistake in referring to a “default” without qualification; and
(ii) the precise words that the parties had intended to use.

There was nothing in the Contract to support the proposition that the parties intended the word “default” to be restricted purely to wilful and deliberate failure to comply with the obligations under the Contract.

Miss Joanna Smith QC sitting as Deputy Judge of the High Court therefore concluded that there was no proper basis to hold that the parties intended the word “default” in clause 1(1)(j)(iii) to be restricted in its meaning by reference to “wilful and deliberate” conduct.

**Commercial common sense**

In Rainy Sky SA v Kookmin Bank [2011], Lord Clarke made clear that:

“Where the parties have used unambiguous language, the court must apply it.”

The same point was applied here by the TCC. If the parties had wished to limit Disallowed Cost under clause 1(1)(j)(iii), they could have done so by drafting express terms to that effect.

It was clear that this was not a situation where there were two conflicting interpretations in an ambiguous clause, where there may have been a requirement to adopt the interpretation that was most consistent with business common sense.

Therefore, the TCC granted declaratory relief in favour of Network Rail.

**Commentary**

This case highlights that the courts remain reluctant to reject the natural meaning of a provision as correct, simply because it appears to be a very imprudent term for one of the parties to have agreed. This is the overarching principle applied by the Courts in contract interpretation.

The commercial consequences of Network Rail’s interpretation of clause 1.1(j)(iii) were significant for ABC. It should be noted that the mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties, is not a reason for departing from the natural language.

Network Rail’s NR12 amendments form the basis of several high-value contracts, making the judge’s decision relevant to parties engaged on those projects. It is also likely that similar “default” wording is used in other contracts and sub-contracts.

In addition, this case underlines that any definition of Disallowed Cost should be considered very carefully at the start of a contract.