Legal Net

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Check Your Own Cotter Pins: A Mariner's Primer on the Principles of Interpreting Contracts

Shortly after completion of its mid-life upgrade in June of 2005, the *Queen of Oak Bay* lost propulsion while approaching the dock in Horseshoe Bay and grounded, causing significant damage to other vessels, and docks. The ensuing Transportation Safety Board investigation, as well as a BC Ferries internal investigation, revealed a cotter pin, missing from the linkage between the governor output lever and the fuel pump control rod on one of the main engines, likely allowed the linkage to become disconnected, resulting in the engine over-speeding and consequently undergoing an automatic shutdown. As a result, the master lost propulsion and steerage and the vessel grounded.

BC Ferries subsequently sued the shipyard, who acted as the lead contractor for the mid-life upgrade, as well as a subcontractor, who manufactured and serviced propulsion control systems installed on the ferry. BC Ferries alleged one, or both, were responsible for checking the nut and cotter pin on the governor linkage. The court was asked to consider the contract between BC Ferries and the shipyard, which set out the work that was to be done during the refit, and decide whose responsibility it was to check the cotter pin. The court's decision, released in March of 2011, provides an interesting opportunity to familiarize readers with the general principles the courts will apply when asked to decide the meaning of terms in a contract. It will be of benefit for mariners to bear these principles in mind when confronted with a potential contractual dispute.

Basic Principles of Interpreting Contracts:

At issue in the *Queen of Oak Bay* case was whether the following provision, contained in a lengthy (150 page) contract, made it the responsibility of the shipyard, or the subcontractor, and not BC Ferries employees, to check for the presence of the cotter pin:

> *7300.0 Propulsion Control –*
> ***Pneumatic Controls*** *Survey and* ***Service***
> ***Survey*** *all propulsion equipment* ***pneumatic controls*** *for the vessel's main engines, as well as the* ***control units****, etc., in the engine room, wheelhouse and all [subcontractor]* ***related systems*** *of the subject vessel, as per annual contract with technicians from [the subcontractor].*

The issue was significant because if BC Ferries could prove either the shipyard or the subcontractor were responsible for checking the cotter pin, and their failure to do so resulted in the engine failure, then BC Ferries could proceed in their claim against the

shipyard or subcontractor for potentially millions of dollars it had to pay repair or replace the docks and vessels that were damaged during the grounding in Horseshoe Bay. The court reviewed the following principles to be applied in interpreting contracts:

Principle #1 – The Parties' Original Intention Binds: When interpreting a contract, the court will determine the intention of the parties when they first entered into the agreement, and not what their intention is when a dispute later arises.

Principle #2 - Oral Evidence of Intention Inadmissible: The intention of the parties is determined by looking at the language of the contract, and not at the evidence of what the parties say their intention was. As the court said in this case, "*the latter is of little value, as it is invariably shaped by the parties' post-contract dispute and self-serving hindsight*".

Principle #3 - Whole of the Contract Considered: The court will interpret the words of a portion of the contract in the context of the whole of the contract, and not just the wording of the section that is in dispute. In other words, the court will look at other terms in the same contract to help identify the intention of the parties.

Principle #4 – Assume a "Sensible Commercial Result" was Intended: An interpretation of a contractual term that produces a fair, or sensible commercial result, will be favoured over an interpretation that produces an unfair result. Importantly, because of this principle, if parties enter into a contract that is vastly more favourable to one party than the other, the contract should expressly acknowledge this and the reason for the imbalance, else the parties risk the court applying an unintended "sensible commercial result".

Principle #5 - Look Outside of the Contract Wording only if Necessary: If the whole of the contract does not make clear what the intention of the parties was, the meaning of the words would bring about an unrealistic result, or there are two reasonable alternative interpretations, the court can look to the circumstances that existed at the time the contract was entered into (including the parties' behavior), so long as this does not overwhelm the words employed. While looking at how the parties conducted themselves before, and after, signing the contract may be useful in determining what they intended in the contract, the actual wording of the contract remains the focus.

Principle #6 - Favour Not the Drafter, if the Contract is Unclear - If there is an ambiguity in the contract, the court may also interpret the contract against the drafter of the contract where there was little opportunity for the other party to modify the words (this principle is called *contra proferentem)*.

The Principles Applied to the *Queen of Oak Bay* Grounding:

BC Ferries argued the terms "*survey*", "*service*", "*pneumatic controls*", "*control units*" and "*related systems*" in s.7300.0 of the contract required the shipyard or the subcontractor to make a detailed inspection of the governor linkage, which included confirming the presence of the cotter pin. The court reviewed the specific wording of the section, and the contract as a whole, and concluded "survey" and "service" did not require "*an inspection of every connection and nut and bolt*", and that the governor linkage itself was not part of the "pneumatic controls" and "control units" referred to in s.7300. Importantly, the court noted that another section of the contract did involve the attaching and adjusting of the governor linkage (s.2115), but BC Ferries had failed to assign the work under this section to the shipyard or the subcontractor.

On the wording of the contract as a whole however, the court was unable to decide whether the term "related systems" in s.7300 was meant to include the governor linkage, so following the principles above, the court looked to the surrounding facts, including the conduct of the parties. The court reviewed the history of work between BC Ferries and the subcontractor, and found that the subcontractor had not historically inspected or serviced the governor linkage. The court accepted that although the subcontractor conducted annual ship control inspections, those inspections were to determine whether the system operated properly, and did not require "*an inspection of every fastener connected to the entire control systems*", such as the cotter pin on the governor linkage.

Lastly, the shipyard argued that because s.7300 was ambiguous about whether the governor linkage was to be inspected, the principle of *contra proferentem* applied and the ambiguity should not be resolved in favour of BC Ferries, because BC Ferries drafted the contract and the shipyard had little, if any, input in its preparation. However, as the court had found (by looking at the words of the contract and the conduct of the parties) that the contract did not require the shipyard or the subcontractor to inspect for the missing cotter pin anyways, the court said it was unnecessary to apply *contra proferentem.* In other words, the court determined *contra proferentem* would not assist the shipyard or subcontractor, because they had already won.

While it is almost always prudent to seek legal advice when preparing a contract, or resolving a dispute under a contract, mariners can expect that the principles discussed above are those that their lawyers and the courts will apply to the facts of each case.

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