Neutral Citation Number: [2018] EWHC 140 (TCC)

Case No: HT-2016-000176

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2018

Before:

MRS JUSTICE O'FARRELL

- -

Between:

CONNECT PLUS (M25) LIMITED	**Claimant**
- and -	
HIGHWAYS ENGLAND COMPANY LIMITED	**Defendant**

- -
- -

David Streatfeild-James QC and Andrew Fenn (instructed by **Pinsent Masons LLP**) for the **Claimant**
Anneliese Day QC, Isabel Hitching and Melissa Shipley (instructed by **DLA Piper**) for the **Defendant**

Hearing dates: 10th July (reading day), 11th July, 12th July, 13th July, 17th July, 18th July, 20th July 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE O'FARRELL

Mrs Justice O'Farrell:

1. The claimant is Connect Plus (M25) Limited ("CP"), a company in which the shares were owned, at the commencement of these proceedings, by a consortium comprising Balfour Beatty, Skanska, WS Atkins and Egis.

2. The defendant is Highways England Company Limited ("HEC"), the successor to the Highways Agency.

3. On 20 May 2009, CP entered into a Design, Build, Finance and Operate Contract with the Secretary of State for Transport ("the DBFO Contract"). The DBFO Contract was amended by deeds of variation dated 21 December 2012, 27 September 2013, 26 January 2015 and 26 May 2016.

4. On 1 April 2015 the DBFO Contract was statutorily transferred from the Secretary of State to HEC.

5. The DBFO Contract has a term of 30 years and a value of £6.2 billion.

6. Under the DBFO Contract, CP undertook to carry out the design and construction of the widening of sections of the M25 London orbital motorway, refurbishment works, network improvement and safety schemes, operation and maintenance of the motorway.

7. CP is entitled to a net monthly payment from HEC, calculated by reference to a series of adjustments made to the gross monthly figure as set out in Schedule 25.

8. The adjustments include the "Critical Incident Adjustment" under Schedule 25, Part 6, Section B of the DBFO Contract, which provides for adjustments in respect of the time taken for CP to respond to and manage unplanned events. A Relevant Critical Incident triggers an adjustment, calculated as the CI Offset Component, based on a notional incident in which all lanes on the affected part of the road are closed for a period of 2.5 hours, less the CI Component, based on the actual duration of the lane closures. The Critical Incident Adjustment can result in the payment of a bonus, or a deduction from monies otherwise due, to CP.

9. A dispute has arisen between the parties as to the definition of "Critical Incident" for the purposes of the DBFO Contract and the application of the Critical Incident Adjustment.

10. CP's case is that the term Critical Incident is defined by reference to objective criteria, set out in a list of deemed Critical Incidents in paragraph 7.3.2 of the Network Management Manual ("NMM"). Although it is accepted that the DBFO Contract contemplated declarations on behalf of the Secretary of State, by category 1 or 2 responders, CP's case is that the parties agreed that CP would declare Critical Incidents using the deemed list as part of the administration of the contract. Further, the dispute as to the definition of Critical Incidents was referred to the Network Board and resolved. Alternatively, CP relies on post-contractual conduct giving rise to an estoppel in respect of the above matters.

11. HEC's case is that the declaration of a Critical Incident is a matter for the Secretary of State, exercising a general discretion in accordance with applicable emergency procedures in force from time to time. The list of "deemed" critical incidents in the NMM provides operational guidance but is not binding and must be read against the introductory words of the definition. HEC's position is that only the Secretary of State (or someone acting on behalf of the Secretary of State) is entitled to declare Critical Incidents for the purpose of the contractual payment mechanism, as stipulated in the DBFO Contract, and there was no binding agreement to the contrary post contract. There was no binding resolution of the dispute following the reference to the Network Board and CP is not entitled to rely on estoppel.

12. Both parties seek declarations, reflecting the above arguments.

13. The issues can be summarised as follows:

    i) On a true construction of the DBFO Contract, is the declaration of a Critical Incident a matter for the Secretary of State for Transport, as an exercise of discretion, or based on objective criteria, by reference to the list of deemed Critical Incidents in the NMM?

    ii) Did the parties enter into a binding post-contractual agreement whereby Critical Incidents can be declared by CP using the deemed list in the NMM for the purpose of the Critical Incident Adjustment under the DBFO Contract?

    iii) Was the definition of a Critical Incident and/or identity of those authorised to make a declaration determined by the reference to the Network Board and its resolution?

    iv) Did the parties' post-contractual conduct give rise to an estoppel in respect of any of the above matters?

Factual background

14. The strategic road network ("the SRN") comprises approximately 4,300 miles of motorways and major trunk A roads in England.

15. Historically, local highway authorities were responsible for and required to maintain those parts of the SRN that fell within their geographical area of responsibility. The Department for Transport was responsible for the construction of new road infrastructure within the SRN. Operational management of the SRN, such as responding to incidents and managing traffic, was the responsibility of local police.

16. In 1994 the Highways Agency was established to improve maintenance and operation of the SRN.

17. In 2001 the maintenance and operation of the M25 road network (Area 5) was brought under the control of one contractor on behalf of the Highways Agency. Incident Support Units ("ISUs") were introduced with the aim of responding to incidents within 20 minutes of notification, rather than the previous response time of 2 hours.

18. In January 2003 an incident known as 'White Friday' occurred in which some 1,500 people were trapped on the M11 overnight in very cold weather following heavy,

unexpected snowfall. The 2005 report into the causes of White Friday identified failings within the Highways Agency, including the absence of a clear operational command structure, resources necessary to respond to such incidents, a suitable communication system to ensure an effective operational response, and an effective means of warning and/or informing travellers of such incidents and/or alternative routes.

19. In response to the White Friday incident and the above criticism, the Highways Agency was given expanded powers and improvements were put in place.

20. New technology, such as traffic detectors, CCTV and variable on road signing, was installed at key sites around the SRN.

21. The National Traffic Control Centre ("the NTCC"), a private sector entity appointed to provide services to the Highways Agency, was established to collate and provide real-time information across the SRN, provide strategic management of traffic, influence the behaviour of road users and enable them to plan routes and avoid congested areas. In 2011 the NTCC was re-named the National Traffic Operations Centre ("the NTOC").

22. Regional Control Centres ("RCCs") were established across the SRN, staffed by the Highways Agency, often with the presence of the police and service providers. The role of the RCC is to collate and assess regional network information, including incidents and emergencies, deploy Traffic Officers to incidents, monitor traffic and control electronic signs in their part of the SRN.

23. The Traffic Officer Service was established to patrol the SRN 24 hours a day, 7 days a week, with powers to stop and direct traffic. In respect of incidents on the SRN, the Traffic Officer Service coordinates the resources of the emergency services, manages traffic to reduce incident related congestion, clears debris from the carriageways, re-opens routes as soon as it is safe to do so and supports the police.

24. On 31 July 2003 a Regional Network Contingency Plan was published by the Highways Agency, covering a number of areas of the SRN, including the M25. The executive summary stated:

> "This plan has been written to assist the Highways Agency, MA (C) and their partners and other organisations in dealing with Major and Critical Incidents as defined in section 3.1 affecting the motorway and trunk road network in Areas… 5…
>
> This Plan identifies the objectives to be achieved and defines the criteria by which the Plan should be activated. It identifies the responsibilities, sets out the lines of communication, actions and interfaces between the various organisations involved…"

Paragraph 3.3 goes on to state:

> "Critical incidents are unforeseen events that seriously impact upon the Highways Agency and its ability to deliver its 'safe roads, reliable journeys, informed travellers' objective.

> Importantly, the police, emergency services or local authorities may not consider these types of incident as important as the Highways Agency.
>
> Critical incidents also include incidents that ministers wish to be informed of.
>
> It should be noted that critical incidents may be, or become, major incidents.
>
> Service providers declare critical incidents for their own, and the Highways Agency, management purposes. If service providers believe that critical incidents are or may become major then they should notify the police immediately.
>
> The following are critical incidents… "

25. The Highways Agency contingency plan indicates that, at least by this stage, there was a general definition of critical incidents, namely, unforeseen events that seriously impacted upon the Highways Agency and its ability to deliver its 'safe roads, reliable journeys, informed travellers' objective. Further, there was a list of the categories of incidents that fell within that definition. In cross examination, Nick Ash of CPS and Ms Roberts of NTOC agreed that this definition was well known in the industry.

26. The above contingency plan also indicates that at this stage, critical incidents were declared by the service providers and not by the Highways Agency.

27. In 2004 National Incident Liaison Officers ("NILOs") were established, based at the NTCC (now NTOC) in Birmingham. NILOs are responsible for receiving information from the Highways Agency, service providers and NTCC and assessing the severity, significance and impact of incidents on the SRN. They are the first point of contact for all service providers and other internal Highways Agency customers to report real-time, major and critical incidents on the SRN. NILOs are responsible for sharing information about such incidents with RCCs, service providers, area performance teams, NTOC and the press office. NILOs are also responsible for assessing and identifying incidents as critical across the SRN in accordance with the NILO emergency contact procedures.

28. On 27 September 2004 a document entitled "Information Flow for Emergency Contact Procedures" ("ECP") was published, setting out the procedures to be followed, by NILOs, DBFO Cos and others, in the event of major and critical incidents on the SRN. Critical Incidents were defined as follows:

> "Critical incidents are unforeseen events that seriously impact upon the Highways Agency and its ability to deliver its 'safe roads, reliable journeys, informed travellers' objective. Importantly, the police, emergency services or local authorities may not consider these types of incident as important as the Highways Agency.

> Critical incidents also include incidents that ministers wish to be informed of.
>
> It should be noted that critical incidents may be, or become, major incidents.
>
> Service providers declare critical incidents for their own, and the Highways Agency, management purposes. If service providers believe that critical incidents are or may become major then they should notify the police immediately.
>
> The following are deemed to be critical incidents… "

29. On 25 October 2004 Area Management Memo 54/04 was issued stating:

> "This Area Management Memo details the arrangements being put in place to roll out a 24/7 National Incident Liaison Officer (NILO) role, who will act as the first point of contact within the HA in gathering information about real-time incidents occurring on the network, and make decisions on who to alert about individual incidents, dependent on the severity of each and its likelihood to escalate. For larger scale incidents, the NILO will also be expected to monitor their progress, and keep senior HA staff informed of developments."

30. Annex A to the memo was a draft letter to be sent to service providers, stating:

> "… You will recall that since 4th August Service Providers have been required to report incidents of a critical nature to locally based Incident Liaison Officers, within office hours, and to a national Duty Officer during Out of Hours periods. This role is now being taken on around the clock by National Incident Liaison Officers (NILOs)."

31. That change was reflected in the ECP updated on 5 November 2004. The definition of Critical Incidents remained as in the earlier documents. The information flow diagram at section 3.3 of the ECP showed that information on incidents would be given to NILO by the service providers, police/RCCs and NTCC. NILO would record the incident and decide on its severity.

32. Thereafter, there were a number of revisions made to the ECPs but the lines of communication continued to be as above. Critical incidents were identified and reported by the service providers (including DBFOs), NTCC or RCCs to NILO, who recorded each incident and decided on its severity.

33. In September 2006 the Network Management Manual (NMM) was introduced, to replace Volumes 1 and 3 of the Trunk Road Maintenance Manual. The introduction explained:

> "It brings together extant policy from those two volumes together with current Area Management Memos and Network

> Security Notes. It provides advice, some mandatory instruction and guidance on good practice for the management and provision of the routine and winter service on the trunk road network. It generally describes the processes for the management of the maintenance service including the interface between the Highways Agency, its service providers and other stakeholders."

Part 7 of the NMM was entitled: "Traffic Incident Management" and contained a definition of Critical Incidents in the same terms as the ECP, although there were variations in the formulation, and number, of listed events between different versions of the documents.

Tender

34. On 12 March 2007 the Instruction and Guidance to Tenderers ("IGT") was distributed to tenderers. The IGT set out a description of the Critical Incidents Adjustment mechanism and stated:

> "4.8.3 Critical Incidents are unplanned events on the Project Road that have the potential to impact seriously upon the Agency or its ability to deliver its objective relating to safe roads, reliable journeys and informed travellers.
>
> 4.8.4 Critical Incidents will arise as a result of a variety of circumstances and will include, for example, collisions involving fatalities or serious injuries, vehicles disabled on a carriageway, spillages or incidents involving vehicles carrying dangerous substances, collisions resulting in serious structural damage or an unsafe carriageway, lane closures necessitated by adverse weather or required by the emergency services to deal with incidents such as fires or suicide threats. Other circumstances falling within the Critical Incident category will include security alerts or criminal/terrorist acts either on or off the Project Road which cause one or more lanes to be closed. Details of Critical Incidents that have been recorded by the Agency since January 2006 will be made available in the Data Room.
>
> 4.8.5 For purposes of the calculation of the Critical Incident Adjustment only those Critical Incidents that constitute Relevant Critical Incidents are taken into account. Relevant Critical Incidents are a limited category of Critical Incidents which necessitate partial or full closure of a Carriageway on the Project Road and resulting in one or both of the following:

- a physical obstruction of the Carriageway that needs to be cleared before the affected traffic lanes can be reopened;

- damage to the Project Facilities requiring assessment or remedial action before the lanes can be re-opened.

Additionally, to constitute a Relevant Critical Incident the Incident Controller must have requested the DBFO Co's attendance at the scene of the Critical Incident to perform its duties.

4.8.6 Neither Major Incidents nor Exceptional Circumstances will be Relevant Critical Incidents. If a Relevant Critical Incident is re-categorised as a Major Incident by the National Incident Liaison Officer, the Critical Incident Adjustment will not be applied to that incident. Major Incidents are emergencies that involve the implementation of special arrangements by the emergency services, NHS or local authorities to deal with large numbers of affected people."

35. The tender documents did not contain a definitive list of Critical Incidents for the purpose of the draft DBFO Contract but the tenderers were given access to details of critical incidents recorded by NILO since January 2006 in the data room, as agreed by Mr Steel of CP in cross-examination.

36. In May 2007 CP issued the following Comment 22 in respect of Schedule 25 of the draft DBFO Contract:

> "We would welcome clarification on what sort of incident will constitute a Critical Incident, and whether this is a defined term in any emergency or operational procedures. We would also welcome clarification on who will have the authority to declare a Critical Incident."

37. In May 2007 CP submitted a mark-up to the draft Schedule 25 of the DBFO Contract including the following:

> "Critical Incident means an incident declared as such by or on behalf of [by whom – Incident Controller?] the Secretary of State in accordance with applicable emergency procedures [we need to understand what incidents will be declared CIs – is it a defined term in operational procedures?]"

38. On 29 June 2007 a payment mechanism seminar was attended by the Highways Agency, CP and other tenderers. Ian Henderson of Halcrow (retained in March 2007 as part of the Hyder-Halcrow Joint Venture to provide consultancy support to the Highways Agency through DNCS) presented the section of the seminar entitled 'Unplanned Event Management'. The presentation slides included:

> "The Agency's Traffic Incident Management and Contingency Planning requirements are set out in Part 7 of the Network Management Manual.
>
> Paragraph 7.3.2 provides the definitions of Critical Incident and Major Incident.
>
> HA to notify the DBFO Co that an incident is a Critical Incident.
>
> Only Relevant Critical Incidents are subject to the Critical Incident Adjustment
>
> - Not a Major Incident or Exceptional Circumstance
> - Closure of part of the Carriageway
> - Obstruction/actual/potential damage
>
> Start time is the time DBFO Co is notified by the HA…"

39. Following the seminar, the Highways Agency circulated to the tenderers a paper entitled: "Issues Raised by Tenderers at M25 Payment Mechanism Seminar", together with the slides from the presentation. The paper included the following:

> "Tenderers suggest that their Critical Incident calculations, based on the data supplied, appear to be producing consistently negative results (i.e. deductions not bonus payments) and have asked the HA to provide details of its own calculations referred to in the Workshop presentation…
>
> The analysis referred to in the presentation is based on Critical Incident Data for January 2006 until October 2006 in the Data Room…
>
> The Agency does not propose to provide its detailed calculations as these are based on its interpretation of the data but if Tenderers still have concerns they are invited to supply details of their Critical Incident calculations that they believe are producing perverse results and the Agency will review and comment on these. The Agency will not make comments in relation to the interpretation of data or results."

40. On 13 July 2007 Tender Question 441 was submitted:

> "Please could the Highways Agency include in Schedule 25 a defined list of the types of incidents that would be considered an Exceptional Circumstance, a Major Incident or a Critical Incident?"

41. On 6 August 2007 the Highways Agency responded to Tender Question 441:

> "The Agency does not consider it appropriate to include defined lists of types of incidents in Schedule 25. For Critical Incidents paragraph 7.3.2 of Part 7 of the Network Management Manual includes a list of incidents that are deemed to be critical incidents."

42. Mr Henderson recognised that there was a degree of uncertainty for the DBFO Co in the drafting of the Critical Incident definition as set out in his response to Comment 22:

> "It is recognised that there is a degree of uncertainty for the DBFO Co in the current drafting. Critical Incidents are described in the HA's 'Incident Management Framework' document. Additionally, the types of incident that have been categorised as such in the past are recorded by the HA and that data, as recorded, can be provided. As far as the identity of the person making the designation on behalf of the SoS is concerned we recommend that Traffic Operations Directorate be asked to designate who will have authority to do this."

43. However, following meetings on 4 July 2007 and 26 July 2007 between CP and the Highways Agency regarding Schedule 25 of the draft DBFO Contract, CP confirmed that it was generally comfortable with the definition of critical incidents and major incidents. As a result, Comment 22 was withdrawn, although it was agreed that a further technical query would be raised seeking further information.

44. On 9 August 2007 CP issued a further tender query in respect of critical incidents:

> "From the incident reports provided, is the Agency able to indicate which should be considered Relevant Critical Incidents? We have undertaken our own assessment and would like to understand how it compares to the Agency's view."

45. On 21 August 2007 the Highways Agency responded to CP's tender query:

> "As noted in the Agency's response to "Issues Raised by Tenderers at M25 Payment Mechanism Seminar on 29 June 2007", included as an appendix to Circular Wk 17 – 12th June 2007, the Agency is prepared to review and comment on any Tenderer's Critical Incident calculations that are submitted to it."

46. On 23 August 2007 David Goldman of Balfour Beatty Infrastructure Services Ltd emailed Ian Henderson the CP's critical incident analysis, based on NILO reports in the Data Room.

47. On 30 August 2007 Ian Henderson met with Simon Beauchamp, David Goldman and David Penalba from CPS to discuss the CI adjustment calculations produced by CP. Following adjustments to the calculations to take account of an increase in the offset period for each Critical Incident from 2 to 2.5 hours, they produced a net bonus for CP instead of a net deduction.

48. In October 2007 CP submitted its bid for the DBFO Contract.

49. Following a limited re-tender process, on 24 March 2008 CP issued its response to Clarification 582, including:

> "Risks covered in this section are:
>
> Payment mechanism deductions and additions for Critical Incident (CI) clear-up times. Our analysis of the historic CI data suggests that a net credit of £191,000 per annum is likely. We consider that the driver of payment mechanism will be effective in reducing clear-up times and have therefore allowed for this credit throughout the thirty year term."

50. On 8 May 2008 CP was notified that it was the provisional preferred bidder for the DBFO Contract.

51. From the above documents and the evidence of the witnesses, the position prior to the DBFO Contract was that there was a generally accepted industry definition of critical incidents, namely, unforeseen events that seriously impacted upon the Highways Agency and its ability to deliver its 'safe roads, reliable journeys, informed travellers' objective. There were recognised categories of incidents that were accepted to fall within that definition, although the list of such categories was not uniform throughout the Contingency Plan and ECP documents. Critical incidents were identified and declared by the service providers, as set out in the ECPs, and reported by NILO, as set out in the Data Room documents.

52. During the tender period, the tenderers were informed by the Highways Agency that:

    i) the definition of Critical Incidents was set out in paragraph 7.3.2 of the NMM;

    ii) there was no definitive list of what would constitute Critical Incidents but records of Critical Incidents reported by NILO were made available in the Data Room; and

    iii) the Highways Agency would declare Critical Incidents for the purpose of the DBFO Contract.

DBFO Contract

53. On 20 May 2009 the DBFO Contract was signed. The Works Commencement date was 20 May 2009. The Service Commencement date was 13 September 2009.

54. Clause 3.1 of the DBFO Contract obliges CP to design and construct the Works, operate and maintain the Project Facilities, conduct the other Operations and finance the same.

55. The Project Facilities are defined as the Project Road, the Off-Site Facilities and any Included Off-Site Equipment.

56. The Project Road is defined as the lengths of trunk road or motorway described and shown on the drawings in Schedule 3. It covers the M25 and the A282 Dartford to

Thurrock River Crossing, the trunk roads between the M25 and the Greater London Authority boundary and the motorway routes into London (excluding the M40).

57. The Works are defined as the upgrade works to the Project Facilities.

58. Operations are defined as including the activities of, or required of, CP in connection with the performance of any obligations of the DBFO Co under the DBFO Contract.

59. Services are defined as the Operations other than carrying out the Works.

60. Clause 3.2 provides that the Secretary of State and CP shall deal fairly, in good faith and in mutual co-operation with one another.

61. Clause 3.3 obliges CP to satisfy the Core Requirements:

> "In carrying out the Operations, the DBFO Co shall take all such action and do all such things (including organising itself, adopting measures and standards, executing procedures, including inspection procedures and safety patrols, and engaging and managing contractors, agents and employees) as will and in such manner as will:
>
> 3.3.1 enable the Secretary of State to provide a safe highway in respect of its condition, use and risks affecting third parties;
>
> 3.3.2 promote the safety of Users, workers or other persons on the Project Road or the Adjacent Areas or on land adjacent to the Project Facilities or using adjoining or affected roads or facilities;
>
> 3.3.3 enable the Secretary of State to fulfil his obligations in respect of his statutory powers and in respect of administrative law, common law, European Community law and human rights; and
>
> 3.3.4 enable the Secretary of State to achieve the Project Objectives …"

62. The Project Objectives are defined by Annex 1 to Part 1 of Schedule 18 as including safe roads, reliable journeys and informed travellers. The project road objectives are set out in paragraph 2 and include at paragraph 2.1:

> "delivery of a high quality, flexible service that puts customers first and will help reduce congestion, improve journey time reliability and improve safety on the Project Road through:
>
> 2.1.1 maintaining the Project Road in a safe and serviceable condition;
>
> 2.1.2 integrated operation of the whole of the Project Road… in a way that minimises delay to the travelling public;

> 2.1.3 timely, efficient and safe management of incidents, accidents, road works and winter service;
>
> 2.1.4 timely planning and delivery of trunk road improvements, while minimising disruption to the travelling public;
>
> 2.1.5 accurate forecasting, planning and implementation of road space management;
>
> 2.1.6 providing a proactive public relations service for customers and stakeholders;
>
> 2.1.7 utilising asset, traffic and safety related information recording, analysis and presentation systems that are state-of-the-art as at the Effective Date and that are updated to include advancements in technology systems as appropriate and relevant to the particular system; and
>
> 2.1.8 timely and accurate delivery of information to influence travel behaviour and informed decisions ..."

63. Clause 3.3.8 obliges CP to:

> "enable the police, Traffic Officers, local authorities, and others with statutory powers in relation to the Project Facilities or adjoining or affected roads to fulfil their obligations in respect of those statutory powers."

64. Clause 3.3.10 obliges CP to:

> "minimise the occurrence and adverse effects of accidents and Incidents and ensure that all accidents, Incidents and emergencies are responded to as quickly as possible."

65. Clause 3.3.14 obliges CP to:

> "ensure that Users are given adequate information and forewarning of any events on or any matters affecting the Project Road so as to enable them to mitigate any adverse consequences on them of those events or matters."

66. By clause 3.4 CP is obliged to procure that the Operations are performed in accordance with Good Industry Practice and in accordance with the Management System Documentation.

67. The Management System Documentation is defined as the policy, manuals, plans, procedures, work instructions or like documents as appropriate which describe and define one or more Management Systems. The Management Systems set out the policy and objectives of HEC.

68. Annex 1 to Part 1 of Schedule 2 provides that CP is obliged to produce DBFO Co plans including:

    i) plans as required by the NMM;

    ii) a Services Plan to set out the methodology by which the services were to be delivered;

    iii) a Contingency Plan;

    iv) an Information Management Plan including the processes and procedures for the production, collection and dissemination of information relating to the performance of the DBFO Contract;

    v) a Communications Plan to include liaison procedures; and

    vi) Management System Documentation.

69. Clause 36.1 obliges CP to put in place and implement an Integrated Management System for all aspects of the Operations.

70. Clause 17.1.1 provides that CP is responsible for performing all aspects of the Operations:

> "17.1.1.1 in accordance with the Service Requirements and the Technology Service Requirements;
>
> 17.1.1.2 in such manner as to procure satisfaction of the Core Service Requirements and the Core Technology Requirements; and
>
> 17.1.1.3 in accordance with the terms of this Agreement."

71. The Service Requirements are defined as the requirements in respect of the performance of the Services set out or referred to in Part 2 of Schedule 9, as amended from time to time.

72. Part 2 of Schedule 9 imposes the following obligations on CP:

> "2.1.1 … the DBFO Co shall perform all Services in accordance with the Service Standards as in force and reflected in the Standards List from time to time."
>
> "2.1.2 If there is any inconsistency between any provision of the RWSC, the NMM or any other Service Standard and an express provision of this Agreement, the express provision of this Agreement shall prevail.
>
> 2.1.3 The DBFO Co shall perform the Services in accordance with the Services Plan as in force from time to time in accordance with paragraph 3.1.

…

3.3.1 The DBFO Co shall, on behalf of the Secretary of State, prepare, maintain, revise and implement a contingency plan in respect of the Project Road meeting the requirements for or description of a contingency plan in the NMM.

…

4.1.1 The DBFO Co shall monitor real time conditions on or affecting the Project Road, including weather, congestion, Incidents and defects, on a 24 Hour Basis.

4.1.2 In making decisions having an impact on the operation of the Project Road, the DBFO Co shall take into account:

4.1.2.1 information on the conditions on the Project Road obtained in accordance with paragraph 4.1.1; and

4.1.2.2 information on conditions on adjacent highways obtained through liaison with the relevant highway authority;

in order to minimise inconvenience to Users.

…

4.2.1 The DBFO Co shall establish one or more control centres in the vicinity of the Project Road… the Network Control Centres shall be the primary points of contact for all communications with the Regional Control Centres.

…

4.2.4 The NCCs shall also:

4.2.4.1 monitor conditions on the Project Road in real time in accordance with paragraph 4.1.1;

4.2.4.2 monitor Tunnel Control Systems in accordance with paragraph 9.4;

4.2.4.3 co-ordinate the DBFO Co's activity on the Project Road, including responses to defects, fault reporting and Incident response and management;

4.2.4.4 maintain up to date contact lists for all emergency services and persons identified in the Contingency Plan; and

4.2.4.5 undertake liaison with Interested Parties as necessary to ensure efficient and effective operations on the Project Road and adjacent highways.

…

5.3.15 The DBFO Co shall provide incident management support in accordance with the Service Standards … in accordance with Chapter 7 of the NMM as amended and supplemented by paragraph 2 of Annex 1 … and …

to satisfy the performance requirements in respect of incident management set out in paragraph 2 of Annex 1…

… in the event of an Incident, respond to instructions from the Traffic Officers, RCCs or emergency services as required …

provide a single contact telephone number for emergency response and provide the contact details to the emergency services and all relevant persons identified in any incident management or contingency plan or the Liaison Procedures …

provide Incident Support Units that meet the specification set out in the Service Standards …

mobilise the necessary staff, plant, equipment, materials and other resources to achieve the response times for attendance at Incidents in accordance with the Service Standards as amended and supplemented in accordance with paragraph 2 of Annex 1 …

take immediate action to arrange for the part of the Project Road affected by the Incident to be made safe and returned to normal operating standards as soon as possible …

in consultation with the emergency services and Traffic Officers, take the necessary action to remove or prevent any immediate risk to the safety of the public arising out of the condition of the Project Road."

73. Annex 1 to Part 2 of Schedule 9 provides for response times for Incidents. There is a maximum response time (either 40 minutes or one hour, depending on the time of day) and a statistical measure (90% of Incidents within a calendar month to be responded to within a time of either 20 minutes or 40 minutes). CP must record incident response times in accordance with the NMM and report them monthly.

74. Clause 18 sets out CP's obligations in respect of traffic operations:

> "18.1 The DBFO Co shall liaise with the Traffic Officers and support the Traffic Officers in carrying out their functions in respect of the Project Road, all in accordance with the Liaison Procedures developed in accordance with Part 1 of Schedule 22…
>
> 18.2.1 Without prejudice to clauses 18.1 … and 18.4 …, the DBFO Co shall comply with all lawful instructions from a Traffic Officer. The DBFO Co shall be responsible for implementing any such instructions so as to achieve their objectives in a manner that is safe for Users, other members of the public and the DBFO Co's workforce…
>
> 18.3.1 The DBFO Co shall liaise with the Regional Control Centres in accordance with the Liaison Procedures developed in accordance with Part 1 of Schedule 22 …and Part 2 of Schedule 9…
>
> 18.3.2 Without limitation to paragraph 11.1 of Part 2 of Schedule 9, the DBFO Co shall keep the Regional Control Centres informed of operations and conditions (including the occurrence of any Incidents) on the Project Road.
>
> 18.4.1 Without prejudice to clause 18.2, the DBFO Co shall, in the event of an emergency or Incident, comply with all instructions of the police, a Traffic Officer, the emergency services or any Relevant Authority having authority in respect of the emergency or Incident. The DBFO Co shall at all times be responsible for implementing any such instruction so as to achieve the objective of the instruction in a manner that is safe for Users, other members of the public and the DBFO Co's workforce.
>
> 18.4.2 Subject to clause 18.4.1 and the terms of any relevant Liaison Procedures but notwithstanding any other provision of this Agreement, the DBFO Co shall and shall be entitled to take (at its own cost) such steps as necessary in an emergency for the protection of the public."

75. Annex 2 to Part 2 of Schedule 15 provides:

> "The DBFO Co shall, without prejudice to the requirement to report accidents and Incidents in accordance with paragraphs 1.3 and 1.4 of Part 4 of Schedule 18 [Performance Monitoring and Reporting], immediately report to the Department's Nominee each accident or Incident deemed to be a "Critical Incident" (as referred to in the NMM), distinguishing between Critical Incidents that impact on the payment mechanism (referred to as "Relevant Critical Incidents" in section B of Part 6 of Schedule 25 [Critical Incident Adjustment]) and those that do not."

76. The Standards included in the DBFO Contract include, by Schedule 8 Part 3 Paragraph 4, the NMM, as amended by Annex 4. The NMM is defined as the manual issued by the Highways Agency on behalf of the Secretary of State. The version of the NMM incorporated into the DBFO Contract is Issue 1, amendment 7, dated June 2008 (as amended by Annex 4).

77. The NMM contains a standard set of operating protocols and an escalation process to ensure that all incidents are managed appropriately.

78. Annex 4 to Part 3 of Schedule 8 provides that all references to "Service Provider" in the NMM are references to the "DBFO Co" and all references to "Highways Agency's Service Manager" are references to the "Department's Nominee".

79. Paragraph 7.1.1 of the NMM states that the Highways Agency is a Category 2 responder under the Civil Contingencies Act 2004.

80. Paragraph 7.2.2 provides that the RCCs are the focal point for all communications regarding planned and unplanned events, such as incidents and emergencies, on the SRN. The primary function of the NTCC is to collect, process and distribute strategic traffic information, including setting strategic roadside variable message signs and other dissemination media, using pre-agreed protocols, to assist travellers in planning their journeys. NILO is responsible for receiving information from within the Highways Agency and its Service Providers about critical and major incidents, sharing information with RCCs, Service Providers, Area Performance Teams, NTCC, Press Office and others where appropriate and when necessary escalating incidents and informing senior management. The Senior Officer on Call is a senior level resource to be alerted to monitor more serious critical incidents in line with defined criteria.

81. Paragraph 7.2.3 states that:

> "The Service Providers along with Traffic Officers are responsible for dealing with incidents at an operational level, providing support to the Highways Agency and other responders involved in the incident, providing tactical incident management such as traffic management…, and undertaking asset management or repair required as a result of incidents ..."

82. Paragraph 7.3.2 (as amended by Annex 4 to Part 3 of Schedule 8) defines Critical Incidents as follows:

> "Critical Incidents are unforeseen events that seriously impact upon the Highways Agency and its ability to deliver its 'safe roads, reliable journeys, informed travellers' 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.
>
> 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:
>
> 1. Multiple collisions involving fatalities, serious injuries or vehicles disabled on a carriageway.
>
> 2. Partial or full closure of motorways or trunk roads due to weather or road conditions. This will also include minor incidents occurring at different locations aggravated by other circumstances, which taken as a whole fall into this category.
>
> 3. Collisions involving crossover of a vehicle from one carriageway to another.
>
> 4. Collisions involving passenger coaches, school minibuses, trains, or public service vehicles resulting in fatalities or injuries.
>
> 5. Fatal collisions involving fire.
>
> 6. Serious collisions involving a vehicle carrying dangerous substances (e.g. hazardous chemicals, flammable liquids such as petrol, radioactive materials etc).
>
> 7. Collisions on motorways or trunk roads resulting in serious/potentially serious structural damage (e.g. to a bridge) necessitating road closures.
>
> 8. Fatal collisions on motorways or trunk roads where roadworks are in progress.

> 9. Any significant event impacting partial or full closure of motorways or trunk roads due to collisions, security alerts or criminal terrorists acts…
>
> 10. Any incident off or adjacent to the network that may meet any of the above criteria, and affects the network.
>
> 11. Any incident or event off the Project Road which results in stationary vehicles for a period of 1 hour or more.
>
> 12. Suicide or attempted suicide resulting in the closure of lanes or carriageways.
>
> 13. Roadworks overrunning by 30 minutes or more, and likely to have an impact on the network.
>
> 14. Any instances of 50% of the reserve winter maintenance fleet being utilized within any area."

83. Paragraph 7.5.4 requires CP to produce a contingency plan and provides:

> "… The contingency plan is designed to ensure that the Service Providers, together with the Traffic Officer Service and Area Performance Teams, are able to make a proper response to the situation… to ensure that proper interfaces are achieved with other organisations …"

84. Paragraph 7.7 made provision for CP to provide services in accordance with a National Timeline Model, a framework for detailing service requirements. The model provides for a series of phases, including the following:

i) The verification phase requires CP to liaise with RCC and NTCC/NILO to update them with the incident details and anticipated or actual consequences.

ii) The response phase is divided into the Immediate Response and Ongoing Emergency Response. During the Immediate Response, the RCC takes a facilitation role and acts as an information hub. In the Ongoing Emergency Response, CP with the RCC liaise with the NTCC and with NILO to ensure that all information is shared effectively and escalation procedures can be followed without delay.

iii) During the first part of the Scene Management Phase the RCC and DBFO Co are required to update the NTCC and NILO who ensure that strategic traffic management and media updates are based on current information.

iv) During the Restore Phase, the RCC and DBFO Co are required to liaise continually with the NTCC and NILO to ensure that the media are up-to-date on the incident status.

85. Paragraph 7.15.2 obliges CP to report to the NCC:

> "[CP] must liaise with the NTCC/NILO during major/critical incidents and update them with the incident details and anticipated or actual consequences, at least on an hourly basis."

86. The Standard Incident Management Framework ("the SIMF") is contained in Annex 7.8.11 to the NMM. The purpose of the SIMF is to have in place an effective and efficient standardised command and control system to enable coordinated and cohesive working with the various organisations involved in incidents. Critical incident is defined in similar (but not identical) terms as in the NMM. The paragraph concerning declarations is omitted and the deemed list in the SIMF is shorter than the deemed list in the NMM.

87. The SIMF provides:

> "In the first instance when a critical incident is discovered or reported the person receiving the information should ensure that the National Incident Liaison Officer (NILO) is notified as soon as practicable. NILO will then inform the relevant parts of the Agency and ensure that those who need to be updated or made aware are provided with the necessary information in accordance with the procedures that are outlined in the Emergency Contact Procedures."

88. A draft Contingency Plan is contained in Annex 7.8.12. Paragraph 1.12 states:

> "HA have established definitions of Major and Critical incidents. These are in Appendices C and D of this plan."

Appendix D defines 'Critical Incidents' as set out in the NMM (without the amendments regarding declarations by the service providers) and 'ECP' as "Highways Agency Emergency Contact Procedures."

89. Incident is defined by clause 1.2 of the DBFO Contract as any unplanned event which affects the M25.

90. Critical Incident is defined by clause 1.2 and paragraph 1 of Section B of Part 6 of Schedule 25 as:

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

91. Paragraph 1 of Section B of Part 6 of Schedule 25 provides that the Critical Incident Start Time is:

> "the time the DBFO Co is first notified by or on behalf of the Secretary of State that an incident is a Critical Incident."

92. Relevant Critical Incident is defined by clause 1.2 and paragraph 1 of Section B of Part 6 of Schedule 25 as:

> "a Critical Incident that:

> (a) is neither an Exceptional Circumstances Event (as defined in paragraph 1 of Section A [Exceptional Circumstances Adjustment]) nor a Major Incident: and
>
> (b) requires or results in the partial or total closure of a Carriageway on the Project Road; and
>
> (c) results in one or more of the following:
>
> (i) a physical obstruction (other than traffic management equipment) in the Carriageway that requires removal before the affected traffic lanes can be safely opened to traffic: or
>
> (ii) damage or potential damage to any of the Project Facilities that will require assessment and/or remedial action before the affected traffic lanes can be safely opened to traffic; and
>
> in respect of which the Incident Controller has requested the attendance of the DBFO Co at the scene of the Critical Incident in order to perform any of its duties under this Agreement…"

93. Clause 73.2 states:

> "Save as otherwise provided in this Agreement, the DBFO Co shall not be, or be deemed to be, an agent of the Secretary of State and the DBFO Co shall not hold itself out as having authority or power to bind the Secretary of State in any way."

94. Clause 75 of the DBFO Contract states:

> "This Agreement (including the Schedules) … constitute the whole agreement and understanding of the Parties as to the subject matter hereof and there are no prior or contemporaneous agreements between the Parties with respect thereto."

95. Clause 77 states:

> "No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Secretary of State and the DBFO Co."

Issue 1 – Meaning of Critical Incident

96. The applicable legal principles of contract construction are now well-established and not in dispute. When interpreting a written contract, the court is concerned to ascertain the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract. It does so by focussing

on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of:

i) the natural and ordinary meaning of the clause,

ii) any other relevant provisions of the contract,

iii) the overall purpose of the clause and the contract,

iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and

v) commercial common sense, but

vi) disregarding subjective evidence of any party's intentions.

See: *Arnold v Britton* [2015] UKSC 36 per Lord Neuberger at paras. [15] to [23]; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 per Lord Clarke at paras. [21] to [30]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 per Lord Hoffmann at paras. [14] to [15], [20] to [25]; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 per Lord Hodge at paras. [8] to [15].

97. Both parties have referred to witness statements and documents that contain subjective intentions and views in respect of the Critical Incident definition and mechanism. No criticism is made of the parties in that respect because those matters are, or may be, relevant to the issues of post-contractual agreement, settlement and estoppel. However, save where such evidence concerns shared communications or understanding, it is inadmissible as an aid to interpretation of the DBFO Contract.

98. CP's case is that Critical Incidents are defined for the purposes of the DBFO Contract as the list of deemed Critical Incidents in paragraph 7.3.2 of the NMM (as amended). Mr Streatfeild-James QC submits that this definition of Critical Incident was established by the Highways Agency and incorporated into the DBFO Contract by the NMM, a contract document. CP is obliged to comply with the NMM and to produce its Contingency Plan in accordance with the NMM definition of Critical Incidents. The reference to "applicable emergency procedures" in paragraph 1 of Section B of Part 6 of Schedule 25 is concerned only with the mode of declaration of Critical Incidents and not with the definition of such events.

99. Mr Streatfeild-James submits that the factual matrix supports CP's construction as during the tender period references were made to paragraph 7.3.2 of the NMM as containing the definition of Critical Incident. He also relies on commercial good sense. CP has no control over the Critical Incidents that occur and, in many cases, limited control over its ability to achieve the 2.5 hour clearance time. It would be surprising if determination of the trigger for a mechanism with significant financial implications over the contract period of 30 years were to be left to the general discretion of the Secretary of State.

100. HEC's case is that a Critical Incident means an incident in fact declared as critical by or on behalf of the Secretary of State in accordance with the procedures applying to the declaration of Critical Incidents in force from time to time. Ms Day QC submits

that the Secretary of State has a general discretion to declare Critical Incidents under the DBFO Contract as set out in paragraph 1 of Section B of Part 6 of Schedule 25. It is not suggested that the discretion is unfettered; the discretion must be exercised in accordance with the applicable emergency procedures. The applicable emergency procedures recorded in the DBFO Contract are those in the NMM (as amended). However, any declaration must be in accordance with the whole of the definition in paragraph 7.3.2 of the NMM and not just the 14 listed items. The listed Critical Incidents are indicative but not conclusive as to what constitutes a Critical Incident. Any Critical Incident must be an event that seriously impacts upon HEC and its ability to achieve its stated objectives.

101. Ms Day also relies on commercial good sense. She submits that it would be surprising if CP were entitled to make its own declarations as to what constituted a Critical Incident, given the financial implications under the DBFO Contract. CP is remunerated under the terms of the DBFO Contract for its obligations to respond to and deal with incidents. It is unlikely that the parties intended that minor incidents could be used to entitle CP to substantial bonus payments in addition to such remuneration.

102. The starting point is the express words used in the DBFO Contract. Clause 1.2 and paragraph 1 of Section B of Part 6 of Schedule 25 define Critical Incident as:

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

103. These words are clear and unambiguous. It is the Secretary of State (or someone appointed on behalf of the Secretary of State) who makes the declaration. Although prior to the DBFO Contract, service providers, including DBFO contractors, were responsible for declaring Critical Incidents, the NMM was amended to remove that provision. Paragraph 7.3.2 expressly limits the power to make such declarations to category 1 or 2 responders, which does not include CP.

104. The purpose of a declaration is to determine that an event constitutes a Critical Incident and to start time running under the DBFO Contract. This is clear from Schedule 25 and accords with commercial common sense. Although CP has contractual obligations to respond to Incidents under Part 2 of Schedule 9, it needs to have clarity and certainty as to the events that might trigger an adjustment to its payments so that it can plan and allocate its resources accordingly.

105. This construction was a matter of common understanding between the parties during the tender period. The payment mechanism slides produced by Mr Henderson stated that the Highways Agency would declare Critical Incidents. David Steel and Liam McGirl of CP accepted in cross examination that it was made clear to CP during the tender process that the Highways Agency would be responsible for declaring Critical Incidents under the DBFO Contract.

106. Annex 2 to Part 2 of Schedule 15 imposes an obligation on CP to report Critical Incidents to the Department's Nominee but that does not amount to a power to declare what constitutes Critical Incidents for the purpose of the DBFO Contract that would displace the express words used in Schedule 25 or the NMM.

107. Schedule 25 provides that such declaration by or on behalf of the Secretary of State must be made in accordance with applicable emergency procedures. I reject CP's submission that "in accordance with applicable emergency procedures" simply refers to the mode of the declaration. It is common ground between the parties that the DBFO Contract contains no stipulated mode or form for making a declaration. All that is required is a clear communication that an event is a Critical Incident. The DBFO contract does, however, contain provisions as to the definition of a Critical Incident, in the NMM. Therefore, the reference to "in accordance with applicable emergency procedures" must mean that the declaration as to what constitutes a Critical Incident should be determined by reference to the applicable emergency procedures.

108. 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 (as amended). Although the parties have relied on different lines of argument since the inception of the contract, it now appears to be common ground that the definition of Critical Incident in the NMM is applicable (albeit that the parties disagree as to the interpretation of that definition).

109. Paragraph 7.3.2 of the NMM sets out an express definition of Critical Incidents:

> "Critical Incidents are unforeseen events that seriously impact upon the Highways Agency and its ability to deliver its 'safe roads, reliable journeys, informed travellers' objective…"

110. The words are clear and unambiguous. An unforeseen event constitutes a Critical Incident for the purpose of the DBFO Contract only if it inflicts a serious impact on the Highways Agency and its ability to deliver its stated objectives.

111. 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, either in the NMM or in Schedule 25. The definition in Schedule 25 and/or the NMM could have included operative words such as "in the Secretary of State's opinion" or "if the Secretary of State considers" to indicate discretion on the part of the maker of the declaration but they do not do so. The test is an objective one.

112. The meaning of the "deemed" list is clear and unambiguous, although it is apparent that there is scope for dispute as to its application. The 14 categories of events listed are deemed to fall within the general definition set out in the introductory paragraph of 7.3.2. Once identified, there is no need to go further and consider the impact of such an event for the purpose of determining whether it constitutes a Critical Incident. The effect of the word "deemed" in this context is that any unforeseen event falling within the list is agreed to have a serious impact on the ability of the HA and its ability to deliver its stated objectives. It automatically falls within the definition of a Critical Incident for the purposes of the DBFO Contract and must be declared as such by the Secretary of State (or on behalf of the Secretary of State).

113. The list of deemed Critical Incidents is not a closed list as submitted by CP. The list is not stated to be an exclusive definition of Critical Incidents. The natural meaning of the words is that it is a list of specific categories of events falling within the general definition set out in the introductory paragraph. CP's interpretation would render otiose the definition set out at the beginning of paragraph 7.3.2. That is unlikely, particularly against the background of the general definition being an established one within the industry for many years prior to the DBFO Contract, and the responses by HA to CP's queries during the tender process that there would not be a definitive list of Critical Incidents.

114. The list of deemed Critical Incidents is not merely illustrative as submitted by HEC. Although the NMM provides that it contains guidance unless text is set out in a box, such general provision is subject to the parties' intention ascertained by reference to the express words used in the NMM. HEC's interpretation would be contrary to the natural meaning of the word "deemed". It would also be contrary to the express statements made by or on behalf of the HA during the tender period, set out in the IGT, the slides on the payment mechanism and the response to TQ 441.

115. I accept HEC's submission that the Critical Incident Adjustment was intended to apply only to those unforeseen events that had a serious, as opposed to a minor, impact on safety and use of the Project Road. The deemed list was introduced and developed over a number of years prior to the DBFO Contract, and it must be assumed that all stakeholders were satisfied that the categories of events in the list did have the potential to seriously impact the Highways Agency or its ability to deliver its stated objectives. The mere declaration of a Critical Incident does not automatically entitle CP to benefit (or suffer) from the CIA mechanism. The CIA applies only to those Critical Incidents that fall within the definition of Relevant Critical Incidents, and the RCI test in Schedule 25 takes into account the impact of the event on the Project Road.

116. HEC rightly draws attention to paragraph 2.1.2 of Part 2 of Schedule 9 of the DBFO Contract and paragraph 18.3 of Part 3 of Schedule 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, Schedule 25 and the NMM can be interpreted so that there is no inconsistency between them and therefore, this issue does not arise.

117. In summary, on a true construction of the DBFO Contract, the declaration of a Critical Incident is a matter for the Secretary of State (or someone acting on behalf of the Secretary of State), based on objective criteria by reference to the list of deemed Critical Incidents in the NMM and other events falling within the general definition of Critical Incidents in paragraph 7.3.2 of the NMM.

Operation of the DBFO Contract

118. During the pre-commencement period, on 23 June 2009 HEC sent to CP the delegations matrix, indicating that the Department's Nominee ("the DN") would be responsible for resolving ambiguities or discrepancies in the DBFO Contract and for administering the Change Mechanism in the DBFO Contract.

119. In July 2009 CP produced its Service Provider Network Contingency Plan, as required by the DBFO Contract. Paragraph 1.12 and Appendix D contained the NMM contractual definition of Critical Incidents, save that two of the deemed critical events were merged and above the list it stated:

> "Only the Secretary of State or his agents may declare if a Critical Incident has occurred. If Connect Plus believes that a Critical Incident has or may become a Major Incident then it shall notify the police and the Department's Nominee immediately."

National Incident Liaison Officer was defined in the Contingency Plan as:

> "The Departments role manned 24/7 to receive information about Critical and Major incidents and to disseminate information within the Agency to senior management and Press Officers in accordance with established procedures."

120. The flow diagram at Figure 1 of the Contingency Plan, the CP standard incident response process map, stated that RCC would notify CP of Critical and Non-Critical Incidents and the KMC operator at CP would notify the communications team, who would update NILO.

121. The NILO process flow diagram at Figure F.6 stated that information on incidents would be given by the service providers [CP], police/RCC and NTCC to NILO, who would record the incident and decide on its severity.

122. The NILO Processes and Procedures Manual introduced in 2009 stated at Process F1 – Emergency Contact Procedures (ECP):

> "The Emergency Contact Procedures (ECP) provides a common guidance and understanding on the categorisation of incidents: Emergency, Major and Critical. It outlines when the NILO should raise a report, when to contact the Duty Press Officer and SOoC out of hours and who to contact during normal office hours. Full contact details of key people within the HA are provided…"

123. Process C1 – NILO Reporting System Instructions stated:

> "The reporting system has been designed for the NILOs to record and report on incidents that occur on the network…
>
> A report should be created for all reports that meet the criteria to be reported for Other, Critical and Major incidents (see Process F1 – Emergency Contact Procedures (ECP) for criteria). In the past, Service Providers and RCCs usually called through any incidents that met the Critical level and sometimes informed the NILO about Other incidents as well. This process has recently changed due to Regionalisation within the HA. The process now is that all information will be provided to the

> RCC who will inform the TIP Desk who pass it on to the NTCC Operators and they in turn will inform NILO …
>
> The NILO decide at which level to report the incident based on the criteria in the ECP…"

124. Process F1 defined Critical Incidents as follows:

> "Critical incidents are unforeseen events that seriously impact upon the Highways Agency and its ability to deliver its 'safe roads, reliable journeys, informed travellers' objective. Importantly, the police, emergency services or local authorities may not consider these types of incident as important as the Highways Agency.
>
> Critical incidents also include incidents that ministers wish to be informed of.
>
> It should be noted that critical incidents may be, or become, major incidents.
>
> Service providers declare critical incidents for their own, and the Highways Agency, management purposes. If service providers believe that critical incidents are or may become major then they should notify the police immediately.
>
> The following are deemed to be critical incidents…"

125. On 14 July 2009 an Incident Management Workshop was held, attended by representatives of HEC, DNCS and CP, including Francis Cluett of HA and Bob Bird of DNCS, to go through worked examples of incidents. The minutes record that NILO indicated that they did not want CP to update them on incidents because it would be contrary to the ECP.

126. Tim Priest of NILO stated in his oral evidence that from 2009 the RCCs became the central point of information and co-ordination for incidents. The RCCs would log and record the time of all incidents, request the service providers to attend and inform NILO. Mr Priest and Ms Roberts confirmed that, at this stage, NILO recorded but did not declare Critical Incidents.

127. At the July workshop it was also agreed that the definition of Critical Incident would be circulated. The definition circulated with the minutes comprised the list of deemed Critical Incidents from the SIMF. In July 2009 Mr Ash of CPS prepared a note of the Critical Incident definition in use but that was based on the incorrect, unamended version of the NMM.

128. As part of its obligations under clause 36.1 and Annex 1 to Part 1 of Schedule 2 of the DBFO Contract, CP developed the INFORM command and control system to capture information in relation to incidents and monitor performance data. INFORM was used to record information about all incidents, including non-critical incidents, reported to CP by the RCCs. Detailed information captured by the system included the nature of

the incident, its location, who reported it, initial response and actions, assignment of ISU and any claims. The fields set up in the INFORM system for categorising critical incidents were intended to reflect the deemed list in the NMM. Operators selected from a drop-down menu which would automatically cross-reference the selections against the NMM deemed list and categorise the incidents as Critical Incidents. This information was then used by CP to calculate the RCI adjustments for the purpose of determining the monthly payments due using the Paymech system.

129. On 27 August 2009 a desktop simulation took place at CP. The DNCS report on the simulation concluded that the CP systems, processes, procedures and resources were considered to be at an acceptable level of readiness to allow CP to effectively manage incidents. However, a number of issues to be addressed were identified, including an assumption by CP's duty manager that an incident was critical without having full details of the same.

130. It is accepted by CP that there were problems with INFORM. Initially, CP used the wrong version of the NMM. The field descriptors generally were comparable to the items in the deemed list in the NMM but did not mirror them precisely and they were incomplete. Further, the operators used item 1 on the drop-down list as the default category. Mr Ash and Mr Baughan accepted in cross-examination that there were deficiencies in the configuration of the initial system. Mr Hodgson of CPS explained that, as a result, substantial amendments were required to bring it into line with the NMM and ensure accuracy and consistency in input by the operators.

131. On 10 September 2009, Philip Horton, Director, Highways Services at Atkins, produced a process decision tree diagram for determining whether incidents fell within the criteria of Relevant Critical Incidents. The test used in the diagram was the deemed list in the NMM and Schedule 25. Mr Horton stated:

> "We've keep [sic] this deliberately simple as our detailed incident management procedures are already set out elsewhere and this merely acts as a decision support for Relevant Critical Incidents using the two abbreviated extracts from the contract requirements (the NMM and Schedule 25, Part 6 specifically) that set out the key drivers."

132. In October 2009, whilst carrying out his audit responsibilities, Mark Unwin of DNCS became concerned that CP might not be categorising all relevant critical incidents in accordance with the requirements of Schedule 25 and the NMM.

133. On 29 October 2009 Bob Bird and Mark Unwin of DNCS met with CP to discuss "anomalies in the identification of Relevant Critical Incidents (RCI) identified in INFORM reports". It is recorded in the minutes of that meeting that:

> "It was agreed that the Critical Incident (CI) definition is the one set out in the Network Management Manual Ch. 7 and that an RCI is defined in Schedule 25, Part 6, Section B. [Robert Bird] suggested the only areas of possible ambiguity in the definitions relates to NMM Ch. 7, points 1 & 9. It was further agreed that before an incident could be categorised as an RCI it firstly has to meet one of the 14 CI definitions in the NMM."

It was agreed that revisions were required to INFORM and that the operators required further training.

134. Robert Bird of DNCS stated in cross-examination that at the time that he left, at the end of 2009, these outstanding issues were not resolved.

135. On 18 November 2009 Mr Unwin circulated a revised process decision tree for determining Relevant Critical Incidents. Notification of an incident was shown as made by RCC. A Critical Incident was required to be declared as such by Secretary of State/RCC. A Critical Incident was required to meet the definition in section 7.3 of the NMM and Schedule 25.

136. On 31 December 2009 Kevin Smith of HEC raised concerns about the way in which CP was drawing up the invoices:

> "It does seem to raise the question as to whether the calculations are being completed and checked correctly by the DBFO Co / DNCS."

137. On 18 January 2010 Francis Cluett, the Department's Nominee, suggested that a periodic review should be carried out to see whether the financial model was operating as anticipated and providing the right incentives to CP. CP agreed that an audit should be carried out to ensure that the payment mechanism was being properly implemented. Audits took place in May 2010 and June 2010 and some, but not all, of the incidents and figures were corrected and/or reconciled. In the audit report of 4-6 May 2010, it was stated that:

> "it appears that the classification of RCI's is now universally understood across the board."

138. The witness and documentary evidence indicates that during this early period of the DBFO Contract, CP and DNCS were seeking to agree a common understanding and approach to the categorisation of Critical Incidents. A large measure of agreement was achieved and the payment mechanism was implemented. The deemed list was used as shorthand for the NMM definition and in practice this was used to identify Critical Incidents for the purpose of calculating the payment adjustments. There was no formal amendment to the DBFO Contract. DNCS did not have authority to bind HA under the DBFO Contract in respect of any amendment to its terms and in any event identified paragraph 7.3.2 of the NMM and Schedule 25 as setting out the definition of Critical Incidents. Although the payment applications were processed, agreement was not reached on application of all items in the deemed list in the NMM.

139. In about August 2010 Mr Harding of DNCS realised that the classification of events as Critical Incidents was being made by reference to the deemed list but without considering whether there was any serious impact on the Highways Agency by reference to the general part of the definition in the NMM.

140. On 11 October 2010 (revised on 25 October 2010) Nick Harding and Pioneer Madara of DNCS produced a note on the definition of Critical Incidents ("the Technical Note"), stating:

"There is a difference in the incidents classified as 'Critical' by CPS and the National Incident Liaison Officer (NILO) on behalf of the Agency. This has an effect on regional reporting and also on the payment adjustments made under the contract payment mechanism…

Both NILO and CPS use the same definition of a Critical Incident which is repeated in several documents including the NMM and the NILO Emergency Contact procedures…

Despite having similar definitions CPS and NILO classify incidents differently …

It appears that NILO focus more on the impact of an incident i.e. whether it will have a serious impact on the HA's ability to deliver its objectives, using the list of 'deemed critical incidents' to broadly classify the incident rather than to establish whether the incident should be recorded as a critical incident.

In contrast, CPS have been using only the definition of the first 'deemed to be critical incident' in the list from the NMM: *Multiple collisions involving fatalities, serious injuries in vehicles disabled on a carriageway*. The incidents are listed by CPS as critical regardless of the impact on the network. The other 13 criteria in the list have been ignored …

In the absence of a procedure within the RCCs to declare a Critical Incident the focus to date has been on whether a Critical incident meets the criteria to be 'deemed' critical and to allow a retrospective declaration to be made where the criteria are met. This is causing a disparity between the NILO and CPS reporting…

CPS have used a very narrow definition of Critical Incident to date and have picked up a number of minor incidents that meet the deemed critical criterion of multiple collisions with a disabled vehicle that have very minor effect on the network. They have also excluded incidents that do not meet one of the 14 criteria but that are significant incidents that meet NILO criteria.

Under the contract the SoS has the ability to declare a Critical Incident in accordance with the emergency procedures. The NILO emergency contact procedures would meet this definition and any issue of fairness should be addressed by the fact that NILO are trained and delegated responsibility for declaring critical incidents from an operational standpoint on a regional basis and are not influence by contractual matters ...

Conclusion

> A discussion should be held with NILO to establish that the procedure as described in this note is correct.
>
> A review of the potential effect of adopting the NILO classification for the monthly payment report should be undertaken.
>
> The procedure for notifying CPS of the incidents that are declared critical on behalf of the SoS should be developed.
>
> A meeting should be arranged to discuss with CP the implementation of the new methodology for the classification of Critical Incidents."

141. The Technical Note was sent to CP on 3 November 2010 and at a Commercial Forum Meeting held on 3 November 2010, attended by Mr Steel, Francis Cluett, the Department's Nominee, stated:

> "… there appears to be a divergence between PayMech and notification by HA (NILO) re: Critical Incident Adjustment. This is the subject of ongoing discussions between Nick Harding and Nick Ash."

142. On 15 December 2010 CP produced a response to the Technical Note:

> "At present CPS declare Critical Incidents on behalf of the DBFO Co and Secretary of State applying all the criteria laid out in the NMM. The NMM has been altered under the DBFO Co contract to allow critical incidents to be declared by category 1 or 2 responders, CPS consider themselves to be a category 2 responder under this contract on behalf of the Secretary of State …
>
> The NMM has rigid definitions of what is deemed to be a critical incident, the first paragraph is by way of introduction. No matter who declares the Critical Incident the definition must be applied.
>
> The role of NILO is clearly defined in the NMM 7.2.1 as to receive information from sources including Service Providers and distribute information, it does not have a role in classification …
>
> The adoption of suggestion would require a change in standards and the contract …
>
> In order to improve communication and facilitate alignment in reporting we propose giving NILO direct access to a special bulletin board via a secure web link that would provide near real time information on Critical incidents and allow them to drill into incident logs."

143. At the end of 2010, the position was that RCCs were the central point for all information about the network. The RCCs logged, and informed CP and NILO of, incidents that occurred, including Critical Incidents. However, there were two independent streams recording Critical Incidents: CP, through the INFORM system, and NILO, through its critical incident reports. CP and NILO used different criteria to determine what constituted Critical Incidents and, as a result, reached different conclusions. Mr Ash and Mr Baughan accepted that CP did not correctly use all the "deemed list" of Critical Incidents, at least in the early months of the DBFO Contract. Mr Priest of NILO accepted that NILOs reported critical incidents based on an assessment of significant delay or other impact of an incident on the HA and its ability to deliver its objectives.

Reference to the Network Board

144. Neither party pursued a resolution of the dispute when it was first identified in 2009/2010. No doubt both parties hoped that it could be resolved without the need for a formal process, and monthly payments continued to be made by the Highways Agency. However, by 2012 the value of the dispute was estimated to be approximately £60 million.

145. On 30 July 2012 Graham Threader of the Highways Agency sent an email to Mr Steel of CP/CPS, setting out the Highways Agency's interpretation of Critical Incident for the purposes of the DBFO Contract by reference to the definition at paragraph 7.3.2 of the NMM and placing reliance on the requirement of serious impact on the Highways Agency. He stated that until the issues between the parties were resolved, the RCI Paymech adjustments could not be approved.

146. In response to that email, on 15 August 2012 Tim Jones of CP sent a letter suggesting that the parties should separate the monthly review process for the purpose of payments from the issue as to the interpretation of the DBFO Contract in respect of Critical Incidents.

147. By letter dated 23 October 2012 from Simon Duke of the Highways Agency to CP, the Highways Agency stated its position that only the Highways Agency, as a delegated authority of the Secretary of State, had the powers of a category 2 responder to declare Critical Incidents. Such powers had not been delegated to CP and from the date of the letter, RCIs would only be considered if they were declared as Critical Incidents by NILO.

148. From about 2013, the NILO process documents were introduced (Process B1), to update the NILO procedures. The changes included the removal of references to service providers declaring critical incidents.

149. By letter dated 18 January 2013 from Mr Russell of CPS to Tim Jones of CP, CPS set out the DBFO position as follows:

> "We acknowledge that it is for the Secretary of State ("SoS") or someone on behalf of the SoS to declare incidents as Critical Incidents for the purpose of the DBFO Contract. However the SoS does not have an unfettered discretion when determining

> whether incidents are Critical Incidents or when such declaration should be made.
>
> "The Network Management Manual ("NMM") deals expressly with the circumstances in which the Highways Agency (on behalf of the SoS) will declare incidents as Critical Incidents. The SoS must have regard to the NMM when considering whether to declare incidents as Critical Incidents for the purpose of the DBFO Contract.
>
> "Part 7.3.2 of the NMM refers expressly to a list of events which are "deemed" to be Critical Incidents. Such "deeming" is not conditional on other requirements being satisfied and it is clear that any event that is deemed to be a Critical Incident by operation of Part 7.3.2 should also be declared as Critical Incident by SoS (or someone on its behalf)."

150. On 25 January 2013 CP formally notified the Highways Agency of a dispute under clause 51.8 of the DBFO Contract.

> "Schedule 25 of the DBFO Contract states that a Critical Incident means an incident declared as such by or on behalf of the Secretary of State. This is a contract obligation on the Highways Agency to make the declaration."
>
> Criteria for declaring a Critical Incident
>
> Part 7.3.2 of the Network Management Manual ("NMM"), as amended by Annex 4, Part 3 of the Schedule 8 of the DBFO Contract, describes the circumstances that are deemed to be Critical Incidents. Such deeming is not conditional on other requirements being satisfied and therefore any event that is deemed to be a Critical Incident as defined by Part 7.3.2 of the NMM should also be declared as a Critical Incident by SoS (or someone on its behalf)…
>
> "From September 2009 to September 2012, 774 incidents were accepted through the Clause 51 and Schedule 25 process for the RCIs that meet the criteria set out in the NMM. We have deemed the acceptance to be a declaration on behalf of the Secretary of State."

151. On 19 February 2013 Mr Steel of CP sent a letter to Louise Haining at the Highways Agency, enclosing a summary of legal advice received. CP accepted that under the DBFO Contract the Secretary of State was empowered to declare Critical Incidents and that CP could not unilaterally declare events as Critical Incidents. The dispute identified was the circumstances in which the HA would declare incidents as Critical Incidents, i.e. the definition of Critical Incident.

152. On 26 February 2013 CP sent its paper for the Network Board to the Highways Agency. The CP Board Paper stated:

> "We understand from the HA the single point of issue between us, and therefore the basis of this dispute, is the definition of Critical Incident as set out in the Network Management Manual (NMM) …"
>
> The HA interpret this definition such that unless an incident satisfies the first paragraph of the NMM definition it is not defined as a Critical Incident. CP/CPS have, and continue to rely on the last part of the definition which sets out a list of incident[s] which are deemed to be Critical Incidents …
>
> As the Dispute revolves around the definition of Critical Incidents and in particular the legal interpretation of whether the "deeming" of the list of incidents to be Critical Incidents means that any incident included in the list is, in legal terms a Critical Incident, CP/CPS have obtained legal advice from Ashurst.

153. The summary of the Ashurst legal advice was set out at Annex 1 to the paper and included the following:

> "The DBFO Contract makes it clear that it is for the SoS (or someone on its behalf to declare incidents as Critical Incidents – DBFO Co cannot unilaterally declare incidents as Critical Incidents. However, the SoS does not have an unfettered discretion when determining whether incidents are Critical Incidents…"
>
> We understand it to be the HA's position that if events fall within the list set out at Part 7.3.2 of the NMM it is not required to declare such incidents as Critical Incidents for the purpose of the DBFO Contract, unless they are also unforeseen events that seriously impact upon the HA and its ability to deliver "its safe roads, reliable journeys, informed travellers' objective."…
>
> In our view the NMM makes it expressly clear that events falling within the list are deemed to be Critical Incidents – they are not stated to be conditional on other requirements being satisfied.
>
> In our view, a more logical interpretation is that matters listed in Part 7.3.2 should be declared as Critical Incidents by the SoS (or on their behalf) as they are expressly stated to be "deemed" Critical Incidents … We therefore believe the SoS (or someone on its behalf) is obliged to declare incidents as Critical Incidents when incidents are "deemed" to be Critical Incidents – on the basis that such an interpretation is necessary to enable the DBFO Contract to make business sense.

154. On 28 February 2013 a Network Board meeting in respect of the dispute was held and on 6 March 2013 the parties attended a further meeting to discuss the dispute.

155. On 15 March 2013 the Highways Agency sent a letter to CP:

> "Our legal advice is that there is full discretion on NILO to declare incidents in accordance with their applicable emergency procedures…
>
> Our advice now confirms that the list of fourteen critical incidents in section 7.3.2 of the Network Management Manual (NMM) does deem certain incidents critical albeit only for the purpose of payment adjustments under the Applicable Critical Incident Adjustment (ACIA). It is therefore conceivable that certain incidents, although not deemed Critical by NILO, may be deemed critical under our contract agreement only.
>
> Based on our new advice, I consider that the dispute discussed at Network Board on the 28th February 2013 and outlined in your RCI paper can now be closed.
>
> It is now our intention to analyse the incidents relevant to the disputed amount in light of this advice. We will clarify the intention of each of the 'deemed' critical incidents given in Section 7.3.2 of the NMM and work with you to agree under which circumstances an incident can be categorised as critical. We will then apply the RCI criteria to determine the relevant payment due. We will also apply the RCI criteria to those NILO critical incidents that have not been included in your invoices…
>
> To allow us to mutually agree the administration of the interpretation of the 'deemed list' and ongoing operation of the ACIA, I suggest a way forward is discussed at the next RCI meeting on Tuesday 19th March 2013 …"

156. On 27 March 2013 the parties attended a strategic management group meeting to discuss the letter of 15 March 2013. The meeting notes recorded:

> "RCI
>
> - Escalated to Network Board
> - Legal advice received by HA is that CP is deemed to be correct
> - Agreed to look at disputed payments, including NILO and re-evaluating it …
> - HA and CP to investigate the definitions for Critical Incidents …
>
> Action: LH/DS to report progress to close RCI."

157. By email dated 3 April 2013 Mr McGirl of CPS confirmed:

> "1) The immediate substance of the dispute is now resolved, in that it is accepted by the HA that the NMM does deem certain incidents critical for the purpose of [ACIA] payment adjustments.
>
> 2) Amounts disputed in relation to this matter should now be paid/released to CP/CPS in accordance with the Contract.
>
> 3) Changes are needed to the RCI process to more directly reference and apply the NILO inputs, and to distinguish between the NILO and other "deemed" critical incidents.
>
> 4) The HA consider that a process of conclusive interpretation/definition is needed of the critical incidents listed in the NMM, for the purposes of a regular application in the ACIA payment adjustments.
>
> 5) A retrospective review of all NILO declared critical incidents is required from the start of the Contract.
>
> 6) The necessity/extent of any wider retrospective review of incidents historically declared as critical will be considered and established as part of point 4)."

158. In April and May 2013 the parties attended workshops to attempt agreement in respect of the disputed categorisation of Critical Incidents and calculation of the payments. Some agreement was reached on the interpretation of the list of deemed critical incidents but, as Mr McGirl accepted in cross-examination, other areas of the dispute were not resolved and there was no binding agreement.

159. On 28 November 2013 CP provided its interpretation of the meaning of "Multiple Collisions" in item 1 of the list of deemed critical incidents in the NMM.

160. By letter dated 8 April 2014, the Highways Agency set out its position as to the operation of the CI adjustment. Attached at Appendix 1 was a legal note, stating:

> "…there is no positive contractual or other obligation on the Highways Agency under the Contract to declare any incident a critical incident nor is there any right of the DBFO Co to expect the Highways Agency to do so; …
>
> whether or not a Critical Incident is declared under the DBFO Contract is a matter for the unfettered discretion of the Highways Agency under its applicable emergency procedures; …
>
> there is no basis on which DBFO Co can second guess or question the exercise of any discretion by the Highways Agency not to declare an incident critical...
>
> …we can see nothing in the definition of "Critical Incident" that would link it to the Network Management Manual

> ("NMM") and the definition of that term contained within that document …"
>
> Our understanding is that National Incident Liaison Officer ("NILO") acts on behalf of the Agency to report on traffic incidents on the motorway network in the UK. NILO has in place emergency procedures in relation to the classification, and declaration of, various categories of incident including Critical Incidents. The key focus of this assessment is the impact of delay and the severity of an incident…

161. On 31 October 2014 CP responded:

> "Schedule 25, Part 6, Para 1, Section B, of the DBFO Contract states that a *"Critical Incident means an incident declared as such by or on behalf of the Secretary of State"*. This places a contractual obligation on the Highways Agency to make a declaration on behalf of the Secretary of State."
>
> "In summary, the Highways Agency's position is that a deemed Critical Incident is still required to be actively declared as a Critical Incident by NILO. Whereas DBFO Co's position is that should an incident occur which falls within the list of 15 deemed Critical Incidents detailed in section 7.3.2 of the NMM there is no further requirement for such incident to be actively 'declared' by or on behalf of the Secretary of State. However, if an unforeseen event occurs that is not one of the 15 deemed Critical Incidents but which seriously impacts upon the Highways Agency and its ability to deliver its 'safe roads, reliable journeys, informed travellers' objective then the incident can be declared as a Critical Incident by or on behalf of the Secretary of State."

Expert determination and proceedings

162. On 4 January 2016, HEC referred to Expert Determination the dispute as to the proper definition of Critical Incident under the DBFO Contract.

163. The arguments raised before the Expert differed from the arguments raised in earlier exchanges and differed from the arguments relied on in these proceedings.

164. On 12 February 2016, the Expert issued his determination, declaring that a Critical Incident means an incident in fact declared as critical by NILO in accordance with Process B1 NILO Incident Reporting Criteria dated November 2013.

165. CP disagreed with the Expert's determination and on 11 July 2016 these proceedings were commenced.

Issue 2 – Post-contractual agreement

166. CP's case is that the parties agreed and operated the declarations process using the deemed list through the INFORM system, whereby CP declared Critical Incidents. The parties agreed that CP would declare Critical Incidents as part of the agreement of the administration of the DBFO Contract and declarations made in the manner agreed were valid. Mr Streatfeild-James submits that as a matter of fact CP was appointed to declare Critical Incidents for or on behalf of the Secretary of State and relies on an express or implied agency.

167. HEC's case is that the DBFO Contract is clear that the Secretary of State and not CP, as service provider, has power to declare Critical Incidents. There was no formal amendment to the DBFO Contract and clause 77 precludes binding informal amendments. In fact, initially RCC, and later NILO, made declarations on behalf of the Secretary of State. CP's use of INFORM and the Paymech Calculator did not reflect the NMM definition of Critical Incident and HEC did not agree the test criteria used by CP.

168. It is common ground that there was no formal amendment to the DBFO Contract to empower CP to make declarations in respect of Critical Incidents.

169. Clause 77 provides that *"No amendment to this Agreement shall be binding unless in writing and signed by the duly authorised representatives of the Secretary of State and the DBFO Co."* Ms Day acknowledges that, as a matter of principle, a contract containing a clause that any variation of it be in writing can be varied by an oral agreement or by conduct provided that there is evidence of an intention by both parties to alter their legal relations: *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 per Beatson LJ at para.[113]; Underhill LJ at para.[117] and Moore-Bick LJ at paras.[119] & [120]; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553.

170. There is no evidence that there was any intention to override the provisions of the DBFO Contract. There is no evidence that there was any formal or informal agreement that CP would declare Critical Incidents under the DBFO Contract. On the contrary, Mr Cluett of HEC stated in evidence that he did not agree that CP could declare Critical Incidents under the DBFO Contract. No document has been produced that records or refers to any such agreement or arrangement.

171. In practice, at the commencement of the DBFO Contract RCC declared Critical Incidents on behalf of the Secretary of State, as reflected in CP's Contingency Plan and in the revised Process Decision Tree prepared by Mr Unwin. As from 2009, NILO's role developed, as reflected in the NILO process documents. The service providers were no longer its primary source of information regarding traffic incidents and it started to receive information from the RCCs and NTOC. In addition to disseminating information, NILO started to review incidents and determine whether they should be categorised as Critical Incidents. From about 2010/2011, NILO declared Critical Incidents, in addition to recording them.

172. CP used INFORM to identify Critical Incidents and calculate the CI adjustments for the purpose of making payment applications but there is no evidence that they were treated by HA as declarations under the DBFO Contract. Mr Steel and Liam McGirl accepted in cross-examination that it was made clear to CP during the tender process that HA would be responsible for declaring Critical Incidents under the DBFO

Contract. Mr Ash accepted in cross-examination that he knew that the opinion of DNCS was that Critical Incidents had to be declared by the Secretary of State or RCC.

173. Mr Streatfeild-James correctly points out that in practice the Secretary of State delegated the power to make declarations under the DBFO Contract. However, there is no evidence of any delegation to CP. It is common ground that there was no express delegation to anyone. The process documents prepared by the parties at the beginning of the contract identified RCC as responsible for declaring Critical Incidents. Subsequently, NILO took over this role, as set out in NILO's process documents. There is no record that indicates any alternative agreement or practice, transferring to CP responsibility for declaring Critical Incidents under the DBFO Contract.

174. In summary, there is no evidence to support CP's case that the parties agreed, expressly, impliedly or by conduct, that CP would declare Critical Incidents under the DBFO Contract.

Issue 3 - Reference to Network Board

175. CP's case is that the parties referred the issue of the definition of Critical Incidents to the Network Board and resolved it between themselves by agreement, and that agreement is binding. Reliance is placed on the letter dated 15 March 2013 as containing or evidencing such agreement.

176. HEC's case is that the agreement was limited to inclusion of the deemed list of Critical Incidents as part of the definition to be applied by NILO on behalf of the Secretary of State. That did not extend to an overall agreement on the matters in dispute. NILO's assessment of Critical Incidents falling outside the deemed list would also be included. The parties agreed at the meeting on 19 March 2013 to review all disputed payments to ascertain whether they fell within the definition of Critical Incident using the paragraph 7.3.2 definition, including the introductory words and the deemed list. The payments that were made by HEC after the agreement were made on a "without prejudice" basis.

177. HEC's letter dated 15 March 2013 conceded CP's argument that the deemed list of Critical Incidents in the NMM should be included as Critical Incidents for CIA purposes without the need to satisfy a further "impact" test: *"Our advice now confirms that the list of fourteen critical incidents in section 7.3.2 of the Network Management Manual (NMM) does deem certain incidents critical …"*. However, HEC referred to a further exercise to be undertaken to clarify the intention of each of the deemed Critical Incidents: *"and work with you to agree under which circumstances an incident could be categorised as critical."*

178. The letter also placed continued reliance on HEC's case that NILO declared Critical Incidents based on an "impact" test in addition to the deemed Critical Incidents identified by CP: *"We will also apply the RCI criteria to those NILO critical incidents that have not been included in your invoices."*

179. A reading of the letter in full shows that although in principle it was agreed that the list was a "deeming" list, the parties had not reached agreement on its application to events or the wider definition of Critical Incident.

180. Those outstanding matters were recorded in the notes of the meeting held on 27 March 2013, indicating that the disputed issue of the definition of Critical Incident under the DBFO Contract was not resolved.

181. Mr McGirl's email confirmed that although the parties had reached sufficient agreement to enable payments to be made to CP, there were unresolved issues in respect of which further agreement was required, namely, a conclusive definition of Critical Incidents, changes to the procedures to reflect NILO's involvement and a retrospective review of all past Critical Incidents.

182. Mr Steel accepted in cross-examination that no agreement was reached between the parties in respect of item 1 on the deemed list, the category most frequently identified as a Critical Incident by CP.

183. The parties did reach agreement in respect of the payments in dispute that triggered the reference to the Network Board. CP justifiably relies on the words in the letter of 15 March 2013: *"the dispute discussed at Network Board on the 28th February 2013 and outlined in your RCI paper can now be closed."* However, although that resolved the issue whether outstanding payments should be made to CP, there was no final settlement as to whether those payments were properly due under the DBFO Contract. That unresolved issue was identified as outstanding in the notes of the meeting held on 27 March 2013 and Mr McGirl's email of 3 April 2013.

184. The dispute referred to the Expert in 2016 was the definition of Critical Incidents under the DBFO Contract and the identity of the entity responsible for making declarations under the DBFO Contract. It was not suggested by CP that these matters had already been resolved by settlement.

185. In summary, the dispute between the parties, the subject of these proceedings, was not determined or resolved by agreement in, or as a result of, the Network Board reference in 2013.

Issue 4 - Estoppel

186. CP's case is that HEC is estopped from denying:

i) that it agreed that issues falling within the deemed list in the NMM were Critical Incidents and/or that CP was to declare Critical Incidents;

ii) that the disputes between the parties were resolved as a result of the reference to the Network Board.

187. HEC's case is that the required elements of estoppel are not set out by CP or proved on the evidence.

188. CP relies on estoppel by convention in respect of its case that HEC is estopped from denying that it agreed that issues falling within the deemed list in the NMM were Critical Incidents and/or that CP was to declare Critical Incidents. CP submits that the parties agreed that:

i) CP would declare Critical Incidents on behalf of the Secretary of State;

ii) CP would identify Critical Incidents using the INFORM system, based on the categories of Critical Incident set out in the deemed list within the NMM;

iii) those Critical Incidents would be included in CP's Incident Logs and thereby declared as Critical Incidents;

iv) the incidents so declared would be treated as Critical Incidents for the purpose of Schedule 25, Part 6, Section B of the DBFO Contract.

189. The principles to be applied are not in dispute. Where parties to a transaction proceed on the basis of an underlying assumption on which they have conducted their dealings between them, neither will be allowed to go back on that assumption when it would be unfair or unjust to do so: *Amalgamated Property Company v Texas Bank* [1982] 1 QB 84 (CA) per Lord Denning pp.121-122; Brandon LJ pp.131; *The Indian Endurance and the Indian Grace (No.2)* [1998] AC 878 (HL) per L Steyn p.913.

190. The essential requirements of estoppel by convention were summarised in *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396 per Akenhead J at Para.51; and *HM Revenue & Customs v Benchdollar Ltd* [2009] EWHC 1310 per Briggs J at Para.52. 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.

191. For the reasons set out in respect of Issue 2 above, in this case there was no shared assumption or understanding that CP would declare Critical Incidents based on the deemed list in the NMM. The closest that CP gets is the reference to a common understanding of the classification of RCIs in the audit report of May 2010 but that must be read against the background of the inaccuracies in the original INFORM drop-down list and input by the operators. Agreement on the application of the deemed list amounted to a working agreement for the administration of the contract but did not affect the proper interpretation of the DBFO Contract. There is no evidence that the parties agreed any specific definition of Critical Incidents beyond that contained in Schedule 25 and paragraph 7.3.2 of the NMM. There is no evidence of any agreement or understanding that CP would make the declarations; on the contrary, all the evidence indicates that the Highways Agency told CP that the Highways Agency was responsible for making the declarations. In its correspondence in 2013, CP accepted that it could not make unilateral declarations of Critical Incidents.

192. There is no evidence of any reliance by the parties on any such assumption. By late 2009, DNCS had raised with CP concerns over the categorisation of Critical Incidents through the INFORM system and stated that RCC was required to declare Critical Incidents. The Technical Note and CP's response at the end of 2010 set out the competing positions of the parties, indicating that there was no common understanding. Thereafter, the parties were in dispute.

193. It would not be unconscionable to allow HEC to assert the true position. Since inception of the Project, both parties have raised a number of different arguments concerning the construction of the Critical Incident provisions. This is not surprising

in the context of a complex, long term contract. 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.

194. 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.

195. CP relies on estoppel by convention and/or representation in support of its case that HEC is estopped from denying that the disputes between the parties were resolved as a result of the reference to the Network Board. CP submits that there was a shared assumption and/or HEC represented that:

i) CP and NILO would declare Critical Incidents under the DBFO Contract;

ii) Events falling within the deemed list in the NMM were Critical Incidents for the purpose of the Critical Incident Adjustment.

196. The essential requirements of estoppel by representation were set out in *Mears v Shoreline* (above) per Akenhead J at Para.52:

> "First, A makes a false representation of fact to B…Second, in making the representation, A intended or knew that it was likely to be acted upon. B, believing the representation, acts to its detriment in reliance on the representation. Fourth, A subsequently seeks to deny the truth of the representation. Fifth, no defence to the estoppel can be raised by A".

197. There was no common or shared convention as submitted by CP. The letter of 15 March 2013 did not refer to any understanding or assumption that CP was entitled to declare Critical Incidents. Although the letter did reflect an agreement in principle that events falling within the deemed list in the NMM were Critical Incidents, it was subject to future agreement as to the definition of Critical Incidents that was anticipated by the parties and referred to in Mr McGirl's email.

198. There was no representation or promise in the letter that CP was entitled to declare Critical Incidents. There was a representation or promise that HEC accepted that the deemed list would determine that such events constituted Critical Incidents for the purpose of the CIA mechanism but that was subject to further agreement to be reached as to the events that fell within the definition of the deemed list.

199. CP did not rely on any convention or representation made in the 15 March 2013 letter. The parties entered into discussions and participated in workshops in efforts to reach agreement on the matters in dispute. The nature and duration of the DBFO Contract necessitated a high level of co-operation between the parties. It is very likely that those steps would have been taken by CP regardless of any convention or representation. CP wanted to secure a resolution of the dispute and a favourable commercial outcome in respect of the whole dispute. Both parties wanted certainty for the future performance of the long-term DBFO Contract.

200. It would not be unconscionable to allow HEC to assert the true position, particularly given the fact that CP did not raise this matter in the Expert Determination. In any event, any estoppel could not be relied on to affect the proper construction of the DBFO Contract for the future.

Conclusion

201. For the reasons set out above, the answers to the issues raised are as follows:

i) On a true construction of the DBFO Contract, the declaration of a Critical Incident is a matter for the Secretary of State (or someone acting on behalf of the Secretary of State), based on objective criteria by reference to the list of deemed Critical Incidents in the NMM and other events falling within the general definition of Critical Incidents in paragraph 7.3.2 of the NMM.

ii) The parties did not enter into a binding post-contractual agreement whereby Critical Incidents can be declared by CP using the deemed list in the NMM for the purpose of the Critical Incident Adjustment under the DBFO Contract.

iii) The definition of a Critical Incident and/or identity of those authorised to make a declaration was not determined by the reference to the Network Board or any resolution.

iv) The parties' post-contractual conduct did not give rise to an estoppel in respect of any of the above matters.