April 2018

Led by the Government, the industry is seeing a steady roll out of the NEC form of contract on major infrastructure projects. Something in the order of 90 contracts have been let by Government alone using the NEC forms. Other procurers of construction services have followed suit to a greater or lesser extent in trialing the NEC forms. The initiative has been widely welcomed by the industry.

One of the challenges in advising clients dealing with the NEC forms is the limited number of publicly available decisions on the suite. In this Talking Point we therefore wish to draw readers’ attention to a recent decision of Mr Justice Fraser in the English Technology and Construction Court in *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd*.

The dispute arose from welding work carried out by MMT, a specialist engineering piping manufacturer, for ICI at a new paint manufacturing facility in Northumberland in the United Kingdom (the “Project”). The contract was initially awarded with a relatively low contract value of £1.9m. However, a Project Manager’s Instruction was issued which extended the scope of the work and increased the value of the contract to approximately £20m. In time the Project overall faced cost overruns and delay. Personnel deployed by ICI on the Project were replaced with personnel employed by ICI’s parent company, Akzo Nobel. Following the change of personnel, the Employer (nominally ICI but now resourced mainly by Akzo Nobel personnel) took a more active role in the Project. These developments coincided with defects being identified in the welding and subsequently the resignation of the Project Manager appointed under the contract. Following the resignation of the Project Manager, an employee of Akzo Nobel was appointed to perform the role of the Project Manager.

The contract was based on the NEC3, Third Edition with amendments 2006 and 2011, Main Option “A” (priced contract with an activity schedule).

The Court considered a number of issues, of which we highlight two. The first is the question of whether the appointment of an Akzo Nobel employee was a proper or valid appointment. In arriving at the conclusion that it was not, the Court referred to the nine point test set out by Mr Justice Jackson (as he then was) in *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd*. In summary:
1. It is unusual for an employer himself to be the certifier or decision maker. This can only be achieved by an express term.
2. The structure of the contract is built upon the premise that the certifier and the employer are separate entities.
3. The certifier has a legal duty to perform his decision making role in an independent, impartial, fair and honest manner. It was considered that this was more difficult for the employer than an independent professional agent.
4. Reference in the contract to the appointment of "any other person" must be read subject to some limitation.
5. Both the contractor and the employer have an interest in securing that the certifier makes correct decisions and issues correct certificates.
6. The contractor has two separate protections which reduce the likelihood of under-assessment or under-certification occurring. First, assessment by an identified professional person or firm separate from the employer. Second, the duty on the certifier to act in a manner which is independent, fair and honest.
7. These protections are not achieved by the involvement of independent consultants in a decision made by the employer or its employee.
8. The Court's own research of cases had revealed that in every case it had identified in which the certifier was a direct employee of the employer this had been stated at the outset.
9. If it was right that an employer could replace the certifier with its employee, it could conceivably replace all the professional team, which would "utterly transform" the contract.

The Court considered that this analysis applied here. In arriving at this conclusion, the Court rejected the suggestion that the concern regarding independence could be addressed by the existence of an adjudication provision. On the facts it did not draw a distinction between ICI and Akzo Nobel.

The second issue of note is the Court's consideration of the rights of ICI to recover overpayments made or alleged to have been made to MMT under certified payments issued under Clause 50.1 and 50.2. The Court considered that assessments issued under these provisions were not definitive or final. This conclusion should come as little surprise and is confirmed by Clause 50.5, which provides that "the Project Manager corrects any wrongly assessed amount due in a later payment certificate". It was argued however that the right to repayment could only arise after a later payment certificate had been issued. Where, as here, no later payment certificate had been issued, it was said a right to repayment had not arisen. This conclusion was rejected by the Court. The Court drew a distinction between the timing of a right to demand a valuation and the finite amount to which the contractor is entitled. It therefore concluded that ICI had a right to recover payment in excess of MMT's entitlement, even if the right to a payment certificate to reflect that amount had not arisen. The Court went on to consider ICI's alternative route to recover the overpayment in restitution, which goes beyond the scope of this Talking Point.

The Court's clarification of these issues is to be welcomed. The wider publication of decisions
on the NEC forms would be welcomed, with a view to providing clarity to users and their advisers.

To find out more please contact any of our lawyers in the Construction and Engineering practice.

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