



Welcome to May's 2015 edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

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Case law on NEC3

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But are things really that bad? The form has been before the Technology and Construction Court on several occasions over the past four years and was considered for the first time by the Court of Appeal in February 2014, so it is at long last starting to receive some judicial scrutiny. This 47th issue of *Insight* examines the more important of these decisions and considers the court's evolving approach to the NEC3 form.

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*"are used throughout the construction and engineering industries and are highly regarded in the sense that they are perceived by many as providing material support to assist the parties in avoiding disputes and ultimately in resolving any which do arise. There are some sirens or other voices which criticise these Conditions for some loose language, which is mostly in the present tense, which can give rise to confusion as to whether and to what extent actual obligations and liabilities actually arise. Very few cases involving material disputes as to the interpretation of the NEC3 Conditions have made their way through to reported court decisions."*¹

This paints rather a dim picture of the NEC form, but are things really that bad? The form has been before the Technology and Construction Court on several occasions over the past four years and was considered for the first time by the Court of Appeal in February 2014, so it is at long last starting to receive some judicial scrutiny. This 47th issue of *Insight* examines the more important of these decisions and considers the court's evolving approach to the NEC3 form.

Atkins Ltd v Secretary of State for Transport [2013] EWHC 139 (TCC), 1 February 2013

This case was concerned with the validity of a compensation event

under a Highways Agency Managing Agent Contractor contract which was a heavily amended form of NEC3 that was entered into between Atkins Ltd ("Atkins") and the Secretary of State for Transport ("SST") to maintain various trunk roads in East Anglia. Payment was broadly on a lump sum basis subject to Atkins' right to claim relief for any compensation events.

During the course of the works, Atkins encountered a greater number of potholes (which it was obliged to repair) than it had anticipated and sought to claim additional payment on the basis that this constituted a compensation event under clause 60.1(11). That clause stated (in similar terms to clause 60.1 of the NEC3 Conditions) that:

"The Provider encounters a defect in the physical condition of the Area Network which ... an experienced contractor or consultant would have judged at the Contract Date to have such a small chance of being present that it would have been unreasonable for him to have allowed for it."

The SST rejected Atkins' contention on the basis that the volume of potholes could have been reasonably foreseen, and that any excess in number did not give rise to a compensation event.

Mr Justice Akenhead agreed with the SST and dismissed Atkins' claim that a higher prevalence of potholes than was expected constituted a compensation event under clause 60.1(11), either as a matter of the language of the clause itself, or as a matter of commercial interpretation. The Judge noted that there was nothing in the clause which expressly suggested that the number of defects was a key or important element in the compensation event equation, and it was very difficult to conclude that an excess number of potholes over and above a reasonable



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number which could be considered to have been allowed for could form the basis of a compensation event. It would also be very difficult in practical terms to determine how many potholes would constitute an excessive number and such an exercise would be both difficult and artificial.

Taking a commercial view, because the contract was a lump sum contract, the parties collectively took the risk that any defects might be more or less in number and expense than the contract actually allowed for, and indeed this was not unusual in such contracts. If Atkins' argument was accepted, there would be no commercial risk at all, and Atkins would effectively be in a win-win situation, whereby it could keep the whole of the lump sum if the number of potholes were less than reasonably anticipated, and it almost automatically gets additional payments if the number of potholes exceeds that which was reasonably anticipated. In other words, Atkins' argument would have converted what was a lump sum contract into a re-measurement arrangement and this was not what the parties had intended.

WSP Cel Ltd v Dalkia Utilities Services Plc [2012] EWHC 2428 (TCC), 28 August 2012²

This case centred on the issue of whether, by virtue of the parties' consent agreement which varied the terms of clause W1.3(1) and W1.3(2) of the NEC3 Professional Services Contract, the adjudicator had jurisdiction to determine his own jurisdiction in a final account dispute.

Dalkia Utilities Services Plc ("Dalkia") claimed that the adjudicator did not have jurisdiction as WSP Cel Ltd ("WSP") had failed to refer the dispute within the period provided for by the time bar in clauses W1.3(1) and W1.3(2). WSP argued that the adjudicator had been afforded jurisdiction under the terms of the consent agreement, which varied the procedure for adjudication such that the time bar for referring a dispute to adjudication under clauses W1.3(1) and W1.3(2) was superseded.

As is often the case, the decision of the court was based heavily on the specific facts of the case, but the judgment provides useful obiter comments on the application and interpretation of clause W1.3 and the Adjudication Table in the NEC3 Professional Services Contract.

Mr Justice Ramsey emphasised that the philosophy of the NEC Conditions is to avoid disputes at the end of a project by having intensive management machinery to deal with issues arising whilst the project is on foot. The notification of disputes and the reference to an adjudicator is a necessary part of the detailed management philosophy under the NEC Conditions which requires disputes to be referred to the adjudicator in a timely manner so that they can be resolved at the time. The Judge concluded obiter that in the absence of the consent agreement, WSP could not have sought adjudication of issues arising under Grounds 1 and 2 unless they had been referred within the time set out under those grounds. The court therefore interpreted clause W1 effectively as a condition precedent.

Mr Justice Ramsey further considered whether, had it not been for the consent agreement, the dispute on the final account came within Ground 4 in the Adjudication Table,

or Grounds 1 or 2. He found that just because a claim forms part of a composite claim at termination, this does not necessarily change its character under the machinery of the NEC Conditions. Claims based on compensation events should be dealt with under the compensation event machinery, and any disputes arising either from an action of the Employer, or the Employer not having taken action, should be referred to adjudication under Grounds 1 or 2. Those claims do not change to become "any other matter" under Ground 4 just because they are included in the final account and are part of a larger composite claim. If they fall within Grounds 1 and 2 then they should remain there, unless the claim is not based on any action or inaction of the Employer.

Ecovision Systems Limited v Vinci Construction UK Limited [2015] EWHC 587 (TCC), 11 March 2015

It is worth noting that NEC3 was also considered in the adjudication context in *Ecovision*, in which Vinci Construction UK Limited ("Vinci") engaged Ecovision Systems Limited ("Ecovision") under a NEC3 subcontract to design, supply and install a ground source heating and cooling system which subsequently broke down.

Vinci initiated adjudication proceedings but its adjudication notice failed to specify which set of adjudication rules applied out of a possible total of three adjudication rules that appeared to be prescribed by the terms of the subcontract under the main contract, sub-contract and Scheme. The adjudicator confirmed that Option W2 of the subcontract rules applied. Ecovision sought a declaration that the adjudicator had no jurisdiction by virtue of the fact there were conflicting adjudication rules, and that the applicable



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adjudication rules were the TeCSA adjudication rules that were prescribed by Option W2 of the main contract as amended by clause Z16.

His Honour Judge Havelock-Allan QC agreed with Ecovision in holding that the adjudicator did not have jurisdiction to determine his own jurisdiction as the main contract rules applied, and so the adjudicator had been appointed under the wrong rules. Even if the subcontract rules had applied, the Judge commented that the adjudicator had probably been appointed one day too late.

Whilst this case does not teach us anything new about NEC3, it provides a stark reminder for parties to make sure (i) their contract has clear, back-to-back provisions for the appointment of adjudicators, and (ii) that those provisions are followed by the parties to the letter to avoid any arguments as to the adjudicator's jurisdiction further down the line.

RWE Npower Renewables Ltd v J N Bentley Ltd [2014] EWCA Civ 150, 19 February 2014

In this case, J N Bentley Ltd ("Bentley") carried out civil engineering works for RWE Npower Renewables Ltd ("RWE") on a hydroelectrical plant in Scotland. The agreement included the NEC3 Engineering and Construction Contract Conditions Data Sheets Parts 1 and 2, Post Tender Clarifications, Works Information and Site Information, and, importantly, contained an order of preference clause.

A dispute arose as to whether Part 1 of the Contract Data or clause 6.2 of the Works Information took precedence, the answer to which prescribed whether all work that was described as forming part of section 2 had to be finished before the section as a whole could be regarded as being complete. If that was the case, then the intake, penstock pipeline and tailrace all had to be tested and completed.

Mr Justice Akenhead held at first instance that the agreement should be read as a whole and construed as far as possible to avoid inconsistencies between different parts of the agreement, on the assumption that the parties had intended to express their intentions in a consistent and coherent manner. In the Judge's view, there was no significant inconsistency between Option X5 and clause 6.2, which could be read together without undue difficulty.

Bentley disagreed with the decision at first instance and took the view that there was a clear discrepancy between Option X5 and clause 6.2, as the former only required the installation of the hydroelectrical plant as part of section 2 whereas the latter called for the hydroelectrical plant to be tested and commissioned.

Moore-Bick LJ agreed with Mr Justice Akenhead, adding that Option X5 was worded in more general terms than clause 6.2, which identified the work



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that was included in each section in much greater detail. Despite the difference in the level of detail in the two clauses, the Court of Appeal held that the two provisions would be expected to complement each other and that it would only be necessary to resort to the contractual order of precedence clause in circumstances where different provisions on their true construction imposed different obligations in relation to the same subject matter.

If the order of precedence provisions fell to be considered, Moore-Bick LJ confirmed that the correct approach would be to resolve discrepancies relating to individual obligations rather than forcing a choice between one clause and another. Under both Option X5 and clause 6.2, there was a single obligation to carry out the whole of the prescribed work in order to complete section 2 and it was not possible to extract the part relating to pipelines and treat that as a free-standing obligation as there was no free-standing obligation as a matter of fact.

On the facts, Moore-Bick LJ found that both clauses referred to the completion and testing of the penstock pipeline and they were capable of being read sensibly together on the basis that section 2 was intended to compromise substantially the whole of Bentley's work, other than the part that fell within section 1. It therefore made no difference whether the reference was to installing the hydroelectrical plant (Option X5), or testing and commissioning it (clause 6.2) as in practice none of that formed part of Bentley's work. To the extent there was any discrepancy, the obvious place to

start was clause 6.2 which contained more detailed provisions about what was required.

Conclusion

The above decisions demonstrate that the courts are able to easily interpret NEC3 clauses by adopting a common sense approach to the language that is used, having regard at all times to the facts of each case. As Mr Justice Akenhead said of the NEC3 form in RWE:



"It needs to be borne in mind that much of the language of these conditions is in the present tense, although that factor does not seem to impact upon contractual interpretation..."

It is hoped that this comment and the decisions above will go some way towards dispelling the sentiment that is held by some in the construction industry that NEC3 contracts can be difficult to understand and problematic to enforce, which the case law to date shows not to be the case.

Footnotes

1. See *Atkins Ltd v Secretary of State for Transport* [2013] EWHC 139 (TCC) at para 9.
2. It should be noted that whilst the judgment was handed down on 28 August 2012, it was only made available in early spring 2013.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston. lkingston@fenwickelliott.com. Tel +44 (0) 207 421 1986

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