NEC ENGINEERING & CONSTRUCTION CONTRACT:

STEPPING INTO THE PROJECT MANAGER'S SHOES FOLLOWING RESIGNATION OF THE AGREED PROJECT MANAGER

IS AN EMPLOYER'S EMPLOYEE IMPARTIAL IN THOSE SHOES?

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Many involved in administration of either the NEC3 or NEC4 Engineering and Construction Contract (ECC) are all too familiar with the provision at Clause 10.1 that calls for the Employer[i] , the Contractor and the Project Manager to act in the spirit of mutual trust and co-operation. How this requirement translates to the duty of the Project Manager to act impartially is debatable.

Traditionally, the employer and the contractor make their contract on the understanding that in all matters where the architect has to apply his professional skill, he will act in a fair and unbiased manner in applying the terms of the contract (Lord Reid in Sutcliffe v Thackrah [1974][ii]). Despite Lord Reid's view, stated in Sutcliffe, there are many contrasting interpretations concerning impartiality of the employer appointed certifier (whether it be an architect, contract administrator or project manager) as the cases below illustrate:

In London Borough of Hounslow v Twickenham Garden Developments Limited [1971] 1 Ch. 233, Judge Megarry noted:

"under a building contract the architect has to discharge a large number of functions, both great and small, which call for the exercise of his skilled professional judgment. He must throughout retain his independence in exercising that judgment ... it is the position of independence and skill that affords the parties the proper safeguards and not the imposition of rules requiring something in the nature of a hearing"

Lord Hoffmann in Beaufort Developments Ltd v Gilbert Ash Northern Ireland Limited [1999] AC 266 observed:

"the architect is the agent of the employer. He is a professional man but can hardly be called independent. One would not readily assume that the contractor would submit himself to be bound by his decisions subject only to a challenge on the grounds of bad faith or excess of power. It must be said that there are instances in the nineteenth century and the early part of this one in which contracts were construed as doing precisely this … But the notion of what amounted to a conflict of interest was not then as well understood as it is now … today one should require very clear words before construing a contract as giving an architect such powers."

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i Employer under the NEC3; Client under the NEC4

ii Sutcliffe v Thackrah [1974] AC 727

Similarly, in Royal Brompton Hospital NHS Trust v Hammond (No. 8) [2002] EWHC 2037 (TCC); 88 Con LR 1 Judge Humphrey LLoyd QC described iiithe central part of the role of a project manager as "co-ordinator and guardian of the client's interest".

The above cases concerned disputes where the terms of the conventional contract were not that of the NEC3 or NEC4. Can those views on impartiality be of application to the functions performed by the Project Manager under the NEC ECC?

In Costain v Ltd & Others v Bechtel Ltd & Anr [2005] EWHC 1018 (TCC) several reasons were proffered by the Counsel for Bechtel, as to why the certifiers duty under an NEC3 ECC (as amended) was different from conventional standard form contracts in order to avoid implying a term of impartiality:

- The terms of the present contract which regulate the Contractor's entitlement are very detailed and very specific. They do not confer upon the Project Manager a broad discretion, similar to that given to certifiers by conventional construction contracts. Therefore, there is no need, and indeed no room, for an implied term of impartiality in the present contract.
- The decisions made by the Project Manager are not determinative. If the Contractor is dissatisfied with those decisions, he has recourse to the dispute resolution procedures set out in section 9 of the contract. The existence of these procedures has the effect of excluding any implied term that the Project Manager would act impartially.

iii at paragraph 23

- The Project Manager under the contract is not analogous to an architect or other certifier under conventional contracts. The Project Manager is specifically employed to act in the interests of the Employer.
- Two Z Clauses (i.e. additional or amendments to the ECC) which prevent any implied term arising that the Project Manager will act impartially.

Judge Jackson (as he was then), decided:

"When the Project Manager comes to exercise his discretion in those residual areas, I do not understand how it can be said that the principles stated in Sutcliffe *do not apply. It would be a most unusual basis for any building contract to postulate that every doubt shall be resolved in favour of the Employer and every discretion shall be exercised against the Contractor."*

I am unable to find anything which militates against the existence of a duty upon the Project Manager to act impartially in matters of assessment and certification".

Judge Jackson could not see how a clause excluding any term implied by custom could be relevant: "The implied obligation of a certifier to act fairly, if it exists, arises by operation of law not as a consequence of custom". Ergo, the principles in Sutcliffe (mentioned earlier) do apply as a matter of law to the Project Manager acting under the NEC3 ECC.

WHAT HAPPENS IF THE PROJECT MANAGER UNDER THE NEC3 OR NEC4 ECC RESIGNS AND IS REPLACED WITH AN EMPLOYEE OF THE EMPLOYER WHO IN TURN INSTRUCTS A QUANTITY SURVEYOR TO PERFORM THE ASSESSMENT OF THE PRICE OF THE WORKS DONE DATE (BEING ONE OF DUTIES OF THE PROJECT MANAGER)?

Clause 14.2 permits the Project Manager to delegate any of its actions after notifying the Contractor; and Clause 14.4 of NEC ECC entitles the Employer to replace the Project Manager after it has notified the Contractor of the name of the replacement. Beyond that, the NEC3 or NEC4 ECC do not set out who can stand as the replacement Project Manager and, if the Employer does so act, whether it or those it has delegated its actions to will be deemed impartial. This was an issue in Imperial Chemical Industries Ltd ("ICI") v Merit Merrell Technology Ltd ("MMT") that Judge, Mr Justice Fraser, had to consider when determining the Final Account, ICI's claim of overpayment and a purported Project Manager's Final Assessment, which had been assessed and issued by a quantity surveyor appointed by AzkoNobel (that acquired ICI in 2007) following the resignation of the Project Manager named in the NEC3 ECC.

From 2015 to 2018 ICI v MMT have been in the court [iv]. MMT (now in liquidation) was a specialist engineering piping manufacturer. On 18 December 2012, MMT and ICI entered into a contract for works associated with the construction of a new paint manufacturing facility for ICI in Northumberland ("the Plant" or "Project Fresco").

Between 2012 and 2014 the works proceeded, however, the project as a whole began to run substantially over the internal budget set by AkzoNobel, and to take longer than expected. Although ICI was a separate legal entity, all of the decisions that were made that are relevant to the period from the middle of 2014 onwards,

iv [2018] EWHC 1577 (TCC); Liability is at [2017] EWHC 1763 (TCC); [2017] EWHC 2269 (TCC); [2016] EWHC 3082 (TCC); [2016] EWHC 3030 (TCC); and [2015] EWHC 2915 (TCC)

were made by personnel at AkzoNobel, who controlled the funding, and who took over and ran the project. A committee within AkzoNobel, called the Steering Committee or Steer Co, had its own internally approved figure for total expenditure on Project Fresco, which was called CapEx (for Capital Expenditure). In the middle of 2014 the senior management of AkzoNobel decided that Project Fresco had to be finished, and overall expenditure had to be brought down below the approved CapEx figure. Accordingly, some AkzoNobel personnel were dispatched to the site for that sole purpose.

AkzoNobel alleged that there was a substantial number of defects in the works performed by MMT and these would cost £5 million to remedy. The Court found that such defects did not exist in the quantities suggested, if barely at all, and were also raised based upon a more stringent testing regime than the one contractually agreed. Moreover, following the liability trial and the courts findings on defects, the defect correction head of claim against MMT was agreed in the more modest sum of just £187,000.

The independent Project Manager appointed under the contract resigned on 9 October 2014, shortly after they were given, by a senior manager of AkzoNobel, an instruction that all valuations had to be approved and signed off by a member of the AkzoNobel site staff. Mr Justice Fraser, found that such an instruction is plainly at odds with how a third-party certifier, or decision maker, should conduct themselves professionally (to use the phrase of Jackson J as he then was in Scheldebouw BV v St James Homes [2006] EWHC 89 (TCC)). In his judgement on liability, Mr Justice Fraser decided that AkzoNobel's senior manager's purported appointment to act as Project Manager under the NEC3 contract form, to replace the independent Project Manager, was invalid because he was effectively the Employer and thus this was a breach of contract. Mr Justice Fraser, in his later judgement went on to find that AzkoNobel's senior manager, *"was eminently unsuitable to act as the Project Manager", and from all the evidence he had seen "did not remotely at any stage attempt to do anything other than fulfil the AkzoNobel purpose, which was to reduce expenditure on, or exposure to, MMT by forcing that company into insolvency. Indeed, he was eminently unsuitable in every single respect, and was the very opposite of independent"*.

ICI/ AzkoNobel sought to have the entirety of what the Project Manager had agreed with MMT contemporaneously revisited. This included rates, measures, quantities and value of Project Manager's Instructions ("PMIs"), and also interim payments, entirely re-valued on a wholly different basis to that adopted at the time.

By February 2015 MMT left the site. Prior to this, it had commenced Adjudication proceedings and eventually received a payment of £20.9 million. ICI's case was that this constituted an overpayment of approximately £10 million. That figure was based on what was said by ICI, at the time in 2015 and subsequently, to be a Project Manager's Final Assessment which was performed by a firm of quantity surveyor's appointed by ICI/ AkzoNobel in January 2015.

Mr Justice Fraser observed that *"The involvement of an **independent** third-party certifier in considering the correct level of interim payment to be made to a Contractor such as MMT is a highly important part of the contract".*

The firm of quantity surveyor's evidence of

valuation/assessment was that of fact and not that of an independent quantity surveyor performing the role of expert witness or that of the Project Manager.

Mr Justice Fraser noted that given that the firm of quantity surveyors had been instructed by AkzoNobel, and AkzoNobel's senior manager could not be validly appointed as the Project Manager, it can therefore be seen that whatever the quantity surveyor was doing for AkzoNobel, it cannot have been doing a Project Manager's Final Assessment. There was no Project Manager to instruct him to do so.

Mr Justice Fraser noted that there may be nothing wrong in providing quantity surveying services to a client who wishes to achieve a certain end. However, in his judgment, there is certainly a great deal wrong in attempting to disguise either what the exercise consisted of, and/or what that end in reality was, and/or in blatantly mis-describing the exercise performed. He found that the quantity surveyor's exercise, termed the "Project Manager's Final Assessment", was nothing of the kind, and it must have known throughout that it was nothing of the kind whilst he was doing it. It was in fact an attempt to justify a sum for MMT's works, supposedly under the contract, which paid no attention to the proper scope of those works; paid no attention to the contract terms; paid no attention to the agreements reached by the Project Manager and other individuals at ICI on rates, measures, and numerous PMIs; and paid no attention to the extent and reality of the works on site. According to Mr Justice Fraser, this was done to achieve, on the face of it, a figure for a repayment back to ICI from MMT of £10 million or so and, consequentially, dismissed it as being of no evidential value.

WHAT CAN WE TAKE FROM THIS?

If the Project Manager resigns, the Employer must ensure that the replacement Project Manager is impartial, otherwise the independence shoes (so to speak) of the outgoing Project Manager will not fit. The likelihood is that an employee of the Employer will not be perceived by the Contractor as impartial. If the Employer does opt to appoint one of its employees, the Contractor should at the earliest opportunity raise an objection to the Employer concerning the replacement (which was a step that was not taken in ICI v MMT).

To avoid arguments of bias and collusion with the Employer, it makes commercial common sense that the Employer gives notice to the Contractor of the replacement and a third-party Project Manager is appointed. Even then, the replacement Project Manager should ensure that his duties are undertaken with reference to the contract and not supplementary instructions introduced by the Employer, which may impact on the impartial role that we are advised by the courts lays within the terms of the NEC3 ECC.

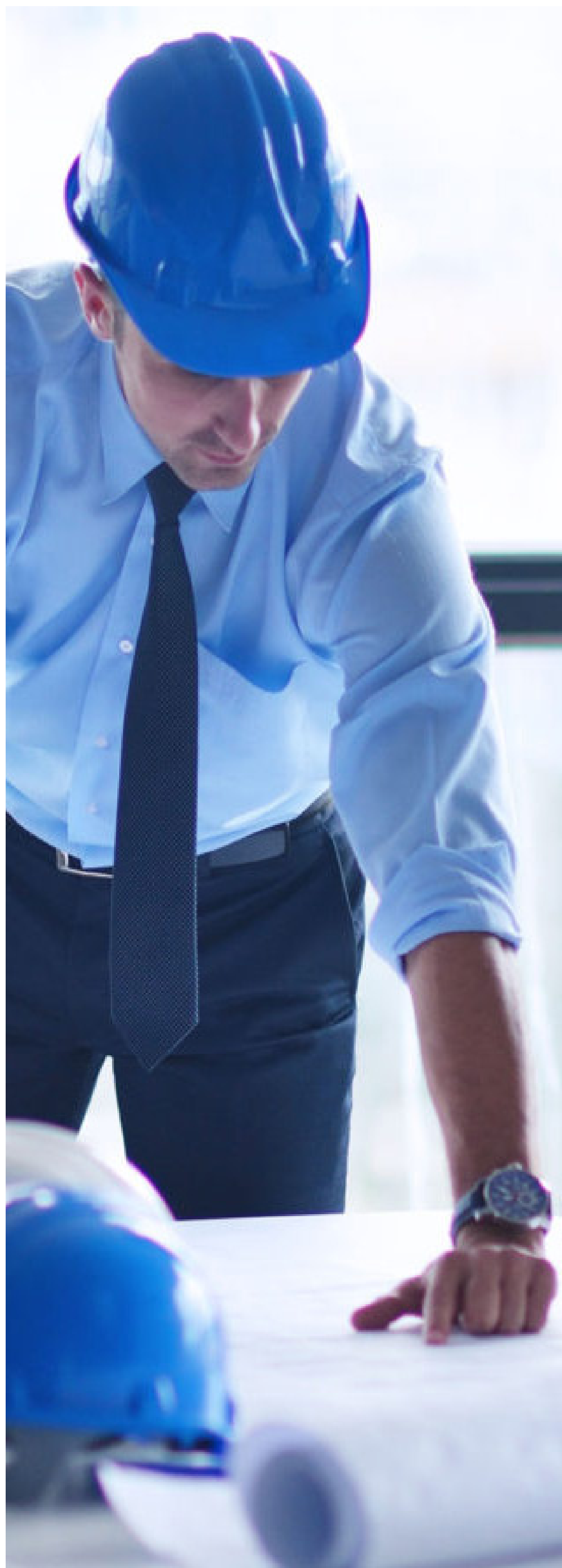
Whilst Mr Justice Fraser's criticism of the role of the quantity surveyor and its purported Final Assessment may seem harsh, it serves as a reminder to the instructing solicitor/Employer that they must ensure that the instruction will enable the quantity surveyor to perform an independent valuation with reference to the terms of the contract - especially if it is later to be used by (ideally a third party) the Project Manager and Employer for the purpose of an assessment of the Price of Work Done to Date, or a compensation event. As mentioned above, the quantity surveyor in ICI v MMT does not appear to have been instructed as an independent expert witness and its (Project

Manager's Final) assessment was offered as part of 'witness of fact' evidence - not that of an independent quantity surveying expert.

Even when an Employer does elect to appoint a quantity surveyor to assist the Project Manager in the various assessments and reviews set out in the ECC, some Contractor's do take issue with that appointment, simply because under the ECC it is the Project Manager that is tasked with making the assessment and not the Employer appointed quantity surveyor. Hence, the issue of impartiality of the Project Manager (and, more precisely, interference by the Employer) may be called into question again. In these circumstances, one solution is that both parties perform their own respective assessment in accordance with the contract and if common ground cannot be found and/or the issue resolved, there may be a crystallised dispute which can be resolved by an adjudicator - a third party that we would trust to be impartial from the outset.

If you have any issues with regards to the assessment of the Price of Works Done to Date or the assessment of compensation event(s) or believe that the Project Manager under the contract is behaving contrary to the express terms of the ECC, please contact your nearest DGA office for further assistance.

The 2018 case involving ICI v MMT is of further interest as it considers whether it is permissible to revisit assessments under the ECC terms once they have been agreed. Look out for our next E-Bulletin on this issue.



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