

New Engineering of old challenges

7 November 2018

In this Talking Point, we look at the legal status of the Project Manager's assessment under the NEC3, as well as the duties and roles of factual and expert witnesses. This case is of particular interest as it deals with final account disputes under the NEC3, which has not been the subject of many published decisions.

The decision of *Imperial Chemical Industries v. Merit Merrell Technology (No. 3)* [2018] EWHC 1577 (TCC) deals with the quantum issues following from the judgment on liability handed down in July 2017 (see our [April 2018 Talking Point](#)). In the liability hearing, the Court held, amongst other things, that the claimant (ICI) repudiated the contract, but was entitled to recover any overpayment from the defendant (MMT). The quantum disputes involve the value of MMT's works as at the date of repudiation and the amount of damages MMT is entitled to as a result of ICI's repudiation.

Project Manager's assessments not binding on the Court

MMT argued that in light of the wording in Clause 65.2, the assessment of a compensation event cannot be reopened by subsequent legal proceedings. Clause 65.2 states: "*The assessment of a compensation event is not revised if a forecast upon which it is based is shown by later recorded information to have been wrong.*"

The Court rejected this argument. It did not accept that it was bound by any assessment by the Project Manager, although the assessments "*are of powerful evidential weight.*"

Factual evidence which contradicts the Court's previous findings of fact inadmissible

The witness statement of ICI's factual witness contained evidence which was directly contrary to findings that had been made in the liability judgment. The Court held that where it had made a binding finding in the liability judgment, any further evidence on the same point in the quantum proceedings cannot be relevant and therefore cannot be admissible.

Another of ICI's factual witness (a quantity surveyor) included a large amount of opinion in his witness statement. The Court also held such opinions to be inadmissible and ordered re-service of his evidence with his opinions deleted.

Principles governing expert evidence

The Court heavily criticized the lack of independence of ICI's experts, expressing concern that "*there should be such a preponderance of partisan experts, all called by the same party*". The

Court reminded experts and the legal advisers instructing them to take very careful note of and to adhere to the principles set out in *National Justice Cia Naviera SA v. Prudential Assurance Co Ltd, The Ikarian Reefer (No.2)* [2000] 1 All ER 37. Examples of the application of those principles in practice include:

- Experts of like discipline should have access to the same material.
- Where there is an issue of fact which is relevant to the expert's opinion, it is not for the expert to identify which version of the facts they prefer.
- Where late material emerges close to trial, and if any expert considers that it is going to lead to further analysis, consideration, or testing, notice of this should be given to that expert's opposite number as soon as possible.

Takeaway points

Whilst the Court confirmed that it has power to review the Project Manager's decision, there remains a question as to whether such assessment should be done prospectively (based on forecast cost) or retrospectively (based on actual costs). Guidance is provided in the Northern Ireland High Court in *Northern Ireland Housing Executive v. Healthy Buildings (Ireland) Ltd* [2017] NIQB 43 where the Court carried out a retrospective assessment of a compensation event with reference to actual costs, stating "*why should I shut my eyes and grope in the dark when the material is available to show what work [Healthy Building] actually did and how much it cost them?*"

This case also serves as a reminder of the importance of independent experts complying with their duty to the Court.

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