

## Construction Law Update

### Reviewing Assessments under NEC3

In the sixth first instance decision in the long-running dispute of Imperial Chemical Industries Limited (“ICI”) v Merit Merrell Technology Limited (“MMT”) the court assessed the quantum disputes between the parties. In an extensive judgment, the court considered a wide range of issues including; the ability to revisit assessments under NEC3 and review agreements reached during the contract, the role of expert witnesses, and the principles governing the award of damages.

#### Background

In 2012 ICI engaged MMT to carry out works associated with the construction of a paint manufacturing facility. The contract was an amended NEC3 Engineering and Construction Contract with an initial value of £1.9 million. However, the scope of works expanded considerably and ICI paid MMT £20.9 million.

In a judgment on liability it was held that ICI had repudiated the contract in February 2017 by purporting to accept non-existent repudiatory breaches on MMT’s part and dismissing MMT from site. This latest instalment of the case dealt with the quantum dispute between the parties, including ICI’s claim that MMT had been overpaid in the region of £10 million and also MMT’s claim for damages.

#### Could the Project Manager’s assessments be revisited?

One of the key elements of the case was the value of the works carried out by MMT at the date of the repudiation. In assessing that sum the court had to determine whether it could revisit the assessments made by the Project Manager during the course of the works. The court held that there was nothing in the NEC3 form which provided that a Project Manager’s assessment is conclusive as to the rights of the parties and further, that it was open to either party to refer a dispute concerning an assessment to adjudication. As the court could not have less power than an

adjudicator, it also had jurisdiction to determine a dispute as to an assessment. There was therefore no legal obstacle preventing ICI from challenging the assessments of the Project Manager.

However, the court noted that such assessments were made by the Project Manager, with the benefit of their detailed and in depth knowledge of the project and were being challenged on the basis of the evidence of individuals who had nothing to do with the project until after the event. Whilst the assessments were not legally binding, the court held that they were of powerful evidential weight.

#### Could agreements made between MMT, ICI and the Project Manager be revisited?

From July 2014, ICI interfered with the administration of the contract leading to the Project Manager resigning in October 2014. During that period, many agreements were reached between ICI and MMT as to the final valuation of MMT’s works, including as to the appropriate rates or measures to be applied. The court held that these agreements satisfied the requirements for the formation of a contract and were intended to conclusively determine the matters in issue. Therefore they were binding on the parties. Even if this was not so, the agreements would have carried powerful evidential weight.

#### The burden of proof

ICI asserted that MMT had to prove its entitlement to payment for the works, as opposed to ICI having to prove that there had been an overpayment. The court held that the burden of proof lay with ICI, stating that if an employer claims that a contractor has been overpaid, the employer has the burden of demonstrating that. For the court to hold otherwise would have meant that an employer seeking to recover sums held by a contractor as a result of, for example, an adjudicator’s decision could require the contractor

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to prove it was entitled to those sums simply by issuing a claim form.

### **The role of the court and expert witnesses**

The court stated that it would usually expect to rely heavily upon expert quantity surveying evidence to arrive at the correct valuation and that:

*“No judge, even in the Technology and Construction Court, can be expected to embark him or herself upon a detailed valuation of every part of a contractor’s final account or final assessment.”*

However, in this case the experts had failed to agree the vast majority of the items in dispute. The court was particularly critical of ICI’s expert witness on a number of grounds, including; for failing to provide an alternative valuation on the basis of the agreements reached during the course of the works, ignoring the contractual rates, taking a position on issues of fact and law beyond his sphere of expertise, and failing to prepare his valuation with “sufficient attention to his duty to the court as an independent expert”.

### **The value of MMT’s works and counterclaim**

In light of ICI’s unsatisfactory valuation, in respect of nearly every aspect of MMT’s account that was in dispute, the court accepted MMT’s valuations and concluded that there had not been any overpayment.

In respect of MMT’s counterclaim, the court held that each head of loss fell to be considered against the established principles of causation and remoteness. The court found that ICI was therefore liable for the immediate costs flowing from the repudiation, including the costs of taking professional advice as to MMT’s future and their increased costs of banking. MMT was also entitled to £1.3 million from ICI in respect of a final account agreement MMT had reached on another project, as MMT had agreed a far lower sum than it was due because of the financial pressures ICI’s refusal to pay had caused. However, the court found that the costs associated with MMT’s liquidation were too remote.

### **Analysis**

This case demonstrates the complex and difficult issues which can arise out of construction contracts and the time and effort which the parties and courts can expend on resolving them. The court stressed that it would not devote unlimited resources to resolve each and every point of disagreement and nor are the parties entitled to expect the court to provide such a service. The judge was clearly exasperated in this case by the lack of assistance he was able to derive from the expert witnesses.

As for the status of a Project Manager’s assessments under NEC3, whilst such assessments are not binding on the parties, the court is inclined to give them significant evidential weight. A party attempting to advance a case contrary to such assessments should bear in mind that it may struggle to convince the court to go against them.

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