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Wednesday 7th October 2015

Construction and Engineering Seminar – 2015 Legal Update

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7 October 2015

CDM 2015

Nicola Ellis

CDM 2015

INTRODUCTION

- CDM 2015 applies from 6 April 2015 and replaces CDM 2007
- Transitional provisions expired yesterday (6 October 2015)!
- Aim to reduce red tape and to simplify CDM 2007
- Number of accidents on “small” sites compared to larger sites

CDM 2015

KEY CHANGES

- CDM-C role abolished and replaced by “Principal Designer”
- Client role enhanced
- Removal of explicit competence requirements – now a specific requirement for appropriate skills
- Replacement of ACoP with “targeted guidance”
- Removal of domestic client exemption
- Principal Contractor and Designer duties largely unchanged

CDM 2015

TRANSITIONAL PROVISIONS

- CDM 2015 in force since 6 April 2015. CDM 2007 no longer in force after then.
- Transitional arrangements applied to projects commenced before 6 April 2015 but are now well and truly over.
- CDM 2015 applies in full so that, even for a project where the construction phase started before 6 April 2015, the client must now appoint a Principal Designer.
- Certain “savings”.

CDM 2015

REPLACEMENT OF CDM-C WITH PRINCIPAL DESIGNER

- Rationale
- The client must appoint a P.D. i.e. “a designer with **control** over the **pre-construction phase**” (Reg 5(1)(a))
- Appointment must be made as soon as practicable and before the construction phase begins (Reg 5(2))
- Appointment must be “in writing”
- P.D. must “*plan, manage and monitor the pre-construction phase... to ensure that, as far as reasonably practicable, the project is carried out without risks to health and safety*” (Reg 11 (1))
- Some practicalities...
 - Can role be “standalone”?
 - Novation of P.D. appointment on D&B procurement

CDM 2015

ENHANCEMENT OF CLIENT DUTIES (1)

- A client “*must make suitable arrangements for managing a project... [to] ensure that... the construction work can be carried out, so far as reasonably practicable, without risks to the health and safety of any persons affected by the project*” (Regs 4(1) and (2))
- What if more than one “client”?
- Notification – this duty now falls on the client rather than the P.D.
- Select the project team and formally appoint duty-holders (Reg 5)
 - Appoint a P.D. and P.C. in writing
 - Ensure that the duty-holders are able to demonstrate that they can deliver project safely
 - Ensure that management arrangements are working
- Provide pre-construction information (Reg 4(4))

CDM 2015

ENHANCEMENT OF CLIENT DUTIES (2)

- Ensure that a construction phase plan is prepared before construction works begin (Reg 4(5)(a))
- Ensure that the P.D. prepares a health and safety file (Reg 4(5)(b)). If role of P.D. has finished before the end of the project, the P.C. will take responsibility
- Ensure that there are suitable welfare facilities on site (Schedule 2)
- If the client does not appoint a P.D. or P.C., then the client must carry out their duties (Regs 5(3) and (4))

CDM 2015

SIMPLIFICATION OF COMPETENCE REQUIREMENTS

- Rationale
- *“A designer (including a principal designer) or contractor (including a principal contractor)... must have the skills, knowledge and experience and, if they are an organisation, the organisational capability, necessary to fulfil the role that they are appointed to undertake...” (Reg 8(1)) (our emphasis)*
- A designer or contractor must not accept an appointment unless they fulfil these conditions (Reg 8(2))
- A person who is responsible for appointing a designer or contractor must take reasonable steps to satisfy themselves of these conditions (Reg 8(3))
- HSE Guidance

CDM 2015

REPLACEMENT OF ACoP WITH TARGETED GUIDANCE

- Purpose of ACoP was to assist duty holders with expected standards
- Reality – too long and not read
- HSE have replaced ACoP with tailored industry guidances for Clients, Contractors, Designers, Principal Contractors, Principal Designers and Workers
- Intended to be in plain English and short.

CDM 2015

DOMESTIC CLIENTS

- “... a client for whom a project is being carried out which is not in the course or furtherance of a business of that client” (Reg 2)
- CDM 2015 applies to a domestic client (unlike CDM 2007)
- Domestic client’s burden is minimised – duties passed to other parties
- CDM 2015 requires the contractor (or P.C. if there is one) to carry out the domestic client’s duties to manage and to notify

CDM 2015

SUMMARY

- Construction documents should have been changed
- Property documents updated
- Ramifications of appointing a P.D.
 - Standalone or existing designer?
 - D&B contracts and novations
- Breaches and Sanctions

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Construction Case Law Update

Inga Hall

OVERVIEW OF CASES

- Construction Act cases:
 - pay less notices and guidance on “forming part of the land”
- NEC cases:
 - good faith and insurance provisions

OVERVIEW OF CASES

- Cases on key construction issues:
 - contract formation, good faith, duty to warn, certificates, bonds etc
- Adjudication cases:
 - fraudulent misrepresentation and the implied right to litigate

CONSTRUCTION ACT CASES – PAY LESS NOTICES

- 3 cases by Edwards-Stuart J in Manchester TCC between December 2014 and February 2015
 - *Harding (t/a MJ Harding Contractors) v. Paice and another* [2014] EWHC 3824
 - *ISG Construction Ltd v. Seevic College* [2014] EWHC 4007
 - *Galliford Try Building Ltd v. Estura Ltd* [2015] EWHC 412

PAY LESS NOTICE CASES

- *Harding (t/a MJ Harding Contractors) v. Paice and another* [2014] EWHC 3824
 - failure to serve valid pay less notice not fatal to employer's ability to assess sum "properly due" on a final account
 - merits of the claim still subject to assessment

PAY LESS NOTICE CASES

- *ISG Construction Ltd v. Seevic College* [2014] EWHC 4007
 - employer's failure to issue pay less notice on an interim application means agreement to value of contractor's work for the purposes of that (but not subsequent) applications

PAY LESS NOTICE CASES

- *Galliford Try Building Ltd v. Estura Ltd* [2015] EWHC 412
 - followed *ISG v Seevic* re effect of absence of a pay less notice
 - partial stay of execution re £4m award
 - manifest injustice arguments successfully raised by employer

PAY LESS NOTICE CASES

- *Caledonian Modular Ltd v Mar City Developments Ltd* [2015] EWHC 1855
 - departure from the contractor's 'usual' form of interim application created uncertainty as to when a pay less notice is due
 - clarity and consistency required for the courts to support 'smash and grab' adjudications
 - TCC supporting a 'common sense approach' to the new payment regime

PAY LESS NOTICE CASES

- *Henia Investments Inc v Beck Interiors Ltd* [2015] EWHC 2433 (TCC)
- *Leeds City Council v Waco UK Ltd* [2015] EWHC 1400

CONSTRUCTION ACT CASES – S105(1)

- Guidance on interpretation of section 105(1) of the Construction Act
- *Savoie v. Spicers Ltd* [2014] EWHC 4195
 - Guidance of meaning of “forming part of the land”
 - Section 105 of the Construction Act:
 - “Construction operations” include construction etc. of
 - Buildings or structures forming, or to form, part of the land, whether permanent or not (S105(1)(a)); and
 - Any works forming, or to form, part of the land, including walls, roadworks... industrial plant... (S105(1)(b))

INTERPRETATION OF S105(1)

- Case gives good guidance on whether the criteria S105(1) are made out:
 - question of fact and degree
 - objective purpose
 - look at installation as a whole

NEC CASES – GOOD FAITH?

- No general duty of good faith implied into contracts under English law
- Line of recent cases examining express contractual provisions e.g NEC3 cl 10.1 and nature of implied terms in long-term relational contracts e.g
 - *Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd* [2014] NICA 27
 - *Mid Essex v Compass Group* cases

NEC CASES – GOOD FAITH?

- *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396
 - obiter comments by Akenhead J re limited extent to which the cl 10.1 obligation to act in a spirit of mutual trust and co-operation allows other terms to be implied
 - Employer estopped from recouping alleged overpayments under NEC3 TSC
- Good faith also considered in other recent cases

NEC CASES

- *SSE Generation Ltd v Hochtief Solutions AG and another* [2015] CSOH 92
 - Inter-relationship between liability and insurance clauses in NEC2
 - liability of the parties to each other not displaced by contractor's obligation to take out joint names CAR policy
 - No 'irrebuttable presumption' – contract wording crucial
 - C.f NEC and JCT approaches re exclusion of liability for jointly insured risks (e.g. JCT D&B 2011 cl 6.2 and 6.3)

KEY CONSTRUCTION LAW CASES

- Contract formation

- *Transformers & Rectifiers Ltd v. Needs Ltd* [2015]
EWHC 269

- importance of drawing the other party's attention to standard terms
 - avoid a battle of the forms – if the other party responds with its own T&Cs make clear (i) they are not accepted and (ii) you only contract on your own terms
 - don't assume standard T&Cs always apply across a long course of dealing: give each transaction the same care as the first

KEY CONSTRUCTION LAW CASES

- Good faith and contract interpretation
 - *Arnold v Britton* [2015] UKSC 36
 - caveating the prevailing view from *Rainy Sky v Kookmin Bank* that the interpretation most according to commercial common sense should prevail
 - courts are reluctant to step in to save a party from a bad bargain

KEY CONSTRUCTION LAW CASES

- *Portsmouth City Council v Ensign Highways Ltd*
[2015] EWHC 1969
 - no overriding duty of good faith but an implied term to act honestly, on proper grounds and not in an arbitrary, irrational or capricious manner
 - extends the implied term established in *Mid Essex v Compass Group*

KEY CONSTRUCTION LAW CASES

- Duty to warn
 - extent of a duty to warn is a ‘grey area’ under English law
 - cases tend to be fact-specific
 - *Goldswain & Anor v. Beltec Ltd & Anor* [2015] EWHC 556
 - Coulson J sets out a test to consider when a duty to warn exists:
 - court to first consider contractual scope of services
 - then consider circumstances: risk to life/limb/property? Ought professional have known of danger?
 - must be more than a mere possibility of future danger

KEY CONSTRUCTION LAW CASES

- Final certificates
 - *The Trustees of the Marc Gilbard 2009 Settlement Trust v OD Developments and Project Ltd* [2015] EWHC 70 (TCC);
 - contractor prevented from starting adjudication proceedings over a year after the final certificate had been issued

KEY CONSTRUCTION LAW CASES

- Hybrid bonds
 - *Caterpillar Motoren GMBH & Co K.G v Mutual Benefits Assurance Company* [2015] EWHC 2304 (Comm)
 - ‘hybrid’ bonds combine performance guarantee and on-demand bond language and obligations – consequential ambiguity
 - tests set out in *Wuhan Guoyo Logistics v Emporiki Bank* to decide the true nature of hybrid bond obligations
 - ‘on demand’ language in this case prevailed
 - such bonds have their place but review carefully – is it what your project needs?

ADJUDICATION / DISPUTE RESOLUTION CASES

- Fraudulent misrepresentation
 - *Eurocom Ltd v. Siemens plc* [2014] EWHC 3710
 - Misuse of the ‘conflicting interest’ element of adjudicator nomination process may amount to fraudulent misrepresentation
- Adjudicator’s decision finally binding
 - *Khurana & Anor v Webster Construction Ltd* [2015] EWHC 758
 - residential parties (exempt from Act) incorporated the Scheme provisions in their adjudication agreement ‘save that the adjudicator’s decision would be binding’

ADJUDICATION / DISPUTE RESOLUTION CASES

- Implied right to litigate
 - *Aspect Contracts (Asbestos) Ltd v. Higgins Construction Plc* [2015] UKSC 38
 - Supreme Court upheld 2013 Court of Appeal decision
 - implied term that a paying party in a Scheme adjudication is entitled to have the dispute finally determined by litigation and any overpayment refunded if proceedings successful
 - right runs for 6 (or 12) years from date of payment
 - potential reversal of burden of proof raised in *Walker Construction v Quayside Homes* [2014] unresolved

ADJUDICATION / DISPUTE RESOLUTION CASES

- FIDIC Arbitration clause condition precedent
 - *Al Waddan Hotel Ltd v Man Enterprise SAL (offshore)*
[2014] EWHC 4796 (TCC)
 - Employer not entitled to take advantage of its own wrong in enforcing a condition precedent in FIDIC Red Book (1987) 4th Edition to prevent contractor referring its dispute to arbitration

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The NEC Suite of Contracts – Getting Beyond the ECC

Matthew Smith

WHAT IS THE NEC?

"The NEC Contract is a legal framework of project management procedures designed to handle all aspects of the management of engineering and construction projects. Its benefits – stimulus to good management, flexibility and simplicity – can be applied to any project, large or small."

SUCCESS OF THE NEC IN THE UK

Background - the 'Bad Old Days'

- Drivers for change: Latham and Egan
- Lack of collaborative behaviour
- Dr Martin Barnes:

“It was clear to me that the contract was not something that was indifferent to good management. It was positively hindering good management. Even if the contract was left in the drawer there were people who thought they knew what it said, and it didn't motivate them to collaborate....”

SUCCESS OF THE NEC IN THE UK

- NEC a was a major departure from traditional forms of contract
- The NEC is not a contract that is 'left in the drawer'!
- Forward looking
- Encourages good project management techniques

ADVANTAGES OF THE NEC

- Proactive risk management
- Open communication
- Encourages the parties to work together to solve problems

WHERE ARE NEC3 CONTRACTS USED?

- England and Wales:
 - NEC contracts are used extensively, particularly for infrastructure projects
 - Endorsed by the OGC
 - Used by major Employers including the Highways Agency, TfL, HS2, Thames Tideway Tunnel, NDA, BAA
- International use
 - New Zealand, South Africa, Hong Kong

THE NEC FAMILY

- ECC and PSC
- Other contracts within the suite:
 - NEC3 Engineering and Construction Subcontract (ECS)
 - NEC3 Engineering and Construction Short Contract (ECSC)
 - NEC Engineering and Construction Short Subcontract (ECSS)
 - NEC Professional Services Contract (PSC)

THE NEC FAMILY

- NEC3 Adjudicator's Contract (AC)
- NEC3 Term Service Contract (TSC)
- NEC3 Professional Services Short Contract (PSSC)
- NEC3 Term Service Short Contract (TSSC)
- NEC3 Framework Contract (FC)
- NEC3 Supply Contract (SC)
- NEC3 Supply Short Contract (SSC)

FLEXIBILITY IN PRICING

- Range of Main (pricing) options for the ECC including lump sum (Option A), remeasurable (Option B), target price (Options C and D) and cost reimbursable (Option E)
- Option C (target price with activity schedule) undoubtedly the most popular
- Other target price options in the PSC and TSC
- Option F (the management contract) probably the least popular

FLEXIBILITY IN ALLOCATING RESPONSIBILITY FOR DESIGN

- Allocation of design responsibility
- Critics have commented that there is no ‘turnkey’ option similar to FIDIC Silver Book
- Ignores the inherent flexibility of the contract suite
- ECC Clause 21.1: “The *Contractor* designs the parts of the *works* which the Works Information states he is to design”
- Is a full transfer of design risk incompatible with the NEC ethos?

FLEXIBILITY IN ALLOCATING GENERAL, LEGAL AND INSURABLE RISKS

- ECC Core clause 81.1 provides:

“From the starting date until the Defects Certificate has been issued, the risks which are not carried by the *Employer* are carried by the *Contractor*.”
- Replicated in the ECS
- Clause 80 then lists certain specific Employer's risks including “Additional risks stated in the Contract Data”
- Clause 60.1(14) – compensation event for “an Employer’s risk stated in the contract”

MANAGING AND INTEGRATING THE SUPPLY CHAIN

- Use of NEC forms at Subcontract level
- Flowing down key obligations (e.g. cl. 10.1)
- ECC Clause 26.3
- Partnering X12
- Project Bank Accounts Y(UK)1
- Alliancing - 2013 IUK's Infrastructure Procurement Routemap 2013 a new NEC alliancing contract?

COMMON THEMES ACROSS THE NEC SUITE

- Spirit of mutual trust and cooperation
- Tailored approach to risk allocation
- Plain English style, avoiding jargon
- Present tense
- No cross-references
- Modular approach – Main (pricing) and Secondary Options

PROFESSIONAL SERVICE CONTRACT (PSC)

- Unlike most other consultant's appointments because it includes the key NEC features (e.g. proactive risk management, collaborative working and modular structure)
- Four Main (pricing) Options:
 - Option A: priced contract with activity schedule
 - Option C: target contract
 - Option E: time based contract
 - Option G: term contract

PROFESSIONAL SERVICES CONTRACT

- Key role of the “Scope”
- Much more extensive than a typical schedule of services
- Compensation events

TERM SERVICE CONTRACT (TSC)

- Contract to provide a *service* for a period rather than a complete ‘project’
- NEC TSC Guidance Notes:

“It is important to appreciate that the TSC is not a contract for a project. The principle of the TSC is that contracting to maintain an existing state A for a period of time is a service. Contracting to achieve a state B when the present state is A is not a service – it is a project. However, a modest amount of improving the condition of an asset can sensibly be included in a TSC.”

TERM SERVICE CONTRACT

- The TSC therefore uses terms such as “*service*”, “Service Information” and “Service Manager”
- Three Main (pricing) Options:
 - Option A: priced contract with price list
 - Option C: target contract with price list
 - Option E: cost reimbursable contract
- Particularly suitable for maintenance type services (e.g. highways maintenance)
- TSC X19 “Task Order” Secondary Option

SUPPLY CONTRACT (SC)

- Designed for the supply of “high value goods and related services including design” (e.g. transformers, turbines, loading bridges, mining machinery)
- May be used at any point in the supply chain
- Unlike the other members of the NEC Suite, there are no Main Options
- The Price Schedule is priced by the *Supplier* and is a list of activities and goods and services which may contain lump sums and/or rates
- The “Goods Information” describes the goods and services and any constraints and includes the “Supply Requirements”

CLOSING THOUGHTS

- The NEC is fairly flexible both in terms of its ability to adapt to different methods of procurement and the variety of contracts within the NEC 'family'
- More than other standard contract forms, it positively encourages good project management and collaborative behaviour, building relationships between the various project participants
- It places an emphasis on an informed allocation of risk between the parties and, where appropriate, sharing the financial risk and reward of the works through incentivised target price contracts
- It can also play a part in encouraging greater integration and better management of the supply, thereby achieving significant potential savings for the project
- With appropriate amendment, the forms could even be used as the basis for full integration through alliancing and other similar models.

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