

Legal Aspects of the NEC

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NEC3 - Introduction

My Bugbears

■ N is for New

- This is not a new form of contract any more, it was first published in 1993 – it is now 18 and therefore an adult

■ E is for Engineering

- This is not an engineering contract, it is often used on building projects as well, even major stadia

■ C is for Contract

- It is not a contract. It is a whole suite of contracts with multiple options under each different form

■ 3 is for 3rd version

- It is actually the fourth version, the first consultative version of 2001 was not numbered



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NEC3 - Introduction

What's the point!

- What are contracts for?
 - A promise or set of promises which the law will enforce
 - An agreement giving rise to obligations which are enforced or recognised by the law (both taken from Chitty on Contracts)
- Practical implications of that definition
 - The promises can be simple (I will pay, you do the work) or much more complex and intricate (see any construction contract)
 - It is something subject to legal enforcement
 - An instruction manual to help the parties manage their dealings
 - A rule book to resolve differences of opinion on what the bargain was



NEC3 - Introduction

Where to start

- What do lawyers think of the NEC?

- “I have to confess that the task of construing the provisions in this form of contract is not made any easier by the widespread use of the present tense...it seems to me to represent a triumph of form over substance”

Anglian Water Services Ltd –v- Laing O’Rourke Utilities Ltd

- What does the NEC think of lawyers?

- “NEC contracts were deliberately not written to fit into lawyers comfort zones – they were written as working documents to achieve efficient management of risk...”

Rudi Klein – NEC User Group Honorary President,
NEC Newsletter 53



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NEC3 – Case Law Summary

NEC Based Decisions

- Mowlem -v- Hydra Tight (2000)
- Staverly -v- Odebrecht (2001)
- Rossco -v- Dwr Cymru (twice) (2004 & 2000)
- McAlpine -v- Transcon (2004)
- **Costain and others -v- Bechtel (2005)**
- Balfour -v- Gilcomston (2006)
- McConnell Dowell Ltd v National Grid Gas PLC (2006)
- AE Yates -v- Black & Veatch (2008)
- ROK -v- Celtic Composting (2009)
- **Anglian Water -v- Laing O'Rourke (2010)**
- RBG -v- SGL Carbon (2010)
- Llewellyn -v- Excel Brickwork (2010)
- Volker Stevin -v- Holystone (2010)



NEC3 - Introduction

What's the point!

- Objectives of NEC3
 - Flexibility
 - Clarity and Simplicity
 - Stimulus to good management
- Are they achieved?



NEC3 and the Law

Key Legal Issues - Introduction

- What **DOES** clause 10.1 mean?
- What is the role/liability of the Project Manager
- Time bars to entitlement
- Legal issues in prospective analysis
- Legal issues regarding acceptance in particular relating to the programme
- What happens when it all goes wrong



NEC3 and the Law

Key Legal Issues

- What **DOES** clause 10.1 mean?
 - “The Employer, the Contractor, the Project Manager and the Supervisor shall act as stated in this contract and in a spirit of mutual trust and co-operation” (NEC3 clause 10.1)
 - “The phrase ‘mutual trust and cooperation’ imports not only honesty and reasonableness but may also oblige someone to do more than the contract calls for if the contract is truly to be performed co-operatively” HHJ Humphrey Lloyd (Some thoughts on NEC3 – 2008)
 - The employer’s project manager cannot unjustifiably withhold consent since that would conflict with clause 10.1 HHJ Humphrey Lloyd (Some thoughts on NEC3 – 2008)



NEC3 and the Law

Key Legal Issues

- What **DOES** clause 10.1 mean?
 - Interesting pieces
 - The Employer, Contract, Project Manager and Supervisor
 - Act as stated in the contract
 - In a spirit of
 - Mutual trust and co-operation
 - Any closer to an understanding?



NEC3 and the Law

Key Legal Issues

- What **DOES** clause 10.1 mean?
 - It does **NOT** mean you ignore the contract
 - It suggests an underlying or pervasive theme for how the contract provisions should be interpreted
 - It probably does not create a new legal obligation on its own
 - It records a statement of intent by the parties and an expectation of how the relationship will work



NEC3 and the Law

Key Legal Issues

- What is the role/liability of the Project Manager
 - The Project Manager is not a party to the ECC but does have obligations under it. The Project Manager will (probably) have a PSC with the Employer but those terms will not be known to the Contractor
 - "When assessing sums payable to the Contractor, is it the Project Manager's duty (a) to act impartially as between employer and contractor or (b) to act in the interests of the employer?" (Costain –v- Bechtel)
 - I would add a third, that the PM owes a duty to the Project, in other words an effective, unincorporated, JV with a single purpose



NEC3 and the Law

Key Legal Issues

- What is the role/liability of the Project Manager (cont)
 - The House of Lords in Sutcliffe v Thackrah held that an architect, issuing interim certificates under the then standard form of building contract, was not immune from liability in negligence to his employer
 - In Royal Brompton Hospital NHS Trust v Hammond (No. 8) Judge Humphrey Lloyd QC described the project manager as "co-ordinator and guardian of the client's interest" (not an NEC contract but useful guidance)
 - In Costain –v- Bechtel it was not permissible for the court to give a definitive answer to the question. The importance of this question had been acknowledged on all sides. "If the parties want a definitive answer ... it would be better to raise the question in proceedings to which [the employer] is a party."



NEC3 and the Law

Key Legal Issues

- Time bars to entitlement
 - Effective notice (Anglian Water –v- Laing O'Rourke)
 - Failure to early warn
 - Failure to notify compensation events
- Are time bars effective?
 - Very complex question, nothing really to do with NEC
 - Yes...
 - and no
- Is it a good thing to have more of them?
 - Should PM acceptances be time barred?
 - What effect would that have in light of 14.1
 - Can an Employer hand over that amount of control?



NEC3 and the Law

Key Legal Issues

- Legal issues in prospective analysis
 - In most contracts the method of analysis to prove delay is open to the claiming party, the NEC is prescriptive
 - The anticipation is that a forecast will be used including risk
 - Where the analysis is not done at the time can it be done in retrospect?
 - Yes, it can but that does not reflect the contract anticipation
 - The contract anticipates open and constructive dialogue on risk management, this is not really possible retrospectively



NEC3 and the Law

Key Legal Issues

- Legal issues in prospective analysis
 - So what do you do?
 - Time at large?
 - Try to re-create the contract anticipation?
 - Abandon the contract method and adopt something more pragmatic
 - No definitive answer...
 - ...but most likely the latter
 - The NEC3 is based on an assumption of good project management, good project management does not mean if one method fails you give up, you adapt and carry on



NEC3 and the Law

Key Legal Issues

- Legal issues regarding acceptance in particular relating to the programme
 - What is the result of a failure to accept
 - A failure to reply within the period is a CE
 - What is it that is accepted
 - Clause 14.1, in relation to design, does not accept compliance only submission
 - Does the same apply for the programme?
 - No. So what are you left with?



NEC3 and the Law

Key Legal Issues

- What happens when it all goes wrong?
 - By “all” I mean you don’t have accepted programmes, you don’t have all compensation events implemented, you didn’t have early warning and didn’t carry out risk reduction meetings
 - DON’T START FROM HERE!
 - Probably all you can do is abandon the wreckage of the contract
 - That can be done destructively via a dispute on constructively through re-baselining the project



NEC3 – A Legal Perspective

Summary

- NEC3 is not written for lawyers but will be interpreted by them
- Although in use for 18 years there is still very little court consideration of the terms
- The ECC form is legally complex with many interwoven rights and obligations, it is difficult to amend effectively
- A practical approach is needed to the resolution of legal issues in exactly the same manner as project management generally under this form



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