

# The NEC Definitely, Maybe...?

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# General Introduction

# The NEC – Why is it relevant

- The 2015 national Construction Contracts and Law Survey 2015 by NBS, part of the Royal Institute of British Architects (RIBA):
  - confirmed NEC3 contracts are now the most popular procurement route for clients – and continue to increase their overall market share at the expense of other standard contract forms.
  - found the NEC3 contract suite is now most used by 42% of clients compared to 32% mostly using JCT contracts.
  - reported the NEC to be most used by 30% of the construction industry, up from 22% in the last survey three years ago, while JCT contracts are most used by 39% of the industry, down from 48% in 2012.
  
- Many (most) major projects utilise the NEC (with varying degrees of amendment)
  - Olympics, HS1, East London Line, Cross Rail 1
  - HS2, Cross Rail 2, Hinkley Point

# Format for today

## ■ Three Presentations

- What do we really know about the NEC. An exploration of direct NEC case law that isn't about adjudication enforcement
- What can we infer about how the NEC is likely to be applied from case law on similar concepts
- What significant issues under the NEC are we completely in the dark over.

The NEC  
What we know  
The cases

# 14 cases directly on NEC (1-6)

- Costain Ltd v Bechtel Ltd
  - Queen's Bench Division (Technology & Construction Court), 20 May 2005
- Henry Brothers (Magherafelt) Ltd v Department of Education for Northern Ireland
  - Queen's Bench Division (Northern Ireland), 3 October 2008
- Walter Llewellyn & Sons Ltd v Excel Brickwork Ltd
  - Queen's Bench Division (Technology & Construction Court), 22 December 2010
- Balfour Beatty Ltd v Gilcomston North Ltd (formerly Gilcomston Construction Ltd)
  - Court of Session (Outer House), 23 May 2006
- Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd
  - Queen's Bench Division (Technology & Construction Court), 25 June 2010
- SGL Carbon Fibres Ltd v RBG Ltd
  - Court of Session (Outer House), 27 January 2012

## 14 cases directly on NEC (7-14)

- WSP Cel Ltd v Dalkia Utilities Services Plc
  - Queen's Bench Division (Technology & Construction Court), 28 August 2012
- Northern Ireland Housing Executive v Healthy Building (Ireland) Ltd
  - Court of Appeal (Northern Ireland), 13 February 2014
- RWE npower Renewables Ltd v JN Bentley Ltd
  - Court of Appeal (Civil Division), 19 February 2014
- Liberty Mercian Ltd v Cuddy Civil Engineering Ltd
  - Queen's Bench Division (Technology & Construction Court), 30 October 2014
- Atkins Ltd v Secretary of State for Transport
  - Queen's Bench Division (Technology & Construction Court), 01 February 2013
- Fermanagh DC v Gibson (Banbridge) Ltd
  - Court of Appeal (Northern Ireland), 17 June 2014
- SSE Generation Ltd v Hochtief Solutions AG
  - Court of Session (Outer House), 14 July 2015
- Mears Ltd v Shoreline Housing Partnership Ltd
  - Queen's Bench Division (Technology & Construction Court), 20 May 2015

# Costain Ltd v Bechtel Ltd

- NEC2 Option C for the construction of HS1, the Channel Tunnel Rail Link
- An application for interim injunction, not a full consideration of the merits
- Key question was whether the Project Manager had a duty to act impartially when assessing Actual Cost and Disallowed Cost
  - The Court relied on Sutcliffe –v- Thackrah, a JCT case about architects
  - Acceptance that the NEC is more specific and objective than other forms
  - Acceptance that in some circumstances the PM acts for the Employer
  - The requirement for impartiality arises from law not custom
  - The question of impartiality was **NOT** decided by the court. The court acknowledged the importance of the question but said that the Employer should be involved in any such discussion



# Balfour Beatty Ltd v Gilcomston North Ltd (formerly Gilcomston Construction Ltd)

- A case before the Court of Sessions (Outer House) in Scotland
- NEC2 Option C for the construction of a cold store at which there was a fire
- This was a case all about insurance under Section 8, on which the court gave the following guidance
  - Clause 82 has nothing to do with liability only actions to be taken
  - The indemnity contribution at 83.2 should be given its natural meaning and not construed in an overly narrow way
  - Clause 83.2 is fair and sensible
  - The combination of clause 83.2 and 84.2 does not mean that the negligence of the Employer (or the contractor in this case as the argument was with a subcontractor) is never taken into account

# Henry Brothers (Magherafelt) Ltd v Department of Education for Northern Ireland

- A decision of the Northern Ireland High Court
- An application for interim injunction, then a full hearing (ended in the Court of Appeal but not the relevant NEC issues)
- A dispute arising out of a procurement challenge for a framework to deliver schools in Northern Ireland. The procurement had been based purely on assessment of the fee. The following points arose
  - It was argued that the cost to build was always the same, no matter the main option used (ie the cost to build under Option C was the same as Option A)
  - Expert evidence to the contrary was given
  - The proposition that cost to build was always the same was found to be wrong, amounting to a manifest error in the procurement

# Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd

- NEC2 Option C for the construction of a sewage treatment plant
- There had been an adjudication on certain disputes and Anglian Water was dissatisfied with the outcome so wished to proceed to arbitration as the *tribunal*
- The court identified and decided the following four issues
  - Clause 93.1 compatible with the Construction Act, and nothing really to do with adjudication
  - Compliance with 13.2 is the only way of achieving effective delivery, actual delivery by the wrong means will not be effective
  - A notice of dissatisfaction is part of the adjudication process and so where a professional is authorised to accept adjudication documents service on them will be acceptable
- Comment from the Judge that the use of the present tense makes construing the contract difficult

# Walter Llewellyn & Sons Ltd v Excel Brickwork Ltd

- NEC2 Option A subcontract for the carrying out of block and brick work to various timber framed buildings
- Court proceedings were commenced regarding alleged defects and an application was made to stay those proceedings to arbitration which, it was argued, the NEC provided for.
- The court found
  - The standard NEC contract does not provide for arbitration, rather it provides for the *tribunal*. The parties then decide what form the *tribunal* will take
  - Failing to chose a form of *tribunal* did not give rise to an ambiguity and even if it did it was not one to which 17.1 would apply

# SGL Carbon Fibres Ltd v RBG Ltd

- A case before the Court of Sessions (Outer House) in Scotland
- NEC3 Option C for the construction of an additional production line in an industrial unit.
- The following points arose
  - Assessments of PWDD are only for the purpose of determining the sum payable at a particular date and is not binding on future assessments
  - While the parties had operated a slightly different payment mechanism to the contract that should leave neither better off and the contract method could be re-applied when making a final determination
  - The party challenging an assessment will have the burden of proving the assessment is wrong
- What happens where the PM changes a decision at the request of the Employer?

# WSP Cel Ltd v Dalkia Utilities Services Plc

- NEC3 Professional Services Contract for the design and project management of a biomass energy plant
- The following points arose
  - In the language of the NEC “does not refer”, in the context of a reference to the *tribunal* means “cannot refer” or “may not refer”
  - The validity and value of claims in an account were either actions of the employer or the employer not having taken an action for the purpose of determining when adjudication was to be brought.
  - The philosophy of the NEC is to avoid disputes at the end of projects by having extensive project management machinery
  - A reference to adjudication may be necessary at each stage of the compensation event process

# Atkins Ltd v Secretary of State for Transport

- NEC3 heavily amended but based on the Professional Services Contract for the maintenance of roads and whether the number of potholes appearing created a compensation event
- As the terms were somewhat different to the standard it is difficult and dangerous to draw too many definitive conclusions
- However, the court did find, in relation to unforeseen conditions that
  - If when a condition has been foreseen (in this case potholes) more of that conditions arises than was anticipated, that is not sufficient to trigger the unforeseen conditions compensation event

# Northern Ireland Housing Executive v Healthy Building (Ireland) Ltd

- Northern Ireland Court of Appeal decision
- NEC3 Professional Service Contract for asbestos surveys
- The following points arose
  - A notification under 13.7 would not be effective unless sent separately
  - Whether or not a compensation event arises is an objective not a subjective test
  - Where, objectively, the Employer or PM should have given notice of a CE and did not, the time bar cannot apply
  - An instruction to do additional work was not, of itself, a notification of compensation event
  - The time bar in 61.3 is to be read *contra proferentem*, that is, against the party seeking to rely on it



# RWE npower Renewables Ltd v JN Bentley Ltd

- English Court of Appeal
- NEC3 contract for a hydroelectric plant in Scotland, the dispute arose over the definition of when completion of a section had occurred. The Court gave the following guidance
  - Key dates and sectional completion are separate but one may help the understanding of the other
  - If there is a difference in the wording of similar requirements one should try to construe them together first before saying there is an ambiguity or inconsistency

# Fermanagh DC v Gibson (Banbridge) Ltd

- Northern Ireland Court of Appeal
- NEC2 Option C contract for the construction of a waste management facility
- The following points arose
  - There is a difference between the wording of the NEC and the ICE conditions of arbitration which make it ambiguous whether the notice of dissatisfaction and intention to refer in the NEC is the same or a different notice to the notice of referral in the ICE terms. The Court held that the notice of dissatisfaction and intention does start arbitration proceedings
  - If a party wishes to challenge an adjudicator's decision, even if through lack of jurisdiction, it must still comply with the notice of dissatisfaction process.

# Mears Ltd v Shoreline Housing Partnership Ltd

- NEC Option C term service contract for responsive and planned maintenance of social housing
- The following arose
  - The “mutual trust and cooperation” provision of clause 10.1 does not prevent a party from relying on its contractual rights
  - You cannot extend “mutual trust and cooperation” to imply that neither party would take advantage of the other for any departure from the strict requirements of the contract without fair warning

# SSE Generation Ltd v Hochtief Solutions AG

- A decision of the Court of Session, Outer House
- NEC2 Option C contract for the design and construction of a hydro-electric scheme. After completion a tunnel collapsed and a dispute arose around who was liable for that failure and, in particular, whether the claim should be made under joint names insurance or between the parties
- The following arose
  - The indemnity given at 83.1 of the contract was not overridden or displaced by an obligation to provide or the provision of joint names insurance

# Liberty Mercian Ltd v Cuddy Civil Engineering Ltd

- NEC3 Option A for a development project at Bath House. A bond, certain warranties and parent company guarantee were not provided before termination
- The following points arose
  - Clause 90.5 is clear that after termination the contractor does nothing more to “Provide the Works”
  - The provision of bonds, parent company guarantees and warranties are not part of the *works* and are therefore are not needed to “Provide the Works”
  - The provision of bonds, parent company guarantees and warranties, whether under X13 or under a Z clause, is a self standing obligation not forming part of the obligation at 20.1
  - The provision of bonds, parent company guarantees and warranties is collateral to the main purpose and merely procedural or ancillary
- Does this really deal with “and all incidental work, services and actions” part of the definition of Provide the Works?

The NEC  
What we know  
The principles

# What then are the takeaway points?

- Project Managers must act independently...probably... and 10.1 does not prevent reliance on the contract...probably...
- The insurance obligations are reasonable and the existence of insurance does not alter the indemnity position
- You cannot judge relative value of a tender from fee percentage alone
- Communication obligations will be construed precisely
- The party challenging an assessment has to prove the assessment was wrong
- If a condition has been foreseen, lots of that condition does not become unforeseen
- An instruction to do work and a notice of compensation event are different
- Bonds, warranties, guarantees and similar are not part of the *works*...maybe

## ...or looked at another way

### ■ Where do the cases come from?

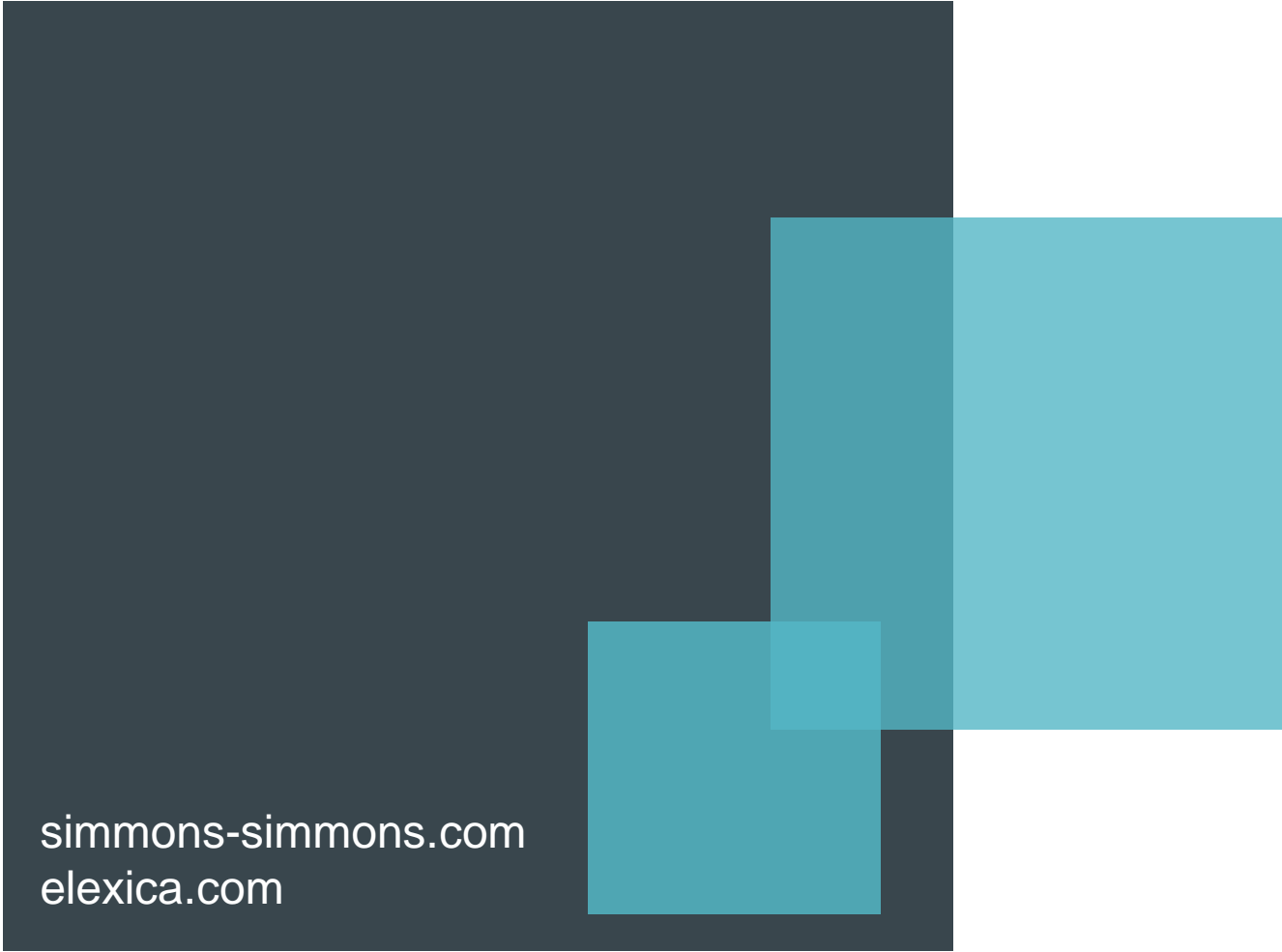
- 3 out of 14 cases have been given by the Northern Ireland Courts
- 3 out of 14 cases have been given by the Scottish Courts
- 3 out of the remaining 8 cases arise from projects outside England
- Only 5 of 14 cases arise from English NEC based projects

### ■ Why?

#### ■ When

- |            |             |
|------------|-------------|
| – 2005 (1) | – 2013 (1)  |
| – 2006 (1) | – 2014 (4)  |
| – 2007 (1) | – 2015 (2)  |
| – 2010 (2) | – 2016 (0?) |
| – 2012 (2) |             |





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