

# Different strokes

**Jon Close looks at the main differences between JCT's contract administrator and NEC3's project manager roles in contract administration and how understanding this important role can help achieve project success**

The starting point for defining the responsibilities and liabilities of a third-party certifier lies in their terms of engagement read in conjunction with the applicable construction or engineering contract. But that's not the end of the story as non-contractual duties and obligations, such as those under common law, statute and in tort can impact unless expressly excluded by an 'entire agreement clause'. Such non-contractual considerations are, however, outside the scope of this article, which confines itself to highlighting some of the key areas concerning the different approaches adopted by JCT and NEC3 in contract administration.

As is well known, the standard of care imposed on a professional person at common law is to carry out its services with 'reasonable skill and care' as established in the case of *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582; [1957] 2 All ER 118. The 'Bolam Test' was as a result of several earlier decisions which established that the duty of an architect should not be fettered, or unduly influenced, by its employer (in particular, *Hickman v Roberts* [1913] AC 229).

In both the contracts, this standard of care is measured against the certifier carrying out its duties. There are subtle differences, however, as to how administrators of JCT and NEC3 interpret and operate their duties

The Bolam Test has subsequently been expanded upon in case law. In *Sutcliffe v Thackrah* [1974] AC 727, Lord Salmon stated in his reasoning the proposition that, in issuing certificates, an architect must act fairly and impartially between the employer and contractor. In other words, the architect must be an independent certifier. This principle has been extended to project managers and engineers as a result of subsequent cases (*Costain v Bechtel* [2005] Adj.L.R. 05/20; *AMEC v Secretary of State for Transport* referred to below).

## Conflicting roles

Quite often, appointed third parties under a contract have dual roles employed by the employer but are required to administer conditions of contract which, at times, can be seen to conflict.

There is a familiar paradox in JCT where an architect may undertake design functions on behalf of the employer separate to its appointment as the contract administrator (CA) within the contract.

This tension between the dual roles has generated a certain amount of case law concerning certifiers 'fettering' (or compromising) their impartiality. The current position has culminated in the acceptance that the duty to act impartially only arises when the appointed third party is administering the terms of the contract or acting in its 'decision-making function' not its 'agency function', when its role is to advise the employer in its best interests (*Scheldebouw BV v St. James Homes (Grosvenor Dock) Ltd* [2006] Adj.L.R. 01/16).

What is 'fair' does, of course, depend on the particular circumstances. That the appointed third party may only give the contractor one day to consider how to overcome certain delays or respond to complex technical allegations may not, in itself, be unfair if there is another pressing time reason which threatens the successful completion of the project and justifies this instruction (*AMEC Civil Engineering Ltd v Secretary of State for Transport* [2005] BLR 227 CA).

## Main responsibilities

In both of the contracts, this standard of care is measured against the certifier carrying out its duties. There are subtle differences, however, as to how administrators of JCT and NEC3 interpret and operate their duties. Figure 1 outlines the respective responsibilities of the certifiers in each contract form.

Inherent problems can and do arise in the exercise of these decision-making functions. The success of a project can still be prejudiced by over-certification or signing-off elements of the works as practically complete when they should not be, often in the mistaken belief that this will help keep the parties working together on site. The outcome can be quite different than envisaged.

The following provides a brief oversight and non-exhaustive list of some of the differences that may arise when moving between the standard forms.

## Conclusivity of decision making

In JCT, the CA is afforded a certain amount of protection in terms of its decision-making responsibilities. Provided the decision is 'reasonable' then it should not be open to successful challenge. The standard provisions make the final certificate conclusive in the following respects:

- the quality and standards are to its reasonable satisfaction

JCT Contract Administrator	NEC Project Manager
<p><b>Overall</b></p> <ul style="list-style-type: none"> <li>Administers the contract and attempts to assure the contract sum by ensuring that the contractor complies with its instructions</li> <li>Has wider powers when acting as employer's agent</li> <li>In certain instances, contractual provisions can be subject to 'fair and reasonable' assessment</li> </ul>	<ul style="list-style-type: none"> <li>Performs proactive administration requiring skilled judgement</li> <li>Collaborative role with employer and contractor including prescribed communication routes</li> <li>Acts in a spirit of mutual trust and co-operation with the employer, contractor and supervisor (condition 10.1)</li> </ul>
<p><b>Quality control</b></p> <ul style="list-style-type: none"> <li>Issues timely information relating to set out and any other pre-agreed information as and when required</li> </ul>	<ul style="list-style-type: none"> <li>Acts as gatekeeper to contractor's design and programme forming part of the contract and use of sub-contractors. Considering and accepting the contractor's design if any (conditions 21-23), any sub-contractors (condition 26) and the proposed programme (condition 31)</li> <li>Replies within the period for reply to any communication submitted to it by the contractor</li> <li>Issues certificates to the employer and contractor</li> <li>Operates the early warning mechanism by notifying the contractor of any increase, delay or impairment to performance, entering such instances in the risk register, attending risk reduction meetings and making decisions and finding solutions with others to overcome those risks (condition 16)</li> <li>Issues instructions dealing with acts of prevention (condition 19)</li> </ul>
<p><b>Variations/change</b></p> <ul style="list-style-type: none"> <li>Issues instructions/variations to overcome discrepancies and/or changes in scope of works</li> <li>Issues notices in respect of remedying discrepancies between contract documents (clauses 2.13-2.18)</li> </ul>	<ul style="list-style-type: none"> <li>Issues instructions relating to changes in scope and completion date</li> <li>Actively monitors by means of an early warning mechanism for any change to scope, price, timings or impairment of performance</li> </ul>
<p><b>Time and money</b></p> <ul style="list-style-type: none"> <li>Certifies sums due</li> <li>Assesses delay and grants time and cost relief according to prescribed provisions but subject to overriding power to grant time relief as is fair and reasonable immediately following practical completion</li> <li>Issues extensions of time which it considers fair and reasonable and reaches a decision as soon as reasonably practicable (clause 2.28.2)</li> <li>Considers with the QS, if employed, all interim valuations, claims for variations and loss/expense resulting and issue payment certificates as appropriate</li> </ul>	<ul style="list-style-type: none"> <li>Certifies sums due</li> <li>Decides the date of completion and certifying completion (condition 30)</li> <li>Notifies the contractor of the outcome for any claim for a compensation events and requests quotations for any proposed instruction or changed decision</li> <li>Assesses the additional cost of the contractor not achieving a key date (condition 25.3)</li> <li>Considers compensation events, their value and instructing their implementation (conditions 60-65)</li> </ul>
<p><b>Practical completion and snagging</b></p> <ul style="list-style-type: none"> <li>Determines when practical completion achieved and issues notices of non-completion, defects and can allow early possession</li> <li>Issues practical completion certificate or sectional completion certificates (clauses 2.30-2.32) or a non-completion certificate (clause 2.31)</li> <li>After practical completion, immediately considers the overall position on extensions of time and exercises discretion as to whether any further adjustment to time should be made</li> <li>Address any actual or suspected defects and exercises its power to specify and require remedial action arising during the rectification period, preparing both a schedule of defects (clause 2.38.1) and by issuing instructions for individual defects (clause 2.28.2) and/or making an adjustment to the contract sum if the employer agrees that any defects may remain.</li> </ul>	<ul style="list-style-type: none"> <li>Determines when practical completion achieved</li> <li>Assesses defects and their value (conditions 40-45).</li> </ul>

Figure 1 – Summary of scope and main responsibilities under JCT and NEC forms

- » • additions, omissions and adjustments to the contract sum have been correctly made (save in the instance of accidental inclusion or exclusion or arithmetical error)
- all and only such extensions of time contained in the certificate have been given
- all reimbursement of direct loss and expense has been made to the contractor.

This is, of course, subject to a party not bringing an action within 28 days of the certificate being issued, in which case it is only conclusive in respect of those matters not subject to that action. No other certificate of the CA is conclusive that the contractor's works, design, materials or goods are in accordance with the contract.

In comparison, NEC3 does not have express conclusivity provisions. It does however contain a mechanism in terms of assessing additional time and cost, whereby the Project Manager (PM) is deemed to have accepted the contractor's proposal if it has not rejected it within a specified timeframe.

## Lord Salmon stated that, in issuing certificates, an architect must act fairly and impartially between the employer and contractor, i.e. the architect must be an independent certifier

For instance, in condition 61.4, if the PM does not notify his decision to the contractor as to whether or not an event constitutes a compensation event either within one week of such a request (or such other period as the parties decide) then a failure by the PM to reply within two weeks of this notification amounts to acceptance that the event is to be treated as a compensation event. This is also deemed to be an invitation for the contractor to submit quotations. Although not a conclusivity provision as such, it does mean that any adjudicator/court should find in the contractor's favour should a debate subsequently arise as to the status of an event.

### *Subjective decision making*

This is an inherent issue in the contracts, where the subjective opinion of the CA/PM could be called into question, especially where the relief for the contractor may hinge on the certifier 'becoming aware' of a certain event or circumstance having taken place.

In JCT forms, the contract stipulates that 'if' the CA becomes aware of any divergence between statutory requirements and the contract documents, it shall give an immediate notice to the contractor.

Within seven days of becoming aware of such divergence, the CA issues instructions which (if they vary the works) amount to variations.

In JCT, this subjectiveness in becoming aware is limited and not extended to wider matters. Unlike NEC3, it is only 'if' the CA becomes aware that the clause is triggered, so a CA may never become aware of any divergence until and unless a situation arises. To overcome this, the contractor is not prejudiced and can obtain relief in clause 2.17.3 so that it will not be penalised for carrying out non-compliant works that are stipulated in the contract documents.

In comparison, the NEC3 form says that the PM shall notify the contractor of any matter which could increase, delay or impair the works 'as soon as [it] becomes aware'. This is worded much wider than in JCT. However, any ambiguity in the wording of the contract is intended to be tempered by some inherent fail-safes. If, for example, the PM fails to notify the contractor of a compensation event when it should have done, the contractor will not necessarily be time barred from applying for relief for time and additional cost (condition 61.3).

### *Delegation of powers*

JCT forms state that any person authorised by the CA should have certain rights, such as access to the works. While in both contracts, replacement of the CA is discouraged to avoid uncertainty and disjointedness in the procurement of works, there is a 21-day period for the employer to nominate a replacement and to give the contractor notice. To maintain consistency, that replacement is then bound by any certificate, decision instruction, etc, made by its predecessor unless they have the contractual power to disregard it.

In NEC3, however, the PM may delegate authority with the only requirement being that it first notifies the contractor. There is no employer control mechanism here.

### *Meetings*

Site meetings are pretty much at the CA's discretion in JCT. In NEC3, the procedures for early warning and problem solving are much more prescriptive and risks need to be recorded.

### *Information flow*

Unless the parties agree in JCT that an information release schedule is in place, the obligation on the CA is simply to provide copies of contract documentation upon execution of the contract (clause 2.8).

In NEC3, the PM may be part of the team that puts together the works information. Thereafter, the onus is on the contractor to provide the PM with documentation to show how it proposes to 'provide the works' and any revisions thereof submitted for acceptance.

### Practical completion

In NEC3, completion is when the contractor has done all the work which the works information says he is to do by the completion date and when it has corrected notified defects which would have prevented the employer from using the works.

The process of achieving completion itself is subject to a period of testing led by the supervisor, employed by the employer, who is the ultimate arbiter (not the PM) of whether or not the works are defect-free. Importantly, the contractor remains liable for correcting defects whether or not the supervisor notifies it or not.

In JCT, however, it is (as a general rule) the CA's opinion that counts as to when practical completion has been achieved provided that certain design documents (if required) and CDM requirements have been complied with.

This can, on certain projects, result in the parties agreeing and inserting a definition of practical completion in order to avoid argument at a later date as to when it occurred or should have occurred. Ultimately, practical completion is a matter of fact and the contractual definition serves only to trigger release of half of the retention being withheld from payment, if retention is applicable to a particular project.

### Role models

As with any contract, whether standard industry or bespoke, the parties need to consider the precise role of the parties. Contract administration can substantially aid the successful completion of a project, provided everyone understands the precise scope of responsibility and power afforded to the person undertaking that role.

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