Chapter 18

Claims under NEC 3 Engineering and Construction Contract (NEC 3)

18.1 Introduction

The first edition of the New Engineering Contract was published in 1993. Although from its title, one might be excused for believing that it was not suitable for use for building works, its authors maintained that it could be used for either engineering or building. The second edition was published in 1995 and its title had been changed to the Engineering and Construction Contract although it was still known by the initials 'NEC'. Amendments have been issued since then to deal with the Housing Grants, Construction and Regeneration Act 1996 and a third edition was published in June 2005 and re-published with further minor amendments in June 2006. It is the June 2006 edition which will be considered here. The philosophy of this form is intended to be different from that of the more common JCT and other contracts. There is a family of NEC contracts of which NEC 3 is but one, albeit perhaps the most important.

Although the form was praised by Sir Michael Latham, as containing the kind of provisions advocated in his report 'Constructing the Team',[1] it has been the subject of some criticism by legal commentators.[2] Some perceived shortcomings are that the syntax and grammar is not good. This is partly because the present tense is used almost exclusively even where one would normally expect to see past or future tenses. The form is supposed to be a model of simple English, but sticking almost exclusively to one tense does not assist comprehension. That leads to ambiguity and a lack of certainty. Certainty is a prime requisite for a legally binding contract. It is difficult to know whether something is being expressed as a power or a duty or just as a fact. There are few reported cases dealing with this form of contract, but in a recent case involving the second edition of the form, the court was critical of the use of the present tense:

> '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 in its operative provisions. No doubt this approach to drafting has its adherents within the indus-

[1] HMSO July 1994.
[2] D G Valentine, *The New Engineering Contract* (1996) 12 Const LJ 305 is well worth reading.

Building Contract Claims, Fifth Edition. David Chappell.

try but, speaking for myself and from the point of view of a lawyer, it seems to me to represent a triumph of form over substance.'[3]

There are other difficulties. Clause numbering is quite strange. For example clause 21.3 is a sub-clause of clause 2, not clause 21. Clause 93.2 is a sub-clause of 9, etc. One would have expected to see reference to clauses 2.1.3 and 9.3.2 respectively. The most confusing, for some reason, is reference to sub-clauses of clause 1 – 11.1, 11.2, 14.3, etc. Defined terms have capitals and terms identified in the contract data (something like the JCT Contract Particulars) are in italics. It is difficult to get used to this, particularly in a phrase such as: 'The Completion Date is the *completion date* unless. . . .'[4] Perhaps the strongest criticism is that the form appears to go out of its way to avoid using words and phrases which are in common use in other construction contracts. The effect of that is that it becomes very difficult to interpret the meaning of such words and phrases by reference to decisions in the courts and other legal authorities. For example, are 'delay damages' in option X7 the same as 'liquidated damages' under other standard forms and as generally understood at law? Interpretation of this contract is, therefore, to some extent a venture into the unknown. Leaving aside the precise legal meanings of the words used, the contract, although purporting to be clearer and simpler than other forms, is actually quite difficult to understand for anyone encountering it for the first time.

Guidance notes and flow charts are published. But although certainly useful in operating the contract and in conveying what the draftsperson thinks has been produced, it must be remembered always that these have no legal significance. In law, what the draftsperson intended to mean when the contract was drafted is irrelevant. It is the actual meaning as found in the words of the contract which is important. Obviously, a court has to interpret a contract in line with the intentions of the parties, but it is the intentions of the parties as revealed by the words of the contract, and not some extraneous document such as guidance notes, which matters.

NEC has become very popular for civil engineering work and it is used, and in some places strongly advocated, for building work. Whether it will increase in popularity remains to be seen. Opinions may change when cases on the form are more frequent. The form is said to comply fully with the AEC (Achieving Excellence in Construction) principles. The title page records that the Office of Government Commerce (OGC) recommends the use of NEC 3 by public sector construction procurers on their construction projects. The form does have its good points. It has a set of 9 core clauses which are intended to be present in every version of the contract. There are then six options (A, B, C, D, E and F) one of which must be included in every contract. The purpose of these is to convert the contract for use with different procurement systems:

A – priced contract with activity schedule
B – priced contract with bill of quantities
C – target contract with activity schedule
D – target contract with bill of quantities

[3] *Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd* (2010) 131 Con LR 94 at 101 per Edwards-Stuart J.
[4] See clause 11.2(3).

E – cost reimbursable contract
F – management contract.

In addition, there is a choice between two dispute resolution options and a selection of other clauses which may, but need not, be included in the contract. These cover such matters as performance bonds, advance payment to the contractor, sectional completion, delay damages.

Before turning to a consideration of the relevant clauses, it is worth noting that there is no architect or contract administrator mentioned in the contract. The parties to the contract are the employer and the contractor, but a key player is the project manager whose function it is to administer the contract by issuing instructions, certifying payment, assessing compensation events and the like. However, there is also a supervisor. The supervisor broadly deals with standards and quality of the work.

18.2 Compensation events

18.2.1 Clause 6

Put simply, compensation events are events which entitle the contractor to be compensated in terms of time and/or adjustment of the prices of the activities in the activity schedule. The idea is to deal with extensions of time, loss and/or expense and the valuation of variations at the same time. The result is a clause (6) of great complexity and some difficulty in interpretation.

Due to the complexity of clause 6, the procedures clearly require time to operate. It is debatable whether it is possible to use it properly as a tool to deal with the multitude of claims for additional money and time which characterise even the simplest project. The clause lists the events and sets out the procedure. The adjustment of the prices varies dependent on which of the main options is incorporated into the contract.

18.2.2 The compensation events

Project manager's instructions changing Works information – clause 60.1(1)

Works information is defined in clause 11.2(19) as information specifying the Works or stating constraints on carrying out the Works. Essentially, it appears that it will comprise drawings and specifications and similar restrictions to those possible under SBC clause 5.1.2. Where the contractor is to carry out some of the design, it will provide that part of the Works information. The project manager may issue instructions to change the Works information under clause 14.3. The second part of clause 11.2(19) states, somewhat inelegantly, that the Works information is to be found in the documents where the contract data says it is or in an instruction which is given in accordance with the contract. It is essential, from the employer's point of view, that the contract data does indeed list all the relevant documents. Any omissions may

cost the employer dearly if the contractor is successful in contending that they are changes. Although, in the main, this event covers what would normally be called variation instructions, it is not necessarily confined to that and any instruction changing the Works information as contained in the documents specified by the contract data or in any instruction will rank as a compensation event albeit possibly with little or no financial effect.

A change for any reason will fall under this ground except if:

- it is made under clause 44.2 which is merely accepting a defect to avoid correcting it; or
- made to the Works information provided by the contractor at its request or in order to make it comply with the employer's Works information.

The reasons for the exceptions are so that the contractor benefits neither from its own defects, nor from its failure to make its design suit the employer's Works information, nor from its decision to change its design later. A consequence of the latter is that the contractor may be entitled to keep any savings which it can make to its design. The clause does not expressly address the position if the project manager fails to issue an instruction. It is partially addressed in clause 63.1 which refers to the date when the project manager should have instructed the contractor to submit a quotation.

The employer's failure to allow access to and use of part of the site by whichever is the later of the access date and the date in the accepted programme – clause 60.1(2)

This clause used to refer to possession, rather than access. Possession is a wider entitlement. The accepted programme is the programme identified in the contract data unless the project manager has accepted a later programme. At any time, the accepted programme is the latest programme accepted by the project manager. The programme is dealt with in clause 31 and revisions to the programme under clause 32. This is a perfectly straightforward provision. The access date is to be inserted by the employer into the contract data. There is provision for access to be given in parts. In normal circumstances, that is the date on which the contractor must have access to and use of the site or the part indicated and the contract data would also show that a programme had been produced which reflected that date. However, if the contractor prepares a programme, accepted by the project manager, which indicates a later date for access, it is the later date which applies. Every time the contractor produces another programme with an adjusted date which is accepted by the project manager, the adjusted date applies. It is clear from clause 31.2 that the contractor cannot submit a programme showing a date earlier than the date in the contract data.

A party which enters onto land is normally taken to have possession of the land although, in the case of building contracts, a contractor is said to have an express or implied licence to be on the land. The extent of the contractor's occupation of the site under this contract is not exclusive possession. That is clear from clause 25.1 which states that it 'shares' (presumably meaning that it *must* share) the working areas with others as indicated in the Works information. Clause 33.1 refers to the employer allowing the contractor 'access to and use of' the site. In the ordinary

meaning of possession, the contractor would certainly have access, use and control of the site in order to enable it to carry out the contract Works.[5] Failure to give access on the due date is a serious breach of contract. Depending on the circumstances, if prolonged, it may amount to repudiation on the part of the employer. The extent to which the contractor may take action against the employer at common law is discussed later.

Employer's failure to provide something by the date in the accepted programme – clause 60.1(3)

Clause 31.2 contains what appears to be a mandatory list of the contents of any programme submitted for acceptance. It is impossible to be definite about the matter, due to the curious use of the present tense mentioned earlier. In such circumstances, the normal rules for construing a contract should be employed. It is noted that the word 'may' is used in some clauses. That clearly denotes a power, but not an obligation to do something. In other words, where 'may' is used, it means that the action can be taken if desired. On the basis that the draftsperson of the contract proceeded in a logical manner, the absence of the word 'may' must mean something different. It seems logical that it means that the particular action is obligatory. In other words, it is a duty.

The list seems to be fairly comprehensive regarding what the contractor *must* include in its programme, but it does not include reference to something being provided by the employer or the date for so providing. However, that does not preclude the contractor from incorporating other things. The conclusion is that this ground refers to the situation where it has been agreed between the parties that the employer will provide something to the contractor, perhaps paint, bricks or other building materials which the employer can obtain cheaply. Having come to an agreement, the contractor has quite reasonably included the item to be supplied, and the date by which it must be provided if the Works are not to be delayed, in its programme for acceptance by the project manager.

It is noteworthy that, under clause 31.3, the project manager has very limited scope to refuse to accept a programme. If the contractor has inserted the wrong date for requiring the information, the only grounds for rejection appear to be that either the contractor's plans are not practicable or it does not represent the contractor's plans realistically. The contractor is entitled to revise the programme and it may be in the contractor's interests to bring forward some of the dates when something is required from the employer. There appear to be no grounds on which the project manager can refuse to accept such a programme and the employer may be placed in a difficult situation. It is clearly inequitable that the contractor can, at will, revise the programme so as to effectively place the employer in breach of its obligations. However, there appears to be no easy solution, because the project manager's refusal to accept a programme for reasons other than those listed in clause 31.3 is itself ground for a compensation event (clause 60.1(9)).

[5] For a full consideration of the position regarding possession of the site by the contractor, see Chapter 4, Section 4.6.

Project manager's instruction stopping work or preventing it from starting or changing a key date – clause 60.1(4)

This appears to be similar to a postponement instruction under a JCT contract. Clause 34.1 authorises the project manager to stop, not to start or to re-start work and clause 14.3 authorises changes to key dates.

Failure of the employer or others to work within the times on the accepted programme or the conditions stated in the Works information or carrying out work not in the Works information – clause 60.1(5)

This is split into three grounds. 'Others' are defined in clause 11.2(10) as people or organisations not being the employer, the project manager, the supervisor, the adjudicator, the contractor, or any employee, sub-contractor or supplier of the contractor. Therefore, such people can be anyone else. The limiting factor is that, in respect of the first part of the ground, they must be referred to in the accepted programme. Express relevant reference is made in clause 31.2 (fourth and seventh bullet points).

This is a sensible provision, but the employer, having agreed appropriate dates with the contractor, would be wise to keep careful watch on any future revised programme to ensure that the date is not changed to something which the employer cannot easily meet. The difficulties of achieving this have been noted earlier when dealing with clause 60.1(3). The project manager also has a duty to discuss with the employer any change to the original date.

This edition of NEC sees the addition of the third part of the ground which considerably enlarges the scope of this ground to include any work carried out by the employer and others, but which is not referred to in the Works information. Although the contractor does not have exclusive possession of the site, clause 25.1 expressly states that the contractor shares the working areas with others as stated in the Works information. In other words, the Contract states precisely the parties with whom the contractor must share the areas. Therefore, if the employer sees fit to introduce others, who are not included in the Works information, the contractor is likely to suffer inconvenience at least and serious disruption at worst for which it now has a contractual remedy.

Project manager or supervisor fails to respond to contractor within the stipulated period – clause 60.1(6)

This is the sanction if the project manager or the supervisor fails to comply with the provisions of clause 13.3. This requires them, and the contractor, to reply to communications within the 'period for reply' stated in the contract data. The NEC 3 is full of good ideas, but this is not one of them. The period during which a reply must be made depends on all the circumstances. For example, some communications do not need a reply at all, some need an immediate reply, while others can safely be left some weeks before a response is necessary. A well-known ploy among contractors seeking to establish grounds for a claim is to bombard the project manager with large numbers of letters on a daily basis; most asking for immediate answers to petty

questions. It is also notable that although this is the sanction if the project manager or the supervisor fails to respond by the due time, there is no express sanction if the contractor fails. In any event, subsequent clauses regulate the effects so that the compensation event is only relevant if the failure has some detrimental effect on the other party. This ground is best deleted.

Project manager gives instructions about an object of value, or historical or other interest found within the site – clause 60.1(7)

This is similar to the JCT provisions regarding what are termed 'antiquities' in those contracts. However, it is clear that the NEC 3 definition in clause 73 is very much broader than under JCT contracts and embraces, not only items of historic interest but also, anything valuable and anything which could objectively be classified as interesting. The only constraint seems to be that it must be an 'object'. That is to say, it must be something separate from the site itself. Therefore, curious or even significant rock strata would not be covered by this clause, but pieces of jewellery, old weapons and the foundation of a Roman villa would be covered as would a piece of modern sculpture.

Project manager or supervisor changes a decision previously communicated to the contractor – clause 60.1(8)

Nothing in this contract suggests that the word 'decision' has any special, broad or restricted meaning, such as a formal decision under particular circumstances, and its ordinary meaning can be assumed. For example, an instruction of the project manager is a decision and a change or withdrawal of an instruction appears to fall under this ground. Therefore, this ground applies whenever the project manager gives the contractor a decision of any kind and then subsequently changes it.

Project manager withholds an acceptance for a reason not stated in the contract – clause 60.1(9)

The exception to this is if the acceptance in question is in regard to a quotation for acceleration or for not correcting a defect. Clause 13.8 gives the project manager the power ('may withhold') to withhold acceptance of any submission by the contractor. There are two things to note about this power.

The first is that it must be implied that the submission concerns something which the contractor is entitled to submit. Examples are to be found throughout the contract and its options together with contractually valid reasons for non-acceptance by the project manager.

The second is that although the project manager has a very broad power, the exercise of it may result in a compensation event if the reason for acceptance does not fall within one of the reasons stated in the contract. Therefore, whenever the contractor makes a proper submission under the contract, it is imperative that the project manager carefully considers the contractually valid reasons for rejection

before coming to a decision. Obviously, there may be instances when the project manager does not wish to accept a programme, particulars of a design or a quotation, etc. for reasons not included in the contract. The potential effect of the resultant compensation event requires a careful weighing of the balance between the benefits to the employer compared to the likely cost in terms of time and money.

No defect is found after the supervisor instructs the contractor to search – clause 60.1(10)

There is a proviso that excludes the situation where the contractor gave insufficient notice before doing work which obstructed a required test or inspection. Such notice is required under the provisions of clause 40.3.

Clause 4 deals with testing and defects. The Works information may require some tests and inspections to be carried out, but this ground deals with the situation under clause 42.1 where the supervisor may instruct the contractor to search, provided that reasons are given. Searching may include what is commonly understood by the expression 'opening up and testing' under SBC clause 3.17, but not the kind of opening up and testing following the finding of defective work as set out in SBC clause 3.18.4. In a similar way to that employed under SBC, this ground protects the contractor, if the search reveals that there is no defect, by providing the contractor with a right to additional time and/or money.

A test or inspection carried out by the supervisor causes unnecessary delay – clause 60.1(11)

This ground is a reference to clause 40.5 which requires the supervisor to carry out tests and inspections without causing unnecessary delay. 'Unnecessary delay' is a difficult concept. It presupposes that some delay is necessary. The difficulty with that is the absence of any criteria which can be used to separate necessary from unnecessary delay. A tentative view can be advanced that the ground excludes any delay which one might expect to be caused as a result of the opening up or testing. That would be 'necessary' delay in the sense of being 'indispensable' or 'inevitable' or 'inevitably resulting from the nature of things'.[6] On that reading of the clause, 'unnecessary delay' probably refers to delays which are not inevitable, but which are nonetheless caused by the opening up and testing. If that view is correct, it appears that the contractor is expected to have allowed in its price and timetable for the supervisor carrying out opening up and testing, because the contractor should be aware of the tests required from the Works information and what the contract refers to as the 'applicable law' (clause 40.1). Unfortunately 'applicable law' is neither defined nor is it part of the contract data (although the law of the contract is in the data). This seems to be a case of sloppy drafting and the meaning of 'applicable law' and its effect on this ground will depend upon all the circumstances. On a strict reading, 'applicable law' means the law which applies to the particular provision of the contract. It is not easy to see how the general law will 'require' tests and inspections.

[6] *The Concise Oxford Dictionary.*

In due course a court will no doubt have the task of explaining this particular compensation event.

Physical conditions encountered by the contractor in the site which are not weather conditions and which an experienced contractor would have judged the chance of occurring to be so small that no allowance need by made for them – clause 60.1(12)

This edition of NEC sees the addition of a stipulation that it is only the difference between the physical conditions encountered and those for which it would have been reasonable to allow which are to be taken into account. That is perfectly sensible and may well have been implied in any event. This ground is similar, but not the same as clause 12(1) of the ICE 7th edition 1999 form of contract. Both use the expression 'physical conditions'. Had the reference been to 'site', 'ground' or 'soil' conditions, the expression would have a limited rather than a wide effect. So far as the soil conditions are concerned, the expression has been held to apply to both transient and intransient combinations of stresses.[7] In other words, pre-existing permanent conditions are included, but so are conditions which may change for one reason or another. It is often overlooked that the expression also refers to above ground conditions.

Weather conditions are excepted and the only sensible way to interpret this is that it means exactly what it says: 'physical conditions which are not weather conditions'. Therefore, snow, ice, rain and excessive heat are not included under this ground. It is thought that if the weather conditions caused the site to be flooded, that would also be excluded as it would if the site became snow or ice bound. However, if the flooding was due to the failure of a dam which itself was caused by excessive rainfall or melting snow, that would probably be included in the overall 'physical conditions'.

The proviso concerning the contractor's judgment could cause difficulties. It must be read in conjunction with clauses 60.2 and 60.3. These clauses stipulate that, in judging the physical conditions, the contractor is assumed to have taken into account the site information which describes the site and surroundings and any publicly available information noted therein, what the contractor can obtain from a visual inspection and any other information it could reasonably be expected to have or to acquire. Moreover, if there is an inconsistency within the site information, the contractor is assumed to have taken account of the conditions most favourable to doing the work. It should be noted that 'assumed' used in this context appears to be similar to 'deemed' as used in many contracts.[8] This appears to be a statement of what otherwise would be implied as a result of the operation of the *contra proferentem* rule. Therefore, there are three possible situations for the contractor's judgment:

- physical conditions which will not occur
- physical conditions which have such a small chance of occurring that it would be unreasonable for the contractor to allow for them
- physical conditions which are very likely to occur.

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[7] *Humber Oil Terminals Trustee v Harbour and General* (1991) 59 BLR 1.

[8] Meaning that circumstances are to be treated as existing even if manifestly they are not: *Re Cosslett (Contractors) Ltd, Clark, Administrator of Cosslett (Contractors) Ltd (in Administration) v Mid Glamorgan County Council* [1997] 4 All ER 115.

Effectively, the contractor is assumed to have made its decision based on the information in the site information (this might well include a soil investigation report), any other available information, its own experience and what the contractor can actually see. Therefore the job of deciding whether the first or last situations apply should be fairly easy.

The task of deciding whether physical conditions have so small a chance of occurring that it would be unreasonable to allow for them requires the contractor to calculate the risk. Whether it would be unreasonable is clearly to be decided based on what the contractor would view as unreasonable taking all factors into account. In practice, it is likely to be difficult to argue that a contractor was being unreasonable unless the matter was something which a normal contractor used to carrying out similar work would not have done. Obviously, in preparing its tender, a contractor is unlikely as a matter of principle to take unreasonable risks. It is suggested that a contractor faced with this kind of risk assessment should carry it out in a formal way so as to have evidence of the method of assessment if needed in the future.

A weather measurement is recorded within a calendar month and before completion date for the Works at the place stated in the contract data the value of which, compared to weather data, occurs on average less frequently than once in 10 years – clause 60.1(13)

This edition of NEC sees the addition of a stipulation that it is only the difference between the weather measurement and the weather shown by the contract data to occur on average less frequently than once in 10 years which are to be taken into account. The idea is that a record of past weather over the last 10 years is provided in the contract data. Weather conditions only qualify to rank as a compensation event if it exceeds what is in the contract data. The weather data containing the past weather measurements are divided into cumulative rainfall, the number of days when rainfall exceeds 5 mm or when minimum air temperature is less than 0° C or when snow is lying at a specific time; usually, no doubt, at some time early in the working day. There is a space in the contract data for the inclusion of additional criteria. If no recorded data are available, assumed values are to be inserted in the contract data. It appears that the intention is to provide a simpler system of deciding when the contractor is entitled to further time and or money without having to make a judgment about whether the weather conditions are exceptional. The result has a high chance of being accurate, but it will give rise to problems of fairness if the weather is exceptional and pushes the boundaries of one or more of the criteria at once, but keeps within the parameters set down. This event gives the contractor the right to claim additional money in respect of weather conditions which are outside the stipulated norm. Other standard forms may allow extra time (but not invariably), but they do not allow additional money to the contractor and it is difficult to see why they should do so.

An employer's risk event occurs – clause 60(14)

This is simple. Employer's risks are set out in clause 80.1 and an event occurs when one of the risks manifests itself. In such a case, it becomes a compensation event. The risks are broadly as follows:

- claims, proceedings and so on due to use or occupation of the site by the Works, negligence or breach of statutory duty by the employer or a fault of the employer or in the employer's design
- loss or damage to plant and materials supplied by the employer up to the day the contractor has accepted them
- loss or damage to plant and materials due to war and the like, strikes and the like and radioactive contamination
- loss or damage to parts of the Works taken over by the employer unless the loss or damage is due to existing defects or an event which was not an employer's risk or the contractor's on-site actions after take over occurred before the defects certificate
- loss or damage to the Works and equipment, materials, etc. kept on site by the employer after termination unless damaged by the contractor on site after termination
- additional risks stated in the contract data.

The purpose of this clause is unclear, because it should be noted that under clause 83.1 each party indemnifies the other against claims, costs etc. due to events at that party's risk. It is likely that the event is included under clause 60.1 in order to allow the contractor an extension of the contract period in addition to monetary compensation.

Take-over of part of the Works is certified by the project manager before both completion and the completion date – clause 60.1(15)

Take-over is dealt with in clause 35. Under clause 35.3, the project manager is to certify the date and extent when the employer takes over any part of the Works. It should be noted, however, that the employer may use any part of the Works before completion has been certified. In that case the employer has taken over that part of the Works when it begins to be used unless it is for a reason in the Works information or the use is to suit the contractor's method of working (clause 35.2). Take over is not quite the same as practical completion under JCT contracts although, in practice it may amount to the same. Take over depends on some action by the employer, while practical completion under JCT contracts depends on whether practical completion has taken place in the opinion of the architect; such opinion being exercised according to law.

Completion is defined in clause 11.2(2) as being when the contractor has carried out the work in the Works information stated to be carried out by the completion date and it has corrected the defects which would have stopped the employer from using the Works.

The completion date is defined in clause 11.2(3) as the completion date stated in the contract data unless it has been changed later in accordance with the contract. If so, it is presumably the date as changed although the definition does not expressly state that.

Therefore, this compensation event depends upon completion not having taken place and the completion date being still in the future so that the contractor is not in culpable delay. Provided those two criteria are met, all that is required is for the

project manager to certify take over of part of the Works. It has been seen that this happens when the employer begins to use the part provided that the use is not for a reason stated in the Works information and that the employer is not simply using the part to suit the contractor's way of working. But if the project manager fails to certify, there is no compensation event. However, once the completion date has passed and the contractor is in culpable delay, it appears that the project manager may certify take over and the employer may use some parts or all of the Works with impunity.

Employer, contrary to the Works information, fails to provide materials, facilities and samples for tests – clause 60.1(16)

This is a straightforward breach of the obligation stated in clause 40.2 which requires both employer and contractor to provide these things. Of course, it is only the employer's breach which is of consequence here. The breach specified is a failure to provide and not a failure to provide by any particular dates. Therefore, if the employer provides materials but three weeks after the date stipulated, that is not a compensation event under this clause.

Project manager notifies a correction to an assumption regarding a compensation event – clause 60.1(17)

This refers to the procedure noted in Section 18.2.3. If the project manager has stated an assumption under clause 61.6 which is later found to be wrong, the project manager must notify a correction. The importance of this event is related to clause 65.2 which provides that the assessment of a compensation event is not revised if the forecast is found to be wrong. Clearly, the necessary adjustment must be carried out here or the contractor may be deprived of adequate compensation.

Employer's breach of contract which is not otherwise a compensation event – clause 60.1(18)

This is clearly an attempt at a catch-all clause. The idea is to allow all breaches of contract to be dealt with under the contractual mechanism rather than having to be dealt with at common law.

It also prevents time becoming at large if an employer's action or default is responsible for delay, but for which the contract does not otherwise expressly provide. This contract does not expressly reserve the contractor's common law rights and remedies, but it is thought likely that the contractor would still have this option and clear words would be required to displace them.[9] However, clause 12.4 states that the contract is

[9] The Court of Appeal decision in *Lockland Builders Ltd v John Kim Rickwood* (1995), 77 BLR 38, suggested the contrary, but seems to ignore *Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern) Ltd* (1974) 1 BLR 73; *Architectural Installation Services Ltd v James Gibbons Windows Ltd* (1989) 46 BLR 91. The more recent Court of Appeal decision in *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd* (1998) 87 BLR 52 supports the preservation of rights.

the entire agreement between the parties, while clause 63.4 states that rights to changes in prices, to the completion date and to key dates are the only rights in respect of a compensation event, and it has been suggested by some commentators that one or both of these clauses have the effect of excluding the parties' common law rights. The purpose of an entire agreement clause is much misunderstood. The usual purpose is to exclude liability for any statements, sometimes classed as collateral warranties, other than those contained in the contract.[10] They may also operate to exclude extrinsic evidence proving additional terms.[11] However, the Law Commission has had this to say about an entire agreement clause:

> 'It may have a strong persuasive effect but if it were proved that, notwithstanding the clause, the parties actually intended some additional term to be of contractual effect, the court would give effect to that term because such was the intention of the parties.[12]

An important effect of clause 63.4 is to attempt to limit the remedies available for compensation events to those stated in the contract. It is arguable that this clause falls foul of section 13(1)(b) of the Unfair Contract Terms Act 1977.

Something which prevents the contractor completing the Works by the date on the accepted programme or at all and which the parties could not prevent, which an experienced contractor would have judged the chance of occurring to be so small that no allowance need be made for them and which is not another compensation event – clause 60.1(19)

This is obviously intended to be a catch-all clause to sweep up anything which should have been included. The main purpose is presumably to prevent time becoming at large for want of the power to extend time.

The task of deciding whether some unspecified event has so small a chance of occurring that it would be unreasonable to allow for it requires the contractor to calculate the risk. This is a much more difficult task than the one which faces the contractor in the ground stipulated in clause 60.1(12) where it merely has to consider physical conditions. Whether it would be unreasonable is again to be decided based on what the contractor would view as unreasonable, taking all factors into account. Again, in practice, it is likely to be difficult to argue that a contractor was being unreasonable unless the matter was such as a normal contractor used to carrying out similar work would not have done. In preparing its tender, a contractor is unlikely as a matter of principle to take unreasonable risks, but this ground expects the contractor to carry out a comprehensive review of all the possible risks. It can be argued that a competent contractor should do that in any event. It is suggested that a contractor faced with this kind of risk assessment should carry it out in a formal way so as to have evidence of the method of assessment if needed in the future.

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[10] *Inntrepreneur Pub Co Ltd v East Crown Ltd* [2000] 2 Lloyd's Rep 611.
[11] *McGrath v Shah* (1989) 57 P & CR 452.
[12] Law Commission, Law Com 154, Cmnd 9700 (1986) para 2.15.

A difference between the final quantity of work done and the quantity for an item in the bill of quantities which changes the defined cost per unit and if the affect is more than 0.5% of the total of the prices at the contract date – clause 60.4 **(Options B and D)**

This event relates to measurement and deals with the situation which often arises when the work measured is not the same as the work in the bills of quantities. It will be noted that the former term 'Actual Cost' has been rightly abandoned in favour of 'Defined Cost', presumably because the former was misleading. 'Defined Cost' is explained in clause 52. Three criteria must be satisfied before a compensation event can be said to have occurred:

- The difference must not be a result of a change to the Works information, or what would commonly be known as a variation.
- The difference must be the cause of the defined cost per unit changing.
- The item will not qualify for a compensation event unless its bill of quantities rate, when multiplied by the final quantity of work carried out under that item exceeds 0.5% of the total of the 'Prices at the Contract Date' (a somewhat awkward way of describing what other contracts would call the 'contract sum'). This is apparently to avoid trivial effects on items and leaving only important items for consideration.

The clause makes plain that if the defined cost per unit is reduced, the rate is also reduced. The main criterion is that there is a difference between the quantity of work actually done and the quantity in the bill of quantities for any important item and that this difference causes the actual cost to change. It should be noted that the end result may be a reduction in actual cost. It is not entirely clear how this complex little clause will work in practice.

A difference between the final quantity of work done and the quantity for an item in the bill of quantities at the contract date which delays completion or the meeting of a key date – clause 60.5 **(Options B and D)**

This is similar to the last event save that there is no limit on the items to be considered. That is clearly sensible, because even items which are relatively small in quantity may have a significant effect if they are delayed. The key criterion is that the difference, of whatever amount, must delay completion. This is a straightforward clause which, in similar fashion to SBC, amounts to a warranty on the part of the employer that the bills of quantities are accurate. Essentially, if the bills are not accurate and the difference causes a delay, the contractor has a claim.

Mistakes in the bill of quantities which are corrected by the project manager – clause 60.6 **(Options B and D)**

The mistakes must be either departures from the method of measurement stipulated in the contract data or due to ambiguities or inconsistencies. The departure from the method of measurement is clear enough. Ambiguity and inconsistency are ordinary

English words. In order to correct an ambiguity, the project manager must clarify it. In order to correct an inconsistency, the project manager must choose one of the inconsistent elements over the others. There appears to be no restriction on whether the correction results in more or less or whether higher or lower quality. In any event, the correction is dealt with as a compensation event. Obviously, it can lead to reduced prices. It is clear that it does not allow the project manager to correct mistakes in the contractor's pricing of the bills of quantities.

It is not thought that there is any justification for the view of some commentators that there is an inconsistency between this clause and clause 63.8 (see below). Clause 63.8 does not deal with bills of quantities. Clearly, the project manager must be allowed to deal with 'mistakes' in the bills of quantities as seems appropriate. There may or may not be a price for the employer to pay.

A very important new clause 60.7 has been inserted into Options B and D. It is simple and straightforward. It provides that where a compensation event is to be assessed as a result of the correction of an inconsistency between the bills of quantities and any other document, there is a presumption that the contractor has taken the bills of quantities as correct. It is not clear why this clause refers to any other document and not any other document in the Works information which is, after all, the basis for what the contractor undertook to do.

A change, after the contract date, in the law of the country in which the site is located – clause X2.1 (**Secondary Options**)

Where this secondary option applies, 'law' would be given its ordinary meaning and, in this instance, the ordinary meaning is not restricted in any way. Therefore, the clause is very broad and any change in any aspect of the applicable law of the site of the Works is a compensation event. It should be noted that the law of the contract as stated in the contract data may be stated as a different country from the site of the Works. For example, it is not unknown for a contract for Works in Europe to be carried out under English law. This could lead to confusion and it would have been consistent to have linked this clause to the law of the contract instead of the law of the country.

It is quite conceivable that there may be dozens of compensation events on this ground during the life of any contract. It should be noted that, although the contract date marks the beginning of such events, there is no concluding date indicated. In practice, of course, it is only those changes in the law which have an effect on the cost of the project which will be worth notifying by the contractor. The effect of the change in the law may be to reduce the total defined cost, in which case the prices are also to be reduced. Perhaps, for that reason, the clause empowers the project manager to give notice to the contractor and to instruct it to submit quotations.

Some commentators make reference to the guidance notes issued in support of this contract. However, care should be taken in using the notes. It should be remembered that, although they may be helpful, they do not have the force of law nor do they bind the parties. An adjudicator, arbitrator or judge trying to decide the meaning of the clauses would not be able to refer to the notes.

An instruction given by the core group to the partners to change the partnering information – clause X12.3(6) **(Secondary Options)**

Option X12 is the partnering option. The core group is the partners listed in the schedule of core group members. Instructions from the core group to the partners which change the partnering information constitute compensation events. Partnering information is defined in clause Z12.1(4) as information specifying the way in which the partners work together. The clause states that it may result in reduced prices.

Delay in making the advanced payment – clause X14.2 **(Secondary Options)**

Where secondary option X14 applies, the employer must make an advanced payment to the contractor of the amount stated in the contract data. It must be made within the time specified. That is within four weeks of the contract date. If an advanced payment bond is required, the payment may be delayed until not later than four weeks from the date the employer receives the bond, if that is later than the contract date. If the employer is late in making the payment, it ranks as a compensation event. Late receipt of the bond may be because it does not conform to the requirement in the Works information or, because the project manager cannot accept the bank or insurer proposed by the contractor on account of its poor commercial position relative to the value of the bond.

Clearly, delay in receiving the advanced payment may result in serious financial and time consequences for a contractor.

Correction of a defect for which it was not liable by the contractor – clause X15.2 **(Secondary Options)**

Option X15 refers to the limitation of the contractor's liability for design to reasonable skill and care. Clause X15.1 states that the contractor is not liable for design defects to the extent that it proves that it used reasonable skill and care. However, clause X15.2 simply refers to the correction of a defect, not a design defect. Clause 11.2(5) defines 'Defect' very broadly to cover both defects because part of the Works is not in accordance with the Works information and contractor's design defects. Therefore, it appears that this compensation event is not limited to the correction of design defects, but that it is a compensation event if the contractor corrects any defect for which it was not liable. It must always be implied that the contractor would be entitled to payment for the correction of defects for which it was not liable.

Suspension of performance by the contractor under the Housing Grants, Construction and Regeneration Act 1996 – clause Y2.4 **(Secondary Options)**

This is straightforward. The Act entitles the contractor to suspend performance of all its obligations if the employer has not made payment of all money properly due by the final date for payment and has not served any effective withholding notice. This clause makes such suspension into a compensation event. By doing so, it goes

further than the Act which only entitles the contractor to an extension of the contract period.[13] Because it is a compensation event, the contractor may be entitled also to additional payment.

18.2.3 Procedure

The procedure is set out in clauses 61–65 inclusive. These are very complex in operation.

Clause 61 – notifying compensation events

If the event is due to either the project manager or the supervisor giving an instruction or changing a decision, clause 61.1 states that it is for the project manager to notify the contractor of the event. The project manager must do this at the time the instruction is given or the earlier decision is changed. This is a change from the previous requirement to notify 'at the time of the event'. The new wording has the merit of being clearer than the old. Of course, the project manager may not then know that it is a compensation event, but there is no provision for the project manager to notify an event later. The notification must be separate from the instruction (clause 13.7). It is suggested that such communications are put into separate envelopes, even if sent on the same day. That may be over-cautious and it is difficult to envisage any tribunal coming to the conclusion that a notice is invalid, because it is in the same envelope as another communication. What is clear is that separate pieces of paper are required. There will be a need for close liaison between project manager and supervisor if the supervisor's actions are not to be overlooked.

It appears strange that the contractor has to rely on the notification by the project manager before it can become entitled to additional payment or extension of the contract period in respect of these events. There may be a temptation for the project manager to fail to give notice where the event clearly is a matter concerning the employer's default. This would be a wrong view, because the failure to notify and consequently give an appropriate extension of time in such instances might put time at large. There is no simple answer to this except that if the project manager does fail to give notice, it amounts to a breach of contract for which the employer may be vicariously liable if aware.[14] If the contractor notifies the employer of the project manager's breach, the employer is obliged to take some action or itself be in breach. It is arguable that it thus creates another compensation event under clause 60.1(18). The contractor would be obliged to give early warning notice to the project manager under clause 16.1 in any event. Therefore, if the project manager is in breach of obligation to notify the contractor under clause 61.1, the contractor should give early warning to the project manager and serve notice on the employer that there has been a breach. In any event, it is likely that clause 61.3 is broad enough to permit the

[13] At the time of writing the Local Democracy, Economic Development and Construction Act 2009, which inserts s. 112(A) into the 1996 Act to correct the oversight, has not come into force.
[14] *Penwith District Council v V P Developments Ltd* 21 May 1999, unreported.

contractor to notify the project manager in circumstances where the project manager has a duty to do so, but has not notified it.

The compensation events which fall into these categories are not listed in the contract, but an inspection of clause 60 suggests that they are 60.1(1), (4), (7), (8), (10) and (17). Instructions or changed decisions must be put into effect by the contractor immediately. If the project manager simply wishes to discover what it may cost to issue an instruction or change a decision, clause 61.2 permits the project manager to instruct the contractor to submit a quotation for 'proposed' instructions or changed decisions. In this instance, of course, the contractor does not put them into effect.

The use of the present tense allows only a surmise that the contractor's duty to notify a compensation event arises under clause 61.3 if the contractor believes it is a compensation event which has happened or which the contractor expects to happen and if the project manager has not already notified the event to the contractor. It is a surmise based on the fact that where a power is expressed, the word 'may' seems to be used, at least in clause 6. The contractor must act no later than eight weeks after it became aware of the event. That is a big improvement on the meagre two weeks allowed under the previous edition. The project manager's obligation to notify the contractor arises under clause 61.1 only in connection with a small number of the events. Therefore, the onus is on the contractor to notify in most instances. No doubt the contractor will do this in all instances, just to be sure.

Becoming aware

It will be a matter of fact, although perhaps difficult to prove, just when the contractor became aware of the event. The only restriction on such notification taking place at any time, provided only that it is no later than eight weeks after the contractor became aware, is set out in clause 61.7. That clause states that a compensation event 'is not notified' (presumably this means 'is not to be notified' when translated from NEC 3 parlance) after the defects date. The defects date is found in the contract data supplied by the employer. It appears to be roughly the equivalent of the end of the defects liability period in JCT contracts. Therefore, no notification by either contractor or project manager can take place after this date. In practice, it will be difficult for a contractor to demonstrate that it did not become aware of an event very soon after it occurred except in wholly unusual circumstances.

If it can be shown that the contractor became aware on a certain date and did not notify within eight weeks of that date, it is clear from clause 61.3 that it is not entitled to the benefit of additional time and/or money. This is a re-wording of the clause in the previous edition and leaves little room for doubt that the contractor's notice within eight weeks is intended to be a condition precedent to entitlement to time and money. Whether or not it does operate as a condition precedent may be open to doubt in view of the perceived need to add a rider to deal with the situation if the project manager should have notified. The exclusion of the condition applies only if the project manager should have notified the event but failed to do so. This may appear to be for the benefit of the contractor, but it actually benefits the employer by leaving open the opportunity to allow an extension of time even where the contractor has itself failed to notify within the period.

Quotation

Under clause 61.1, the project manager must request a quotation from the contractor unless it has been already submitted or the event is due to the fault of the contractor. Clause 61.4 deals with the project manager's duty when in receipt of the contractor's notification. The project manager must decide, within a week of the notification or such longer period as agreed by the contractor. It is not clear whether it is the date of issue or receipt of the notification which is intended although the wording suggests that it is the receipt which is the trigger. The clause lists four categories for the event. It:

- arises from the contractor's fault; or
- has not and is not expected to happen; or
- has no effect on actual cost or completion; or
- is not a compensation event.

If the project manager decides that the event falls into one or more of these categories, the project manager need do no more than notify the decision to the contractor that the prices, the completion date and the key dates are not to be changed. However, a project manager who decides that it does not so fall, in other words that it is valid, must instruct the contractor, as in clause 61.1, to submit a quotation. If the project manager fails to notify the contractor within the prescribed week, the contractor may notify the project manager. The contract states 'to this effect' and the meaning is not really clear which effect is intended. One may assume that, in the circumstances, the only thing which the contractor would notify the project manger would be that the compensation event is valid and gives entitlement to time and/or money and that the project manager has failed to notify within the relevant time period. The project manager has two weeks to respond, presumably to disagree, otherwise the failure is to be taken as acceptance that it is a compensation event and an instruction to submit quotations.

Early warning

Under clauses 16.1–16.4 inclusive, the contractor and the project manager have a duty to give early warning of various matters which obviously include compensation events. Clause 61.5 provides that a project manager who comes to the decision that the contractor did not give early warning of the event which an experienced contractor would have given, must so notify the contractor at the time the contractor is instructed to submit a quotation.

This becomes important when the project manager comes to assess the events, because clause 63.5 states that where such notification has been given under clause 61.5, the event is assessed as if the contractor had given early warning. Obviously, if the contractor had given early warning, the project manager might have taken various steps to reduce the impact of the event. On the other hand, it is conceivable that to treat it as if early warning had been given, when in fact it had not, could produce a result in the contractor's favour. For example, if early warning was given in a particular instance, the project manager might have issued further instructions to reduce

the impact of the event. In fact, the early warning was not given and the instruction remained unissued. However, if it is treated as if early warning had been given, it might be argued that the lack of instructions on the part of the project manager was a matter solely for the project manager and could not be the cause of any reduction in time and/or money for the contractor. The precise intention behind this provision is difficult to discern.

Forecasting

In submitting a quotation, the contractor will be obliged to incorporate some forecasts of the effects of the event. Clause 65.2 provides that an assessment will not be revised later because the forecast is found to be wrong. Due to the short timescale during which most events must be notified, the effects of the event will be unknown or only partly known. The contractor will, therefore, take some care about its forecasts, usually erring on the generous side. If, under clause 61.6, the project manager comes to the decision that the future effects of a compensation event are too uncertain to be reasonably forecast, the project manager 'states assumptions' about the event. Once again, the strange use of the present tense does not make the task of interpreting what this means easy, but it is presumed that the clause means that the project manager has a duty to state assumptions. From the contractor's point of view, the good thing about the project manager's assumptions is that, under clause 61.6, unlike forecasts, if any of them is later found to be wrong, the project manager 'notifies' (again presumably an obligation to notify) a correction. The added advantage of this for the contractor is that the notification of a correction by the project manager itself ranks as a compensation event (clause 60.1(17)).

Clause 62 – quotations for compensation events

This edition of the contract introduces a requirement that the project manager, before instructing alternative quotations, must discuss with the contractor different practicable ways of dealing with the compensation event. The wording gives very broad scope to the discussion, but it does not state that the project manager must take the views of the contractor into account. Even if it did, there is no suggestion that the project manager cannot deal with the compensation events in whatever manner seems appropriate. The preamble to this clause has presumably been inserted to comply with the expressed spirit of the contract. It has been seen that quotations usually cannot be amended to suit changed circumstances which come to light as the project proceeds. With the exception noted in clause 61.6, the quotations are fixed. They are to comprise the contractor's proposals about changes to the prices and its assessment of the amount of delay to the completion date and the key dates resulting from the event. It is clear that the contractor has a duty to submit the details or calculations of its assessment. It must also submit a revised programme with its quotation if it believes that the accepted programme will be affected (clause 62.2).

Clause 62.1 provides that either the project manager may instruct the contractor to submit alternative quotations based on different ways of dealing with the event or the contractor may submit additional quotations on its own initiative, provided the

contractor considers its suggestions to be practicable. There may be alternative ways of dealing with the event. One may be cheaper, but the other more effective. The contractor may well think of an entirely different way of resolving what is essentially a problem in each case. It is for the employer, advised by the project manager, to decide.

Under clause 62.3 quotations must be submitted within three weeks of the project manager's request. It is at least arguable that the time limit does not apply to a contractor submitting an alternative quotation under clause 62.1. The project manager has very little time to respond to a quotation; just two weeks from the submission of the quotations. These time periods are subject to clause 62.5 which allows them to be relaxed if the project manager and the contractor agree to an extension of the time periods before the quotation or the project manager's response is due. It is the duty of the project manager to notify the agreed extensions to the contractor. The project manager may reply in one of four ways:

- By giving the contractor an instruction to submit a revised quotation under but before doing so, the project manager must explain the reasons to the contractor. These reasons should be in writing. These may simply be that the quotations submitted triggered the idea of an entirely new approach. The project manager must give reasons, it appears, for the purpose of assuring the contractor that the revised quotation is not requested on a whim. However, there is nothing which seems to prevent the project manager so requesting and, indeed, giving that as the reason. The contractor has a further three weeks to submit the revised quotation. Presumably the three weeks commence on receipt of the instruction. There appears to be nothing to stop the contractor instructing the contractor to submit a revised quotation several times in succession providing that, each time, reasons are given.
- By a simple acceptance of the contractor's quotation.
- After a request under clause 61.2 for a quotation, that a proposed instruction or changed decision will not be given.
- If the project manager is not minded to accept any quotation and does not believe that the position can be rectified by asking for a revised quotation, the project manager may notify the contractor that he or she will make their own assessment.

Clause 63 – assessing compensation events

Although the word 'assessed' is used to state how the effects of a compensation event are to be determined, rather than such words as 'calculated' or 'ascertained', the word is nowhere defined in the contract. The ordinary everyday meaning of assess is to fix an amount or to estimate.[15] It therefore seems that something less than complete accuracy is acceptable.

The key figures are the contractor's actual defined cost of work done, the forecast defined cost of work not yet done and the resulting fee. Clause 52 explains 'Defined Cost' as amounts calculated using rates and percentages stated in the contract data and other amounts at open market or competitively tendered prices with deductions

[15] *The Concise Oxford Dictionary.*

for all discounts, rebates and taxes which can be recovered. Contractor's costs not included in the defined costs are treated as included in the fee. The definition of 'Defined Costs' is to be found in the main Options. Options A and B has one definition while Options C, D, E and F have another.

The dividing line between work done and not done is set at the date the project manager instructed the contractor to provide quotations. If the project manager failed to so instruct, it is the date when the instruction should have been given. It is the effect of the compensation events on such costs which determine the amount of compensation. The effect encompasses both the effect on cost and on time and the costs are the direct costs of the event (i.e. the valuation) as well as what JCT contracts would refer to as direct loss and/or expense. The assessment, which must be carried out in the first instance by the contractor in its quotations and, possibly later by the project manager if necessary, is a complex affair. Partly, that is due to the structure of the main options, and partly to the NEC approach to the subject. It has to be said again that many clauses are less than crystal clear and the need to go through the process many times as many compensation events are notified will stretch the resources of both contractor and project manager. The problem is that the system requires the calculation of what it would have cost the contractor to carry out the work without the compensation event and compare with an exercise to calculate what it cost taking the effect of the event into account. This is clearly a lot of work.

Clause 63.1 makes reasonably clear that the effect of the compensation event upon actual defined cost of work done, the forecast defined cost of work not yet done and the resulting fee is to be expressed as a change to the prices. Therefore, broadly it is the effect on the actual defined cost and forecast defined cost which is translated to the prices. Except in the situations where the contract expressly so states (e.g. clause 60.6 of Option B) the prices are not reduced if the effect of the event is to reduce the total defined cost (clause 63.2).

Difference between 'planned Completion' and 'Completion Date'

The difference between 'planned Completion' and 'Completion Date' is important in clause 63.3. The delay to the completion date is to be assessed as the length of time that the compensation event has caused planned completion to be later than planned completion shown on the accepted programme. Likewise, it is the difference between the planned key date on the programme and the planned date when it will be met. The exercise will necessitate careful examination of the programmes in the normal way, but with regard to the planned completion, it is only when a decision has been reached about the delay to the planned completion that the length of that delay is transferred to the completion date; similarly with regard to the key date. The contractor should be able to demonstrate its reasoning by means of the revised programme that it is obliged, under clause, 62.2 to provide to the project manager.

The programme

The accepted programme is the crucial document in assessing delays. However, that does not mean that, if the contractor has indicated an optimistic completed date and

key dates, these are the dates which will be used. Clause 31 makes clear (or as clear as the insistence on using the present tense will allow) that when submitting the programme for acceptance the contractor must show the key dates and the completion date. The completion date and the key dates are defined in clauses 11.2(3) and 11.2(9) respectively as the dates in the contract data. Therefore, the contractor does not have freedom to insert other dates of its choosing. If the contractor did attempt to insert other dates, the project manager could refuse to accept the programme on the ground that it did not show the information required by the contract (clause 31.3).

Clause 63.4 is new. It states that the rights of the parties in respect of a compensation event are restricted to changes to prices, the completion date and key dates. It is not thought that this clause is sufficient to exclude the common law rights of either party and it seems doubtful that is the purpose behind its inclusion. The better view is that it is to be construed in regard to contractual rights only. It is merely emphasising what is self-evident from reading the contract as a whole.

Clauses 63.5, 63.6 and 63.7 set out various terms of general application. Clause 63.5 refers to the effect if the contractor fails to give early warning and the project manager has notified the contractor. This provision has been discussed above. Clause 63.6 requires the assessment to include risk allowances for cost and time for matters which have a significant chance of occurring and which are at the contractor's risk. Clause 63.7 reasonably states that assessments are to be made on the assumption that the contractor has reacted both competently and promptly to the event, that any defined cost is incurred reasonably and that the accepted programme can be changed. The general law would imply these assumptions in any event.

Cost and time risk allowances

The most difficulty is caused by clause 63.6 which states the assessment of the effect of a compensation event must include cost and time risk allowances. Matters which are at the contractor's risk are referred to in clause 81.1. Some commentators even believe that the effect of this clause is that the contractor must bear the risk of such things as ground conditions which an experienced engineering contractor should have anticipated. It is reasonably clear that certain risks under clause 81.1 must be borne by the contractor. Clause 81.1 states that those risks are the risks not carried by the employer. The contractor must bear such risks from the starting date of the contract until the defects certificate has been issued. It is perfectly sensible and in accordance with law that the parties must stand by their bargain and that, in respect of the Works for which the contractor originally contracted, it will bear such risks. However, in this instance, the clause is dealing with the effects of a compensation event.

By its very nature, a compensation event is one over which the contractor has little or no control. Many of the compensation events rank as breaches of contract on the part of the employer for which the contractor could expect to recover damages sufficient to put itself in the position it would have occupied if the breach had not occurred. It is obvious that the effect of a compensation event could well include what would normally be considered as contractor's risk items under clause 81.1. The

contractor's costs for dealing with such items would also be part of the recoverable damages. Indeed, it appears that the contractor can raise a claim at common law for the whole of its damages where a compensation event is also a breach of contract on the part of the employer.

This is not a matter that the contractor must include for its risk items as part of a quotation to carry out additional work. Here, the contract is dealing with the assessment (which may be the contractor's quotation or it may be the project manager's assessment) consequent upon a compensation event.

Although the wording of clause 63.6 could be much clearer (hence the difficulty) the commonsense interpretation of it is that the assessment of the effect of a compensation event must include the cost to the contractor of what would otherwise be cost and time risk allowances for matters which have a significant chance of occurring and are at the contractor's risk under the contract. That also appears to be the legal interpretation. If the contractor is preparing the assessment, it will include its costs and, if the effects are in the future, it will have to make a forecast. Such a forecast will no doubt be on the generous side.

Ambiguities and inconsistencies

Clause 63.8 deals specifically with compensation events which arise from instructions to change the Works information in order to resolve an ambiguity or inconsistency. The way that it is to be treated depends, again quite reasonably, on whether it is the information provided by the employer or by the contractor which is changed. If it is the employer's information, the prices, the completion date and the key dates are assessed in the way most favourable to the contractor. If it is the contractor's information, the assessment is to be done in the way most favourable to the employer. It is unlikely that the general law would quite imply this procedure. It is similar to, but goes further than, the *contra proferentem* rule of contract construction.

Clause 63.9 is a new clause to NEC 3. It states that if a change to the Works information (which obviously must have been instructed by the project manager under clause 14.3) causes the description of a condition for a key date to be incorrect, the project manager must correct the description and it must be taken into account when the compensation event for the change (clause 60.1(1)) is assessed.

Main options

Clauses 63.10, 63.11, 63.12, 63.13, 63.14 and 63.15 deal with variations concerning the main options. Assessments under option A and C will be in the form of changes to the activity schedule, but assessments under options B and D will be in the form of changes to the bills of quantities. However, under options B and D, the project manager and the contractor may agree to use the lump sums and rates in the bill of quantities instead of the actual cost and resulting fee. No doubt this will appeal to many. In the case of main contract options C, D and E, if the project manager and the contractor agree, the contractor may carry out the assessment by using the shorter schedule of cost components. In any event, where the project manager is to assess, the shorter schedule may be used. The recovery of the fee will usually amount

to the difference between the fee percentage applied to defined cost before and after the effect of the compensation event is taken into account.

Clause 63.10 (Options A and B) provides that if the total defined cost is reduced by an event which is a change to the Works information or a correction of the project manager's assumption in assessing an earlier event, the prices are to be reduced. Clause 63.11 (Options C and D) is the same as clause 63.10 except that it excludes a change to employer's Works information where the change was proposed by the contractor and accepted by the project manager. Clause 63.12 (Options A and C) stipulates that assessments for changed prices are to be changes to the activity schedule while clause 63.13(Options B and D) states that assessments are to be changes to the bills of quantities. This simply reflects the different documents employed in these options, but they add that the project manager and the contractor can agree that, instead of the defined cost, they use the rates and lump sums for assessment. Clause 63.14 (Option A) provides that the project manager and the contractor can agree that, instead of the defined cost, they use the rates and lump sums for assessment. Clause 63.15 (Options C, D and E) provide that if the contractor and the project manager agree, the contractor must and the project manager may assess using the shorter schedule of cost components.

Clause 64 – Project manager's assessments

This clause sets out stipulations regarding the assessment of a compensation event by the project manager. This should be the exception, because usually the contractor will have been requested to provide a quotation using the principles set out in clause 63. Only if the contractor fails to satisfy all the criteria may the project manager act. Of course, it is initially a matter for the project manager to decide whether such failure has occurred so as to justify intervention. There are six instances where the project manager may carry out the assessment. A result of the weird sentence construction is that the project manager may have a duty and not just the power to assess in these instances. They are set out in clauses 64.1 and 64.2. They are if:

- the contractor fails to supply the quotation and details within the time allowed. (This is straightforward. If the contractor does not comply with the three week time period set out in clause 62.3 or such extension of that time as agreed under clause 62.5);
- the contractor, in the opinion of the project manager, fails to assess the event correctly in its quotation and the project manager does not request a revised quotation. (Reference to 'correctly' can only mean in accordance with the rules set out in the contract. The contractor's assessment is not incorrect simply because it does not accord with the project manager's view);
- the contractor fails to submit a programme required by the contract when it submits its quotation. (Again, this is straightforward. Obviously, if the programme for the remaining work is unaffected by the compensation event, the requirement to provide a revised programme under clause 62.2 falls away);
- the contractor has submitted a quotation, but the project manager has not accepted the accompanying programme for one of the reasons stated in the contract. (Clause 31.3 sets out these reasons as being if the programme is not practicable, if it does not show the information required under the contract, if it is not a

realistic representation of the contractor's plans, or if it does not comply with Works information);
- there is no accepted programme; or
- the contractor has failed to submit a revised programme for acceptance.

It is not quite clear why the last two reasons are separated from the others in the contract. The only difference is that the project manager seemingly has a free hand in assessing the compensation event in the first instance, but in the second instance the project manager's own assessment of the programme must be used. Since the second instance deals with those circumstances where there effectively is no programme, it seems that the project manager has little choice in any event. It is difficult to see why the project manager should not do that in the first instance also if it seems appropriate.

Clause 64.3 could be drafted more clearly. The first phrase: 'The *Project Manager* notifies the *Contractor* of his assessment of a compensation event. . .' is clear if 'notifies' is taken to mean 'must notify'. However, the remainder of the first sentence: '. . .and gives him details of it within the period allowed for the *Contractor's* submission of his quotation for the same event.' is less clear. Presumably, the project manager is to notify the assessment and give details at the same time. But this time is the period allowed for the contractor to submit its quotation. Clause 62.3 states that such period is three weeks of being instructed to do so by the project manager (assuming for simplicity that no extension has been agreed under clause 62.5). But it is usually not until the end of the three weeks period that the project manager will know that he or she has to carry out the assessment. The last sentence caters for this by stating that the period begins when it becomes apparent that there is the need for the assessment. The clause does not state to whom it should become apparent, presumably the project manager. It would have been much easier to simply specify that the project manager should notify the contractor of the assessment within three weeks of becoming aware of the need to make an assessment.

However, the clause could conceivably be interpreted as meaning that the project manager must notify the contractor of the fact of the assessment and it is only the details which are subject to the time constraints.

Clause 64.4 is also new. It seems to be intended as a failsafe device although the wording leaves gaps. It provides that if the project manager does not carry out the assessment within the stipulated period, the contractor may serve notice on the project manager to that effect. Read strictly that means that the notice should say something like: 'Take this as notice that you have not assessed a compensation event within the time allowed.' A little more flesh is put on the bones by the provision that, if the contractor has submitted more than one quotation, it must state which quotation it proposes should be accepted. However, it follows that if only one quotation has been submitted by the contractor, it need say nothing further in the notice. One imagines that the average project manager may require a little more prompting than that.

Nevertheless, if the project manager does not reply within two weeks (presumably of receipt) of the notice, the notice is treated as acceptance by the project manager of the contractor's quotation. Surely it ought to be the failure to *reply* which is treated as acceptance? The clause gives no indication of what the project manager ought to say in the reply. Taken at face value, any kind of reply, short of acceptance itself, would be enough to prevent the contractor's quotation being treated as accepted.

Certainly a reply incorporating the project manager's assessment would settle the matter, but it appears that a reply stating that the project manager disagreed with the contractor's quotation would be enough to prevent it becoming accepted. The question is: 'What then?'.

Clause 65 – implementing compensation events

This is a strange combination of words. Leaving that aside and trying to interpret this clause on its own terms, implementing the compensation events is not straightforward. Until they are implemented, the contractor is entitled to neither additional money nor additional time. Clause 65.1 purports to state how and when implementation occurs. The clause has been clarified in NEC 3. The clause proceeds to give a definition of when implementation takes place by stating that it is the project manager's notification of:

- acceptance of a quotation; or
- completion of the project manager's own assessment; or
- when the contractor's quotation is treated as accepted.

Following from the provisions of clause 65.1, it appears that, under the provisions of clause 61.1, the contractor is required to carry out the instruction or changed decision before the event is implemented. Clause 65.2 makes clear that an assessment is not to be revised just because it was based on a forecast which is later shown to have been wrong.

Clauses 65.3, 65.4 and 65.5 set out certain variations applicable to the main options. Under Options A, B, C and D, the project manager is to include in the notification, the changes to the prices, the completion date and the key dates included in the notification implementing an event. However, under options E and F, cost reimbursable and management contracts respectively, the project manager is to include the changes to the forecast amounts. Both options E and F produce what are cost reimbursable contracts.

18.3 Delay damages

18.3.1 Clause X7

Delay damages is not part of the core clauses of NEC. It is only a secondary option: option X7. If delay damages is not chosen, the employer must resort to ordinary unliquidated damages as a remedy for the contractor's late completion.[16]

18.3.2 Commentary

Delay damages appear to be the same as liquidated damages under other contracts and at law. There is no good reason for adopting a new name, because the courts will

[16] See Chapter 3, Section 3.1.

look to the substance rather than the form to decide whether a provision is, in fact, liquidated damages.[17] The general comments on liquidated damages in Chapter 3 are equally applicable to delay damages under NEC. The contractor is to pay delay damages from the completion date until either completion or when the employer takes over the Works. There is no requirement for the equivalent of a certificate of non-completion from the project manager. The rate of delay damages are to be set out in the contract data. Where options X5 (sectional completion) and X7 are used together, the individual damages are to be set down for each section. The contract data also provide for the situation where Option X7 is used without Option X5.

The delay damages are set at a rate per day. This might lead to the contractor successfully arguing that the amount is really a penalty unless, for example, the employer can show that the daily rate for Saturday and Sunday, which is the same as for the other days, was a genuine pre-estimate of the loss likely to be suffered by the employer in the case of an overrun.

Clause X7.1 provides that the contractor 'pays' (presumably 'must pay') damages at the rate in the contract data. It appears that, unlike the position under other contracts, the project manager takes the amount of delay damages into account when certifying payment (clause 50.2). Clause R1.2 provides that if the completion date is changed after delay damages have been paid, the employer must pay the overpayment with interest. Interest is to run from the date of payment to the date of repayment which is an assessment date. This is more advantageous for contractors than JCT contracts which make no provision for interest in these circumstances.

A welcome addition is clause X7.3 which was noted as missing in the last edition of this book. Clause X7.3 deals with the situation which occurs if the employer takes over part of the Works before completion. In common with other contracts, NEC 3 provides that the damages are to be reduced from the date on which the part was taken over. However, unlike other contracts, NEC 3 requires the proportionate reduction of the damages to be according to the benefit to the employer of taking over the part of the Works as a proportion of the benefit of taking over the whole of the Works not already taken over. Other contracts proportion the reduction according to the value of the part compared to the value of the whole of the Works. Although it may be argued that it is easy to calculate the value, but quite difficult to calculate the benefit and that disputes will arise, the reference to loss of benefit is better related to the concept of damages than simply a reference to value.

[17] *Kemble v Farren* [1829] All ER 641.