



## LEGAL BRIEFING

### *RBG Ltd ("RBG") v SGL Carbon Fibers Ltd ("SGL")* [2010] CSOH 77, Lord Menzies

#### *The Facts*

RBG was engaged by SGL to perform certain works at SGL's premises. The contract incorporated the NEC3 Engineering and Construction Contract, Option 3 ("NEC3"), which is the target cost option. Disputes arose over RBG's entitlement to payment for certain invoices. RBG commenced an adjudication and was awarded the majority of the sums it had invoiced. SGL did not pay the sums awarded. At the hearing for enforcement of the decision, SGL submitted that the adjudicator had failed to exhaust his jurisdiction, and/or had acted in breach of natural justice, as he had not taken into account SGL's defence, that RBG had been overpaid in earlier invoices.

The adjudicator had decided that he was only entitled to consider the amounts due to RBG, contained in the specific invoices referred to him. He thought that this meant he could not take into account an earlier overpayment, as this was a matter contained in an earlier invoice which was not part of the subject matter of this dispute.

#### *The Issue*

Even though the overpayments were relevant to earlier invoices and not specifically referred to the adjudicator in the notice of adjudication and/or the referral notice, should the adjudicator have considered them when making his decision?

#### *The Decision*

The Judge considered that the adjudicator should have taken the overpayment into account when considering the amount due to RBG. The contractual mechanism under the NEC3, for the assessment of payments is based on an accumulating Payment for Works Done to Date ("PWDD"). The quantity surveyor makes an assessment of the PWDD as at the assessment date, and can make further contractual additions or deductions to this figure. This mechanism requires the quantity surveyor to calculate the PWDD as an accumulating balance, and allows for the correction of earlier mistakes by the quantity surveyor. The NEC3 adjudication provisions effectively require the adjudicator to perform the same task. Therefore, the Judge decided that in order to calculate the PWDD, the adjudicator had to have regard to the earlier overpayments.

In addition to this, the Judge held that the general rule of adjudication was that the responding party was entitled to rely on any argument in defence of a claim.

#### *Comment*

It is rare that a case reaches the courts on the subject of an NEC3 contract, particularly one where the NEC3 conditions are analysed. It should be seen as useful guidance for parties and adjudicators involved in adjudications involving NEC3 contracts. Whilst it should always have been open to SGL to raise the overpayment as a defence, following *Cantillon v Urvasco*, the case confirms that if the level of PWDD is challenged by either party, then the adjudicator is required to make his own assessment. Further, each party should be prepared to substantiate their position with all the relevant paperwork, and cannot simply rely on the quantity surveyor's assessment.

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Finally, this case highlights the importance for contracting parties, contract administrators and adjudicators as well of the need to be aware of the differences in operating, or resolving disputes over, whatever form of contract may have been used.

Nicholas Gould  
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