

# Clause 3

## Summary

Clause 3 deals with the duties and obligations of the Engineer and his assistants.

Sub-Clause 3.1 deals with the role and duties of the Engineer. The Engineer is deemed to act for the Employer. The Engineer has no authority to relieve the Contractor of his duties, obligations or responsibilities under the Contract; nor can the Engineer amend the Contract.

Under Sub-Clause 3.2 the Engineer can delegate authority to any assistants; however, the Engineer cannot delegate the responsibility to make Determinations. Under Sub-Clause 3.3 the Engineer may issue instructions or modified Drawings at any time, which are necessary for the execution of the Works. If the instruction constitutes a Variation, then it is dealt with under Clause 13 [*Variations and Adjustments*]. The Contractor is required to comply with any instruction given by the Engineer or delegated assistant.

Sub-Clause 3.4 deals with the replacement of the Engineer. The Employer must not replace the Engineer with someone against whom the Contractor raises reasonable objection.

Sub-Clause 3.5 deals with Determinations. When making a Determination the Engineer should consult with each of the Parties and, if agreement cannot be reached, make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances. Both Parties are required to give effect to any Determination unless, or until, it is revised under Sub-Clause 20.1 [*Claims, Disputes and Arbitration*].

## Origin of clause

Clause 3 of FIDIC Red Book 1999 had its origins in clause 2 of the FIDIC Red Book 4<sup>th</sup> edition. Under the FIDIC Red Book 4<sup>th</sup> edition the Engineer had an obligation to act impartially when exercising any discretion. This obligation has been omitted from the 1999 edition where the Engineer has a more limited obligation to make a fair determination when the Contract requires the Engineer to agree or determine a matter.

## Cross-references

Reference to Clause 3 or to a determination is found in the following clauses:

Sub-Clause 1.1.2      Parties and Persons  
Sub-Clause 1.1.2.4    Definitions – Engineer

Sub-Clause 1.1.2.6	Definitions – Employer’s Personnel
Sub-Clause 1.9	Delayed Drawings and Instructions
Sub-Clause 2.1	Right of Access to the Site
Sub-Clause 2.5	Employer’s Claims
Sub-Clause 4.3	Contractor’s Representative
Sub-Clause 4.7	Setting Out
Sub-Clause 4.12	Unforeseeable Physical Obstructions
Sub-Clause 4.19	Electricity, Water and Gas
Sub-Clause 4.20	Employer’s Equipment and Free-Issue Material
Sub-Clause 4.24	Fossils
Sub-Clause 7.4	Testing
Sub-Clause 8.9	Consequences of Suspension
Sub-Clause 9.4	Failure to Pass Tests on Completion
Sub-Clause 10.2	Taking Over of Parts of the Works
Sub-Clause 10.3	Interference with Tests on Completion
Sub-Clause 11.4	Failure to Remedy Defects
Sub-Clause 11.8	Contractor to Search
Sub-Clause 12.3	Evaluation
Sub-Clause 12.4	Omissions
Sub-Clause 13.2	Value Engineering
Sub-Clause 13.7	Adjustment for Changes in Legislation
Sub-Clause 14.4	Schedule of Payments
Sub-Clause 15.3	Valuation at Date of Termination
Sub-Clause 16.1	Contractor’s Entitlement to Suspend Works
Sub-Clause 17.4	Consequences of Employer’s Risks
Sub-Clause 19.4	Consequences of Force Majeure
Sub-Clause 20.1	Contractor’s Claims

In most cases this is a reference to Sub-Clause 3.5 [*Determinations*].

### **Sub-Clause 3.1 - Engineer’s Duties and Authority**

Sub-Clause 3.1 sets out the Engineer’s duties and authority.

#### Appointment

“*The Employer shall appoint the Engineer.*” This is a mandatory obligation on the Employer and should be read with the definition of Engineer at Sub-Clause 1.1.2.4 which provides for the Engineer to have been both “*appointed*” and “*named in the Appendix to Tender*”. The provision in Sub-Clause 1.1.2.4 for the Engineer to have been “*appointed*” and “*named in the Appendix to Tender*” gives certainty and enables the Contractor to have carefully considered (and priced for) the named Engineer’s technical competence, reputation, impartiality, independence etc.

The Engineer comprises part of the Employer’s Personnel as defined in Sub-Clause 1.1.2.6. He is a person, which includes corporations and other legal entities (except

where the context requires otherwise) under Sub-Clause 1.1. Usually the Engineer is an independent consultant engaged under a separate consultancy agreement, but the Employer is not prevented from appointing one of his own salaried employees.

Although not expressly stated, it is accepted practice that the Engineer be appointed until issue of the Final Payment Certificate in order to administer properly the Contract. FIDIC Contracts: Law and Practice<sup>1</sup> states, “*The duration of the Engineer’s appointment is also not specified in the FIDIC forms but they expressly contemplate that it will continue until the issue of the Final Payment Certificate. Sub-Clause 14.11 of these Books requires the Engineer’s involvement in receiving the Contractor’s application and Sub-Clause 14.13 obliges the Engineer to issue the Final Payment Certificate. This may require the Employer to extend the appointment of the Engineer if the completion of the Works has been delayed or the Defects Notification period has been extended*”.

#### Duties assigned to the Engineer

The Engineer is someone appointed by the Employer to carry out the duties assigned to him in the Contract.

This Sub-Clause should not be read with any prior assumptions about the duties of the Engineer. Earlier editions of FIDIC and some other forms of contract give the Engineer a role which is not only a certifier and supervisor but also a quasi-arbitrator role. The Engineer under the FIDIC Red Book 1999 form does not have this role.

There is nothing in Sub-Clause 3.1 to say how the Engineer is to perform his duties. There is no obligation of fairness or equal treatment. The Engineer has no authority to amend the Contract and therefore has neither the right nor the duty to depart from the terms of the Contract even if he thinks the Contract is unfair. The Contract is defined in Sub-Clause 1.1.1.1 as “... *the Contract Agreement, the Letter of Acceptance, the Letter of Tender, these Conditions, the Specification, the Drawings, the Schedules, and the further documents (if any) which are listed in the Contract Agreement or in the Letter of Acceptance*”. The Contract, as defined, is not the consultancy agreement between the Engineer and the Employer (such as the FIDIC White Book, Client/Consultant Model Services Agreement, 4<sup>th</sup> edition, 2006).

Whilst there is no overarching obligation for the Engineer to act independently or impartially, as in the FIDIC Red Book 4<sup>th</sup> edition, where the Engineer is required to make a determination under Sub-Clause 3.5 he is obliged to make it “*a fair determination*” following consultation with the Parties, and when issuing a Payment Certificate under Sub-Clauses 14.6 and 14.13 he must “*fairly determine*” the amount due. See the commentary on Sub-Clause 3.5 below for further discussion.

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<sup>1</sup> FIDIC Contracts: Law and Practice by Ellis Baker, Ben Mellors, paragraph 6.17.

### Engineer's failure to carry out his duties

As the Engineer is not a Party to the Contract the obligation is on the Employer to have appointed (and by implication, keep appointed) an Engineer who shall carry out the duties assigned to him in the Contract. The Contract imposes an obligation on the Employer not to instruct the Engineer to depart from his duties under the Contract or to interfere with his carrying on his duties.

If the Employer fails to so appoint or the Engineer fails to carry out his duties, the Employer will be in breach of his obligation under the Contract to have appointed (or kept appointed) an appropriate person. If a dispute arises out of the Engineer's lack of appointment or the Engineer's failure to carry out his duties, such dispute may be referred to the Dispute Adjudication Board.

There are difficulties in bringing an Engineer into a contractual dispute between the Employer and the Contractor<sup>2</sup>. Many claims where a Contractor has sought to bring an action directly against an Engineer have failed. In *Pacific Associates Inc. v Baxter (COFA)*<sup>3</sup> the English Court of Appeal considered whether an Engineer owed a duty of care to a Contractor. Some of the factors the court considered in concluding that the Engineer owed no duty of care were: (a) insufficient proximity to establish the necessary duty of care; (b) that there was a contractual relationship between the Employer and Engineer; (c) that there was no direct contractual relationship between the Engineer and the Contractor; and (d) the Contractor could challenge the Engineer's role by claiming against the Employer. A similar decision was reached by the Hong Kong court in *Leon Engineering & Construction Co Ltd v KA DUK Investment Co Ltd*<sup>4</sup>, where the court dismissed an application for the Architect to be made second defendant on the grounds that they owed the Contractor a duty of care to give proper, timely and impartial consideration to the claimant's claims.<sup>5</sup>

Therefore, a failure by the Engineer to carry out his duties may result in a claim by the Contractor against the Employer directly: for example, where the Contractor is delayed or disrupted under Sub-Clause 8.4(e) [*Extension of Time for Completion*]. However, if the contract machinery for extending time for Employer risk and shared risk events is rendered inoperable by an act of prevention, time may be set at large, entitling the Contractor to a reasonable time within which to complete the Works and defeat any claim for delay damages. This may happen if, for example, there is no recourse to a Dispute Adjudication Board because one has not been appointed by the date stated in the Appendix to Tender.

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<sup>2</sup> Regard should, however, be had to the proper law of the contract. For example, under English law the Contracts (Rights of Third Parties) Act 1999 could potentially give a contractor a right of action against an Engineer if the Engineer's contract with the Employer identifies the Contractor as a person who is entitled to enforce a term that purports to confer a benefit on him.

<sup>3</sup> (1988) 44 BLR 33.

<sup>4</sup> (1989) 47 BLR 139.

<sup>5</sup> See also *John Holland Construction v Majorca Projects* [2000] 16 Const. LJ 114.

Alternatively, the Contractor may bring a claim in damages for breach of an implied term. In the case of *Merton LBC v Leach*<sup>6</sup> the responsibility of the Employer to ensure a contract administrator's compliance with his duties under a JCT form of contract was the subject of an implied term. Vinelott J stated:

*“In my judgment under the contract Merton undertook to ensure there would at all times be a person who would carry out the duties to be performed by the architect and that he would perform those duties with diligence, skill and care and that where the contract required the architect to exercise his discretion he would act fairly ... I accordingly agree with the arbitrator's conclusion that Leach are entitled to recover sums otherwise than in accordance with Clause 24(1) and 30 of the Contract in respect of such breaches as they can prove ...”.*

In the case of *Al-Waddan Hotel Ltd v Man Enterprise Sal (Offshore)*<sup>7</sup>, an Engineer's decision could not be given because Al-Waddan had ended the Engineer's retainer and took no steps to re-engage or replace the Engineer. In the circumstances, the court allowed the dispute to be referred directly to arbitration. In reaching this conclusion the court considered the Employer's breach of an implied term not to hinder or prevent performance of the FIDIC Red Book 4<sup>th</sup> edition.

In many countries a claim in negligence will be permissible against the Engineer by the Contractor where the Engineer's negligence has caused personal injury or damage to property. However, where the negligence has only resulted in economic loss then, only in a limited amount of jurisdictions, will a claim in negligence succeed – see, for example, Pennsylvania Supreme Court's decision in **Bilt-Rite Contractors, Inc. v. The Architectural Studio**, 866 A.2d 270 (Pa. 2005) and **The Lathan Company, Inc. v. State of Louisiana, Dept of Education et al 2016-913 La. App. 1 Cir. 12/6/17, 2017 WL 6032333**.

#### The Engineer and the Engineer's Staff

Unlike the FIDIC Red Book 4<sup>th</sup> edition, there is no provision for an Engineer's Representative. However, the second sentence of the sub-clause foresees that the Engineer will have “*staff*” who will carry out similar functions. The Engineer's staff must be “*suitably qualified*” and “*competent to carry out these duties*”. In this way, the Contract appears to assume that the Engineer will be an organisation and that the organisation will be staffed by suitably qualified people.

Under Sub-Clause 3.2 the Engineer's assistants must also be fluent in the language for communications provided in the Appendix to Tender. Whether the staff are suitably qualified and competent, and whether assistants are suitably qualified, competent and fluent in the relevant language of communications is an objective standard. It does not state that the Engineer himself must be so. The Contractor should therefore insist

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<sup>6</sup> (1985) 32 BLR 51.

<sup>7</sup> [2014] EWHC 4796 (TCC).

during the tendering phase that the Employer undertake that he is suitably qualified and competent. This is particularly important because there is no express provision for a Contractor to object to a pre-appointed Engineer; a Contractor can merely object to a replacement Engineer by raising “*reasonable objection*”. See the commentary under Sub-Clause 3.4 below.

### The Engineer’s Authority and Employer’s Approval

As in the FIDIC Red Book 4<sup>th</sup> edition, the Engineer may exercise “*the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract*”. However, the Engineer has no authority to amend the terms of the Contract.

The Employer does have the right to impose a requirement that the Engineer obtains specific approval before exercising a power. The extent of the approval might depend on the relationship between the Engineer and the Employer. Whereas a consultant working for a private Employer may have wide authority, a consultant working for a Government Employer often has more limited authority, perhaps having to obtain approval from more senior persons or different departments.

If the Engineer is required to obtain the approval of the Employer before exercising a specified authority, the requirements shall be as stated in the Particular Conditions. The Parties will then be aware of the constraints that have been placed on the Engineer in having to obtain such approval. The Employer must disclose from the outset any terms in the Engineer’s consultancy agreement, which might impact on the Contractor. It is necessary because the Contractor may not see the consultancy agreement between the Engineer and the Employer. Such approval does not, however, relieve the Contractor of its responsibilities under the Contract in accordance with Sub-Clause 3.1(c). If the Engineer fails to obtain the necessary approval from the Employer, he will be in breach of his terms of engagement.

For example, it is not unusual for Employers to impose in the Particular Conditions requirements for Engineers to obtain the Employer’s approval prior to:

- instructing a Variation;
- issuing any other approval, consent, notice or instruction (other than a determination under Sub-Clause 3.5 [*Determinations*]) which will entitle the Contractor to claim any additional payment;
- issuing any instruction that relieves the Contractor from any of its obligations under the Contract;
- consenting to any Subcontractor under Sub-Clause 4.4 [*Subcontractors*];
- issuing an instruction under Sub-Clause 4.1(d) [*Contractor’s General Obligations*] permitting the submission of “*as-built*” documents and/or operation and maintenance manuals following taking-over; or
- instructing a full or partial suspension of the Works under Sub-Clause 8.8 [*Suspension of the Works*].

Sometimes such approvals are expressly stated to be required except in emergencies, such as those involving risk or injury to a person or affecting the safety of the Works or any adjoining property. However, imposing an obligation on the Engineer to obtain the Employer's approval before giving a determination under Sub-Clause 3.5 is not encouraged by FIDIC. Occasionally, the Contract is amended to enable the Employer to give instructions directly to the Contractor, but generally, this should be avoided in order to maintain a single line of communication with the Contractor and to avoid potentially conflicting instructions.

*“The Employer undertakes not to impose further constraints of the Engineer's authority, except as agreed with the Contractor”.* This wording suggests that the Employer may widen the Engineer's power without the Contractor's agreement. However, such powers could never exceed those of the Employer under the Contract and, in accordance with the normal law of agency, the Employer would need to notify the Contractor of the change.

Approval must be given in writing and must not be unreasonably withheld or delayed (Sub-Clause 1.3). The Employer should be aware of, and take into account, the likelihood of any additional costs being incurred by the Contractor while the Engineer is awaiting the Employer's approval.

Where there is some doubt as to whether the Engineer is acting within his authority, Sub-Clause 3.1 sets out certain assumptions:

*“Whenever the Engineer exercises a specified approval for which the Employer's approval is required then (...) the Employer shall be deemed to have given approval.”*

Therefore, in theory, the Contractor need not query whether there was Employer's approval (although, as stated above) the approval will not relieve the Contractor from any of his responsibilities under the Contract in accordance with Sub-Clause 3.1(c)). This gives the Engineer a free hand but might have consequences for the Engineer under, or for breach of, the consultancy agreement. However, it is arguable that where the Parties are well aware that no consent has been given, the deeming effect of the paragraph in the clause should not be considered effective. A Party should not be able to rely upon the fiction that approval had been given.

A common example occurs where the Engineer gives an instruction (which he is entitled to do under Sub-Clause 3.3). The Contractor proceeds on the basis of the instruction but incurs additional cost and delay as a result and later claims that the instruction was in fact a Variation. The Contractor was probably aware at the time of the instruction that the Engineer had not obtained any approval and the Employer probably thought no approval was necessary as (on the advice of the Engineer) it would have assumed that the instruction was not a Variation. When the Contractor makes his claim, can the Employer argue that since (as the Contractor very well knew) no approval had been given for a Variation there was in fact no Variation? The answer is probably

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yes – because otherwise it would create an injustice or absurdity<sup>8</sup> - the Contractor, being aware that there was no approval, ought to have thought at the time that the instruction was not a Variation. It may therefore be argued that it is not reasonable for the Contractor to rely on a fiction created by a deeming provision when he knew very well that the approval had not been given. The situation would be different if the Contractor did not know there had been no approval or did not know whether, or not, there had been an approval.

The situation is more difficult where the Engineer, having been forbidden from granting an extension of time with the Employer’s approval, makes what he considers a “*fair determination*” under Sub-Clause 3.5 granting an extension of time. This grant will have followed a long argument between the Contractor and the Employer and the Employer will no doubt have made it clear that he did not agree to the extension. Thus, all Parties will be well aware of the lack of approval. In this context it is arguable that a provision “deeming” approval to have been given will not override the clear facts of the case. The mere fact that the word “*deemed*” has been used in a context where it may be obvious from the facts that no approval has been given is an indication that, where it is otherwise obvious that no approval was given, the deeming should not come into effect.

A number of cases in the English Courts have dealt with the effect of the use of a deeming provision on the effect of title to goods brought on site. Many building contracts contain provisions deeming materials or plant brought on site to be the property of the Employer<sup>9</sup>. In one case<sup>10</sup> the judge took as a premise that actual title remained in the Contractor, because otherwise it would not have been necessary to “deem” the materials the property of the employer for the purposes of the contract. In another case<sup>11</sup> the relevant clause provided that “*all plant and materials brought to and left upon the ground by the contractor ... for the purpose of carrying out the contract or forming part of the works, shall be considered to be the property of the employer and the same shall not on any account whatever be removed ... by the contractor.*” In this case, in the absence of proof of actual ownership, one of the judges considered that the clause only gave the employer the right to have the materials remain on the land for use by the contractor. Another judge thought that the expression “*considered to be the property*” was ambiguous and, in the context, not intended to pass property to the employer.

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<sup>8</sup> *Inland Revenue Comrs v Metrolands (Property Finance) Ltd* [1981] 1 WLR 637, 646; and *Commissioners for Her Majesty's Revenue and Customs (Respondent) v DCC Holdings (UK) Limited (Appellant)* [2010] UKSC 58.

<sup>9</sup> Sub-Clause 54.1 of the previous edition of FIDIC had a clause to this effect but the word “deemed” has been removed in the present edition (Sub-Clause 7.7) possibly to avoid the ambiguity.

<sup>10</sup> *Re Winter, ex parte Bolland* (1878) 8 Ch.D. 225.

<sup>11</sup> *Keen v Keen, ex parte Collins* [1902] 1 K.B. 555.



### Deemed Approval

- (a) **Except as otherwise stated, “...the Engineer shall be deemed to act for the Employer”**

Sub-paragraph (a) provides that “*Except as otherwise stated in these Conditions ... wherever carrying out duties or exercising authority specified in or implied by the Contract, the Engineer shall be deemed to act for the Employer.*”

The Engineer is deemed to act for the Employer except as otherwise stated in the Contract. This is supported in the FIDIC Contracts Guide (1<sup>st</sup> edition, 2000), which states:

*“Under [the Red Book 1999] or [the Yellow Book 1999], the Employer is required to appoint the ‘Engineer’, who is to be named in the Appendix to Tender. The Engineer does not represent the Employer for all purposes. The Engineer is not authorised to amend the Contract, but he is deemed to act for the Employer as stated in subparagraph (a). The role of the Engineer is thus not stated to be that of a wholly impartial intermediary, unless such a role is specified in the Particular Conditions. If [the Red/Yellow Book’s] Engineer is an independent consulting Engineer who is to act impartially, the following may be included in the Particular Conditions: At the end of the first paragraph of Sub-Clause 3.5, insert: ‘The Engineer shall act impartially when making these determinations’”.*

Therefore, in the absence of a Particular Condition to the contrary and under the usual rules of agency, the Engineer will remain the Employer’s agent when he makes a “*fair determination*” under Sub-Clause 3.5 or “*fairly determines*” the amount due in an Interim Payment Certificate under Sub-Clause 14.6, or Final Payment Certificate under Sub-Clause 14.13. However, in making the fair determination, it is probable that he must act without bias and impartially notwithstanding his role as the Employer’s agent. For further details on the Engineer’s determination see the commentary under Sub-Clause 3.5 below.

The position is complicated where the Engineer is obliged to obtain the Employer’s approval before, for example, agreeing or determining an extension of time and/or additional costs, or issuing a Variation. Under Sub-Clause 3.5 the Engineer is obliged to make a fair determination, but if the Employer does not approve that fair determination, the Engineer cannot make it. This leaves the Engineer in a difficult position. He should not make a determination he thinks unfair but as the Employer’s agent he ought to do as he is told by his principal. In practice, what appears to happen is that the Engineer does nothing and the matter is referred to the Dispute Adjudication Board to resolve where a Dispute Adjudication Board is provided for. Although not expressly provided for in the FIDIC Red Book 1999, Sub-Clause 20.1 of the FIDIC Pink Book 2010 states that “*If the Engineer does not respond within the timeframe defined in this Clause<sup>12</sup>, either*

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<sup>12</sup> 42 days.

*Party may consider that the claim is rejected by the Engineer and any of the Parties may refer to the Dispute Board in accordance with Sub-Clause 20.4*". It is arguable that, by failing to approve the fair determination, the Employer has interfered with, or prevented, the Engineer from carrying out the duties assigned to him in the Contract<sup>13</sup>. See the commentary on the Engineer's failure to carry out his duties above for further details.

As with deemed approval (discussed above), it is submitted that if the Parties, or the Party who would benefit by the application of the deeming provision, is well aware that the Engineer is acting contrary to the instructions of the Employer, the deeming provision should not have effect.

Sub-paragraph (b) makes it clear that the Engineer's authority as agent is limited.

#### Limits to the Engineer's acts as Employer's agent

**(b) Except as otherwise stated, "the Engineer has no authority to relieve either Party of any duties, obligations or responsibilities under the Contract."**

In the FIDIC Red Book 4<sup>th</sup> edition the Engineer had no authority to relieve the Contractor from any of his "obligations" under the Contract; this has now been extended to "duties, obligations and responsibilities" and to both Parties. This is intended to limit the extent to which the Engineer may act as agent of the Employer (and thus reducing the potential effect of sub-paragraph (a) above). However, the Engineer does have some explicit authority to relieve the Contractor from some obligations. For example:

- the Engineer's authority to issue instructions and additional or modified Drawings as described in Sub-Clause 3.3;
- the Engineer's authority to instruct Variations as described in Clause 13, including the omission of work as described in Sub-Clause 13.1(d); and
- specific provisions in the Particular Conditions and other contract documents.

Of course, on a practical level, an Engineer will almost certainly make minor modifications to the Parties' duties, obligations and responsibilities when administering the Contract. As Robert Knutson<sup>14</sup> explains:

*"The fact is that engineers normally have an extremely important impact on the progress of a project and its eventual success or failure. In administering it they*

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<sup>13</sup> Roberts v Bury Improvement Commissioners [1870] L.R. 5 C.P. 310 – Blackburn J. "...it is a principle very well established at common law, that no person can take advantage of non-fulfilment of a condition the performance of which has been hindered by himself ...; and also that he cannot sue for a breach of contract occasioned by his own breach of contract...".

<sup>14</sup> FIDIC An Analysis of International Construction Contracts, page 49.

*can, and often do, cause de facto changes to the obligations of the parties and thus amend the contract. It is quite normal in international construction contracts to see numerous actual minor breaches of the contract on the part of the engineers acting as agents for the Employers which at the end of the day may be difficult or impossible to actually attribute to the Employer, perhaps because of the very real human tendency to distinguish between the acts of the agent and his principal, despite the frequent legally indistinguishable nature of their actions”.*

Courts, arbitrators and adjudicators will undoubtedly seek out ways to hold the Engineer accountable to the Contractor for his deeds or misdeeds insofar as they have affected the Contractor’s performance under the Contract. It would be wrong for a Party to hold a position of power but have no responsibility for such. In overseas contracts where English law is the governing law, Robert Knutson sees no reason why engineers could not, under the wording of this contract and in particular circumstances, be held liable for the tort of actionable interference with contract, see for example *John Mowlem v Eagle Star Insurance & Others*<sup>15</sup>, and states that engineers can be held to have acted negligently for their employers – see also *Imperial College v Norman & Dowbarn*<sup>16</sup>. In such circumstances, protection might also be afforded to a Contractor under the Contracts (Rights of Third Parties) Act 1999, (unless expressly excluded) where the Contractor is a third party to the consultancy contract between the Employer and Engineer.

#### The Contractor’s responsibility under the Contract

- (c) **Except as otherwise stated, any approval etc “...shall not relieve the Contractor from any responsibility he has under the Contract...”**

Any “*approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by the Engineer (including absence of disapproval) shall not relieve the Contractor from any responsibility he has under the Contract, including responsibility for errors, omissions, discrepancies and non-compliances*”. This is an important provision. The Employer always has it within his power to waive compliance with any provision of the Contract, but the sub-paragraph makes it clear that this power of waiver is not delegated to the Engineer.

It is a draconian provision if taken literally. It is common for the Engineer to turn a blind eye to minor compliance issues or to agree to a method of achieving some particular objective which is not quite in compliance with the strict terms of the contract. There is potential for dispute if the Employer tries to interpret the wording literally as the Contractor will not take kindly to being told by the Employer to redo that which the Engineer has agreed is acceptable.

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<sup>15</sup> (1992) 62 BLR 126 (QBD).

<sup>16</sup> (1986) 8 Con LR 107 (QBD).

To be sure that the Engineer's agreement to any non-compliance is binding, the Contractor ought to obtain direct confirmation from the Employer. If the Employer refuses to commit itself, the Contractor may then be able to protect himself by informing the Employer directly of the Engineer's approval and the element of non-compliance. If, knowing of this, the Employer fails to take any immediate action, the Contractor should be able to argue that the Employer has waived his right to object.

### **Sub-Clause 3.2 – Delegation by the Engineer**

As stated above, unlike the FIDIC Red Book 4<sup>th</sup> edition, there is no express provision for an Engineer's Representative. However, the Engineer may assign in writing duties and delegate authority to assistants, save in relation to Sub-Clause 3.5 [*Determinations*]. This recognises the different skills required of the Engineer. The Engineer may also revoke such assignment or delegation. The assignment, delegation or revocation must be in writing and, as it does not take effect until copies have been received by both Parties, it cannot be made retrospectively. Unlike the FIDIC Red Book 4<sup>th</sup> edition, there is no requirement to notify the Contractor of "*the names, duties and scope of authority*" of such persons.

Any approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test, or similar act by an assistant, in accordance with the delegation, shall have the same effect as though the act had been an act of the Engineer save, that any failure to disapprove any work shall not constitute an approval, and that the Contractor may refer any questions on the determination or instruction of an assistant to the Engineer for confirmation.

The powers of each assistant appointed under Sub-Clause 3.2 is defined by the document delegating the power. If the assistant is acting within his powers then the act shall be considered as having the "*same effect*" as if it had been done by the Engineer. However:

- in contrast to the obligations of the Engineer, the absence of any disapproval of any work, Plant or Materials by an assistant does not constitute approval, and does not prejudice the right of the Engineer to reject such; and
- if the Contractor questions any determination or instruction of an assistant, the Contractor may refer the matter up the line to the Engineer, who shall promptly confirm, reverse or vary the determination or instruction. The consequences of any reversal or variation are not stated because this will depend on the actual events.

The assistants must be suitably qualified, competent, and fluent in the language for communications provided in the Appendix to Tender. This is an objective standard. There is no express provision requiring the Engineer himself to be qualified, competent, or fluent in the language for communications provided in the Appendix to Tender.

Many assistants may need to be appointed, and the Employer should ensure that there are sufficient assistants. Both the Engineer and the assistants referred to in this Sub-Clause fall within the definition of “*Employer’s Personnel*” in Sub-Clause 1.1.2.6. It is anticipated that such assistants will have a major role in the achievement of a successful project and be given whatever formal title is considered by the Engineer to be appropriate. It should be noted that one of the grounds for claiming additional time under Sub-Clause 8.4 [*Extension of Time for Completion*] is any delay, impediment or prevention caused by, or attributable to, the Employer’s Personnel. Therefore, a delay by an assistant to the Engineer or any independent inspector appointed to inspect the Plant and Materials would give an entitlement to time. It may also, depending on the circumstances, give an entitlement to additional Cost.

Obviously if there is a change in the Engineer under Sub-Clause 3.4, it is likely that some of the Engineer’s assistants will find their assignments and delegations revoked, to make way for the new Engineer’s assistants.

### **Sub-Clause 3.3 - Instructions of the Engineer**

Sub-Clauses 3.3 and Clause 13 [*Variations and Adjustments*] should be read with Sub-Clause 4.1 [*Contractor’s General Obligations*] which states, “*The Contractor shall design (to the extent specified in the Contract), execute and complete the Works in accordance with the Contract and with the Engineer’s instructions, and shall remedy any defects in the Works*”.

Sub-Clause 3.3 provides that at any time, the Engineer may issue to the Contractor instructions and additional or modified Drawings (for example, during the construction) which may be necessary for the execution of the Works and the remedying of any defects, all in accordance with the Contract. In general, the Contractor must comply, although it does not expressly say to the Engineer’s satisfaction as it did in Sub-Clause 13.1 of the FIDIC Red Book 4<sup>th</sup> edition.

Sub-Clause 3.3 applies to work needed to bring it in line with contractual or statutory obligations. However, if an instruction constitutes a Variation, Clause 13 [*Variations and Adjustments*] will apply. If the Engineer denies that the instruction amounts to a Variation (as the Engineer did, for example, in the English Privy Council case of *Mitsui v AG for Hong Kong*<sup>17</sup>) the matter may be referred to the Dispute Adjudication Board under Sub-Clause 20.1. If the Contractor cannot comply with a Variation instruction, he may give notice as detailed in Sub-Clause 13.1. A right to increased payment will arise in the case of a Variation but not for modifications to the Contractor’s work under Sub-Clause 3.3.

An issue that has arisen on occasion is where the Engineer instructs the Contractor to carry out some part of the design. The second sub-paragraph of this Sub-Clause states that “*The Contractor shall comply with the instruction given by the Engineer or*

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<sup>17</sup> (1986) 33 BLR 1.

*delegated assistant, on any matter related to the Contract.*” However, it is submitted that because the Contractor is only responsible for the design to the extent specified in the Contract, and also the design undertaken under the value engineering process, such an instruction would effectively amend the Contract and under Sub-Clause 3.1 the Engineer has no authority to do this.

The Contractor must only take instructions from the Engineer, or from an assistant to whom the appropriate authority has been delegated under Clause 3. If the Contractor questions any determination or instruction of an assistant, the Contractor may refer the matter up the line to the Engineer, who shall promptly confirm, reverse or vary the determination or instruction under Sub-Clause 3.2.

Whenever practicable, the Engineer’s or his assistant’s instructions must be given in writing. This supplements Sub-Clause 1.3 which provides for notices to be in writing and delivered in a prescribed way. However, it does not exclude oral instructions. If the Engineer or a delegated assistant gives an oral instruction, it must be confirmed by the Contractor promptly – i.e. within two working days rather than the seven working days as provided in the FIDIC Red Book 4<sup>th</sup> edition.

If, within two working days after giving the instruction, the Engineer or delegate assistant receives a written confirmation of the instruction from, (or on behalf of), the Contractor, and the Engineer or delegate assistant does not reply by issuing a written rejection and/or instruction within a further two working days after receiving the confirmation, then the Contractor’s confirmation constitutes the written instruction of the Engineer or delegated assistant.

It is not clear what would happen if the Engineer or his delegated assistant failed to receive a written confirmation of the instruction within two working days after giving the instruction, in accordance with Sub-Clause 1.3. Nor is it stated what happens if the Engineer or assistant rejects the instruction.

For further provisions relating to instructions, see Clauses 1.5 [*Priority of Documents*], 1.9 [*Delayed Drawings or Instructions*], 3.2 [*Delegation by the Engineer*], 4.1 [*Contractor’s General Obligations*], 4.3 [*Contractor’s Representative*], 4.6 [*Co-operation*], 4.12 [*Unforeseeable Physical Conditions*], 4.24 [*Fossils*], 6.7 [*Health and Safety*], 7.4 [*Testing*], 7.6 [*Remedial Work*], 8.9 [*Consequences of Suspension*], 8.10 [*Payment for Plant and Materials in Event of Suspension*], 8.12 [*Resumption of Work*], 13.1 [*Right to Vary*], 13.3 [*Variation Procedure*], 13.5 [*Provisional Sums*], 15.2 [*Termination by Employer*], 20.4 [*Obtaining Dispute Adjudication Board’s Decision*], 20.6 [*Arbitration*].

### **Sub-Clause 3.4 - Replacement of the Engineer**

The Employer may replace the Engineer (not to be confused with a named individual where the Engineer is a company) by giving the Contractor notice at least 42 days before the intended date of replacement. The notice should comprise of the name, address and relevant experience of the intended replacement Engineer and should comply with the formalities set out in Sub-Clause 1.3 (i.e. be in writing, sent to the correct address by an approved means, and be copied to the Engineer). The notice does not need to give reasons for the replacement. The Employer cannot replace the Engineer with a person against whom the Contractor raises reasonable objection. The Contractor must give notice of its reasonable objection with supporting particulars. There is no mechanism specified as to how such objection should be determined. Ultimately, such a dispute may be referred to the Dispute Adjudication Board.

There is no reciprocal arrangement under Sub-Clause 3.4 for the Contractor to replace the Engineer, but he may allege a breach of the obligation in Sub-Clause 3.1 that “*The Engineer’s staff shall include suitable qualified engineers and other professional who are competent to carry out [the duties assigned to the Engineer in the Contract]*”. Question whether this would apply to the Engineer himself.

The ability for the Employer to replace the Engineer is new to the FIDIC Red Book 1999. There was no such provision in the FIDIC Red Book 4<sup>th</sup> edition because it was thought tenderers would not want the Employer to be able to replace the Engineer, after having carefully considered (and priced for) the original Engineer’s technical competence, reputation, impartiality, independence etc. The wording in the 1999 edition favours Employers who consider that there should be no restriction imposed on replacing the Engineer, whom the Employer has appointed to administer the Contract.

#### Reasons for Replacement

Under the FIDIC Red Book 1999 the Employer may replace the Engineer for any reason. There is no requirement of default on the Engineer’s part. The Engineer might be replaced, for example, due to failing to act, refusing to act, retirement, illness or death. The Employer should take into account that the change in Engineer will impact on the Contract administration, particularly as a change in the Engineer will probably result in a change in the Engineer’s assistants.

#### Employer’s Notice

The Employer is required to give at least 42 days’ notice. Notice is required, but if at least 42 days of notice is not given there is no sanction. There are no words to the effect that failure to give over 42 days’ notice will render the replacement invalid. Therefore, the notice period does not appear to constitute a condition precedent. If an Engineer should suddenly become unavailable, e.g. by death, the notice period should be waived by the Parties by agreement.

The Employer's notice needs comprise only of the name, address and relevant experience of the intended replacement Engineer. It would be good practice for the notice to indicate also the date of replacement, and the replacement Engineer's qualifications and contact telephone number and email address.

#### Contractor's "Reasonable Objection"

The Employer cannot replace the Engineer with a person against whom the Contractor raises "*reasonable objection*", by notice to the Employer, with "*supporting particulars*". This tempers the Employer's power. However, if no reasonable objection is raised, the Engineer may be replaced and the Contractor has no further right to object.

Reasonable objection is not defined and therefore open to dispute. What would suffice as a reasonable objection depends upon the circumstances, including the representations originally made to the tenderers, the details of the replacement Engineer's experience, and the duties and authority necessary to administer the Contract and supervise the full scope of the Contractor's execution of the Works. Reasonable objections might include:

- evidence that the proposed replacement is potentially not impartial or independent due, for example, to existing relationships or interests (although there is no express provision that the Engineer must act impartiality in contrast to the FIDIC Red Book 4<sup>th</sup> edition);
- inadequate qualifications and/or experience; or
- specific requirements set out in the contract documents.

In the case of *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd*<sup>18</sup> (which concerned a non FIDIC form of contract) the Employer sought to replace an independent construction manager with his own employee. The Contractor objected and the objection was upheld by the court. The court held that this was not permissible and stated that if the Employer was to become the certifier, then there would need to be an express clause to deal with this unusual state of affairs. Mr Justice Jackson stated:

*"The construction manager is under a legal duty to perform his decision-making function in a manner which is independent, impartial, fair and honest. In other words, he must use his professional skills and his best endeavours to reach the right decision, as opposed to a decision which favours the interests of the employer ... Whilst I reject Mr Hughes' submission that the employer is incapable of performing this task, I do consider that this task is more difficult for the employer than it is for a professional agent who is retained by the employer. A senior and professional person within an organisation can conscientiously put his employer's interest on one side and make an independent decision. See*

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<sup>18</sup> [2006] EWHC 89 (TCC).



*Perini. It is more difficult for the organisation itself to make a decision which is contrary to its own interests. The employer could of course ask a named professional employee to make the relevant decision, but the employer would still have to go on and adopt that decision on its own”.*

Where, however, the contract does include an express provision for the employer to act as certifier then, in principle, it would be permitted to replace one employee with another: *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Co.*<sup>19</sup>

Unlike the Employer’s notice, the Contractor’s notice is a condition precedent, i.e. notice must be given in order to prevent the Employer from replacing the Engineer. Unlike the Employer, the Contractor does not have an express time limit in which to give notice, although after 42 days the replacement will have been made. It is most unlikely that the Contractor could raise reasonable objection retrospectively.

Supporting particulars are not defined and therefore open to dispute. There is scope for the Employer to replace the Engineer despite objection by the Contractor on the basis that in the Employer’s opinion adequate supporting particulars have not been provided. Unscrupulous Employers might seek to take advantage of this by failing to inform the Contractor that adequate supporting particulars have not been provided, or by informing the Contractor of this fact immediately prior to the end of the 42 days period, giving insufficient time for more detailed particulars to be provided before the replacement takes place. In some jurisdictions such behaviour might fall foul of a duty to act in good faith.

If the Contractor does not raise any reasonable objection, he cannot later raise objection to the appointed Engineer or undo the appointment under this Sub-Clause. However, he may have recourse under Sub-Clause 3.1, as above, if the Contractor considers the Engineer’s staff to be incompetent.

### **Sub-Clause 3.5 - Determinations**

The Engineer is required to agree or determine both Contractor’s claims (Sub-Clause 20.1) and Employer’s claims (Sub-Clause 2.5).

Where the Contract provides for the Engineer to agree or determine any matter the Engineer must:

- consult with each Party in an endeavour to reach agreement;
- if agreement cannot be reached, make a “fair” determination;
- take into account all relevant circumstances;
- act in accordance with the Contract; and
- notify the Parties of the agreement or determination with supporting particulars.

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<sup>19</sup> [1996] 78 BLR 42.

This only applies where the Contract explicitly provides. In *ICC Case 19581 (2014) – Final Award*, in an Eastern European Capital City, a sole arbitrator found that the wording “*Whenever these Conditions provide...*” in the FIDIC Red Book 1999 did not support an argument that all disputes out of or in connection with the Contract must be referred to the Engineer. Instead, disputes only needed to be referred to the Engineer where this was explicitly provided for in the Contract.

A failure to so act could place the Employer in breach of contract and possibly expose the Engineer to a claim in negligence by the Contractor.

The Parties must give effect to the agreement or determination by the Engineer unless, and until, revised under Clause 20.

The Contract provides for agreement or determination in, for example, Clauses 1.9 [*Delayed Drawings or Instructions*], 2.1 [*Right of Access to the Site*], 2.5 [*Employer’s Claims*], 4.7 [*Setting Out*], 4.12 [*Unforeseeable Physical Conditions*], 4.19 [*Electricity, Water and Gas*], 4.20 [*Employer’s Equipment and Free Issue Material*], 4.24 [*Fossils*], 7.4 [*Testing*], 8.9 [*Consequences of Suspension*], 9.4 [*Failure to Pass Tests on Completion*], 10.2 [*Taking Over of Parts of the Works*], 10.3 [*Interference with Tests on Completion*], 11.4 [*Failure to Remedy Defects*], 11.8 [*Contractor to Search*], 12.3 [*Evaluation*], 12.4 [*Omissions*], 13.2 [*Value Engineering*], 13.7 [*Adjustments for Changes in Legislation*], 14.4 [*Schedule of Payments*], 15.3 [*Valuation at Date of Termination*], 16.1 [*Contractor’s Entitlement to Suspend Work*], 17.4 [*Consequences of Employer’s Risks*], 19.4 [*Consequences of Force Majeure*], and 20.1 [*Contractor’s Claims*].

#### Consult with each Party in an endeavour to reach agreement

The Engineer must first act in a mediatory capacity to try to facilitate an agreement. There is no express time limit, so a reasonable time will be implied. There is no specified forum for the consultation or any requirement for both Parties to be present during the consultation. Therefore, individual telephone calls to each Party may be sufficient.

If the Engineer does not consult with one of the Parties then the decision may be “*invalid and unenforceable*”: *Amec Capital Projects Ltd v Whitefriars City Estates Ltd*.<sup>20</sup> However, in such a case the decision is not “*a complete nothing: it remained a decision, in the light of which the Highways Agency was entitled to refer the dispute to arbitration*”.<sup>21</sup> If agreement cannot be reached, the Engineer must determine the matter “fairly” in accordance with the Contract taking into account all the relevant facts.

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<sup>20</sup> [2004] EWCA Civ 1418, unreported 28 October 2004.

<sup>21</sup> *AMEC Civil Engineering Ltd v The Secretary of State for Transport* [2005] Adj.L.R. 03/17.

Make a “fair” determination taking into account all relevant circumstances

If agreement fails, the Engineer must make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances. This is despite the fact the Engineer is deemed to act for the Employer under Sub-Clause 3.2(a). Again, there is no express time limit, so a reasonable time will be implied. This task cannot be delegated under Sub-Clause 3.2.

A fair determination is not the same as an independent or (arguably) an impartial determination, and the role of the Engineer is not the same as an adjudicator's or arbitrator's so there should be no temptation to draw a comparison between an adjudicator's or arbitrator's duty to be independent and impartial. Sub-Clause 20.2 allows for the appointment of a Dispute Adjudication Board to resolve such matters judicially but note that in *Costain Ltd (Corber) v Bechtel Ltd*<sup>22</sup> (considering the N.E.C.2 form of contract) the court did not accept an argument that the inclusion of a dispute resolution procedure mitigated against the existence of a duty upon a project manager [Engineer] to act impartially in matters of certification. See below for further details.

Independence is usually tested objectively: for example, whether there is, as a matter of fact, a relationship between the Engineer and one of the Parties. The Engineer is clearly not intended to be independent under this contract. He is an agent or employee of the Employer and is paid by the Employer. This is supported by the Statutes and By-laws of FIDIC, which refer to a Code of Ethics applicable to member associations of FIDIC. The Code of Ethics states that, “*All member associations of FIDIC subscribe to and believe that the following principles are fundamental to the behaviour of their members if society is to have that necessary confidence in its advisors*”. The Code includes the principle that the consulting engineer shall:

- “*Act at all times in the legitimate interest of the client and provide all services with integrity and faithfulness*”.

Partiality is usually tested subjectively: it is a state of mind, for example, whether there is any actual or apparent bias. The FIDIC Red Book 1999 has removed the obligation upon the Engineer to act impartially, found in the FIDIC Red Book 4<sup>th</sup> edition, and it is therefore clear the Engineer is not intended to be impartial unless such a requirement is stated in the Particular Conditions: he is required to operate the Contract on the Employer's behalf. However, this change has not been reflected in the Code of Ethics referred to above which includes the principles that the consulting engineer shall:

- “*Be impartial in the provision of professional advice, judgement or decision.*”
- “*Inform the client of any potential conflict of interest that might arise in the performance of services to the client.*”

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<sup>22</sup> [2005] EWHC 1018 (TCC).

- *Not accept remuneration which prejudices independent judgement”.*

The suggestion that the Engineer’s duty to be impartial should be implied into common law contracts to reflect the fair and unbiased role of the Engineer as explained in the House of Lords decision of *Sutcliffe v Thackrah*<sup>23</sup> (considering the R.I.B.A form of contract), and followed in subsequent English decisions such as those of Mr Justice Jackson in *Costain Ltd (Corber) v Bechtel Ltd*<sup>24</sup> (considering the N.E.C.2 form of contract) and *Scheldebouw v St James Homes (Grosvenor Docks) Ltd*<sup>25</sup> is said to be an Anglo-Saxon concept that is not well understood or accepted internationally.

In *Sutcliffe v Thackrah* a judge acting in a private capacity proposed to build a house and employed architects to produce drawings and engage a contractor to build it. The judge became dissatisfied with the work and terminated the contract, but then discovered that, on the basis of the architect’s over-certification, he had overpaid the contractor by £2,000 and could not recover the sum from the contractor. Could he sue his architect for that sum? There was an argument that the certifier was acting in a quasi-judicial capacity and therefore was immune from suit in the same way as a judge or arbitrator. In giving judgment, Lord Reid said that an architect had two different functions. In one capacity, as a designer, he had to follow his employer’s instructions; but in his other, as a certifier, he had to decide for himself. He said that it was therefore implicit that the architect was obliged to act with due care and skill and in an unbiased manner. This opened the way for employers to sue their certifiers.

The case of *Costain Ltd (Corber) v Bechtel Ltd* concerned a dispute under an amended NEC Form of Contract which provided in the recitals that, “*The Employer, the Contractor and the Project Manager act in the spirit of mutual trust and co-operation and so as not to prevent compliance by any of them with the obligations each is to perform under the Contract*”. The Employer was Union Rails (North) Limited. Costain and various other companies formed a consortium (generally referred to as “Corber”) that was the Contractor. The Project Manager (a contract administrator with a similar role to that of the Engineer in the FIDIC forms of contract) was a consortium called Rail Link Engineering (“RLE”) whose dominant member was Bechtel Rail Link Engineering. Most of the RLE personnel were therefore Bechtel employees. RLE issued payment certificates which disallowed several million pounds worth of Corber’s costs. Mr Bassily (the rail operations manager of Bechtel and the executive chairman of RLE) had instructed all Bechtel employees to take a stricter approach to disallow legitimate costs when assessing payment certificates. Corber became concerned that Bechtel had deliberately adopted a policy of administering the contract unfairly and adversely to Corber. Corber therefore commenced court proceedings claiming that Bechtel and Mr Bassily had unlawfully procured breaches of contract by the Employer and sought injunctions to restrain RLE from acting in such a way. Bechtel’s position was that Mr Bassily was justified in what he said and that the contract did not require the Project Manager to act impartially. The court considered the arguments and

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<sup>23</sup> [1974] AC 727, 737.

<sup>24</sup> [2005] EWHC 1018 (TCC).

<sup>25</sup> [2006] EWHC 89 (TCC).

reviewed the case law. It was the court's view that the statements in the case of *Sutcliffe v Thackrah* had generally been accepted by the construction industry and the legal profession as correctly stating the duties of architects, engineers and other certifiers under the conventional forms of construction contract.

However, Bechtel sought to distinguish this contract. In particular, it was argued that there should be no implied term of impartiality because:

- The terms of the present contract, which regulated Corber's entitlement, were very detailed and very specific and did not confer upon the Project Manager a broad discretion, similar to that given to certifiers by conventional construction contracts.
- The decisions made by the Project Manager were not determinative, as if Costain was dissatisfied with those decisions, it could refer to the dispute resolution procedures set out in the contract.
- The Project Manager under the contract provisions was not analogous to an architect or other certifier under conventional contracts. The Project Manager was specifically employed to act in the interests of the Employer.

The court did not accept Bechtel's arguments. The judge said, "*It would be a most unusual basis for any building contract to postulate that every doubt shall be resolved in favour of the employer and every discretion shall be exercised against the contractor*". He said, "*If (a) the project manager assesses sums partially and in a manner which favours the employer, but (b) the adjudicator assess sums impartially without favouring either party, then this is likely to lead to successive, expensive and time consuming adjudications. I do not see how that arrangement could make commercial sense*". The judge also said that although he accepted that in discharging many of its functions under the contract, the Project Manager acts solely in the interest of the Employer, "*I do not see how this circumstance detracts from the normal duty which any certifier has on those occasions when the project manager is holding a balance between employer and contractor*". The court agreed that Corber had raised serious questions to be tried in relation to whether RLE had acted in breach of its duty to act impartially as between employer and contractor, whether as a consequence the employer was thereby in breach of contract, and whether the RLE consortium had committed the tort of procuring a breach of contract. However, the court was not prepared to exercise its discretion at this interim stage and grant an injunction to correct any failings in the contractual payment procedures, because in accordance with English law it could be adequately compensated for in damages.

In some jurisdictions, arguments of good faith may be applicable. In *Aoki Corp v Lippland (Singapore) Pte Ltd*<sup>26</sup> the Singaporean Courts expressed the view that a contract administrator "*must exercise his function as a certifier in good faith and to the*

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<sup>26</sup> [1995] 2 SLR 609.

*best of his uninfluenced professional judgment, even though he is appointed by the Employer*". However, at page 68 of the Costain case referred to above, Mr Justice Jackson clearly distinguished "impartiality" from "good faith". He rejected the phrase "good faith" as ambiguous on the grounds that it is sometimes used as a synonym for "impartiality" and sometimes as a synonym for "honesty". He preferred the test of "impartiality".

The earlier cases of *Hounslow LBC v Twickenham Garden Developments*<sup>27</sup>, and *Amey v Secretary of State for Transport*<sup>28</sup> found that the rules of natural justice do not apply to contract administrators. In the latter case, May LJ stated at paragraph 46-47:

*"The rules of natural justice are formalised requirements of those who act judicially. Compliance with them is required of judges and arbitrators and those in equivalent positions, but not of an Engineer giving a decision under Clause 66 of the ICE Conditions ... Under Clause 66, the Engineer is required to act independently and honestly. The use by the New Zealand Court of Appeal [in Hatrick] of the word impartially does not, in my view, overlay independence and honesty so as to encompass natural justice ... I would not be coy about saying that the Engineer has to act 'fairly', so long as what is required is regarded as fair is flexible and tempered to the particular facts and occasion."*

Recent authorities have also made clear that "fairness" by an expert does not denote "natural justice". In *Ackerman v Ackerman*<sup>29</sup> it was held that "It is well established that an expert is not bound to observe all the rules of natural justice, though he does have an implied obligation of fairness".

What constitutes a fair determination is open to interpretation. The Engineer is not entitled to do anything that breaches the term of the Contract but how much further need he go? Nael Bunni<sup>30</sup> states that the dictionary defines fair as "*just, unbiased, equitable in accordance with the rules*". This suggests an element of impartiality and honesty. In the case of *Semco Salvage Marine Pte Ltd v Lancer Navigation Ltd*<sup>31</sup> it was said that fair would mean fair to both Parties.

In making the fair determination, it is probable that the Engineer must act without bias and impartially notwithstanding his role as the Employer's agent. If the Engineer is acting for the Employer when issuing a fair determination, why would the Engineer need to "*consult with each Party*" and why is the Employer entitled to dispute the Engineer's determination and refer it to the Dispute Adjudication Board under Sub-Clause 20.4? How could the determination be disputed under the FIDIC form if the Contractor and the Engineer (as Employer's agent) agree? If a principal does not like

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<sup>27</sup> [1971] 1 Ch 233.

<sup>28</sup> [2005] EWCA Civ 291.

<sup>29</sup> [2011] EWHC 3428 (Ch), at [264].

<sup>30</sup> The FIDIC Forms of Contract, page 524

<sup>31</sup> [1997] UKHL 2.

something his agent has done which was properly within the agent's authority, the principal would ordinarily take it up with the agent under the agency agreement.

#### Notify the Parties of the agreement or determination with supporting particulars

The Engineer must give notice to both Parties of each agreement or determination. There is no express time limit, so a reasonable time will be implied. Notice must be given in writing and must not be unreasonably withheld or delayed in accordance with Sub-Clause 1.3. Under the FIDIC Red Book 1999 a notice need not be identified as such and need not include a clause reference. However, under Sub-Clause 1.3 of the FIDIC Gold Book 2008 it must do so. Occasionally the Red Book Particular Conditions are amended to include this Gold Book provision.

Notice must be given with “*supporting particulars*”. Supporting particulars are not defined and therefore their form and extent are open to dispute. Although it is not expressly stated that the Engineer must give reasons in his determination, it is arguable that reasons for the determination would fall within “*supporting particulars*”. It is certainly good practice to give reasons.

In practice, the Engineer may make an interim determination(s), indicating an intention to review it when further particulars are presented to him, and meanwhile including the appropriate adjustment in Interim Payment Certificates. Although an interim determination may nevertheless be referable to the Dispute Adjudication Board directly without further delay, it is usually preferable, if further particulars become available, for the Engineer to review his previous determination.

#### Each Party must give effect to the agreement or determination

Each Party must give effect unless and until revised under Clause 20. There is no express time limit for compliance provided for in the Contract, although the Engineer is likely to set one in the agreement or determination.

In the FIDIC Red Book 1999 the requirement to have a determination made by the Engineer is a condition precedent to any claim by the Employer (see Sub-Clause 2.5) or the Contractor (see Sub-Clause 20.1). However, unlike the FIDIC Silver Book 1999, Sub-Clause 3.5 does not first require the Contractor to give notice of his dissatisfaction with a determination within 14 days of receiving it in order to refer the dispute to the DAB.

It should be noted that until the Engineer has made a determination of the Employer's claim, the Employer cannot make a deduction to the Contract Price or Payment Certificate: *NH International (Caribbean) Ltd v National Insurance Property*

*Development Company Ltd (Trinidad and Tobago)*<sup>32</sup>. Further, in order for either Party to commence Dispute Adjudication Board proceedings they must first have had the claim dealt with under Sub-Clause 3.5: see, for example, *Final Award in Case 16765 (Extract)*<sup>33</sup>.

If either Party is dissatisfied with the Engineer's determination it must proceed in accordance with Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*].

### **GUIDANCE NOTES – Sub-Clause 3.6: Additional Sub-Clause - Management Meetings**

This additional clause proposes that the Engineer or the Contractor's Representative may require the other to attend a management meeting in order to review the arrangements for future work and/or matters in connection with the Works. A record of the management meeting is made by the Engineer and copies supplied to those attending the meeting and to the Employer.

*“The Engineer or the Contractor's Representative may require the other to attend a management meeting in order to review the arrangements for future work. The Engineer shall record the business of management meetings and supply copies of the record to those attending the meeting and to the Employer. In the record, responsibilities for any actions to be taken shall be in accordance with the Contract.”*

It makes attendance at recorded management meetings compulsory to the extent such attendance is required by the Engineer or the Contractor's Representative. Management meetings are not defined and therefore open to dispute unless a definition is expressly provided. There is no form in which the Engineer or Contractor's Representative need to require attendance; this can therefore be given orally or in writing. If not pre-arranged such meeting should take place promptly in order to resolve problems immediately.

The Engineer is obliged to take a record of the meeting. There is no requirement that the Contractor or other attendees agree this record. The Contractor or other attendees should point out any differences in the record from their understanding of the meeting promptly and in writing.

Responsibility for any actions must be taken in accordance with the Contract. As Sub-Clause 3.1 states that the Engineer has no authority to amend the Contract, the record

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<sup>32</sup> [2015] UKPC 37 (6 August 2015); see also *J Murphy & Sons Ltd v Becton Energy Ltd* [2016] EWHC 607 (TCC) (18 March 2016) where the court allowed a claim for delay damages without the Employer going through the Sub-Clause 2.5 and 3.5 process. However, the terms of the contract had been heavily amended.

<sup>33</sup> ICC Dispute Resolution Bulletin 2015 No. 1 at p.101.



of the meeting will not be able to impose responsibilities which are not in accordance with the Contract.

By Victoria Tyson