# Legal Briefing

## *SGL Carbon Fibres Ltd v RBG Ltd*

[2012] CSOH 19, Lord Glennie

In this Scottish case, the court dismissed an appeal by the employer against an arbitrator's decision. The court, in agreement with the arbitrator, found that an employer bore the burden of proof when seeking to recover alleged overpayments to a contractor under a NEC3 Engineering and Construction Contract.

*The Facts*

- SGL Carbon Fibres Limited engaged RGB Ltd under an amended NEC3 Engineering and Construction Contract (June 2005, with Options C and W2) to carry out engineering works at SGL's premises.

- During the course of the project, the parties departed from the NEC3 contractual payment mechanism and instead used a process by which the employer's quantity surveyor, rather than the project manager as provided for in clause 50.1, would approve the amount that the contractor intended to claim before the latter submitted its monthly application for interim payment.

- A number of disputes arose, two of which were referred to adjudication and the resulting decisions challenged in court. In 2011 the parties agreed to arbitrate their disputes, and on 2 August 2011, the arbitrator issued a Part Award. The arbitrator found that:

    - The contractor bore the burden of proof when claiming additional payments above what it had already received. Conversely, the employer bore the burden of proof when attempting to recover amounts allegedly overpaid to the contractor.

    - Any agreement reached or assessment made as to the amounts to be paid on each assessment date was "on an interim basis only" and was not a final and binding determination of the Price for Work Done to Date ("PWDD" - a term used in the contract to represent the cost of the value of work). Under clause 50.5 it could be corrected at a later date but the burden of proof at that stage lies on the party arguing for such a correction.

- In October 2011, SGL was granted permission to appeal against the Part Award on the ground that the arbitrator had made an error of law in concluding that the employer bore the burden of proof when attempting to recover any overpayment.

*The Issues*

The point arising for decision here concerned the burden of proof relating to SGL's claim to recover sums allegedly overpaid to RGB during the course of the contract. At the appeal SGL argued that the arbitrator made two separate but overlapping errors.

Firstly it was argued that the contract required the Contractor to show in respect of each interim payment that the sums claimed by it are justified by its "accounts and records" and therefore fall to be included within Defined Cost (and therefore PWDD) rather than Disallowed Cost. The onus lay on the contractor to justify the accumulated PWDD throughout. The arbitrator therefore failed to give effect to the terms of the contract.

Secondly, SGL argued that the arbitrator wrongly attached significance to the parties' departure from the contractual payment mechanism (of pre-agreeing the amount to be

claimed without assessment by the project manager), to the extent of considering that the agreement or assessment of interim payments overrode the provisions placing the burden of proof throughout on the contractor.

*The Decision*

The court dismissed SGL's appeal and confirmed that the party challenging a certificate bears the burden of proof. In doing so, Lord Glennie considered the following:

- The general rule, "he who avers must prove", is a good starting point for any consideration of the issue.

- The contract mechanism was not operated to the letter and agreement was reached as to the amount of each interim payment without the involvement of the project manager. The arbitrator found that the parties are (and should be) in no better or worse position by reason of their having operated a different payment mechanism. As this was not something that was challenged by either party, the court could properly address the issue by considering the position as it would have been had the contractual payment mechanism been followed.

- Any assessment made by the project manager, and any certificate issued by him, is capable of being corrected by a subsequent assessment and certificate. It does not follow from the non-binding nature of the project manager's assessment and payment certificate that they should be ignored when calculating the final account, or when a party either seeks additional payment or recovery of overpayment. The sum assessed and certified by the project manager becomes due on the assessment date. Unless corrected at a later date by the project manager, or by an adjudicator or arbitrator, that sum remains for the purpose of future calculations the sum which is to be regarded as having been due at the assessment date. Therefore, any party seeking correction of a prior assessment "must at least bear the burden of persuasion".

- The arbitrator (and under Option W2, an adjudicator) has the power to review and revise any actions or inactions by the project manager but a payment certificate would still stand until and unless corrected. In such circumstances, the onus must be on the party seeking to persuade the arbitrator (or adjudicator) to depart from the assessment of PWDD as made by the project manager.

*Comment*

Whilst this Scottish judgment is not binding on the English courts, it provides some clarity on NEC3 payment provisions. As this is an area where there have been few reported cases, the judgment is likely to be of particular interest to adjudicators and arbitrators seeking guidance when dealing with payment disputes under NEC3 contracts.

Lord Glennie's reasoning demonstrates that it would make little business sense for payment provisions to operate in such a way that at the point of arbitration or adjudication, all previous assessments and certificates are disregarded and parties are required to start from scratch such that the contractor would bear the burden of proof in showing what is due. The judgment makes clear that when disputing the amounts certified by the project manager under a NEC3 contract, it is for the party asserting that the project manager was wrong to persuade the arbitrator or adjudicator of that fact.

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