

# MUTUAL TRUST AND CO-OPERATION: NOT THE PANACEA IT MAY SEEM

---

- ▶ What if a contract has two seemingly inconsistent disputes clauses?
- ▶ What is the impact of the mutual trust provision in NEC3?
- ▶ Watch out for Z clauses!

## What's it about?

*Costain Limited v Tarmac Holdings* [2017] EWHC 319 (TCC) concerned defective concrete in central reservation barriers on the Nottinghamshire stretch of the M1.

Costain and Tarmac each had a framework agreement with the DoT based on the NEC3 Framework Conditions, Costain as a contractor and Tarmac as a supplier of concrete products.

As required by its call-off order from the DoT to repair the motorway, Costain gave Tarmac the contract to supply the safety barriers.

One part of the supply contract duplicated the call-off arrangements in Tarmac's framework with the DoT, including provisions for disputes to go to adjudication 'at any time' and then to court. The other part, based on the NEC3 Supply (Short) Conditions, provided for disputes to go to adjudication and then to arbitration, subject to strict 'drop dead' time limits.

It was not disputed that the barriers supplied by Tarmac were defective, but the necessary extent and cost of the remedial works were not agreed. Costain therefore referred the matter to adjudication. What followed raises some interesting issues concerning differing dispute resolution procedures where several sets of contract conditions apply, particularly in relation to the 'good faith' clause 10.1 of NEC3.

## What were the key issues?

Costain's attempt to adjudicate the matter failed, the adjudicator holding that, under the NEC3 Conditions, Costain were out of time. No doubt thinking that any arbitrator might reach the same conclusion, Costain then began proceedings in the TCC claiming about £6 million in damages, relying on the disputes clause in the first part of the contract. Tarmac sought to stay those proceedings to arbitration, relying on the arbitration clause in the NEC3 Conditions.

The NEC3 SSC conditions also included a mutual trust provision at clause 10.1, which provided:

*"The Purchaser [Costain] and the Supplier [Tarmac] shall act as stated in this contract and in the spirit of mutual trust and cooperation..."*



Tarmac argued that the two dispute resolution provisions related to separate aspects of the contract (ie the call-off order mechanism and the sale of goods relationship), and that only the disputes provisions in the NEC3 SSC applied to the supply of the barriers and therefore to the current dispute

Costain argued that, when read together, the provisions allowed the parties to adjudicate, arbitrate or litigate, according to which they considered to be the most suitable for the matter in hand, and that the mutual trust provision in clause 10.1 required the parties to liaise between themselves and agree which of the available procedures was best for any particular dispute. They also argued that the arbitration clause was 'inoperative', which prevented the court action from being stayed.

## What was decided?

In the TCC, Judge Coulson:

*"reached the firm conclusion that [Tarmac's] interpretation of the contract [was] the correct one... the fact that there were two separate sets of NEC3 conditions was a deliberate decision which reflected the two elements of the relationship between the parties. In those circumstances, the fact that the parties had agreed that those two separate aspects of their relationship required two different dispute resolution provisions is unexceptionable. The conclusion that, in this case, there were two separate dispute resolution procedures which did not overlap but complemented each other, because they related to two separate elements of the relationship between the parties..."* [is the correct one].

## What does it mean?

Costain were caught out, ultimately, because the contract was essentially for the sale of goods, so that the statutory right to adjudicate "at any time" did not apply the NEC3 SSC Conditions, and consequently its drop dead provisions were perfectly valid. That did not make the arbitration clause inoperative, but simply meant that any arbitrator would be most likely to decide that the dispute had already been conclusively resolved in Tarmac's favour.

Coulson's judgment is a stark warning not to assume that any construction-related contract is necessarily a "construction contract" and therefore protected by the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (England and Wales) Regulations 1998. It also acts as a warning not to take too much comfort from the NEC's well-known '*mutual trust and cooperation*' provisions.

This case highlights the need for the parties using the ever popular NEC Framework Contract, often preferred to the repeated procurement of individual contracts, to employ qualified and experienced legal advisors to ensure terms are well-drafted, particularly where Z clauses or their equivalents under other standard forms of contract are concerned.

---

# Who to contact

## JENNIFER WALL

Associate

0161 934 6582

07885 800782

[jennifer.wall@addleshawgoddard.com](mailto:jennifer.wall@addleshawgoddard.com)



[addleshawgoddard.com](http://addleshawgoddard.com)

Doha, Dubai, Hong Kong, Leeds, London, Manchester, Muscat, Singapore and Tokyo\*

\* a formal alliance with Hashidate Law Office

© 2017 Addleshaw Goddard LLP. All rights reserved. Extracts may be copied with prior permission and provided their source is acknowledged. This document is for general information only. It is not legal advice and should not be acted or relied on as being so, accordingly Addleshaw Goddard disclaims any responsibility. It does not create a solicitor-client relationship between Addleshaw Goddard and any other person. Legal advice should be taken before applying any information in this document to any facts and circumstances. Addleshaw Goddard is an international legal practice carried on by Addleshaw Goddard LLP (a limited liability partnership registered in England & Wales and authorised and regulated by the Solicitors Regulation Authority) and its affiliated undertakings. Addleshaw Goddard operates in the Dubai International Financial Centre through Addleshaw Goddard (Middle East) LLP (registered with and regulated by the DFSA), in the Qatar Financial Centre through Addleshaw Goddard (GCC) LLP (licensed by the QFCA), in Oman through Addleshaw Goddard (Middle East) LLP in association with Nasser Al Habsi & Saif Al Mamari Law Firm (licensed by the Oman Ministry of Justice) and in Hong Kong through Addleshaw Goddard (Hong Kong) LLP, a Hong Kong limited liability partnership pursuant to the Legal Practitioners Ordinance and regulated by the Law Society of Hong Kong. In Tokyo, legal services are offered through Addleshaw Goddard's formal alliance with Hashidate Law Office. A list of members/principals for each firm will be provided upon request. The term partner refers to any individual who is a member of any Addleshaw Goddard entity or association or an employee or consultant with equivalent standing and qualifications. If you prefer not to receive promotional material from us, please email us at [unsubscribe@addleshawgoddard.com](mailto:unsubscribe@addleshawgoddard.com). For further information please consult our website [www.addleshawgoddard.com](http://www.addleshawgoddard.com) or [www.aglaw.com](http://www.aglaw.com).