

Insight

Insight provides practical information on topical issues affecting the building, engineering and energy sectors.

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Know your position: An overview of the role of the certifier



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Certifiers hold a key role in construction contracts. Certificates, statements and decisions issued by certifiers – whose titles include Contract Administrator, Employer’s Agent, Project Manager, Engineer and Architect to name a few – can have a huge impact on cash flow. Their actions can also provide a recipe for disputes where the certifier is viewed as, or is, one-sided or biased. In this Insight we review the basic laws governing certification and what can be done when something goes wrong in the process.

What is a certificate?

Hudson’s Building and Engineering Contracts defines a certificate as:

*“the expression in a definite form of the exercise of the opinion of the certifier in relation to some matter provided for by the terms of the contract”.*²

Essentially it is a formal decision or approval which determines an entitlement to payment or relief of some sort.³ Certificate in the context of this article includes decisions and notices (which may not be called certificates) which have a contractual effect in determining rights and obligations under a construction contract.⁴

A wide variety of certificates⁵ are found in construction contracts. Key types include:

1. **Interim certificates** which determine what is payable as the contract progresses. These effectively include judgments as to the progress of the works, quality as well as the value of the works as a whole;
2. **Sectional and practical completion certificates** confirming that an element or the works as a whole are complete;
3. **Extension of time certificates** if a contractor or subcontractor has been delayed;
4. **Certificates of non-completion** where a completion date has been missed which may result in liquidated damages being levied;
5. **Final certificates** confirming that

defects found within the defects liability period have been rectified and that the retention can be released.

Who can certify?

The construction contract will lay down who has a certifying role within the contract. Across different types of construction contracts the certifier may have different names. In the NEC forms the role sits with the Project Manager whilst in FIDIC forms it is the Engineer who occupies the role. The JCT Design and Build forms have an Employer’s Agent whilst their Standard Building Contract has a Contract Administrator.

One question that comes up occasionally, is whether the Employer can substitute himself (or an employee) into a certifying role if he gets rid of the certifier or for some reason they become unavailable. In the recent case of *Imperial Chemical Industries v Merit Merrell Technology Limited*⁶ the Employer had tried to substitute their own employee as the Project Manager. The original Project Manager had quit following the Employer’s decision to limit some of their powers.

Mr Justice Fraser rejected the notion that an employee of the Employer could be used to fulfil the Project Manager’s role. He held:

“134. It is contrary to the whole way in which the contractual mechanism is structured, and intended to work, to have the employer seek to appoint itself (or one of its employees, or an employee of its parent) as the decision maker. As Scheldebouw makes clear, ‘the whole structure of the . . . contract is built upon

the premise’ that the employer and the decision maker are separate entities, and ‘endless anomalies arise if the employer and the [decision maker] become one and the same’. It can be seen that, so far as the alternative argument put forward by the employer concerning contractual termination is concerned, the giving of notices under the termination procedures in clause 91 of the contract are required to be given by the Project Manager, not by the employer. If the employer and the Project Manager are the same entity, then notices would be coming from the employer in reality, but dressed up as though they were from the Project Manager, and notification(s) would be given by the employer (as though it were the Project Manager) to itself. This is not how the contract is designed to work, either by intention, or indeed by its terms.

In my judgment, one need go no further than the reasons in Scheldebouw at [45](1), (2) and (3) to conclude that the arguments by MMT on this point are plainly to be preferred. Such a situation is so unusual that an express term is required. *There is no such express term here. The situation which ICI sought to impose upon MMT by appointing Mr Boerboom as the Project Manager was fundamentally different to that for which MMT tendered, and contracted. This is the case even though Mr Boerboom was formally employed by AkzoNobel and not ICI. AkzoNobel was and is the parent company of ICI, and he was acting as the project manager for ICI prior to his purported ‘appointment’ as the Project Manager. He was the very opposite of independent on*

the facts of this case." [Emphasis added]

So express words would be required if an employer wanted to substitute themselves as Project Manager. This is due to the duty of independence a certifier owes when fulfilling that function (as to which see further below). Obviously, it would then be up to the Contractor to decide whether it would be sensible to accept such wording.

The right to delegate a certification role is also limited. Whilst the detailed preparation work for certificates may be delegated, ultimately a certifier will have to exercise their own independent judgment. A certifier cannot therefore delegate the whole function of certifying.⁷

What powers does a certifier have?

The powers given to a certifier are determined by the terms of the contract under which he is required to act.⁸ A certifier therefore needs to ensure that they don't purport to make a decision on an issue that is not within their remit. Likewise if there is a time limit for reaching a decision then this will need to be adhered to.

In *Penwith DC v VP Developments Ltd*⁹ HHLJ Lloyd stated:

"Clearly a certifier or any other decision-maker must have the necessary contractual authority to act for otherwise the certificate or decision will be invalid. If the person has gone outside the limits of the decision-making authority conferred by the contract, ie the person does not have the power or jurisdiction to make the decision or to issue the certificate, the certificate or decision will be unenforceable and will be liable to be set aside. The parties may of course agree to accept the act and in effect to ratify it and if only one party is affected that party may elect to waive its rights not to be bound by it and, by waiver or otherwise, accept the certificate or decision as valid so that it is not always useful to describe it as a 'nullity'." [Emphasis added]

As ever it is crucial to read the contract.

General duties of certifiers

So what are the general duties of certifiers? Perhaps the best description of the duties owed by a certifier is given by Jackson J as he then was in *Scheldebouw BV v St James Homes (Grosvenor Dock) Limited*¹⁰:

"34 Let me now draw the threads together. In many forms of building contract a professional person retained by the employer, and sometimes a professional person directly employed by the employer, has decision-making functions allocated to him. I will call that person 'the decision-maker'. The decisions which he makes are often required to be in the form of certificates, but this is not always so. For example, there are many contracts (of which the present one is an instance) in which extensions of time do not take the form of certificates.

35 Three propositions emerge from the authorities concerning the position of the decision-maker.

(1) The precise role and duties of the decision-maker will be determined by the terms of the contract under which he is required to act.

(2) Generally the decision-maker is not, and cannot be regarded as, independent of the employer.

(3) When performing his decision-making function, the decision-maker is required to act in a manner which has variously been described as independent, impartial, fair and honest. These concepts are overlapping but not synonymous. They connote that the decision-maker 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.

36 In my judgment, these propositions are all applicable to the construction manager in the present case. The fact that the construction manager acts in conjunction with other professionals

when performing his decision-making function does not water down his legal duty. When performing that function, it is the construction manager's duty to act 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."

What is clear is that when it comes to the certifier carrying out their decision-making process (as opposed to the rest of the time) they have to act independently and impartially. They cannot favour the employer or act as the agent of the owner.

Grounds on which a certificate may be attacked

So bearing this in mind, what are the key ways in which a certificate may be attacked on the grounds of the certifier's behaviour (as opposed to the underlying content of the decision or certificate)? They include:

1. Fraud, collusion or dishonesty;
2. Lack of independence;¹¹
3. Interference by the employer;
4. Unknown interests of the certifier;
5. Mistakes (in limited circumstances); and
6. Gross negligence.

Fraud, collusion or dishonesty

Fraud, collusion or dishonesty will disqualify the certifier and invalidate the certificate.¹² You would perhaps assume that a clause attempting to say otherwise would be void for public policy reasons. However, in the case of *Tullis v Jackson* the clause was upheld as effective between the owner and the contractor although the certifier could still be liable for his fraud.¹³ As stated in *Construction Law* this "should be regarded as a shaky authority" at best.¹⁴ Any attempt to include a similar provision should obviously be resisted!

Lack of independence

A failure to certify independently may also lead to disqualification. In the famous House of Lords case, *Hickman v Roberts*,¹⁵ the certifier improperly delayed issuing his certificate. He advised that:

“Had you better call and see my clients, because in the face of their instructions to me I cannot issue a certificate, whatever my own private opinion in the matter.”

It was held that the architect *“had not present to his mind, and did not act upon, that need for judicial independence that is requisite for any one in his position . . .”*. As a result the building owner could not use the lack of the certificate as a ground for dismissing the action for payment.

A similar type of incident was seen in the case of *Costain v Bechtel*.¹⁶ In that case Bechtel staff (Bechtel being the Project Manager) were told to exercise their functions under the contract in the interests of the employer and not impartially.¹⁷ Whilst an injunction was not granted it was held that the Project Manager did have a duty of impartiality in carrying out their duties which had, arguably, been breached.

Interference by the employer

Although in some ways a subcategory of *“lack of independence”*, undue pressure and interference by the employer in certification will also potentially invalidate a certificate. In *Hickman v Roberts* the employer crossed the line in refusing to allow the certificate to be issued. However, the line between normal communication, information exchange and undue interference may be difficult to draw in borderline cases.

Unknown interests

A certifier will also be disqualified if they have an unknown interest which may influence their role.¹⁸ In *Kimberley v Dick*¹⁹ an architect entered into an undertaking with his employer that a house should be erected for a sum not exceeding £15,000, including architect’s commission and all

expenses. A builder was then engaged who, without being informed of the undertaking, gave an estimate based on quantities given him by the architect, and entered into a contract with the employer for the completion of the work from the architect’s plans, and under his superintendence, for £13,690. The architect had the power to order extra works and a clause provided that all questions between the parties under the contract should be settled by the award of the architect.

It was held that, on the evidence, the architect was the agent of the employer; that his undertaking having been concealed from the builder, the clause in the contract regarding the architect’s decision was not enforceable.

In contracts, if the architect or certifier has known interests at the time of entering the contract these will not disqualify the decision maker. So an architect can report on costs to the employer during the course of the works.

Mistakes

A mistake will not normally invalidate a certificate even where it is an obvious one.²⁰ In *Cantrell v Wright & Fuller Ltd*,²¹ it was held that:

“an error or departure from the contractual requirements in a certificate will only invalidate the certificate if its nature or effect is such that it is no longer clearly and unambiguously the required certificate in form, substance or intent if, applying an objective standard, the error does not mislead or does not have the potential of misleading either of the parties to whom it is addressed as to its form, substance or intent.”

Whether a certifier is empowered to correct his certificate will depend on the wording of the contract. The lack of such a power is likely to matter less for an interim certificate than it will for a final certificate.

Gross negligence

A certificate can be attacked (even

where it is said to be final and binding otherwise) if the certifier has been grossly negligent in issuing it. This is more than just negligence. As stated in *Construction Contracts*:²²

“It refers to the contract administrator going well beyond what the contract envisaged him doing, so as to have acted beyond the powers conferred by the contract. This could occur, for example, if a construction contract required the contractor to build a three-storey building, and the contract administrator certified practical completion as having been achieved when only two of the three floors had been constructed.”

Summary

Remedies are available where a certifier acts in bad faith (including in a biased fashion or under the undue influence of the employer), fraudulently or with gross negligence. Indeed, in such cases the common law provides remedies even in circumstances where the certificate may otherwise be final and binding on the parties. For those acting as a certifier it is always worth remembering the importance of acting independently and impartially when carrying out a certification function. The role in this sense is an odd one, particularly given that the employer will be paying the bills, but in order to ensure the smooth functioning of construction contracts it is crucial that a certifier remembers these duties whenever they put on their certification hat.

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Footnotes

1. By Claire King. With thanks to Laura Bowler for her research.
2. See Robert Clay and Nicholas Dennys, QC, *Hudson’s Building and Engineering Contracts*, 13th edition (2017, Sweet and Maxwell), ch. 4 – Certificates and Defects, paragraph 4-001 (“Hudson”).
3. See also the definition in Ben Patten QC and Hugh Saunders, *Professional Negligence in Construction*, 2nd edition (2018, Routledge), p. 103.
4. See also Julian Bailey, *Construction Law* (Informa law, 2016), vol. 1, ch. 5.98 for a concise definition of certificate.
5. As stated in Hudson, chapter 4-001: “It should be noted that the law on certificates is also

relevant to other decisions or statements which may in substance be similar to a certificate.”

6. [2017] EWHC 1763 (TCC).
7. See Stephen Furst and The Hon. Sir Vivian Ramsey, *Keating on Construction Contracts*, 10th edition (2018, Sweet and Maxwell), ch. 5-056, Delegation of Duties. See also *Clemence v Clarke* (1880) in H.B.C. 4th edition, vol. 2, paras 54 and 59.
8. *Jackson J in Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC).
9. [1999] EWHC Tech 231 at [17].
10. [2006] EWHC 89 (TCC).
11. Categories 2, 3 and 4 can all be seen as categories within an overall heading of “bad faith”. See *Bailey, Construction Law*, ch. 5.142, Vol. 1.
12. *Sharpe v San Paulo Railway* (1873) L.R. 8 Ch. App, 597.
13. See *Keating on Construction Contracts*, ch. 5-064; see also *Tullis v Jackson* (1892) 3 Ch. 441.
14. See *Bailey, Construction Law*, vol. 1, ch. 5.156.
15. [1913] A.C. 229.
16. [2005] EWHC 1018 (TCC).
17. See paragraph 35 of *Costain v Bechtel* [2005] EWHC 1018 (TCC).
18. See *Keating on Construction Contracts*, ch. 5-066.
19. (1871) L.R. 13 Eq. 1.
20. See *Bailey, Construction Contracts*, vol. I, ch. 5.108. See also *Toepfer v Continental Grain Co* [1974] 1 Lloyd’s Rep 11 at 13, per Lord Denning MR.
21. [2003] BLR 412.
22. See *Bailey, Construction Contracts*, ch. S.142.

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