

FAILURE TO COMPLY WITH THE NEC TIME BAR FOR ADJUDICATION PREVENTS ENFORCEMENT OF AWARD

- ▶ The recent case of *Sitol UK Ltd v Finegold* and another highlights the need for parties to be aware of and comply with contractual provisions governing time limits for the referral of disputes. The TCC enforced the time-bar set out in the suite of NEC3 and NEC4 contracts in a contract to which the Construction Act did not apply. The case provides guidance on when a dispute arises – a request for further information does not necessarily mean that there is no dispute.

What's it about?

Sitol was engaged by the Finegolds to undertake specialist tiling work at their property under an NEC3 Engineering and Construction Short Contract. The Finegolds were residential occupiers and, therefore, the Construction Act did not apply to the contract.

Following a successful adjudication Sitol commenced proceedings for enforcement of the amount awarded and adjudicator's fees, which was resisted by the Finegolds on two grounds, one of which was that the adjudication had been brought out of time according to clause 93.3 of the contract which stated:-

A party may refer a dispute to the adjudicator if:-

- ▶ *the party notified the other party of the dispute within four weeks of becoming aware of it; and*
- ▶ *between two and four further weeks have passed since the notification.*

If a disputed matter is not notified and referred within the times set out in this contract, neither Party may subsequently refer it to the Adjudicator or the tribunal.

In considering whether the dispute had been notified to the Finegolds as required, the court used the principles established by *Amec v Secretary of State for Transport* including that "a dispute does not arise unless and until it emerges that the claim is not admitted." The court considered that a letter dated 19 February 2018 sent by the Finegolds' solicitor to Sitol, in which Sitol's claim was denied on the basis that the Finegold's contractual relationship was with the "main contractor" and not Sitol, resulted in Sitol being aware that a dispute had crystallised.

Sitol did not notify the Finegolds of the dispute prior to service of its notice of adjudication on 25 April 2018 (more than 4 weeks after 19th February) and as such it was in breach of the requirements as to notification and was barred from commencing an adjudication. The fact that the Finegolds' solicitor had requested further information in its letter, and that the Finegolds believed the contractual relationship was with the "main contractor", did not prevent the 19th February response from crystallising the dispute.

Why does it matter?

Whilst this decision does not impact contracts to which the Construction Act applies (given the right under the Act to refer a dispute to adjudication at any time) it shows that the courts will enforce contractual provisions which control the right to refer a dispute for resolution in other contracts, even if they are reluctant to do so.

Mr Justice Waksman also considered the specific wording of clause 93.3 of the NEC form, i.e. that the adjudication must be commenced "within four weeks of the party becoming aware of it." He took the view that this could not be a wholly subjective test, as this would allow, for example, a failure of a party to open a letter advising them of the dispute to prevent time from starting to run, but should be judged on the basis of when the dispute had objectively been brought to the relevant party's attention.

Now what?

This case highlights that a failure by a party to comply with the terms of a contract may (subject to the provisions of the Construction Act) result in the loss of chance to refer a matter to adjudication, or, alternatively, may provide a valid defence when the timetable has not been adhered to.

Parties to NEC forms of contract (or other contracts containing restrictions on the rights to refer a dispute for determination) to which the Construction Act does not apply should:

- ▶ be aware of, keep in mind during the duration of the project and (of course) comply with the stipulations of any provisions governing notification and/or referral of disputes;
- ▶ err on the side of caution when reviewing correspondence from the opposing party or when there is a potential dispute – consider whether it could be argued that the correspondence indicates that a dispute has crystallised;
- ▶ draft any correspondence carefully so that it has the required effect with regard to a potential dispute; and
- ▶ bear in mind that the fact that the opposing party requests information does not necessarily mean that there is not a dispute, although provision of the information may resolve the dispute.

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