

Construction Law Update

Too Late to Adjudicate Under NEC Contracts?

Can a party to a non-Construction Act contract lose its right to adjudicate if it does not commence proceedings within a contractual time limit? In the recent case of *Sitol Limited* (“Sitol”) v *Finegold* the court considered the application of the time bar in the NEC3 contracts.

Background

Sitol, a specialist tiling and ceramic company, sought to enforce an adjudicator’s decision against Mr and Mrs Finegold for outstanding sums for work carried out in the sum of £45k plus the adjudicator’s fees of £42k.

The Finegolds sought to resist summary judgment on the basis of two arguments:

1. the Finegolds should not have been named in the adjudication or subsequent proceedings because Sitol had contracted with Proman UK Limited (“Proman”), who the Finegolds had employed to act as the main contractor on the redevelopment of their home; and
2. the referral to adjudication was made out of time.

Was there a contract between the Finegolds and Sitol?

Proman had issued an NEC contract (the “Contract”) to Sitol which described the employer as the Finegolds. Sitol signed a copy of the Contract and returned it to Proman but the Finegolds never signed it and it was not clear if they were ever given a copy of it.

However, taking into account Proman’s usual practice and the correspondence detailing what actually happened in this case, the court concluded that Proman had been engaged by the Finegolds as the project manager, not the main contractor. The Contract was therefore between Sitol and the Finegolds, with Proman having acted as agent for the Finegolds.

Was the notice of adjudication out of time?

Clause 93.3 of the Contract 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.”

In determining when the dispute had arisen, the court relied on *Amec Civil Engineering Limited v Secretary of State for Transport* and emphasised that *“a dispute does not arise unless it emerges that the claim is not admitted”*.

The court found that the dispute had crystallised on 19 February 2018 when the Finegolds’ solicitors wrote to Sitol rejecting their demand for payment and stating that there was no contract between the parties. The fact that Sitol had been invited to provide evidence of its claim did not mean that a dispute had not crystallised. The court also held that when a party becomes aware of a dispute must be determined objectively and, in this instance, the dispute had been objectively brought to Sitol’s attention upon receipt of the letter as it was addressed to Sitol.

As Sitol did not issue a notice of adjudication until 25 April 2018, the court concluded that Sitol had failed to comply with the requirement under clause 93.3 and therefore the adjudication was out of time and the Finegolds’ second defence succeeded.

Analysis

Whilst the NEC time-bar provisions are not applicable where the Construction Act applies, it is important to note that they will take effect in relation to contracts with residential occupiers, international works, supply only contracts and operations which are excluded under the Construction Act. This judgment serves as a stark reminder of the importance of complying with contractual time limits, particularly where parties are carrying out the types of works listed above under NEC contracts.

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