

Insights

THE OBLIGATION TO ADJUDICATE UNDER NEC

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SUMMARY

A recent case serves as a reminder that, when using an NEC contract, a dispute must first be referred to adjudication before court or arbitration proceedings

Since its introduction as an interim method of dispute resolution in the [Housing Grants, Construction and Regeneration Act 1996](#), adjudication has often been seen as the primary method of dispute resolution for construction disputes, as it is quicker and more cost-effective than court or arbitration.

Adjudication is not, however, a required step before formal proceedings under the 1996 Act; rather, it is an optional method of dispute resolution that a party can choose to take. Nevertheless, NEC option W2 – which is intended for contracts in the suite that are subject to the 1996 Act – states that a dispute must be referred to adjudication before it is referred to the tribunal.

Furthermore, adjudication is only temporarily binding, subject to a notice of dissatisfaction being issued under W2.4(2), so some parties may seek to bypass it and start proceedings. This was the issue in the recent decision in *Fraserburgh Harbour Commissioners v McLaughlin & Harvey Ltd* [2021] CSOH 8, where the court had to determine whether option W2 did mean an adjudication had to take place before a dispute could be referred to the tribunal.

Dispute over dispute resolution

In November 2012, the parties entered into an NEC3 contract for carrying out works to deepen part of Fraserburgh Harbour. The parties incorporated option W2 and chose arbitration as their preferred form of tribunal. The contract stipulated it was subject to the law of Scotland.

Following completion, the employer discovered various alleged defects, and commenced proceedings in the Scottish courts for damages in excess of £7m. The contractor challenged the claim on the grounds that option W2 required the dispute be first referred to adjudication and then arbitration, and therefore the court was not entitled to decide the case.

In order to justify its position, the employer argued that under Scottish law an arbitration clause did not necessarily rule out the possibility of court proceedings. It also maintained that there was relevant case law that represented a distinctive Scottish approach to clauses providing for an alternative mode of dispute resolution, which informed its interpretation of option W2.

It went on to argue that a contract should not be interpreted as excluding the court's jurisdiction, unless there was clear wording or necessary implication to this effect, which it said did not apply in this instance. It further contended that, although clause W2.4(1) required that an arbitration could not commence without an adjudication having taken place, this requirement did not apply to court proceedings.

The contractor in turn argued that clause W2.4(1) made it clear that adjudication is a mandatory step before there can be any referral to a tribunal. It relied on several passages in the [guidance notes](#) issued for the NEC3 Contract supporting that interpretation.

It also relied on the English decision in [Anglian Water Services Limited v Laing O'Rourke Utilities Limited \[2010\] EHC 1529 \(TCC\)](#), which concerned the equivalent provision of NEC2. In that case, the court held that there was a requirement that a dispute was first referred to adjudication, and that requirement was not inconsistent with the 1996 Act.

The court decision

Unsurprisingly, the court held that the effect of clause W2.4 was clear from the express wording used, which meant that an adjudication on the matter in dispute is a precondition to referral to the tribunal. In this case the parties had chosen arbitration as the tribunal, and this would be the forum to determine any dispute once an adjudication had taken place.

The court was clear that clause W2.4(1) was intended to be definitive as to the means for determining any disputes between the parties, and the sequence in which they were to be taken. The employer's interpretation would have resulted in parallel proceedings, which the judge saw as being at odds with the clear wording and detailed specification of the means for dispute resolution provided for in the contract, and likewise at odds with the aims of the 1996 Act. The court, however, retained its residual jurisdiction in respect of ancillary matters.

It is worth noting that the court did not express any views about the contractor's reliance on the guidance notes to interpret NEC; neither did it express a view on the employer's argument that those notes state expressly that they should not be used for such legal interpretation of the suite. The decision was based on the general principles of interpretation and the case law cited by the parties.

Remember your requirements

The decision is a useful reminder that, although adjudication is an option under the 1996 Act for many other forms of contract, the NEC contract makes it a step that parties must take before court

or arbitration proceedings can be commenced, unless the standard provisions have been amended.

This decision concerns the standard wording and, not surprisingly, the court applied the express wording used in the NEC contract. This is consistent with decisions of the English courts on the same issues, and with the commentary in the NEC guidance notes and other textbooks.

The case is also a useful demonstration of the difficulties that a party will face when seeking to ignore the contract's express requirements, especially with regard to the dispute resolution method.

In that respect, it is important to appreciate that the requirement in clause W2 to refer a dispute first to adjudication will apply to disputes that arise not just during a project but also once it has completed.

Where disputes are referred to adjudication after completion, it is then important to remember that this does not stop the clock running for limitation purposes. Parties will need to allow for the adjudication to take place within such periods, so that court or arbitration proceedings can commence before the limitation period expires.

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