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Insights

NEC AND NOTICES OF DISSATISFACTION

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Getting the notice right is important for all construction contracts and *NEC* is no exception. Failing to *issue a notice* as required under the contract can have serious consequences and in NEC this is often an issue that arises in relation to the obligation to notify compensation events within an eight week period (clause 61.3 of *NEC4 ECC*). Another key issue arises in respect of the obligation to issue a *notice of dissatisfaction* within 28 days of an adjudicator's decision, as a failure to do so will mean that such decision becomes final and binding, and cannot be challenged by referring it to the tribunal (clause W2.4(1) of NEC4 ECC).

Three recent decisions have considered notices of dissatisfaction under NEC, highlighting the importance of getting it right.

THREE CHALLENGES TO VALIDITY

In *Transport for Greater Manchester v Kier Construction*, the court looked at a situation under *NEC3* where, following an *adjudication* in late 2019, the employer's solicitors wrote to the contractor's solicitors, stating in the usual way that while their client did not accept the decision, it would make payment recognising it was temporarily binding. When the employer sought to commence court proceedings in August 2020, the contractor argued the solicitors' letter was not a valid notice of dissatisfaction and therefore the decision became final and binding.

We considered this decision and its implication on notices more generally in *a previous blog*, but in short the court rejected three challenges to the validity of the notice, holding that:

- For the purposes of the adjudication, the details exchanged between the parties' respective lawyers became the "last address notified" under clause 13.2, so the solicitors' letter was served validly under the contract despite not being sent using the project software specified in the contract.
- A valid notice had to be clear and unambiguous so as to put the other party on notice that the decision was disputed, but did not have to explain or set out the grounds on which it was disputed.

- The letter did not breach the requirement in clause 13.7 to send notices separately, as it was a short letter and the fact that the client referred to its intention to pay the disputed sums awarded by the adjudicator was not a separate notification requiring a separate communication.

Bearing in mind the consequences of an invalid notice under clause W2.4(2), it is perhaps not surprising the challenge was made, but a month later the court looked again at this provision.

THE EFFECT OF BEING DISSATISFIED

In *Prater Ltd v John Sisk & Son (Holdings) Ltd* a valid notice of dissatisfaction was issued by the subcontractor under an NEC3 subcontract, but no further steps were taken and the dispute was not referred to a tribunal.

The court went on to hold that the decision remained final and binding until revised by the tribunal. In the context of a number of different adjudications, this prevented the subcontractor from arguing that the decision in the second adjudication lacked *jurisdiction*, which the subcontractor used in order to *resist enforcement* of a later and different adjudicator's decision. That was in the context of serial adjudication but it shows that while a valid notice of dissatisfaction preserves the right to later challenge a decision, it does not affect its *enforceability* in the meantime. This also shows the complex issues that can arise when looking at challenges based on jurisdiction, something that came up in a recent decision.

THE GROUNDS FOR DISSATISFACTION – SUBSTANCE OR JURISDICTION?

Matt Molloy *looked* at *The Metropolitan Borough Council of Sefton v Allenbuild Ltd* in the context of the stay for arbitration, a project using NEC2 where a dispute was referred to adjudication 14 years after completion.

One of the arguments raised in that case was that a notice of dissatisfaction has to make it clear whether a challenge is being made to the validity of an adjudicator's decision on jurisdictional grounds, instead of, or in addition to, a challenge to its substantive merits. Here the contractor issued a general notice of dissatisfaction, relating to:

> *"… the entirety of the Adjudicator's Decision including all of the Adjudicator's conclusions, reasoning, and decisions."*

Not surprisingly it relied on *Transport for Greater Manchester v Kier* to argue this was sufficient for a valid notice of dissatisfaction.

The court rejected this argument. It accepted that for the purposes of the *NEC dispute resolution clauses*, there is no distinction between a challenge to an adjudicator's decision on the underlying merits of the dispute or as to the adjudicator's jurisdiction and that a notice of dissatisfaction need not descend into the details of any substantive challenge. It did however go on to hold that because

the issue of the validity of a decision is fundamentally different from its substantive merits, a notice of dissatisfaction must make it clear the basis on which a challenge is being made – whether it is a challenge to the validity of an adjudicator's decision on jurisdictional grounds and/or a challenge to its substantive merits.

It is relevant to note in that context that the court was also influenced by the fact that the contractor did not raise any objections based on jurisdiction or expressly reserved the right to do so, which the court held meant it waived any right to object to the adjudicator's jurisdiction.

THE CAUTIOUS APPROACH TO NOTICES

These decisions highlight the importance of issuing a valid notice of dissatisfaction as required under the NEC form of contract but also that while it is not necessary to provide a detailed explanation of the reasons for the dissatisfaction with the decision, a party should identify whether it is seeking to challenge the decision on the merits or whether it objects to the adjudicator's jurisdiction.

There have been a number of cases where the courts have highlighted the need to raise jurisdictional arguments in detail and at an early stage, and this latest decision reflects the same rationale. It highlights the importance of raising such objections without delay and in detail where possible, as a failure to effectively reserve rights is likely to result in a waiver of such rights (as discussed by the Court of Appeal in *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd*).

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