

Insights

TRANSPORT FOR GREATER MANCHESTER V KIER CONSTRUCTION: NOTICE THE LITTLE THINGS

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Preparing and sending *contractual notices* always makes me nervous. There are so many things to get wrong: is it in time, where should I send it, who to, how should I send it? Not to mention the actual content of the notice.

For those of you like me, the recent case of *Transport for Greater Manchester v Kier Construction Ltd* shows that we are right to worry about these things. Notices are important, and getting them wrong has serious consequences.

The facts – a brief recap

Transport for Greater Manchester (TfGM) engaged Kier Construction Ltd to design and build a bus interchange in Bolton under an amended *NEC3 ECC form of contract*.

What happened next is, unfortunately, a familiar story. The works were delayed, TfGM deducted *liquidated damages*, Kier objected and launched an adjudication demanding an *extension to the completion date* and repayment of liquidated damages. The adjudicator decided in Kier's favour.

Now, under *clause W2.4 of NEC3 ECC*, the adjudicator's decision becomes final and binding unless a party serves a notice of dissatisfaction within four weeks of notification of the adjudicator's decision. So, within four weeks of the decision, TfGM's solicitors sent an email to Kier's solicitors stating that the adjudicator had erred in law and interpretation of the contract. Further, it reserved TfGM's:

“right and intention to seek formal resolution to reverse the outcome of the Decision.”

TfGM's solicitors sent the notice by email and post to Kier's solicitors.

Off the back of this notice, TfGM issued a *Part 8 claim* seeking final determination of the disputes and reversal of the adjudicator's award. Kier sought to prevent the claim. It said that the court lacked jurisdiction because TfGM had not served a valid notice of dissatisfaction under clause W2.4, in particular the notice:

- was sent to the wrong address;
- included communications on other topics; and
- did not provide that TfGM intended to refer a specified matter to court.

Let's look at each of these points in turn.

Where should the notice have been sent?

Clause 13.2 of the parties' contract stated that a communication was effective when received at the last address notified by the recipient for receiving communications or, if none was notified, at the address of the recipient stated in the Contract Data.

The Contract Data specified Kier's registered address as the address for communications under the contract. Further provisions of the contract stated that all communications must be made using the project extranet. Kier argued that the notice of dissatisfaction was invalid because it was sent to its solicitors rather than to its registered address, or using the project extranet.

TfGM disagreed and said that the notice was correct because:

- Kier had authorised communications concerning the adjudication through its solicitors; and
- for the purposes of adjudication, Kier's *notice of adjudication* and *referral notice* gave the contact details of its lawyers and TfGM's lawyers had done the same. Critically, neither party raised any objection to this approach.

Mrs Justice O'Farrell disagreed with Kier's argument, holding that for the purposes of the adjudication, the details exchanged between the parties' lawyers became the "last address notified" under clause 13.2 of the contract. If Kier was correct, and it was not valid to serve notices on the parties' solicitors, then its own notice of adjudication would have been invalid too.

What should the notice have contained?

Kier said that TfGM's notice was invalid because it was not precise enough and so did not meet the clause W2.4 requirements. Once more, Mrs Justice O'Farrell disagreed holding that TfGM's notice was a valid notice of dissatisfaction for the purposes of clause W2.4. The key takeaway here is that to be valid, the notice should be clear and unambiguous so as to put the other party on notice that the decision is disputed. However, there is no need for the grounds of dispute to be set out in the notice.

Should the notice have been sent separately?

Another argument that Kier advanced was that the notice included other matters and so did not comply with clause 13.7, which stated:

“A notification which this contract requires is communicated separately from other communications...”

Again, Mrs Justice O’Farrell disagreed with Kier. The letter was only three paragraphs, each dealing with the disputed adjudication decision. The fact that TfGM referred to its intention to pay the disputed sums awarded by the adjudicator was not a separate notification requiring a separate communication.

Final thoughts

This case underlines the importance of the care that is needed when dealing with notices. For those of you who get nervous about sending notices, I offer this checklist:

- The fundamental starting point is that a notice should make clear that it is a notice, and what it is notifying.
- Start with the contract notice provisions. Identify:
 - Who should the notice be sent to?
 - Who should send it?
 - Where should it be sent?
 - How should it be sent there?
 - When does it need to be sent?
 - When will it be deemed received?
- Do I need to specify the clause that the notice relates to? Be aware that some contracts such as the *FIDIC Red, Yellow and Silver 1999 and 2017 forms* require that certain notices refer to specific clauses (for example, clause 20.4 (Obtaining Dispute Adjudication Board’s Decision) in the 1999 forms and clause 21.4.1 (Obtaining DAAB’s Decision) in the 2017 forms. Although not always strictly required, if you want to notify something under a particular contract clause, you may wish to refer expressly to that clause in your notice to avoid any future arguments about its validity.
- What information do I need to include in the notice?
- If sending a notice by email:
 - first check that the contract makes provision for this method of service;
 - address the notice to the correct email address. Do not cc or bcc your intended recipient;

- to avoid any doubt over whether the recipient has received the email, phone and check (and take a note of that call).

Finally, if in doubt, cover all the bases and send it to more than one recipient by more than one method. It's the little things that matter.

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