

Construction Law

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Know your Contract!

A recently reported case from the Technology and Construction Court has re-emphasised the critical importance of knowing the form of engineering or building contract you are working with and completing it properly, as well as providing a timely reminder of the need to expressly select arbitration in the contract as the relevant form of dispute resolution if this is to be the preferred choice.

The Facts

In *Walter Llewellyn & Sons Limited and another –v– Excel Brickwork Limited* the first claimant, Walter Llewellyn & Sons Limited (WLAS) was a main contractor employed by a housing association to design and build 121 timber framed dwellings at a site known as Crossways in Thamesmead. By a sub-contract order made in May 2002, WLAS employed the defendant, Excel Brickwork Limited (Excel) to carry out brickwork and blockwork at the site.

The sub-contract order incorporated the standard terms of the NEC2 Engineering and Construction Subcontract, using Option A and attaching a number of other specification documents and drawings. In addition, there was a schedule of bespoke amendments which were expressly stated to override the standard form clauses and purported to bring the sub-contract's payment regime into line with the requirements of the Construction Act 1996.

Unfortunately, the parties, despite completing much of the contract, did not sign the standard form of contract or, crucially, fully complete part 1 of the Sub-Contract Data of the NEC2 form, which is where, amongst other things, the dispute resolution mechanism applicable to the contract is selected along with the relevant procedure for that dispute resolution mechanism.

Excel's arguments

The case centred around an application by Excel for a stay of the court proceedings as it considered that there was a binding arbitration agreement between the parties, despite the Sub-Contract Data not being completed. Excel argued that in other parts of the sub-contract document it made arrangements for, or prepared for, arbitration as a means for dispute resolution.

It was Excel's case that in the bespoke schedule of amendments, for example, there was a clause stating:

"If the standard Sub-Contract form makes provision for settlement of disputes by arbitration then it is hereby agreed by the parties to this Sub-Contract that any dispute which arises for which of those provisions have been made shall be referred to arbitration in accordance with them."

In addition, Excel pointed to clause 90.11 of the NEC2 which states that the "decision of the Adjudicator is binding until the dispute is finally determined by the tribunal or by agreement". It was argued that a 'tribunal' was not a 'court', therefore arbitration applied by implication.

The decision

The court dismissed these arguments, stating that, on a simple matter of interpretation of the sub-contract documentation, the parties had not agreed on arbitration as the dispute resolution tribunal or forum. This is because:

- 1 There was nothing in any of the sub-contract documents which showed or demonstrated any express or conscious agreement that arbitration was the ultimate dispute resolution process;



- 2 The clause in the bespoke schedule of amendments clearly needed the main NEC2 conditions to choose arbitration before it came into effect, and;
- 3 The standard NEC2 Sub-Contract form, left unamended, does not make provision for arbitration. Clause 93 simply identifies "the tribunal", but there is no standard form definition of "the tribunal" and it requires the parties to complete what "the tribunal" should be by filling in the Sub-Contract Data, which they did not do.

It followed that Excel's application to stay the proceedings failed as there was no arbitration agreement in the sub-contract order between the parties.

Conclusion

This case clearly demonstrates the critical importance of parties knowing properly the contracts they are using and completing them in the correct manner. This is especially important in the context of choosing arbitration as the main method of dispute resolution, as this requires express agreement between the parties before it is incorporated, but it will equally apply to other important provisions governing the contractual relationship between the parties.

There is danger in leaving any standard form of building or engineering contract with missing information, or unsigned, as this may give rise to legal consequences that the parties did not intend. The simple answer is, if in doubt, get it checked!

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