Reports from the courts

Andrew Croft and Ben Spannuth of Beale & Company Solicitors LLP present our regular round up of court cases of most interest to construction. One decision confirms that the courts will enforce time bars to adjudication under NEC contracts in circumstances where the Construction Act 1996 does not apply; another emphasises the importance of clarity as to what is being agreed in relation to selection of adjudicators.

Sitol Ltd v Finegold
[2018] EWHC 3969 (TCC); TCC; Waksman J
Sitol Ltd (Sitol), a tiling and ceramic company, was engaged by Mr and Mrs Finegold (the Finegolds) in respect of a large refurbishment and building project at their house to deal with highly-specialised tiling operations pursuant to an NEC3 Engineering and Construction Short Contract (the Contract).

The Construction Act 1996 did not apply as the Finegolds were residential developer clients.

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.’

On 17 January 2018, Sitol issued an invoice for its unpaid fees to the Finegolds, which at that stage were put at just over £47,000 inclusive of VAT.

In February 2018, Sitol sent a letter and, subsequently, an email to the Finegolds chasing payment.

On 19 February 2018 the Finegolds’ solicitors informed Sitol that they disputed that a contract existed between Sitol and the Finegolds.

On 9 March 2018, Sitol sent a further letter to the Finegolds chasing payment. In response, on 16 March 2018, the Finegolds’ solicitors maintained that no contract existed. Sitol therefore provided various documents, including a copy of the Contract, and proposed adjudication proceedings or, alternatively, some other form of dispute resolution. The Finegolds’ solicitors’ position remained unchanged.

Sitol issued a Notice of Adjudication and a Referral dated 25 April 2018 and 30 April 2018 respectively. By a decision dated 18 June 2018, the adjudicator awarded £44,838.38 inclusive of VAT in respect of Sitol’s unpaid fees. Sitol sought to enforce the adjudicator’s decision. With reference to the specific notification provision at cl 93.3 of the Contract, the Finegolds argued that the dispute had arisen by 19 February 2018 and was therefore referred to the adjudicator after the four-week period had expired. Sitol’s position was that it was only on 4 April 2018 (when the Finegold’s solicitors requested evidence of Sitol’s entitlement to the sums claimed) that there was a dispute of which it was aware.

Decision
Waksman J rejected Sitol’s application for summary judgment.

Waksman J held, ‘with no great enthusiasm’, that, for the purposes of cl 93.3 of the Contract, a dispute had crystallised on 19 February 2018 such that ‘a dispute had most clearly arisen by 19 March’ so ‘the adjudication would be timed out’. In considering the meaning of ‘dispute’, Waksman J referred to the decision in Amec Civil Engineering Ltd v Secretary of State for Transport [2004] EWHC 2339, noting that: ‘dispute’ was ‘to be given its normal meaning’; there was ‘no hard-edged legal rule as to what was or was not a dispute’; ‘[t]he mere fact that one party notifies the other party of a claim does not automatically and immediately give rise to a dispute’, but ‘a dispute does not arise unless and until it emerges that the claim is not admitted’; and ‘[t]here may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted ... The respondent may simply remain silent for a period of time, thus giving rise to the same inference’.

Waksman J considered that this was not a case of silence, but was ‘on any analysis, a case of an express rejection of the claim’. Waksman J explained that the fact that one party might request evidence from another party does not indicate that the dispute has not arisen, but simply means that it is possible that the dispute might be resolved without litigation.

Comment
The decision will be of interest to parties entering
into NEC contracts. It confirms that the courts will enforce time bars to adjudication under NEC contracts in circumstances where the Construction Act 1996 does not apply.

Any party considering bringing a claim in adjudication must therefore be particularly vigilant and have regard to such time bars or otherwise risk being out of time.

**Equitix ESI CHP (Sheff) Ltd v Veolia Energy & Utility Services UK Plc**

[2019] EWHC 593 (TCC); TCC; Jefford J

Equitix entered into an EPC Contract with Kantor Energy Ltd (Kantor) for the design and construction of a biomass energy plant. Equitix also entered into an O&M Contract with Veolia Energy & Utility Services UK Plc (Veolia) for the operation and maintenance of the biomass energy plant (the Contract).

Schedule 8, Part 3, para 1.5 of the Contract stated:

‘The Adjudicator nominated to consider a dispute referred to him shall be selected [...] from the relevant panel of experts which shall comprise three (3) experts in the field of biomass energy plants and who shall be selected jointly by [Veolia], [Kantor] and [Equitix] [...]’

The Contract further provided that the selection of an adjudicator should take place within 20 days of the Commencement Date. In the event of failure to agree on the identity of the experts, para 1.9 provided that appointments to the panel were to be made by the CIArb.

It was common ground that no steps were taken within 20 business days of the Commencement Date. In 2018, Veolia made proposals for appointing an expert, but these ‘did not find favour with Equitix’. Equitix’s position was that the experts must have ‘technical expertise’. Further to discussions between the parties, Equitix asked the CIArb to appoint persons with technical expertise. Veolia’s position was that Equitix’s suggested approach was not the proper construction of the Contract.

On 7 February 2019, the CIArb confirmed that 3 people had been appointed to the panel and were willing and able to act, namely a quantity surveyor dually qualified as a barrister (non-practising), a Queen’s Counsel with a specialist practice in construction and engineering, and a practising barrister with further technical qualifications.

Equitix contended that none of these candidates met the criteria in the Contract and that the appointments were therefore invalid. Equitix sought the appointment of alternative candidates who ‘they considered to have “the requisite technical expertise”’, namely two mechanical engineers and a person ‘specialising in heat generation and transfer technologies, particularly biomass and energy from waste’.

Equitix commenced proceedings on 17 January 2019, seeking, amongst others, a declaration that:

‘... [t]he CIArb is obliged to appoint experts in the field of biomass energy plants pursuant to paragraph 1.9 of Schedule 8, Part 3 of [the Contract] meaning persons who possess technical expertise in the field of biomass energy plants.’

**Decision**

Jefford J declined to grant the declaration sought by Equitix.

Jefford J noted that the phrase ‘experts in the field of biomass energy plants’ likely would not, in isolation, include lawyers. However, the context of ‘expertise in contracts related to or disputes related to the field of biomass energy plants’ was important. Jefford J found that the words ‘in the field of’ meant that the expertise intended was wider than a specific technical expertise.

Jefford J noted that any dispute would not simply be limited to technical issues, but might extend to issues relating to liquidated damages and cost of remedial works.

Jefford J also considered that the fact that the parties had agreed that the CIArb was the adjudicator nominating body, rather than an engineering institution or other technical body, further supported the position that a technical expert was not required.

**Comment**

This decision emphasises the importance of contracting parties being clear as to precisely what is being agreed. In particular, any adjudication procedure should clearly identify the adjudicators who can be appointed and should not use potentially vague phrases such as ‘technical expertise’.

Where parties require adjudicators to have specific experience or expertise, this should be clearly stated. Parties should therefore consider making reference to particular types of professional. **CL**