



Don't get your kicks from Clause 66

- possible anomalies in Clause 66 of the ICE

Introduction.

In an interesting recent case the inter-relationship between an Engineer's decision under Clause 66 of the ICE Form of Contract, the issuing of a Notice of Arbitration, and the limitation period on a contract was considered.

The case in question being *Amec Civil Engineering Ltd. v Secretary of State for Transport* [2005] EWCA Civ. 291, 17th March 2005.

Amec Civil Engineering Ltd. v Secretary of State for Transport.

Amec Civil Engineering Ltd ("Amec") carried out major renovation works to the Thelwell Viaduct for the Secretary of State for Transport ("SST") under an ICE Form of Contract.

The works were completed on 23 December 1996.

In June 2002 it became apparent that some of the roller bearings installed by Amec had failed. Although the reason for the failure was unclear, the SST turned first to Amec as being responsible for the remedial costs (which were likely to be very substantial).

The contract had been executed under hand which meant that the limitation period expired on 23 December 2002 (i.e. 6 years after 23 December 1996).

Clause 66 of the ICE provides for disputes or differences to be referred in the first instance to the Engineer. The initiation of Arbitration (under the ICE Form) being reliant upon the parties having first received a written decision of the Engineer, or of the Engineer having failed for 3 months to give a decision.

The following chronology of events evolved:-

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| 29 July 2002 | The SST wrote to Amec advising Amec of the problem and asking it to inspect the works. |
| 19 September 2002 | Meeting held at which Amec indicated that it did not accept responsibility. |
| 2 October 2002 | The SST wrote to Amec enclosing the minutes of the 19 September meeting, and also noting that its stance was firmly that there was a defect to be addressed by one or more of the parties involved, and requesting Amec's formal response. |
| 7 October 2002 | Amec asked for detailed information before it could submit a formal response, but also noted that the SST had recorded a potential claim situation. |
| 6 December 2002 | The SST sent a "formal" letter of claim, which was received by Amec on 9 December 2002, asking Amec to respond by 10 December 2002. |

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- 10 December 2002 Amec wrote to SST to advise SST that Amec was not in a position to comment on liability.
- 11 December 2002 The SST referred the “dispute” to the Engineer (pursuant to Clause 66 of the ICE Contract) for his decision.
- 18 December 2002 The Engineer gave his decision that, based on the limited information available, the defect had resulted from the use of materials or workmanship not in accordance with the contract.
- 19 December 2002 The SST wrote to Amec asking for immediate acceptance of the Engineer’s decision, and then later that day, when no response had been received, gave a Notice of Arbitration in respect of the claim advanced on 6 December 2002.

Amec challenged the legitimacy of the Notice of Arbitration, with the obvious aim of forcing the SST to re-issue a Notice of Arbitration, and then when it did re-issue the Notice of Arbitration, Amec would say that it was not valid as it was outside of the limitation period.

Amec’s challenge to the legitimacy of the Notice of Arbitration was on two main bases:-

1. The Engineer could not make a decision as there was no “dispute” at the time that the matter was referred to him on 11 December 2002.
2. As the Engineer had not asked for Amec’s submissions, and as he had made his decision in a very short timescale, the process that he had followed was unfair, and therefore the Engineer’s decision was invalid.

The Court of Appeal considered the above points and found:-

1. Because the wording of Clause 66 says “dispute or difference”, it was apparent that there was a difference (and a dispute) as at 18 September 2002 when Amec did not accept liability.
2. A reasonable time for an Engineer’s decision to be made may be predicated by the imminent expiry of the limitation period.
3. An Engineer’s acknowledged duty to act fairly (i.e. consider both parties’ cases), may also be predicated by the imminent expiry of the limitation period.
4. An Engineer’s decision is not invalid simply because the Engineer himself may be liable for the defects in question (i.e. that there is a possible conflict of interest).
5. Although not unanimously decided (with Lord Justice Rix being the dissenting voice) it was found that although an Engineer is required to act independently and honestly, the Rules of Natural Justice (i.e giving both parties the opportunity of presenting its case) do not apply to an Engineer’s decision, and also the Engineer is not required to act judicially.
6. Consequently, the Notice of Arbitration was not invalid and the Arbitration action should be allowed to proceed.



Conclusion.

Although the above case was well argued, it appeared that the Court of Appeal's judgment had as much to do with questions of public policy, as it did with the merits of the actual case in question.

It appeared that the Court of Appeal wished to avoid allowing contractors from slipping through the limitation period "loop-hole" because of an over legalistic interpretation of Clause 66 of the ICE Form of Contract.

So, in this regard and from a contractor's perspective, it appears (to paraphrase the old Chuck Berry song) that they will not be allowed to get their kicks from Clause 66.

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