



CONDITIONS PRECEDENT WHAT MAKES THEM STAND UP IN COURT?

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NOTICES CAN BE (AND ARE) VERY IMPORTANT!

- **Directory** rather than **Mandatory**?
 - Contracts can make the giving of Notice a **condition precedent** to entitlement (some also make the provision of Detailed Particulars a condition precedent)
 - **No Notice = No Entitlement**
 - Giving a Notice is therefore a **threshold issue**, without which there can be no discussion on the merits or technical aspects of the Claim
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WHY DON'T WE GIVE NOTICES?

- [PQS] *“We need to give this notice as the Employer’s design was late”*
 - [PM] *“But we’ve only just started the project, this notice will ruin our good relationship with the Employer...”*
 - [Employer’s CA] *“Don’t worry about the design it will be with you shortly, in the meantime why don’t you progress this other aspect of the Works”*
 - [PM] *“ok, lets discuss this issue at the next progress meeting...”*
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WHY DON'T WE GIVE NOTICES?

- Reality: issuing Notices is a thankless task
 - But responsible if a Variation or Claim fails because no Notice was sent?
 - [PM to PQS, after receiving the dreaded Opinion from Lawyers]: ***“Why didn’t you give the Notice???”***
 - Be conscious of the effect of a positive cash flow (can mask underlying Claim effects) until it is too late (and way too late for a notice)
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- *Bremer Handelgesellschaft mbH v Vanden Avenne Izegem nv* [HOL 1978]

Notice provisions are a binding condition precedent if:

- (i) it states the precise time within which the notice is to be served;
 - (ii) it makes it plain by express language that unless the notice is served within that time the party making the claim will lose its rights under the clause
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- *Multiplex Construction v Honeywell Control Systems* [TCC 2007]

*“Contractual terms requiring a contractor to give prompt notice of delay serve a **valuable purpose**; such notice enables matters to be investigated while they are **still current**. Furthermore, such notice sometimes gives the Employer the **opportunity to withdraw** instructions when the financial consequences become apparent”*

[emphasis added]



- *Steria Limited v Sigma Wireless Communications Limited* [TCC 2007]

*“...the principle which applies here is that **if there is genuine ambiguity** as to whether or not notification is a condition precedent, **then the notification should not be construed as being a condition precedent**, since such a provision operates for the benefit of only one party, i.e. the employer, and operates to deprive the other party (the contractor) of rights which he would otherwise enjoy under the contract.”*

[emphasis added]



BE FAMILIAR WITH NOTICE PROVISIONS

Practical Tip 1:

Be familiar with the Notice provisions of the Contract (and their effect)



Batwind Project



BE FAMILIAR WITH NOTICE PROVISIONS (2)

Clause 20.1 FIDIC Yellow Book

“If the contractor considers himself to be entitled to any extension of the Time for Completion and/ or any additional payment, under any Clause of these Conditions...the Contractor shall give notice to the Engineer, describing the event or circumstances giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance”



BE FAMILIAR WITH NOTICE PROVISIONS (3)

Clause 20.1 FIDIC Yellow Book

“If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim”



BE FAMILIAR WITH NOTICE PROVISIONS (4)

Obrascon Huarte Lain SA v Her Majesty's Attorney General For Gibraltar [2014] (TCC)

Clause 8.4 of the Yellow Book

“The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over of the Works and Sections] is or will be delayed by any of the following causes...”



BE FAMILIAR WITH NOTICE PROVISIONS (5)

Obrascon Huarte Lain SA V Her Majesty's Attorney General For Gibraltar [2014] (TCC)

MR JUSTICE AKENHEAD:

“...no reason why this clause should be construed strictly against the Contractor and can see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer”



BE FAMILIAR WITH NOTICE PROVISIONS (6)

"Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed..."



BE FAMILIAR WITH NOTICE PROVISIONS (7)

- Clause 61.3 of NEC3 (& NEC4):

*“The **Contractor notifies the Project Manager** of an event which has happened or which he expects to happen as a compensation event if:*

- *the Contractor believes that the event is a compensation event and*
- *the Project Manager has not notified the event to the Contractor.*

*If the Contractor does not notify of a compensation event within eight weeks of becoming aware of the event, **he is not entitled to a change in the Prices, the Completion Date of a Key Date unless the event arises from** the Project Manager or the Supervisor giving an instruction or notification, issuing a certificate or changing an earlier decision”*

[emphasis added]



BE FAMILIAR WITH NOTICE PROVISIONS (8)

- NEC Guidance notes to Clause 61.3:

*“To avoid having to deal with a compensation event long after it has occurred there is a **time limit on notification** by the Contractor. **Failure to comply with this time limit ‘time-bars’ the Contractor** from any compensation for the event unless the event is one which the Project Manager should have notified under clause 61.1”*

[emphasis added]



BE FAMILIAR WITH NOTICE PROVISIONS (9)

- Clause 2.27.1-3 of JCT SBC 2016:

*“If and whenever it becomes reasonably apparent that the progress of the Works or any Section is likely to be delayed the Contractor **shall forthwith give notice** to the Architect/ CA of the material circumstances, including the cause or causes of the delay, and shall identify in the notice any event which in his opinion is a Relevant Event.*

*In respect of each event identified in the notice the Contractor shall, if practicable in such notice or otherwise in writing **as soon as possible thereafter, give particulars** of its expected effects, including an estimate of any expected delay in the completion of the Works or any Section beyond the relevant Completion Date.*

*The Contractor **shall forthwith notify** the Architect/ CA of any material change in the estimated delay or in any other particulars and supply such further information as the Architect/ CA may at any time reasonably require”*



BE FAMILIAR WITH NOTICE PROVISIONS (9)

- Common Amendment to Clause 2.27 of JCT SBC 2016:

*“...whenever the Contractor becomes aware that the Completion Date for the Works or a Section is likely to be delayed (whether due to factors within or beyond the Contractor’s control) the Contractor shall notify the Employer of the likelihood of the delay and the reasons for it as soon as reasonably possible **and in any event no later than 10 working days after becoming aware of such delay**. Thereafter the Contractor shall provide the Employer with such further information as becomes available to the Contractor concerning such matters. **If the Contractor fails to comply with its obligations under this Clause 2.27.4 it shall not be entitled to any extension of time or addition to the Contract Sum in respect of such delay.”***



Practical Tip 2

**Be Clear: This is a Notice
under the Contract**





CLARITY OF NOTICE (2)

- *"This is a Notice" or "This is a Claim"*
 - *"Required pursuant to clause 20.1 of the Contract, or any other clause of the Contract"*
 - *"It is necessary to give notice under the Contract requesting an Extension of Time because the Employer has failed to..."*
 - *"Pursuant to clause [xx] of the Contract, it was the Employer's responsibility to provide the design information in relation to...The Employer has failed to provide this information as required and the Contractor will incur [state the time impact] and/or suffer [state the cost impact]".*
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COMPLIANCE OF NOTICE (3)

Practical Tip 3

**Ensure the Notice
complies with all other
requirements of the Notice
provisions**





FORM OF NOTICE MUST COMPLY WITH CONTRACT

- Invariably be required in writing
 - May need to be signed, and signed by a specific person
 - May need to be served on a specific person
 - May need to be in a separate communication (e.g. NEC4 13.7)
 - Time limits - which may act as a condition precedent to the claim
 - Check the permitted delivery methods and deemed delivery provisions
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NOTICE CONCLUSIONS

Other Notices Issues

Notices Take Away





Other Notice Issues?

- ***Is it still worth giving a Notice if the underlying event was passed 3 months ago?***
 - Yes – almost certainly – the **effect** of the event may still be within the 28 day period
 - Or – it may be argued the drop dead effect only applies up until when notice was given
 - It is better to give notice late, than not at all
 - ***All is not lost (equitable principles may rescue you):***
 - It may be possible to demonstrate that the E has **waived** its rights to rely on the notice provisions and/ or that it is **estopped** from denying the underlying Claim
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OTHER NOTICE ISSUES (2)

- **Signed Variation Orders**
- Do not accept or agree to E “boiler plate” wording on Variation Order forms designed to prevent a C from relying on a Variation for delay or disruption – e.g.:

“This Variation Order includes the entire compensation for the variation set forth above. It includes, but is not limited to, compensation for design, material, equipment, subcontractor, labour, profit, loss, cost, changes in scope and/ or sequencing and/ or programming, additions, deletions, omissions, effects on productivity, delay, disruption, impacts, extra work, quantum meruit and/ or equitable adjustments as well as for further claims for compensation for any item, resulting directly or indirectly from this variation. All present and future claims against the Employer that are incidental to or as a consequence of the aforesaid variation are satisfied by this Variation Order”



NOTICES TAKEAWAY (1)

- It is the **Employer's Contract**...remind the E, and the CA, that the E provided the form of contract requiring Notices
 - Giving Notices is an **administrative task** to notify and preserve entitlement, like C issuing an application for payment
 - It is not a claim, it is just the preservation of rights
 - There is no excuse or reason not to give a Notice!
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NOTICES TAKEAWAY (2)

- If you are not sure about the effect of an Event, then **be cautious and always give Notice**
 - A Notice does not necessarily mean you will have a Claim, but it is the **gateway to a Claim**
 - Condition Precedent Notice requirements can be **reciprocal** (negotiate this with the Employer!)
 - Only put the **required detail** in the Notice otherwise risk of (i) insufficient notices and/ or (ii) notices being too specific
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SPEAKER PROFILE



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Richard Booth specialises in construction and engineering matters, with a specific focus on offshore projects. He advises on “front end” drafting and negotiation of contracts; advises on projects during the delivery stage, helping with contractual and commercial issues as they occur; and on disputes.

Richard is consistently recommended as a notable practitioner by Chambers & Partners which has said he is “**excellent at tackling the issues while bearing in mind practical and commercially sensible solutions...**”; “**his strengths are his ability to find solutions in negotiations and to get a deal done**” and says he is “**sharp, punctual and pleasant to work with**”.

Legal 500 has also consistently recommended Richard for non-contentious construction and power work. In the 2020 edition, it says “**the ‘innovative’ Richard Booth is another notable name within the team with a focus on renewables including offshore wind and solar as well as transport work. He leads the firm’s work for a number of major clients**” and recommends Richard as a “**Next Generation Partner**” for power work. It says that he “**is very approachable; he has a good legal brain and is an innovative thinker with commercial acumen**”.