

Conditions Precedent

Where is the legal wriggle room over conditions precedent and how can you gain an advantage with timed out claims, late submissions and claims for EoT and loss and expense?

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So what are we talking about?

- Construction Contracts contain mechanisms for managing claims for extensions of time and/or additional costs
- Contractor required to give notice of events which may cause delays to the works and/or result in additional costs being incurred
- Typically, the Contractor's entitlement to an extension of time is dependent upon
 - The service of a notice
 - Within a stipulated time of the event(s) causing delay
 - Sometimes with details of the likely delay to the works and additional costs that may result.

Examples of Notice Clauses

- RIAI
 - Written notice within 5 working days of Employer's act or default / immediately upon happening of listed delay event?
 - Architect required to ascertain fair and reasonable EOT (and any loss and expense)
- Clause 10.3 PWC
 - Written notice within 20 working days of when became aware or should have become aware
 - Notice to meet formal requirements
 - More detailed notice within a further 20 working days
 - If notices not given in accordance with requirements, no entitlement to EOT or increase in contract sum and Employer released from liability

Examples of Notice clauses (cont'd)

- NEC
 - Written notice within 8 weeks of becoming aware that event has occurred
 - If no notice given in time, dates / costs will not change unless event arises from instruction or notification, issue of certificate or changing earlier decision
- FIDIC (2017)
 - Written notice within 28 days of when contractor became aware or should have become aware of event giving rise to delay
 - If notice not given, no entitlement to EOT or additional payment and Employer discharged from liability

But are they
conditions
precedent to
entitlement?

- A Condition Precedent is
 - *“a contractual obligation*
 - *that must be performed by one party*
 - *before another contractual obligation of the counterparty arises”.*

Lewison, The Interpretation of Contracts

What do
the courts
say?

- **Bremer Handels GmbH v Vanden-Avenne Izegem PVBA** [1978] HL
 - Whether this clause is a condition precedent or a contractual term of some other character must depend on (i) the form of the clause itself, (ii) the relation of the clause to the contract as a whole, (iii) general considerations of law

Lord Wilberforce

What do
the courts
say?
(cont'd)

- **Multiplex Construction v Honeywell Control Systems [2007]**
 - Requirement for requisite notice expressly stated to operate as a CP with express wording to say that failure to provide notice and/or supporting documents would mean the entitlement to an EOT was waived.
 - *“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.”*

What do the courts say? (cont'd)

- **Steria Ltd v Sigma Wireless Communications Ltd [2008]**
- Clause stated sub-contractor was entitled to EOT
 - “*provided that*” written notice of events causing delay given within a reasonable period.
- Court found
 - Use of words “provided that” was clear as to meaning and notice operated as a CP
 - While there might be a dispute as to what was a “reasonable time”, this did not undermine finding of a CP.
 - NOTE
 - no need to include express wording that entitlement lost if notice not given
 - Sufficient that words have effect of making entitlement conditional on giving notice

What do the courts say? (cont'd)

- **Walter Lilly v Mackay [2012]**
 - Lack of some supporting documents will not be allowed to defeat effectiveness of timely notice where sufficient details provided
 - BUT notice requirement in question did not reference “all necessary supporting documentation”
- **Obrascon Huarte Lain SA v HM AG for Gibraltar [2014]**
 - Considered clause 20 of FIDIC
 - In this contract, no specific requirements for Notice
 - For Employer / ER to establish notice given late (and when Contractor should have been aware of event)

Wiggle room?

- Courts are willing to uphold compliance with notice requirements as a condition precedent to entitlement
- What about notice requirements and the Prevention Principle?
 - In Australian (northern territory) case of Gaymark (1999), court refused to award Employer LADs
 - Mr Justice Jackson queried if correct statement of English law in Multiplex case, noting
 - Acts of prevention won't set time at large IF there is EOT mechanism to deal with such acts
 - However, any ambiguities in EOT clause should be construed in favour of contractor

Wiggle room? (cont'd)

- Contractors should follow contract and give timely notice to preserve entitlement
 - Make sure notice given in time and with sufficient details (including supporting documentation where you can)
 - Improves position with contract administrator and any subsequent dispute resolver
 - Plus always maintain good contemporaneous records
- Keep good records of all responses to notices, whether notices given strictly in accordance with notice requirements or not
- Strict compliance with provisions may inadvertently be waived and an argument for estoppel *may* arise
 - Recent Part 8 proceedings: **ISG Retail Ltd v FK Construction Ltd** [2024]

Conclusion

- Generally, the Courts require clear wording before finding that a notice requirement operates as a condition precedent
- BUT
- It is not necessary for it to be expressly stated that a contractual obligation will operate as a condition precedent
- Clear timelines for notices preferred but not necessary
- Understand how the EOT mechanism works and what the notice requirements are – the parties' agreement will generally be upheld
- Don't rely on Irish courts and dispute resolvers necessarily following the principle set out in Gaymark!

THANK YOU!



QUESTIONS?

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