Notice Provisions & Conditions Precedent in Construction Contracts

White Paper Conference, 18 June 2019

by

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INTRODUCTION

1. It is commonplace for construction contracts to provide that a contractor's entitlement to a claim (whether for an extension of time, or loss and expense, or additional payment) depends upon service of a notice within a stipulated period of time.

2. This paper considers the guidance from the case-law about how such notice provisions will be construed by the Courts – e.g., when they will be considered to be conditions precedent, when their terms will be strictly enforced, and when contractors may avoid the consequences of failing to comply in full with those terms.

3. In particular, this paper considers:

   3.1. First, the principles governing construction of notice provisions generally;

   3.2. Secondly, special considerations that apply to notice provisions relating to claims for Extensions of Time;

   3.3. Thirdly, some general recommendations for contractors faced with notice provisions during the course of a project; and

   3.4. Fourthly, the rules relating to another special category, namely pre-conditions to the right to adjudicate.

(1) NOTICE PROVISIONS GENERALLY

Starting point: what does the contract say?

4. The extent to which a contractual notice provision will be enforced, and the way in which it will be applied, will depend upon the proper construction of the terms of that provision in accordance with the general principles governing construction of contracts.

5. Those general principles have been well-rehearsed in recent case-law,[1] and are the subject of the following talk, so are not repeated here. I discuss below the case-law specific to the construction of notice provisions.

6. The case-law shows that there are, broadly, two types of notice provision:

[1] Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173, explaining and affirming the earlier decisions of Arnold v Britton [2015] UKSC 36 and Rainy Sky SA v Kookmin Bank [2011] UKSC 50.

6.1. Provisions which provide that the service of a notice is a pre-condition, or condition precedent, to entitlement to a claim; and

6.2. Provisions which are silent or unclear about the consequences of failing to serve a notice.

7. The Courts will take the context and purpose of the provision into account when considering the natural and ordinary meaning of the words used in that provision, but the general rule that emerges from the case-law is that:

7.1. If the proper construction of the provision is that service of a notice is a condition precedent to entitlement to the claim, then the Courts will enforce that provision in accordance with its terms – i.e. the failure to serve the requisite notice is likely to result in the claim being shut out.

7.2. If, however, the provision is silent or unclear about the consequences of failing to serve a notice, then the Courts will tend to avoid a strict construction against the party making the claim.

8. I turn now to consider the factors that a Court will apply in determining whether the notice provision in question is a condition precedent, and in deciding how to apply that provision.

What will amount to a condition precedent?

9. A notice provision is likely to be held to be a condition precedent if it expressly states that it is a condition precedent or if the effect of the words used in that provision is such as to amount to a condition precedent. A provision does not have to say expressly that it is a condition precedent in order for that to be the effect of its terms.

10. The House of Lords gave guidance about the construction of a notice clause as a condition precedent in **Bremer Handels GmbH v Vanden-Avenne Izegem PVBA** [1978] 2 Lloyd's Rep. 109, HL. This case is regarded as setting the test for this issue. Reviewing the terms of a contractual frustration clause,[2] Lord Wilberforce held at page 113 that:

> "*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.*"

[2] That clause provided as follows: "*In case of prohibition of export, blockade or hostilities or in case of any executive or legislative act done by or on behalf of the Government of the country of origin or of the territory where the port or ports of shipment named herein is/are situate, preventing fulfilment, this contract or any unfulfilled portion thereof so affected shall be cancelled. In the event of shipment proving impossible during the contract period by reason of any of the causes enumerated herein, sellers shall advise buyers of the reasons therefor. If required, sellers must produce proof to justify their claim for cancellation*".

11. The factors that Lord Wilberforce took into account when considering whether the clause in that case was a condition precedent included the following:

11.1. As to (i) form, Lord Wilberforce noted that the clause was not framed as a condition precedent, and cancellation of the contract was not expressed to be conditional upon compliance with the requirement to notify and produce proof of the event said to lead to cancellation. Instead, the clause operated automatically upon the relevant event occurring. Moreover, he relied upon the generality of the time-related words used – i.e. notice was to be given "*without delay*" rather than by any particular time. He observed that "*if a condition were intended, a definite time limit would be more likely to be set*".

11.2. As to (ii) inter-relation, Lord Wilberforce noted that other provisions in the contract suggested that, if a condition were intended, different and stricter language would have been used.

11.3. As to (iii), Lord Wilberforce reviewed the case-law[3] relating to the distinction between conditions and innominate terms (which distinction depends upon the nature, effect, and gravity of breach of the relevant term), and concluded that this was an intermediate term because the consequences of breach could vary.

12. These are guidelines, not hard and fast rules, and the outcome will depend upon the circumstances of each case and the particular terms used.

13. If, on the other hand, the notice provision is not a condition precedent, then the Courts will tend to avoid a construction which shuts out the contractor's claim altogether, per Mr Justice Vinelott in **London Borough of Merton v Stanley Hugh Leach Ltd** (1985) 32 BLR 51.

14. A different reasoning to Bremer Handels was applied[4] in **Steria Ltd v Sigma Wireless Communications Ltd** [2008] B.L.R. 79, a case which concerned (amongst other things) whether the requirement to give written notice of delay in an extension of time provision was a condition precedent. The relevant clause provided that the Sub-Contractor was entitled to an extension of time "***provided*** *the Sub-Contractor shall have given within a reasonable period written notice to the Contractor of the circumstances giving rise to the delay*". HHJ Stephen Davies observed that this phrase was "*clear in its meaning*", and held that the notice provision was a condition precedent despite there being no stipulation of a particular time limit by which the notice was to be given. He held at [90] that "*the fact that there may be scope for argument in an individual case as to whether or not a notice was given within a reasonable period is not in itself any reason for arguing that it is unclear in its meaning and intent*".

[3] Including Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd [1961] 1 Lloyd's Rep.478, [1962] 2 Q.B. 26; and Reardon Smith Line v. Hansen-Tangen [1976] 2 Lloyd's Rep. 601, [1976] 3 All E.R. 570.
[4] Although the judgment in Steria v Sigma does not refer to Bremer Handels, and it does not appear that the Court was referred to this case.

15. It is notable that the Judge held that the notice provision was a condition precedent even absent express wording to the effect that non-compliance would lead to a loss of entitlement. He held at [91] that "*a notification requirement may, and in this case does, operate as a condition precedent even though it does not contain an express warning as to the consequence of non-compliance*". In this case it was sufficient, he held, that the provision "*makes it clear in ordinary language that the right to an extension of time is conditional on notification being given*" and "*This is an individually negotiated sub-contract between two substantial and experienced companies*". He placed in weight in particular on the formulation "***provided** the Sub-Contract shall have given*" notice.

16. This decision demonstrates that the Courts will take the surrounding circumstances into account, and will apply a close textual analysis to the particular words used, when construing the notice provision in order to reach a view on whether the provision is a condition precedent.

17. Steria v Sigma also gives some helpful guidance about how the constituent requirements of a notice provision will be applied, and the circumstances in which a contractor will be found to have complied with those requirements. The Judge (at [81]) was unwilling to go beyond the words used in the notice provision when deciding the level of detail required to be provided in the notice. What was required was more than just a notification that particular relevant circumstances had occurred; it was necessary for the sub-contractor to state that those circumstances had caused a delay to the sub-contract works. However, there was no requirement for the notice to explain how and why the relevant circumstances had caused the delay because "*that would be to import a requirement for Steria to provide a level of detail in the notice which goes beyond the simple notification which is of the essence of the clause*".

18. The later decision in **W.W. Gear Construction Ltd v McGee Group Ltd** [2010] EWHC 1460 (TCC) is easier because the relevant notice provision[5] stated expressly that it "*shall be a condition precedent*" to the contractor's entitlement to loss and expense that the contractor "*complied fully with all the requirements of this clause*", including the requirement to bring an application for loss and expense within two months of it becoming apparent that the progress of the works was or was likely to be affected. Mr Justice Akenhead held at [12] that:

> "*It is sometimes said and argued that conditions precedent which have the effect of otherwise excluding what would otherwise be perfectly valid claims or entitlements are to be construed strictly. For instance in cases such as Gilbert-Ash (Northern) Ltd Modern Engineering (Bristol) Ltd 1974 AC 689 , various judges used words to the effect that the contractual language used to exclude rights of set off or other such common law or equitable rights must be "sufficiently clear" (see Lord Diplock page 716 H). However **the basic rules of construction apply to all contractual terms**.*"

[5] This was clause 4.21 of the JCT Standard Trade Contract (TC/C) Conditions 2002 (as amended).

19. Akenhead J then considered Bremer Handels and London Borough of Merton v Stanley Hugh Leach Ltd, concluding at [17] that the provision in question was what Mr Justice Vinelott in the latter case described as an "if" provision – i.e. "*provisions which only operate in the event that the contractor invokes them by making a written application*". He placed weight upon the use of the phrase "*provided always that*" in the provision, stating at [18] that:

> "*This type of wording is often the strongest sign that the parties intend there to be a condition precedent. What follows such a proviso is usually a qualification and explanation of what is required to enable the preceding requirements or entitlements to materialise*".

20. This echoes the reasoning of HHJ Stephen Davies in Steria v Sigma that what took the notice provision into the category of conditions precedent was words that had the effect of making the entitlement conditional on notification being given, even if those words did not expressly spell out the consequences of non-compliance: so in Steria v Sigma those words included "*provided*"; in WW Gear those words included "*provided always that*".

21. Akenhead J carried out a detailed analysis of the words used in the provision, concluding at [19] that:

> "*It follows from the above that the requirement to make a timely application in writing is a precondition to the recovery of loss and/or expense under Clause 4.21.* ***The Contractor simply has no entitlement to recover such loss or expense unless and until it has made such an application because it is the application which triggers the ascertainment process which leads to the adjustment of the Contract Sum****. That is what the parties have agreed. The parties have preserved the Contractor's rights to claim in effect at common law for breach of express or implied terms of the Contract. However, the parties have also agreed through the proviso in Clause 4.21.1, as amended, that the application must be made in a timely manner and in any event no more than two months after either it has become or should reasonably have become apparent to him that the regular progress of the Works or of any part thereof had been or was likely to be affected. The timeliness and the two-month period can thus be seen to be related to either progress actually being affected or to a time when it was likely to be affected. It will therefore follow that upon a proper construction of Clause 4.21 including Clause 4.21.1 there is a condition precedent to the Contractor's entitlement to recover loss or expense which involves the submission of a written application within the time constraints set out in Clause 4.21.1. It is not an unduly onerous provision in any event.*"

22. A separate question is how the requirements of the notice provision will be construed and applied once it is established that the provision is a condition precedent. This is illustrated by another judgment of Akenhead J in **Walter Lilly v Mackay** [2012] EWHC 1773. It was common ground

there that the notice provision[6] was a condition precedent, but the parties were in dispute about what was required to be done in order to comply with the requirements of that provision. The judgment of Akenhead J provides helpful guidance about how such requirements will be applied, including the following at [463]-[466]:

22.1. "…***one must bear in mind that most of the matters which entitle the Contractor to such loss and expense are the "fault" or at least the risk of the Employer****, such as variations or the late provision of information or instructions by the Architect.* ***One therefore needs to consider with some care precisely what the words mean, without construing them in any way against the Contractor as such***."

22.2. "*There has been a substantial debate as to what information must be provided in relation to the first and second conditions. It is difficult and undesirable to lay down any general rule as to what in every case needs to be provided. It is legitimate to* ***bear in mind what knowledge and information the Architect already has****. For instance, the Architect (as in this case) attended meetings regularly and frequently throughout the project and was the recipient of scores of applications for extensions of time from WLC; it might legitimately be thought that the Architect already had a very substantial amount of information at its fingertips so that, arguably, less information needed to be provided by the Contractor in its application because all that is required is that the Architect must be reasonably put into a position in which it can form an opinion that "direct loss and/or expense has been incurred or is likely to be incurred…because the regular progress of the Works…has been materially affected" by the given events*."

22.3. "*Construing Clause 26.1.3 in its context, an* ***entitlement to various heads of loss and expense will not be lost where for some of the loss details are not provided****. Otherwise, one can have the absurd position that where £10 out of a £1 million claim is not adequately detailed but the rest of the claim is, the whole claim would fail to satisfy the condition precedent.*"

22.4. "*One must also bear in mind that what is required is "details" of the loss and expense and that does not necessarily include all the backup accounting information which might support such detail. It would have been possible for the clause to say that the Contractor should provide "details and all necessary supporting documentation" but that is not what the clause says.*"

22.5. "*There is* ***no need to construe Clause 26.1.3 in a peculiarly strict way or in a way which is in some way penal as against the Contractor****, particularly bearing in mind*

[6] The notice provision in that case was Clause 26 of the JCT Standard Form of Building Contract 1998 Edition Private Without Quantities.

that all the Clause 26.2 grounds which give rise to the loss and expense entitlements are the fault and risk of the Employer."

23. Akenhead J developed this guidance further in his first instance decision in **Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar** [2014] EWHC 1028 (TCC); [2014] B.L.R. 484, which was upheld on appeal [2015] EWCA Civ 712, [2015] B.L.R. 521.

24. The facts of Obrascon were as follows. Obrascon was the successful tenderer for the design and construction of a road and tunnel that was to run under the eastern end of an airport runway. At the time of the tender, Obrascon had an environmental statement and a site investigation report. Shortly after the commencement of work, concerns were raised about a lack of investigation into ground contaminants, and about the intended use of the excavated soil and its storage. Obrascon fell into delay due, it alleged, to unforeseen contaminated materials and contaminated groundwater for which it had not budgeted. Obrascon eventually suspended its tunnel excavation works pending further contamination testing and the re-design of the works. The employer issued two contractual notices identifying alleged breaches and stipulating steps and time periods for their rectification. The employer then purported to terminate the contract on the basis of Obrascon's non-compliance with those notices. There were a number of issues in dispute, including whether Obrascon was entitled to an extension of time for completion.

25. At first instance, Akenhead J considered the notice provisions in clause 20.1 of the then current FIDIC conditions, which, it was common ground, was a condition precedent. This clause provided that:

> "*If the Contractor considers himself to be entitled to any extension of the Time for Completion…under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor* ***shall give notice*** *to the Engineer,* ***describing the event or circumstance 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.*
>
> ***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****. Otherwise, the following provisions of this Sub-Clause shall apply.*"

26. Akenhead J held that Clause 20.1 did not call for any particular form of notice, but such a notice (a) had to be written, (b) had to describe the event or circumstance relied on, and (c) must intend to notify a claim for extension under the contract or in connection with it. In short, it had to be "*recognisable as a claim*". He held that, although Obrascon was, at the time of termination, entitled to no more than seven days' extension of time in relation to two of its claims, its claim of six days in relation to one of those claims failed for want of a timely notice under the contract.

27. Akenhead J's reasoning was set out at [312]-[316], where he stated in particular that:

27.1. "*Properly construed and in practice, the "event or circumstance giving rise to the claim" for extension must first occur and there must have been either awareness by the Contractor or the means of knowledge or awareness of that event or circumstance before the condition precedent bites.* ***I see 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***."

27.2. "*…there is no particular form called for in Clause 20.1 and one should construe it as permitting any claim provided that it is made by notice in writing to the Engineer, that the notice describes the event or circumstance relied on and that the notice is intended to notify a claim for extension (or for additional payment or both) under the Contract or in connection with it. It must be recognisable as a "claim". The notice must be given as soon as practicable but the longstop is 28 days after the Contractor has become or should have become aware.* ***The onus of proof is on the Employer or GOG here to establish that the notice was given too late.***"

28. Other aspects of the first instance decision were appealed, and upheld on appeal, but this particular part of the decision, and reasoning, was not challenged.

29. In **NV International v National Insurance Property Development Co Ltd** [2015] UKPC 37, a failure to give notice under clause 2.5 of the FIDIC conditions was held by Lord Neuberger to be fatal to that claim. That clause provided that a claim would not be allowed unless it had been the subject of a notice, which must have been given "*as soon as practicable*". He noted that the whole point of this clause was to require timely notification.

30. As Akenhead J observed, the notice provisions in both Walter Lilly and Obrascon were not particularly onerous. A factual scenario similar to that in Obrascon, but a very different type of notice provision, was considered by the High Court of Hong Kong in the very recent decision of **Maeda Kensetsu Kogyo Kabushiki Kaisha v China State Construction Engineering (Hong Kong) Ltd** [2019] HKCFI 916. This case demonstrates that, where onerous requirements are set out in unambiguous wording in a notice provision, the Courts will enforce that provision, and a failure to comply with those onerous requirements will result in the claim being shut out.

31. The facts of that case were that the claimant contractor was engaged by the employer to construct tunnels for the Hong Kong to Guangzhou Express Rail Link. The claimant sub-contracted the diaphragm walls to the defendant sub-contractor. Like the contractor in Obrascon, the defendant relied upon allegedly unforeseen ground conditions, but in this case it argued that those ground conditions gave rise to a variation of the scope of works entitling it to additional payment.

32. The defendant's right to claim additional payment for a variation was subject to onerous notice provisions in clause 21 of the sub-contract, as follows:

32.1. Clause 21 of the sub-contract provided that:

"*If the Sub-Contractor intends to claim any additional payment or loss and expense… as a* ***condition precedent*** *to the Sub-Contractor's entitlement to any such claim, the Sub-Contractor* ***shall give notice*** *of its intention to the Contractor within fourteen (14) days after the event, occurrence or matter giving rise to the claim became apparent or ought reasonably to have become apparent to the Sub-Contractor. For the avoidance of doubt, the* ***Sub-Contractor shall have no entitlement to any additional payment*** *or any additional loss and expense* ***and no right to make any claim whatsoever*** *for any amount in excess of the Sub-Contractor Sum in respect of any event, occurrence or matter whatsoever* ***unless this Sub-Contractor sets out an express right to that additional payment, additional loss and expense or claim***."

32.2. Under clause 21.2, if the Sub-Contractor wished to maintain its right to pursue a claim for additional payment under clause 21.1, it was required "*as a* ***condition precedent*** *to any entitlement*" to set out in writing to the Contractor - within twenty eight days after giving of notice under clause 21.1 - the "*contractual basis*" of the claim; "*full and detailed particulars and the evaluation of the claim*"; "*details of the documents and any contemporary records that will be maintained to support such claim*"; and details of any mitigation measures.

32.3. To put the matter beyond any doubt, clause 21.3 provided that:

"*The Sub-Contractor* ***shall have no right*** *to any additional or extra payment, loss and expense, any claim for an extension of time or any claim for damages under any Clause of the Sub-Contract or at common law* ***unless Clauses 21.1 and 21.2 have been strictly complied with***."

33. A dispute over the defendant's right to additional payment came to arbitration. The arbitrator took a relaxed approach to clause 21, holding that notice could be given by reference to "*previous documents*", and that the notice had to be construed "*in the light of the background knowledge which the parties would reasonably have*". Specifically, the arbitrator held that the requisite notice had been given by virtue of the defendant having informed the claimant at several meetings and in various letters that there had been an increase in the quantity and quality of rock excavation due to unforeseen ground conditions. He also held that the "*contractual basis*" set out in the notice need not be the same as the contractual basis of the claim pursued in arbitration because it was not reasonable to expect a party to finalise its legal case within the relatively short time periods required by clause 21.

34. The claimant appealed against the arbitrator's decision to the High Court on (amongst other things) the question of whether the defendant had complied with the notice provisions in Clause 21. The appeal was successful. The Court held at [18] that the arbitrator had failed to pay heed and give effect to the express provisions of clause 21.2 because it was "*clearly stated to be a condition precedent for any claim*" and was required by the express provisions of clause 21.3 to be "*strictly complied with*". Further, the Court held at [23] that "*there can be no dispute, and no ambiguity, from the plain and clear language used*" that clauses 21.1 and 21.2 are conditions precedent which must be strictly complied with.

35. The defendant argued that clause 21 was in substance an exclusion or time bar clause, which must be strictly construed. The Court rejected that argument, stating at [25]-[26] that it was only in the event of ambiguity that a narrower construction may be applied, and that the words used here were "*clear and unambiguous*".

36. The Court then turned to consider whether the defendant had in the event complied with the notice provisions. The Court held at [27]-[28] that the letters relied upon by the defendant as constituting notice only gave notice of the ground conditions encountered at site (the factual basis) but did not give requisite notice of the "*contractual basis*" of the claim, or detailed particulars and evaluation of the claim, which were required by clause 21.1. The Court held at [31] that clause 21 "*employs clear and mandatory language for the service and contents of the notices to be served, with no qualifying language*", and there was no basis on which to "*rewrite*" clause 21 after the event. The High Court therefore concluded that the defendant had failed to give proper notice under clause 21.2 and the arbitrator's decision to allow the claim was wrong in law. The relatively onerous requirements of this provision were therefore enforced.

Conclusion: the key guidance from the case-law

37. The case-law set out above considered many different types of notice provision, and the diverging outcomes illustrate that each case will depend upon the particular words used in the relevant provision and the surrounding circumstances.

38. Nevertheless the following general guidance emerges from the case-law:

    38.1. The ordinary rules of construction will be applied.

    38.2. The Court will apply a close textual analysis to the words used, taking account of the context and purpose of the provision.

    38.3. A notice provision does not need to state expressly that it is a condition precedent to be held to have that effect (although if those words, or similar words, are used then the provision is more likely to be held to be a condition precedent). The key factor is whether the natural and ordinary meaning of the words used makes the entitlement to the claim conditional upon compliance with the requirements of the provision.

38.4. A provision which sets a definite time limit is more likely to be considered to be a condition precedent, although the absence of a set time limit would not necessarily preclude such a conclusion.

38.5. When deciding what the contractor needs to have done in order to comply with the requirements of the notice provision, the Court will take into account two things:

38.5.1. That the matters which entitle the contractor to the relief claimed are the "fault", or at least the risk, of the employer, and will not construe them against the contractor; and

38.5.2. The knowledge and information that the person reviewing and determining that claim (e.g. architect, engineer, or contract administrator) already has.

38.6. The requirements of the notice provision will not be construed in a strict or penal way against the contractor.

38.7. However, if onerous requirements are set out in clear and unambiguous language then those requirements will be enforced.

38.8. A notice should be written and must be recognisable as a claim.

38.9. A notice should identify the legal or contractual basis for the claim. Reference to earlier letters or meetings relating to the factual basis for the claim is unlikely to be sufficient.

38.10. An obligation to provide details of a claim is not likely to include providing supporting documentation, unless the term expressly says so.

38.11. The onus of proof will be on the employer to establish that the notice was given too late, or did not comply with the requirements for such a notice.

(2) A SPECIAL CATEGORY: CLAIMS FOR EXTENSIONS OF TIME

39. The principles that apply to applications for extensions of time are beyond the scope of this paper. Nevertheless, no discussion of the construction of notice provisions is complete without at least some consideration of the particular principles that apply where a contractor fails to serve the requisite notice of delay required under the contract in circumstances where the contractor would otherwise be entitled to an extension of time by reason of employer delay. This issue is therefore considered briefly below for completeness.

40. The difficulty that is caused by this category of notice provision is that, if the notice provision is a condition precedent, then a failure to comply could not only (a) deprive the contractor of an entitlement to an extension of time for a relevant event, but furthermore (b) the employer could be entitled to recover liquidated damages in relation to the delay caused by that event. If the

relevant delay event was caused by the employer, then the employer would, if it were able to recover liquidated damages in relation to that delay, benefit from its act of prevention.

41. This conceptual difficulty led to the Supreme Court in the Northern Territory of Australia holding in **Gaymark Investments Pty Ltd v Walter Construction Group Ltd** (1999) N.T.S.C. 143 that an award of liquidated damages would be unmeritorious where there had been delay by the employer, and failure by the contractor to comply with a notice provision that was a condition precedent to its entitlement to an extension of time.

42. There has been a lot of discussion about whether Gaymark would be applied in the English courts. It now seems, following two important decisions in the English courts discussed below, that Gaymark is unlikely to be followed here, although this issue has not yet been definitely decided.

43. The first decision is **Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd** [2007] EWHC 447 (TCC); (2007) 111 Con. L.R. 78, in which Mr Justice Jackson (as he then was) commented *obiter* at [103] that it was doubtful that Gaymark represented English law because a term requiring a contractor to give notice serves a "*valuable purpose*" because "*such notice enables matters to be investigated while they are still current*". Such notice could give the employer the opportunity to, e.g., withdraw instructions when the financial consequences became apparent. If Gaymark were followed and non-compliance with such a notice provision placed time at large, then the contractor could disregard any provision making proper notice a condition precedent with impunity, and place time at large at its option. In this way the contractor would benefit from its own breach.[7]

44. Jackson J in Multiplex set out the following three propositions governing extension of time notice provisions:

    44.1. First, legitimate actions by the employer may still be characterised as prevention if those actions cause delay beyond the contractual completion date;

    44.2. Acts of prevention by the employer will not set time at large if the contract provides that the contractor has an entitlement to an extension of time in respect of those events; and

    44.3. If the extension of time provision is ambiguous, it should be construed in favour of the contractor.

45. The Court of Appeal approved these three propositions in **North Midland Building Ltd v Cyden Homes Ltd** [2018] EWCA Civ 1744. Lord Justice Coulson held that the prevention principle did not override the express terms of the contract. He characterised the prevention principle as a

[7] HHJ Stephen Davies had expressed the same reservations about Gaymark in Steria v Sigma at [95].

type of implied term which the parties could exclude or amend in their contract. He also supported Jackson J's comments about Gaymark in Multiplex at [30].

46. In conclusion, it seems likely that effect will be given to liquidated damages provisions where the contractor fails to give the requisite notice, where such a notice is a condition precedent to an entitlement to an extension of time.

(3) GENERAL RECOMMENDATIONS FOR CONTRACTORS FACED WITH NOTICE PROVISIONS

47. The case-law discussed above focuses on those cases where it is arguable that the contractor or sub-contractor has not met the requirements of the relevant notice provision in full or at all.

48. It goes without saying that the best recommendation for contractors subject to notice provisions is: don't get caught out! It is of course far preferable to comply with the applicable notice provisions than to have to test the boundaries of what arbitrators and judges will be prepared to do to assist contractors seeking to avoid the consequences of falling foul of notice provisions.

49. To that end, it is prudent for contractors to err on the side of caution:

    49.1. So, if notice is required 'within a reasonable time', give notice as soon as possible;

    49.2. Provide as much detail as you can in terms of particulars of the relevant event entitling you to claim; and

    49.3. Provide supporting documentation even if it's not clear from the notice provision whether supporting documentation is required.

50. As a general point, it is better for a contractor to give detailed notice and evidence of claims contemporaneously – so far as practically possible – as this increases the prospects of:

    50.1. Persuading the project decision maker (e.g. the Engineer, or Contract Administrator) that your claim is valid and justified, and should be granted; and/or

    50.2. Persuading a tribunal (adjudicator, arbitrator, or judge) at a later stage that the claim was meritorious and ought to have been granted.

51. A general observation is that tribunals tend to look much more favourably on claims for delay, loss and expense, etc. where the contractor has maintained and preserved detailed contemporaneous records (of delays and the effects of delays, of losses, etc.) and has relied upon those records in seeking remedies under the contract.

(4) CONDITIONS PRECEDENT & ADJUDICATION CLAUSES

52. Finally, another special category: the Courts have examined a number of cases where parties have sought to place contractual pre-conditions upon the right to adjudicate. The Courts have

consistently held that such pre-conditions are unenforceable because they are contrary to the right under section 108(2)(a) of the Housing Grants, Construction and Regeneration Act 1996 ("**the Construction Act**") to refer a dispute to adjudication "*at any time*".

53. Section 108 provides as follows:

> "*(1) A party to a construction contract has **the right** to refer a dispute arising under the contract for adjudication under a procedure complying with this section…*
>
> *(2) The contract shall include provision in writing so as to –*
>
> *(a) enable a party to give notice **at any time** of his intention to refer a dispute to adjudication;*
>
> *…*
>
> *(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.*"

54. For example, in **John Mowlem & Co plc v Hydra Tight Ltd** (2001) 17 Const LJ 358, the Court considered a contractual provision which stated that a dispute could not be referred to adjudication unless a 'notification of dissatisfaction' had first been served and the parties had attempted for at least four weeks to meet to resolve their differences. The Court held that the deferral of the right to adjudicate for four weeks, and the attempt to place a pre-condition on that right, breached section 108(2)(a) of the Construction Act and this provision was therefore illegal. The consequence of the illegality was that the sub-contract's adjudication provisions were replaced by all of the adjudication provisions of the Scheme for Construction Contracts 1998 ("**the Scheme**").

55. Similarly, the Courts have held that a contractual provision requiring that the dispute must first be referred to mediation was unenforceable (**Edmund Nuttall Ltd v RG Carter Ltd** [2002] EWHC 400 (TCC)). In **Midland Expressway Ltd v Carillion Construction Ltd (No. 2)** [2005] EWHC 2963 (TCC) the Court held that a contractual clause requiring the parties to operate a dispute resolution procedure before referring a dispute to adjudication fell foul of the requirement in section 108(2)(a) and was unenforceable.

56. This principle was re-stated by the Court of Appeal in **Connex South Eastern Ltd v MJ Building Services Group** [2005] EWCA Civ 193. In that case, it was argued that it was an abuse of process for the referring party to start adjudication proceedings so long after practical completion had been certified and the contract had been repudiated. Dyson LJ rejected that argument, holding at [38-39] that the statutory words "*at any time*" were to be given their literal and ordinary meaning. However, he acknowledged in *obiter* comments that there may be circumstances in which the parties could agree to restrict the time within which an adjudication could be commenced:

"*The phrase "at any time" means exactly what it says.* ***It would have been possible to restrict the time within which an adjudication could be commenced, say, to a period by reference to the date when work was completed or the contract terminated****. But this was not done. It is clear from Hansard that the question of the time for referring a dispute to adjudication was carefully considered, and that it was decided not to provide any time limit for the reasons given by Lord Lucas. Those reasons were entirely rational.*

There is, therefore, no time limit. There may be circumstances as a result of which a party loses the right to refer a dispute to adjudication: the right may have been waived or the subject of an estoppel. But subject to considerations of this kind, there is nothing to prevent a party from referring a dispute to adjudication at any time, even after the expiry of the relevant limitation period. Similarly, there is nothing to stop a party from issuing court proceedings after the expiry of the relevant limitation period. Just as a party who takes that course in court proceedings runs the risk that, if the limitation defence is pleaded, the claim will fail (and indeed may be struck out), so a party who takes that course in an adjudication runs the risk that, if the limitation defence is taken, the adjudicator will make an award in favour of the respondent."

57. However, as is clear from the following text, the *obiter* suggestion that parties are free to agree to restrict the time within which an adjudication could be commenced refers to limitation periods, rather than to notice provisions. Given the Court's defence of the parties' right to adjudicate at any time, and their rejection of express conditions precedent which seek to restrict that right, it is likely that any attempt to stipulate a time period within which a notice of intention to refer a dispute to adjudication must be served would similarly be held to be unenforceable.

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18 June 2019