

Conditions Precedent: The Gateway or the Barrier?

Gaining the edge in drafting and enforcement

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Objectives

- What are Conditions Precedent?
- Drafting for success.
- Application in practice.
- Judicial lessons.
- Enforcement and Risk.
- Top tips and the Future.



Conditions Precedent

- **Definition:** A contractual provision that an event must occur before a contract (or a party's obligations or entitlements) come into effect.
- **Impact:** Failure to meet a CP means the right or entitlement is often **irrevocably lost**.
- **Purpose:** Useful risk management tool **when used properly**; prevents stockpiling of claims; ensures timely notification and cooperation.

When are they used?

- **Funding and regulatory approvals** – e.g. work will not start until planning permission or other permits have been issued.
- **Provision of security and insurance** – e.g. delivery of performance bonds/guarantees, evidence of insurances, approval of H&S documentation etc. as conditions precedent to commencement or to the first payment.
- **Conditions precedent to claims** – EoT, loss & expense, variations, disruption, acceleration etc.
- **Dispute resolution clauses** – notices, escalators etc.

Legal Framework

- **Starting point:** *Bremner v Vanden Avenne*
- **Prior authorities:** *Tartsinis v Navona Management*
- **If clauses:** *LB Merton v Leach*
- **Strict time not necessary:** *Steria v Sigma*
- **Statement of consequences necessary?**
 - *Steria v Sigma*
 - *Yuanda v Multiplex (obiter)*
 - *Scottish Power v BPE*

Tata v DBS [2025] CA

- **The Clause** (Clause 6.1): If a milestone failed, DBS "**shall promptly issue a Non-conformance Report.**" DBS "**will then have the options set out in clause 6.2**" (inc. delay payments).
- **Finding:** The Court of Appeal confirmed Clause 6.1 was a condition precedent.
- **Effect:** DBS's failure to comply (by giving no notice) was fatal to the claim. The "if-then" language secured the CP status.
- **Utility:** The NCR was considered an important element of the contract machinery.

Drafting CPs after Tata

- **Overriding Test:** Interpretation depends on the **precise words used** and the surrounding **contractual context**
- **The paradigm:** Use the unambiguous **“if-then”** structure:
 - Positive formulation: ‘if you do X, you will get Y’
 - Negative formulation: ‘unless you do X, you cannot have Y’
- **Variations:** “provided that”, “subject to”.
- **Mandatory wording:** Reinforce conditionality using the language of obligation (e.g., “must” or “shall”) – necessary but not sufficient.

Drafting CPs after Tata

- **No magic words:** Not necessary to use the explicit phrase "this is a condition precedent," **but clear words are essential.**
- **Do you need/want precise timing?**
- **If not:** "timely", "promptly", "within a reasonable time"
- **Best to specify the consequences of non-compliance.**

"the clearer the articulation, purpose and feasibility of the requirement to be complied with (in terms of substance and/or timing), the more consistent it will be with the conclusion that, depending on the rest of the language used, the requirement forms part of a condition precedent regime."

Waiver and estoppel

- **Express Waiver**
- **Waiver by Conduct:** *City Inn v Shepherd*
- **Estoppel:** *Tata v DBS*
- **High bar for waiver/estoppel:** Courts start from strict enforcement of clear CPs and time bars – non-compliance means no entitlement unless a **properly made** waiver/estoppel case is proved.
- **Contractual Safeguards:** include no waiver clauses, ensure proper reservations.

Deemed Fulfilment – King Crude v Ridgebury

- **What if you can't fulfil a CP because of the other party's conduct?**
- ***Mackay v Dick (1881)*** – Civil Law concept - deemed fulfilment.
- ***King Crude v Ridgebury [2025] Sup Ct*** – No such concept.
- May still be able to get there with interpretation or implied terms.
- **Future-Proof Drafting:** For critical commercial terms, explicitly draft mechanisms ensuring that non-cooperation or breach by the counterparty does not inadvertently defeat a CP.

Practical Takeaways

- **Draft with Precision:** Use **clear, precise, and well-structured** language to establish conditionality (e.g., "if-then").
- **Clarity on Consequence:** Explicitly state that non-compliance results in the **loss of entitlement/claim**.
- **Know Your Contract:** Ensure project staff understand the CP regime, including deadlines and required formats.
- **Enforce or Lose:** If relying on a CP defense, enforce it rigorously. Consistent acceptance of late notices risks **waiver**

Final Thought: The Law of Unintended Consequences



Case References

- ***Multiplex v Honeywell*** [2007] EWHC 447 (TCC)
- ***Bremer Handelsgesellschaft Schaft v Vandena Avenue Izegem PVBA*** [1978] 2 Lloyd's Rep 109
- ***Tartsinis v Navona Management Co.*** [2015] EWHC 57 (Comm)
- ***London Borough of Merton v Stanley Hugh Leach Limited*** [1986] 32 BLR 51
- ***WW Gear Construction Limited v McGee Group Limited*** [2010] EWHC 1460 (TCC)
- ***Steria Limited v Sigma Wireless Communications Limited*** [2007] EWHC 3454 (TCC)
- ***Yuanda (UK) Company Limited v Multiplex Construction Europe Limited*** [2020] EWHC 468 (TCC)
- ***Scottish Power UK PLC v BP Exploration Operating Co. Limited*** [2015] EWHC 2658 (Comm)
- ***Tata Consultancy Services Ltd v Disclosure and Barring Service*** [2024] EWHC 1185 (TCC)
- ***Disclosure and Barring Service v Tata Consultancy Services Ltd*** [2025] EWCA Civ 380
- ***City Inn Ltd v Shepherd Construction Ltd*** [2010] ScotCS CSIH 68
- ***King Crude Carriers SA v Ridgebury*** [2025] UKSC 39

Thank you!

Any questions?

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