



Notice Provisions & Conditions Precedent in Construction Contracts

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Introduction

- Construction contracts often provide that entitlement to a claim depends on service of a notice
- This talk considers when the Courts will enforce these notice provisions strictly – and when a contractor may be able to avoid the consequences of falling foul of them
- For example:
 - Loss & expense
 - Additional payment
 - Extensions of time
 - Pre-conditions to adjudication



Notice provisions generally

- Starting point: what does the contract say?
- Construction of notice provision will be subject to general rules governing construction of contracts (Wood v Capita, Arnold v Britton, etc.)
- In addition, there is guidance in case-law specific to construction of notice provisions



Notice provisions generally

- Broadly two types of notice provision:
- First, service of notice is condition precedent to entitlement to the claim –
 - Court will enforce strictly, and failure to serve notice will shut out claim.
- Second, provision unclear / silent about consequences of failure to serve notice –
 - Court will avoid strict construction where possible.



What will amount to Condition Precedent?

- When will a notice provision be found to be a condition precedent?
- Guidance in Bremer Handels v Vanden-Avenne Izegem [1978]: depends on:
 - Form of clause
 - Relation of clause to contract as a whole
 - General considerations of law
- Court there held clause was not a condition precedent
- Guidelines, not hard & fast rules



What will amount to Condition Precedent?

- Different outcome in Steria v Sigma [2008]: clause was condition precedent - despite absence of express wording that non-compliance would lead to loss of entitlement
- Ordinary rules of construction apply: WW Gear Construction v McGee Group [2010]
- Should not be construed in penal way against contractor: Walter Lilly v Mackay [2012]
- Bear in mind information available to the decision-maker: Obrascon Huarte v HM's AG for Gibraltar [2014]



What will amount to Condition Precedent

- Illustration: recent decision of High Court in Hong Kong – Maeda Kensetsu v China State Construction [2019]
- Notice provision:
 - Sub-contractor shall give notice “*as a condition precedent*” to entitlement
 - No entitlement to additional payment unless sub-contractor sets out “*express right*”
 - Clauses must be “*strictly complied with*”



Special category: Extensions of Time

- What if contractor fails to give a notice which is condition precedent to entitlement to EoT, but Employer has caused delay?
- Australian case: Gaymark v Walter Construction (1999) – prevention principle barred claim to LADs
- TCC (obiter) in Multiplex v Honeywell [2007] doubted Gaymark represents English law
- Reasoning in Multiplex supported by Court of Appeal in North Midland v Cyden Homes [2018]



Contractors: don't get caught out!

- Better to err on side of caution:
 - Comply with notice provisions
 - Provide particulars & supporting documentation
- Giving notice & evidencing claims at the time increases prospects of success
- Courts / arbitrators tend to reward good record-keeping!



Special category: Adjudication

- Courts generally refuse to enforce pre-conditions to the right to adjudicate
- Contrary to s.108(2)(a) Construction Act 1996: right to adjudicate “*at any time*”
- E.g. Notice of dissatisfaction: John Mowlem v Hydra Tight [2001]
- Mediation first: Edmund Nuttall v RG Carter [2002]
- ADR procedure: Midland Expressway v Carillion [2005]
- Court of Appeal in Connex v MJ Building [2005]

