Fenwick Elliott
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Welcome to January's 2015 edition of ***Insight***, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

This issue is concerned with a relatively regular occurrence in construction projects: issuing notices. A 2014 decision of the High Court suggests that a new approach is emerging which is much more accommodating.

Insight

Issuing notices under construction contracts: an emerging new approach

This 43rd issue of Insight (i) considers the decision in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC) which relates to a claim for an extension of time and repudiatory breach under the FIDIC Yellow Book; (ii) provides practice points in relation to the timing of, and giving of, notices generally in light of *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*; and (iii) provides an indication as to the likely future direction of English law in relation to the timing of notices, particularly as regards the domestic standard forms.

Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar

The facts

The case concerned the construction of a road and tunnel near and under a runway at Gibraltar airport under the FIDIC Conditions of Contract for Plant and Design–Build for Electrical and Mechanical Plant, and for Building and Engineering Works Designed by the Contractor, 1st edition, 1999 ("the contract"), which is commonly known as the Yellow Book.

Sub-clause 20.1 of the contract contained a condition precedent to claims for additional time and cost in terms that:

> *"If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment … 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."*

Sub-clause 20.1 also has to be read in conjunction with sub-clause 8.4 which had widely been understood to place a burden on contractors to consider whether notice is required, even in circumstances where an event does not have an immediate impact upon activities which are on the critical path at the time of its occurrence, but which may become critical in the future. Sub-clause 8.4 provides that:

> *"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 … is or will be delayed …"*

The works commenced in December 2008 and completion was set for December 2010, two years later. However, the works quickly fell into delay, and OHL sought to claim an extension of time from the employer due to weather, and because it had encountered a large amount of hydrocarbon and lead contamination on site that it argued would not have been reasonably foreseeable to an experienced contractor at the time of tender.

Matters continued to deteriorate, and, six months *after* the forecasted completion date, work on site had effectively been suspended for almost seven months and the project was still only 28% complete. Unsurprisingly, the employer lost confidence in OHL and served a notice terminating its employment.

OHL claimed that the employer's termination notice was ineffective because it was not delivered to the address provided for by the contract. The invalid notice was regarded by OHL as being a repudiatory breach by the employer, which OHL accepted, bringing the contract to an end.

The issues that Mr Justice Akenhead had to decide, therefore, were whether OHL's notice claiming an extension of time was valid, and whether the employer's termination notice was valid, despite having been served on the wrong address.

The decision

Notice claiming an extension of time

On the facts, the Judge held that OHL was in principle entitled to a seven-day extension of time, but that

Insight

the availability of the claim for an extension of time was subject to OHL first complying with sub-clause 20.1, which imposed a condition precedent on OHL to give written notice of any claim.

Mr Justice Akenhead held that as a matter of construction and practical application, the event or circumstance giving rise to the claim for an extension of time must occur first, following which there must then either be awareness by the contractor, or else the means of knowledge or awareness of the event or circumstance prior to the condition precedent becoming operative.

Contrary to popular understanding about the operation of sub-clause 20.1, the Judge could see no reason why sub-clause 20.1 should be construed strictly such that notice would be required even in circumstances where an event does not have an immediate and measurable impact on the completion date, but may have such an impact at some point in the future. Indeed, he could see every reason why sub-clause 20.1 should be construed broadly in light of the serious effect it could have on otherwise good claims, for example for breach of contract by the employer.

Mr Justice Akenhead noted that, as a matter of construction, sub-clause 8.4 did not impose any requirement that it would be the "earliest of ""is or will be delayed", and in the absence of an express requirement in relation to timing, he found that the extension of time could either be claimed prospectively, after the time at which it was clear there would be delay, or retrospectively, when the delay had actually begun. This extends considerably the period during which the contractor can serve notice.

To take a practical example, if the employer issued a variation which was not on the critical path but later became critical, it would still be open to the contractor to serve a notice for an extension of time when the variation had actually started to cause delay. Prior to the decision in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*, the contractor would have had to notify possibly as early as the date on which the variation was instructed in case the variation became critical at a later date. The result was a myriad of notifications (and the associated administrative burden) which may or may not have been necessary.

Whilst Mr Justice Akenhead's finding on the extension of time point was contractor friendly, it did not ultimately assist OHL, as he found that OHL's claim for an extension of time was not recognisable as being a claim in relation to delay that had been caused by ground conditions and weather. The Judge accordingly reduced the seven-day extension of time that he found OHL was in principle entitled to, to just one day.

Termination notice

Sub-clause 1.3 of the contract required all notices called for by the Conditions to be hand delivered, or sent by email or courier to OHL's Madrid office. Alternatively, if the recipient gives notice of another address, communications should be sent to the other address, unless the recipient states otherwise. In practice, the latter scenario would occur if the recipient starts to communicate from a second address, after which notice could properly be given at that second address.

From 2009 onwards, OHL had been running the project from its site office, where the Project Manager and Engineer were also based, and project correspondence had been regularly sent there (including a sub-clause 15.1 notice) without any objection by OHL. The parties had, to all intents and purposes, acted as if the site office was an appropriate address at which notices could be served.

When the employer served the termination notice, it was hand delivered to OHL's site office in Gibraltar and signed for by OHL's Project Manager, after which it was promptly sent on to OHL's Madrid office. It was, however, OHL's Madrid office that was the address for service of notices called for by the contract.

Mr Justice Akenhead emphasised how important it was to adopt a commercially realistic interpretation of sub-clause 1.3. Adopting a commercial approach, provided that the termination notice had been served on responsible officers of the recipient, the fact that the notice had not been served at the address called for by the contract would not of itself render it invalid, and service on OHL's Madrid office was not a condition precedent to effective contractual termination. As the purpose (i.e. the termination) could be achieved by delivering the termination notice to the site office without strict compliance with the contract, then strict compliance was not regarded by the Judge as being necessary.

The Judge went on to explain that the primary purpose of sub-clause 1.3 was to provide an arrangement whereby notices and other contractual communications could be dispatched in an effective way and received by the recipient. Termination notices are intended to ensure that the contractor is aware that its employment on the project is to end, and this objective

Insight

was achieved by the employer, notwithstanding that the notice was served at the wrong address.

It was therefore OHL who repudiated the contract (and not the employer as OHL had claimed) by erroneously treating the contract as being at an end on the grounds of defective service when the contract was actually still subsisting.

Timing of notices – standard forms and the future

JCT

It is likely that the JCT Standard Form of Building Contract 2011 would produce the same result in relation to the extension of time point as the FIDIC Yellow Book and, indeed, Mr Justice Akenhead commented on it in 2012 in *Walter Lilly & Company Ltd v Giles Patrick Cyril Mackay and another* [2012] EWHC 1773 (TCC). The Judge considered the wording at clause 26.1 of the 1998 version of the JCT Standard Form Building Contract (which contains materially identical wording to the 2011 form) which deals with the contractor's application for loss and expense in terms that:

> *"the Contractor's application shall be made as soon as it has become, or should reasonably have become, apparent to him that the regular progress of the Works or of any part thereof has been or was likely to be affected as aforesaid …"*

The Judge confirmed in his judgment that the application for loss and expense can be made either prospectively or retrospectively, as is the case with the FIDIC Yellow Book.

NEC3

The timing of notices under the NEC form, however, is more difficult, and this is because there is no authority as to whether time might run from the delaying event, or from the time when the delaying event actually started causing delay.

Time and cost are governed by compensation events under core clause 61.3 of NEC3 which provides:

> *"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 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 or a Key Date unless the Project Manager should have notified the event to the Contractor but did not."*

Core clause 61.3 must also be read in conjunction with clause 60.1(18) which provides that a compensation event includes:

> *"A breach of contract by the Employer which is not one of the other compensation events in this contract."*

Clause 61.3, therefore, effectively operates as a bar to the contractor in respect of any time and financial consequences of any compensation event or breach of contract by the employer if the contractor fails to notify the project manager within eight weeks of becoming aware of the event in question.

The contractor must of course be "aware of the event" in order to notify the project manager under clause 61.3, and the question then arises as to when the contractor became aware or should have become aware of a particular event, and also the extent of knowledge in respect of any particular event.

In the case of ground conditions, for example, contractors may continue to work in the hope that they will overcome difficult ground conditions without any delay or additional costs. As the work progresses, however, the contractor's experience of dealing with the ground conditions may change such that the contractor reaches a point where he considers he should notify the project manager. Should the contractor, however, have notified the project manager at the date of the initial discovery of the ground conditions, or at the date when the contractor first believed the ground conditions were unsuitable and may cause delay? Arguably, the contractor should give notice when he encounters ground conditions which an experienced contractor would have considered at the Contract Date to have had only a minimal chance of occurring and so it would have been unreasonable to have allowed for them in the contract price, having regard to all of the information that the contractor is to have taken into account in accordance with clause 60.2.

Some practice points

- Before the works commence, read the contract very carefully to ensure that you understand how notices are to be served. Try and ascertain whether your notice requirements give rise to any conditions precedent by the use of words such as "condition", "subject to", or "condition precedent".

Insight

- A word of caution: prudent employers may seek amendments to the standard forms to clarify the date by which notices are to be issued, which would be likely to require notices to be given at the earliest possible date. You should therefore check your contract carefully for any such amendments prior to signing so that you are clear as to what is required.
- Before you serve a notice, be clear on the form the notice is to take. Notices will usually have to be given in writing. If no form is prescribed, you should describe the event or the circumstances relied on in detail, and make it clear on the face of the notice the claim to which the notice is intended to relate under the contract. The notice must be recognisable as a "claim".
- To avoid any arguments that your notice has not been properly served, try and ensure that your notice is served in the correct way (on the right office, for example) and on the correct person (on a director, the project manager, or other senior personnel of the recipient as might be required by the contract), notwithstanding the decision in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*.
- If you do not serve notices correctly, and your contact imposes a condition precedent in relation to the service of notices, you risk losing entitlements to additional time or money to which you might otherwise be entitled. This is the case even if the notice itself was valid, and was served by the correct method on the correct person, so always proceed with care when issuing notices.
- If you are claiming an extension of time, the earliest you can serve your notice of claim is the earliest date on which it becomes clear that the works are delayed and will impact completion. To be on the safe side, make sure you notify as soon as it becomes likely that the works will be delayed.
- If you fail to notify, and the delay has already begun, following the decision in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*, it will not be too late for you to notify, but again, you should notify as soon as you can to avoid any criticism that your notification has come too late after the delay first began.
- If you wish to terminate, tread very carefully indeed as termination is a serious step. You will need to ensure substantive compliance with the relevant contractual provisions if your termination is to be contractually effective. If you have any reason whatsoever to suspect that your termination notice may be defective, then you should immediately issue a confirming notice which will cure any deficiencies in the original notice.

Conclusion

The decision in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* potentially provides contractors with greater flexibility to retrospectively notify events, the impact of which was not fully understood or appreciated at the time, by adopting a sensible, commercial approach.

In practical terms, contractors may be less likely to (i) lose any entitlement they might otherwise have had to an extension of time; (ii) be rendered liable for delay liquidated damages in circumstances where the employer is in fact responsible for the delay; and (iii) lose a right to terminate they might otherwise have had.

Employers will no doubt seek to amend the standard forms to their advantage to make it clear that the contractor's duty to notify arises on the earliest possible date.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston.
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