



Time bars in construction and global claims

Time bars in construction contracts

Introduction

1. There is an increasing tendency in construction contracts to include time bar clauses which are intended to have the effect of disallowing the contractor a claim that might otherwise be legally recognisable. Two examples of these are the NEC3 and FIDIC forms. The NEC3 form is particularly important as it will form the basis of the London 2012 construction contracts and is increasingly being taken up on major projects.²
2. Clause 61.3 of NEC3 says this:

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 of 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.
3. Sub-clause 20.1¹ of the FIDIC form states that:

If the Contractor considers himself to be entitled to any extension to the Time for Completion and/or any additional payment, 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.
4. Neither contract imposes a similar obligation on the Employer. The regime is different between FIDIC and NEC. Under FIDIC, the duty is to notify of an entitlement to additional time or money; under NEC3 there is a duty to notify of an event.
5. However, the contracts are as one as to the effects of the contractor failing to give the appropriate notice. Under NEC3, if the Contractor does not give notice within eight weeks of becoming aware of the event, the Contractor is not entitled to additional payment or any change to Completion Date or the Key Dates unless the Project Manager should have notified the event to the Contractor and did not.

1. Clause 20.1 is identical in the Red, Yellow and Silver Books, except that in the Silver Book, the Employer performs the role of the Engineer.

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6. This is a fundamental requirement of the NEC3. The Contractor must give notice of compensation events within eight weeks of becoming aware. At its most straightforward under NEC3 the prevention principle does not operate to prevent the Employer's right to have the Contractor pay delay damages under NEC3 Clause X7.1 simply because the Contractor has not exercised his right to give notice in accordance with clause 61.3 for the Employer's breach of contract. This clause is a radical departure from the NEC Second Edition whereby notice had to be given within two weeks, but the NEC Second Edition was silent as to whether failure to give notice within this time would result in the Contractor being penalised.
 7. The contrast can clearly be seen with the JCT Standard Form of Building Contract. Clause 2.27 states:
 - 2.27.1 If and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith give written notice to the Architect/Contract Administrator of the material circumstances, including the cause or causes of the delay, and shall identify in the notice any event which in his opinion is a Relevant Event.
 - .2 In respect of each event identified in the notice the Contractor shall, if practicable in such notice or otherwise in writing as soon as possible thereafter, give particulars of its expected effects, including an estimate of any expected delay in the completion of the Works or any Section beyond the relevant Completion Date.
 - .3 The Contractor shall forthwith notify the Architect/Contract Administrator in writing of any material change in the estimated delay or in any other particulars and supply such further information as the Architect/ Contract Administrator may at any time reasonably require.
 8. There are no clear time limits for the submission of the notice and there is no clear stated loss of right in the event of a failure to notify. However, even this represents a tightening up of the language. The old JCT form required the notice to be given within a "reasonable time". This requirement was considered in the case of *London Borough of Merton v Hugh Leach*, where it was said:²

[The Contractor] must make his application within a reasonable time: It must not be made so late that, for instance, the architect can no longer form a competent opinion or satisfy himself that the contractor has suffered the loss or expense claimed. But in considering whether the contractor has acted reasonably and with reasonable expedition it must be borne in mind that the architect is not a stranger to the work and may in some cases have a very detailed knowledge of the progress of the work and the contractor's planning.
 9. So, here is a fertile area for disputes. What if the contractor's notification is late? In other words, are clauses 61.3 and 20.1 conditions precedent? Indeed, as we will see, the question can be equally applied to the JCT form, even though the language is very different.
 10. In simple terms the answer is yes. Sub-clause 61.3 is a condition precedent and potentially provides the employer with a complete defence to any claim for time or money by the contractor not started within the required time frame.
 11. Generally, in England and Wales, the courts will take the view that timescales in construction contracts are directory rather than mandatory, so that the contractor should not lose its right to bring its claim if such claim is not brought within the stipulated timescale.³ In the case of *Bremer Handelgesellschaft mbH v Vanden Avenne Izegem PVBA*,⁴ however,
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2. (1985) 32 BLR 51

3. *Temloc v Errill Properties* (1987) 39 BLR 30, (CA) per Croom-Johnson LJ

4. [1978] 2 Lloyd's Rep. 113, (HL) per Lord Salmon

the House of Lords held that a notice provision should be construed as a condition precedent,

- (i) it states the precise time within which the notice is to be served; and
- (ii) it makes plain by express language that unless the notice is served within that time the party making the claim will lose its rights under the clause.

12. Sub-clauses 61.3 and 20.1 plainly fulfil both these conditions as:

- (i) the notice of claim must be served within an expressed period of time of the contractor becoming aware of the event; and
- (ii) if the contractor fails to give notice of a claim within such period, he is not entitled to time or money.

13. The clauses were thus clearly drafted as a condition precedent and the English and Welsh courts have made it clear that there is nothing inherently wrong in that. In the case of *Multiplex Construction v Honeywell Control Systems*,⁵ where Mr Justice Jackson held that

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.

14. HHJ Davies followed the approach of Mr Justice Jackson in the case of *Steria Limited v Sigma Wireless Communications Limited*.⁶ The case related to the provision of a new computerised system for fire and ambulance services. Sigma contracted to provide a computer-aided mobilisation and communications system and Steria, in turn, subcontracted with Sigma to provide the computer-aided despatch system. The subcontract was a heavily amended version of the standard MF/1 form of subcontract. A dispute arose in relation to the release of the final tranche of retention due at the expiry of the defects liability period. Sigma asserted that Steria had delayed in completing the subcontract works and as a result Sigma was entitled to set off against the final payment and/or counterclaim LADs or general damages.

15. Clause 6.1 of the subcontract stated:

if by reason of any circumstance which entitles the Contractor to an extension of time for the Completion of the Works under the Main Contract, or by reason of a variation to the Sub-Contract Works, or by reason of any breach by the Contractor the Sub-Contractor shall be delayed in the execution of the Sub-Contract Works, then in any such case provided the Sub-Contractor shall have given within a reasonable period written notice to the Contractor of the circumstances giving rise to the delay, the time for completion hereunder shall be extended by such period as may in all the circumstance be justified

16. Now, clause 6.1 is similar in type to standard forms such as the JCT contract. As noted above, the language is very different from that to be found in FIDIC and the NEC3.

17. Sigma argued that the written notice referred to in clause 6.1 was a condition precedent to a grant of an extension of time and that it had not been complied with. Steria countered that there was no such condition precedent but that if there were, then either it had been complied with and/or it had been waived.

18. The Judge held that clause 6.1 was a condition precedent requiring Steria

5. [2007] EWHC 447 (TCC)

6. TCC 15 November 2007; [2008] CILL 2544

to give written notice within a reasonable period. That notice had to emanate from the subcontractor claiming the extension of time. Therefore, for example, minutes of meetings prepared by third parties recording that the subcontract works had been delayed did not constitute adequate notice.

19. Judge Davies agreed with Mr Justice Jackson's comments in the *Multiplex* case and said that:

In my judgment an extension of time provision confers benefits on both parties; in particular it enables a contractor to recover reasonable extensions of time whilst still maintaining the contractually agreed structure of a specified time for completion (together, in the majority of cases, with the contractual certainty of agreed liquidated damages, as opposed to uncertain unliquidated damages). So far as the application of the *contra proferentum* rule is concerned, it seems to me that the correct question to ask is not whether the clause was put forward originally by Steria or by Sigma; the principle which applies here is that if there is genuine ambiguity as to whether or not notification is a condition precedent, then the notification should not be construed as being a condition precedent, since such a provision operates for the benefit of only one party, i.e. the employer, and operates to deprive the other party (the contractor) of rights which he would otherwise enjoy under the contract.

20. The Judge felt that the words "provided that the sub-contractor shall have given within a reasonable period written notice to the contractor of the circumstances giving rise to the delay" were clear in their meaning. What the subcontractor is required to do is give written notice within a reasonable period from when he is delayed, and 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.
21. The case is important because the Judge held that the extension of time clause gave rise to a condition precedent *even though there were no express words to that effect*.
22. Therefore the case seems to confirm that the courts may well follow a strict line when it comes to interpreting such clauses, even when the clause does not follow the requirements of the *Bremer* case.
23. That said, the Judge also gave some useful guidance on what a written notice should contain and what documents could constitute written notice, reasoning that meeting minutes not drafted by the party applying for the extension of time could not be true written notice. The key is that the notifying party must be told that the other is contending that relevant circumstances have occurred and that they have led to delay in the subcontract works.

Are there any ways round the condition precedent?

24. Is there the possibility that a court/arbitral tribunal might decline to construe it as a condition precedent, having regard to the particular circumstances of the matter before it and the impact of the applicable law? The Scottish case of *City Inn Ltd v Shepherd Construction Ltd*⁷ suggests there may be.
25. The disputes related to the construction of a hotel under a contract incorporating the JCT Standard Form (Private Edition with Quantities) 1980 as amended. The core element of the dispute was whether or not the contractor was entitled to an extension of time of 11 weeks and consequently whether or not the employer was entitled to deduct LADs.

7. [2007] CSOH 190; Outer House of the Court of Session; 30 November 2007.

Clause 13.8 which contained a time bar clause, requiring the contractor to provide details of the estimated effect of an instruction within ten days. Lord Drummond Young characterised the clause thus:

I am of opinion that the pursuers' right to invoke clause 13.8 is properly characterized as an immunity; the defenders have a power to use that clause to claim an extension of time, and the pursuers have an immunity against that power if the defendants do not fulfil the requirements of the clause.

26. However, the Judge also felt that an immunity can be the subject of waiver. The architect and employer have the power, at least under the JCT Standard Forms, to waive or otherwise dispense with any procedural requirements. This was what happened here. Whilst the employer (in discussions with the contractor) and the architect (by issuing delay notices) both made it clear that the contractor was not getting an extension of time, neither gave the failure to operate clause 13.8 as a reason. The purpose of clause 13.8 is to ensure that any potential delay or cost consequences arising from an instruction are dealt with immediately. Thus, the architect can assess the consequences of the instruction.
27. The point made by the Judge is that whilst clause 13.8 provides immunity, that immunity must be invoked or referred to. At a meeting between contractor and employer, the EOT claim was discussed at length. Given the importance of clause 13.8, in the view of the Judge, it would be surprising if no mention was made of the clause unless the employer, or architect, had decided not to invoke it. Significantly, the Judge held that both employer and architect should be aware of all of the terms of the contract. Therefore, it is important that all certifiers are aware of the potential consequences if, by their actions, they could be deemed to have waived time bar clauses or other condition precedents. **Employers and certifiers alike will need to pay close attention to their conduct in administering contracts in order to avoid the potential consequences of this decision.**

Conclusion

28. In summary, it seems clear that under English law a condition precedent will be held to be effective, so as to preclude a claimant from bringing an otherwise valid claim, provided that the wording of the contract is clear that that is its intention. However, might it be that Mr Justice Jackson's comments amount to a high-water mark in the enforcement of condition precedents? The FIDIC approach seems to be changing. In autumn 2007, FIDIC introduced a new draft form of contract, the D-B-O form. This included the following concession within clause 20:

20.1(a) However, if the Contractor considers there are circumstances which justify the late submission, he may submit the details to the DAB for a ruling. If the DAB considers the circumstances are such that the late submission was acceptable, the DAB shall have the authority under this sub-clause to override the given 28-day limit and advise both the parties accordingly.

29. Further, as can be seen from the *City Inn* case, in practice, the particular circumstances of each situation will need to be considered, not solely because the courts construe these provisions extremely strictly, but also because the actual circumstances of the case might reveal that the time bar provision cannot be considered to be effective.⁸ And here, HHJ Davies' comments in the *Steria* case may prove to be of value. Certainly this particular area is likely to become an increasingly fertile ground for dispute.

8. Contractors may well find comfort in his Lordship's test of fair and reasonable apportionment, the comments concerning the sequential commencement of delays and the more straightforward method propounded for dealing with prolongation claims which involve elements of culpable delay. However, contractors should beware that His Lordship considered both parties' expert delay analyses in detail in arriving at his decision. Robust delay analyses therefore continue to play an important role in any extension of time claim and the question of whether competing delays can be seen as concurrent.

Global claims and concurrent delay

30. The question of whether or not a party is free to make a global claim is one which has long exercised the courts. In recent years, a number of time and money claims have failed entirely, one of the main reasons for this was that claims were pursued being on a “global” basis without any systematic analysis. A claimant would make myriad complaints of things that had delayed him. Generalised complaints would be made about the number of variations, and the time of the instructions. For a time, the courts held that such claims should be struck out. This changed with the Court of Appeal decision in *GMTC Tools and Equipment v Yuasa Warwick Machinery*⁹ where the court said that a plaintiff should have been permitted to formulate its claims for damages as it wished, and not be forced into a straitjacket of the judge’s or their opponent’s choosing.¹⁰
31. Two Scottish cases added a new dimension to the question of global claims, namely apportionment. In *John Doyle Construction Ltd v Laing Management (Scotland) Ltd*,¹¹ a claim for direct loss and expense was made under the equivalent of clause 26 of the JCT Standard Form 1980. The court had to consider the way in which a contractor could establish a global claim, where it is impossible to demonstrate individual causal links between events for which the employer is responsible and particular items of loss and expense. Typically, when a global claim is pursued, the contractor must demonstrate that the whole of his loss and expense results from matters that are the responsibility of the employer.
32. However, the court identified that that requirement might be mitigated in three ways:
 - (i) It may be possible to identify a causal link between particular events for which the employer is responsible and individual items of loss;
 - (ii) The question of causation must be treated by the application of common sense to the logical principles of causation, and if it is possible to identify an act of the employer as the dominant cause of the loss, that will suffice; and
 - (iii) it may in some cases be possible to apportion the loss between the causes for which the employer is responsible and other causes. In my opinion these principles have only limited application to the present case.
33. One of the judges in the *Laing v Doyle* case was Lord Drummond Young. He was also the Judge in the *City Inn Ltd v Shepherd Construction Ltd*¹² case. As noted above, the contract was based on the Standard Form of Building Contract (Private Edition with Quantities) (1980 edition). In respect of loss and expense, he decided that the direct loss and expense and delay sustained by the contractor could and should be apportioned between the events for which the employer was responsible and the events for which the contractor was responsible.
34. In relation to time the Judge said this:

While delay for which the contractor is responsible will not preclude an extension of time based on a relevant event, the critical question will frequently, perhaps usually, be how long an extension is justified by the relevant event. In practice the various causes of delay are likely to interact in a complex manner; shortages of labour will rarely be total; some work may be possible despite inclement weather; and the degree to which work is affected by each of these causes may vary from day to day. Other more complex situations can easily be imagined. What is required by clause 25 is that the

9. (1994) CILL 1010 73 BLR 102

10. Indeed, the Court of Appeal directed that the case be remitted back to another judge, a clear indication that the then practice of Official Referees telling parties how to plead was regarded as a serious blight; indeed, the Court of Appeal referred to the case as “no credit to the conduct of civil litigation in this jurisdiction”.

11. Both the decisions of Lord MacFadyen at first instance, CA 141-01/2002 CILL 1870 and of the Inner House, 2004 SC 713/2004 CILL 2135 are equally worth reading.

12. [2007] CSOH 190

architect should exercise his judgment to determine the extent to which completion has been delayed by relevant events. The architect must make a determination on a fair and reasonable basis. Where there is true concurrency between a relevant event and a contractor default, in the sense that both existed simultaneously, regardless of which started first, it may be appropriate to apportion responsibility for the delay between the two causes; obviously, however, the basis for such apportionment must be fair and reasonable. Precisely what is fair and reasonable is likely to turn on the exact circumstances of the particular case. A procedure of that nature is in my opinion implicit in the wording of clause 25.3.1 and .3; both of these provisions direct the architect to give an extension of time by fixing a Completion Date that he considers to be fair and reasonable.

35. The Judge said that the exercise of apportionment is broadly similar to apportionment of liability on account of contributory negligence or contribution amongst joint wrongdoers. What matters is the degree of culpability involved in each of the causes of the delay and the significance of each of the factors in causing that delay. That said, culpability is likely to be less important than the actual causative significance of each of the relevant factors. Two matters are potentially of some importance: the length of the delay caused by each of the causative events and the significance of each of the causative events for the works as a whole. An event that only affects a small part of the building might be of less importance than an event whose impact runs throughout the building. Ultimately this would be a question of judgment and accordingly, the Judge carried out his own fair and reasonable apportionment exercise. This led to the contractor's claim for an 11-week extension of time being reduced by two weeks.
36. These are Scottish authorities and as such they are only of persuasive authority in the English courts, no more. In respect of his conclusions as to time, this might be considered to be particularly important as Lord Drummond Young's conclusions are in direct contrast to what can be simplified as the "all or nothing" approach of a number of English authorities, including *Henry Boot Construction Ltd v Malmaison Hotel (Manchester) Ltd* and *Royal Brompton Hospital Trust v Hammond & Others*.¹³
37. Mr Justice Ramsey had the opportunity to consider these issues in the case of *London Underground Ltd v Citylink Telecommunications Ltd*.¹⁴ The case arose out of a PFI project involving the replacement of the entire communication system throughout London's underground rail network. LUL challenged an arbitrator's findings on the basis that the claim was a global one. The arbitrator indicated that he had followed the rationale of the Scottish Courts in the *Laing v Doyle* case. Mr Justice Ramsay held that:
- The essence of a global claim is that, whilst the breaches and the relief claimed are specified, the question of causation linking the breaches and the relief claimed is based substantially on inference, usually derived from factual and expert evidence.
38. In other words, a Tribunal must decide whether on the basis of the evidence provided there is a sufficient link between cause and effect. However, the question as to whether this case means that the *Laing v Doyle* approach to global claims will be adopted by the TCC in England and Wales, remains a live one. Mr Justice Ramsay was careful to proceed on the basis of the case as put forward in the arbitration itself, saying that:

13. 70 Con LRR 32 and 76 Con LR 148
14. [2007] EWHC 1749 (TCC)

the approach set out in the decision of *Laing v Doyle* is not challenged on this

application and I accept that approach.

Conclusion

39. This leaves open the question of whether a global claim will succeed at trial. At trial, it should not be forgotten that you must prove your case and there is an important distinction between a global claim as a matter of pleading and a global claim as a matter of evidence. The position seems to be this:
- (i) Where a claim for an extension of time and/or loss and expense is advanced pursuant to contractual terms, then an arbitrator or the court can make a global award, subject to the same limitations as were set out in *Crosby* and *Merton*. But the mood is against merely impressionistic assessments, and a claimant is far more likely to succeed if he can show what effects flowed from what events giving rise to entitlement; and
 - (ii) Where the claim is for damages for breach of contract, the claimant's task may be somewhat easier, because he will usually be able to claim damages for loss of a chance, at any rate in the alternative, and under that head the arbitrator or the court is much more likely to be persuaded indeed is probably required to take an impressionistic approach.

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