

Insight

Insight provides practical information on topical issues affecting the building, engineering and energy sectors.

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Conditions Precedent: Will they bite?



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Conditions precedent (which include time bar provisions) are important contractual devices, serving as either gateways or barriers to contractual relief. Their identification and enforcement, however, is not always straightforward. In some cases, a clause may not appear to be a condition precedent but will still operate as one and, in other cases, a clause may appear to be a condition precedent on the surface but is incapable of being enforced as one.

In this *Insight* we examine when a provision is, or is not, a condition precedent by reference to recent case law. We then examine where in the standard forms of construction contract they are often encountered before analysing what parties need to have in mind when determining if a provision is in fact a condition precedent and, further, whether it can be enforced.

What is a condition precedent?

A condition precedent is a contractual stipulation that must be satisfied before a right or an obligation comes into existence.¹ These are particularly common in construction contracts for provisions concerning payment, claims for extension of time, claims for compensation or adjustment of the construction price, application of liquidated damages, and dispute resolution, amongst others.

Conditions Precedent are often used as management tools for construction projects allowing claims or issues to be identified as soon as possible and dealt with. Contractors may also impose conditions precedents on their subcontractors in order to ensure they have time to feed the claim up the contractual chain. As such they are recognised as a necessary and helpful management tool by the Courts who will implement them, if they are sufficiently clear, even in circumstances where the consequences of doing so appear to be harsh.²

What is needed for a condition precedent to be upheld?

In order for a condition precedent to be upheld it needs to be clear that the relief or obligation that is the subject of the condition precedent is contingent on the performance of certain obligations, creating a "conditional link".³ So long as this is clear, there are no specific words that need to be used. In particular, the words "condition precedent" are not required,⁴ though they are often used.

It could, however, be argued that the express intention to create a conditional link will not exist in a clause where the words "condition" or "precedent" have not been used, if they have been used elsewhere in the contract to create a condition precedent. This is because the identification of conditions precedent relies heavily on the application of general principles of contractual interpretation, particularly the natural, ordinary meaning of the words in the context of the contract as a whole.⁵ Further, the words "subject to" may in some cases denote a condition precedent provision. However, whether they do in the contract you are examining will depend on how those words are used elsewhere in the contract and how the contract as a whole should be interpreted.⁶

If the intended effect of the condition precedent is to extinguish a right to relief (such as notice provisions for claims), then there needs to be express wording reflective of this intention for it to be enforced as a condition precedent.⁷ In addition, such clauses are treated as operating in the nature of limitation clauses and are therefore subject to the usual rules governing such clauses⁸ and also interpreted strictly.

As stated in Keating on Construction Contracts:

"Many contracts provide that the contractor's entitlement to an extension of time is dependent upon, amongst other things, the service of a notice within a stipulated time

*of an event causing delay. Courts are normally reluctant to construe the requirements as to the form and content of the notice required under such clauses too strictly and are unlikely to treat them as condition precedent to the making of any claim (as opposed to procedural requirements) absent clear language to this effect."*⁹

Even if the wording of the clause demonstrates an express intention that the performance be contingent on an event, this may not be enough to result in the clause being considered a condition precedent; the wording needs to be interpreted in the context of the contract as a whole, and the clause needs to provide sufficient detail of both the conditions and the effect of the clause for it to satisfy the requirements of contractual certainty. If there is no express intention and/or no contractual certainty, the event is not a condition; it is an option.

In relation to notice provisions in particular, the key House of Lords case held that these will be considered to be conditions precedent and will be binding only if:¹⁰

1. the clause states the precise time within which the notice is to be served; and
2. 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.

What should you consider when drafting a Condition Precedent provision?

Ingredients that therefore need to be considered when drafting your conditions precedent in order to have a sufficient level of contractual certainty include, but are not limited to:

1. **Deadline for fulfilment:** ideally a clear deadline for fulfilment should be set or a period time set within which notification should be given.¹¹
2. **Consequences of non-fulfilment:** what happens if a condition precedent is not fulfilled? This needs to be spelled out clearly. Depending on the wording it may be possible to argue that a claim for damages arising out of the owner’s breach of contract has not been barred even if another form of claim has.¹²
3. **Steps to fulfil the condition:** what exactly does the condition require? Is there clarity as to the steps that the party must take, the form of any agreement the party is expected to enter into or test that needs to be undertaken? Does the fulfilment of the condition need to be procured in its entirety, or just to the extent that a party can establish that reasonable endeavours have been made?
4. **Determining fulfilment:** is one party required to approve whether the condition has been fulfilled?¹³

If a condition precedent does not include sufficient detail in relation to the elements outlined above, it may be that the clause cannot operate as a condition precedent and, instead, non-fulfilment of the condition will amount to an ordinary breach of contractual obligations for which the other party can claim damages, rather than the lapsing of the clause or the contract.

Where do we encounter them?

While conditions precedent in bespoke and amended standard form contracts will need to be identified through the means set out above, there are conditions precedent in the standard form contracts that it is useful to be aware of.

FIDIC

The FIDIC Suite is known for having particularly stringent notice provisions that serve as conditions precedent with the ability to extinguish a party’s ability to bring a claim if they are not complied with. But is it always the case that non-compliance with one of FIDIC’s notice provisions will prevent a claim from proceeding?

When one thinks of conditions precedent and FIDIC, sub-clauses 20.1 and 20.2 of the FIDIC form naturally come to mind. These sub-clauses require either party to give notice of any claims within 28 days of the date on which the party became aware, or ought to have become aware, of the event or circumstance giving rise to the claim. Failure to comply with this time limit extinguishes any right to the claim. Sub-clause 20.2 provides a prescriptive procedure that it stipulates must also be complied with in order to proceed with any claim.

These clauses are strictly worded and do not appear to provide any reprieve for late notice save for in sub-clause 20.2.5, which provides the engineer with discretion to treat late notice as valid in light of the circumstances (examples of such potentially relevant circumstances being set out in the sub-clause). Despite this apparent silver bullet to the condition precedent at sub-clause 20.1, it is not clear whether this additional discretion will provide much practical benefit for the parties or the engineer; given the clarity of the time bar for notice, the circumstances in which late notice is likely to be reasonable are limited.

There are no other mechanisms within the contract that soften the notice

provision at sub-clauses 20.1 and 20.2. However, the law governing the contract may offer reprieve for the claiming party, including waiver and estoppel under common law jurisdictions, and the principle of good faith in civil law jurisdictions.¹⁴ Under English law there may also be a possibility that the notice provisions have been waived if there has been some form of gentleman’s agreement (i.e. don’t worry about this now, we can sort it out later).

NEC

Clause 61.3 of NEC3 contains a similar notice provision for claims made under that contract, but with an 8-week time frame rather than 28 days. Again, this is similarly strictly enforced as binding. There are, however, a few exceptions and/or legal arguments around this which may assist.

Possible ways around this include:

1. Under clause 61.3 the time bar does not apply if it arises out of an instruction, a certificate, changing an earlier decision or correcting an instruction. What is an “instruction” sometimes itself becomes the subject of a dispute, with parties seeking to widen this exception as far as they can.¹⁵
2. Arguing that the awareness of the event must be by someone of the requisite seniority and hence the time bar does not bite until later on (conveniently after the notice was given).
3. Arguing perhaps that it was only when it became obvious the event would have a time impact that it became necessary to notify it (although this would not assist for scope changes).
4. Arguing that the right to insist on this provision has been waived either specifically in relation to that particular Compensation Event or, as we see far too often, as a result of an informal

gentleman's agreement that the Project Manager will of course do the right thing in due course.

JCT

Whether there are condition precedents within the JCT forms (both the 2011 and 2016 editions¹⁶), which are often regarded as more contractor friendly than other forms, is sometimes disputed. For example, "loss and expense claims" require that notice is given "within a reasonable time" or "as soon as possible" after the event.¹⁷ Such disputes take place notwithstanding the fact that the drafting team for the 2016 edition did NOT intend the provision to be a condition precedent. A member of the JCT Drafting Committee in fact blogged as follows:

"JCT has not adopted the approach of some bespoke amendments whereby notification by the Contractor in accordance with a time limit is a condition precedent to entitlement to loss and expense, which means that in principle noncompliance avoids the claim."¹⁸

However, it should be noted that, in any event, bespoke amendments are often made to the JCT forms to add in clearer time bars and, as such, parties need to ensure they review the specific clauses they are signing up to in detail.

Will they bite you?

In England and Wales, Scotland and Ireland, conditions precedent are generally enforced as binding, particularly notice provisions, and ought to be treated with caution. If the condition precedent is clear in its terms, it is likely that the benefiting party will be able to rely on it. Therefore, for the party seeking to rely on conditions precedent (often the Employer), it is necessary to ensure at the outset that the drafting of the contract is clear and that the conditions precedent achieve contractual certainty if amending a standard form or drafting a bespoke contract.

If the benefiting party intends to rely on the condition precedent, then it needs to be strictly enforced. Any reluctance to enforce the provision could amount to a waiver of the party's intention to rely on it. In the event that a party does waive their right to rely on a condition precedent but wishes to reserve its right to rely on it in future, then this needs to be made clear and, where necessary, amendments made. For example, if the waiver concerns a notice provision, the waiver ought to include a new reasonable deadline for fulfilment that the party can rely on at a later date if the expected progress is not made.

If there is any dispute as to the requirements of a condition precedent, particularly what the deadline for fulfilment is or what actions are actually required to fulfil the conditions in terms of substance or form, then it may be that the condition precedent will not be binding for lack of contractual certainty, or at least that the operation of the clause could be interpreted in the otherwise barred party's favour rather than strictly against them in light of the impact it may have on otherwise good claims to enforce the condition precedent.¹⁹

The other main situation in which a party may be able to avoid the operation of a condition precedent is where the benefiting party waives its right to rely on it. Obviously, you do not want to be the party seeking to establish a waiver on the basis of a gentleman's agreement which is, with the benefit of hindsight, not as clear as you would like it to be or, indeed, in writing.

The golden rule therefore remains notify, notify, notify and do it on time (or early).

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Footnotes

1. See Julian Bailey, Construction Law, 2nd edition 2016, Section 3.50 (online), accessed 22 June 2020.
2. See CMA Assets Pty Ltd v John Holland Pty Ltd [No. 6] [2015] WASC 217. See also Construction Law, Section 6.316.
3. Aspen Insurance UK Ltd v Pectel Ltd [2009] 2 All ER (Comm) 873.
4. O'Brien v TTT Moneycorp Ltd [2019] EWHC 1491.
5. See Davy Offshore Ltd v Emerald Field Contracting Ltd (1991) 55 BLR at 79.
6. See Heritage Oil and Gas Limited v Tulow Uganda Limited [2014] EWCA Civ 1048 and also Interserve Construction v Hitachi [2017] 2633 TCC.
7. Scottish Power UK Plc v BP Exploration Operating Co Ltd [2016] 1 All E.R. (Comm) 536.
8. For example, the Unfair Contract Terms Act 1977 and its requirements for reasonableness may apply in certain situations. See J Murphy & Sons Ltd v Johnston Precast Ltd [2008] EWHC 3024 (TCC).
9. See Keating on Construction Contracts, 10th edition, 2016, at paragraph 8-031.
10. Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem nv [1978] 2 Lloyd's Rep. 113.
11. Total Gas Marketing Ltd v Arco British Ltd [1998] UKHL 22).
12. See, for example, Foundation Co of Canada Ltd v United Grain Growers Ltd (1997) BCLR.
13. "Contracts: Conditions Precedent", in Thomson Reuters Practical Law (2020), accessed on 1 June 2020.
14. Simon Hughes QC, "The Evolution of Notice Provisions in the FIDIC Suite", Keating Spring Update 2019.
15. Northern Ireland Housing Executive v Healthy Buildings (Ireland) Limited [2014] NICA 27.
16. The key difference being that the wording "shall" is used in the 2016 edition whilst "may" is used in the 2011 edition (see clause 4.20).
17. The House of Lords case Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem nv [1978] 2 Lloyd's Rep. 113 strongly suggests that this is not the case.
18. See Ms Reeves' blog dated 25 April 2017.
19. Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 (TCC).