

# Notices

## Construction Law Terms: A to Z

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# N is for Notices

### Introduction

Anyone who has ever read a construction contract, or been involved in a construction project, will know that notices play a big part in the success of a project.

Notices are commonly required in construction contracts in respect of:

- payment (the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009, (the “**Construction Act**”) includes a regime requiring “*payment notices*” and “*pay less notices*”);
- delay events and other claims (e.g. variations);
- notices of dissatisfaction in respect of an adjudicator or dispute board’s decision;
- completion of the works (or part of the works);
- exercising a right to suspend performance under a contract; and
- exercising a right to terminate.<sup>1</sup>

This article focuses on two of these: notices relating to payment and notices in respect of delay events and other claims. It will also consider the importance of complying with contractual provisions and conclude with some practical tips to help contractors comply with contractual notice provisions.

<sup>1</sup> The purpose of requiring a contractor to give notice of certain issues (for example events causing delay to a project) is to give the employer the opportunity to consider the issue and to how best to deal with it.

<sup>2</sup> “H is for Housing Grants, Construction and Regeneration Act 1996”: <https://www.fenwickelliott.com/research-insight/articles-papers/construction-law-terms-a-z/housing-grants-act-1996>

<sup>3</sup> [2021] EWHC 2441 (TCC)

### Notices relating to payment

The Construction Act<sup>2</sup> mandates specific timelines for making payments, ensuring that contractors and subcontractors are paid promptly for their work. To facilitate that, it outlines clear rules for payment claims, payment schedules, and the consequences of non-payment, providing transparency and predictability in payment practices. A key element of these rules is the requirement for making and responding to payment claims. The Construction Act’s notice regime is intended to ensure that a contractor is informed of the amount due, or any sums to be withheld, and how those sums have been calculated.

The notices regime in respect of payments under construction contracts has been the subject of countless disputes, in adjudications and court proceedings. One recent case of note is that of *Downs Road Development LLP -v- Laxmanbhai Construction (UK) Limited*.<sup>3</sup> Laxmanbhai Construction (UK) Limited (“**LCUK**”) issued an interim application for the sum of

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£1,888,660.70. In response, Downs Road Development LLP (“DRD”) sent two payment notices in each payment cycle.

- The first notice was effectively a ‘holding’ notice certifying a nominal sum being due (the notice before the Court was for 97p) whilst the Employer’s Agent fully assessed the application by the contractor, LCUK. When issuing the first payment notice, DRD stated that “a further Payment Notice will be issued to you in due course and will not affect your payment date”.
- The second notice (6 days later) certified the Employer’s Agent’s assessment of the sum due for payment (the notice before the Court was for £657,218.50).

LCUK commenced an adjudication for the “correct sum due” and, whilst the DRD accepted that its second payment notice was out of time, it maintained that its first payment notice (for 97p) was valid. The Adjudicator decided that the “correct sum due” was £771,045.48 and the Court was asked to determine whether or not the Adjudicator’s decision was enforceable. The Construction Act requires that payment notices set out the sum the employer “genuinely” considered to be due and the basis on which that sum was calculated. The notice in question did not reflect what the employer **genuinely** considered due in respect of LCUK’s payment application and, as such, it was not a compliant payment notice. As the facts make clear, this case involved a very particular – and extreme – set of facts and it is unclear how it will be used in the future.

### Notices relating to claims

The purpose of requiring a contractor to give notice of certain issues (for example, events causing delay to a project) is to give the employer the opportunity to consider the issue, how it wishes to deal with it and to instruct the contractor accordingly.

Contracts sometimes provide that if a party fails to provide a notice of a claim within a specified timeframe, it forfeits its claim. These clauses are referred to as ‘condition precedent’, ‘time bar’ or ‘drop dead’ provisions. It isn’t necessary to use the phrase “condition precedent” for a provision to be considered a condition precedent. Nor is there any other specific form of words that must be used. But the clause must be certain enough to satisfy the general contractual rules on certainty and it must be clear from its wording that the clause is intended to operate as a condition precedent.

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.<sup>4</sup> If the intended effect of the condition precedent is to extinguish a right to relief (like notice provisions for claims) then, for it to be enforced as a condition precedent, there needs to be express wording that reflects that intention.<sup>5</sup>

The recent Scottish case of *FES Limited -v- HFD Construction Group Limited*<sup>6</sup> deals with clause 4.21.1 of the Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot) (2016 Edition) and considered whether the giving of a notice in terms of clause 4.21 was a condition precedent for recovering loss and expense.

The Court noted that the provision in questions had been negotiated and drafted by skilled professionals, that the language was “clear and straight-forward” and, in the judge’s view, it was difficult to interpret the clause in any way other than as a condition precedent. Compliance with the clause was not unduly onerous and both parties stood to benefit from the timely notification of loss and expense claims. It held that the clause was a condition precedent. We understand that this decision may be subject to appeal to the Court of Session’s Inner House.

<sup>4</sup> *Temloc -v- Errill Properties* (1987) 39 BLR 30, (CA)

<sup>5</sup> *Scottish Power UK Plc -v- BP Exploration Operating Co Ltd* [2016] 1 All E.R. (Comm) 536.

<sup>6</sup> [2024] CSOH 20

The wording considered in that case is materially the same as the equivalent clauses in the JCT suite of contracts 2016 edition, and the recently published JCT Design and Build 2024 contract. However, the decision of the Scottish Courts is not binding on the courts in England and Wales, and it remains to be seen whether they will adopt a similar interpretation.

### The importance of complying with contractual provisions

The case of *Maeda Corporation -v- Bauer Hong Kong Limited*<sup>7</sup> arose after Bauer encountered unforeseen ground conditions that required it to excavate more rock than it had anticipated. The subcontract required Bauer to submit to Maeda, in relation to any claim for additional payment, a notice of the 'contractual basis' of the claim, together with full and detailed particulars and its evaluation of the claim, within 28 days of an initial notification (compliance with which was a condition precedent to any entitlement). Bauer issued a notice identifying the basis of its claim as an entitlement to a variation. However, Bauer had undertaken the additional work without complying with the contractual mechanism for variations, which required a formal instruction from the engineer.

The Arbitrator held that although Bauer was not entitled to a variation (and therefore additional monies) because it had failed to comply with the contractual mechanism, it was nevertheless entitled to payment as a separate claim. The case ultimately came before the Hong Kong Court of Appeal which held that the subcontract was "clear and unambiguous" in requiring strict compliance with the notice requirements. Bauer's notice identified the basis of its claim as a variation and, applying the wording of the notice provisions, Bauer was not able to subsequently (and out of time) advance a claim on an alternative basis.

### Important practical issues to consider relating to notices

It is important that parties understand from the outset:

- what circumstances require notices to be given;
- what detail/information a notice is required to contain;
- when notices are to be given;
- any time limits for the service of a notice;
- how a notice is to be transmitted;
- to whom the notice should be transmitted and where; and
- whether the service of a notice is a condition precedent.

It can often help, at the start of a project, for those managing the contract to compile a schedule of the clauses which require notices to be given, along with the procedure, timescales and requirements relevant to giving each notice – sometimes flowcharts can also help with making breaking down the procedures into clear guidance. If the mechanism is followed, this should mean that any dispute is around the underlying issue which caused the notice to be issued, and not the validity of the notice itself. Given the significant consequences of a contractor failing to comply with a condition precedent, it can also help for contractors to identify those clauses which are (or might arguably be) condition precedents, so that they pay particular importance to complying with those provisions.

Then, when drafting notices they should:

- be clearly labelled as a notice;
- only deal with one issue;
- refer to the clause pursuant to which the notice is given;
- set out clearly and concisely the facts relied on;
- set out clearly what relief is being sought; and
- what response, if any, is required and by what date.

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<sup>7</sup> [2020] HKCA 830

\*Content in this article is not legal advice.