

Conditions Precedent

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- When drafting conditions precedent in bespoke forms, what wording is required for them to be enforceable by the court?
- To what extent is the court enforcing what the parties draft and agree?

INTERPRETATION – THE PRINCIPLES

- *Bremner Handelsgesellschaft MbH v Vanden Avenne Izegem PVBA* [1978] 2 LLR 109, HL.

- Whether a clause is a condition precedent depends on 3 important factors:
 - The form of the clause itself
 - The relation of the clause to the contract as a whole and
 - General considerations of law.

“21. Prohibition

*In case of prohibition of export, blockade or hostilities or in case of any executive or legislative act done by or on behalf of the Government of the country of origin or of the territory where the port or ports of shipment named herein is/are situate, preventing fulfilment, this contract or any unfulfilled portion thereof so affected shall be cancelled. **In the event of shipment proving impossible during the contract period by reason of any of the causes enumerated herein, sellers shall advise buyers of the reasons thereof. If required, sellers must produce proof to justify their claim for cancellation.**”*

- The clause was not framed as a condition precedent: the cancellation in the first sentence wasn't conditional on the second sentence being complied with
- The sentences could not be read as linked by words such as “provided that” – as no such words were present

- Should conditions precedent be construed strictly?
Do special rules of construction apply?
- No - *WW Gear Construction Ltd v Mcgee Group Ltd* [2010] EWHC 1460 (in reliance on *Bremner*)

- *“It is sometimes said and argued that conditions precedent which have the effect of otherwise excluding what would otherwise be perfectly valid claims or entitlements are to be construed strictly..... However, the basic rules of construction apply to all contractual terms....” (para 13)*

- Should such clauses be construed *contra proferentem*?
- Only if there is a genuine ambiguity – *Steria Ltd v Sigma Wireless Communications Ltd* [2008] BLR 79 (extension of time clause)

- *“...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, ie the employer, and operates to deprive the other party (the contractor) of rights which he would otherwise enjoy under the contract”*
- In fact, the wording of the clause was clear

- Is there judicial latitude over the interpretation and application of the notice requirements?
- Yes – *Obrascon Huarte Lain SA v AG for Gibraltar* [2014] BLR 484 (EOT and loss and expense)

- *If the contractor considers himself to be entitled to any extension of the Time for Completion....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” [clause went on to describe consequences of failure to give notice]*

- It was conceded that the clause was a condition precedent
- But the Court construed the notice requirements broadly (para 312 – 313):
- *“Properly construed and in practice the “event....”must first occur and there must have been either awareness by the Contractor or the means of knowledge or awareness of that event or circumstance before the condition precedent bites.”*

- *“I see no reason why this clause should be construed strictly against the Contractor and can see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer”*
- *“...there is no particular form [of notice] called for....and one should construe it as permitting any claim provided that it is made by notice in writing to the Engineer, that the notice describes the event or circumstances relied on and that the notice is intended to notify a claim...under the Contract or in connection with it. It must be recognisable as a ‘claim’”*

DRAFTING – WHAT WORKS?

Key factors to consider



- Conditionality
- Time limits
- Consequences

- What can work?
 - If and/or provided that
 - Use of words “condition precedent”

- What does not work?
 - Mere mandatory words

- *“If the Contractor makes such application....provided always that the Contractor shallmake his application as soon as it has become or should reasonably have become, apparent to him that the regular progress has been or is likely to be affected..... [etc]*
- *See LB of Merton v Leach 32 BLR 51; Greater Glasgow Health Board v GHI Contracts Ltd [2012] SCOH 174*

- *“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....., **then in any such case provided the Subcontractor 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 circumstances be justified and all extra costs incurred by the Subcontractor in relation thereto shall be added to the Subcontract Price together with a reasonable allowance for profit.**”*
- *See Steria Ltd v Sigma Wireless Communications Ltd [2008] BLR 79*

- *“Provided that the Main Contractor’s compliance with these requirements shall be a condition precedent to his entitlement to an extension of time.”*
- *See: W Hing Construction Co Ltd v Boost Investments Ltd [2009] BLR 339*

- The belt and braces approach: *see WW Gear [2010]*) (But beware of meaningless words)
- *“**If** the Trade Contractor makes written application ...stating that he has incurred or is likely to incur direct loss and/or expense **provided always that** the Trade Contractor’s application shall be made as soon as and in any event not later than two months after it has become ...apparent....**and it shall be a condition precedent** to the Trade Contractor’s entitlementthat the Trade Contractor has complied fully with all the requirements of this clauses including, for the accordance of doubt, the said time period of two months....”*

- But insufficient (*Bremner*):
- *“....In case of prohibition of export, blockade or hostilities or in case of any executive or legislative act done by or on behalf of the Government of the country of origin or of the territory where the port or ports of shipment named herein is/are situate, preventing fulfilment, this contract or any unfulfilled portion thereof so affected shall be cancelled. In the event of shipment proving impossible during the contract period by reason of any of the causes enumerated herein, **sellers shall advise buyers of the reasons thereof**. If required, sellers must produce proof to justify their claim for cancellation.”*

- Inclusion of a clear, definite time period preferable (e.g. 28 days, 2 months)

- *Bremner*, commenting on the use of the words “without delay”:
 - *“If a condition were intended a definite time limit would be more likely to be set.”*

- Reference to a reasonable time sufficient e.g. *Steria v Sigma*:
 - “*provided the Subcontractor shall have given within a reasonable period of time written notice to the Contractor of the circumstances giving rise to the delay...*”

- Clauses frequently provide for the consequences of a failure to notify
- e.g. *Education 4 Ayrshire v South Ayrshire Council* [2009] CSOH 146:
 - *“In the event that information is provided after the specified number of Business Days contained in Clause 17.6, the Contractor will not be entitled to any extension of time, compensation, or relief...”*

- But it's not essential – see *Steria* (para 90 – 91)
- *“...the real issue which is raised on the wording of this clause is whether [clear words “provided that”] by themselves suffice, or whether the clause also needs to include some express statement to the effect that unless written notice is given within a reasonable time the subcontractor will not be entitled to an extension of time”*

- *“...a further express statement of that kind is not necessary. I consider that a notification requirement may...operate as a condition precedent even though it does not contain an express warning as to the consequence of non-compliance. It is true that in many cases ...careful drafters will include such an express statement, in order to put the matter beyond doubt. It does not however follow... that a clause...which makes it clear in ordinary language that the right to an extension of time is conditional on notification being given should not be treated as a condition precedent. This is an individually negotiated sub-contract between two substantial and experienced companies, and I would be loathe to hold that a clearly worded requirement fails due to the absence of legal “boilerplate”.*



- Belt and braces advisable?
 - Clear wording
 - Conditional wording
 - A time limit
 - Consequences

- Less may be sufficient – but why take the risk?

- *WW Gear* [2010] and [2012] – a salutary lesson?
- Avoid meaningless words!
 - The Court may apply *Chartbrook*, and get out the judicial red pen, but why take the risk?
- Avoid other clauses which allow the same recovery without the need to comply with your carefully drafted condition precedent!