MCMS Blog

Can you spot a condition precedent when you see one?

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On 30th June, around 20 adjudicators from the RICS Presidential Panel gathered at 55 Colmore Row in Birmingham for Competency Workshop No2 titled "*Maintaining and Controlling the Process".* **Janey Milligan started the day by discussing the adjudication process with plenty of useful discussion around timetabling, the subtle differences between the Scheme for Construction Contracts (England and Wales) and the Scheme for Construction Contracts (Scotland), jurisdictional challenges and when to deal with them, and how to control poor behaviour by the parties.**

My colleague, Jonathan Cope, then presented the afternoon session titled "*Legal Principles in Adjudication*", which included a discussion on condition precedent. Most of us know the definition of condition precedent as being "*a contractual stipulation that must be satisfied before a right or obligation comes into existence*". But the question Jonathan homed in on was: *can we recognise a condition precedent when it is buried in a contact document without a label*? I should point out at the outset that I'm not a lawyer, so I won't delve into detailed case summaries. However, in my role as an adjudicator, I regularly come across issues relating to conditions precedent so thought it would be useful to share some of the key principles I took away from the really helpful session, along with a few of the key cases on the topic.

So, what should we look out for?

Starting with "if" and "then"

The 2025 Court of Appeal Decision in *Disclosure and Barring Service v Tata Consultancy Services Ltd [2025] EWCA Civ 380* gives us some guidance and confirms that the court looks for conditionality in the drafting. Lewison LJ says that almost any sentence beginning with "*if*" is conditional. He goes on to say that "*A sentence whose structure is "if-then" is a paradigm of conditionality*". So, the condition introduced by "*if*" has to be satisfied before the "*then*" can occur. That sounds fairly simple and obvious, but as we know contracts are not always drafted like that, so what else should be considered?

What does the case law tell us?

A number of cases, some of which are not related to construction, have helped understand the requirements for a condition precedent. In the case of *Bremer Handelsgeseuschaft MbH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep 109 HL*, the House of Lords found that whilst the contract clause imposed a distinct and definite obligation on the seller obtaining relief, it did not provide that cancellation was compliant upon the seller complying with the contract. Lord Wilberforce concluded that if it was a condition precedent then a definite time would have been set, and using the words "*without delay*" did not satisfy that requirement. Lord Salmon reinforced the opinion of Lord Wilberforce stating a precise time would be expected to be stated and conveyed in express language that, if the notice was not served within the time, then the sellers would lose their rights.

However, in *WW Gear Construction Ltd v McGee Group Ltd [2010] EWHC 1460 (TCC)*, Mr Justice Akenhead pointed out that the use of the words "*provided always that*" was important because this type of wording is often a strong indication that the parties intend to create a condition precedent. What followed was a qualification and explanation of what was required for the entitlement to arise. The actual clause required the contractor to make its application "*as soon as*" and, in any event, no later than two months after the relevant circumstances had become, or should reasonably have become, apparent, even though the judgment supports the broader proposition that the language and structure of the clause are what matter when determining whether it creates a condition precedent.

In *Steria Limited v Sigma Wireless Communications Limited [2007] EWHC 3454 TCC*, HHJ Stephen Davies found that service of a notice within a "reasonable period" was a condition precedent to a right to an extension of time even though the clause did not expressly say "condition precedent" or expressly spell out that failure to notify would remove the entitlement. He came back again to the issue of the wording of the clause. He opined that clear wording would suffice, and there was no requirement for a further express statement warning of the consequences of non-compliance. Though he did say that careful drafters would do so to avoid any doubt.

In *Tullow Uganda Ltd v Heritage Oil and Gas Ltd & anr [2014] EWCA Civ 1048,* Beatson LJ considered the interpretation of clauses containing a number of sub-clauses. He cautioned that, where a sub-clause is said to operate as a condition precedent, that interpretation must make sense within the structure and wording of the clause as a whole. Where the requirements are expressed as part of a combined provision, each individual requirement must be capable of operating as a condition precedent if the provision as a whole is to be treated in that way. Sub-clauses therefore need to be sufficiently separate and self-contained for a distinction in their effect to be significant. Beatson LJ also considered the significance of different wording being used within the same contract. Where clear condition precedent wording was used in one clause but not in another, this could indicate that the drafters knew how to create a condition precedent when that was their intention.

The general principles

Keating on Construction Contracts at para. 8-033 summarises the general principles:

a. Whether a party has to comply with one or more stated requirements before being entitled to relief will turn on the precise words used, set within their contractual context.
b. To be framed a condition precedent, a clause needs something that makes the relief conditional upon the requirement.
c. Clear words will usually be necessary for a clause to be a condition precedent, although it is unnecessary for the clause to say in terms '*this is a condition precedent*'.

Going back to *Disclosure and Barring Service v Tata Consultancy Services*, Coulson LJ identifies the general principles (a) to (c) above, but also adds:

- In addition to conditionality, it will usually be necessary for the link between the two steps to be expressed in a language of obligation, but that will not on its own be sufficient to amount to a condition precedent,

- It was not necessary for the step one condition to be expressed in a finite number of days or weeks, and clauses which include more flexible periods may be conditions precedent.

Where such a provision is a condition precedent then a failure to comply would result in the contractor losing entitlement.

What does this look like in construction contracts?

So having considered the case law, we can now look at how these principles appear in some of the standard forms of construction contracts. The NEC4 Engineering & Construction Contract (ECC) follows the rules set out in *Disclosure and Barring Service v Tata Consultancy Services Ltd* very closely when considering compensation events. Clause 61.3 states that:

"….***If*** *the Contractor does not notify a compensation event within* ***eight weeks*** *of becoming aware that the event has happened,* ***the Prices, the Completion Date or a Key Date are not changed*** *unless the event arises from the Project Manager or the Supervisor giving an instruction or notification, issuing a certificate or changing an earlier decision*.".

Whilst the word "*then*" is missing, the clause clearly states what needs to be done, within what time frame, and the consequences of non-compliance.

The position under the JCT forms provides another useful example. In the JCT Design & Build Contract 2011, Clause 4.20 is not so clear. The clause started by using the word "*if*", but then goes on to use the word "*may*". The clause then states what would happen if the Contractor made the application, but the time limit is not precisely stated, instead using the terminology "*as soon as it has become, or should have reasonably have become …*" .

However, by the JCT Design & Build Contract 2016, Clause 4.19.1 had become clearer, using the words "*if*", "*he shall*" and "*compliance with the provisions*". Clause 4.20.1 also contains the time element which is "*as soon as*", therefore containing all the elements indicative of a condition precedent. The importance of this type of wording can also be seen in *FES Limited v HFD Construction Group Limited [2024] CSOH 20*, where Lord Richardson considered the equivalent provisions of the SBCC Standard Building Contract with Quantities for use in Scotland (2016 Edition). Clause 4.20.1 provided that the contractor's entitlement to reimbursement was "subject to … compliance with the provisions of clause 4.21", while clause 4.21 required notification as soon as the relevant matters became, or should have become, reasonably apparent. Lord Richardson held that this wording created a condition precedent to the contractor's entitlement to loss and expense and, importantly, he said it was difficult to construe "*subject to … compliance with clause 4.21*" in any other way, because the contractor's entitlement was expressly made dependent upon compliance.

So, can you spot a condition precedent when you see one?

In summary, when determining whether a clause is a condition precedent considering if the "if" and "then" terms are present is a good starting point, but it's not the end of the exercise. The next step is to look at the construction of the clause as a whole. *If an event occurs, do the parties need to do anything? If so, what do they need to do and by when? How does the clause link compliance with that requirement to the entitlement being claimed? If they fail to comply, what is the consequence?* The precise wording and contractual context will ultimately be key, but asking these questions provides a useful framework when trying to spot a condition precedent buried within a contract.

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