MC MS Blog

Conditions Precedent - is it time for JCT to have a rethink?

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Last week, I had the pleasure of attending the Society of Construction Law's annual dinner in the wonderful surroundings of Lincoln's Inn. The SCL President, Lord Justice Coulson, awarded honorary SCL membership to two very worthy recipients, Mr Justice Waksman and Rosemary Jackson KC. He also remembered a number of members of the SCL who had sadly died in the past year, including the former SCL President, Sir Anthony May.

However, as readers will know, when Lord Justice Coulson isn't undertaking his presidential duties, he can be found in the Royal Courts of Justice, and it was one of his judgments from last month that got me thinking about the subject of conditions precedent: namely *Disclosure and Barring Service v Tata Consultancy Services Ltd [2025] EWCA Civ 380*, which concerned an appeal from the judgment of Mr Justice Constable in the TCC (*Tata Consultancy Services Ltd v Disclosure and Barring Service [2024] EWHC 1185 (TCC)).* This was an IT case, rather than a construction case, and so I'm not going to go into detail concerning the background facts. However, one of the issues in the case concerned the question of whether compliance with the notice requirements of particular clauses constituted conditions precedent, and both Constable J and Coulson LJ helpfully set out the current principles applying to conditions precedent.

Background – the winter of discontent

However, before setting out the relevant extracts from the judgments, I want to take you back to 1978 when the House of Lords handed down their judgment in *Bremer Handelsgesellschaft mbH* v *Vanden Avenne-Izegem nv* [1978] 2 Lloyd's Rep. 113. This case arose out of a contract for a shipment of soya beans from the United States to the Netherlands in 1973, which was delayed following an embargo by the US on the export of soya beans. The sellers relied on clause 21 of the contract, which stated:

"21. 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 whether the port or ports of shipment named herein is/are situate, preventing fulfillment, 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 therein, sellers shall advise buyers of the reasons therefor. If required, sellers must produce proof to justify their claim for cancellation"

Relying on Lord Denning MR's judgment *Tradax Export S.A.* v *Andre & Cie* [1976] 1 Lloyd's Rep. 416 in the House of Lords, the buyers argued that, for the sellers to rely on clause 21, they had to demonstrate that the advice of the prohibition was given "…*without delay*…". The House of Lords did

not accept that compliance with clause 21 constituted a condition precedent to the seller's obtaining relief, and found that: "…*although the second sentence in cl.21 imposed a distinct and definite obligation on the sellers and one which they had to discharge without delay it did not provide that cancellation was conditional upon the sellers complying with the contract*…".

Lords Wilberforce and Salmon expressed some views concerning conditions precedent:

Lord Wilberforce:

"Whether this clause is a condition precedent or a contractual term of some other character must depend on (i) the form of the clause itself, (ii) the relation of the clause to the contract as a whole, (iii) general considerations of law."

When considering the first requirement, Lord Wilberforce noted that "…*Moreover, the generality of the words "without delay" tells against the buyer's contention: if a condition precedent were intended a definite time limit would more likely be set*…"

Lord Salmon:

"…Had it been intended as a condition precedent, I should have expected the clause to state the precise time within which the notice was to be served, and to have made plain by express language that unless the notice was served within that time, the sellers would lose their rights under the clause…"

To my mind, their Lordships were therefore of the view that a definite time limit was required in order for a contractual provision to constitute a condition precedent, and Lord Salmon also expressed the view that such a clause needs to set out the consequences of non-compliance. I will leave it to the legal scholars to decide whether their Lordships' findings were part of the ratio of the judgment, but either way, I think that it is clear that the House of Lords set quite a high bar for conditions precedent.

The current position on conditions precedent

It's arguable that the bar set by the House of Lords has been somewhat lowered in cases over the past almost 50 years, as is evident from Constable J's summary of the current principles arising from recent judgments. In particular, at paragraph 74 of his judgment Constable J stated:

"(1) whether it is necessary for a party to comply with one or more stated requirements in order to be entitled to make a claim for money or relief will ultimately turn on the precise words used, set within their contractual context;

(2) there is nothing as a matter of principle which prevents parties freely agreeing that the exercise of a particular right to payment or relief is dependent on compliance with a stated procedure, but parties will not be taken to have done so without having expressed that intention clearly;

(3) the language of obligation in relation to procedure to be complied with (e.g. 'shall') is necessary, but not sufficient;

(4) the absence of the phrase 'condition precedent' or an explicit warning as to the consequence of non-compliance is not determinative against construing the regime as one of condition precedent;

(5) however, the absence of any language which expresses a clear intention that the right in question is conditional upon compliance with a particular requirement is likely to be, at the very least, a powerful indicator that the parties did not intend the clause to operate as a condition precedent;

(6) the requisite 'conditionality' may be achieved in a number of different ways using different

words and phrases when construed in their ordinary and natural meaning;

(7) the clearer the articulation, purpose and feasibility of the requirement to be complied with (in terms of substance and/or timing), the more consistent it will be with the conclusion that, depending on the rest of the language used, the requirement forms part of a condition precedent regime."

In the Court of Appeal, Coulson LJ also identified the following general principles at paragraph 26 of his judgment:

"(a) Whether or not 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) As Lord Wilberforce made clear in Bremer, to be framed as a condition precedent, a clause needs something that makes the relief conditional upon the requirement;

(c) As with exclusion clauses or clauses which seek to limit liability, clear words will usually be necessary for a clause to be a condition precedent (see by analogy, Triple Point Technology Inc v PTT Public Company Ltd [2021] UKSC 29 at [108]-[111]). That said, it is not necessary for the clause to say in terms "this is a condition precedent": none of the clauses in the authorities noted above, which were found to be conditions precedent, used those words;

(d) In addition to conditionality, it will usually be necessary for the link between the two steps to be expressed in the language of obligation (i.e. shall) but that will not on its own be sufficient to amount to a condition precedent: see for example Scottish Power;

(e) It is not necessary for the step one condition to be expressed in a finite number of days or weeks. More flexible periods – "timely", "within a reasonable time" etc – have been included in clauses which courts have found to be a condition precedent (see for example Steria and WW Gear)."

What is clear from these two sets of helpful principles is that, in contrast with Bremer, definite time limits are not required, and phrases such as "…within a reasonable time…" will suffice. Furthermore, explicit warnings as to the consequences of non-compliance are not necessarily required. I think the result is that more clauses will now be considered conditions precedent.

Standard forms

I don't want to enter the arena when it comes to the great NEC v JCT debate, but in respect of conditions precedent at least, the NEC provisions are clear and unambiguous. In particular, clause 61.3 of NEC4 states:

"61.3 The Contractor notifies the Project Manager of an event which has happened or which is expected 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 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"

NEC therefore sets a definite time limit and clearly sets out the consequences of non-compliance. Unfortunately, the position in JCT is not as clear, as can be illustrated by the recent Scottish case of *FES Limited v HFD Construction Group Limited [2024] CSOH 20*. In that case, the parties were in dispute as to whether compliance with the notice provisions of clause 4.21 of the

Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot) (2016 Edition) constituted a condition precedent to FES's entitlement to loss and expense. I won't recite the clauses in full, but clause 4.20 provides that the contractor is entitled to loss and expense "…subject to…..compliance with the provisions of clause 4.21…". Furthermore, clause 4.21 requires the contractor to "…*notify the Architect/Contract Administrator as soon as the likely effect of a Relevant Matter on regular progress or the likely nature and extent of any loss and/or expense arising from a deferment of possession becomes (or should have become) reasonably apparent to him*…".

The adjudicator found that timely notification was a condition precedent to FES's entitlement to loss and expense, and Lord Richardson agreed. Some interesting findings from Lord Richardson's judgment include:

- A textual analysis is appropriate given that the contract was drafted by skilled professionals;

- There are clear words that indicate that a claim for loss and expense is conditional on a timely notice "…subject to … compliance with the provisions of clause 4.21…" and FES's interpretation would have required the Court to ignore those words;

- The fact that clause 4.20 does not spell out the consequences of non-compliance with clause 4.21 is not relevant as "…the wording of the clause makes it clear that without such compliance, the contractor is not entitled to reimbursement…";

- Since there is no ambiguity in the wording, there is no need to analyse what may be regarded as business common sense, but if there were that would be of no assistance to FES given that the need to be notified of a potential liability within a reasonable time span is reasonable;

- Lord Richardson respectfully disagreed with comments made in 2017 by a member of the JCT drafting sub-committee:

"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."

On appeal by FES, the Inner House of the Court of Session rejected the appeal for essentially the same reasons (**FES Limited v HFD Construction Group Limited [2024] CSIH 37**).

Time for change?

Given the recent judgments both north and south of the border, my view is that JCT should grasp the nettle and make amendments to its loss and expense provisions. If the intention of the drafting committee was really that they are not intended to constitute a condition precedent, then why not spell this out? Or perhaps introduce a post practical completion loss and expense sweep-up clause which isn't dependent on the service of notices, i.e. similar to that for extensions of time.

Alternatively, given that current Scottish case law has confirmed that compliance with the current JCT loss and expense notice requirements is a condition precedent to entitlement, why not amend the provisions in a similar manner to clause 61.3 of NEC4? At least that way, contractors and those involved in running projects would be under no illusion as to the consequences of non-compliance. It would certainly focus the mind.

Finally, I wonder whether either or both of the cases considered above will end up in the Supreme Court? If so, would the judges of the Supreme Court reach the same conclusions? Only time will tell…

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