NOTICES, TIME BARS AND PROPORTIONALITY

A talk by Sir Rupert Jackson to the Hong Kong Society of Construction Law on 21st September 2018

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1. INTRODUCTION

1.1 This paper. This paper addresses the practical and legal problems which arise when a contractor fails to serve notice of delay in accordance with the contractual requirements, but the circumstances would otherwise justify the grant of an extension of time.

1.2 Abbreviations. In this paper:
'C' means the contractor.
'E' means the employer.
'EOT' means extension of time.
'LAD' means liquidated and ascertained damages.
'SC' means subcontractor.
'TCC' means the Technology and Construction Court in London.

2. NOTICE PROVISIONS

2.1 Two broad categories. Contractual provisions requiring E or C to give notice of a claim may (a) expressly state whether the giving of notice is a pre-condition to pursuit of the claim or (b) be silent as to the consequences of failure to give notice.

2.2 Approach to construction. In so far as the provision leaves matters open, courts will lean against an interpretation which shuts out claims altogether: *LB Merton v Stanley Hugh Leach* (1985) 32 BLR 51; *Obrascon Huarte Lain v Attorney General for Gibraltar* [2014] EWHC 1028 (TCC).

2.3 Express pre-condition. Where the contract makes giving notice an express pre-condition for pursuing a claim, the courts will enforce it. So must arbitrators. Clause 2.5 of the first edition of the FIDIC conditions (the Red Book) provided:
"If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract … the Employer or the Engineer shall give notice and particulars to the Contractor. …

The Notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. … The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract.

The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause."

2.4 In *NH International v National Insurance Property Development Co Ltd* [2015] UKPC 37 E's failure to give notice under clause 2.5 of the FIDIC conditions shut out E's claim. The Privy Council reversed the decision of the Trinidad and Tobago Court of Appeal and remitted the case to the arbitrator. At [38] – [40] Lord Neuberger said:

"38. The Board takes a different view. In agreement with the attractively argued submissions of Mr Alvin Fitzpatrick SC, it is hard to see how the words of clause 2.5 could be clearer. Its purpose is to ensure that claims which an employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of a notice, which must have been given "as soon as practicable". If the Employer could rely on claims which were first notified well after that, it is hard to see what the point of the first two parts of clause 2.5 was meant to be. Further, if an Employer's claim is allowed to be made late, there would not appear to be any method by which it could be determined, as the Engineer's function is linked to the particulars, which in turn must be contained in a notice, which in turn has to be served "as soon as practicable".

39. Perhaps most crucially, it appears to the Board that the Court of Appeal's analysis overlooks the fact that, although the closing part of clause 2.5 limits the right of an Employer in relation to raising a claim by way of set-off against the amount specified in a Payment Certificate, the final words are "or to otherwise claim against the Contractor, in accordance with this sub-clause". It is very hard to see a satisfactory answer to the contention that the natural effect of the closing part of clause of 2.5 is that, in order to be valid, any claim by an Employer must comply with the first two parts of the clause, and that this extends to, but, in the light of the word "otherwise", is not limited to, set-offs and cross-claims.

40. More generally, it seems to the Board that the structure of clause 2.5 is such that it applies to any claims which the Employer wishes to raise. First, "any payment under any clause of these Conditions or otherwise in connection with the Contract" are words of very wide scope indeed. Secondly, the clause makes it clear that, if the Employer wishes to raise such a claim, it must do so promptly and in a particularised form: that seems to follow from the linking of the Engineer's role to the notice and particulars. Thirdly, the purpose of the final part of the clause is to emphasise that, where the Employer has failed to raise a claim as required by the earlier part of the clause, the back door of set-off or cross-claims is as firmly shut to it as the front door of an originating claim."

2.5 <u>What is sauce for the goose is sauce for the gander.</u> If E is shut out from making claims where it fails to comply with an express pre-condition for serving notice, it may be thought that C should also be shut out from making claims where it fails to comply with such a pre-condition. Indeed that is precisely what clause 20.1 of the FIDIC conditions provided. But this can have the rather odd consequence that C may forfeit an extension of time and end up paying LAD for delay which E has caused (e.g. by late variation instructions). Hence the conundrum.

3 <u>A CONUNDRUM</u>

3.1 <u>The problem.</u> A particular problem arises where contractual provisions make the giving of notice a pre-condition to the contractor's entitlement to extension of time. If E's or the Engineer's actions cause delay, but C fails to give timeous notice, does that (a) shut out C's claim for EOT and (b) render C liable to LAD for delay?

3.2 <u>Conflicting policy considerations.</u> On the one hand, C's notice (if given) serves a valuable purpose – E can monitor the consequences and possibly take preventive action, e.g. by withdrawing or modifying a variation instruction. So E may be seriously prejudiced by C's failure to give notice. On the other

hand, the 'prevention principle' is a legal principle meaning that one party cannot recover damages for breach an obligation, where he has prevented the other party from performing the obligation.

3.3 The authorities. Judges do not speak with one voice on this issue, reflecting no doubt the conflicting policy considerations.

3.4 *Gaymark.* In *Gaymark Investments v Walter Construction Group* [1999] NTSC 143 E claimed liquidated damages against C for delay in constructing an hotel in Darwin. Clause 19.1 of the Special Conditions of Contract imposed conditions in respect of giving notice of delay. Clause 19.2 of the Special Conditions provided:

> "The Contractor shall only be entitled to an extension of time for Practical Completion where ... (b)(i) the contractor has complied strictly with the provisions of sub-clause SC19.1 and in particular has given the notices required by sub-clause SC19.1 strictly in the manner and within the times stipulated by that sub-clause."

3.5 The Arbitrator made the following findings:

> (1) That the contractor was delayed in completing the work, including a delay of 77 days by causes for which the employer was responsible, but the contractor's application for an extension of time was barred because of its failure strictly to comply with the notification requirements for the extension of time clause.
> (2) That the 77 days' delay constituted acts of prevention by the employer with the result that there was no date for practical completion and the contractor was then obliged to complete the work within a reasonable time (which the Arbitrator found that it in fact did) with the consequence being that Gaymark was prevented from recovering liquidated damages for delay.

3.6 The Supreme Court of the Northern Territory of Australia refused leave to appeal and upheld the Arbitrator's award. Bailey J said this at paragraphs 69-71 of his judgment:

> "69. Acceptance of Gaymark's submissions would result in an entirely unmeritorious award of liquidated damages for delays of its own making (and this in addition to the avoidance of Concrete Constructions' delay costs because of that company's failure to comply with the notice provisions of SC19). The effect of re-drafting GC35 of the contract (to delete GC35.4 and substitute SC19) has been to remove the power of the superintendent to grant or allow extensions of time. SC19 makes provision for an extension of time for delays for which Gaymark directly or indirectly is responsible but the right to such an extension is dependent on strict compliance with SC19 (and in particular the notice provisions of SC19.1). In the absence of such strict compliance (and where Concrete Constructions has been actually delayed by an act, omission or breach for which Gaymark is responsible) there is no provision for an extension of time because GC35.4 which contains a provision which would allow for this (and is expressly referred to in GC35.2 and GC35.5) has been deleted.
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> 70. In *Peak Construction (Liverpool) Limited v McKinney Foundations Limited* [1970] 1 BLR 111, Salmon LJ held:
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> 'The liquidated damages and extension of time clauses and printed forms contract must be construed strictly contra proferentem. If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employer's own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer'.
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> 71. In the circumstances of the present case, I consider that this principle presents a formidable

barrier to Gaymark's claim for liquidated damages based on delays of its own making. I agree with the arbitrator that the contract between the parties fails to provide for a situation where Gaymark caused actual delays to Concrete Construction's achieving practical completion by the due date coupled with a failure by Concrete Constructions to comply with the notice provisions of SC19.1. In such circumstances, I do not consider that there was any 'manifest error of law on the face of the award' or any 'strong evidence' of any error of law in the arbitrator holding that the 'prevention principle' barred Gaymark's claim to liquidated damages."

3.7 *Multiplex.* In *Multiplex v Honeywell* [2007] EWHC 447 (TCC) the TCC noted the trenchant criticisms of *Gaymark*, made by Professor Ian Duncan Wallace in his article 'Prevention and liquidated damages: a theory too far' (2002) 18 *Building and Construction Law* 82. The court also noted a subsequent decision of the Inner House of the Court of Session, which held that failure to serve notice was a bar to any EOT.[1] The court doubted, albeit *obiter*, that *Gaymark* represented the law of England. The core reasoning on this point at [103] was:

"Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent. If *Gaymark* is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option the contractor could set time at large."

HHJ Stephen Davies expressed the same view about *Gaymark* in *Steria Ltd v Sigma Wireless Communications Ltd* [2007] EWHC 3454 (TCC) at [95].

3.8 Prevention principle and notices. After a lengthy review of the authorities, the court in *Multiplex* derived three propositions:
"(i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date.
(ii) Acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events.
(iii) In so far as the extension of time clause is ambiguous, it should be construed in favour of the contractor."

3.9 *North Midland.* In *North Midland Building Ltd v Cyden Homes Ltd* [2017] EWHC 2414 (TCC) the contract required E to grant EOTs to C in respect of 'relevant events'. The definition of 'relevant events' included acts of prevention by E. Clause 2.25.1.3 (b) provided:
"any delay caused by a relevant event for which the Contractor is responsible shall not be taken into account."
Events for which E was responsible caused 189 days delay. E refused to grant any EOT in respect of those events, because there were culpable delays by C during that period.[2] C challenged E's refusal, arguing that the prevention principle operated; E could not recover LAD in respect 189 days when E had prevented C from completing. Fraser J rejected C's claim, observing that this case fell within *Multiplex*, proposition (ii). The parties had made express provision for concurrent delay. The court would enforce that express contractual provision.

3.10 In a judgment handed down eight weeks ago, the Court of Appeal upheld Fraser J's decision: [2018] EWCA Civ 1744. Coulson LJ (with whom the Master of the Rolls and Senior President of Tribunals agreed) held that clause 2.25.1.3 (b) allocated the risk of concurrent delay to the contractor. He approved the three general propositions stated in *Multiplex* (see para 3.8 above). Coulson LJ rejected

[1] *City Inn Ltd v Shepard Construction Ltd* 2003 SLT 885
[2] E did, however, grant 9 days EOT in respect of weather.

the submission that the prevention principle was a matter of legal policy, which overrode the express terms of the contract. Relying upon *LB Merton v Stanley Hugh Leach Ltd* [1985] 32 BLR 51,[3] he categorised the prevention principle as a species of implied term, which the parties were entitled to exclude or modify by agreement.

3.11 Is *Multiplex* the last word on the conundrum? Not necessarily. The discussion of *Gaymark* in *Multiplex* was relevant but ultimately *obiter*. Commentators continue to disagree, some taking the *Gaymark* line and some taking the *Multiplex* line. The reasoning in *Multiplex* (which was only a first instance decision) gains support from *North Midland* at [30]. Even so, in view of the conflicting policy considerations, there is no really satisfactory answer to the conundrum. Much the best solution is to restructure the standard conditions to soften, but not obliterate, the consequences of failure to comply with notice provisions. Fortunately, that is precisely what FIDIC has done.

4 THE FIDIC SOLUTION

4.1 FIDIC Conditions 1999. As noted above, the first edition of the FIDIC conditions made service of timeous notice a pre-condition for E's and C's claims. This means that a short delay, however, excusable has Draconian consequences.

4.2 FIDIC Conditions 2017. The second edition of the FIDIC conditions, published last year, adopts a more nuanced approach. Old clause 2.5 has gone. Instead a revised clause 20 deals with both E's claims and C's claims for EOT and/or money.

4.3 Clause 20.2. Clause 20.2.1 makes the service of notice within 28 days a pre-condition for pursuing a claim by E or C. If the claimant serves notice late, clause 20.2.2 permits it to put forward "details of why such late submission is justified". Clause 20.2.4 makes service of a fully detailed claim within 84 days another pre-condition for pursuing the claim, with a similar provision for making excuses. Clause 20.2.5 gives the Engineer discretion to treat late notice or late service of the fully detailed claim as valid, taking into account the circumstances. Those circumstances may include:

> "Whether or to what extent the other party would be prejudiced by acceptance of the late submission; in the case of the time limit under Sub-Clause 20.2.1 [*Notice of Claim*], any evidence of the other Party's prior knowledge of the event or circumstance giving rise to the Claim, which the claiming Party may include in its supporting particulars; and/or
> in the case of the time limit under Sub-Clause 20.2.4 [*Fully detailed Claim*], any evidence of the other Party's knowledge of the contractual and/or other legal basis of the claim, which the claiming Party may include in its supporting particulars."

How will this discretion be exercised in practice? It is unlikely that any engineer has yet been called upon to exercise the new discretion under clause 20.2.5. This part of the paper is therefore speculative. The three factors specifically mentioned in clause 20.2.5 all concern prejudice to the responding party. But surely the reasons why the notice and/or the fully detailed claim were late must also be relevant? For example, if the document was being served on the last day (admittedly an unwise approach) and there was a power failure or a cyber-attack on that date, this would presumably be a legitimate consideration. The length of delay must also be relevant.

4.4 Reasonableness. Looking at the matter as a judge, I would expect considerations of reasonableness to play a part. In all the circumstances, how reasonable or unreasonable has been the conduct of the claimant? From the point of view of the respondent, how reasonable or unreasonable is it to overlook

[3] A case in which I appeared as junior counsel over 30 years ago

the delay and allow the claim to proceed? What are the consequences of shutting out the claim? Making C pay LAD to E for delay, which was caused entirely by E's late instructions, may possibly be thought harsher than shutting out C's claim for loss and expense.

4.5 Proportionality. I would also expect considerations of proportionality to play a part. Proportionality means that there is a proper relationship between subject and object. If applied to the action of an administrative body, it means that there is a proper relationship between the administrative action and the objective to be achieved. If applied to a judicial decision, it means that there is a proper relationship between (a) the subject matter of the litigation and (b) any remedy ordered and/or any steps taken to achieve that remedy. If applied to an engineer's exercise of discretion under clause 20.2.5, it means that there is a proper relationship between the (important) objective of the notice provisions and the measures taken to achieve that objective. Proportionality is the antithesis of "zero tolerance". It may be thought disproportionate to shut out a substantial claim for EOT or loss and expense (which everybody knew was coming), simply because the notice was one minute late.

4.6 Splendid. Does this mean that claimants needn't bother too much about serving notice on time? Absolutely not. Anyone planning, or possibly planning, to make a claim would do well to act as if there were no power to excuse late notices. The last thing that any claimant should do is to throw itself, unnecessarily, upon the mercy of the engineer before its claim gets off the ground.

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