

Insights

CONDITIONS PRECEDENT AND TIME BARS, GETTING AROUND THEM

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SUMMARY

When a party fails to comply with a condition precedent, especially if such a provision includes a time limit for the fulfilment of the obligation, it will often advance various arguments to avoid the consequences of non-compliance. The case of *ISG Retail Ltd v FK Construction Ltd* [2024] EWHC 878 (TCC) is an interesting example of the issues that may arise in this scenario. In this Insight, Shy Jackson and Yorkie Fong take a closer look at this case.

It is always important to recognise any contractual conditions precedent. When a party fails to comply with such conditions, especially if they include a time limit, it will often advance various arguments to avoid the consequence of non-compliance. *ISG Retail Ltd v FK Construction Ltd* [2024] EWHC 878 (TCC) is a recent example of the issues that come up when interpreting such clauses and the difficulties that non-compliance will give rise to, especially when trying to rely on waiver and estoppel arguments.

THE ADJUDICATION

ISG Retail Ltd, as the main contractor, engaged FK Construction Ltd as a sub-contractor for roofing and cladding works on industrial units in Bristol in September 2021.

The sub-contract was a bespoke form of contract and clause 9(5) stated that FK was entitled to an extension of time (EoT) if delays occurred due to specified events, *“provided that the SubContractor has given written notice to ISG of the circumstance or occurrence which is delaying him and details of the effects or likely effects of such delay with a best estimate of the continuing extent of such delay and its impact on practical completion of the Works and/or the relevant section within fourteen days of such circumstance or occurrence first occurring”*.

FK generally notified ISG of delays on site through Early Warning Notices (“EWNs”), issuing 106 EWNs from September 2021 to April 2022. FK formally applied for an EoT of 183 days in May 2022,

which ISG substantially responded to.

In March 2023, ISG commenced an adjudication to determine the valuation of FK's works as of February 2023. One of the issues to be determined was whether clause 9(5) was a condition precedent and if so whether FK complied with them. FK argued that it was not a condition precedent but that if it was the EWNs they had issued fulfilled the contractual notice requirements, and further that ISG had waived its entitlement to enforce the clause and/or was estopped from doing so on the basis that ISG responded substantively to FK's claim without raising the issue of non-compliant notices and FK then went on to incur costs of a reply.

On 14 April 2023, the adjudicator, Mr Molloy, decided that clause 9(5) was a condition precedent but that, on the facts, FK had complied with it, awarding them EoT and prolongation costs. Overall, he decided that the work should be valued at £3,736,679.72.

COURT

ISG then issued Part 8 proceedings to obtain declarations including that the FK's EWNs failed to meet the requirements of clause 9(5) and that ISG had not waived and been estopped from enforcing compliance, contending it was relatively straightforward to establish non-compliance.

FK argued that ISG was wrong in principle to bring Part 8 proceedings in relation to one aspect of Mr Molloy's decision when the entire dispute had not been brought for final determination. In addition, on the question of compliance, FK argued that it was achieved not necessarily by way of the EWNs but sometimes by correspondence and/or discussion on site, and that effect of the EWNs had to be construed in light of the context and circumstances known to the recipient at the time. It cited the following instances of ISG's acts or series of acts or conduct which it argued amounted to waiver or estoppel preventing ISG from relying on clause 9(5):

- ISG's engagement in identifying and addressing delays with FK on site effectively constituted a waiver of the obligation to provide notification of delay, or estopped ISG from demanding such notices beyond what FK had already provided;
- ISG never disputed the 106 EWNs issued by FK;
- ISG did not say in its response to FK's formal EoT claim that its claim was precluded by a failure to comply with clause 9(5); and
- ISG stated in its Payless Notice that the prolongation costs were *"Not agreed; Full review to be undertaken once works completed"*.

The Court had to consider whether it could determine these issues under Part 8, which is intended for claims where there are non-factual issues. The Court's view was that the nature of clause 9(5) was a matter of "pure construction" and could be determined under Part 8, but the fact that there

were other issues related to this question but not fully pleaded out led to the Court's refusal to decide on the construction points.

Similarly, the question of breach was not suitable for Part 8 determination as it was likely to give rise to substantial disputes of fact, considering there was clearly regular and routine engagement on site between the parties as to the progress of the works.

In addition, the court took the view that with regard to the estoppel and waiver arguments, FK had an arguable case which had a real prospect of success and were likely to involve substantial disputes of fact.

Finally, the Court noted that there was no reason why one part of an adjudicator's decision should not be the subject of final determination under Part 8 if that issue was otherwise suitable (i.e. unlikely to involve a substantial dispute of fact), particularly if the balance of the adjudicator's decision was uncontentious.

NOTICE PROVISIONS AND WAIVER/ESTOPPEL ARGUMENTS

The contract in this case was a bespoke form of contract, but standard form construction contracts often contain clauses that require contractors to notify employers before they are entitled to claim EoT or loss and expense.

In *Walter Lilly & Co Ltd v Mackay* [2012] EWHC 1773 (TCC), it was held that under the 2011 form of the JCT Standard Building Contract the use of the words "provided always" meant the need to make an application as soon as it has become, or should reasonably have become, apparent that the regular progress has been or is likely to be affected was a condition precedent.

The 2016 JCT edition uses different wording and the term "subject to", but in the recent case of *FES Limited v HFD Construction Group Ltd* [2024] CSOH 20 it was held that under the Scottish Standard Building Contract 2016, which parallels the JCT 2016 standard form, giving notice is a condition precedent to reimbursement of loss and expense.

The JCT clauses do not identify a specific period in which a notice is to be made, unlike the bespoke sub-contract entered into by ISG and FK which provided for a 14-day period, or the NEC provisions which require a compensation event to be notified within 8 weeks. As was the case with FK, parties will usually either seek to argue that certain communications constituted the requisite notice or that a notice requirement had been waived. The latter argument was successful in the *City Inn Ltd v Shepherd Construction Ltd* [2010] CSIH 68 decision where it was held that neither party, nor the architect, had made any reference to the time bar clause during the course of the contract and the silence by the architect at a meeting when the contractor's claim for EoT was discussed resulted in a waiver of the requirement to comply with the clause.

Such arguments are not easy. Further, as Mr Justice Jackson (as he then was) stated in *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* [2007] EWHC 447 (TCC), time bar provisions requiring a prompt notice “serve a valuable purpose” as they enable matters to be investigated while they are still current and may provide the employer an opportunity to withdraw instructions once the financial implications are clear.

In this case, the court took the view that there was “an arguable case of waiver and/or estoppel which has a real prospect of success”. While this does not mean such arguments would succeed once the full factual evidence is examined, it is a reminder that certain employer behaviours could result in not being able to rely on the contractual provisions that govern entitlement. That is why it is important to check the terms of the contract and ensure that any contractual rights are maintained and that contractual processes are adhered to.

RELATED PRACTICE AREAS

- Commercial Construction & Engineering

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