

# Condition Precedents in Construction Contracts

## *How are Condition Precedents interpreted in Construction Contracts and what recovery is available following a failure to comply*

### *Firstly, what is a Condition Precedent?*

A condition precedent is a contractual requirement that must be fulfilled before a contractual entitlement or obligation arises. In construction contracts, condition precedents are often included to make rights or obligations subject to a condition requiring the timely provision of information, notice, or even the issue of a certificate.

A tension exists between a court's enforcement of a Condition Precedent to keep the party's agreement in place and a punitive outcome due to the exclusion of a worthy claim for failure to comply.

A condition precedent to an extension of time or money claim, might be specific notice at a specific time. Even a minor mistake or oversight could prevent the entitlement from being claimed, with potentially huge consequences.

The Courts will generally implement condition precedents if they are sufficiently clear, even in circumstances where the consequences of doing so appear to be harsh. Condition precedents promote certainty and allow the recipient to investigate the subject matter of the notice at the relevant time so they can consider actions to mitigate consequences and make financial provision if necessary.

### *So, what can be done if the unthinkable occurs and a condition precedent requirement is missed?*

A starting point in searching for a possible escape from a purported condition precedent clause is the

provision itself. If the result of the condition precedent is to exclude a right to relief, then there must be a clear expression of this intent for it to be upheld as a condition precedent. The relief or obligation of the condition precedent must be dependent on the completion of specific requirements, forming a "conditional link". Where this is established however, there are no definitive words that must be used and the words "condition precedent" themselves are not a requirement

It has been argued however that a conditional link will not exist in a clause where the words "condition" or "precedent" have not been used, if they have been used elsewhere in the contract to create a condition precedent. This follows the principle that a Contract must be interpreted as, the natural, ordinary meaning of the words in the context of the contract as a whole. The rationale being that where the parties intended to create a condition precedent, they used that term.

In the case of *Bremer Handelgesellschaft v Vanden Avennelzegem* Lord Wilberforce when determining if a clause was a condition precedent held; "Whether this clause is a condition precedent ... 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.

A reason for not finding a condition precedent in this case was that there was no fixed or definite time limit for giving of notice whilst another clause in the contract did have a time limit.



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However, if the clause uses express language to clearly give effect to a condition precedent it will be binding, even if the term condition precedent is not used. If the clause is clear expect the court to give effect to it.

More recent cases have shown the courts willingness to enforce Condition Precedents. In the case of *Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery* the force majeure clause stated that the party invoking the clause “shall give prompt notice to the other party” there was however no mention of a fixed time period. It was held that the clause was a condition precedent. The absence of an express time limit or a warning that notice was required to rely on Force majeure did not prevent it from being a Condition Precedent. This was because the reason for giving notice, was so that the counterparty could investigate if there was Force Majeure and if necessary, challenge it.

Express wording of the consequences of noncompliance is therefore not a prerequisite for a condition precedent to exist. In the case of *Steria v Sigma Wireless Communications*, there was no express statement that failure to give notice would exclude an Extension of Time and no fixed time period in which to do so. Only that notice was required within a reasonable time. HHJ Davies held “a notification requirement may, and in this case does, operate as a condition precedent even though it does not contain an express warning as to the consequence of non-compliance.”

### Ambiguity

One strategy could be to seek or argue ambiguity. Parties do not willingly give up their common law rights, therefore where an ambiguity arises, the courts will generally take the narrower interpretation of a clause.

An often-cited example of potential ambiguity in a construction contract, is provided by NEC Clause 61.3. This clause provides

*“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”.*

narrower interpretation and potentially find that a Condition Precedent is not evident.

### Unfair Contract Terms Act

Possible recovery might be available through the Unfair Contract Terms Act 1977, the Act can apply to commercial contracts made on standard terms of one of the businesses. If the condition precedent is a standard term utilised by the party to the contract it is possible to argue that the term constitutes an exclusion clause and is therefore subject to the Act. If the clause is subject to the Act the onus falls on the party relying on the clause to prove that it is not unreasonable. Potentially providing a possible escape route for the claiming party.

### Interpretation of compliance

In practice a party's cold panic of realisation that a condition precedent requirement has been missed, will quite rightly lead to a painstaking review of correspondence, don't give up. There is so much correspondence and communication in modern construction projects that the search for that 'golden' although inadvertent communication might bear fruit. The case of *Education 4 Ayrshire Ltd v South Ayrshire Council* [2009] however represents a common approach by the courts and the challenge faced, Lord Glennie held “Where parties have laid down in clear terms what has to be done by one of them if he is to claim certain relief, the court should be slow to seek to relieve that party from the consequence of failure.”

Successfully maintaining that a notice has been served where documents relied on were perhaps not originally intended to discharge the condition precedent may be a challenge but perhaps not impossible. The wording of the provision and the quality of communications discovered will determine the likelihood of success of such an approach. It is though a potentially perilous position.

In the case of *Obrascon v HM AG for Gibraltar* [2014] one of the many issues considered was the approach to take in relation to sub-clause 20.1 of the FIDIC 'Yellow Book'. It was accepted that sub-clause 20.1 imposed a condition precedent on the contractor to give notice of any claim. Akenhead J. held however “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.” So, hooray all is not lost, or is it, as whilst this interpretation of the contract appeared “Contractor friendly” it did not help Obrascon. One of their two Extension of time claims was rejected due to the wording relied on, it was held to be not recognisable as a notice of claim.

### Interpretation of compliance

Waiver or estoppel is an equitable doctrine available at the discretion of the courts and is usually a party's last form of defence, with the claiming party arguing that the benefiting party has waived its right to rely on the condition precedent.

If the benefiting party intends to rely on the condition precedent, then it needs to be strictly enforced. A reluctance to enforce the provision could amount to a waiver of the benefiting party's intention to rely on it, presenting a possible escape from the Condition Precedent for the claiming party.

For estoppel to be successfully argued there must be a clear or unequivocal promise or representation which is intended to affect the legal relationship between the parties.