

Are employers' claims under FIDIC subject to a condition precedent?

There are rumours that FIDIC is giving consideration to making the employer's right to bring claims subject to a condition precedent similar to that which is currently imposed upon the contractor by sub-clause 20.1.

The reader will know that a condition precedent means that if a claim is not made within the time limits imposed by that clause, then the right to make the claim may be lost. Sub-clause 2.5 of FIDIC is not a condition precedent as we have become accustomed to but it may have the same affect, let me explain.

Sub-clause 2.5 of the FIDIC form provides:

"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."

The wording is quite different to that of sub-clause 20.1 which says that any claim to time or money will be lost if no notice is given within the specified time limit. Ergo the stance has generally been that a failure by the employer to bring a claim "as soon as practicable" would not be treated as a condition precedent.

However, the latest decision by the Privy Council in the case of ***NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (Trinidad and Tobago) UKPC 37 [2015]*** may just have disturbed all of that. The Privy Council is effectively the Supreme Court for many Caribbean countries and Lords Neuberger, Mance, Clarke, Sumption and Reed sat in judgment.

The matter was a long-running dispute arising out of a contract, under the FIDIC Red Book, to construct a new hospital in Tobago. The arbitrator (Dr Robert Gaitskell QC) had determined that the contractor was entitled to terminate the contract as a result of a failure by the employer to provide proper evidence that it held funds to cover the contract price. Sub-clause 16.4 provided that in such circumstances, the contractor was entitled to be paid loss of profit and other losses arising as a result of this termination.

The defence *inter alia* raised by the employer was an attempt to set-off claims of its own

against the contractor. The contractor responded by asserting that the employer could not bring such claims, as the claims had not been notified in accordance with sub-clause 2.5. The arbitrator agreed with the employer because “clear words are required to exclude common law rights of set-off and/or abatement of legitimate cross-claims” and the words of clause 2.5 were not clear enough. The arbitrator’s decision was upheld by Jones J and the Court of Appeal.

The Privy Council disagreed. In agreement with the submissions of Mr Alvin Fitzpatrick SC, the board found that it was hard to see how the words of clause 2.5 could be clearer.

In summary Lord Neuberger said that:

“... the purpose of sub-clause 2.5 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’.”

Lord Neuberger continued:

“Perhaps most crucially, it appears to the Board 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.”

More generally, it seems that the structure of clause 2.5 is such that it applies to any claims which the Employer wishes to raise.

The result is that the words “any payment under any clause of these Conditions or otherwise in connection with the Contract” were of very wide scope.

Sub-clause 2.5 is clear insofar as if the employer wanted to raise such a claim, it must do so promptly and in a particularised form. This seems to follow from the linking of the Engineer’s role to the notice and particulars.

Further, the purpose of the final limb of this clause was 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”.

In the light of the Board’s decision as to the effect of clause 2.5, the arbitrator’s decision was remitted on the basis that he reconsider the sums which he allowed by way of set-off or cross claims. Any of those sums which:

- (i) were not the subject of appropriate notification complying with the first two parts of clause 2.5 and
- (ii) cannot be characterised as abatement claims as opposed to set-offs or cross-claims, must be disallowed.

What the Privy Council did not do was provide any definition of *“as soon as practicable”*. Therefore this is likely to be a question of fact depending on the circumstances of each particular project.

However, the judgment of the Privy Council does suggest that under the FIDIC form employers too might be subject to a time bar. Indeed it might be that depending on the definition of *“as soon as practicable”* that time bar is potentially stricter than the 28-day time bar contractors are subject to.

Further, it is a time bar in two parts. Not only must the employer make a claim *“as soon as practicable”*, but the employer must also provide particulars or other substantiation; again the absence of these could prove fatal to the right to assert a right of set-off.

If the Privy Council decision is followed, it would appear that the right of employers and contractors alike to bring claims under the FIDIC form may both be subject to certain conditions precedent that must be followed to ensure that potentially valid claims can be duly adjudicated upon.

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