

Guide to conditions precedent in construction contracts

What are conditions precedent?

Conditions precedent are increasingly common in construction contracts. Put simply they are provisions which bar a party from claiming for something under the contract unless that party has complied with the condition. It is crucial that conditions precedent are adhered to or a party could find itself out of pocket and unable to claim for losses it has incurred.

A condition precedent is a clause in a contract which provides that certain provisions of the contract, for example, obligations or the ability to make a claim, will only come into effect if and when certain specified conditions have first been complied with. If a party fails to comply with that condition then they will lose the right contained in the clause.

Example of a conditions precedent

In a construction context, conditions precedent often arise where the contract deals with claims for delay and associated loss and expense or suspension of the works. Examples of conditions precedent are:

- the contractor can only claim for an extension of time if he has provided the employer with sufficient notice of the likely delay;
- the contractor can only claim for loss and expense within a certain time of his incurring that loss and expense; or
- under an insurance policy, the insured can only make a claim if the insurer has been notified as soon as it was apparent that loss or damage had arisen.

How do you determine if a clause is a condition precedent?

It is not necessary for a condition precedent to be labelled as such, and the court will look at the purpose and practical effect of the clause in order to determine whether or not it is a condition precedent. The words 'provided always that' are a good indication that the clause will be deemed to be a condition precedent (for example 'the contractor can make a claim for delay provided always that such claim is made within two months of the delay becoming apparent').

The position taken by the courts is, provided that there is no ambiguity and it is clear to both parties that the right or obligation is conditional upon certain actions being taken, then the court will uphold the condition precedent.

If a party fails to comply with the terms of a condition precedent, for example by a contractor failing to give the requisite notice before claiming for loss and expense, it will be barred from making a claim even if it has actually incurred those costs and would under normal circumstances have a valid claim. Therefore there is a danger of being left out of pocket and unable to claim under the contract.

WW Gear Construction Limited v McGee Group

In this recent case the employer, WW Gear Construction had entered into a contract with McGee Group, the contractor, in 2007 for the carrying out of ground works at a site near Westminster Bridge in London.

The contract was based on the JCT 2002 Trade Contract with JCT's published Amendment 1 and also included various bespoke amendments which the parties had agreed.



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McGee was employed to undertake ground works including excavation. Delays arose on site and McGee applied for payment in its interim application 18, which it described as a 'loss and expense' claim, including delay and disruption claims relating to site plant, additional head office overheads and site management.

Clause 4.21 of the contract, dealing with the contractor claiming for loss and expense, had been amended to include a condition precedent (amendments shown in italics):

'If the trade contractor makes written application to the construction manager stating that he has incurred or is likely to incur direct loss and/or expense ... and if as soon as the construction manager is of the opinion ... that the regular progress of the works or of any part thereof has been or is likely to be so materially affected as set out in the application of the trade contractor then the construction manager ... shall ascertain the amount of such loss and/or expense which has been or is being incurred by the trade contractor; provided always that:

1. the trade contractor's application shall be made as soon as *and in any event not later than two months after* it has become, or should reasonably have become, apparent to him that the regular progress of the works or any part thereof has been or was likely to be affected as aforesaid, *and such application shall be formally made in writing and fully documented and costed in detail, and it shall be a condition precedent to the trade contractor's entitlement under this clause 4.21.1 or clause 4.25 that the trade contractor has complied fully with all the requirements of this clause including, for the [avoidance] of doubt, the said time period of two months'*

Disputes arose between the parties in respect of payment and McGee's claims for loss and expense. WW Gear referred the disputes to adjudication and sought to argue that McGee had failed to comply with the terms of the contract, namely that the amendment to clause 4.21 provided that if the contractor wished to make an

application for loss and expense he was obliged to make a formal, fully documented and fully costed application to the employer within two months of it becoming reasonably apparent to him, and that this obligation was stated to be a condition precedent to his entitlement to make a claim.

The adjudicator held that the condition precedent in the contract was 'devoid of meaning' and that the contractor's failure to comply with clause 4.21 did not in fact preclude it from claiming for loss and expense. As such, the adjudicator held that McGee could claim for loss and expense.

WW Gear was dissatisfied with the adjudicator's decision and commenced court proceedings in the Technology and Construction Court seeking a declaration in respect of whether the condition precedent was indeed valid and enforceable. The issue was whether this was a true condition precedent, which the contractor was accordingly required to comply with.

Justice Akenhead disagreed with the adjudicator and determined that the requirement under clause 4.21 for the contractor to make a 'fully documented and costed in detail' application in writing within two months of it becoming reasonably apparent to him was a precondition to the recovery of loss and/or expense under the contract. The court held that this requirement and the timescales imposed were not particularly difficult or onerous on the contractor and that there was no reason not to uphold the provision as a condition precedent.

WW Gear was therefore entitled to a declaration that McGee was obliged to comply with the preconditions in clause 4.21 before it was able to claim for loss and expense.

Review your contract terms

This case highlights the importance of contractors complying with conditions precedent in contracts.

Contractors must ensure they fully understand the terms of the contract and the obligations placed upon them as a contractor and must be aware of any conditions precedent

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from the outset. Failure to comply with the terms of the contract could leave the contractor unable to make a claim for delay or loss and expense under the contract and consequently could leave the contractor out of pocket for losses it has nevertheless incurred.

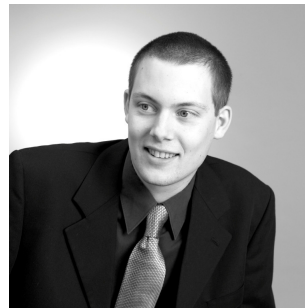
Once the contract is finalised it is important to ensure that all key members of the team are aware of the terms and adhere to the procedures that have been agreed. As the demands of a project increase, contractual compliance may not be a priority as the parties are focused on completing the project. However, it is important to remember that if problems do occur, the contract will be scrutinised. If the project has been delayed and the contractor is seeking to claim an extension of time, the employer will no doubt be keen to enforce any condition precedent which must be complied with before the contractor can validly make a claim.

Practical points to note for contractors and tips for avoiding and managing the risks presented by conditions precedent:

- make sure you and everyone working on the project is aware of the terms and provisions of the contract. If there are bespoke amendments to a standard form contract it is important that everyone is aware of these and does not simply assume that the contract is standard. Identify the areas of risk and make sure these are monitored.
- although the contract in this case had been amended it was based primarily on a JCT standard contract and it is not unusual for these types of condition precedent to be added to a contract by the employer. In fact, under the standard NEC 3rd edition it is a condition precedent for the contractor to provide a substantiated claim for loss and expense within eight weeks of it becoming apparent to the contractor.

- if there are conditions precedent in the contract ensure that these are fully complied with throughout the duration of the contract. When negotiating contracts try to resist the inclusion of any conditions precedent which may later prove onerous or difficult to comply with.
- although conditions precedent must be sufficiently certain in the contract, the court will not hesitate to uphold them if it is clear that the intention of the parties was to impose a condition precedent.
- it is worth noting that even though failure to comply with a condition precedent may bar the contractor for making a claim under the contract for loss and expense, it should not affect or reduce the contractor's right to make a common law claim unless this has been ruled out by the contract.

If you would like to discuss any of the issues raised in this update, please contact:



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