



Construction Law Update Seminar

Notice Provisions, NEC3 & Bribery Act

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The Effect Of Notice Provisions On Rights & Obligations

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NEC3: judicial scrutiny lies ahead

NEC3 is being used increasingly in the UK construction industry and has been the subject of much favourable comment by users. Nevertheless, some commentators continue to have reservations about the drafting and legal implications of NEC3. **Mike Barlow** of **MacRoberts LLP** outlines a few of the issues in NEC3 that have caused concern for some.

KEY POINTS

- NEC3 is increasingly widely used and appears to be delivering successful projects with relatively few disputes.
- Some disputes are however inevitable and these will put the detailed drafting of NEC3 under the spotlight.
- Some concerns remain about the drafting of NEC3, or issues not currently covered by NEC3, which could usefully be addressed.
- NEC3 users need to be aware that the risk allocation under NEC3 may differ significantly from JCT in certain specific areas such as loss or damage caused by Specified Perils.

NEC3, it seems, is everywhere. NEC3 has been endorsed by the Government and has been used on recent high profile projects such as Terminal 5 and the London 2012 Games. There is evidence that NEC3 is being used more widely - possibly at the expense of JCT - as increasing numbers of project managers become familiar with NEC3 and recommend it to their Employers.

So much has been written about the structure and ethos of NEC3 that it would be superfluous to repeat it here. By all accounts, NEC3's focus on the importance of collaborative working, relationships and management procedures has contributed to the success of many projects. NEC3's numerous supporters highlight what is arguably the key benefit of NEC3's compensation event procedure: namely, that project issues are sorted out at the time, and not saved up for protracted debate at the final account stage. Although there is an acknowledgement that the administrative burden of NEC3 is higher than other standard forms, the additional management resources are said to benefit the running of the project. And indeed, NEC3's track record does seem to be very good.

Yet despite this, some in the industry – and quite a few construction lawyers – continue to harbour reservations about NEC3. The strange use of the present tense throughout NEC3 still gives rise to debate among lawyers, while the extreme brevity of the clauses leads to concerns about a lack of detail. Rival contracts such as JCT are longer for a reason, they say – namely, to clearly set out the parties' rights and obligations in each different scenario. Lawyers who comment adversely on NEC3 do however risk being criticised by NEC3 enthusiasts, who describe such points as overly legalistic or even nit-picking. NEC3 supporters say that using NEC3 involves a conscious decision not to legislate for every eventuality, but to place one's faith in the relationship of the parties and the project management processes. Contracts, they say, are for projects, not for lawyers. NEC3 supporters point to the limited case law on NEC3 as evidence that NEC3 is working well, by avoiding disputes.

The potential difficulty here is that the lack of reported disputes does not necessarily show that the detailed drafting of NEC3 (or indeed of any contract) is working. For example, commercial deals might be done behind closed doors just to avoid having to decide an unclear point. The prevalence in the UK of adjudication, where decisions are unreported, will also mask disputes. Furthermore, there is a time lag before new types of contract end up in court. For example, although huge numbers of collateral warranties were signed from the early 1990s onwards, there was an almost eerie lack of reported cases on collateral warranties until a few years ago. NEC3, too, is now beginning to crop up in court. This is not surprising given NEC3's widespread usage, but it will be instructive to see how NEC3 fares when subjected to judicial scrutiny.

In this regard, the recent TCC case of Anglian Water Services Ltd v. Laing O'Rourke Utilities Ltd may be a litmus test. The judge commented that construing NEC3 was made more difficult by NEC3's use of the present tense: "*No doubt this approach to drafting has its adherents within the industry but ... from the point of view of a lawyer, it seems to me to represent a triumph of form over substance.*" It was perhaps inevitable that the unconventional language of NEC3, though now quite widely known in the industry, will continue to generate debate. NEC3 certainly uses simple English, but some argue that it is difficult to call it plain English when NEC3's near-universal use of the present tense is directly contrary to everyday speech.

It is also difficult to deny that the drafting of some clauses is not particularly clear. The vital “pain / gain” mechanism in clause 53.1 of Option C is hard enough to understand for those for whom English is their first language, let alone those for whom it is not. It should not be necessary to resort to the Guidance Notes to work out what such clauses mean.

Furthermore, although the consistency of terminology across NEC3's main Options is often cited as a benefit, it can lead to a lack of clarity. For example, nowhere in Option C is the expression "target price" used. This is because of NEC's determination to use common terminology (i.e. the "Prices") across all Options – but it would perhaps be more user friendly if the language of Option C actually referred to a target price. Another example of NEC's enforced commonality of contractual provisions is the NEC3 Professional Services Contract ("PSC"). It seems highly artificial to include, in a consultant appointment, detailed provisions on the programme and compensation events. There is certainly a case for obliging consultants to work to the required project timetable – but why do we need five pages of text in the PSC dealing with the programme and compensation events? It would surely be more useful to NEC3 users if the PSC were to cover, for example, possible novation arrangements, or more detailed provisions dealing with intellectual property rights.

One also wonders whether the use of common terminology across the NEC3 main Options may have unintended legal consequences. For example, what is the effect in Option C of clause 63.4? Clause 63.4 purports to limit the financial impact of compensation events to changes to the "Prices" - but under Option C, the Price for Work Done to Date (which is what is payable to the Contractor) is not the "Prices" (as it is in Option A) but rather the Defined Cost plus the Fee.

As a general comment, in the event of a dispute, what really matters is how the particular contract in question performs; the fact that the contract happens to form part of a wider, flexible suite of contracts is – at that point - of limited relevance.

There is always a danger here of falling into the trap of being too legalistic. Commentators have however raised a number of substantive points they consider should be addressed. Those points cannot be dismissed out of hand. For example, it does seem odd that NEC3 exports to the Works Information the whole question of what is to be designed by the Contractor, while at the same time remaining silent on the standard of design (which would appear impliedly to be fitness for purpose unless secondary option X15 is selected). Other issues include the perceived need for a priority of documents clause; a contractual obligation to comply with applicable statutory requirements; minimum standards to apply to all materials, goods and workmanship; a clearer statement in relation to intellectual property rights; a prohibition on the assignment of the contract; a secondary option which expressly deals with provisional sums; a secondary option for collateral warranties rather than third party rights under the 1999 Act; whether NEC could be simplified by dropping Option W2 in favour of

the statutory adjudication scheme; and a need to clarify certain aspects of the Schedule of Cost Components. It might also be useful if a secondary option dealing with professional indemnity insurance could be published. In the author's experience, NEC3 users often tend to expand the insurance table in clause 84.2 to include professional indemnity insurance, but then fail to amend the requirement for all insurances to be in the joint names of the parties - which is obviously problematic in relation to professional indemnity insurance.

To NEC3's credit, NEC3 expressly caters for "Z clauses" which could deal with points such as these. But the absence of some of the basic clauses listed above – which are normal in many other standard forms - positively *invites* Z clauses. Given NEC3's stated preference of minimising the length of any Z clauses, it is to be hoped that standard clauses to cover at least some of these points can instead be included in the next version of NEC, whether in the core clauses or as new secondary options.

Perhaps more importantly, NEC3 users in the UK building industry need to be aware that the risk allocation under an unamended NEC3 may be significantly different from that under other standard forms such as JCT 2009. The rather sweeping statement in clause 81.1 is an example of this.

Under clause 81.1, from the starting date until the Defects Certificate is issued, the risks which are not carried by the Employer are carried by the Contractor. Importantly, under clause 83.1, each party indemnifies the other party against claims and costs due to an event which is at his risk. This may satisfy the NEC's desire to achieve a clear risk allocation, but it must be recognised that clause 81.1 is extraordinarily wide. For example, unless expressly inserted as an additional Employer's risk in the Contract Data, the risk of loss or damage to the works caused by terrorism would appear to be a Contractor's risk. Strictly speaking, this ought to be covered by insurance – but do all contractors realise this, and do they also realise that they must indemnify the Employer against terrorism risk?

Contractors also need to bear in mind that – in contrast to JCT 2009 – loss or damage caused by a "Specified Peril" (as defined in JCT) will not entitle the Contractor to an extension of time under NEC3. Where the works are covered by the Contractor's CAR cover, but are damaged as the result of (for example) a fire or flood, this may leave the Contractor with a substantial liability for delay in completion which (unlike the reinstatement costs) will not be covered by insurance. Separately, NEC3 users should understand that NEC3 contains none of the detailed provisions dealing with works to existing structures as are found in JCT 2009, and extra care must be taken when preparing the contract in such circumstances. As NEC3's proponents have often said, NEC3 is radically different to other forms of contract. Accordingly, its users need to bear in mind that some provisions they may take for granted do not in fact appear in NEC3, which will need to be amended to reflect those provisions, if required.

This may also apply in relation to the payment provisions of some of the NEC3 main Options. For example, most contractors in the UK building industry operate on the basis on monthly interim payments. If however the parties contract on the basis of NEC3 Option A (Priced Contract with Activity Schedule), there is a potential trap for the unwary. This is because under Option A, the definition of "Price for Work Done to Date" refers to the Prices for each group of *completed* activities, and each *completed* activity which is not in a group, as set out in the Activity Schedule. (A completed activity is one which is without Defects which would either delay or be covered by immediately following work.) Accordingly, the Activity Schedule is not merely a JCT-style "Contract Sum Analysis" - instead, its content and layout will have a critical impact on the level of interim payments. Indeed, it would appear quite possible for a contractor to almost wipe out its entitlement to receive interim payments simply by grouping too many activities together in the Activity Schedule.

In conclusion, lawyers are trained to ask themselves "what if" when they look at contracts, and NEC3 contains fewer details to guide the reader than do other standard forms. Advocates of NEC3 will argue that this misses the point, and that NEC3 is a project management tool based on the principles of collaborative working. On the other hand, if things do go wrong, and a dispute does arise, it is to the contract that the parties will look for the answers. The danger here is that the court deciding the dispute will focus on what NEC3 actually says, without having absorbed the background values and mindset so frequently championed by NEC3's supporters. For this reason, unless NEC3 itself is amended to address some of the issues outlined above, we should expect that lawyers will continue to alter NEC3 by way of Z clauses. That may not please all of NEC3's supporters, but there is no reason why legal certainty and good project management principles should not go hand in hand. It would be unfortunate if the proven benefits of NEC3 were to be undermined by judicial criticism when its detailed provisions are scrutinised by the courts – as they inevitably will be.

Disclaimer

The material contained in this handout is of the nature of general comment only and does not give advice on any particular matter. Readers should not act on the basis of the information in this handout without taking appropriate professional advice upon their own particular circumstances.

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Bribery Act 2010

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Why Now?

- ▣ On 8th April the UK Bribery Act received its Royal Assent
- ▣ £millions lost in bribes every year
- ▣ Over 100 years of legislation repealed & replaced



Why Now (2)

- ❑ Poor record in dealing with Bribery
- ❑ Corruption cases & lack of successful prosecutions by SFO
- ❑ Mounting criticism
- ❑ Criticism from OECD & United Nations
- ❑ Some doubt as to the level of commitment to fighting bribery
- ❑ Most fundamental overhaul



Why Now (3)

- ▣ Conceded to Organisation for Economic Cooperation and Development (OECD) and the United Nations; and
- ▣ Created one of the most extensive pieces of anti-bribery legislation in the world



Worth the Wait?

- ▣ It's been a long time coming; so has it been worth the wait and more importantly
- ▣ Does the legislation create greater clarity for business or does it simply create more problems for business?



Foreign Corrupt Practices Act

- ▣ Much comparison of new regime with US Foreign Corrupt Practices Act
- ▣ FCPA widely considered to be fairly robust
- ▣ UK Act goes much further
- ▣ It is important to note that the legislation covers much more ground



FCPA vs. UK Bribery Act

- Bribing of all public officials – whether they are in the UK or Foreign public officials
- Bribing of commercial bodies, individuals whether they are public officials or not
- It will not only apply to UK companies, it will also apply companies doing business in the UK i.e. those that have offices or employees or agents who are in the UK will be caught by the regimes and irrespective of where the bribery took place



FCPA vs. UK Bribery Act (2)

- ▣ A big difference is the approach taken to what we call facilitation payments - payments made to government officials to smooth the way forward; and
- ▣ Finally, the penalties are just simply far more serious!
- ▣ Okay so what are the offences?



Offences

So what are the offences:

- ▣ Keep in mind the Act applies to both public sector and private sector corruption
- 1. Offering a bribe;
- 2. The act of receiving a bribe;
- 3. Bribing a foreign public official; and
- 4. Strict Liability Corporate Offence



Offering A Bribe

- ❑ Offence of bribing another person (also called the "active offence")
- ❑ Where a person offers, promises or gives a financial or other advantage:
 - ▶ to another person
 - ▶ to perform improperly a relevant function or activity
 - ▶ or to reward a person for the improper performance of such a function or activity

It does not matter whether the person given the bribe is the same person who will perform the function or activity concerned



The Act Of Receiving A Bribe

- ▣ Offence of being bribed (also called the "passive offence")
 - ▶ Where a person receives or accepts a financial or other advantage
 - ▶ to perform a function or activity improperly

It does not matter whether the recipient of the bribe receives it directly or through a third party, or whether it is for the recipient's benefit or not



Bribing A Foreign Public Official

▣ Bribery of a Foreign Public Official -

Where a person directly or through a third party offers, promises or gives any financial or other advantage to a Foreign Public Official ("FPO") in attempt to influence them in their capacity as a FPO and to obtain or retain business, or an advantage in the conduct of business



Strict Liability Corporate Offence

- ▣ Corporate offence of failure to prevent bribery -

A commercial organisation could be guilty of bribery where a **person associated** with the organisation bribes another person intending to obtain or retain business for the organisation or to obtain or retain an advantage in the conduct of business for the organisation

Persons "associated" with the organisation could potentially include employees, agents, sub-contractors and joint-venture arrangements (amongst others)



Strict Liability Corporate Offence (2)

- ▣ What could the new corporate offence mean for you and your business?
- ▣ **Look at the term again: Persons "associated" with the organisation -**

could potentially include employees, agents, sub-contractors and joint-venture arrangements (amongst others)



If It Goes Wrong?

- What are the penalties if an offence is committed? Criminal Penalties
- The offences of bribing another person, being bribed and bribing a foreign public official are punishable either by an unlimited fine, imprisonment of up to 10 years or both
- The new corporate offence of failure to prevent bribery is punishable by an unlimited fine
- **Criminal Penalties are more severe than the FCPA**



Are There Any Defences?

- Lack of knowledge of the new bribery laws is not a defence
- Are there any defences that your business could rely on?
 - ▶ there are a few - relatively narrow
- The bribery was specifically authorised by some written law/custom
- The conduct was necessary for the proper exercise of any function of an intelligence service or the armed forces when engaged in active service
- Demonstration of Adequate Procedures by the Corporate Body



Defence Of Adequate Procedures

- ❑ The organisation had adequate procedures in place to prevent employees or agents committing bribery
- ❑ This defence cannot apply where it has been proved that a senior officer of the organisation has consented to the offence and both the company and the senior officer will be guilty of the offence
- ❑ The government will issue guidance in due course on what constitutes **adequate procedures**; however it is anticipated that this will form a set of principles rather than an in depth guidance material



Adequate Procedures?

- ▣ Companies must prepare themselves now
- ▣ Reviewing existing compliance procedures
- ▣ Review policies relating to hospitality and political contributions
- ▣ Training
- ▣ Review of contractual arrangements with employees and agents and joint venture arrangements.
- ▣ Review procedures for disciplinary action;
- ▣ How do you select your agents or business associates;
- ▣ How do you report suspected bribery activities.
- ▣ If you've not got policies.....



Not Yet In Force

- ▣ When does the Bribery Act 2010 come into force?
- ▣ Autumn
- ▣ But it's not just about policies
- ▣ Culture changes from the top down



Bribery Act 2010 - Beyond the Adopting of Policies



The Three Big Questions

- ▣ “What did you do to stay out of trouble?”
- ▣ “What did you do when you found out?”
- ▣ “What remedial action did you take?”



What do you do to stay out of trouble?

- ▣ What systems has the company in place
- ▣ The company's Code of Conduct
- ▣ The policies and procedures present to implement the Code of Conduct
- ▣ A company wide anonymous Hotline
- ▣ Culture of compliance



Staying Out Of Trouble

- ▣ More than just having the policies and processes in place
- ▣ Does the company provide training on these policies and processes
- ▣ Are they used actively in the business?
 - ▶ (for instance, in the area of due diligence on business partners, agents, distributors and vendors)



Staying Out Of Trouble

- ▣ How is compliance ensured?
- ▣ Do you audit compliance?
- ▣ How do you deal with compliance failures?
- ▣ Is there senior management sign-on?
- ▣ Is everyone treated equally?



Staying Out Of Trouble

- Establish internal and external controls adequate to ensure compliance with both the anti-bribery provisions of the act
- Educate all employees as to what type of activity is prohibited under the Act
- Establish a Bribery Act compliance manual summarising policy and procedures
- Involve special Bribery Act training programs for in-house lawyers, auditors, managers and employees working on overseas projects
- Develop external controls and procedures to ensure that all transactions and relationships between a company and any intermediary adequately comply with the Bribery Act



Staying Out Of Trouble

- ▣ Training should go beyond a “read and sign” process and address real world situations
- ▣ Apply the smell test – would you feel comfortable seeing the whole facts set out in the FT / Daily Mirror?
- ▣ Consider **RISK** in every scenario



Knowing The Risks

- ▣ Who?
 - ▶ Everyone employed by or engaged to provide services to the company
- ▣ Where?
 - ▶ Not just High risk jurisdictions
- ▣ Why?
 - ▶ Why are you making the payment?
- ▣ How?
 - ▶ Is the transaction normal?



Who?

- ▣ Employees
- ▣ Agents
- ▣ Distributors
- ▣ Franchisees
- ▣ Partners
- ▣ Other intermediaries



Where?

- ▣ Everywhere in the world (and beyond)
- ▣ Some jurisdictions have a bribery tolerance culture – UK doesn't!
- ▣ If you do business *there*, you have to make sure that your operation *there* is compliant



Why are you making payment?

- ▣ Must be proper reason
- ▣ Non-excessive in circumstances
- ▣ Is it required by law?
- ▣ Or by local regulations
 - ▶ Everyone else doing it is not a defence
- ▣ Facilitation payments are still illegal



How?

- ▣ Is the payment through the books?
- ▣ Fully and properly described?
- ▣ Made directly to the correct entity – and not an employee
- ▣ Directly to the person providing services
- ▣ Of a nature that is not unusual



What did you do when you found out?

- ▣ What was the company's response after an Bribery Act / compliance issue arose or was discovered
- ▣ Was there an investigation?
 - ▶ by persons involved with the underlying matter
 - ▶ or by an outside agency or law firm



What did you do when you found out?

- ▣ Did you contact the authorities?
 - ▶ In UK?
 - ▶ In that country?
- ▣ Disclosure to regulatory bodies / stock exchanges



Response To Failure

- ▣ Did the company voluntarily disclose the matter to the authorities?
- ▣ Did the Company cooperate with the authorities in any ongoing investigation



Your Response To Failure

- ▣ Collection of evidence
- ▣ Preservation of evidence
- ▣ Dealing with evidence
- ▣ Dealing with perceived failures or inadequacies
- ▣ Civil or criminal?
 - ▶ Employees may need separate advice



You Need To Be Committed

- ▣ A true commitment to conduct business in accordance with a written ethics and anti-corruption policy is demonstrated, in part, by imposing real sanctions on those that violate it
- ▣ The absence of any consequences for violations demonstrates the lack of such a commitment
- ▣ Accordingly, an effective compliance policy should designate persons responsible for reviewing potential violations and for real penalties for non-compliance



What remedial action did you take?

- ▣ Were the persons involved in any Bribery Act / compliance violations disciplined?
- ▣ What happened to the whistleblower?



Minimising The Risk

- ▣ Annual review of all overseas expenditures and business partners
- ▣ Assign a designated person(s) as the owner of the Anti-Bribery process
- ▣ Establish a standard due diligence process along with documentation for all overseas business partners
- ▣ Provide annual refresher training on Bribery Act and hot topics to all personnel involved with overseas transactions



The 12 Steps to Compliance

1. *A culture of compliance with the appropriate “tone at the top”.*
2. *Clearly articulated and visible policy against bribery and corruption.*
3. *It must be the duty of every employee to company with a company’s anti-bribery program.*
4. *One or more senior officers in charge of the compliance program who must report directly to the Board or appropriate Board Committee.*
5. *Design the compliance program to prevent and detect bribery and corruption.*
6. *Make the program applicable to third party business partners.*



The 12 Steps to Compliance (cont'd)

7. *Have a system of internal financial controls in place to ensure that bribery and corruption cannot be hidden.*
8. *Have periodic communications and training on the compliance program.*
9. *Provide positive support for employees to comply with the compliance program.*
10. *Consistently discipline employees for violations of the compliance program.*
11. *Provide guidance and advice for employees on the compliance program.*
12. *The compliance program should be periodically re-assessed and re-evaluated to take into account new developments.*



Conclusion

- ▣ Build strong compliance programs
- ▣ Invest in training and diagnostic tools
- ▣ If you do discover a problem, **go to the authorities before the authorities come to you**



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JUDICIARY OF
ENGLAND AND WALES

Take Notice:
The effect of notice provisions on rights and liabilities

Sir Vivian Ramsey
Technology and construction Court, London

Notice Provisions

Notice may be

- necessary to give rise to a right, obligation or liability
- a condition precedent to liability
- be required to be given in a particular form or within a particular time
- contractual or statutory
- be affected by statute

Notice giving rise to a right, obligation or liability

Notice may be required

- to obtain an extension of time
- to obtain payment
- to terminate a contract
- to withhold payment
- to give rise to a adjudication
- To start an arbitration

Form of Notice Provision

- Notice as a condition precedent
- Notice Requirements
 - Time to serve notice
 - Form of notice
 - Service of notice
- Notice with mandatory requirements
- Notice with discretionary requirements

Example: ICE 7th Edition

- By Clause 53 (2): “If the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions...he shall give notice in writing of his intention to the Engineer as soon as may be reasonable and in any event within 28 days after the happening of the events giving rise to the claim.”
- It is added “Upon the happening of such events the Contractor shall keep such contemporary records as may reasonably be necessary to support any claim he may subsequently wish to make”.
- By Clause 53 (5): “If the Contractor fails to comply with any of the provisions of this Clause in respect of any claim which he shall seek to make then the Contractor shall be entitled to payment in respect thereof only to the extent that the Engineer has not been prevented from or substantially prejudiced by such failure in investigating the said claim.”
- By Clause 53 (6): “The Contractor shall be entitled to have included in any interim payment certified by the Engineer pursuant to Clause 60 such amount in respect of any claim as the Engineer may consider due to the Contractor provided that the Contractor shall have supplied sufficient particulars to enable the Engineer to determine the amount due. If such particulars are insufficient to substantiate the whole of the claim the Contractor shall be entitled to payment in respect of such part of the claim as the particulars may substantiate to the satisfaction of the Engineer.”

Example: JCT 2005

Clause 4.23 in relation to loss and expense.

“If in the execution of this Contract the Contractor incurs or is likely to incur direct loss and/or expense for which he would not be reimbursed by a payment under any other provision in these Conditions ...because the regular progress of the Works or of any part of them has been or is likely to be materially affected by any of the Relevant Matters, the Contractor may make written application to the Architect/Contract Administrator...

provided always that the Contractor shall:

.1 make his application as soon as it has become, or should reasonably have become, apparent to him that the regular progress has been or was likely to be affected;

.2 in support of his application submit to the Architect/Contract Administrator upon request such information as should reasonably enable the Architect/Contract Administrator to form an opinion; and

.3 upon request submit to the Architect/Contract Administrator or to the Quantity Surveyor upon request such details of the loss and/or expense as are reasonably necessary for such ascertainment.

Example NEC

Core Clause 61.3

The *Contractor* notifies the *Project Manager* of an event which has happened or which he expects 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 of the event, he is not entitled to a change in the Price, the Completion Date or a Key Date unless the *Project Manager* should have notified the event to the *Contractor* but did not.

Example

The clause in Multiplex Construction v. Honeywell Control Systems [2007] BLR 195 where the clause provided:

11.1.3 It shall be a condition precedent to the Sub-Contractor's entitlement to any extension of time under clause 11, that he shall have served all necessary notices on the Contractor by the dates specified and provided all necessary supporting information including but not limited to causation and effect programmes, labour, plant and materials resource schedules and critical path analysis programmes and the like. In the event the Sub-Contractor fails to notify the Contractor by the dates specified and/or fails to provide any necessary supporting information then he shall waive his right, both under the Contract and at common law, in equity and/or to pursuant to statute to any entitlement to an extension of time under this clause 11.

Education 4 Ayrshire Ltd v South Ayrshire Council

Education 4 Ayrshire Ltd v South Ayrshire Council [2010] S.L.T. 253

The Clauses

- 17.6 Procedure for relief

Subject to Clause 17.8, to obtain relief or claim compensation under this Clause 17 the Contractor must:

- 17.6.1 as soon as practicable, and in any event within 20 Business Days after it becomes aware that the Works Compensation Event has caused or is likely to cause delay, breach of an obligation under this Agreement or the Contractor to incur costs or lose revenue, give to the Authority a notice of its claim for an extension of time to the relevant Target Service Availability Date, payment of compensation and/or relief from its obligations under this Agreement;
- 17.6.2 within 15 Business Days of receipt by the Authority of the notice referred to in Clause 17.6.1 (or such longer period as the Authority acting reasonably may agree) give full details of the Works Compensation Event and the extension of time and any Estimated Change in Project Costs claimed (including evidence, on an open book basis, of the calculation of any Estimated Change in Project Costs); and
- 17.6.3 demonstrate to the reasonable satisfaction of the Authority that...

- 17.8 Late provision of information

In the event that information is provided after the specified number of Business Days contained in Clause 17.6, then the Contractor will not be entitled to any extension of time, compensation, or relief from its obligations under this Agreement in respect of the period of time during which the information is delayed.

- Under Clause 72.1 Notices to the authority have to be sent by first class post, facsimile or by hand, to the chief executive at County Buildings, Wellington Square, Ayr.

Education 4 Ayrshire Ltd v South Ayrshire Council

The notice

“In accordance with Clause 17.1 of the project agreement, we hereby inform you that we anticipate a delay in achieving the Target Service Availability Date in relation to Prestwick Academy. Taking into account the measures we are proposing to adopt to mitigate the delay we estimate that delay will be 19 weeks and is due to the discovery of asbestos in Building 7.

To this end please refer to our previous correspondence of 18 April to Mr Roddy Macdonald and the attached correspondence from the Building Contractor dated the 30/4/07 which provides further details and includes the proposed programme for removal of asbestos.

We will submit our full claim in accordance with clause 17.6 of the project agreement.

By way of background we have held various discussions with the representative from the Health and Safety Executive to ensure all Health and Safety obligations are being met and we have also requested the Employer’s Agent to provide a report on the financial effects of the delay.

Please be assured we will continue to work with all parties to ensure every effort is made to mitigate the delay and will keep the relevant people at the council informed as work progresses.”

Education 4 Ayrshire Ltd v South Ayrshire Council

In concluding that the contractor had not given notice Lord Glennie in the Outer House said:

- *“The notice has to be sent within a limited time, as soon as practicable “and in any event within 20 Business Days ...”. Clause 17.6.1 does not contain the wording found in cl 17.6.2, “or such longer period as the Authority acting reasonably may agree”. The time requirement is strict. The requirement for strict compliance is illustrated further by the fact that certain formalities are insisted upon. Clause 72.1 requires the notice to be sent, not to anyone, but to the chief executive of the authority. Furthermore, it must be in writing and sent by first class post, facsimile or by hand (email will not suffice). Clause 72.5 governs the question of when notices sent by post, delivered by hand or given by facsimile become effective. All this implies a level of formality which would, to my mind, be negated if the notice which had to be sent in a particular way, to a particular person and by a particular time, did not have to say what the clause appears to require it to say.*
- *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.*
- *The points advanced in argument by counsel for the pursuers appear to me to demonstrate that, at least on the ground, the authority knew about the delay likely to be caused by the discovery of type 3 asbestos. But cl 17.6.2 is not directed towards ensuring that the authority have knowledge at that level. ...Nor, to my mind, does it help the pursuers to say that the letter of 2 May 2007, when read with the letter of 30 April 2007 from the building contractor, would have enabled the authority to infer that the claim by the building contractor against the pursuers was going to be passed up the line to them. That may be so, but the purpose of the clause is to avoid such uncertainty. The pursuers were required to tell the authority what claim they were making. It does not do for them to say: “here is what the building contractor has written to us, you work it out for yourself”. That is not a valid notice under the clause. The failure to give a valid notice in accordance with cl 17.6.2 is fatal to the pursuers' claim for relief.*

Gaymark

- The Gaymark principle, based on the Australian decision of Bailey J. in Gaymark Investments v. Walter Construction 21 Con LJ 71 where he said:

“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...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. 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 ... has been deleted.”

- Essentially the argument which succeeded in that case was that a failure to give notice means that there is no effective provision for extensions of time for matters which are the employer's fault and under the prevention principle the employer cannot prevent completion and still rely on the provisions as to completion and liquidated damages.
- In coming to his conclusion Bailey J differed from the view of Cole J in Turner Contracts v. Ausotel where Cole J put the matter this way:

“If the Builder, having a right to claim an extension of time fails to do so, it cannot claim that the act of prevention which would have entitled it to an extension of time for Practical Completion resulted in its inability to complete by that time. A party to a contract cannot rely upon preventing the contract of the other party where it failed to exercise a contractual right which would have negated the effect of that preventing conduct.”

Gaymark considered

- Keating on Construction Contracts includes the view that Gaymark is correct.
- The last edition of Hudson took the opposite view.
- In the NSW Court of Appeal decision in Peninsula Balmain v. Abigroup Contractors (2002) 18 BCL 322 the court preferred to the Hudson view.
- In Multiplex Construction v. Honeywell Control Systems Jackson J, obiter, took this view:

"I am bound to say that I see considerable force in Professor Wallace' criticisms of Gaymark. I also see considerable force in the reasoning of the Australian courts in Turner and in Peninsula and in the reasoning of the Inner House in City Inn. Whatever may be the law of the Northern Territory of Australia, I have considerable doubt that Gaymark represents the law of England. 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."

Service of notice

- In Construction Partnership UK Ltd v. Leek Developments the contract contained a notice provision which stated that:

“Any notice, which includes a notice of determination, shall be in writing and given by actual delivery or by special delivery or recorded delivery. If sent by special delivery or recorded delivery, the notice or further notice shall, subject to proof to the contrary, be deemed to have been received 48 hours after the date of posting, excluding Saturday and Sunday and public holidays.”

- The contractor sought to determine the contract based on an earlier notice of default by the employer in paying sums due. That notice had been served by fax. It was argued that service by fax was not “actual delivery” and what was required for that was that somebody must actually go along to the recipient and hand it over and the someone must be acting for and on behalf of the claimant and that a letter sent by post which actually reaches the recipient cannot be said to be actual delivery .
- The judge held that service by fax was sufficient and said in relation to the submissions to the contrary:
- *“I am bound to say it seems to me that is a surprising and, in my view, quite unrealistic and uncommercial interpretation of clause 7.1. It is commonplace in modern commercial practice for documents to be sent by post, and even more commonplace for documents to be sent by fax these days. A fax, it seems to me, clearly is in writing; it produces, when it is printed out on the recipient's machine, a document, and that seems to me is clearly a notice in writing. The question is, is that actual delivery? It seems to me, if it has actually been received, it has been delivered. Delivery simply means transmission by an appropriate means so that it is received, and the evidence in this case is that the fax has been actually received.”*

Avoiding the effect of notices

- **Estoppel by representation:** A party makes a representation with the intention and effect of inducing the other party to alter his position in reliance on the representation, the party making the representation may be estopped from relying on facts which are at variance with the representation.
- **Estoppel by convention:** Where parties have acted upon a common assumption of fact or law on the basis of which they have regulated their subsequent dealings, they will be estopped from subsequently denying that the assumption is true if it would be unjust or unconscionable to permit them to resile from it. Once a common assumption is revealed to be erroneous, the estoppel will not apply to future dealings.
- **Promissory estoppel:** Where a party has made an unequivocal promise or representation to another party that he will not enforce his strict legal rights and the promise or representation is intended to be relied on and is in fact relied on, the first party may be estopped from successfully asserting his strict legal rights if it would be unconscionable or unjust to allow him to do so.
- **Waiver:** A party to a contract may act so as to show that he does not intend to enforce a contractual right or require performance of a contractual obligation. By so acting, he may by waiver lose the right or cease to be entitled to the performance either temporarily or permanently.
- **Unfair Contract Terms Legislation:** to the extent that it prevents
 - making the liability or its enforcement subject to restrictive or onerous conditions;
 - excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
 - excluding or restricting rules of evidence or procedure;

Conclusion

- Read the clause
- Scope and extent of the notice obligation
- Analyse: condition precedent, mandatory or discretionary requirements
- Draft the notice by reference to the obligation
- Time for serving the notice
- Method of service of the notice
- Does it preclude the claim?
- Alternative remedies
- Can the effect be avoided?