CONTRACTORS' CLAIMS FOR TIME AND MONEY: THE CONSEQUENCES OF LATE NOTIFICATION (Astana lecture 1.4.21)

TALK BY SIR RUPERT JACKSON AT THE ASTANA INTERNATIONAL FINANCIAL CENTRE COURT TO LAWYERS PRACTISING IN CENTRAL ASIA ON 1 APRIL 2021

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1. INTRODUCTION

1.1 This paper. This paper addresses the practical and legal problems which arise when a contractor fails to serve notice of delay, disruption or similar matters in accordance with the contractual requirements, but the circumstances would otherwise justify the grant of an extension of time and/or additional payment. I am grateful to Carola Binney, a pupil barrister at 4 New Square, for her considerable assistance in the preparation of this paper.

1.2 Abbreviations. In this paper:
'C' means the contractor (or seller or builder in the context of shipbuilding).
'E' means the employer (or buyer in the context of shipbuilding).
'EOT' means extension of time.
'LAD' means liquidated and ascertained damages for delay.
'SC' means subcontractor.
'TCC' means the Technology and Construction Court in London.

2. NOTICE PROVISIONS GENERALLY

2.1 Two broad categories. Contractual provisions requiring E or C to give notice of a claim may (a) expressly state whether the giving of notice is a pre-condition to pursuit of the claim or (b) be silent as to the consequences of failure to give notice.

2.2 Approach to construction. In so far as the provision leaves matters open, courts will lean against an interpretation which shuts out claims altogether: *LB Merton v Stanley Hugh Leach* (1985) 32 BLR 51; *Obrascon Huarte Lain v Attorney General for Gibraltar* [2014] EWHC 1028 (TCC).

2.3 Express pre-condition. Where the contract makes giving notice an express pre-condition for pursuing a claim, the courts will enforce it. So must arbitrators. Clause 2.5 of the first edition of the FIDIC conditions (the Red Book) 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."

2.4 In *NH International v National Insurance Property Development Co Ltd* [2015] UKPC 37 E's failure to give notice under clause 2.5 of the FIDIC conditions shut out E's claim. The Privy Council reversed the decision of the Trinidad and Tobago Court of Appeal and remitted the case to the arbitrator. At [38] – [40] Lord Neuberger said:

"*38. The Board takes a different view. In agreement with the attractively argued submissions of Mr Alvin Fitzpatrick SC, it is hard to see how the words of clause 2.5 could be clearer. Its purpose 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".*

39. Perhaps most crucially, it appears to the Board that the Court of Appeal's analysis overlooks the fact 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.

40. More generally, it seems to the Board that the structure of clause 2.5 is such that it applies to any claims which the Employer wishes to raise. First, "any payment under any clause of these Conditions or otherwise in connection with the Contract" are words of very wide scope indeed. Secondly, the clause makes it clear that, if the Employer wishes to raise such a claim, it must do so promptly and in a particularised form: that seems to follow from the linking of the Engineer's role to the notice and particulars. Thirdly, the purpose of the final part of the clause is 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."

2.5 <u>What is sauce for the goose is sauce for the gander.</u> If E is shut out from making claims where it fails to comply with an express pre-condition for serving notice, it may be thought that C should also be shut out from making claims where it fails to comply with such a pre-condition. Indeed, that is precisely what clause 20.1 of the FIDIC conditions provides. But this can have the rather odd consequence that C may forfeit an extension of time and end up paying LAD for delay which E has caused (e.g. by late variation instructions).

3 EXTENSIONS OF TIME

3.1 The problem. A particular problem arises where contractual provisions make the giving of notice a pre-condition to the contractor's entitlement to extension of time. If E's or the Engineer's actions cause delay, but C fails to give timeous notice, does that (a) shut out C's claim for EOT and (b) render C liable to LAD for delay?

3.2 Conflicting policy considerations. On the one hand, C's notice (if given) serves a valuable purpose – E can monitor the consequences and possibly take preventive action, e.g. by withdrawing or modifying a variation instruction. So E may be seriously prejudiced by C's failure to give notice. On the other hand, the 'prevention principle' is a legal principle meaning that one party cannot recover damages for breach an obligation, where he has prevented the other party from performing the obligation.

3.3 The authorities. Judges do not speak with one voice on this issue, reflecting no doubt the conflicting policy considerations.

3.4 *Gaymark*. In *Gaymark Investments v Walter Construction Group* [1999] NTSC 143 E claimed liquidated damages against C for delay in constructing an hotel in Darwin. Clause 19.1 of the Special Conditions of Contract imposed conditions in respect of giving notice of delay. Clause 19.2 of the Special Conditions provided:

> "*The Contractor shall only be entitled to an extension of time for Practical Completion where ... (b)(i) the contractor has complied strictly with the provisions of sub-clause SC19.1 and in particular has given the notices required by sub-clause SC19.1 strictly in the manner and within the times stipulated by that sub-clause.*"

3.5 The Arbitrator made the following findings:

> (1) That the contractor was delayed in completing the work, including a delay of 77 days by causes for which the employer was responsible, but the contractor's application for an extension of time was barred because of its failure strictly to comply with the notification requirements for the extension of time clause.
> (2) That the 77 days' delay constituted acts of prevention by the employer with the result that there was no date for practical completion and the contractor was then obliged to complete the work within a reasonable time (which the Arbitrator found that it in fact did) with the consequence being that Gaymark was prevented from recovering liquidated damages for delay.

3.6 The Supreme Court of the Northern Territory of Australia refused leave to appeal and upheld the Arbitrator's award. Bailey J said this at paragraphs 69-71 of his judgment:

"*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 (to delete GC35.4 and substitute SC19) 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 (and in particular the notice provisions of SC19.1). 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 (and is expressly referred to in GC35.2 and GC35.5) has been deleted.

70. In Peak Construction (Liverpool) Limited v McKinney Foundations Limited [1970] 1 BLR 111, Salmon LJ held:
'The liquidated damages and extension of time clauses and printed forms contract must be construed strictly contra proferentem. If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employer's own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer'.

71. In the circumstances of the present case, I consider that this principle presents a formidable barrier to Gaymark's claim for liquidated damages based on delays of its own making. I agree with the arbitrator that the contract between the parties fails to provide for a situation where Gaymark caused actual delays to Concrete Construction's achieving practical completion by the due date coupled with a failure by Concrete Constructions to comply with the notice provisions of SC19.1. In such circumstances, I do not consider that there was any 'manifest error of law on the face of the award' or any 'strong evidence' of any error of law in the arbitrator holding that the 'prevention principle' barred Gaymark's claim to liquidated damages."

3.7 <u>*Multiplex*.</u> In *Multiplex v Honeywell* [2007] EWHC 447 (TCC) the TCC noted the trenchant criticisms of *Gaymark*, made by Professor Ian Duncan Wallace in his article 'Prevention and liquidated damages: a theory too far' (2002) 18 *Building and Construction Law* 82. The court also noted a subsequent decision of the Inner House of the Court of Session, which held that failure to serve notice was a bar to any EOT.[1] The court doubted, albeit *obiter*, that *Gaymark* represented the law of England. The core reasoning on this point at [103] was:

"*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.*"

HHJ Stephen Davies expressed the same view about *Gaymark* in *Steria Ltd v Sigma Wireless Communications Ltd* [2007] EWHC 3454 (TCC) at [95].

3.8 <u>Prevention principle and notices.</u> After a lengthy review of the authorities, the court in *Multiplex* derived three propositions:
(i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion

[1] *City Inn Ltd v Shepard Construction Ltd* 2003 SLT 885

date.
(ii) Acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events.
(iii) In so far as the extension of time clause is ambiguous, it should be construed in favour of the contractor.

3.9 North Midland. In *North Midland Building Ltd v Cyden Homes Ltd* [2017] EWHC 2414 (TCC) the contract required E to grant EOTs to C in respect of 'relevant events'. The definition of 'relevant events' included acts of prevention by E. Clause 2.25.1.3 (b) provided:
"*any delay caused by a relevant event for which the Contractor is responsible shall not be taken into account.*"
Events for which E was responsible caused 189 days delay. E refused to grant any EOT in respect of those events, because there were also culpable delays by C during that period.[2] C challenged E's refusal, arguing that the prevention principle operated; E could not recover LAD in respect 189 days when E had prevented C from completing. Fraser J rejected C's claim, observing that this case fell within *Multiplex*, proposition (ii). The parties had made express provision for concurrent delay. The court would enforce that express contractual provision.

3.10 The Court of Appeal upheld Fraser J's decision: [2018] EWCA Civ 1744. Coulson LJ (with whom the Master of the Rolls and Senior President of Tribunals agreed) held that clause 2.25.1.3 (b) allocated the risk of concurrent delay to the contractor. He approved the three general propositions stated in *Multiplex* (see para 3.8 above). Coulson LJ rejected the submission that the prevention principle was a matter of legal policy, which overrode the express terms of the contract. Relying upon *LB Merton v Stanley Hugh Leach Ltd* [1985] 32 BLR 51,[3] he categorised the prevention principle as a species of implied term, which the parties were entitled to exclude or modify by agreement.

3.11 Jiangsu. In *Jiangsu Guoxin Corp Ltd (formerly Sainty Marine Corp Ltd) v Precious Shipping Public Co Ltd* [2020] EWHC 1030 (Comm) C contracted to construct and supply 14 vessels to E. E rejected four vessels, which then clogged up C's yard. C claimed an EOT, despite failing to serve timeous notice. The relevant contract provision was:

"ARTICLE VIII DELAYS & EXTENSION OF TIME FOR DELIVERY

1 CAUSE OF DELAY

If, at any time before actual delivery, either the construction of the VESSEL, or any performance required hereunder as a prerequisite of delivery of the VESSEL, is delayed due to [various listed force majeure events]…or other causes beyond the control of the SELLER or of its sub-contractors, as the case may be, or by force majeure of any description…then, in the event of delay due to the happening of any of the aforementioned contingencies, the SELLER shall not be liable for such delay and the time for delivery of the VESSEL under this Contract shall be extended…

2 NOTICE OF DELAY

Within seven (7) business days from the date of commencement of any delay on account of which the SELLER claims that it is entitled under this Contract to an extension of the time for delivery of the

[2] E did, however, grant 9 days EOT in respect of weather.
[3] A case in which I appeared as junior counsel 37 years ago

VESSEL, the SELLER shall advise the BUYER by telefax or email confirmed in writing, of the date such delay commenced, and the reasons therefore. …

Failure of the SELLER to give the BUYER notice of delay as provided in this article except in the case of entire power failure or cut-off of the communication facilities shall preclude the BUILDER from claiming extension of the delivery date by reason of such failure."

3.12 The seller argued that notice under Article VIII.2 was not required when the delay was caused by the buyer's breach. On the seller's construction, Article VIII.1 was a force majeure clause, applicable only when the delay was outside the control of either party; the contract did not make provision for delays caused by the buyer's breach at all, and the prevention principle therefore applied to stop the buyer from relying on a delay caused by its own breach. The buyer argued that Article VIII.1 applied to "*any*" delay, and that in any event notice under Article VIII.2 was necessary whatever the cause of the delay.

3.13 The arbitral tribunal held that the service of notice under Article VIII.2 was a condition precedent to an extension of time being granted; the seller's failure to serve notice allowed the buyer to ignore delays that would have been permissible on service of the correct notice when calculating the termination date.

3.14 Butcher J upheld the tribunal's decision. On the construction issue, he held that Article VIII.1 was drafted in sufficiently broad terms to encompass the buyer's breach as well as force majeure. At [34]:

"34. The general position in relation to an extension of time clause has been said to be that it should, in the case of ambiguity, be construed in favour of the contractor. As made clear by Jackson J in Multiplex at paragraphs 56 to 57, what this should involve is the court leaning in favour of a construction which permits the contractor to recover appropriate extensions of time in respect of events causing delay. Here, paradoxically, it is the Seller which is contending that a cause of delay is not covered by article VIII.1 and is therefore not subject to the extension of time prescribed in that article. It does so in order to argue that the relevant cause of delay is not dealt with by the contract at all, in the sense that no extension is provided for it, and therefore the "prevention principle" is applicable. In my judgment this is not a construction which the court should favour. Even if article VIII.1 were ambiguous, which I do not consider that it is, the construction to which the court should lean is that which tends to give the Seller the benefit of the extension of time provided for in the article, in relation to matters which are not within its control. That militates in favour of giving a wide, not a narrow meaning to the phrase "other causes beyond the control of the SELLER."

3.15 The balance of authority, therefore, currently favours the view that where notice is a pre-condition for EOT, C's failure to serve timeous notice exposes him to LAD for delay caused by E. That is a logical but harsh result. Some would say it is counter-intuitive.

4 A MORE EQUITABLE SOLUTION

4.1 In his paper 'Prevention, time bars and *Multiplex v Honeywell*'[4] Professor Doug Jones[5] argued that a more balanced approach was preferable to 'all or nothing'. This is available under civil law systems. For example, article 1147 of the French Civil Code prevents an employer from recovering damages for delay caused by the employer, even if the contractor failed to give timeous notice.

[4] Published as chapter 19 of *Construction Law, Costs and Contemporary Developments*, J. Bailey (ed), Hart, 2018

[5] A judge of the Singapore International Commercial Court and an international arbitrator

Likewise, article 7.4.13 of the UNIDROIT principles, if incorporated into the contract, allows a more equitable sharing of the loss than the black and white common law approach. That provides:
"*(1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm.*
(2) However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances."
Similarly, article 114 of the People's Republic of China Contract Law allows a people's court or arbitral tribunal to reduce damages for breach of contract if "they are excessively higher than the loss caused by the breach".

4.2 FIDIC Conditions 2017. The second edition of the FIDIC conditions, published in 2017, adopts a more nuanced approach. Old clause 2.5 has gone. Instead, a revised clause 20 deals with both E's claims and C's claims for EOT and/or money.

4.3 Clause 20.2. Clause 20.2.1 makes the service of notice within 28 days a pre-condition for pursuing a claim by E or C. If the claimant serves notice late, clause 20.2.2 permits it to put forward "details of why such late submission is justified". Clause 20.2.4 makes service of a fully detailed claim within 84 days another pre-condition for pursuing the claim, with a similar provision for making excuses. Clause 20.2.5 gives the Engineer discretion to treat late notice or late service of the fully detailed claim as valid, taking into account the circumstances. Those circumstances may include:
"Whether or to what extent the other party would be prejudiced by acceptance of the late submission;
in the case of the time limit under Sub-Clause 20.2.1 [*Notice of Claim*], any evidence of the other Party's prior knowledge of the event or circumstance giving rise to the Claim, which the claiming Party may include in its supporting particulars; and/or
in the case of the time limit under Sub-Clause 20.2.4 [*Fully detailed Claim*], any evidence of the other Party's knowledge of the contractual and/or other legal basis of the claim, which the claiming Party may include in its supporting particulars."

4.4 How will this discretion be exercised in practice? I am unaware of any judicial decision about the exercise the discretion under clause 20.2.5. It takes some time for such a standard form provision to filter through to a judicial decision, especially since the vast majority of decisions under FIDIC are finally resolved by arbitration. This part of the paper is therefore speculative. The three factors specifically mentioned in clause 20.2.5 all concern prejudice to the responding party. But surely the reasons why the notice and/or the fully detailed claim were late must also be relevant? For example, if the document was being served on the last day (admittedly an unwise approach) and there was a power failure or a cyber-attack on that date, this would presumably be a legitimate consideration. The length of delay must also be relevant.

4.5 Reasonableness. Looking at the matter as a judge, I would expect considerations of reasonableness to play a part. In all the circumstances, how reasonable or unreasonable has been the conduct of the claimant? From the point of view of the respondent, how reasonable or unreasonable is it to overlook the delay and allow the claim to proceed? What are the consequences of shutting out the claim? Making C pay LAD to E for delay, which was caused entirely by E's late instructions, may possibly be thought harsher than shutting out C's claim for

loss and expense.

4.6 Proportionality. I would also expect considerations of proportionality to play a part. Proportionality means that there is a proper relationship between subject and object. If applied to the action of an administrative body, it means that there is a proper relationship between the administrative action and the objective to be achieved. If applied to a judicial decision, it means that there is a proper relationship between (a) the subject matter of the litigation and (b) any remedy ordered and/or any steps taken to achieve that remedy. If applied to an engineer's exercise of discretion under clause 20.2.5, it means that there is a proper relationship between the (important) objective of the notice provisions and the measures taken to achieve that objective. Proportionality is the antithesis of "zero tolerance". It may be thought disproportionate to shut out a substantial claim for EOT or loss and expense (which everybody knew was coming), simply because the notice was one minute late.

5. CONTRACTORS' CLAIMS FOR ADDITIONAL PAYMENT

5.1 In cases where the contractor has failed to give timeous notice as required by its contract, there is a significant difference between claims for time and claims for money. Where the contractor is seeking an EOT, he can at least try to rely upon the prevention principle. In some jurisdictions he might succeed, as happened in *Gaymark*. But where the contractor is bringing a claim for prolongation costs or loss and expense, no question of 'prevention' arises.

5.2 *Maeda.* In *Maeda Kensetsu Kogyo Kabushiki Kaisha (Maeda Corp) v Bauer Hong Kong Ltd* [2020] HKCA 830 the claimants formed a joint venture, which was the main contractor under two contracts for the construction of railway tunnels. The joint venture subcontracted the diaphragm wall works for each tunnel to Bauer, the defendant. The subcontracts contained a clause requiring Bauer to state the contractual basis of its claim within 28 days of giving initial notice of a claim for any additional payment or expense:

"21. Claims

21.1 If the sub-contractor intends to claim any additional payment or loss and expense due to:

21.1.1 any circumstances or occurrence as a consequence of which the contractor is entitled to additional payment or loss and expense under the main contract; …

21.1.6 any variation or subcontract variation, as a condition precedent to the sub-contractor's entitlement to any such claim, the sub-contractor shall give notice of its intention to the contractor within fourteen (14) days after the event, occurrence or matter giving rise to the claim became apparent or ought reasonably to have become apparent to the sub-contractor…

21.2 If the subcontractor wishes to maintain its right to pursue a claim for additional payment or loss and expense under clause 21.1, the sub-contractor shall as a condition precedent to any entitlement, within twenty eight (28) days after giving of notice under clause 21.1, submit in writing to the contractor:

21.2.1 the contractual basis together with full and detailed particulars and the evaluation of the claim; [and various other supporting documents] …

21.3 The sub-contractor shall have no right to any additional or extra payment, loss and expense, any claim for an extension of time or any claim for damages under any clause of the subcontract or at common law unless clauses 21.1 and 21.2 have been strictly complied with."

5.3 A dispute arose under the subcontracts, which was referred to arbitration. Bauer's primary case was that unforeseen ground conditions had given rise to a variation of the scope of the works under the express variation provisions of the subcontracts. In the alternative, Bauer make a 'like rights' claim under Clause 21.1.1.

5.4 The arbitrator rejected Bauer's primary claim, and the issue between the parties became whether the like rights claim had been properly notified pursuant to Clause 21.2 – there was no dispute that Bauer's Clause 21.2 notice did not make express reference to a claim under Clause 21.1.1, and referred only to the variation claim under Clause 21.1.6. The arbitrator made an award in favour of Bauer, holding that the contractual basis stated in the notice did not have to be the contractual basis on which the party in fact succeeded at arbitration. The claimant appealed.

5.5 Both the Court of First Instance and the Court of Appeal disagreed with the arbitrator's assessment, largely for the same reasons. The wording of Clause 21.2.1 was held to be clear and unambiguous. Both the Court of Appeal and the court below considered that the arbitrator's construction of it – that the principal purpose of the clause was to enable the joint venture to know the *factual* basis of the claim, so that it could decide what steps to take – was contrary to commercial common sense. The Court of Appeal held, at [60]-[61]:

"…[t]he arbitrator's interpretation of Clause 21.2.1 would negate the commercial purpose of achieving finality, as a claim can be advanced on a different contractual basis in an arbitration which may be years down the line.

61. The other commercial purpose for this provision is similar to what was mentioned above in The Yellow Star. In a chain contract situation, the Contractor would wish to know whether the Sub-Contractor's claim would need to be passed up the line. If the claim is based on other matters, such as breach of the Sub-Contract by the Contractor (cl.21.1.2), it would not need to be. The arbitrator's interpretation may prejudicially affect this commercial purpose as well."

5.6 The decision of the Hong Kong courts in *Maeda* was entirely orthodox. Contractors who wish to escape the Draconian consequences of failure to give notice of claims, should give attention to this issue at the stage of contract negotiation. Ideally there should be a provision which allows C to make some recovery, but abated to reflect the prejudice suffered by E as a consequence of the lack of timeous notice.

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