Can Time Bar Clause (20.1 FIDIC 1999) Lead to Lose Contractor's Rights?

Mahinda Ranatunga. BSc QS(Hons), MCIArb, CCE, Pg. Dip.(Arb & Const. Law)

Mahinda Ranatunga is a Member of Chartered Institute of Arbitrators, Certified Cost Engineer and a Quantity Surveyor for the Golden Arrow Interiors, UAE. He has completed his BSc in Quantity Surveying at the University of Moratuwa in December 2000. Further he has earned a post graduate diploma in arbitration and construction law. His Master's degree in Construction Law and Arbitration is presently underway (final year) at Robert Gordon University, Scotland. His experience in the construction industry counts nearly 10 years in Sri Lanka, Qatar and the United Arab Emirates.

Invariably an entitlement of extension of time (EOT) will be based on the nature of the delay event and operation of EOT mechanism. Absence of claim notification is one of the most common mistakes made by the Contractor which can lead to lose his right to have the completion date extended. Prior to FIDIC 1999, Standard Construction Contract Forms have not traditionally included time-bar provision. Clause 20.1 of the FIDIC 1999 standard form of contracts states: *"If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim…"* which is unambiguously states that once the time period has expired, all rights will be lost.

The aims of the stringent requirements on notices of delays are;

(a) to give the employer the opportunity to take all reasonable steps available to minimize the effect of the delay;
(b) alert the Employer to watch out for the reasonableness of the Contractor's endeavours to prevent or minimise delays in completing the works;
(c) to alert the Employer to the effects of the delay as they occur;
(d) to allow the Employer to advise the Lender of likely delays so that the latter can re-arrange his affairs accordingly or his own funds re-arranged. But even though, the Employer was aware of the delay event and recorded site minutes of meetings, it would not constitute a good delay notice.

Clause 1.3 of FIDIC 1999 has unambiguously stated that notices shall be in writing. Whether site meeting minutes constitute a good delay notice will depend upon the precise wording of the Contract. In the Scottish decision of *John L. Haley Ltd v. Dumfries & Galoway Regional Council (1998)*, the court held that the minutes of meetings will not constitute a good notice unless the parties specially amend the contract in this respect. *In Steria v. Sibma*, the Judge decided that the notice must emanate from the Contractor, therefore minutes of meeting recorded by a third party will not suffice. And also he decided that the requirement of notice, in respect of delay, did not require that the notice refer to clause number and assessment of delay, but to achieve its purpose it did not have to give notice that relevant circumstances had occurred and secondly that those circumstances had caused delay.

Notice as a condition precedent is *"a condition which makes the rights or duties of the parties depend upon the happening of an event the right or duty does not arise until the condition is fulfilled* [1]

Situation of lack of notice was examined in case of Bremer Handelsellscaft v. Vanden Avenne-Izagem, House of Lord (1978), the Judge said; *"I should have expected the clause to state the precise time within which the notice was to be served and to have made plain by express language that unless the notice was served within the time the seller would lose their right under the clause".*

If the clause is treated as a condition precedent and the contractor failed to take the steps specified under relevant

References

David Chappel, Derek Marshal, Vencent Powel-Smith & Simon cavender, Building Contract Dictionary, 3rd edition, Blackwell Science.

clause, then unless the employer waived the requirements of the clause, the contractor would not be entitled to an extension of time. Scottish case of *City Inn Ltd v. Shepherd Construction Ltd, Outer House (2001)*, was held by Lord MacFadyen and he stated;

"The fact that the contractor is laid under an obligation to comply with clause 13.8.1, rather that merely given an option to do so, does not in my opinion deprive compliance with clause 13.8.1 of the character of a condition precedent to entitlement to an extension of time. None-compliance with the condition precedent may in many situation results in a party to a contract losing a benefit, which he would otherwise have gained, or incurring a liability, which he would otherwise have gained, or incurring a liability, which he would otherwise have avoided. The benefit lost or the liability incurred may not be in any way commensurate with any loss inflicted on the other party by the failure to comply with the condition. The law does not, on that account, regard the loss or liability as a penalty for the failure to comply with the condition. In my opinion, it would be wrong to regard the liquidated damages to which the defendants remained liable because they failed to comply with clause 13.8.1, and thus lost their entitlement to an extension of time, as being a penalty for that failure".

In the Australian case *Turner Corporation Ltd (Receiver and Manager Appointed) v. Austotal Pty Ltd (1998)*, the delay caused by the employer and the contractor failed to serve notice which is a condition precedent. They stated; *"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 on preventing conducting of the other party where it failed to exercise contractual rights which have negated the effect of that preventing conduct".*

The prevention principle infers that a party can not take advantage of its own wrong in enforcing a contract. Gillian Birky and Albert Point have described this principle in their book of Good Practice Guide : Extension of Time, as; *"The prevention principle provides that where one party to a contract has, by any act or omission, prevented the other party from performing a particular obligation under the contract, they cannot insist upon the performance of that obligation by the other party. Therefore, where an employer is responsible for any delay to the project (referred to as an act of prevention') they cannot hold the contract to the previously agreed date for completion unless the contract states otherwise".*

Australian case, *Gaymark Investment Pty Ltd v. Walter Construction Group Ltd (1999) NTSC 143, (1999) 16 BCL 449;* considered that the prevention principle presented *'… a formidable barrier to Gaymark's claim for liquidated damages based on delays of its own making'.* The arbitrator expressly indicated that the employer would have been entitled to liquidated damages but for the fact that in his view the prevention principle defeated the employer's right. The employer sought leave to appeal that the concept of prevention had no application to this delay for which the employer was responsible because the contract provides mechanism for the extension of time. The Judge stated that *"… the contract provides extension of time for delay for which the employer directly or indirectly is responsible but the right to such strict compliance is with notice. In absence of such strict compliance there is no provision for extension of time …".* The prevention principle has prevailed which defeats the notice requirement as a condition precedent. No dates for an extended completion date could be set and Walter Construction was only obliged to complete the works within a reasonable time i.e. *"time is at large".*

Peak Construction (Liverpool) Ltd v. McKinney Foundation Ltd (1970) 1 BLR 111, CA; Lord Salmon LJ said in the Court of Appeal that the contract had contained a power to extend time for the cause of delay, the failure to award an appropriate extension of time under the circumstances would also have left the employer without an enforceable completion date, which would have defeated the liquidated damages provisions.

In *Maindenhead Electrical Services v. Johnsn Controls (1996)*, pursuant to claim clause, any claim for an extension of time had to be made within ten days of the event has first arisen. It was held that a failure to comply with the notice provisions did not render a claim invalid.

By considering the above, the prevention principle applies in the situation where the contract does not provide a remedy of extension of time and contractual mechanism is not adequate for act of prevention by the employer causing delay. In order to protect the employer's right to liquidated damages, extension of time clauses need to provide a remedy for the expected range of act of prevention by the employer.

Sub-clause 1.3 of FIDIC 1999 has unambiguously stated that notices shall be in writing. This sub-clause is not amended by any other clause in the contract in respect of notice to intend to claim extension of time. By considering court decision and phrase of this sub-clause, a minute of meeting would not constitute a delay notice.

In the case of *Gaymark*, the notice requirement was unusual and it required the contractor to overcome a threshold of "burden of proof". In the case of *City Inn*, it appears to have been significant that this clause did not impose an excessive burden on the contractor. There are three types of delay event (1) risk events, (2) instruction for extra works and (3) employer's defaults including breaches of contract. Risk events; in the case of *Humber Oils Terminal Ltd v. Hersent Offshore Ltd, 20BLR 22 (1981)*, a notice was necessary to allow the employer to make decisions which could be of crucial importance for the future implementation of the contract. Instruction for extra works; in the case of *City Inn*, the notice clause required the contractor not to carry out the instruction if he gave notice. The employer's breaches; it is suggested that the prevention principle will prevail. There has been some discussion regarding whether the prevention principle is to be considered a rule of law or rule of contractual construction. In case of *Alghussein Establishment v. Eton College, (1998) 1 WLR 587,* rule of contractual construction would take very clear words indeed for one party to be entitled to obtain a contractual benefit as a result of their own contractual default. In the case of *SMK Cabinets v. Hili Modern Electrics Pty Ltd (1984) VR 391*, even if prevention is considered a rule of law, it is one which can be modified by express contractual consent. In the case of *Koch Hightex GmbH v. New Millennium Experience Company Ltd, 1999, CA*, the court may refuse to hold the condition precedent clause if it would be contrary to commercial sense in a special situation, but held that the clause was not a condition precedent, even though it read. In my view, condition precedent notice requirements would be commercially sensible, reasonable and fair for risk events and instruction for extra works, but it would not be a commercially viable clause for employer's breaches.

However, the position under UAE remains to be tested. Until the law is settle in this area, both the employer and the contractor need to think very carefully to entering enter into contract with clause 20.1 FIDIC 1999.

Bibliography

Case Laws

Gaymark Investment Pty Ltd v Walter Construction Group Ltd (1999) NTSC 143, (1999) 16 BCL 449

Peak Construction (Liverpool) Ltd v McKinney Foundation Ltd (1970) 1 BLR 111, CA

Maidenhead Electrical Services v Johnson Controls (1996)

Bremer Handelsgesellscaft v Vanden Avenne-Izagem, House of Lords (1978)

Turner Corporation Ltd (Receiver and Manager Appointed) v Austotal Pty Ltd (1998)

City Inn Ltd v Shepherd Construction Ltd, Outer House (2001)

John L. Haley Ltd v Dumfries & Gallaway, Regional Council (1998)

Steria v Sibma

Humber Oils Terminal Ltd v. Hersent Offshore Ltd, 20BLR 22 (1981)

Alghussein Establishment v. Eton College, (1998) 1 WLR 587

SMK Cabinets v. Hili Modern Electrics Pty Ltd (1984) VR 391

Books and Articles

Roger Knowles, 150 Contractual Problems and Their Solution, 2nd edition, Blackwell Publishing

David Chappel, Derek Marshall, Vincent Powel-Smith and Simon Cavender, Building Contract Dictionary, 3rd edition, Blackwell Science

Gillian Birkby & Albert Ponti, Oct 2008, Good Practice: Extension of Time, RIBA publication

John Uff, 9th edition, Construction Law, Sweet & Maxwell

Michael Firmstone, Building Contract Casebook, Blackwell

Richard Langham, 1996, Condition and Planning Obligation, CLT Professional Publication

Anthony Speaight & Gregory Stone, 8th edition, Architect's Legal Handbook: Law for Architects, Architectural Press

John B Molloy, Notice Provisions – A Change in Attitude?

Daniel Atkinson, April 2007, Delay and Disruption – Employer Delay and the Right to Liquidated Damages

Keith Pickavance and Wendy Maclaughlin, October 2006, A Little of Time At Large: Proof of a Reasonable Time to Complete in the Absence of Completion Date,

Society of Construction Law
Hamish Lal, April 2002, Extension of Time: The Conflict Between The 'Prevention Principle' and Notice Requirement as Condition Precedent, Society of Construction Law
Nicholas Gould, Making A Claim Under The FIDIC Form Of Contract. What is Clause 20 All About?, Fenwick Elliot Solicitors, United Kingdom, 04 December 2007.
Brodie McAdam, Apportionment and City Inn: Save it for the Scots, COBRA2008, RICS Construction and Building Research Conference, September 2008.

Internet Resources

http://www.westlaw.com
http://www.info4education.com
http://www.scl.org.uk
http://sixthformlaw.inf/
http://www.wikipedia.org
http://www.contractjournal.com
http://www.brewerconsulting.co.uk
http://www.alway-associates.co.uk
http://www.mondaq.com
http://rics.org/cobra

Caparo Industries Plc -v- Dickman and others [1990]

The plaintiffs sought damages from accountants for negligence. They had acquired shares in a target company and, relying upon the published and audited accounts which overstated the company's earnings, they purchased further shares.

Held: The purpose of preparing audited accounts was to assist company members to conduct business, and not to assist those making investment decisions, whether existing or new investors in the company. The auditors did not owe a duty of care to the plaintiffs. Liability for economic loss for negligent mis-statement should be limited to situations where the statement was made to a known recipient for a specific purpose of which the maker was aware, and upon which the recipient had relied and acted upon to his detriment. The law has moved towards attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. The House laid down a threefold test of foreseeability, proximity and fairness and emphasised the desirability of incremental development of the law. The test was if "the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other". Lord Bridge of Harwich: "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."