Delay and Disruption in Construction Contracts

By

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Overview to Clause 23 of PAM 2006

• The requirement of submission of Notice and particulars for extension of time by Contractor under Clause 23.1 and sufficiency of information required from the Contractor under Clause 23.3.

• Time for the Architect to decide on the extension of time under Clause 23.4

• Consideration to be taken into account in assessing extension of time under Clause 23.5, 23.6 and 23.8.

• Notification to Nominated Sub Contractor of Architect’s decision under Clause 23.7.

• Grant of Extension of time after issuance of Non-Completion Certificate under Clause 23.9.

• Review of extension of time after Practical Completion under Clause 23.10.
Is failure of contractor to give the requisite Notice under Clause 23.1 fatal to Application for Extension of Time?

- Clause 23.1(a) stipulates that the Contractor shall give written notice to the Architect his intention to claim for such extension of time together with an initial estimate of the extension of time required supported with all particulars of the cause of delay. Such notice must be given within 28 days from the date of the AI, CAI or the commencement of the Relevant Event, whichever is earlier.

- Clause 23.1(a) further states that “the giving of such written notice shall be a condition precedent to an entitlement of extension of time”.
PURPOSE OF THE NOTICE

• The main purpose of the notice requirement is to warn the Architect as to events delaying the progress of the works to enable the Architect to monitor the situation, assess its’ effect and to make an effective evaluation on the extension of time to be given.

• The Society of Construction Law Delay and Disruption Protocol (2002) stipulates that application for EoT should be made and dealt with as close in time as possible to the delay event that gives rise to the application.
• It is to be noted that the requirement to give notice as a condition precedent to entitlement is also incorporated in Clause 11.7 (a) in relation to claim for additional expenses caused by variation and Clause 24.1(a) in relation to claim for loss and expense caused by matters affecting the regular progress of the works.

• There must be a written notice submitted by the Contractor.

• Minutes of meeting which contain record of the Contractor’s intention to claim for extension of time is not sufficient. In the case of John L Haley Ltd v Dumfries v Galloway Regional Council (1988). It was held that site meeting minutes will not constitute a good notice unless the contract was specifically amended in this respect.
• For the purposes of determining whether the 28 days notice is complied, one must be mindful of Article 7(w) which defines “Day” to mean “Calender day including the weekly day of rest but excluding gazetted holidays in the location where the works is carried out.”

• In computing time, mandatory gazetted holidays must be differentiated from ad-hoc public holidays. Only gazetted holidays are excluded.

• Further, in computing time by calender day, the time must be reckoned by looking at the calender and not by counting days.
• In the case of *Koch Hightex GmbH v The New Mellenium Company Ltd (1999) CILL 1595*, it was held that “it is sometimes open to question whether or not a term is a condition precedent unless it is expressly stated to be such and even then, the Courts will sometimes refuse to hold that a term is a condition precedent if to do so would be contrary to commercial sense in a special situation.”

• In Clause 23.1(a), the requirement to give notice is an expressed condition precedent to a right to claim EoT and it would be difficult to imagine a case to persuade the court or Arbitrator that the condition precedent is contrary to commercial sense having regards to its intended purposes as mentioned above.
• In *City Inn v Shepherd Construction Ltd [2003] ScotCS 146*, the contract provides that if the Architect issued an instruction which the Contractor considered in his opinion would require an extension of time, the Contractor must within 10 working days submit in writing to the Architect an estimate of EoT requested, failing which the Contractor would not be entitled to any EoT.

• The court ruled that the provision is a condition precedent. Therefore, failure to comply with the condition precedent is fatal unless the Architect had waived the requirement.
CASE STUDY 2

- In [NH International (Carribean) Ltd v National Insurance Property Development Co Ltd [2015] UKPC 37](#), the facts of the case are these. The parties entered into a contract for the construction of a new hospital in Tobago which adopted the FIDIC 1999 Red Book. Following disagreements between the parties, the contractor, NH International terminated the contract. Following termination of the contract by the Contractor under condition 16.2, the Engineer certified the value of the work. The Employer cross-claimed against the Contractor and sought set off and deduction of various claims under condition 2.5 against amounts certified. The matter was referred for arbitration.
The learned Arbitrator issued 5 interim awards. In his second interim award, the learned Arbitrator decided that the Contractor had validly terminated the contract pursuant to clause 16.2. In his third interim award, the learned Arbitrator went on to determine the amounts owing by the Employer to the Contractor and also the Employer’s counterclaims.

Clause 2.5 of the conditions of contract provides inter-alia as follows:-

“If the Employer considers itself 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 claim, and shall include substantiation of the amount to which the Employer considers himself to be entitled in connection with the Contract. The Engineer shall then proceed in accordance with sub-clause 3.5 to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor……”

“The amount may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set-off against or make any deductions from an amount certified in a Payment Certificate or to otherwise claim against the contractor in accordance with this sub-clause.”
DECISION OF THE ARBITRATOR

• The Arbitrator rejected the contractor’s contention and held that “clear words are required to exclude common law right of set-off and/or abatement of legitimate cross claims” and that in his opinion the words of condition 2.5 were not clear enough.

• The Arbitrator’s decision was upheld by the court of first instance and by the Court of Appeal in Trindad & Tobago before the matter was brought before the Privy Council.

• The Court of Appeal in upholding the learned Arbitrator’s decision stated that Clause 2.5 prohibits the Employer from setting off any sum against any amount certified in a Payment Certificate. It “does not prevent the Employer from exercising his right of set-off in any other way” and “in particular against amounts that are not certified”
DECISION OF THE PRIVY COUNCIL

The Privy Council took a different view. It was held that 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-off 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 points of Clause 2.5 was meant to be. Further, if an Employer’s claim is allowed to be made later, 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.
The Privy Council express the view that “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 particularized form: that seems to follows from the linking of the Engineer’s role to the notice and particulars. Thirdly, the purpose of the the final part of the clause is to emphasize 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.”

(Emphasis is mine)
• However, it was held that Clause 2.5 does not preclude the Employer from raising an abatement argument – ie. That the work for which the Contractor is seeking a payment was so poorly carried out that it does not justify any payment or that it was defectively carried out so that it is worth significantly less than the contractor is claiming. (See Mellows Architect Ltd v Bell Products Ltd (1997) 58 Con Lr 22).

• The Privy Council remitted the Arbitrator’s award to reconsider the sums which he had allowed the Employer to raise by way of set-off or cross claim and disallow any which (i) were not the subject of appropriate notification and (ii) could not be characterized as abatements.
IMPLICATIONS FROM THIS CASE.

• This case, although decided in the context of the Employer’s right of claim against the Contractor under the FIDIC RedBook, is a highly persuasive authority for the proposition that the Contractor will forfeit right to EoT if the contractual requirements described as condition precedent under Clause 23.1 are not complied with.
CASE STUDY NO.3

- **PKNS Engineering Construction Bhd v Global Inter-Dream (M) Sdn Bhd [2014] 5 MLJ 206 (Court of Appeal)**

**Facts**

- This is a Main Contractor and Sub-contractor dispute involving the construction of a housing project which include the construction of a showroom unit which was scheduled for completion by the end of 6 months after possession of site was given.

- The Main Contractor terminated the Sub-contractor on the basis that the showroom unit had not been completed on time and there was substantial delay in the construction of the project.
The High Court decided that the termination was unlawful as the delay in the project was contributed by the Main Contractor in (i) failing to deliver the materials to site timely; (ii) delay in the confirmation of platform levels and (iii) delay in furnishing the method statement.

However, the Court of Appeal overturned the High Court decision. The Court of Appeal referred to various letters written by the Main Contractor in relation to delays by the Sub-contractor as compared to the schedule and the Main Contractor’s request for the Respondent to submit recovery plans. It was held that “it appears to me that the only response of the Respondent (sub-contractor) to those allegations of delay was essentially to request for an extension of time.”
• The Court of Appeal went on to consider the Learned High Court Judge’s finding that the Main Contractor failed to co-operate with the Respondent Sub-contractor thereby causing delay in the completion of the project. The Court of Appeal interpret this to mean that the Main Contractor ought to have granted the extension of time.

• The Court of Appeal took the view that there were insufficient justification for the Learned High Court Judge to arrive at that conclusion on the grounds that (i) the High Court “failed to appreciate that the first letter from the Respondent Sub-contractor for EoT is dated 23.9.2011, a date some 4 months after the Sub-contractor Respondent had been provided with possession of the work site”. (ii) “that the Respondent Sub-contractor issued the second letter on 2.11.2011, there were only 15 days for the completion of the showroom unit” and that “the Sub-contractor Respondent provided no credible reason as to why it failed to be within the work schedule prior to November 2011.”
• The Court of Appeal ruled that in order for the Respondent Sub-contractor to succeed in its’ claims, it had to prove that the termination of its contract was unlawful because it ought to have been granted an extension of time to complete the project which the Sub-contractor had failed to do so.

• The Court of Appeal was of the view that the Sub-contractor failed to meet the contractual requirements in its application for EoT since “the application for extension of time was not made promptly having regards to the date of completion...The first letter cannot satisfy the proviso since it was issued some four months after the Respondent had been put into possession of the site. The second letter is clearly frivolous since it was issued one day prior to the due date for completion on 17.11.2011. It is also significant that neither letter for the EoT included any documentary evidence justifying the request.”
This case highlights the importance of:

- **(a)** giving prompt and timely notification and/or application for extension of time, in particular when the contract expressly provides that it is a condition precedent to an entitlement or right of claim.

- **(b)** such notification of delay or application for EoT must be substantiated and supported by documentary evidence.

- **(c)** failure to comply within the expressed condition precedent is fatal to the contractor’s claim for extension of time at a later date.
CASE STUDY NO. 3


• The Contractor sued the Employer for amount certified. The Employer resisted the Contractor’s claim on the basis that the Employer was entitled to liquidated damages against the Contractor notwithstanding that the Architect had already issued a certificate of extension of time.

• The Employer contended that the EoT given was bad and invalid for want of compliance with Clause 23 of PAM 1969, namely that the notice of delay sent to the Architect was not sent as soon as the delay became reasonably apparent.
• Clause 23 reads:- “Upon it becoming reasonably apparent that the progress of the work is delayed, the Contractor shall forthwith give written notice of the cause of the delay to the Architect...”

• Peh Swee Chin J (as she then was) disagreed with the Employer’s contention and said “the court was not referred to any evidence and there was none to pinpoint either the time or date when the additional work became apparent but such additional work was ordered by the architect in any event and was for the benefit of the developer and in pursuance of the contract. The Architect, therefore, must have had knowledge of the apparentness of such delays, and the architect therefore require no notice or early notice of such delay brought by himself.”
This case provides authority for the proposition that where delay is caused by Employer’s act of prevention rather than neutral events, the court may not give effect to a mandatory express provision or read down a condition precedent as part of the Contractor’s entitlement to EoT.

In Australian case of Gaymark Investment v Walter Construction Group (1999) NT Supreme Court 143, the contract provides that notice of delay is a condition precedent to EoT. The Australian court upheld the decision of the Arbitrator that due to the acts of prevention by the Employer and in the absence of discretionary power to the Architect to grant EoT notwithstanding failure of Contractor to give notice of delay, time for completion have been set at large.
**CASE STUDY NO.4**

*Top Speed Holding Sdn Bhd v Conlay Construction Sdn Bhd* [2011] 1 LNS 1828

Facts:-

- The Contractor applied for 3 extension of time for the completion of the works which comprised of 18 units of shophouses. The Architect granted extension of time of 14 days and issued the certificate of non-completion. The Employer then deducted LAD calculated from the extended date of completion under EoT granted to the date of CPC.

- In the arbitration, the Contractor contended that it was entitled for longer extension of time than what was granted by the Architect and sought a review and revision of EoT and CNC granted.
• The Arbitrator found in favour of the Contractor, revised the EoT granted and allowed the Contractor to recover back the LAD deducted by the Employer.

• The Employer applied to the High Court to set aside the Arbitrator’s award. It was contended that the Arbitrator had completely failed to consider the meaning and effect of Clause 23 of the contract thereby rendering the very basis of the award invalid. It was contended that the learned Arbitrator failed to appreciate that it is a condition precedent to right of claim for EoT that the contractor must apply for EoT within 1 week of delaying events.
The High Court upheld the learned Arbitrator’s ruling that having considered the conduct of the parties as the fact that the Architect had granted the EoT for 14 days notwithstanding the notice requirement had not been complied with, the Architect had waived the requirement to apply for EoT within 1 week. This is particularly so since the Architect did not raise the issue of the one week requirement at any time.

The High Court find no reason to disturb the Arbitrator’s finding of fact “based on the conduct of the parties of the effect that that requirement albeit mandatory or procedural, was waived as evidenced by the conduct of the parties.” It was held that a condition precedent can be waived either by consent or by conduct of the parties.
• The second ground of attack raised by the Employer was that there was no evidence before the Arbitrator for which he could assess any EoT. The Employer contended that there was no critical path analysis made available and therefore there was no evidence before the Arbitrator on which he could make any finding that the Contractor was entitled to EoT.

• The High Court held that the absence of a critical path analysis does not ipso facto mean there was no evidence before the Arbitrator to assess EoT.

• The High Court accepted that there was sufficient evidence or material before the Arbitrator to assess EoT since (i) the application for EoT together with substantiation by the Contractor was lengthy and comprehensive, and (ii) the evidence of the Contractor’s expert evidence on delay analysis was not rebutted.
The third ground of attack raised by the Employer was that the Architect failed to consider the principles of “concurrent delays” and “overlapping works” in assessing EoT.

The Arbitrator decided that “the fact that the Contractor is already in delay itself is not a sound reason not to grant EoT. The delay in TNB cable laying works did cause serious delay to the project.” The Arbitrator find that the TNB cable laying works executed by others engaged by the Employer which have caused delay entitles the Contractor to EoT under Clause 23.7(viii).

The High Court ruled that this is not a case where there were 2 delays occurring simultaneously or concurrently warranting or requiring the Arbitrator to decide which one of the two was the dominant cause.
The points to be highlighted from the case are as follows:-

(a) The condition precedent on the requirement of notice and particulars may be waived by consent or by conduct of parties.

(b) The Architect and Consultant upon whom employers have relied to take care of contact administration should be vigilant to ensure that contractual requirement and condition precedent have been complied with.

(c) The failure by the Architect and Consultant to raise objection to an application for EoT which does not comply with condition precedent and the act of the Employer in affirming the conduct of the Architect. This may preclude the Employer from relying on the lack of notice as a ground of objection to EoT.
CAN THE ARCHITECT EXTEND THE 28 DAY NOTICE REQUIREMENT?

• Unlike Clause 23.1 (b) which give leeway to the Architect to extend time for the Contractor to submit his final claim for EoT by the words “or within such longer period as may be agreed in writing by the Architect”, there is no such proviso in Clause 23.1(a).

• In the 2008 FIDIC Gold Book conditions for Design, Build and Operate Projects, there is a new proviso which allows the DAB to overrule the 28 days limit with respect to contractor’s claims if the DAB considers that it is fair and reasonable in all the circumstances that the late submission be accepted.
• Clause 23.1 in its' current form does not confer on the Architect a discretion to extend the 28 day limit.

• The Architect should procure the written approval of the Employer should there be justification to extend the 28 day limit.
CASE STUDY NO. 5


• The Contractor alleged that it was required to construct the TNB substation at location A. Subsequently the Architect issued a late instruction to relocate the TNB substation to location B. The Contractor complained that the EoT granted by the Architect was insufficient.

• The High Court set aside the Arbitrator’s award on EoT on the basis that “just because the Contractor Respondent took an extra 357 days from the original completion date to complete the TNB substation and commission the M&E services, it does not automatically mean the relocation of the TNB substation caused 357 days delay to the Contractor Respondent."
• The principle of assessing EoT adopted is that the period of extension to be granted is the **effect** whether actual or estimated that the delaying event had or will have on the **date of completion**. The concern is not so much on the direct consequence of the event on the carrying out of the work, for its effect on the final outcome may be very different, not least because it is the Contractor’s duty to mitigate the effect of a delaying event as far as he reasonably can with his intended level of resources.
• In assessing EoT, concurrent delays must be taken into consideration. The High Court held that the issue of concurrent delay is critical when the evidence shows that the instructions and drawings were provided to the Contractor but he sat on it until one month later to commence the works on TNB substation.

• Furthermore, in assessing EoT, the Architect must take into account “overlapping works” as propounded in the case of Balfour Beatty Building Ltd v Chestermount Properties 62 BLR 1.
• In gist, the principle of “overlapping works” means if the relevant event is a variation instruction and if the variation work can reasonably be conducted simultaneously with the original works without interfering with their progress and are unlikely to prolong practical completion, no EoT is justified.
Thank You