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TIME AND MONEY: TIME BAR CLAUSES

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Introduction

This paper focuses on time bar clauses, with a particular reference to clause 20.1 of FIDIC. The NEC, ICE and JCT are mentioned briefly for comparative reasons, but the focus remains upon the mechanics of FIDIC clause 20.1 under English law. In essence, the key question is whether a time bar clause (or to be more precise the condition precedent within clause 20.1) is effective in disallowing the contractor a claim that might otherwise be legally recognisable.

An overview of clause 20.1 is provided initially, before then comparing it to some other frequently encountered provision. The requirements for the giving of a notice, and the circumstances and nature of the time bar provisions are then considered.

In summary, it is possible under English law for a condition precedent to be effective, so as to preclude a claimant from bringing an otherwise valid claim. However, in practice, the particular circumstances of each situation will need to be considered, not solely because the courts construe these provisions extremely strictly, but also because the actual circumstances of the case might reveal that the time bar provision has not been effective. These circumstances are explored and considered below.

Clause 20.1

Clause 20.1 of FIDIC is divided into nine unnumbered paragraphs (the fifth paragraph containing three numbered sub-paragraphs). First is the requirement for a notice:

> If the Contractor *considers* himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor *shall give notice* to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and *not later* than 28 days after the Contractor *became aware*, or *should have become aware*, of the event or circumstance. [emphasis added]

Then, in the second paragraph comes the bar to the claim:

> 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. Otherwise, the following provisions of this Sub-Clause shall apply. [emphasis added]

The clause 20.1 notice might not be the only notices required of the contractor:

> The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars for the claim, all as relevant to such event or circumstance.

Contemporary records are required:

> The Contractor shall keep such *contemporary records* as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer *may*, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to *keep further contemporary records*. The Contractor shall permit the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer. (emphasis added]

A detailed claim:

> *Within 42 days* after the Contractor *became aware* (or *should have become aware*) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer *a fully detailed claim* which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect: [emphasis added]
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> (a) this fully detailed claim shall be considered as interim;
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> (b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and

(c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

The engineer is to respond:

> *Within 42 days* after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, *the Engineer shall respond* with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time. [emphasis added]

Payments include substantiated claims:

> Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

The engineer must determine any extension of time and additional payments:

> The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determination] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [Extension of Time for Completion], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

Payments are to "take account of" failure, prevention or prejudice:

> The requirements of this Sub-Clause are *in addition* to those of any other Sub-Clause which may apply to a claim. If the Contractor *fails to comply* with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment *shall take account* of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, *unless the claim is excluded under* the second paragraph of this Sub-Clause. [emphasis added]

Clause 20.1: An overview

Clause 20.1 provides a procedure for dealing with the notification of and substantiation of extension of time and additional payment claims, and sets out the mechanics of the decision-making process of the engineer in respect of those claims. Notice is initially required from the contractor "describing the event or circumstances giving rise to the claim". The important time bar provision is that the notice must be given "as soon as

practicable" and then more particularly "not later than 28 days after the Contractor became aware, or should have become aware" of the particular event or circumstance. It is then the second paragraph that sets out the time bar provision. If the contractor fails to give notice within the 28-day period the Time for Completion "shall" not be extended, and no additional payment shall be made. This paper primarily then focuses on the interaction of the requirements of the notice in paragraph 1, and then the time bar provisions in paragraph 2.

However, that is not the end of the matter. Clause 20.1 requires the contractor to submit other notices if and as appropriate under the contract, in accordance with the other provisions within the contract. Further, the contractor is to keep "contemporary records" in order to substantiate the claim. The engineer may also require further record keeping or the keeping of further contemporary records.

There are then some sensible deadlines placed upon the contractor to provide substantiation of the claim, and also again sensible timescales required within which the engineer is to consider and approve or disapprove the claim. The reasonably tight timescale within which substantiation is made and the engineer either accepts or rejects the claim must be welcomed in the modern context of considering delay and additional costs during the course of a project. Problems need not fester until the end of a project. A dispute can crystallise during the course of the project and then be dealt with by the Dispute Adjudication Board, assuming that the contractor or employer refers the matter to the Board. However, the fact remains that FIDIC anticipates and provides for either party to progress matters to a conclusion during the course of a project rather than wait until the conclusion of the project.

Finally, the final ninth paragraph of clause 20.1 provides that any extension of time or additional payment "shall" take account of any failure, prevention or prejudice caused by the contractor to the investigation of the claim. That proviso only applies where the time bar provision in the second paragraph has not excluded the claim entirely.

Notice provisions as a condition precedent

The time bar provisions in the second paragraph of clause 20.1 are intended to be a condition precedent to the contractor's claim for an extension of time and additional money. Some commentators regard the FIDIC provision as one that will exclude the employer's liability to the contractor if the contractor first provides the notice within time.[1] Such provisions can be effective under English law.[2]

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1 See in particular Christopher Seppala (2005) "Contractors claim under the FIDIC Contracts for major works" conference paper given at the International Construction Contracts and Dispute Resolution Conference, Cairo, April.

2 See *Bremer Handelsgesellschaft mbH* v *Vanden Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL, and under English law *City Inn Limited* v *Shepherd Construction Limited* (2002) SLT 781.

However, the English courts have taken the view that timescales in construction contracts are not mandatory, but directory.[3] This is unless the contract clearly states that the party will lose its right, and sets out a specific timescale within which the notice must be served. In other words, it must be possible to identify precisely the trigger point for the notice period and then secondly for the clause to have clearly set out the right that has been lost once the time period has expired.

Contemporary records

The contractor must keep contemporary records in order to substantiate its claim. The requirement for contemporary records in the FIDIC Contracts has been considered by Acting Judge Sanders in the case of *Attorney General for the Falklands Islands* v *Gordon Forbes Construction (Falklands) Limited*.[4] Judge Sanders considered that contemporary records were:

> "original or primary documents, or copies thereof, produced or prepared at or about the time giving rise to a claim, whether by or for the contractor or the employer."

The important point then about contemporary records is that they arise at the time of the claim. The emphasis is very much upon the instantaneous keeping of records which document the events and circumstances at the time of, or certainly very close to the time of, the claim.

Judge Sanders held that it was not possible to avoid the contractual requirement of contemporary records by simply producing witness statements at some point after the event. Those witness statements may of course record the recollections of those who were involved at the time, but they are no substitute for the proper keeping of contemporary records at the time of the claim.

Detailed claim submission

The contractor is then required to submit a "fully detailed claim", together with all supporting documentation, in respect of the time or additional payment claim. Sub-paragraph (b) to the fifth paragraph of clause 20.1 expressly requires the contractor to submit these fully detailed claims at monthly intervals. As the contractor is required to give notice not later than 28 days after the "event or circumstance", then it is arguable that, if the event or circumstance continues, the contractor will need to continue to submit notices each month. This is a somewhat unusual requirement in a construction standard form, but one that may have far-reaching ramifications, especially if the contractor submits some notices but not others. In addition, the contractor may need to provide such further

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3 *Tenloc* v *Errill Properties* (1987) 39 BLR 30, CA, C Croom Johnson LJ.
4 (2003) 6 BLR 280.

particulars "as the Engineer may *reasonably* require".

Once the delaying and financial effect arising from the event or circumstance has come to an end, then the contractor must within 28 days provide a final claim. Once again, the engineer may require further reasonable particulars.

The interim and final claims are to be considered by the engineer. The engineer has 42 days after receipt of the claim, or the further particulars requested, to respond. This period may be extended, but only with the approval of the contractor. The obligation on the engineer is to respond because of the use of the word "shall". The engineer may approve the claim, or if disapproving the claim must then provide detailed comments. If the engineer considers that further information is required, the engineer still has an obligation to respond in respect of the principles of the claim within the 42-day (or other agreed) period.

This approach is supported by clause 1.3, which requires the engineer not to unreasonably delay the determination of claims.

The "take account of" provision

The final ninth paragraph of clause 20.1 expressly provides that a failure to comply with clause 20.1 "shall" be taken into account in respect of any claim made by the contractor. If a failure of the contractor means that a "proper investigation" of the claim has been prevented or prejudiced, then any extension of time or additional payment shall take account of the extent of that failure. This is unless the claim has already been barred as a result of the operation of the second paragraph of clause 20.1.

The time bar provision encourages the contractor to put the engineer on notice of delays or requests for additional payments. This further provision, at paragraph 9 of clause 20.1, encourages the contractor to promptly provide a detailed claim, together with supporting documentation, rather than simply serve notices and then work out the detail of its claim at some later date. The emphasis therefore of clause 20.1 is very much to raise claims during the course of the contract, and also, importantly, to work out the detail of those claims, evaluate them, and certify them (or reject them) during the currency of the contract.

The requirement of the contractor to provide a detailed claim within a 42-day period is not expressed as a condition precedent, unlike the initial notice identifying the event or circumstance or as a footnote.[5] Arguably, if the contractor submits, in good time, notices of events or circumstances giving rise to additional time or money but then fails to provide claims, or properly detailed claims and substantiation in accordance with paragraph 5 of

[5] *London Borough of Merton* v *Stanley Hugh Leach Limited* (1985) 32 BLR 51.

clause 20.1, then paragraph 9 of clause 20.1 allows those effects to be taken into account. For example, if a delay occurs that would have been avoidable, the contractor may still not receive an extension of time. If the employer has lost the opportunity to take some avoiding action that could properly have been instigated, then that may also be taken into account either in the award of an extension of time or in the calculation of additional money.

Crystallising a "dispute"

It may be that the crystallisation of a dispute does not occur until the engineer's determination under clause 3.5. However, this factor must be considered in the light of the obligation under clause 1.3, and the approach of Mr Justice Jackson in the case of *Amec Civil Engineering Ltd* v *The Secretary of State for Transport.*[6] Amec brought proceedings to challenge the jurisdiction of an arbitrator. The parties had entered into a contract incorporating the ICE Conditions, 5th Edition, and the engineer had made a decision in relation to a dispute pursuant to clause 66 of those Conditions.

One of the issues to be decided was whether there was a dispute for the purposes of clause 66 of the ICE Conditions. Reviewing the arbitration and adjudication judicial authorities, the Judge set out seven propositions:

> From this review of the authorities I derive the following seven propositions:
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> 1. The word "dispute" which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.
>
> 2. Despite the simple meaning of the word "dispute", there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.
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> 3. The mere fact that one party (whom I shall call "the claimant") notifies the other party (whom I shall call "the respondent") of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.
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> 4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the

[6] [2004] EWHC 2339 (TCC).

inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

6. If the claimant imposes upon the respondent a deadline for responding to the claim, that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reasons for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.

7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication.

Following a meeting on 20 September, where certain defects were discussed, a letter was sent on 2 October setting out the nature of the defects. The fact that no immediate response was required did not prevent this letter being a claim. In fact by this date, Amec had decided to notify its insurers.

A further letter was sent on 6 December, this time not only imposing a deadline for a response of 11 December, but in addition seeking an admission of liability. By this time, the general positions for all parties had been well canvassed such that in the view of the Judge it was inconceivable that such admission would be made.

Therefore, perhaps surprisingly at first blush, the letter of 6 December requiring a response by 11 December, did in fact set a reasonable deadline. The deadline was imposed for a good reason, namely that the limitation period was about to end. The fact that the deadline would not cause Amec any difficulty was clear. It was self-evident that Amec would not be prepared to admit liability for massively expensive defects on a viaduct.

Amec went on to argue that an engineer making a decision under clause 66 is required to abide by the principles of natural justice. The Judge disagreed. He felt there was a great difference between an engineer's decision under clause 66 and an adjudicator's decision under the HGCRA. The duty on the engineer was slightly different, namely to act

independently and honestly and here he had. Interestingly on this point, the Judge gave leave to appeal.

Judgment was given on the appeal in March.[7] The appeal focused specifically on the meaning of "dispute" pursuant to clause 66 of the ICE Conditions of Contract in the context of arbitration. Nonetheless, the Court of Appeal considered adjudication cases dealing with the issue of whether a dispute had formed.

Amec argued that the Secretary of State's notice of arbitration was invalid. Approximately six months before the six-year limitation period was about to expire, defects became apparent to the viaduct that had been constructed by AMEC. Twelve days before the limitation period was about to expire the Highways Agency referred a dispute (as to whether the defect was caused by the roller bearings) to the engineer in accordance with clause 66. Seven days later the engineer gave a decision stating that Amec had installed bearings that were not in accordance with the contract. The following day the Secretary of State gave notice of arbitration. These timescales were short, and AMEC had not accepted nor denied liability. AMEC argued that no dispute existed, and therefore no valid engineer's decision had been given and as a result there was nothing to be referred to arbitration.

The Court of Appeal held that in considering whether there was a "dispute or difference", all of the circumstances including the impending end of the limitation period needed to be considered. Meetings had taken place many months before and it was apparent that Amec did not accept responsibility for the structural deficiencies. The engineer under clause 66 must act independently and honestly, but did not need to comply with the rules of natural justice. As a result his decision was not procedurally unfair and the arbitration notice was valid.

The move towards time-bar provisions

Standard construction contract forms have not traditionally included time-bar provisions. Many standard forms required a notice to be given within a specified period. The pre-1999 FIDIC forms did not include a time bar. The old JCT formulation required a notice to be given within a "reasonable time". This requirement was considered in the case of *London Borough of Merton* v *Hugh Leach*, where it was said:[8]

> [The Contractor] must make his application within a reasonable time: It must not be made so late that, for instance, the architect can no longer form a competent opinion or satisfy himself that the contractor has suffered the loss or expense claimed. But in considering

[7] *Amec Civil Engineering Limited* v *Secretary of State for Transport*, 17 March 2005, Court of Appeal, May LJ., Rix LJ, Hooper LJ. [2005] EWCA Civ 291.

[8] (1985) 32 BLR 51

> whether the contractor has acted reasonably and with reasonable expedition it must be borne in mind that the architect is not a stranger to the work and may in some cases have a very detailed knowledge of the progress of the work and the contractor's planning.

It is therefore unusual for a meritorious claim to be defeated merely because of a lack or a lateness of a notice. Further support for this proposition is often gained from the case of *Temloc* v *Errill Properties*[9] in which it was recognised that prescribed timescales were merely indicative and did not have to be absolutely complied with. However, in the case of *Turner Page Music* v *Torres Design*[10] the judge seems to have taken it for granted that the contractor's failure to provide a written application was fatal to his claim. This approach has not been followed.

The more recent JCT 2005 formulation required a notice to be given "forthwith".[11]

NEC3 has adopted a similar strict regime to FIDIC for contractors in respect of Compensation Events, in 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
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> - the *Contractor* believes that the event is a compensation event and
> - the Project Manager has not notified the event to the Contractor.
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> 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.

Clause 61.3 is apparently a bar to any claim, should the contractor fail to notify the project manager within eight weeks of becoming aware of the event in question. The old NEC2 formulation of a two-week period for notification has been replaced with an eight-week period, but with potentially highly onerous consequences for a contractor. This clause must also be read in conjunction with clause 60.1(18), which states that a Compensation Event includes:

> A breach of contract by the *Employer* which is not one of the other Compensation Events in this contract.

Clause 61.3, therefore, effectively appears to operate as a bar to the contractor in respect of any time and financial consequences of any breach of contract if the contractor fails to notify.

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9 (1987) 39 BLR 30 CA
10 (1997) CILL 1263 (at para 108)
11 See for example clause 2.24.1 of JCT Design and Build Contract 2005.

Impact of the timebar

The courts have for many years been hostile to such clauses. In more modern times, there has been an acceptance by the courts that such provisions might well be negotiated in commercial contracts between businessmen.[12] The House of Lords case of *Bremer Handelsgesellschaft mbH* v *Vanden Avenne Izegem PVBA*[13] provides authority for the proposition that for a notice to amount to a condition precedent it must set out the time for service and make it clear that failure to serve will result in a loss of rights under the contract. This seems relatively straightforward. However, it may not be possible for an employer to rely upon *Bremer* in circumstances where the employer has itself caused some delay. So *Bremer* is a case where a party seeking to rely upon the condition precedent was not itself in breach in any respect. An employer may, therefore, be in some difficulty when attempting to rely upon *Bremer* in circumstances where the employer has caused the loss, or a proportion of the loss.

The courts also interpret strictly any clause that appears to be a condition precedent. Not only will the court construe the term against the person seeking to rely upon it, but it will require extremely clear words in order for the court to find that any right or remedy has been excluded. However, an alternative way of approaching such provisions was highlighted in the Scottish case of *City Inn Ltd* v *Shepherd Construction Ltd.*[14]

Here the Court of Session considered the requirement on the contractor to comply with a time-bar clause (in this case an amended JCT80 Private with Quantities).[15] The contractor had been awarded (by the architect and an adjudicator) a total nine-week extension of time. The employer argued that no extension should have been granted and that liquidated damages should be payable, since the contractor had failed to comply with the time-bar provisions. Clause 13.8.1 provided:

> Where, in the opinion of the Contractor, any instruction, or other item, which, in the opinion of the Contractor, constitutes an instruction issued by the Architect will require an adjustment to the Contract Sum and/or delay the Completion Date the Contractor shall not execute such instruction (subject to clause 13.8.4) unless he shall have first submitted to the Architect, in writing, within 10 working days (or within such other period as may be agreed between the Contractor and the Architect) of receipt of the instruction details of [its initial estimate, requirements in respect of additional resources and the length of any extension of time].

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12 See for example *Photo Production Ltd* v *Securicor Ltd* [1980] AC 827, HL.

13 *Bremer Handelsgesellschaft mbH* v *Vanden Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109, HL.

14 *City Inn Ltd* v *Shepherd Construction Ltd* 2002 SLT 781, [2001] SCLR 961, Outer Hse, Ct of Sess; then appealed to the Inner Hse (successful on the point that failure to use the procedures of clause 13.8 was not itself a breach of contract, so the clause could not be treated as imposing a penalty), [2003] BLR 468.

15 The relevant part of Clause 13.8 was 13.8.5: "If the Contractor fails to comply with one or more of the provisions of Clause 13.8.1, where the Architect has not dispensed with such compliance under 13.8.4, the Contractor shall not be entitled to any extension of time under Clause 25.3."

Clause 13.8.5 further provided:

> If the Contractor fails to comply with any one or more of the provisions of clause 13.8.1, where the Architect has not dispensed with such compliance under clause 13.8.4, the Contractor shall not be entitled to any extension of time under clause 25.3.

In the Inner House, the Lord Justice Clerk applied the timebar as it stood:

> if he [the contractor] wishes an extension of time, he must comply with the condition precedent that clause 13.8 provides for these specific circumstances. But if the contractor fails to take the specified steps in clause 13.8.1, then, unless the architect waives the requirements of the clause under 13.8.4, the contractor will not be entitled to an extension of time on account of that particular instruction.[16]

The Inner House interpreted the time-bar clause as giving an option, so not imposing any obligation on the contractor; which also disposed of the contractor's argument (successful in the Outer House) that the time bar was a penalty, thus unenforceable.

One important distinction between the drafting of the provision in *City Inn* and FIDIC is that the contractor in *City Inn* did not have to carry out an instruction unless he had submitted certain details to the architect. FIDIC, by contrast, provides a bar to the bringing of a claim simply for failure to notify the engineer in time about an event or circumstance that might impact on the Time for Completion or lead to additional payments. A specific instruction might not have been given; and the contractor might not be prompted to respond in the absence of this.

Awareness

Under clause 20.1, the contractor needs to have "become aware ... or should have become aware" in order to notify the engineer. There will no doubt be arguments about when a contractor became aware or should have become aware of a particular event, and also the extent of the knowledge in respect of any particular event. Ground conditions offer a good example.[17] Initially, when a contractor encounters ground conditions that are problematic, he may continue to work in the hope that he will overcome the difficulties without any delay or additional costs. As the work progresses, the contractor's experience of dealing with the actual ground conditions may change, such that the contractor reaches a point where he should notify the project manager. The question arises: should the contractor have notified the project manager at the date of the initial discovery, rather than at the date when the contractor believed that the ground conditions were unsuitable?

The answer must be, in line with the words of FIDIC, that the contractor should give notice when he encounters ground conditions that an experienced contractor would have

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16 [2003] BLR 468, paragraph [23].
17 See cause 4.12 Unforeseen Physical Conditions

considered at the Base Date to have had only a minimal chance of occurring and so it would have been unreasonable to have allowed for them in the contract price, having regard to all of the information that the contractor is to have taken into account under the contract.

Who needs to be "aware"?

A further question arises in respect of clause 20.1: who precisely needs to be "aware"? Is it the person on site working for the contractor, the contractor's agents or employees, or is it the senior management within the limited company organisation of the contractor? Case law suggests that it is the senior management of the company, not merely servants and agents.[18]

The starting point is the general argument that all corporations and authorities have a legal identity and act through the individuals who run, are employed by or are agents of that organisation. A corporation or authority is a legal person, and is therefore regarded by law as a legal entity quite distinct from the person or persons who may, from time to time, be the members of that corporation.

The position is simplified for a person dealing with a company registered under the Companies Act 1985. A party to a transaction with a company is not generally bound to enquire as to whether it is permitted by the company's memorandum or as to a limitation on the powers of the board of directors to bind the company. However, if the contract is to be completed as a deed, then the contract must be signed by either two directors or a director and the company secretary.

Generally, directors and the company secretary have, therefore, authority to bind the company. If a person represents that he has authority, which he does not possess, but in any event induces another to enter into a contract that is void for want of authority, then that person will be able to sue for breach of want of authority. However, these propositions relate to the formation of contracts, rather than the conduct of the contract and in particular the identification of who within the company needs to have the knowledge required in order to make a decision whether a notice should be served. While then an agent of a company can bind a company, that agent must still act within the scope of their authority when taking actions under a contract.

So who then within the company must be "aware" for the purposes of clause 20.1? Identifying the "directing mind" within a company is the key to ascertaining who within a company has the necessary quality to be "aware", as explained by Denning LJ (as he then was) in *HL Bolton (Engineering) Co Ltd* v *TG Graham & Sons Ltd*:

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[18] E.g. *HL Bolton (Engineering) Co Ltd* v *TG Graham & Sons Ltd* (see note 19 and linked main text).

> Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company.[19]

The intention of the company is therefore to be derived from the directors and the managers, rather than those that might be carrying out the work. The company's intention will, therefore, depend upon: the nature of the matter that is being considered; the position of the director or manager; and other relevant facts of the particular case. This principle has been affirmed in subsequent cases, in particular by Lord Reid in *Tesco Supermarkets Ltd* v *Nattrass* in the House of Lords:

> Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation, he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn.[20]

Lord Reid confirms the approach of Denning LJ, but notes that it may be possible for the directors or senior managers to delegate, in this instance, fundamental decision-making processes required during the course of the running of a construction contract. In the absence of such delegation, it is arguable that those who must be "aware" are the directors and managers who constitute the "directing mind" of the company.

The prevention principle

The prevention principle may also apply in respect of any employer's claim for liquidated damages. If the contractor does not make a claim, then the engineer cannot extend the Time for Completion under FIDIC, and so an employer will be entitled to liquidated damages. However, those liquidated damages could be in respect of a period where the employer had caused delay. The employer can only recover losses for delay in completion for which the employer is not itself liable.

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19 *HL Bolton (Engineering) Co Ltd* v *TG Graham & Sons Ltd* [1957] 1 QB 159, CA, page 172.

20 *Tesco Supermarkets Ltd* v *Nattrass* [1972] AC 153, HL, page 171; applied in *KR and others* v *Royal & Sun Alliance plc* [2006] EWCA Civ 1454, [2007] Bus LR 139.

It may be that some will argue that time has thus been set "at large". If an employer is unable to give an extension of time (on the basis that the contractor did not give a clause 20.1 notice) that would otherwise be due, then the contractor may argue that it is relieved of the obligation to complete the works by the specified date. Arguably, where a delaying event has been caused by the employer and there is ordinarily an obligation on the employer to give an extension of time so as to alleviate the contractor from liquidated damages, but the employer is unable to do so, then time will become at large.[21] It must be remembered that the purpose of the extension of time provisions is quite simply to allow the employer the benefit of the liquidated damages provisions where the contractor is in delay, but only where the employer has not caused any of that delay.

The English legal principle of prevention means that an employer cannot benefit from its breach. If, therefore, there is concurrency of delay and the employer refuses to award an extension of time (thus alleviating the contractual liquidated damages), then the contractor may be freed from those liquidated damages in any event.

It might also be said that the true cause of this loss was not the employer, but the contractor's failure to issue a notice complying with clause 20.1. Until recently, judgments such as they were had been divided. The Australian case of *Gaymark Investments Pty Ltd* v *Walter Construction Group Ltd*[22] follows the English case of *Peak* v *McKinney*,[23] but goes further, holding that liquidated damages were irrecoverable when the contractor had failed to serve a notice in time; the completion date could not be identified, since time had become "at large". The alternative approach of *City Inn* suggests a different conclusion: the straightforward application of the timebar.

The key issue in a case like this is: whose acts or omissions under the contract, or breaches of contract, are the events that lead to the loss? Regardless of any acts, omission or breaches of the employer, can the loss be treated as caused by the contractor not having received an extension of time, having failed to issue a clause 61.3 notice in time?

This issue was recently considered in *Multiplex Constructions (UK) Ltd* v *Honeywell Control Systems Ltd (No. 2).*[24] Multiplex was the main contractor building the new national stadium at Wembley and Honeywell was one of the sub-contractors. The claimant in the action was Multiplex, and Honeywell the defendant. The key question in this case was whether time was set "at large" under Honeywell's sub-contract. In other words, had Honeywell's contractual obligation to complete within 60 weeks (subject to any extensions of time) fallen away and been replaced with an obligation to complete within a reasonable time and/or reasonably in accordance with the progress of the main contract works?

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21 See *Peak Construction (Liverpool) Ltd* v *McKinney Foundations Ltd* (1970) 1 BLR 114, CA.

22 *Gaymark Investments Pty Ltd* v *Walter Construction Group Ltd* (2000) 16 BCL 449, Supreme Ct NT.

23 See note 21.

24 *Multiplex Constructions (UK) Ltd* v *Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC), [2007] BLR 195.

Clause 11 required the sub-contractor to carry out and complete works in accordance with the sub-contract. In particular, the sub-contractor acknowledged, at clause 11.1.2, that "the Contractor could suffer loss and/or expense and/or damage if such time related matters [were] not complied with".

The key notice (or time-bar) provisions were clauses 11.1.3 and 11.2.1:

> 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 pursuant to statute to any entitlement to an extension of time under this clause 11.
>
> 11.2.1 If and whenever it becomes apparent or should have become apparent to an experienced and competent Sub-Contractor that the commencement, progress or completion of the Sub-Contract Works or any part thereof is being or is likely to be delayed, the Sub-Contractor shall forthwith give written notice to the Contractor of the material circumstances including, in so far as the Sub-Contractor is able, the cause or causes of the delay and identify in such notice any event which in his opinion is a Relevant Event.

Multiplex sought a declaration from the English Technology and Construction Court that, on the true construction of the sub-contract, clause 11 provided a mechanism for extending the period for completion of the sub-contract works in respect of any delay caused by an instruction under the contract. In particular, that such an instruction would not put time at large. In other words, the contract provided a mechanism for extensions of time in order to fix a new completion date, such that any damages could not be said to be a penalty.

Several authorities, some well known, were cited and discussed, in particular *Holme* v *Guppy*,[25] *Dodd* v *Churton,*[26] *Peak* v *McKinney,*[27] and *Trollope & Colls Limited v North West Metropolitan Regional Hospital Board.*[28] Jackson J derived three propositions from these:

> (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 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.

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25 *Holme* v *Guppy* (1831) 3 M & LJ 387.
26 *Dodd* v *Churton* [1897] 1 QB 562, CA.
27 See note 21.
28 *Trollope & Colls Ltd* v *North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, HL.

(iii) In so far as the extension of time clause is ambiguous, it should be construed in favour of the contractor.[29]

Honeywell argued that there was no power to award an extension of time in respect of a direction given under the variations provisions of the contract. This, they argued, meant that a direction would lead to time being rendered at large. The judge did not accept that proposition. He concluded that directions issued under the variation clause 4.2 may have no effect at all upon the duration of the works. On the other hand, those that did have an effect would be variations under clause 4.2 and then would be recognised under the extension of time provisions.

Honeywell also argued that Multiplex failed to review the overall programme or consider and properly award extensions of time. Once again, these did not render the extension of time provisions inoperative.

Relying on the Australian decision of *Gaymark*,[30] Honeywell argued that a failure to comply with the clause was sufficient to put time at large. In that case, the contract provided that the contractor would only obtain an extension of time if notices had been submitted under clause 19.2 of the contract. That in turn relied upon *Peak Construction* v *McKinney*,[31] in which the House of Lords said that if an employer wished to recover liquidated damages because a contractor had failed to complete on time, then the employer could not do so where any of the delay was due to the employer's own fault or breach of contract. The extension of time provisions in a contract should therefore provide for an extension of time in respect of any fault or breach on the part of the employer. *Gaymark*[32] held that the inability to give an extension of time because of a contractor's failure to provide a notice meant that time was set at large; by contrast, in *City Inn*[33] the court concluded that the breach was not the employer's inability to grant an extension of time, the loss having instead been caused by the contractor's failure to serve an appropriate notice or indeed apply their minds to whether a notice was required.[34]

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29 Note 24, paragraph [56].
30 See note 22 and linked main text.
31 See note 21.
32 See note 22.
33 See note 14.
34 On appeal, the Inner House held that Shepherd was not in breach of contract in failing to issue notices under clause 13. However, if Shepherd had issued notices, then it might have been relieved of liability under the liquidated damages clause 23 (see last sentence of paragraph [25] of the judgment note 14). As a result Shepherd was not "in breach of" clause 13, but had incurred liability under clause 23.

Jackson J also considered the use of "the prevention principle" in *Gaymark*,[35] concluding that it was not clearly English law and that the approach of *City Inn*[36] was to be preferred. He thought that there was considerable force in Professor Wallace's criticisms of *Gaymark*, noting that contractual terms requiring a contractor to give prompt notice of delay serve a useful 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.[37]

He concluded:

> If the facts are that it was possible to comply with clause 11.1.3 that Honeywell simply failed to do so (whether or not deliberately), then those facts do not set time at large.[38]

Honeywell had a further argument in respect of the effect of an earlier settlement agreement between Multiplex and the employer Wembley National Stadium Ltd, but Jackson J concluded that this did not entitle Honeywell to any relief. In the absence of arguments drawn from equity, it seems therefore that there is a high chance that the timebar in FIDIC clause 20.1 will be enforced as a condition precedent.

Equity

The contractor wishing to make a claim for additional time or additional payment, like under a more traditional standard form, may be able to rely upon the equitable principles of waiver and/or estoppel.[39] It may be that the contractor does not serve a formal notice because, by words or conduct, the employer (or indeed engineer) represents that they will not rely upon the strict eight-week notice period.

The contractor would also need to show that he relied upon that representation and that it would now be inequitable to allow the employer to act inconsistently with it. Further, what might be the position if the contract contained a partnering-styled amendment such

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35 See Ellis Baker, James Bremen & Anthony Lavers, *The Development of the Prevention Principle in English and Australian Jurisdictions*. [2005] ICLR 197, page 211; also I N Duncan Wallace, *Liquidated Damages Down Under: Prevention by Whom?* (2002) 7:2 Construction and Engineering Law 23, where Duncan Wallace holds that *Gaymark* represents "a misunderstanding of the basis of the prevention theory" and "a mistaken understanding of the inherently consensual and interpretative basis of the prevention principle". In particular he says of *Gaymark*: "Neither Bailey J nor the arbitrator discussed or noted the practical need which justifies a strict notice requirement in all EOT matters (due to the Contractor's more intimate knowledge of its own construction intentions and so the critical path significance of an EOT event and also to give the owner an opportunity as, for example, by withdrawing an instruction or varying the work to avoid or reduce delay to completion of which he has been notified). Nor was there any recognition that, precisely for these reasons, strict notice would be even more justifiable where random acts or instructions of the owner or his Superintend could later be said to be acts of prevention".

36 See note 14.

37 See note 24, paragraph [103].

38 See note 24, paragraph [105].

39 See *Hughes* v *Metropolitan Railway* (1877) 2 App Cas 439, HL.

as the requirement for the parties to act "in a spirit of mutual trust and co-operation"? It would be somewhat ironic if a contractor did not submit contractual notices, in the spirit of "mutual trust and co-operation", but the employer at some much later date relied on the strict terms of clause 20.1.

Conclusion

The time-bar provisions in clause 20.1 of FIDIC 1999 are valid under English law. However, the success of their operation will vary depending on the circumstance of the case. Clauses of this nature are becoming more prevalent in other standard forms, and also in amendments to standard forms and bespoke contracts.

5 October 2007

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Appendix 20.1 Contractor's Claims

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

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. Otherwise, the following provisions of this Sub-Clause shall apply.

The Contractor shall also submit any other notices which are required by the Contract, and supporting particulars of the claim, all as relevant to such event or circumstance.

The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer.

Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

(a) this fully detailed claim shall be considered as interim;

(b) the Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and

(c) the Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determination] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [Extension of Time for Completion], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

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5 October 2007