



## LEGAL BRIEFING

### *WW Gear Construction Ltd v McGhee Group Ltd* [2010] EWHC 1460 (TCC), Mr Justice Akenhead

#### *The Facts*

Gear Construction as employer engaged McGhee as a ground work contractor to carry out excavation and related work for the development of the Westminster Plaza Hotel in the middle of a roundabout opposite Westminster Bridge in London. The contract incorporated the JCT Trade Contract terms (TC/C) 2002 edition with bespoke amendments. McGhee's application 18 included a loss and expense application for £1,555,919.89. Disputes arose in relation to this and Gear referred these matters to adjudication. The adjudicator decided mostly against Gear, and Gear was not satisfied with the decision, but did not challenge the enforceability of the decision.

#### *The Issue*

Clause 4.21 as amended related to direct loss and expense and required the contractor, within 2 months of it becoming reasonably apparent to him, to make in writing a formal "fully documented and costed in detail" application. It also said that this was a condition precedent to the contractor's entitlement.

The issue was whether this was a true condition precedent, which the contractor was required to comply with.

#### *The Decision*

The Judge held that this was a condition precedent. The contractor's compliance with it was a precondition to the recovery of loss and expense under clause 4.21. The employer, Gear, was therefore entitled to a declaration that McGhee was obliged to comply with the preconditions in clause 4.21 before it could claim loss and expense.

#### *Comment*

Conditions precedent are now being used widely in construction contracts. They are in effect "time bar" clauses. If a party fails to comply with the requirements of the clause (to submit a claim within a certain time) then that party loses the right set out in the clause. So, in this case if the contractor failed to submit a fully costed and substantiated claim within 2 months of the time when the loss and expense was or should have been apparent to the contractor then it lost its right to claim. The right is lost even if the contractor has incurred those costs and would under normal circumstance have a valid claim. A clause like this is included in the NEC 3rd edition, and so contractors should take care to comply with these clauses either in standard forms or in amendments to standard form contracts.

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