

Client Alert

Construction and Engineering Disputes

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Take No Notice and Wa(i)ve Goodbye to Claims

Takeaways From a Recent English Court Case on Notice Obligations

Many construction contracts provide that the contractor's entitlement to an extension of time and/or additional cost is conditional upon the service of a notice within a stipulated time. Contractors and employers alike will be familiar with these notice provisions or 'time bars', which are contained in most standard and bespoke construction contracts.

Some construction contracts, including for example the 2017 FIDIC suite of contracts, also provide that the employer's entitlement to liquidated damages for delay is conditional upon the service of a similar notice.

If such notice provisions contain a conditional link between the obligation to provide notice and the entitlement to relief, English law will generally enforce them as a condition precedent. This means that the parties will be held to the serious consequences of not providing a notice in accordance with the contract and will lose their right to claim relief.

Issuing contractual notices on time is therefore vital to good contract management and preservation of the parties' rights. Yet, parties continue to ignore this important obligation which contributes to disputes. In 2021 and 2022, incomplete and unsubstantiated claims, including lack of contractual notices, was amongst the top three causes of construction disputes globally.¹

The status of contractual notices as a condition precedent, as well as the consequences of not complying with such condition precedent, were recently considered in the English law case of *Tata Consultancy Services Limited v Disclosure and Barring Service* [2024] EWHC 1185 (TCC). Importantly, the Technology and Construction Court considered a point on which there is limited case law to-date: whether the parties waived the



condition precedent by their conduct and therefore retained their entitlement even if they did not serve the contractual notices.

BACKGROUND

Tata Consultancy Services Limited (“TCS”) was retained by the Disclosure and Barring Service (“DBS”) to build a new software system to modernise DBS’ processes. However, the completion of the modernisation project was delayed by around 8-10 months. TCS blamed DBS and its other providers who were responsible for the technical infrastructure for the delays, while DBS blamed TCS due to problems with TCS’ own development and testing.

TCS brought a claim in the Technology and Construction Court for underpayment of service charges and for costs associated with delay. DBS counterclaimed liquidated and unliquidated damages associated with delay, as well as costs associated with defects.

Under the contract, TCS was required to notify DBS “as soon as reasonably practicable” after becoming aware of any delay or potential delay. TCS also had to submit a “draft Exception Report” within 5 working days of such notice, detailing the reasons for the delay, actions to avoid or mitigate the delay, consequences of the delay, and whether it was caused by DBS and how. The contract expressly stated that TCS would have no entitlement to compensation for delay unless it fulfilled both of the above obligations.

DBS was also required to “promptly” issue a Non-Conformance Report to TCS if a contractual milestone was not achieved, setting out the reasons for it not being achieved and any consequential impact on other milestones. DBS would then have the option to levy liquidated damages for delay. This notice obligation did not, however, include the same wording as the contractor’s notice obligation regarding loss of entitlement to liquidated damages if no notice was issued.

As one of the preliminary points in the dispute, the court had to decide whether these notice provisions were a condition precedent and whether the parties lost their entitlement since they admitted that neither served the requisite notice on time or at all.

WERE THE NOTICE PROVISIONS A CONDITION PRECEDENT?

Given the clear wording of TCS’ notice obligations and entitlement to relief, which contained conditionality and expressly set out the consequences of not providing a notice and a draft Exception Report, the court understandably held that the obligation to provide both was a condition precedent.

Perhaps a bit more surprisingly, the court also held that the notice obligation on DBS was a condition precedent. This was on the basis that the clause contained both “if” and “then”, which linked the entitlement to liquidated damages to the obligation to issue a Non-Conformance Report. The court recognised that the notice obligation on the employer was worded differently than that on the contractor, in particular it did not include the sentence regarding loss of entitlement if notice was not provided. While this could suggest that the notice provision was not a condition precedent, the court stated that this was outweighed by (i) the symmetry in making both parties’ entitlement in relation to delay conditional on a notice or a report and (ii) the fact that a Non-Conformance Report served a useful purpose, enabling the contractor to know where it stands and to rectify its default.



DID TCS AND DBS LOSE THEIR ENTITLEMENT DUE TO THEIR FAILURE TO COMPLY WITH THE CONDITION PRECEDENT?

While TCS admitted that it did not issue a draft Exception Report on time and on a strict contractual basis would have therefore lost its entitlement to relief, it argued that the parties' conduct meant that TCS did not have to issue a draft Exception Report within 5 working days and DBS could not rely on the notice provisions in its defence of TCS' claim. In short, TCS relied on estoppel by convention or conduct to get past its failure to comply with the condition precedent.

Estoppel by convention or conduct is often considered as a potential argument in construction disputes but is infrequently argued and rarely established. In the context of notices, it would require the existence of a shared and communicated common assumption between both parties that a notice required by the contract was not in fact required, with this assumption relied upon by one party in the dealings with the other, so that it would now be unjust or unconscionable for the other party to revert to the true contractual position.

In this case, the court considered all of the parties' conduct, including their negotiations in an effort to resolve the dispute commercially, to determine whether there was such a shared and communicated common assumption. The evidence showed that:

- The parties focused on re-planning, which in their mind superseded the importance of a draft Exception Report;
- The parties collaborated on preparing an effective plan for completion of the project and information from that plan was necessary for TCS to be able to prepare a draft Exception Report that complied with the contract, including, for example, with details on avoiding or mitigating the delay;
- The parties proceeded on the basis that a draft Exception Report was still to be produced, but TCS' entitlement (if any) would be determined on substantive merits;
- The parties were in open commercial negotiations in relation to the delay and DBS did not suggest in the negotiations, or even suggest internally as a negotiation strategy, that TCS had no entitlement to relief because it did not serve the draft Exception Report within 5 working days;
- DBS did not at any time assert that TCS would not be entitled to relief because it had not served the draft Exception Report within 5 working days, and DBS had not reserved its position in any way;
- DBS was at one point prepared to offer an extension to the draft Exception Report, but the parties failed to agree on the length of that extension;
- TCS did not internally discuss the condition precedent because it was objectively obvious that TCS considered it had a de facto extension to the service of the draft Exception Report as a result of DBS' conduct; and
- In reliance on DBS' conduct, TCS expended resources and committed to negotiating a commercial deal, and acted to its detriment in that it was denied the opportunity to decide how it might respond when faced with continuing and accruing costs if it had known that DBS had no intention of paying any sums due to a contractual notice argument.

In short, the court concluded that the condition precedent *"was simply not a live point"* and both parties worked on the basis that the requirement to provide a draft Exception Report within 5 working days had fallen away. As a result, DBS was estopped from relying on the condition precedent in defence of TCS' claims and TCS did not lose its entitlement despite failing to provide the required contractual notice.



Curiously, DBS did not try to make the same argument regarding estoppel by convention or conduct in relation to the condition precedent to its entitlement to liquidated damages. Since DBS admitted that it did not issue a Non-Conformance Report at any time and therefore did not comply with the condition precedent, the court held that DBS was precluded from recovering any liquidated damages for delay.ⁱⁱ

CONCLUSION AND KEY TAKEAWAYS

The Technology and Construction Court's decision in *Tata Consultancy Services Limited v Disclosure and Barring Services* will be of interest to all parties involved in construction projects.

The decision re-iterates that English law will generally enforce the serious consequences of non-compliance with notice provisions or 'time bars' that are expressed as conditions precedent. A notice provision will be interpreted as a condition precedent if it includes conditionality – it does not have to expressly state that it is a condition precedent and it does not have to expressly state that non-compliance will lead to loss of entitlement.

But far more interestingly, the decision highlights the fact that parties still ignore these provisions during project execution and discusses the circumstances in which a party can nevertheless maintain a claim. Why do parties continue to act in this manner and trigger this type of dispute, and what can be done to avoid the same? The following outlines a number of observations:

- Notice procedures in contracts are ever more complex and stricter, perhaps at the cost of their clarity and practicality. This could explain why parties remain unwilling to use them and could suggest possible lessons for adjustments to the approach to be taken with the notice provisions being included in contract forms.
- Parties might not always appreciate the increased risk of disputes and subsequently the broader challenge such disputes create when notice provisions are not followed. In such circumstances, advisers and tribunals are left to grapple with the lack of certainty created when the reference points provided in a contract for judging the rights and obligations of the parties become less relevant. The focus often then turns to the facts and how parties have conducted themselves in a manner which is not anticipated by the contract, including to address difficult arguments on estoppel.
- Issuing notices in accordance with the contract remains the best way to preserve rights, ensure certainty in the parties' dealings, and avoid disputes. This also enables the parties to deal with the issue at the time it has arisen and potentially avoid or mitigate any consequences. Relying on estoppel by convention or conduct is a risky path to tread and is in most cases unlikely to succeed.
- Culturally, some parties resist the use of notices and the need to comply with the contract procedures because to do so might be seen as being too aggressive or contractual, certainly in the early phases of a project. Clearly this approach is increasingly unsustainable in the context of the international construction industry and the forms of contracts it uses. Consideration should be given to setting up in contentious situations a process by which parallel communications are issued between the parties: the first, to comply with and maintain the contract position, the second, to invite and discuss the possible resolution of the claims that are the subject of the notices, on a without prejudice basis. It is hoped that in this way the parties can have the best of both worlds –preservation of the position under the contract but in a manner that nevertheless demonstrates a recognition of the need to work together amicably.



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ⁱ 12th Annual Arcadis Global Construction Disputes Report, 2022. 13th Annual Arcadis Construction Disputes Report, 2023.

ⁱⁱ DBS was entitled to recover actual losses incurred after 6 months of delay over and above liquidated damages it would have otherwise been entitled to, because that entitlement to general damages, expressed in a separate clause, was not conditional on the Non-Conformance Report.