

## The Importance of Giving Notice

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All forms of construction contract contain requirements for the contractor to serve notice to the Architect or the Engineer in the event of a delay to the progress of the works as the first step in the procedure for securing an extension of time.

However, most will know that the giving of notice under such clauses is generally not a condition precedent to the right to an extension of time. This position was confirmed by the House of Lords in the case of *Bremer Handelsgesellschaft mbh -v- Vanden Avenne-Izegem*(1978) 2 LLR 109, where Lord Salmon had this to say:

*"Had it been a condition precedent, I should have expected the clause to state the precise time within which the notice was to be served and to have made plain by express language that unless the notice was served within the time, the sellers would lose their rights under the clause."*

So why is it that most forms of contract do not contain the explicit wording necessary for the notice provisions to be a condition precedent?

The reason is that it used to be thought that it would be dangerous to make the giving of notice by a contractor a condition precedent to the right to an extension of time, because in the event that the delay had been caused by the employer, i.e. the employer had committed an act of prevention, and notice had not been served, then the contractor could claim that time was 'at large'.

Time becomes 'at large' where the employer causes a delay to the progress of the works and there is no provision in the contract to grant an extension of time for that delay. The effect of time being at large is that the employer loses the right to liquidated damages and the contractor's obligation is

only to complete the works within a reasonable time. This point was made confirmed in 'Keating on Building Contracts' (4<sup>th</sup> Edition) at p 346, where it is stated:

*"If the Architect wrongly assumes that a notice by the contractor is a condition precedent to the performance of the duty of the Architect to form an opinion and take appropriate steps and in consequence refuses to perform such duties the employer loses his right to liquidated damages. It may therefore be against the employer's interests for an Architect not to consider a cause of delay of which late notice is given or of which he has knowledge despite lack of notice."*

It was felt that even where the contract did provide for extensions of time to be granted for delays caused by the employer, if the employer caused a delay and the contractor failed (for whatever reason) to serve notice within the time specified in the contract, if the giving of notice was a condition precedent to the right to an extension of time, then the contractor could claim that time was at large, on the basis that the employer had committed an act of prevention and further that the employer must not be allowed to benefit from his own breach of contract.

However, in two recent cases in Australia the court considered exactly this point. The extensions of time clauses in the conditions of contract contained provisions entitling the contractor to extensions of time for delays caused by the employer, and also contained notice provisions which were conditions precedent to the right to an extension of time. The employer caused delay and the contractor having failed to serve notice, and thus having received no

extension of time argued that time was at large.

In *Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd* (1994) Justice Cole stated:

*"If the Builder, having a right to claim an extension of time fails to do so, it cannot claim that the act of prevention which would have entitled it to an extension of the time for Practical Completion resulted in its inability to complete by that time. A party to a contract cannot rely upon preventing conduct of the other party where it failed to exercise a contractual right which would have negated the effect of that preventing conduct."*

and in *Turner Corporation Ltd (In Provisional Liquidation) v Coordinated Industries Pty Ltd* (1995), Justice Rolfe reached the same conclusion:

*"Where the contract provides an extension of time clause, which can accommodate delay caused by the principal and provides a contractual regime or mechanism whereby the delay is to be calculated, the*

*fact the principal may have caused delay has the effect that an allowance should be made in accordance with the contract. It does not have the effect that the contractual provisions are thereby overlooked or put aside or that time is put 'at large'."*

These cases have now been considered and followed in Hong Kong in the unreported case of *Dragages et Travaux Publics v. Hong Kong Chinese Insurance Co Ltd*.

These decisions are of great importance for contractors because they confirm that if a contractor is delayed by the employer, then he must comply with the notice provisions contained in the contract (regardless of whether the notice provisions are conditions precedent or not) if he is to be entitled to an extension of time. If he does not do so, he will be unable to claim that time is at large and must complete the work by the due date and pay liquidated damages if he does not.

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