Notice Provisions - The Saga Continues

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The problem with the law and especially with writing articles about legal decisions is that no sooner have you written the article than it can become out of date.

This is definitely the situation at the present time regarding notices, and particularly, the question whether a notice provision in a contract which made the giving of notice a condition precedent to the granting of an extension of time would leave the employer's rights to claim liquidated damages intact in the event that there was a delay caused by the employer but the contractor had failed to serve a notice and thus received no extension of time.

In March 1998, I wrote an article in this journal entitled 'The Importance of Giving Notice' which considered the then recent Australian case of **Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd (1994)**, where the court concluded that if a contractor is delayed by the employer and/or the architect/engineer, then they must comply with the notice provisions contained in the contract if they are to be entitled to an extension of time. If they do not do so, they will be unable to claim that time is at large and must complete the work by the due date and pay liquidated damages if they do not.

Then last month, in an article entitled ‘Notice Provisions - A Change in Attitude’ I reported on another Australian case, that of **Gaymark Investments Pty Ltd v Walter Construction Group Ltd (20 December 1999)**, where the court came to the opposite conclusion that if a contractor is delayed by the employer and/or the architect/engineer, then if they fail to apply for an extension of time within the time set out in the notice provisions and are thus prevented from obtaining an extension of time, then time will become at large and the employer can not claim liquidated damages for the delays incurred.

Well, the matter has come before the courts again, this time in the courts of Scotland, in the very recent case of **City Inn Limited v Shepherd Construction Limited (17 July 2001 CA101/00)**, and in view of the importance of this question, in particular to those working on KCRC West and East Rail projects (where the giving of notice within a strict time period is a condition precedent to the grant of an extension of time), I thought it appropriate to give an update on the comments made in my article last month.

City Inn entered into a contract with Shepherd for the construction of a hotel in Bristol. The contract was an amended version of the Scottish Private Form with Quantities, which I understand is very similar to JCT 1980. I am uncertain why a Scottish form of contract was used for works in Bristol and why the matter came before the Scottish courts rather than the English courts, but it is not relevant to this matter.

The works should have been finished on 25 January 1999, but were late and City Inn took liquidated damages at the rate of ¢G30,000 (approximately HK$345,000) per day. A dispute arose as to City Inn's entitlement to take such liquidated damages and the matter went to adjudication and then on appeal to the courts.

The contract contained an additional Clause 13.8. Sub-clause 1 provided, that if the Architect issued an instruction that the Contractor considered would require, inter alia, an extension of time, the Contractor must within 10 working days submit in writing to the Architect an estimate of the length of the extension of time to which he

considers himself entitled under Clause 25 and the new Completion Date.

Then, and importantly, sub-clause 8 provided:

"**If the Contractor fails to comply with one or more of the provisions of Clause 13.8.1 ..... the Contractor shall not be entitled to an extension of time**"

i.e. making the giving of the details a condition precedent to the grant of an extension of time.

Shepherd argued that the clause amounted to a penalty clause and as such was unenforceable. In doing so they raised an interesting argument.

Shepherd's argument was simply that had they served notice on time they would have been entitled to an extension of time and the employer would not be entitled to take liquidated damages for the period of the extension of time. As they had failed to serve notice, they were in effect being charged liquidated damages not for the delay in completion but for their breach of the requirement to serve notice in accordance Clause 13.8.1. They argued that ¢G30,000.00 per day was City Inn's genuine pre-estimate of the loss that they would suffer due to delayed completion, not a breach of Clause 13.8.1. On this basis they claimed that the liquidated damages were a penalty and unenforceable.

City Inn argued that the figure of ¢G30,000 per week for liquidated damages was a genuine pre-estimate of the loss the Employer would suffer in the event of completion being delayed, completion had been delayed and they were thus entitled to claim damages in respect thereof.

The court held in favour of the Employer, City Inn, and concluded that the effect of Clause 13.8.1 making the giving of notice a condition precedent to the grant of an extension of time did not have the effect of making the liquidated damages a penalty in the event that the Contractor failed to serve notice as required by the clause.

In arriving at this decision the judge carried out a very detailed examination of the authorities that defined the differences between liquidated damages and penalties, including the famous cases of **Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co** and **Clydebank Engineering and Shipbuilding C v Castenada**.

The judge stated that it was no doubt correct that, firstly, the contractor will bear liability for the sum of ¢G30,000 for each week of delay attributable to architect's instructions if he fails to comply with clause 13.8.1 and so fails to obtain an extension of time, secondly, that he will not bear that liability if, on the contrary, he complies with clause 13.8.1 and obtains an extension of time, and thirdly, that that liability, if it is incurred, is not a genuine pre-estimate of any loss suffered as a result of the Contractor's failure to comply with clause 13.8.1.

However, what the above overlooks is that the delay in question, caused by the Architect's instruction, is delay of a sort that the parties have agreed is likely to cause the Employer loss, which is pre-estimated at ¢G30,000 per week. The fact that the cause of the delay is compliance with an Architect's instruction does not alter the fact that the Employer will suffer loss as a result of it. The fact that the contract provides that delay of that sort is one example of the categories of delay in respect of which the Contractor may ask for, and the Architect may grant, an extension of time, means that the Contractor may follow a procedure which procures the result that the delay in completion of the works is not a delay which places him in breach of his obligation under clause 23.1.1 (the extension of time clause), but does not alter the fact that the Employer will suffer loss.

The judge concluded:

If the contract adds a further provision that, if he fails to take certain additional steps, the contractor will not be entitled to an extension of time, that preserves for the employer, in the event of such failure, the entitlement to pre-estimated damages for delay that might have been taken away by the award of an extension of time. In the event, the employer remains in the position that he receives damages, at the pre-estimated rate agreed upon, for the loss consequent upon delay in completion of the contract works. It seems to me, therefore, that the sum of ¢G30,000 remains payable by the contractor on the basis that it is a genuine pre-estimate of the loss suffered by the employer as a result of the delay in completion, and is not converted, by the fact that the contractor might have avoided that liability by taking certain steps which the contract obliged him to take, but failed to do so, into a penalty for failing to take those steps.

This decision is of course entirely contrary to the decision in the Australian case reported last month. However, many members of the local legal profession, who I spoke to, were highly critical of that case, and it does appear to me that the decision in this most recent Scottish case may be the one favoured should the matter ever reach the courts in Hong Kong.

(adopted from the HKIS Newsletter 10(10) October 2001)