Notice Requirement, Condition Precedents and "Loss & Expense" Claim

SUNISSA SDN BHD V KERAJAAN MALAYSIA & ANOR [2020] MLJU 283

INTRODUCTION

It is not unusual in the modern standard construction contract to contain a "prior notice requirement clause" as condition precedent before the contractor's entitlement to claim arises, be it a variation order, loss and expense or extension of time claim.

What is the consequence of failing to comply with the condition precedent? Does it disentitle the contractor from claiming altogether?

The High Court had the opportunity to deal with this issue concerning a "loss and expense" claim in the case of **Sunissa Sdn Bhd v Kerajaan Malaysia & Anor [2020] MLJU 283**. In doing so, the High Court had undertaken a strict interpretation approach in construing whether the prior notice requirement clause applies to the subject matter.

Where the Contractor's claim falls within the ambit of the "prior notice requirement clause", the High Court held that the prior notice requirement could only constitute as a condition precedent provided if it is set out in a clear, precise and unambiguous terms.

In the event that the prior notice requirement could be properly construed as a condition precedent and the contractor has failed to comply and adhere with the condition precedent, the Court will uphold the condition precedent and dismiss the contractor's claim, regardless how unpleasant the consequence may be.

SALIENT FACT

The salient fact of the case is as follows:-

1. The Government of Malaysia and the Public Work Departments ("**Employers"**) had appointed the Plaintiff as the main contractor ("**Contractor"**) to construct a new 10 storey Court Building in Kuantan, Pahang based on the PWD 203/203A (Rev.2007) standard forms of contract ("**Contract"**).

2. During the progression of work, 4 Certificates of Extension of time ("**EOTs**") were granted to the Contractor for delays through no fault / negligence of the Contractor.

3. The Contractor had completed the work within the extended time and the Employers had issued the Certificate of Practical Completion.

THE DISPUTE

1. The dispute herein arose from the Contractor's claim of RM11,937,057.33 for 'loss and expense' arising out of the EOTs granted to the Contractor.

2. The Employers rejected the Contractor's 'loss and expense' claim on the basis that the Contractor failed to observe and comply with the requirement of prior notice for 'loss and expense claim'.

3. The salient terms of the Contract provides that:-

> *"44.1 If at any time during the regular progress of the Works or any part thereof has been materially* ***affected by reason of delays*** *as stated under Clause 43.1 (c), (d), (e), (f) and (i), and* ***the Contractor has incurred direct loss and/or expense beyond that reasonably contemplated and for which the Contractor would not be reimbursed by a payment made under any other provision in this Contract, then the Contractor shall within thirty (30) days of the occurrence of such event or circumstances or instructions give notice in writing to the S.O. of his intention to claim*** *for such direct loss or expense together with an estimate of the amount of such loss and/or expense, subject always to Clause 44.2 hereof.*
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> *44.2 As soon as is practicable but not later than ninety (90) days after practical completion of the Works, the Contractor shall submit full particulars of all claims for direct loss or expense under Clause 44.1 together with all supporting documents, vouchers, explanations and calculations which may be necessary to enable the direct loss or expense to be ascertained by the S.O.. The amount of such direct loss and expense ascertained by the S.O. shall be added to the Contract Sum.*
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> *44.3 If the Contractor* ***fails to comply with Clauses 44.1 and 44.2, he shall not be entitled to such claim and the Government shall be discharged from all liability in connection with the claim."***
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> [Emphasis added]

4. On the other hand, the Contractor counter-argued that the notice requirement for the "loss and expense" claim, is by its very nature, a mere estimation of the claim. As such, the requisite notice is merely directory and not mandatory, and the non-compliance of the notice requirement will not bar the Contractor's claim.

DECISION OF HIGH COURT

A. The Notice Requirement and Condition Precedent: Strict Judicial Interpretation

The High Court first turned to the wording of the contractual provisions. The High Court adopted a strict interpretation of the clause in determining the ambit and/or scope of the "prior notice requirement" clause.

The High Court held that Clause 44.1 is only confined to "loss and expense" claim which is NOT "reasonably contemplated".

Following therefrom, if the "loss and expense" claim is within what is "reasonably contemplated", such claim is not governed by Clause 44.1 and the issue of notice requirement does not arise at all:-

> *[18] If the claim is "within that reasonably contemplated" then it is not governed by Clause 44.1 such that the Notice in writing to be issued to the S.O. within 30 days of the event giving rise to the claim, is not required. Such an interpretation is borne out from the words used as well as from the rationale underpinning Clause 44.1.*

The High Court reasoned that the common and commercial sense would dictate that the Contractor is entitled to claim for "loss and expense" which is "reasonably contemplated" when the delay was not attributable to the Contractor's fault.

The High Court ventured further and stated that in the present case, there is also no necessity for the requirement of 'prior notice' to a professionally qualified person, given that the Supervising Officer (S.O.) would have known that the Contractor would incur more cost when additional time is required to complete the work:-

[19] Both common and commercial sense as well as business reality would combine to allow a claim reasonably contemplated for it is a claim for "loss and expense" that naturally and consequently arises from factors not attributable to any fault or default of the plaintiff contractor such as a change of design and drawing, variation instructed by the S.O., suspension of works by the employer and delay on the part of Nominated Subcontractors to perform their works.

[20] The rationale for service of Notice on the S.O. is not there when the S.O. being professionally qualified in the building or infrastructure construction whether as an architect or engineer, would not be so dull or dense to know that if more time is naturally required arising out of fresh variation works instructions from the S.O. then as the economist would tell us - time is money and more time would mean more money is required.

[21] Surely it cannot be that the plaintiff contractor here is required to do extra works arising out of, for example, further variation works instructed by the S.O. and would therefore incur more costs which are recurring like that of office support staff, rental of premises, equipment and machinery, power and water supply, insurance coverage and extension of performance bond which had already been identified in the Preliminaries, and yet not being able to claim for such "loss and expense".

Premised on the foregoing, the High Court proceeded to ascertain that the 'loss and expense' claims reasonably contemplated are recurring items in the Preliminaries and allowed such claims.

[22] This Court would thus allow the claim for the items in the Preliminaries that are recurring whereby it can be said that these are reasonably contemplated as being incurred with the plaintiff being required to do additional works in the form of variation works through no fault of the plaintiff.

B. CONDITION PRCEDENT

Having held that the prior notice requirement only applies to "loss of expense" claim that is not within reasonable contemplation, the High Court proceeded to examine whether the notice requirement in Clause 44.1 is a condition precedent.

While the High Court questioned the rationale, purpose, and practicability of the prior notice requirement, the High Court nevertheless recognised that the Court must uphold the parties' agreement and give effect to the wordings of the clause.

***[46]** When one looks at the rationale for the need to comply with the 30-day notice deadline, one must not forget that at the point of giving the said notice, the event that triggers the incurring of additional costs not within the reasonable contemplation of the contractor is still very much in the future where the additional "loss and expense" is concerned and at best it is only an estimation.*

***[47]** Realistically any estimation would only be more meaningful and accurate once the EOT is given and the reason for which the EOT is given is stated in the Certificate of EOT. Prior to the issuance of that Certificate the Contractor would not know if the reasons sought for EOT would be approved by the Government and if so, for how long. Generally the Contractor would not be getting the number of days of EOT requested but perhaps a fewer days and that would require a recalculation again.*

> ***[48]*** *Whilst one can appreciate that knowing the additional costs to be incurred would help the Government in budgeting to ensure that cost does not overrun; surely the Government is not suggesting that if the costs is estimated to be high then it would be approving fewer days for EOT or perhaps none altogether!*
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> ***[49]*** *The construction works involve a series of transactions and a myriad of events might happen that the Contractor has to take immediate action to resolve the problem. I appreciate that it may be rather impractical for the plaintiff to send a notice of intention to claim within 30 days for every event or circumstance that arose that may give rise to such a claim.*

In ascertaining whether the "prior notice requirement" clause constitutes a condition precedent or otherwise, the High Court followed the Malaysia Federal Court's decision in the case of ***Globe Engineering Sdn Bhd v. Bina Jati Sdn Bhd*** **[2014] 7 CLJ 1** whereby a condition precedent clause must not be ambiguous and must be spelled out in clear and precise terms.

In this regard, the High Court was of the view that the wording in the Clause 44 is sufficiently clear to constitute a condition precedent whereby Clause 44.3 clearly laid out the consequence of not complying with the condition precedent of giving prior notice within the stipulated period, i.e. that the Employers would be discharged from the liabilities.

> ***[57]*** *The Federal Court in the case of Globe Engineering Sdn Bhd v. Bina Jati Sdn Bhd [2014] 7 CLJ 1 cited the case of Smith & Smith Glass Ltd v. Winstone Architectural Cladding System Ltd [1992] 2 NZLR 473 as laying down the test as to whether a term of the contract is a condition precedent. It was held as follows in the New Zealand's case:*
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> > *"[22] …that* ***he who seeks to rely upon such a clause to show that there was a condition precedent*** *before liability to pay arose at all should show that* ***the clauses relied upon contain no ambiguity... I believe that unless the condition precedent is spelled out in clear and precise terms and accepted by both parties, the clauses... do no more than identify the time at which certain things are required to be done****" (emphasis added)*
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> ***…***
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> *[63] For my part I would say that whilst it is preferable that a consistent style of drafting is to be preferred that does not necessarily mean that the same end cannot be achieved by a different stylistic approach as in* ***here in Clause 44.3 where the expression used, no less clear, is that "...he shall not be entitled to such claim and the Government shall be discharged from all liability in connection with the claim."***

The Learned Judge noted the onerous terms of requiring strict compliance with the notification period and the unpleasant consequences of non-compliance. However, in view of the various Malaysian and English authorities, the Learned Judge was constrained to hold that the prior notice clause in the contract constitute a condition precedent.

> [*65] Much as I personally dislike onerous terms of strict compliance with Notice period as in Clause 44.1 and 44.2, when both parties have agreed on the consequences as spelt out in Clause 44.3, effect must be given to it.*
> *…*
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> *[72] In the light of such clear decisions emanating from our Court of Appeal and supported by cases on similar clauses of condition precedent in the UK Courts, I am constrained to hold that the condition precedent in Clause 44.1 and Clause 44.3 would apply, unpleasant as the consequence may be.*
> *…*
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> *[75] I would thus hold that the words in Clauses 44.1, 44.2 and 44.3 are such that, read together and giving its ordinary and natural meaning, do amount to a condition precedent where the Notices' requirement is concerned.*

C. Condition precedent, Section 29 of Contracts Act, unconscionability and unjustly enrichment

Further to the above, the High Court also dismissed the Plaintiff's argument that the condition precedent with respect of Notice Period infringes **Section 29 of Contracts Act 1950**, which prohibits any agreement that sought to restrain legal proceedings.

The Plaintiff's complaint for want of unconscionability was similarly struck down by the High Court. The High Court reasoned that the Contractor can opt not to tender for the Project should the Contractor disagrees with the terms of the Contract. Further, it is not impossible to comply with the condition precedent with diligent project management.

> ***[109] Here there is nothing unconscionable at all, much less against public policy, though it may be perceived by some contractors to be unduly unfavourable a term to them.*** *However unlike a banking consumer contract, here we are dealing with a construction contract of a substantial sum of about RM157 million in a standard form contract prepared under the auspices of the Government of Malaysia.*
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> ***[110] The plaintiff is at liberty to amend the terms if they are perceived to be unduly harsh or even unfair. This is a case where the plaintiff as a contractor is not obliged to tender for the Project nor agree to execute the PWD 203A standard form contract if it is not comfortable with the terms.***
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> ***[111] It boils down to proper contract management where the contract officer or project manager would have to be alert on all time-based Notices. It is not a matter that could not humanly be complied with but one where with proper contract management the relevant alarms and alerts may be sounded to aid compliance with the Notice****.*

Lastly, the High Court held that the Employers are not unjustly enriched in the present case as the Employers had been ordered to pay the Contractor for "loss and expense" claim, which can be reasonably contemplated.

> ***[112]*** *Learned counsel for the plaintiff submitted that when one considers the facts in relation to the additional works carried out by the plaintiff upon the instruction of the defendant, which is not disputed throughout the present proceeding, the issue arises as to whether the defendant has unjustly benefited by such additional works at the expense of the plaintiff.*
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> ***[113]*** *To be clear this is not a case where the plaintiff was required to do the additional works in the form of variation works for free. This is a case where there were naturally additional expenses incurred in prolongation of time and other "loss and expenses" items that would be within reasonable contemplation as have been set out, considered and granted above.*
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> ***[114]*** *What the plaintiff had failed to claim are the items for "loss and expense" which are beyond reasonable contemplation. There is nothing improper or unconscionable in the Employer stating at the outset that for these "loss and expense" items a proper Notice complying with Clause 44.1 shall be first given with an estimate of the amount intended to be claimed by the Contractor before a claim could be validly made.*

SIGNIFICANCE OF THE DECISIONS

This case illustrates the judicial inclination in upholding the parties' autonomy. In particular, the Court will not strike down a condition precedent merely because of the aggrieved Contractor will suffer dire consequence in failing to observe the contractual notice provision.

As such, it is of vital importance for the Contractors to deploy and practice good construction project management to make sure that the condition precedent, especially time notice requirements, are strictly adhered to.

On the flip side of the coin, the parties shall also be mindful of the contractual language used as the Court will adopt a strict interpretation in construing the ambit / scope of the condition precedent. The Court will not hesitate to strike down a purported "condition precedent" clause if the language used is ambiguous or unclear.

Notwithstanding the above, the Employer shall exercise caution in dealing with claims that fail to comply with the condition precedent and be wary that the communications between parties (including with the consultants) on such matters may be construed as the waiver of the condition precedent under certain circumstances

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