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CONDITIONS PRECEDENT
In Irish Construction Contracts

by

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General note:

The primary forms of contract upon which this paper is based are the Public Works Contract for Building Works Designed by the Employer[2] (hereafter the PWC), the RIAI[3] form of Contract and the FIDIC[4] form of contract in limited circumstances.

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[1] Construction Contracts Act 2013
[2] Public Works Contract for Building Works Designed by the Employer : PW-CF1 v1.9
[3] Royal Institute of Architects of Ireland Agreement and Schedule of Conditions of Building Contract (Yellow) 2012 Edition
[4] FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer First Edition

1.0 Introduction & Overview

Introduction

1.1 Section 2 of this paper starts by addressing the terminology used in relation to Conditions Precedent; such as Notice Provisions, Time-Bars and Conditions Precedent themselves.

1.2 Following this there is a general review of the relevant contractual interpretation principles, followed by an analysis of specific Notice Provisions in accordance with those principles.

1.3 The main body of this section of the paper addresses the fundamental matter of when a Notice Provision will be construed to be a Condition Precedent and a selection of contract provisions are examined as illustrations.

1.4 Section 3 examines amendments to standard forms and the pitfalls that arise when parties seek to amend Contracts by utilising stock phrases from other contracts while not considering the unintended consequences of such amendments.

1.5 Section 4 looks at a defence often raised, albeit not in Ireland, relative to a failure to comply with a Condition Precedent, known as the Prevention Principle.

1.6 Section 5 is a brief examination of the Construction Contracts Act 2013[5], as it has a selection of Notice Provisions that are either Conditions Precedent or have a similar effect.

1.7 Section 6 looks at a recent ruling of the High Court regarding the running of a case where the primary matter in dispute was compliance with a condition precedent; attention is drawn to this ruling and the possible implications for construction disputes.

1.8 The commonly encountered Notice Provisions from the Public Works[6] and the RIAI[7] suite of Contracts are extracted and analysed in tables 1 and 2 at the back of this paper. These are not purported to be complete lists of all the possible Notice Provisions. It is intended that in understanding the application of the principles outlined in the paper, it will be possible to recognise and assess such conditions in any other form of contract.

1.9 Where possible there are references in the table to the relevant parts of the paper, backing up the conclusions reached therein.

[5] Construction Contracts Act 2013
[6] Public Works Contract for Building Works Designed by the Employer : PW-CF1 v1.9
[7] Royal Institute of Architects of Ireland Agreement and Schedule of Conditions of Building Contract (Yellow) 2012 Edition

2.0 The law on Notice Provisions and its application.

Terminology

2.1 Prior to examining the matter of when a Notice Provision is a Condition Precedent and when it is not; it is necessary to examine some of the terminology used, though while arguably self-explanatory, can lead to some confusion.

2.2 A Notice Provision is simply that, a provision that requires a contracting party to give notice of something.

2.3 A Condition Precedent is a provision whereupon the occurrence of an event, in relation to this paper 'the giving of Notice', some contractual right accrues, whereas if the event does not occur, then the right does not accrue. There have been many definitions of a Condition Precedent, most recently by Cregan J in ***Maloney v Danske Bank***[8] as follows:

> *"In my view, the essence of a condition precedent is that it is a condition which precedes other conditions or contractual obligations contained in the contract. By calling it a condition precedent the parties intend to the mean that if this condition is not fulfilled then the other conditions of the contract are unenforceable."*[9]

2.4 A Time-Bar is a term for a condition of a contract stating that the event required to occur must occur within a prescribed period, and stating that failure to comply with the condition within the prescribed period will result in a loss of the resulting contractual right. Cregan J also added to the above in relation to the phrase Condition Precedent suggesting that the use of the phrase a *"preceding condition"*[10] might be a more self-explanatory term. For the time being, the term Condition Precedent is generally used in this paper as this remains the commonly used term, and is used as encompassing Time-Bars as a sub-group of Conditions Precedent.

General Interpretation Matters

2.5 A Notice Provision in a contract is no different to any other contractual provision and the interpretative rules of contract apply equally here as anywhere else in the contract. The complex rules of contractual interpretation are beyond the scope of this paper; however, it is noted that the most commonly quoted rule on contractual interpretation is that interpretation ought to give effect to the 'natural' or 'ordinary' meaning of the words.

2.6 Arising from the complexity of human language and the fact the 'natural' and 'ordinary' are not very prescriptive words, the use of this definition has been refined and replaced in a commercial context with the following interpretative approach: *"a purposive construction ... so as not to defeat the commercial purpose of the contract"*[11], and in so doing taking account of the relevance of the contract as a whole.

[8] *Maloney v Danske Bank* [2014] IEHC 441
[9] *Maloney v Danske Bank* [2014] IEHC 441 at para 52
[10] *Maloney v Danske Bank* [2014] IEHC 441 at para 54
[11] *Antaios Compania SA v Salen AB* [1985] AC 191 at 201

2.7 This interpretation is approached from an objective basis and should not be misunderstood as to be a subjective look at what the parties intended[12].

2.8 For a detailed and comprehensive understanding on the law of interpretation of contracts relevant to this paper, the leading case is ***Analog Devices BV v Zurich Insurance***[13] where Geoghegan J. set out the law very clearly at pages 280 and 281 endorsing the findings of Lord Hoffman in ***ICS v WEST Bromwich BS***[14]. The starting point was stated as follows:

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."*[15]

Lord Hoffman thereafter limited the background to exclude previous negotiations and also qualify the meaning it would convey as not necessarily being the same thing as the meaning of the words.

2.9 The above principles were affirmed by McKenchie J. in ***Marlan Homes Limited v Mark Walsh and Gary Wedick***[16] where he stated that:

> *"The correct approach is to have regard to the nature of the document in question and to consider the words used by reference to the context in which they are set."* [17]

2.10 With the above general principles in mind, one would expect that the provisions of the RIAI, as well as the PWC, to be simply accepted as Conditions Precedent at first glance. With respect to the RIAI form of contract provisions, it is arguable that to not construe the provisions therein as Conditions Precedent is to defeat the meaning which the document would convey to a reasonable person; however, as will be seen, this is not the end of the matter and is ultimately not the case.

The Effect of a Condition Precedent

2.11 In advance of looking at the specific interpretative matters that arise in relation to Notice Provisions and their effect, it is necessary is to get the root of what we are looking at when we talk about Notice Provisions as Conditions Precedent and why they are approached in a specific manner.

2.12 As noted in the comments on terminology, the essence of a Notice Provision is exactly as it reads, a provision that requires that notice be given. There is nothing controversial here; however, when you are considering whether or not a failure to fulfill the requirement to give notice bars a party from reliefs to which they would otherwise be entitled to; either under the provisions of the contract or for breach of contract on the part of the other contracting party, this is an altogether different matter. This is the essence of a Condition Precedent.

[12] See McNeel *The Construction of Contracts* (Oxford, 2nd Ed. 2011) at 1.62
[13] *Analogue Devices & Ors v Zurich Insurance & Ors* [2005] IR 274
[14] *ICS v WEST Bromwich BS* [1998] 1 WLR 896
[15] *Analogue Devices & Ors v Zurich Insurance & Ors* [2005] IR 274 at para 13
[16] *Marlan Homes Limited v Mark Walsh and Gary Wedick* [2009] IEHC 576 [2012] IESC 23
[17] *Marlan Homes Limited v Mark Walsh and Gary Wedick* [2009] IEHC 576 [2012] IESC 23 at para 49

2.13 Considering this briefly; what is at stake is potentially denying a contracting party to a right to be paid for works that they have completed, and furthermore a Client obtaining the benefit of those works without paying for them. These additional works may arise under an express instruction from an Architect or be derived from drawings, but the point remains the same; the Client's requirements have necessitated additional works to which the Contractor is entitled to be paid for as a matter of simple contract law; however, unless the Contractor fulfills the Notice Provisions they will lose the right to be paid. This can be phrased any number of ways and each time it sounds like a very serious limitation on the right of a party to be compensated for carrying out instructions at their expense, which benefit someone else.

2.14 It could logically be queried, given the effect of such a requirement, why Contractors would agree to their inclusion. The answer to this is because the parties are supposedly free to 'agree' to whatever contract terms they wish.

2.15 As to why parties wish to include them, the primary reason, it is suggested, is to enable a Client to keep an eye on expenditure, be alerted when additional expenditure takes place, and potentially mitigate these additional costs by creating savings elsewhere. This was illustrated in the case of ***London Borough of Merton v Stanley Hugh Leach***[18] where the failure to give notice of an event precluded the Contractor's entitlement to an extension of time as the Client's ability to address the delay was impaired.

2.16 It is arguable that it is not the Contractor's duty to be the Client's watchman in these matters; that is the duty of the design team; however, the Contracts clearly pass this role to the Contractor and given that it is fully familiar with what it has priced as included, this is not an unreasonable expectation. The cynical could argue that the reason for the inclusion of Conditions Precedent is to potentially deny the Contractor the right to remuneration for works completed on a simple technicality, a possibly valid argument given that Condition Precedent provisions by and large operate solely in the Employer's favour. It is for this very reason that Conditions Precedent are approached in a specific manner to take account of the simple fact they only operate to the benefit of one party to the exclusion of another's rights.

Condition Precedent Interpretation Matters

2.17 It is with this limitation on a Contractor's rights in mind, that we return to the specific approach to Conditions Precedent. Such a condition is, depending on the wording of the condition, either a limitation clause or an exclusion clause. One trying to limit liability, the other excluding liability in full. Such a condition will be construed strictly against the party seeking to rely on it; otherwise referred to that the clause will be construed *contra proferentem* or *contra proferens* as shown hereafter.

2.18 The leading Irish case on exclusion clauses and the use of the *contra proferentem* rule is ***Analog Devices BV v Zurich Insurances***[19] where Kelly J in the High Court stated his view on the interpretation of an insurance exclusion clause:

[18] *London Borough of Merton v Stanley Hugh Leach* [1985] 32 BLR 51
[19] *Analog Devices BV v Zurich Insurance* unreported, High Court, November 20, 2002

"I am of opinion that the law stated by the Supreme Judicial Court of Massachusetts in ***Palmer v. Pawtucket Mutual Insurance Company (352 Mass. 304)*** *sets out the correct principles in relation to the question of construction of exclusion clauses. This is so not merely in the Commonwealth of Massachusetts but the decision is supported by many others from other jurisdictions in the United States. At p.304 of the judgment of Cutter J. speaking for the court he said*

> *"Ambiguities in the policy are to be construed against the insurer. Exclusions from coverage are to be strictly construed. If the language permits more than one rational interpretation, that most favourable to the insured is to be taken. In interpreting the clause, these principles must be applied"."*

2.19 This approach was affirmed by the Supreme Court[20] in a detailed examination of the *contra proferentem* rule and remains the law on the matter today; this judgement is well worth reviewing for a detailed review of the law in this area.

2.20 There is ample precedence dealing with the rationale of the *contra proferentem* rule in relation to exclusion clauses, none summarising it better than Lord Denning in an English case ***Gillespie Bros v Bowles***[21] (the distinction here in relation to negligence is not a matter for this paper but is worth being aware of a possible distinction in approaches between claims for breach of contract as opposed to negligence vis-à-vis Conditions Precedent):

> *"If you examine all the cases, you will, I think, find that at bottom it is because the clause (relieving man from his own negligence) is unreasonable, or is being applied unreasonably in the circumstances of the particular case. The judges have, then, time after time, sanctioned a departure from the ordinary meaning. They have done it under the guise of "construing" the clause. They assume that the party cannot have intended anything so unreasonable. So they construe the clause "strictly." They cut down the ordinary meaning of the words and reduce them to reasonable proportions. They use all their skill and art to this end. Thus they have repeatedly held that words do not exempt a man from negligence unless it is made clear beyond doubt: nor entitle a man to indemnity from the consequences of his own negligence."*[22]

2.21 In addition, as the clause was nonetheless an express term of the contract, Lord Denning went onto consider the balancing act the Court has to undertake in applying a condition supposedly entered into under the freedom to contract:

> *"Are the courts then powerless? Are they to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable? When it gets to this point, I would say, as I said many years ago: "there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused" ... It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so."*[23]

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[20] *Analog Devices BV v Zurich Insurance* [2005] 1 IR 274
[21] *Gillespie Bros v Bowles* [1973] QB 400
[22] *Gillespie Bros v Bowles* [1973] QB 400
[23] *Gillespie Bros v Bowles* [1973] QB 400

2.22 As to whether or not a Notice Provision is indeed a Condition Precedent, this is addressed hereunder in detail; however, as a starting point, in the Australian case ***Décor Ceilings Pty Ltd v Cox Constructions Pty Ltd***[24] the court held that a Notice Provision is a Condition Precedent once defined time limits were included in the notification section. In support of this requirement the English House of Lords held in ***Bremer v Vanden Avenne***[25] that in order for a Notice Provision to be a Condition Precedent precise time limits must be stated and loss of rights for failure to comply must be clear. Such time limits are the clearest indication that a Notice Provision is a Condition Precedent.

2.23 A specific but broad type of Condition Precedent is an "Observance of Terms" clause under an insurance contract, such that compliance with all the terms of the contract is precedent to the insurers liability. These clauses have been criticized in the English Courts, but not so in the Irish Courts: ***Gaelcrann Teoranta v Michael Payne & Ors*** and ***Capamel Ltd t/a Oakline Kitchens v Roger Lister***[26], where they have been accepted as permissible in this jurisdiction.

Strict Compliance with Conditions Precedent

2.24 Once a condition is determined to be a Condition Precedent, there is an obligation on a Contractor to follow the time provisions precisely. This is on the basis that one cannot have the Court insist on specific wording before it finds a Notice Provision to be a Condition Precedent; but thereafter not expect the Contractor to comply strictly with those specific provisions.

2.25 This was put clearly by the English Courts in ***Education 4 Ayrshire Ltd v South Ayrshire Council***[27]:

> *"The same factors which point to the clause being a condition precedent also point to the need for any notice served in accordance with the clause to comply strictly with its terms."*

2.26 The 'factors' to which the Court referred to being the specificity in the clause, that thereby guided the Court in holding it to be a Condition Precedent. The 'terms' being the additional requirements to submit further information as well as the initial notice, see comments on PWC clause 10.3.1 hereunder.

2.27 An example of how strictly the Notice Provisions are applied was evidenced in the case of ***Ener-G Holdings PLC v Philip Hormell***[28]*;* here the Court held that leaving a notice at a premises did not constitute personal delivery in accordance with the terms of the contract. In addition to this, the claimant was held to have missed out on submitting a warranty claim by a single day. The terms of the contract in question were laid in in the judgement as follows:

> *"Clause 13 is headed "Notices", and it is in these terms:*
>
> *"13.1 Notice in writing*

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[24] *Décor Ceilings Pty Ltd v Cox Constructions Pty Ltd (No 2)* [2005] SASC 483, [2006] CILL 2311, Supreme Ct Sth Aus.
[25] *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109
[26] *Gaelcrann Teoranta v Michael Payne & Ors* [1985] ILRM 109 and *Capamel Ltd t/a Oakline Kitchens v Roger Lister* [1989] IR 319
[27] *Education 4 Ayrshire Ltd v South Ayrshire Council* [2009] CSOH 146
[28] *Ener-G Holding PLC v Philip Hormell* [2011] EWHC 3290

Any notice or other communication under this Agreement shall be in writing and signed by or on behalf of the party giving it.

13.3 Service
Any such notice may be served by delivering it personally or by sending it by pre-paid recorded delivery post to each party (in the case of the Buyer, marked 'for the attention of directors') at or to the address referred in the Agreement or any other address in England and Wales which he or it may from time to time notify in writing to the other party.

13.3. Deemed service
Any notice delivered personally shall be deemed to be received when delivered (or if delivered otherwise than between 9.00am and 5.00pm on a Business Day, at 9.00am on the next Business Day), any notice sent by pre-paid recorded delivery post shall be deemed to be received two Business Days after posting and in proving the time of dispatch it shall be sufficient to show that the envelope containing such notice was properly addressed, stamped and posted." "[29]

2.28 The court held that the notice had to be personally handed to the person and the Court of Appeal upheld this decision[30].

2.29 As noted above, the general rule is that strict time limits must be stated before a Notice Provision will be held to be a Condition Precedent: ***Bremer v Vanden Avenne***[31]; however, there are exceptions to this rule, or at least some cases that cast some doubt on such a strict approach. In ***In the Matter of the Equitable Insurance Company Limited and in the Matter of the Company Acts, 1908 to 1959***[32] the Supreme Court, when interpreting a Notice Provision that failed to specify time limits, but required the giving of notice of an accident "as soon as practicable" after its occurrence, held that this was a precedent condition to the liability of the insurance company.

2.30 In arriving at this position it was necessary for the Court to ascertain what the time limit ought to be:

> *"…in deciding whether or not something has been done "as soon as practicable" after a particular event, regard must be paid to the context in which the words are used and the surrounding circumstances … the prima facie object of a clause such as Condition No. 1 in this policy is to give the insurer some reasonable protection against unsustainable or fraudulent claims by giving him the opportunity to investigate the circumstance … at the first opportunity when the facts can be ascertained…"*[33]

2.31 In deciding what the time appropriate period ought to be the Court then referred to the continuation of notice requirements where damage occurred, but not in the absence of the insured, here a time limit was specified of 48 hours of his knowledge of the damage, and this informed the court as to how long "as soon as

[29] *Ener-G Holding PLC v Philip Hormell* [2011] EWHC 3290 at para 3
[30] *Ener-G Holding PLC v Philip Hormell* [2012] EWCA Civ 1059
[31] *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109
[32] *In the Matter of the Equitable Insurance Company Limited and in the Matter of the Company Acts, 1908 to 1959* [1970] 1 IR 45
[33] *In the Matter of the Equitable Insurance Company Limited and in the Matter of the Company Acts, 1908 to 1959* [1970] 1 IR 45 at 54

practicable" could be meant to mean within a very short time and most definitely not within 13 months as was the case here.

2.32 It is suggested that the law in ***Bremer v Vanden Avenne***[34] is not the law in Ireland; and that once there is a liability bar, as opposed to a Time-Bar, then the Courts will, if possible to ascertain the time limits to be used, construe a Notice Provision with a liability bar, as a Condition Precedent even in the absence of strict time limits.

2.33 One issue worth considering briefly is the matter of inordinate and inexcusable delay. Where a Notice Provision is clearly not a Condition Precedent, the question arises, how late can the Contractor be in submitting their claims pursuant the Contract. The answer, it is suggested, is in the question, 'pursuant to the Contract'. Either a claim is barred under a Condition Precedent, or it is not. If it is not, then once the Contractor submits its claim within the other time periods permitted in the contract, then it ought to be permitted by a tribunal.

Public Works Contracts

2.34 Under clause 10.3.1 of the PWC, Notice Provisions are outlined in detail in relation to any claim for an adjustment to the contract sum:

> If the Contractor considers that under the Contract there should be an extension of time or an adjustment to the Contract Sum, or that it has any other entitlement under or in connection with the Contract, the Contractor shall, as soon as practicable and in any event within 20 working days after it became aware, or should have become aware, of something that could result in such an entitlement, give notice of this to the Employer's Representative…
>
> Within a further 20 working days after giving the notice, the Contractor shall give the Employer's Representative details…

2.35 Clause 10.3.2 entails the bar against any claim not satisfying the requirements:

> If the Contractor does not give notice and details in accordance with and within the time provided in this sub-clause 10.3 … the Contractor shall not be entitled to an increase to the Contract Sum…

2.36 Of particular note is the inclusion of the requirement to provide additional information as detailed, as was also the case in ***Education 4 Ayrshire Ltd v South Ayrshire Council***[35] as referred to above. If the provision of additional information is also a Condition Precedent, which it clearly is, then mere notification is not sufficient. Thereafter, the Contractor must provide all the necessary details within a further twenty days. It is arguable that this is a very harsh condition on the basis that the Employer's Representative has been made aware of the claim, but, perhaps by the very nature of the details required, the Contractor has failed to compile the details, and it is subsequently barred from being compensated. However, similar provisions were upheld in ***Education 4 Ayrshire Ltd v South Ayrshire Council***[36] where the Court barred a claim despite

[34] *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109
[35] *Education 4 Ayrshire Ltd v South Ayrshire Council* [2009] CSOH 146
[36] *Education 4 Ayrshire Ltd v South Ayrshire Council* [2009] CSOH 146

initial notification being given where the claimant had failed to issue further information as required:

> *"Where parties have laid down in clear terms what has to be done by one of them if he is to claim certain relief, the court should be slow to seek to relieve the party from the consequences of failure."*

This also illustrates the strict application of Conditions Precedent once they have been found to be so as discussed earlier in the paper.

2.37 Clause 10.3.3 is the source of much discussion as to whether or not it falls to be subject to the Conditions Precedent as outlined in clause 10.3.1; it is worded as follows:

> If the cause of <u>the claim</u> has a continuing effect, the Contractor shall update the information at monthly intervals
>
> (1) stating the extension of time and adjustment to the Contract Sum claimed for delay and cost already incurred and
> (2) so far as practicable, proposing a final adjustment to the Contract Sum and Date for Substantial Completion of the Works and any affected Section and
> (3) providing any other information the Employer's Representative reasonably requires.

2.38 Contractors often try to use this clause to avoid the Conditions Precedent in the contract; it is submitted that this is a wholly incorrect approach for two reasons. The clause is related to 'a claim' and in the absence of anything to the contrary this can only be meant to refer to a claim as enshrined in the preceding subsections, which as is clear from the wording previously noted, is dependent upon a compliance with a Condition Precedent. Furthermore, the wording of clause 10.1.1 as follows indicates that the Notice Provisions of 10.3.1 are to be fulfilled before any increase in the Contract Sum is permissible, and this wording clearly applies to all aspects of clause 10:

> Subject to and in accordance with this sub-clause 10.1, if a Compensation Event occurs the Contract Sum shall be adjusted [upward or downward] by the amount provided in sub-clause 10.6. However, if the adjustment is an increase it shall only take effect to the extent that all of the following apply to the Compensation Event:
> …
> (3) <u>The Contractor has complied with this clause 10 in full [including giving notices and details within the time required].</u>

2.39 It is clear that a Notice Provision is a Condition Precedent once defined time limits are included in the notification section and the loss of rights for failure to comply is stated. Clause 10.3.1 satisfies these requirements; however, the actual wording clause 10.3.1 is very problematic for entirely different reasons.

2.40 The Contractor has to issue the notice 'if it considers' that it has an entitlement; and only 'after he became aware' of something giving rise to an entitlement. Contractors argue that they only became aware of the entitlement at a late stage, such as in the case of a Global Claim or even a standard disruption claim.

2.41 One counter argument to the above is that the clause states 'or should have become aware'; which is an objective test and one would assume will be objective through the eyes of a competent Contractor that ought to be aware of its rights as they arise.

2.42 Another defence is that the awareness in question is awareness of something that could result in such an entitlement (an event), not that there is an entitlement. It is submitted that being unaware an entitlement accompanied an event is not a valid reason to raise the matter at a later stage when an entitlement is realised.

2.43 There is another very similar argument that has gained some prominence in recent times such that the Contractor only "considered" the matter when it sought advice. The essence of this being that at the point in time when the event occurred, it did not consider that it had an entitlement; it was only when it sought and received advice that it considered it had an entitlement.

2.44 It is suggested that the positioning of the word "consider" does not give any leeway to a contractor to consider a matter at its convenience; such leeway only exists, if it exists at all, relative to when it became aware of the event. Therefore, the issue reverts to when it became aware or ought to have become aware of an event.

2.45 One of the most straightforward defences to claims as outlined above, which are premised around a claiming of ignorance of entitlements, or events, or of the status of a project (financially), is that the Contractor in signing up to the contract understands all of the issues arising under that contract, and that ignorance of its rights, as much as its obligations, does not give rise to a means to circumvent the requirements to give notice. It is submitted that to accept such an argument is to encourage tawdry contract awareness, site management and project reporting.

2.46 Notwithstanding the objections to such attempt to circumvent Notice Provisions, it is necessary to look at the arguments and counter arguments in more detail. The problematic wording noted above leaves it open to a Contractor to claim that he only became aware of his overall delay and disruption claim well after the events leading to it, as it only arose as a result of the cumulative effect of the events. In ***Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)***[37] similar vagueness of the wording in that contract caused a situation where Jackson J held that no definitive time limit could be imposed, this despite some clear wording to the contrary:

> *"The obligation ... as a condition precedent does not comprise or include any absolute obligation to serve notices or supporting information. The obligation imposed upon the sub-Contractor is an obligation to do his best as soon as he reasonably can."*[38]

2.47 The finding above followed an extensive consideration of the various clauses as outlined hereunder, and it is suggested that a similarly detailed analysis of the PWC could result in a similar finding.

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[37] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC)
[38] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC), para 82

2.48 In the first instance Jackson J affirmed the *contra proferentem* approach to Conditions Precedent from ***Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd***[39]:

> *"[70] In* ***Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd [1970] 1 BLR 111****, Salmon LJ held:*
>
> *'The liquidated damages and extension of time clauses and printed forms contract must be construed strictly contra preferentum. If the Employer wishes to recover liquidated damages for failure by the Contractors to complete on time in spite of the fact that some of the delay is due to the Employer's own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the Employer.'"*

2.49 He then proceeded to look at specific wording within the contract:

> *"[78] Clause 11.2.1 contains some important qualifications. Clause 11.2.1 does not require the sub-Contractor to serve notices immediately when any delay is caused, but rather* <u>*to serve notices when such delay becomes or should have become "apparent"*</u> *[emphasis added]. The sub-Contractor's obligation to notify the causes of a delay is not an absolute obligation but rather an obligation to do so "insofar as the sub-Contractor is able"."*

2.50 The most comparable wording to the PWC notice provisions are underlined for clarity; he went on to comment on the effect of these provisions thus:

> *"[80] Standing back for a moment from the various sub-sub-clauses, I construe cl 11.2 as requiring the sub-Contractor to do his best as soon as he reasonably can. I do not read cl 11.2 as requiring the sub-Contractor to serve notices or to provide supporting details which go beyond the knowledge and information available to him."*

2.51 There can be little question that the 10.3 provisions constitute a Condition Precedent, but it is arguable that the vague wording provisions therein fall foul of the same issue which arose in this ***Multiplex***[40]; however,, and this is very important and often overlooked, this issue is likely addressed by virtue of the interpretive rules stated in the PWC contract at 1.2.1 and 1.2.4. It is necessary to read both of these combined to get the required effect:

> 1.2.1 The parties intend the Contract to be given purposeful meaning for efficiency and public benefit generally and as particularly identified in the Contract.[41]
>
> 1.2.4 No rule of legal interpretation applies to the disadvantage of a party on the basis that the party provided the Contract or any of it or that a term of the Contract is for the party's benefit. [42]

2.52 As a result of the exclusion of the *contra proferentem* rule under 1.2.4, when one uses the interpretative rule in 1.2.1, it is not necessary to take the interpretation most favourable to the Contractor, but to take the most likely interpretation

[39] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111,
[40] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC)
[41] PWC Clause 1.2.1
[42] PWC Clause 1.2.4

under the contract. Unfortunately this is not the end of the matter, as what is the "the public benefit generally": is it the interest of getting projects delivered for the least possible cost even at the expense of the survival of SME's, the backbone of our economy; or is it upholding the common sense right of a party to be paid for works completed and the support of those same SME's survival. It is beyond the scope of this paper to express an opinion as to what one of these is the correct interpretation.

2.53 As noted, one of the means used by Contractors seeking to circumvent a failure to comply with Condition Precedent, is to tailor a claim as a Global Claim, or similar; however, this gives rise to another issue, in that it is necessary to frame this claim in a manner that it avoids the exclusion clause for such claim under the PWC Clause 10.7.4:

> Except as provided in this sub-clause 10.7 [notwithstanding anything else in the Contract] losses or expenses arising from or in connection with delay, disruption, acceleration, loss of productivity or knock-on effect shall not be taken into account or included in any increase to the Contract Sum, and the Employer shall have no liability for such losses or expenses"[43].

This is a particular point that goes beyond the scope of this paper; however, practitioners ought to be vigilant to ensure that the claim is not in fact such a claim disguised otherwise.

2.54 In addition, in relation to clause 10.7, it is not itself a Notice Provision falling to be considered in this paper, but is an exclusion clause that ought to be interpreted in accordance with the relevant principles outlined in this paper.

2.55 In summary on the PWC; it is clear that the Notice Provisions of the PWC are Conditions Precedent. However, there is ambiguity in the date of knowledge in the provision and there are other matters as outlined above. The simplest manner to address this is to keep very clear records on site to ensure there can be no question as to when the Contractor became aware or ought to have become aware. Alternatively, a Client could seek to amend this to reflect the date of an event, though whether this would be permissible given the fact this is a standard form used in public works is unlikely.

The Royal Institute of Architects of Ireland forms of Contracts

2.56 A significant difference in the Notice Provisions under the RIAI is that the notice periods referred to start to run from the date of the acts or defaults. Given the detailed analysis above of the wording of the PWC conditions with respect to when the Contractor ought to be aware, this stands out as a marked difference.

2.57 The RIAI form of contract contains *inter alia* the following notification requirements as detailed above:

> Condition 13: Any oral instructions … shall, if involving a variation, be confirmed in writing by the Contractor to the Architect within five working days…

[43] PWC Clause 10.7.4

Condition 29(b): If any act or default of the Employer delays the progress of the works then the Contractor shall within five working days of the act or default give notice in writing to the Architect…

Condition 30: Upon the happening of any such event causing the delay the Contractor shall immediately give notice thereof in writing to the Architect…

2.58 There are no corresponding clauses barring liability for failure to comply with these Notice Provisions, and as a result it has long been accepted in Ireland that these provisions are not Conditions Precedent. This understanding is in keeping with the jurisprudence examined above. In essence without a corresponding Time Bar clause one would reasonably expect these not to be held as Conditions Precedent.

2.59 However, in ***Steria Ltd v Sigma Wireless Communications Ltd***[44] the Court held as follows:

"…in my judgment the phrase, 'provided that the sub-Contractor shall have given within a reasonable period written notice to the Contractor of the circumstances giving rise to the delay' is clear in its meaning. What the sub-Contractor is required to do is give written notice within a reasonable period from when he is delayed, and the fact that there may be scope for argument in an individual case as to whether or not a notice was given within a reasonable period is not in itself any reason for arguing that it is unclear in its meaning and intent. In my opinion the real issue which is raised on the wording of this clause is whether those clear words by themselves suffice, or whether the clause also needs to include some express statement to the effect that unless written notice is given within a reasonable time the sub-Contractor will not be entitled to an extension of time.

In my judgment a further express statement of that kind is not necessary. I consider that a notification requirement may, and in this case does, operate as a condition precedent even though it does not contain an express warning as to the consequence of non-compliance. It is true that in many cases (see for example the contract in the Multiplex Constructions (UK) case itself) careful drafters will include such an express statement, in order to put the matter beyond doubt. It does not however follow, in my opinion, that a clause – such as the one used here – which makes it clear in ordinary language that the right to an extension of time is conditional on notification being given should not be treated as a condition precedent."[45]

2.60 This ruling is at odds with the specific requirements noted in almost all other cases on this topic; one might reconcile the difference by virtue of the wording of limitation 'provided that'; however, this is far less precise than the requirements generally sought.

2.61 If ***Steria Communications***[46] is good law, that would be followed in Ireland; applying this to the wording of the RIAI provisions, it is arguable that the wording of the RIAI Notice Provisions are indeed Conditions Precedent, though the absence of the words 'provided that' in the RIAI provisions may be a significant enough difference such that they remain not so.

[44] *Steria Ltd v Sigma Wireless Communications Ltd* [2008] BLR 79
[45] *Steria Ltd v Sigma Wireless Communications Ltd* [2008] BLR 79
[46] *Steria Ltd v Sigma Wireless Communications Ltd* [2008] BLR 79

2.62 In apparent support of the ***Steria Communications***[47] position, and the importance of the words "provided that", in ***WW Gear Construction Ltd v McGee Group Ltd***[48] the Court held that the wording:

> *"provided always that ... is often the strongest sign that the parties intend there to be condition precedent".*[49]

2.63 The ruling in ***London Borough of Merton v Stanley Hugh Leach Ltd***[50] shows that it will be necessary to look very carefully at the exact wording of the clause in question. The clause from the JCT Standard Form of Building Contract read as follows:

> Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the delay to the Architect/ Supervising Officer, and if in the opinion of the Architect … the completion of the works is likely to or has been delayed … then the Architect shall so soon as he is able to estimate the length of the delay … make in writing a fair and reasonable extension of the time for the completion of the Works…

2.64 The court in this instance held that the clause did not prevent the Architect granting an extension of time where the Contractor had not complied with the provisions of the condition.

2.65 It is some comfort for practitioners that construction Arbitrators have consistently interpreted the RIAI provisions as not being Conditions Precedent and the PWC provisions as being so. It is possible that with the pending change in pool of dispute resolvers, as a likely result of the introduction of adjudication under the Construction Contracts Act 2013, that we may get some tribunals deciding the matter differently; indeed it is possible that we might get some jurisprudence on the matter if a party challenges an Adjudicator's decision under the Act, which is now a possibility[51].

2.66 There is one notable exception to the generally accepted position that the Notice Provisions of the RIAI suite of contracts are not Conditions Precedent; clause 29(a) reads as follows:

> If the Contractor fails to practically complete the Works by the Date for Completion … or within any extended time … **and** the Architect certifies in writing, on simultaneous notice to the Employer and the Contractor, that in his opinion the same ought reasonably so to have been completed the Contractor shall pay or allow to the Employer … "Liquidated and Ascertained Damages" for the period during which the said Works shall so remain or have remained incomplete…

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47 *Steria Ltd v Sigma Wireless Communications Ltd* [2008] BLR 79
48 *WW Gear Construction Ltd v McGee Group Ltd* [2010] EWHC 1460 (TCC)
49 *WW Gear Construction Ltd v McGee Group Ltd* [2010] EWHC 1460 (TCC)
50 *London Borough of Merton v Stanley Hugh Leach Ltd* [1985] BLR 32
51 Under the Construction Contracts Act 2013 the merits and reasons of an Adjudicator's decision are likely open to examination by a Court; section 6(10) The decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision.

2.67 It is well accepted that unless the Architect has certified in writing, at the time of the delayed completion, that the Contractor ought to be finished, then the Employer will not be entitled to recover LAD's.

2.68 This a very important Notice Provision, and it is submitted that the established position could be challenged insofar as the wording of the clause does not preclude the Architect certifying in writing at a later date; in fact that the wording is in the past tense supports such a contention however unorthodox such an argument may appear[52]. The contrasting argument being that the purpose of the Notice is to enable the Contractor to make up the delay, or mitigate its potential losses. It is prudent to note it is unlikely that arguments contrary to the established position would succeed unless such arguments were put to a newly practicing chair or a practitioner from a non-Irish background.

2.69 In support of the established position on clause 29(a) ***A Bell & Son (Paddington) Ltd v CBF Residential Care & Housing Association (A company limited by guarantee)***[53] has been cited, where the Court held that:

> *"The giving of notice of intention to deduct liquidated damages under clause 24.2.1 by the employer is subject to a condition precedent that the architect issues a certificate of non-completion under clause 24.1"*[54]

2.70 However, the wording being considered differed significantly from the wording in the RIAI, merely stating:

> If the Contractor fails to complete the works by the Completion Date then the Architect shall issue a certificate to that effect.[55]

Therefore, it is submitted that this ruling does not address the issues noted above in relation to clause 29(a).

2.71 In summary on the RIAI forms of Contract; it is the established position that in general the Notice Provisions included therein do not constitute Conditions Precedent, with one notable exception re. clause 29(a) and the imposition of Liquidated and Ascertained Damages. However, as the generally accepted positions have never been stated by a Court in Ireland, and given the potential for new tribunals in the foreseeable future, it might be worth putting forward arguments on the basis of the decision in ***Steria Communications***[56] and/or the ambiguity in the wording in relation to clause 29(a). That said; the more advisable course of action is to ensure compliance with the provisions, thereby preventing any question of claims being barred, in addition to providing the notice envisaged under the contract, or more prudently amending the provisions as suggested hereunder.

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[52] The wording states "in his opinion ought reasonable so to have been completed", not "ought reasonably to be complete", which would indicate a contemporaneous certification, and the wording states "have remained incomplete", which is a clear indication that the certification can occur at a date after the delay.

[53] *A Bell & Son (Paddington) Ltd v CBF Residential Care & Housing Association (A company limited by guarantee)* 16 ConLR 62

[54] *A Bell & Son (Paddington) Ltd v CBF Residential Care & Housing Association (A company limited by guarantee)* 16 ConLR 62 at 66

[55] JCT Standard Form of Building Contract, 1980 edition, Private Edition with Quantities, clause 24.1

[56] *Steria Ltd v Sigma Wireless Communications Ltd* [2008] BLR 79

3.0 Amendments

3.1 Given the above discussion and the argument that the 'commercial purpose' of the contracting parties in the RIAI contracts in relation to Notice Provisions has been frustrated, it is highly advisable that practitioners consider amending the wording of the RIAI provisions to give effect to the intention of the parties, or at least the Employer.

3.2 There are numerous possible amendments, most commonly based upon the notice provisions of FIDIC[57] and or the present PWC suite of contracts, though it is notable that all these forms maintain the wording 'after it became aware, or should have become aware'[58] and so consideration should be given to keeping the specificity in this aspect of the RIAI provision.

3.3 Notwithstanding the above, it is possible that the use of more onerous knowledge requirements, such as 'within five days of the act or default', as stated in 29(b) of the RIAI form of contract, would be excessively burdensome on a Contractor and open to challenge. This ought to be taken into account when considering the comments above on the weakness in using the words 'after it became aware, or should have become aware'.

3.4 Another consideration to be borne in mind when putting forward amendments is that one ought to be very careful not to lift a condition precedent in isolation from a contract and insert it into another contract. For example, were one to insert a Condition Precedent in relation to the Notice Provisions of condition 2 of the RIAI contract[59], consideration would need to be given as to how this would interact with the provisions of 29(b) of the same contract[60]; continuity is critical to address the shortcomings in a meaningful manner.

3.5 In addition, were one to use the provisions of the PWC to amend the RIAI form of contract, consideration would need to be given to the lack of interpretative restrictions in the PWC, and whether the lack thereof in the RIAI would deprive a Client of the benefit by virtue that the condition would thereafter be construed *contra proferentem*. It is arguable that the case law would favour the upholding such provisions without the qualifications noted, but one would need to consider any amendments and any unintended consequences very carefully. It might be an option to simply insert the interpretative limitations into the RIAI as amendments also; however, in doing so one would need to see if these limitations would significantly alter the interpretation of any other conditions.

3.6 It is noted that a significant portion of the principles derived from English jurisprudence arise on foot of the FIDIC forms of contract, and most commonly the Red, Yellow and Silver books; however, there is another form of contract in the FIDIC suite, the Gold book, it is a later version of contract and could be

[57] FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer First Edition

[58] FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer First Edition Clause 20.1: "The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance"; and the PWC : "shall, as soon as practicable and in any event within 20 working days after it became aware, or should have become aware, of something that could result in such an entitlement, give notice of this to the Employer's Representative".

[59] If compliance with an Architect's Instruction will involve the Contractor in loss or expense beyond that provided for in or reasonably contemplated by this Contract the Contractor shall so inform the Architect...

[60] If any act of default of the Employer delays the progress of the Works then the Contractor shall within five working days of the act or default give notice in writing to the Architect...

illustrative to those seeking to draft bespoke amendments to the Irish contracts, most notably Contractors seeking to negotiate terms.

3.7 The major difference in the Gold book is that it is permissible in certain circumstances to submit late notices, subject to the Dispute Adjudication Board's discretion. It is not necessarily suggested that this would be a welcome addition to the landscape; however, it is worth considering that if parties were not so focused on whether or not they complied or not with Notice Provisions, but looked to the justice of the situation, then perhaps some common sense would prevail.

3.8 It is noted that at the time of writing there is a review of the PWC suite of contracts, though it appears from the initial publications on this, that no amendments are forthcoming in relation to the Notice Provisions.

4.0 The Prevention Principle

4.1 There is an important matter for construction professionals of relevance to the duty to manage construction contracts, and indeed Conditions Precedent, in a proper manner, the Prevention Principle.

4.2 The Prevention Principle means that if an act of the Employer or their agent has prevented a Contractor complying with its obligations, then the Employer will not be entitled to recover losses and/or will be liable for damages arising as a result of this breach.

4.3 There are many ways to define the principle; however, the one used above focused on the "losses" leads into a very strong argument against the use of the Prevention Principle to defeat Conditions Precedent as dealt with in detail by Hamish Lal in his paper on Time-Bar Clauses[61]. He submits that there are two possible arguments against such an application of the rule. One on the basis that the principle is merely a rule of construction, and the other on the basis of the proximate cause of the loss.

4.4 The latter of these, as an argument grounded upon the principle of freedom of contract and the proximate cause of the loss, it is likely the argument most suited to Construction Arbitrators and Conciliators who are more accustomed to business realities and recognizing what the actual cause of the loss is, than legal rules of construction.

4.5 Applying the proximate cause of the loss test to a claim where a Contractor has failed to comply with a Condition Precedent and is relying upon the Prevention Principle to pursue its claim nonetheless. It is suggested that the loss that the Contractor has incurred arises, not from the act of the Employer, but from the act of the Contractor in failing to fulfill the Condition Precedent.

4.6 Therefore, it is suggested, that to apply the Prevention Principle to defeat a Condition Precedent disregards the contractual intention of the parties and an explicit term of the contract and ought not to be considered good law in this jurisdiction.

[61] Hamish Lal "The Rise and Rise of Time_Bar Clauses for Contractors' Claims: Issues for Construction Arbitrators" Online Society of Construction Law 2007

5.0 Construction Contracts Act 2013

5.1 It is undoubtedly the case that enough time has been spent considering the possible implication of this Act and how the Courts may approach the Act, all before it has even taken effect[62]. Nonetheless, the Act does have significant Notice Provisions and certain aspects of this will apply regardless of what contract provisions are in place; therefore, it would be incorrect to avoid the topic on foot of this fact.

5.2 The operative parts of the Act are split into payments and the right to suspend for non-payment, and the right to refer to adjudication along with the right to suspend for a failure to comply with an adjudicator's decision. The relevant provisions are outlined hereunder, split accordingly.

Payment matters

5.3 Section 3 of the Act defines what a contract has to include in relation to payments, and dictates that the provisions in a sub-contract cannot be any less advantageous than the provisions of the Schedule to the Act. Failure to comply with the payment provisions gives rise to a right to suspend, but this right is contingent on the following Notice Provisions in Section 4 of the Act:

> Where a party delivers a payment claim notice on foot of a payment claim no later than 5 days after the payment claim date; and
>
> The other party, if contesting the amount due, shall deliver a response within 21 days.
>
> Finally, if the matter has not been settled by the day on which the amount is due, then the party shall pay the amount claimed.

There is one clear Notice Provision above and another deadline to be observed; the question that arises is that in the absence of the consequences for failure to comply with the timescales, whether or not the right to pursue the options persists.

This matter has obviously not been decided upon and in the meantime, the consensus is that it is likely that unless a party delivers the payment claim notice within the five days, it loses the right to do so until the following payment period, and by extension loses the entitlement to suspend the works.

Exactly what is meant by a payment claim notice is presently the subject of some confusion, is it a progress statement, or perhaps an invoice raised on foot of an Architect's certificate; this will only be decided once the courts have considered the matter.

[62] The Construction Contracts Act 2013 was enacted on 29th July 2013; however, it has not come into effect as of the date of this paper and will only take effect on the order of the Minister for Public Expenditure and Reform, section 12(2) of the Act.

5.4 On foot of a failure to pay the amount due in accordance with section 4 the Act, section 5 makes provision for suspension of the Works. This section contains an additional Notice Provision:

> The Contractor can give notice of intention to suspend, not earlier than the due date and at least 7 days before the proposed suspension is due to take effect.

This is a simple form of Notice Provision and is indeed a Condition Precedent by virtue of the fact that the right to suspend is conditional upon compliance with the provision; however, the question of what is an amount due remains uncertain.

Adjudication matters

5.5 The provisions of section 6 of the Act are not exactly Notice Provisions, but they are time limitations and are therefore covered briefly noting therein the consequences of failure to meet the set time limits.

5.6 The first set of time limits arise in relation to the parties' actions immediately after commencing adjudication, which can be commenced at any stage, these are as follows:

> If the parties wish to agree an adjudicator themselves, they must do so within 5 days, beginning on the date of the initial notice.
>
> If they fail to so agree it is up to the Minister to appoint an adjudicator from the Minister's panel.
>
> The final time limit here is the requirement that the commencing party shall refer the dispute to the adjudicator within 7 days of the adjudicator's appointment, again commencing on the day of the adjudication.

While none of the above are Notice Provisions *per se*, the effect of a failures to meet the time limits are very similar to failure to meet Conditions Precedent, a loss of rights that would otherwise exist. However, it is notable that this merely delays matters, as a party could commence another adjudication and thereafter comply with the time limits.

One interesting matter here is that even if the parties agree to permit a late referral, the Act does not make provision for this; therefore a new adjudication may need to be commenced.

5.7 There is one overriding time limit within the process, which, while not a Notice Provision either, is worth noting, this relates to the time for decision to be issued:

> The adjudicator shall reach a decision within 28 days beginning on the day on which the referral is made, or as agreed between the parties after the referral has been made.
>
> The adjudicator may extend the period of 28 days by up to 14 days, with the consent of the party by whom the payment dispute was referred.

This appears to be extremely straightforward, if an Adjudicator fails to reach a decision within the time periods permitted, the adjudication is at an end without

a recommendation. Of course this will raise the issue of costs wasted, negligence and perhaps, given the statutory nature of the scheme, breach of statutory duty.

Once again, this is an area that will no doubt be considered by the Courts shortly after the Act comes into effect.

5.8 Following an adjudicator's decision, the final Notice Provision arises under section 7 of the Act. This is a relatively straightforward provision requiring a 7-day notice period prior to suspension, which can only be issued after the 7-day period for payment of an adjudicator's decision has expired.

It is suggested that this is one of the less contentious provisions of the Act, but it is very likely that some matter of contention will become evident relating to this provision also.

5.9 One matter to be aware of in considering all of the above matters is that they are legislative, not contractual provisions and so will need to be construed in that light. Of course if a party chooses to write these provisions into the contract, then it becomes a matter of clear contractual interpretation, a matter parties ought to consider at the outset.

6.0 Recent Developments in case hearing running order.

6.1 There was an interesting development recently in an insurance case ***Kelly Builders (Rosemount) Limited v HCC Underwriting Agency Limited***[63] where Murphy J. *ex tempore* considered the correct running order in a case where the primary defence was non-compliance with a Condition Precedent as a means to defeat an otherwise valid claim.

6.2 In advance of turning to this case it is worth referring to passage of Keane J's High Court ruling in ***Rohan Construction v. ICI***[64] as adopted by the Supreme Court in ***Analog Devices BV v Zurich Insurance***[65] as follows:

> *"It is clear that policies of insurance, such as those under consideration in the present case, are to be construed like other written instruments. In the present case, the primary task of the court is to ascertain their meaning by adopting the ordinary rules of construction. It is also clear that, if there is any ambiguity in the language used, it is to be construed more strongly against the party who prepared it, i.e. in most cases against the insurer. It is also clear that the words used must not be construed with extreme literalism, but with reasonable latitude, keeping always in view the principal object of the contract of insurance."*[66]

6.3 The logical corollary of what is stated in the above passage is that law relating to insurance contracts is equally law in general contract law; insurance contracts are merely a form of written agreement that happen to have Conditions Precedent throughout them and so deal most often with such matters.

[63] *Kelly Builders (Rosemount) Limited v HCC Underwriting Agency Limited* (Unreported) 4th February 2015
[64] *Rohan Construction v. ICI* [1986] ILRM 419
[65] *Analogue Devices & Ors v Zurich Insurance & Ors* [2005] IR 274
[66] *Rohan Construction v. ICI* [1986] ILRM 419

6.4 In the ***Kelly Builders***[67] case, one of the primary matters in contention in the case was the alleged failure of the Plaintiff to comply with a Condition Precedent to the Defendants' liability.

6.5 A matter debated in this case was how central the matter of alleged non-compliance with the Condition Precedent was to the refusal of the insurer to indemnify the insured. The contention on behalf of the Defendant insurer being that there were many other issues upon which the Defendant could refuse to indemnify the Plaintiff; nonetheless Murphy J considered it was sufficiently central so as to result in the ruling noted hereunder.

6.6 In construction cases we are all very familiar with the instance where an Arbitrator divides out the matter of liability and quantum, often directing that the Quantity Surveyors assess the quantum. Thereafter, often dividing a hearing into different disputes, extracting therein claims where the claimant has failed to comply with Conditions Precedent.

6.7 Returning to the development in ***Kelly Builders***[68]; the Plaintiff contended that the onus of proving a breach of Condition Precedent rested with the insurer; something that was not very contentious.

6.8 Thereafter counsel for the Plaintiff submitted that once the primary matter in contention was the proof of non-compliance with a condition precedent that the Defendant ought to open the case.

6.9 There was a detailed examination of the law on the burden of proof and in response counsel for the insurer noted that although ample case law was cited in support of the contention that the burden shifted, none was provided illustrating that the running order of the case ought to change.

6.10 Counsel for the Plaintiff responded to the above by referring to the running order in a challenge to a will, or in a case of adverse possession; it is added that such a reversal in the running order also takes place on a statutory footing in unfair dismissal cases[69] and so it is not altogether unusual for a running order to be reversed.

6.11 Ultimately Murphy J accepted the submissions of the Plaintiff and decided that:

> *"…the Court accepts that the law is and I think the parties, the Defendant, also accepts that the law is, that in seeking to avail of a clause, an exclusion clause as it were, the onus is on the insurance company to prove on the balance of probabilities that they are not liable to cover the event in respect of which indemnity is required.*
>
> *It seems to the Court in those circumstances that it is similar to the situation that might apply in a will case or in a case of adverse possession that the only issue between the party in essence is whether or not the insurance company is entitled to avail of the conditions precedent. It is for the insurance company to establish its entitlement to do so and the Court is therefore persuaded that it is for the insurance company to make its case that it is entitled to avail of the expectation under the policy."*

[67] *Kelly Builders (Rosemount) Limited v HCC Underwriting Agency Limited* (Unreported) 4th February 2015
[68] *Kelly Builders (Rosemount) Limited v HCC Underwriting Agency Limited* (Unreported) 4th February 2015
[69] Unfair Dismissals Act 1977 as amended

6.12 This is the law in relation to proving Conditions Precedent, at the very least, where that is the only matter preventing a successful claim. As already noted, it is common in arbitrations for hearing to be split according to the matters in dispute creating a situation where then only matter in dispute being heard is the question of compliance with Conditions Precedent.

6.13 The effect of such a change in the law, if it is indeed a change in the law, is difficult to assess; it is suggested that even if the running order of the case were changed in this manner, this could very possibly be to the advantage of the Defendant insofar as they will get to frame how the case is presented rather than respond to a case framed by the Plaintiff, as is the norm. For parties in construction disputes it is at least the case that this matter ought to be considered in the planning of the case.

6.14 This of course does lead to a discussion, falling outside the scope of this paper, on whether or not an arbitrator is bound to follow such precedent in setting the running order. Indeed under the Arbitration Act 2010 the question has to be asked whether or not an Arbitrator is bound to follow precedent at all. Given the absence of the case stated procedure and the lack of a challenge for an error of law on the face of the award, it is arguable that an arbitrator can depart as he/she sees fit from precedence; however, if it became clear that an Arbitrator as a matter of course had decided not to follow precedent as a general position, then it is arguable that this is contrary to the law of Ireland as a common law jurisdiction where precedent law is as much law as is legislation, and therefore the approach could be subject to challenge on the grounds of public policy.

7.0 Summary

7.1 The first point to be taken from the above is that, a Notice Provision of a Contract will be held to be a Condition Precedent if the wording provides very clear timescales for the issuing of notices and is absolutely clear in the consequence of failure to comply with the times in releasing the Employer from liability.

7.2 In addition to the above, it is possible on the basis of some case law that wording such as ‘provided that’ may result in a finding that a Notice Provision is a Condition Precedent, notwithstanding a lack of definitive timescales.

7.3 In deciding whether or not a Notice Provision is a Condition Precedent, due to the consequences flowing from such a finding, the condition should be construed strictly against the party seeking to rely upon it.

7.4 Once a Notice Provision is held to be a Condition Precedent, due to the high test applied in order to make such a finding, a Contractor will be obliged to comply strictly with the provision.

7.5 Even when a Notice Provision is held to be a Condition Precedent, the wording of the condition ought to be very carefully examined to ensure a Contractor cannot circumvent the condition, or from the other side to show that the Contractor has failed to fulfill the requirements.

7.6 The primary Notice Provisions of the RIAI contracts have been long held not to be Conditions Precedent, with the exception of the provisions relating to

Liquidated and Ascertained Damages; however, there is an argument that this is not an absolute position on the basis of some English case law.

7.7 The Notice Provisions of the PWC contracts are generally Conditions Precedent. There is potentially some problematic wording that could provide some flexibility for a Contractor; however, other interpretative provisions in the contract arguably address a large portion of this flexibility.

7.8 It is always possible to amend a contract to attempt to address the possible shortcomings of the standard contracts. A party seeking to amend a contract ought to be very careful not to simply lift the wording from one contract, in isolation from the remaining provisions, and insert it into another contract. This potentially can lead to unforeseen problems or unintended consequences.

7.9 There are no plans afoot in the review of the PWC suite of Contracts to address any of the matters noted in this paper and so these issues are likely to feature in construction disputes for the foreseeable future.

7.10 The Construction Contracts Act 2013 imposes a selection of time limitations upon parties; not all of these are strictly Conditions Precedent, though failure to comply with the provisions may result in a loss of rights and so the provisions ought to be approached with a similar mindset to Conditions Precedent.

7.11 As stated previously, an Irish Court has not specifically decided a lot of these matters, so the comments are merely the author's opinion based on the most relevant case law; no doubt opposing conclusions could be reached if one were required to do so. This duplicity will remain the case until there is some definitive Irish precedent on this matter, which may arise as a unintended consequence of the enactment of the Construction Contracts Act 2013[70].

7.12 In light of the above comments, Construction professionals and Contractors alike ought to have very clear systems in place to ensure that Notice Provisions are complied with in full. In so doing contracting parties are respecting the wishes of each other to keep on top of time and costs on a construction project. The alternative is to find oneself arguing in front of a tribunal that a condition is not in fact a Condition Precedent at all, or that one has actually complied with the Condition even though this is not readily apparent.

As Benjamin Franklin said:

"An ounce of prevention is worth a pound of cure."

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[70] Under the Construction Contracts Act 2013 the merits and reasons of an Adjudicator's decision are likely open to examination by a Court; section 6(10) The decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision.