# LIGHT AT THE END OF THE TUNNEL? GIBRALTAR DISPUTE REVIEWS KEY FIDIC YELLOW BOOK PROVISIONS

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## INTRODUCTION

As disputes under the FIDIC forms of contract are normally resolved in private Dispute Adjudication Board ("DAB") proceedings or confidential arbitration proceedings, reported FIDIC cases are rare and often of considerable precedential value either formally or informally. This article considers one such recent decision which was transferred from the Gibraltar courts specified in the particular conditions of the contract (in lieu of arbitration) to the more specialised Technology and Construction Court of England and Wales by the agreement of the parties during the pre-action protocol process.

The case was *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*[1] and concerned a dispute arising out of a £30 million contract for design and construction work to the Gibraltar Airport ("the contract"). The contract incorporated the FIDIC Conditions of Contract for Plant and Design Build for Electrical and Mechanical Plant, and for Building and Engineering Works, designed by the Contractor, 1st Edition 1999, commonly known as the Yellow Book.

Under the current arrangements, the road to the Spanish border (the Winston Churchill Avenue) traverses the airport runway so that the road must be closed when the runway is in use. In an attempt to relieve the congestion caused by the frequent closure of this road, the works included the construction of a new dual carriageway road and a twin bore tunnel under the eastern end of the airport runway, known as the Frontier Access Road.

The contract was entered into in November 2008 and works commenced in December 2008. After over two-and-a-half years of work on the two-year project, when little more than 25% of the work had been done, the contract was terminated. The large Spanish civil engineering company

[1] *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC); [2014] BLR 484.

Obrascon Huarte Lain ("OHL") was the contractor. It commenced proceedings against the employer, the Government of Gibraltar[2].

Although Gibraltar is famous for its rock and despite the airport site's historic military use, the contractor argued inter alia that it had encountered more rock and contaminated material in the ground excavated on the site than would have been reasonably foreseeable by an experienced contractor at the time of tender. The contractor also argued that as a result of a report it had commissioned, which concluded that airborne contamination on the site posed a serious risk to the health of those working in the tunnel, it was necessary to suspend the tunnel excavation works and re-design the tunnel. There followed very little activity by the contractor between 20 December 2010 (the date of the report) and 28 July 2011 (the date of the employer's notice of termination). During this period of inactivity the contractor suggested a new budget of some £98 million (over three times the original contract price) would be needed to complete the works.

The court disagreed with the contractor's arguments and found, inter alia, that the contractor had failed to proceed with the design and execution of the works with due expedition and without delay. It awarded the contractor just one day extension of time from the 660 days originally claimed (reduced to 474 days in the amended particulars of claim submitted during the trial itself). The court was especially critical of the report heavily relied upon by the contractor to support its suspension of the works and redesign of the tunnel, which it described as "*palpably and obviously inept, was clearly worked on by OHL and cannot have been considered by OHL to be independent or competent*"[3].

The main issue revolved around the termination of the contract. The court found that the contractor was responsible both in law and fact for the termination and that the employer had lawfully terminated the contract. In determining responsibility for the termination of the contract, the court considered the following matters which are discussed in this article:

1. Was the engineer entitled to issue notice to correct on 16 May 2011 and/or 5 July 2011 under clause 15.1?
2. Was the employer entitled to terminate the contract under clause 15.2? In particular:
   (a) Did the contractor fail to comply with the notice to correct pursuant to clause 15.2(a)?

[2] Corbett & Co acted on behalf of the Government of Gibraltar in this case.
[3] Paragraph 332.

(b) Did the contractor abandon or otherwise plainly demonstrate the intention not to continue performance of his obligations under the contract pursuant to clause 15.2(b)?
(c) Did the contractor fail without reasonable excuse to proceed with the works in accordance with clause 8 pursuant to clause 15.2(c)(i)?

3. Must the breach of contract which is relied upon to terminate the contract be analogous to a repudiatory breach of contract?
4. Will termination occur if the contractor has been prevented or hindered from remedying the failure for which the notice to correct is given under clause 15.1?
5. Was the notice of termination dated 28 July 2011 a valid and effective notice pursuant to clause 15.2 because it was not served at the address for service of the contractor as stated in the Appendix to Tender?
6. Did the service of the termination notice to the "wrong" address amount to a repudiation?
7. When should the clause 20.1 notice have been given?

The court was not asked to consider quantum which was left for a later date.

## WAS THE ENGINEER ENTITLED TO ISSUE NOTICES TO CORRECT ON 16 MAY 2011 AND/OR 5 JULY 2011 UNDER CLAUSE 15.1?

In determining who was responsible for the termination, the court first reviewed clause 15.1 the contract, which states:

> "15.1. If the Contractor fails to carry out *any obligation* under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time." [Emphasis added.]

The judge, Mr Justice Akenhead, found that the engineer was entitled to issue the clause 15.1 notices to correct on 16 May 2011 and/or 5 July 2011 in relation to various clause 8 breaches, including the suspension of tunnel excavation works.

He made various useful points in respect of clause 15.1 which are of general application.

His first point was that clause 15.1 relates only to more than insignificant contractual failures by the contractor, such as a health and safety failure, bad work or serious delay on aspects of the work. This, he said, will need to be established as an actual failure to comply with the contract rather than something that may have not yet become a failure. For example, the delivery to site of the wrong type of cement may not become a failure until the cement is, or is about to be, used. This is

a commercially sensible construction and one to be encouraged; the construction industry would not benefit from trivial contractual failures giving rise to notices to correct, which if not complied with, would in turn lead to contractual termination. Mr Justice Akenhead supported his view with reference to various authorities[4]. He emphasised that what is trivial and what is significant or serious, will depend on the facts and gave the example that one day's culpable delay on a 730-day contract or 1m² of defective paintwork out of 10,000m² good paintwork would not, if reasonable and sensible commercial persons had anything to do with it, justify termination even if the contractor did not comply with the clause 15.1 notice. Nonetheless, despite this very well-reasoned guidance, it cannot be ignored that on its face the express wording "*any obligation*" in clause 15.1 is very broad indeed. It perhaps remains open to argument in other forums and jurisdictions that a failure to carry out any obligation need not be an important or material obligation. There is also no express time limitation, so in theory it might be possible for the notice to correct to deal with a failure which occurred months or years earlier and which then had, and still has, no significant impact on the contractor's operation (provided that it can still be remedied). Hopefully, the next edition of the FIDIC Yellow Book will resolve any ambiguity.

Mr Justice Akenhead's second point was that the specified time for compliance within the clause 15.1 notice must be reasonable in all the circumstances prevailing at the time of the notice. He gave the example that if 90% of the workforce had gone down with cholera at that time, the period given for compliance would need reasonably to take that into account, even if that problem was the contractor's risk. He said that it may well be relevant to take into account whether the clause 15.1 notice is coming out of the blue or if the subject-matter has been raised before and the contractor has chosen to ignore what it has been told. He emphasised that what is reasonable is fact sensitive[5].

His third point was that clause 15.1 is designed to give the contractor an opportunity and a right to correct its previous and identified contractual failure.

His final point was that given the potentially serious consequence of non-compliance, clause 15.1 notices need to be construed strictly but may be construed against the surrounding facts[6].

[4] Lord Diplock in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201D; [1984] 2 Lloyd's Rep 235; [1984] 3 WLR 592; [1984] 3 All ER 229, *Hudson's Building and Engineering Contracts*, 12th Edition, paragraph 8.056, Lord Steyn in *Mannai Investment Co Ltd v Eagle Star Assurance Company Ltd* (HL) [1997] UKHL 19; [1997] AC 749; [1997] 2 WLR 945; [1997] 3 All ER 352.

[5] See, for example, *Shawton Engineering Ltd v DGP International Ltd (t/a Design Group Partnership)* (CA) [2005] EWCA Civ 1359 at paragraph 69.

[6] *Mannai Investment Co Ltd v Eagle Star Assurance Company Ltd* [1997] UKHL 19 per Lord Steyn.

## WAS THE EMPLOYER ENTITLED TO TERMINATE THE CONTRACT UNDER CLAUSE 15.2?

The court then reviewed clause 15.2 the contract, which states:

> "15.2. The Employer shall be entitled to terminate the Contract if the Contractor:
> (a) fails to comply … with a notice under sub-clause 15.1 …
> (b) … plainly demonstrates the intention not to continue performance of his obligations under the Contract,
> (c) without reasonable excuse fails:
> (i) to proceed with the Works in accordance with clause 8 … or;
> (ii) to comply with a notice issued under sub-clause 7.5 …
> In any of these events or circumstances, the Employer may, upon giving 14 days' notice to the Contractor, terminate the Contract and expel the Contractor from Site."

The employer served a notice of termination on 28 July 2011 on the grounds set out in clauses 15.2(a), (b) and (c).

### Clause 15.2(a)

The court was asked to decide whether, as at 28 July 2011, the employer was entitled to serve a notice of termination under clause 15.2(a) of the contract by reason of the contractor's failure to remedy the defaults notified in notices to correct issued by the engineer on 16 May 2011 and/or 5 July 2011. Mr Justice Akenhead found that the employer was so entitled to serve a notice of termination on 28 July 2011 on the basis that the contractor had failed to comply with the clause 15.1 notices to correct. He was clear that the contractor's right to re-design the tunnel did not outweigh its obligation to get on with the works[7].

### Clause 15.2(b)

In respect of clause 15.2(b) the court was asked to decide whether, as at 28 July 2011, the employer was entitled to serve a notice of termination pursuant to clause 15.2(b) of the contract because the contractor had demonstrated an intention not to continue with the performance of its obligations under the contract. Mr Justice Akenhead found that the employer was entitled to serve a notice of termination pursuant to clause 15.2(b) of the contract because the contractor had plainly demonstrated an intention not to continue with the performance of its obligations under the contract. He drew a verbal and contractual distinction between an intention to continue performance and an intention to continue performance of the contractual obligations. He said that a clear avowed intention to perform, but not by reference to important contractual

[7] Paragraph 328.

terms, could demonstrate such an intention. The demonstration can be judged by reference not only to the words used but also to the actions. On the other hand, a simple disagreement between parties about what the contract meant, or disagreement about whether the contractor had some claim entitlement, would in itself not demonstrate such an intention[8].

The court was also asked to decide whether any entitlement which the contractor might have had, as at 28 July 2011, to an extension of time for the completion of the works, would mean that the employer was no longer entitled to serve a notice of termination pursuant to clause 15.2(b) of the contract. Mr Justice Akenhead found that as the contractor was entitled to only one day's extension of time as at 28 July 2011, such limited entitlement did not mean that the employer was no longer entitled to serve a notice of termination pursuant to clause 15.2(b) of the contract.

**Clause 15.2(c)**

In respect of clause 15.2(c) the court was asked to decide whether, as at 28 July 2011, the employer was entitled to serve a notice of termination pursuant to clause 15.2(c)(i) of the contract. Mr Justice Akenhead found that the employer was entitled to serve a notice of termination pursuant to clause 15.2(c)(i) of the contract because the contractor had failed to proceed with the works with due expedition and without delay and had therefore failed to proceed in accordance with clause 8.1, such as to give the employer an entitlement to terminate the works, and the contractor had no "reasonable excuse" for such failure. He was critical of the contractor who had "*consciously and with its eyes open wrongly and wrongfully suspended the work … and within a few weeks had embarked on a wholly unnecessary re-design of the tunnel*"[9].

He further stated that the fact that liquidated damages (in this case Delay Damages) are permitted for the failure by the contractor to complete on time, does not qualify the right to terminate under clause 15.2 for failure to proceed with due expedition and without delay. The parties must be taken to have known that these were both remedies, albeit on its proper construction minor or insignificant breaches of the progress obligations would not justify termination under clause 15[10].

Finally, in respect of both clauses 15.2(b) and (c), Mr Justice Akenhead gave two basic points of principle which are useful for general application[11].

[8] Paragraph 360.
[9] Paragraph 357.
[10] Paragraph 325.
[11] Paragraph 356.

Firstly, he said the test must be an objective one in relation to the grounds in both sub-paragraphs. So, if the contractor privately intended to stop work permanently but continued openly and assiduously to work hard at the site, this would not of itself give rise to a plain "demonstration" of intention not to continue performance. Similarly, the fact that the contractor was, and had for many months been, doing no work of any relevance without contractual excuse could, without more, objectively judged, give rise to a conclusion that it had failed to proceed in accordance with clause 8 for the purpose of clause 15.2(c)(i).

Secondly, he again emphasised that the grounds for termination must relate to significant and more than minor defaults on the part of the contractor on the grounds that it cannot mutually have been intended that a (relatively) draconian clause, such as a termination provision, should be capable of being exercised for insignificant or insubstantial defaults. Therefore, he said a few days' delay in the context of a two-year contract would not justify termination under clause 15.2(c)(i) and an unwillingness, or even refusal, to perform relatively minor obligations would not justify termination under clause 15.2(b).

In summary, he found that the contract was lawfully terminated by the employer on 20 August 2011 pursuant to clause 15.2 of the contract.

## MUST THE BREACH OF CONTRACT WHICH IS RELIED UPON TO TERMINATE THE CONTRACT BE ANALOGOUS TO A REPUDIATORY BREACH OF CONTRACT?

The wording in clause 63.1 of the old FIDIC Red Book 1987 expressly permitted the employer to terminate the employment of the contractor where the engineer certified to the employer, with a copy to the contractor, that in its opinion the contractor had "*repudiated the Contract*" but this wording was deleted from the FIDIC 1999 editions.

Nonetheless, the contractor argued (with reference to various authorities) that, where "*a contract contains a provision such as clause 15.2 which entitles an employer to terminate by reason of a failure to remedy a breach of contract which has been the subject of a clause 15.1 notice (or to terminate by reason of a breach of contract such as one of those of the type identified in clause 15.2(b) and (c)) the breach of contract that is relied upon must be serious and one which is analogous to a repudiatory breach of contract*"[12]. Mr Justice Akenhead disagreed with the contractor's argument. He stated that any suggestion that the breach of contract relied upon is analogous to a repudiatory breach of contract goes too far (at least as a general proposition) for a number of reasons.

[12] Paragraph 322.

Firstly, he said it is necessary to consider each contract, whether it is a lease, leasehold development, construction or other commercial contract, on its own terms. For example, if the termination clause allows for termination "for any breach of contract no matter how minor", the meaning is clear and does not require some repudiatory breach.

Secondly, most of the authorities referred to did not involve contracts like the contract in this case. The contract lists grounds on which termination can take place including clause 15.2(b) (where the contractor "plainly demonstrates the intention not to continue performance of his obligations under the Contract") which is not unlike the test for English common law repudiation. This ground can be, and is, contractually distinguished from the other grounds, such as clause 15.2(c)(i) (failure "to proceed with the Works in accordance with clause 8", that is in effect often a failure to proceed with "due expedition and without delay"). He queried why the contract would have both the "intention not to continue performance of [contractual] obligations" as well as failure to proceed with due expedition and without delay unless they are, or can be, two separate grounds.

Thirdly, the cases relied upon by the contractor in its submissions had a relatively simple right to terminate (for a, or any, breach). In this contract under clause 15.2(a) (failure "to comply … with a notice under sub-clause 15.1") there was a warning mechanism whereby termination could be avoided by the contractor's compliance with the clause 15.1 notice. In that sense, the contractor is given the chance to avoid termination whilst the simple termination for any breach can come out of the blue. Commercial parties would sensibly understand that this contractual chance is a warning as well to the contractor and the remedy is in its hands in that sense.

Finally, Mr Justice Akenhead accepted that the editors of *Hudson's Building and Engineering Contracts*[13] have properly set out the correct proposition that determination clauses such as this one will generally be construed as permitting termination for significant or substantial breaches as opposed to trivial, insignificant or insubstantial ones. He stated that this accords with commercial common sense.

## WILL TERMINATION OCCUR IF THE CONTRACTOR HAS BEEN PREVENTED OR HINDERED FROM REMEDYING THE FAILURE FOR WHICH THE NOTICE TO CORRECT IS GIVEN UNDER CLAUSE 15.1?

Although there was no suggestion that the employer had hindered or prevented the contractor, Mr Justice Akenhead was clear that termination could not legally occur if the contractor has been prevented or hindered

[13] *Hudson's Building and Engineering Contracts*, 12th Edition, paragraph 8.056.

from remedying the failure for which the notice is given under clause 15.1[14].

He stated that clauses 15.1 and 15.2(c) must, as a matter of common sense, pre-suppose that the contractor is given the opportunity by the employer actually to remedy the failure of which it is given notice under clause 15.1. In that context, termination could not legally occur if the contractor has been prevented or hindered from remedying the failure within the specified reasonable time. This stems from a necessarily implied term under English law that the employer shall not prevent or hinder the contractor from performing its contractual obligations; there is also almost invariably an implied term of mutual co-operation. Therefore, if the engineer has served a clause 15.1 notice to remedy a breach of contract, and the employer hinders or prevents the contractor from remedying the breach, the employer may not rely on the contractor's failure in order to terminate the contract. This is because the employer should not be entitled to rely on its own breach to benefit by terminating[15]. He gave the example of an employer who, following the service of a clause 15.1 notice, denies site access to the contractor to enable it to put right the notified failure.

## WAS THE NOTICE OF TERMINATION DATED 28 JULY 2011 A VALID AND EFFECTIVE NOTICE PURSUANT TO CLAUSE 15.2 BECAUSE IT WAS NOT SERVED AT THE ADDRESS FOR SERVICE OF THE CONTRACTOR AS STATED IN THE APPENDIX TO TENDER?

Clause 3.1 stated how communications were to be made:

> "Wherever these Conditions provide for the giving or issuing of approvals, certificates, consents, determinations, notices and requests, these communications shall be:
>
> (a) …
> (b) Delivered, sent or transmitted to the address for the recipient's communications as stated in the Appendix to Tender. However:
>  (i) If the recipient gives notice of another address, communications shall thereafter be delivered accordingly; and …"

The clause 15.2 notice of termination dated 28 July 2011 was sent by the employer to the contractor's site office rather than to the contractor's Madrid office, which was the address specified in the Appendix to Tender. The contractor argued that it was therefore invalid and ineffective, and on 3 August 2011 wrote stating that this amounted to a repudiatory breach of the contract and purported to accept such repudiation.

[14] Paragraph 324.
[15] See for example, *Alghussein Establishment v Eton College* [1988] 1 WLR 587.

The court was asked to decide whether the notice of termination dated 28 July 2011 was a valid and effective notice pursuant to clause 15.2 of the contract because it had not been sent to the address for service of the contractor as stated in the Appendix to Tender. It concluded that the employer's notice of termination dated 28 July 2011 was a valid and effective notice pursuant to clause 15.2 of the contract.

Although the Madrid office was given in the Appendix to Tender, Mr Justice Akenhead noted that throughout the project, correspondence (including the clause 15.1 notices to correct) had been sent to the contractor's site office without any objection. The project was being run by the contractor from the site office with this office handling the vast bulk of the correspondence, including letters, emails, and technical documentation such as method statements etc. The project manager, with very substantial authority, was based there. He found that in these circumstances, in effect and in practice the parties operated as if the site office was an appropriate address at which service of notices could be effected.

Relying on various authorities,[16] Mr Justice Akenhead drew the following conclusions when finding that service of the 28 July 2011 termination notice to the wrong address was not fatal.

His first conclusion was that termination of the parties' relationship under the terms of such contracts is a serious step. There needs to be compliance with the contractual provisions to achieve an effective contractual termination.

Secondly, as a general rule, where notice has to be given to effect termination, it needs to be in sufficiently clear terms to communicate to the recipient clearly the decision to exercise the contractual right to terminate.

Thirdly, it is a matter of contractual interpretation, (i) as to the requirements for the notice, and (ii) whether each and every specific requirement is an indispensable condition without compliance with which the termination cannot be effective. He said that this interpretation needs to be tempered by reference to commercial common sense.

Fourthly, in the contract in this case, neither clause 1.3 nor clause 15.2 used words such as would give rise to any condition precedent or making the giving of notice served only at the contractor's Madrid office a pre-condition to an effective termination. He said that the key elements of the notice procedure involve securing that the contractor is actually served with a written notice and receives the notice and, it being clear and unambiguous, that the notice is one being served under

[16] *Bremer HandelsGesellschaft MBH v Vanden* (HL) [1978] 2 Lloyd's Rep 109, *Worldpro Software Ltd v Desi Ltd* [1997–98] TLR 279, *Rennie v Westbury Homes (Holdings) Ltd* (CA) [2007] EWCA Civ 1401, *PHRJ Newbold and Others v The Coal Authority* (CA) [2013] EWCA Civ 584; [2014] 1 WLR 1288.

clause 15.2, namely that 14 days' notice of termination is being given by the employer to the contractor, such as to enable it to expel the contractor from the site.

Fifthly, he said the primary purpose of clause 1.3 is to provide an arrangement whereby notices, certificates and other communications are effectively dispatched to, and received by, the contractor. The primary purpose of a clause 15.2 termination notice is to ensure that the contractor is made aware that its continued employment on the project is to be at an end.

His final conclusion was that the service of a clause 15.2 notice at the contractor's Madrid office as such was not an indispensable requirement either of clause 15.2 or clause 1.3. Provided that service of a written clause 15.2 notice was actually effected on the contractor's affiliates at a sufficiently senior level, then that would be sufficient service to be effective.

Mr Justice Akenhead stated that these conclusions applied both in relation to termination clauses in commercial and thus engineering and building contracts in general and specifically in relation to the contract in this case.

## DID THE SERVICE OF THE TERMINATION NOTICE TO THE "WRONG" ADDRESS AMOUNT TO A REPUDIATION?

The contractor sought to argue that the service of the notice of termination dated 28 July 2011 to the wrong address was ineffective and thus amounted to a repudiation of the contract by the employer which it elected to accept on 3 August 2011, such that the contract was terminated on that date. Although Mr Justice Akenhead concluded that it was not necessary for him to decide this issue,[17] he stated that his findings would have been that the service of an otherwise valid and actually well-founded termination notice at the technically wrong address could not in law and on the facts of this case, amount to repudiation (with reference to various authorities[18]).

Therefore, the contractor was not entitled to treat what was otherwise a legally and factually proper clause 15.2 termination notice as a repudiation (as it purported to do). Consequently, he found that the contractor itself repudiated the contract by the terms of its letter dated 3 August 2011 by wrongfully treating the contract as at an end, even though it was not accepted as such by the employer.

[17] Paragraph 375.

[18] *Freeth v Burr* (1874) LR 9 CP 208; [1874–80] All ER 751, *Ross T Smyth & Co Ltd v T D Bailey, Son & Co* (HL) (1940) 67 Ll L Rep 147; [1940] 3 All ER 60; [1940] 56 TLR 825 and *Eminence Property Developments Ltd v Heaney* [2011] 2 All ER 223.

However, because the employer chose to re-deliver the notice of termination via courier on 4 August 2011 to the contractor's Madrid office, it elected to treat the contract as continuing. Thus, in the event this re-delivered notice had been necessary, the contract would have been terminated 14 days later, contractually as opposed to an accepted repudiation.

Mr Justice Akenhead found that given the employer took the contractual route of termination on 28 July 2011 alternatively on 4 August 2011, the employer was not entitled to elect to accept the contractor's repudiatory conduct as detailed in the notice to terminate.

## WHEN SHOULD THE CLAUSE 20.1 NOTICE HAVE BEEN GIVEN?

In determining the contractor's entitlement to an extension of time as at the date of termination, the court considered whether proper notice had been given.

Mr Justice Akenhead found that, as at the termination, the contractor was entitled to no more than seven days' extension of time, subject to compliance with clause 20 of the contract. It was not disputed that clause 20.1 imposed a condition precedent:

> "If the Contractor considers himself to be entitled to any extension of the Time for Completion … under any clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. 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.
>
> If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this sub-clause shall apply …"

Mr Justice Akenhead said that properly construed and in practice, the "*event or circumstance giving rise to the claim*" for an extension of time must first occur and there must, secondly, have been either awareness by the contractor or the means of knowledge or awareness of that event or circumstance before the condition precedent bites. He could see no reason why this clause should be construed strictly against the contractor and thought that it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the employer.

In considering when the event or circumstance giving rise to the extension of time claim arose, regard was had to clause 8.4 which identifies when and in what circumstances such extension of time will be granted:

> "The Contractor shall be entitled subject to sub-clause 20.1 … to an extension of the Time for Completion if and to the extent that the completion for the purposes of sub-clause 10.1 … is or will be delayed by any of the following causes …"

This led Mr Justice Akenhead to conclude that the entitlement to an extension of time arises if, and to the extent that, the completion "*is or will be delayed*" by the various events, such as variations or "*Unforeseeable*" conditions. He said that the extension of time can be claimed either when it is clear that there will be delay (a prospective delay) or when the delay has at least started to be incurred (a retrospective delay).

He gave the following hypothetical example[19]:

> "(a) A variation instruction is issued on 1 June to widen a part of the dual carriageway well away from the tunnel area in this case.
> (b) At the time of the instruction, that part of the carriageway is not on the critical path.
> (c) Although it is foreseeable that the variation will extend the period reasonably programmed for constructing the dual carriageway, it is not foreseeable that it will delay the work.
> (d) By the time that the dual carriageway is started in October, it is only then clear that the Works overall will be delayed by the variation. It is only however in November that it can be said that the Works are actually delayed.
> (e) Notice does not have to be given for the purposes of clause 20.1 until there actually is delay (November) although the Contractor can give notice with impunity when it reasonably believes that it will be delayed (say, October).
> (f) The 'event or circumstance' described in the first paragraph of clause 20.1 in the appropriate context can mean either the incident (variation, exceptional weather or one of the other specified grounds for extension) or the delay which results or will inevitably result from the incident in question."

He explained that the wording in clause 8.4 is not: "is or will be delayed whichever is the earliest". He also said the above interpretation should not in practice necessarily involve a difficult mental exercise on construction projects where a critical path programme is used which can determine when delay is actually being suffered.

His view on this point favours the contractor and may not be shared by employers. If a contractor is "*clear that the Works overall will be delayed*" in October and at that time it considers it will be entitled to an extension of time why should that contractor refrain from giving notice until there is actual delay in November? Clause 20.1 expressly states that notice be given "*as soon as reasonably practicable, and not later than 28 days after the Contractor became aware, or should have become aware of the event or circumstance*". Arguably, knowing that delay will occur but waiting until it has actually been incurred runs contrary to this requirement and will defeat the advantages to the employer of the early warning.

Mr Justice Akenhead was analysing an extension of time claim in his example. It is worth considering here what the notice position might be

[19] Paragraph 312.

for money claims. The logic would seem to apply equally to the money: the event or circumstance can mean either the incident or the *incurring of cost* which results or will inevitably result from the incident. That raises questions where an incident gives rise to both delay and cost which occur at different times. Would notice have to be given within 28 days of the occurrence of whichever came first? If that opportunity was missed, would a notice when the second consequence occurred save the contractor's ability to claim in relation to the second consequence, both consequences, or neither?

Additionally, Mr Justice Akenhead pointed out that there is no particular form called for in clause 20.1 and one should construe it as permitting any claim provided that it is (i) made by notice in writing to the engineer, (ii) that the notice describes the event or circumstance relied on, (iii) that the notice is intended to notify a claim for extension (or for additional payment or both) under the contract or in connection with it, and (iv) that it is recognisable as a "claim"[20]. It is worth clarifying here that under the express wording of clause 20.1 the notice is of the contractor's entitlement to time and/or money with a description of the event or circumstance giving rise to the claim. It is not the claim itself which follows later. (FIDIC's thinking has moved on with regard to notice: clause 1.3 of the Gold Book 2008 is more prescriptive as to the form of notices and other communications than the Yellow Book adopted in this case. The Gold Book also allows DABs to forgive a lack of notice in certain circumstances.)

He also reminded readers that the onus is on the employer to prove the notice was given too late.

Of the seven days' extension of time that Mr Justice Akenhead found the contractor entitled as at the termination, he found that proper notice had been given in respect of only one day. Therefore, the contractor was entitled to only one day's extension of time.

## CONCLUSION

In summary, this case highlights the powers available to employers under the FIDIC Yellow Book to terminate the contracts of contractors who fail to comply with notices to correct pursuant to clauses 15.1 and 15.2(a), abandon the works or otherwise plainly demonstrate the intention not to continue performance of their obligations under the contract pursuant to clause 15.2(b), or (without reasonable excuse) fail to proceed with the works with due expedition and without delay pursuant to clause 15.2(c)(i).

[20] Paragraph 313.

It resists the temptation to temper these powers with the English common law concept of repudiatory breach, but will temper those powers where the contractor has been prevented or hindered from remedying its failures. Whilst the case emphasises the importance of the proper service of termination notices it applies commercial common sense in the service of such notices. The case also gives useful, albeit brief, guidance on when an event or circumstance giving rise to an extension of time arises for the purpose of the clause 20.1 notice.