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No Notice, No Reimbursement: Court of Session Shuts Door on FES in Clause 4.21 Showdown - FES Ltd against HFD Construction Group Ltd (Court of Session) [2024] CSIH 37 (25 October 2024)

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Summary

The case of FES Limited v HFD Construction Group Ltd (CSIH 37) involves a dispute over a construction contract based on the Standard Building Contract with Quantities for use in Scotland (SBC/Q/Scot) (2016 Edition). The main issue was whether the notice provisions in clause 4.21 constituted a condition precedent for the contractor's entitlement to reimbursement under clause 4.20.1. The commercial judge determined that they did, and the Inner House upheld this ruling on appeal.

Key Themes:

1. ***Contractual Interpretation:*** *This case centres on interpreting a construction contract and discerning the parties' intentions from its language.*
2. ***Conditions Precedent:*** *The judgment explores conditions precedent in contracts and whether specific provisions qualify as such.*
3. ***Standard Form Contracts:*** *The case involves interpreting the SBC/Q/Scot standard form contract with bespoke amendments.*
4. ***Notice Provisions:*** *It emphasises the importance of notice provisions in construction contracts and their effect on claims for loss and expense.*

Background

FES entered a contract with HFD to fit out an office building in Glasgow [1, 2]. The contract, based on the SBC/Q/Scot, included clauses on recovering loss and expense for delays [1-3]. Clause 4.20.1 allowed reimbursement for such losses, contingent on compliance with clause 4.21 [3], which required the contractor to notify the Architect/Contract Administrator of the effect of a Relevant Matter and provide a loss and expense assessment [4].

Disputes arose over FES’s entitlement to an extension and loss claims [5]. The adjudicator ruled

against FES, stating non-compliance with clause 4.21's notice provisions, a condition precedent to reimbursement [6, 7]. FES challenged this in the Court of Session, where the commercial judge upheld the adjudicator's decision, prompting this appeal [7, 8].

Legal Issues and Analysis

The central issue was whether clause 4.21.1's notice provisions were a condition precedent to FES's reimbursement entitlement under clause 4.20.1 [7, 8].

1. **The Pursuers' Arguments:** FES argued that clause 4.21 did not explicitly state it was a condition precedent [12, 13, 16, 17]. It noted that 'condition precedent' was used elsewhere in the contract, but not in clauses 4.20 or 4.21. FES suggested that the absence of clear consequences for non-compliance implied the notice provisions were procedural, not a condition precedent [12, 13, 10, 11, 14, 17]. They also appealed to commercial sense, arguing it was unreasonable to deny substantial recovery due to a perceived delay in notice [14, 17, 13, 14, 18, 19].
2. **The Defenders' Arguments:** HFD argued that the phrase 'subject to...compliance with the provisions of clause 4.21' in clause 4.20.1 clearly indicated that the notice provisions were a condition precedent [16, 17, 21, 22]. They stressed the contract's professional drafting and the importance of interpreting its language literally. HFD also noted the commercial function of notice provisions, such as enabling prompt investigation and mitigation of delays [22].
3. **The Court's Decision:** The court upheld the commercial judge's decision, finding that clause 4.21's notice provisions were indeed a condition precedent to reimbursement under clause 4.20.1 [25, 26]. Emphasising the unambiguous language in clause 4.20.1, the court rejected FES's arguments and maintained that the plain meaning must be respected, even if it led to a harsh outcome [25, 26]. While acknowledging the severity of denying recovery, the court noted that terms like 'as soon as' allowed flexibility, potentially offering FES leeway in assessing compliance [25, 26]. The court concluded that compliance with the notice provisions was clearly established as a prerequisite for any loss and expense claims.

Conclusion

The Inner House upheld the commercial judge's decision, ruling that clause 4.21's notice provisions were a condition precedent to the contractor's entitlement to reimbursement under clause 4.20.1 [8]. The decision highlights the importance of clear, unambiguous drafting in contracts and strict adherence to notice provisions, even if they seem procedural.

Key Takeaway:

The key takeaway from this judgment is that courts will enforce clear, unambiguous contract language, even if it results in harsh consequences. Contracting parties, especially when agreements are professionally drafted, must carefully review and understand all provisions, particularly notice and conditions precedent, as non-compliance may lead to losing significant rights, like the right to claim for loss and expense.

Ratio & Obiter:

Ratio:

In this case, clause 4.20.1, granting the right to reimbursement for loss and expense, explicitly stated it was 'subject to...compliance with the provisions of clause 4.21,' which outlined notice requirements. The court found this language clear and unambiguous, concluding that compliance with clause 4.21 was a condition precedent to any reimbursement entitlement under clause 4.20.1 [25].

Obiter:

Several instances of obiter dicta can be identified:

1. **Flexibility in Assessing Compliance:** The court indicated it would adopt a flexible approach and give the contractor 'considerable leeway' if assessing compliance with the notice provisions due to the serious consequences of non-compliance. This was obiter, as the court did not directly decide on compliance [25, 26].
2. **Drafting Errors:** The court noted a drafting error in clause 4.20.1, which referenced clauses beyond the standard 4.21.1 to 4.21.3, including bespoke clauses 4.21.5 and 4.21.6. The court opined that these clauses were not prerequisites for a claim, but this was not central to the decision, which focused on notice requirements in clauses 4.21.1 and 4.21.2 [27, 28].

The ratio emphasises the importance of clear drafting, especially for conditions precedent, while the obiter dicta reflect the court's approach to interpretation and its consideration of practical factors in assessing compliance.

My thanks to Len Bunton for a copy of the judgment.

Parting Thoughts

If there were any lingering doubts that notice provisions in construction contracts matter, FES v HFD has now dragged them into the light, given them a stiff talking-to, and shut the door behind them.

The Inner House has ruled, with the sort of clarity usually reserved for road signs and fire alarms, that the phrase "subject to compliance with clause 4.21" is not ornamental. It means what it says. And what it says is: "No notice, no money."

FES argued valiantly that clause 4.21 didn't explicitly say it was a condition precedent. They cited guidance notes, judicial sympathy, and the general unfairness of being asked to follow instructions in a contract they agreed to. The court was unmoved. This wasn't a morality play—it was contract interpretation. And in the cold calculus of clause 4.20.1, if you don't press the right buttons in the right order, the machine doesn't vend.

The judgment stands as a stern reminder that in modern construction contracts, clarity doesn't just sit in the preambles and general obligations—it hides in the prepositions. "Subject to" is not a suggestion. It's a locked gate with a sign saying "turn back if you missed the last junction."

This decision may seem harsh, especially when it leaves a contractor staring down a multi-million-pound claim turned to ash by a missed email. But as Lord Carloway calmly explained, contracts drafted by professionals are to be read like they were meant—literally, and with both eyes open. Sympathy is not a remedy.

For those drafting or signing contracts, this is your wake-up call. Notice provisions are not procedural fripperies to be filed under "Admin" and ignored until the smoke clears. They are gatekeepers to your entitlements, armed with keys—and occasionally, with clubs.

So, in the age-old battle between rigorous drafting and hopeful interpretation, FES v HFD adds another notch on the side of rigour. There is no judicial appetite for resuscitating claims that contractors themselves left to expire in the inbox. Call it harsh, call it commercial—just don't call it surprising.

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