

## JCT CONDITION PRECEDENT!!!

### Conditions Precedent to recovery of Loss and Expense in JCT Contracts

All users of JCT Contracts should be aware of the recent decision of the High Court in *WW Gear Construction Limited v McGee Group Limited*.

The contract in the case incorporated the JCT Trade Contract Conditions (TC/C) 2002 edition incorporating Amendment 1:2003 and was further amended by the parties. However, as set out below, the decision is likely to affect the interpretation of contracts incorporating other JCT Standard Conditions.

Gear undertook to develop a new hotel in London. McGee was appointed to carry out excavation and other ground works for the development. McGee generally made applications for payment on a monthly basis. These applications included sums in respect of extended preliminaries which McGee claimed had been incurred as a result of delays to elements of the Works. In its Application No. 18 McGee included a sum in respect of its "Loss and Expense Claim" which it stated was "As Attached". That claim was in excess of £1.5m and included for the 'usual' heads of claim such as site preliminaries; head office overheads, and; loss of profit.

Gear decided to refer a dispute to adjudication in relation to the differences between the parties including the proper interpretation of the contract extension of time and loss and expense provisions. The adjudicator generally found in McGee's favour and in

particular decided that the condition precedent requiring McGee to make an application for loss and expense pursuant to the amended conditions was 'devoid of meaning...' and of no effect. Gear being dissatisfied with that decision commenced proceedings for a declaration that compliance with clause 4.21.1 was a condition precedent to McGee making an application for loss and/or expense.



Clause 4.21 read as follows:

*"If the Trade Contractor makes written application to the Construction Manager stating that he has incurred or is likely to incur direct loss and/or expense (of which the Trade Contractor may give his quantification) in the execution of the Trade Contract... because the regular progress of the Works or any part thereof has been or is likely to be materially affected by any one or more of the matters referred to in clause 4.22; and if as soon as the Construction Manager is of the opinion that the regular progress of the Works or of any part thereof has been or is likely to be so materially affected as set out in the application of the Trade Contractor then the Construction Manager from*

*time to time thereafter shall ascertain the amount of such loss and/or expense which has been or is being incurred by the Trade Contractor; provided always that:*

*.1 the Trade Contractor's application shall be made as soon as and in any event not later than two months after it has become, or should reasonably have become, apparent to him that the regular progress of the Works or any part thereof has been or was likely to be affected as aforesaid, and such application shall be formally made in writing and fully documented and costed in detail, and it shall be a condition precedent to the Trade Contractor's entitlement under this clause 4.21.1 or clause 4.25 that the Trade Contractor has complied fully with all the requirements of this clause [sic] including, for the accordance [sic] of doubt, the said time period of two months.*

The judge hearing the case, Mr Justice Akenhead, decided that clause 4.21 was an 'if' clause, i.e. it only becomes relevant **if** one party does something; in this case make a written application to the Construction Manager. If no application is made then there is no obligation placed upon the Construction Manager to ascertain the amount of such loss and/or expense. Hence if you wish to recover sums in respect of loss and/or expense you **must** make a written application to the Construction Manager.

Once a written application is made the Construction Manager is obliged to form an opinion as to whether the regular progress of the Works or any part thereof has been or is likely to be so materially affected as set out in the application. The Construction Manager is then obliged to ascertain sums in respect of loss and/or expense accordingly.

These requirements and obligations are not unique to the JCT Trade Contract Conditions; they are mirrored in the Standard Building Contract Conditions (SBC) at clause 4.23 and the Standard Building Sub-Contract Conditions (SBCSub) at clause 4.19. Hence under the JCT Conditions the obligation to ascertain sums due in respect of loss and/or expense generally only arises on the making of a written application by the party seeking such payment.

Furthermore, as was of particular note in the case of *Gear v McGee*, there are parameters governing the making of a written application for recovery of loss and/or expense. In *Gear v McGee* Mr Justice Akenhead decided that these were a condition precedent to the making of the application and

accordingly ascertainment of sums by the Construction Manager.

Mr Justice Akenhead identified that the use of the words **'provided always that'** at the end of clause 4.21 were:

*"...often the strongest sign that the parties intend that there [is] to be a condition precedent. What follows such a proviso is usually a qualification and explanation of what is required to enable the preceding requirements or entitlements to materialise."*



In the case of *Gear v McGee* the proviso was that the written application had to be made as soon as and in any event not later than two months after it had become, or should reasonably have become, apparent to McGee that the regular progress of the Works or any part thereof had been or was likely to be affected. Again the standard

JCT Conditions mirror these requirements but do not include the two month limit.

Accordingly Mr Justice Akenhead decided that failure to make a timely application in accordance with the timescale set out at clause 4.21.1 precluded McGee from making an application at a later date.

It is therefore essential that when undertaking works pursuant to contracts incorporating JCT Standard Conditions that any application for recovery of loss and expense is made:

**as soon as it becomes apparent, or should reasonably have become, apparent that regular progress has been affected.**

Failure to submit the application within such a timescale will prevent the contractor from being able to recover loss and/or expense under the contract.

It is a further consideration that in order not to be so barred from making such an application Contractors must also closely monitor progress of the Works in order to identify when and how regular progress may be affected.

Haleys provide In-house training on all aspects of the JCT suite of contracts, for further details of these and other services Haleys can provide or to discuss this article please contact us at the following;

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