

## CONTRACT &amp; CONSTRUCTION LAW

# Who bears the risk on construction contract claims?

By Janine Stewart and Charlotte Marsh

In the construction industry, pressure to get deals through often means contracting parties are short-changed on negotiating and review time.

But it is important to take time at the outset to properly consider the effects of key contractual terms, particularly given the current government and industry focus on risk allocation.

Parties should carefully consider whether time bars or time frames apply at the beginning of a project as the courts in New Zealand and the UK tend to uphold the bargain agreed between them.

If the penalty doctrine applies to the consequence of failing to meet a time bar, there may be grounds to strike down a time provision. However, in deciding whether a time provision is penal, New Zealand courts will consider a party's commercial interests and the benefit to the parties of including the time bar.

This article:

- ♦ examines the difference between time bars and time frames;
- ♦ discusses the implications of each for parties in construction projects; and
- ♦ considers the application of the penalty doctrine to time bars (ie, whether allegedly harsh time bars can be ruled unenforceable).

## Time bars versus time frames

A requirement that notice must be given within a specific period or the claim will be void is a common time bar to a claim under construction contracts.

The outcomes of non-compliance are legally binding for contractors. For example, clause 20.1 of FIDIC (the International Federation of Consulting Engineers) states that notice of any claim for an extension of time (EOT) must 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."*

Clause 20.1 is a clear example of a rigid time bar clause, preventing a party from bringing a claim if the specified process is not followed. Strict time bar provisions can help minimise delay and costs, give certainty to parties and, in the case of extension of time claims, increase the likelihood of the claiming party gathering records and correspondence, substantiating the EOT request contemporaneously.



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❖ **Strict time bar provisions can be onerous, difficult to apply to the reality of fast-moving and complex projects and can create combative relationships between principals and contractors from early in the project.**



However, they can also be onerous, difficult to apply to the reality of fast-moving and complex projects and can create combative relationships between principals and contractors from early in the project.

Time frames, which are set periods of time where certain things are expected to occur, are directory rather than mandatory.

A party will not lose the right to bring a claim because of failure to comply with the required time provision.

A failure to comply is simply a breach of contract and the principal may have a damages claim/set off if prejudice or loss can be shown.

For example, clause 10.3.2 of NZS 3910:2013 states the engineer "shall not be bound to grant an extension unless the notice is given within 20 working days after the circumstances arise which are relied on as grounds for the extension, or as soon as practicable thereafter".

The contractor's failure to notify does not

immediately disentitle an EOT claim as the engineer is not "bound" to grant an EOT, but retains discretion to do so. And this is not a time bar as the clause does not set out the consequence of failure. For example, there is no provision stating the EOT claim will be null and void for failure to meet the time period.

Both principal and contractor should carefully weigh up the nature of the project and consider resources for claims management at the outset, and consider the commercial certainty time bars can bring against the flexibility of time frames.

## Enforcing time bars

If strict time bars are adopted, it becomes a question of whether these will be upheld.

Generally, courts across Commonwealth jurisdictions appear to uphold time bars. However in *Gaymark Investments Pty Ltd v Walter Construction Group Limited* (1999) 16 BCL 449, the contractor failed to comply with the mandatory EOT regime requiring notice of a claim within 14 days.

The claim was that the contractor was out of time and was barred. The court held the prevention principle (if the principal prevents the timely completion of the project in any way, it loses the right to liquidated damages and to rely on the agreed completion date) applied, even though the contract permitted EOTs for employer caused delay. The court did not uphold the strict time bar contained in the contract.

The legitimacy of the decision in *Gaymark* was challenged in *Multiplex Construction (UK) Limited v Honeywell Control Systems Limited (No.2)* [2007] EWHC 447, whereby the court acknowledged the important role of the EOT notification regime, holding that a simple failure to comply with a time bar would not set time at large. This case indicates a more robust application of notice requirements by the courts.

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The court in *H & H Contractors Ltd v Leighton Contractors Pty Ltd* [2013] NZHC 2225, also made it clear a party making a claim against the other must adopt a strict approach to contractual procedures. The relevant clause stated that H & H could not bring a claim unless it was brought within 15 days. The High Court upheld the time bar clause, Ellis J commenting at [37] that:

“...the words of cl 45 are, in my view, clear and unambiguous; a party to the contract may not make a claim against the other party unless it complies with the contractual procedures and time frames.” This confirms New Zealand courts will uphold strict time bars agreed between two commercial contracting parties.

**Applying penalties**

If parties chose to adopt a strict time bar in their contract rather than a time frame, industry observation is that motivated contractors will explore arguments to get around the time bar if they have failed to meet it.

For example, by arguing that time bar provisions should be unenforceable due to their penal nature.

The NZ and United Kingdom courts in *Honey Bees Preschool Limited v 127 Hobson Street Limited* [2018] NZHC 32 and *Cavendish Square Holdings BC v Makdessi* [2015] UKSC 76 respectively have made it clear the courts will not hold the time period itself (ie, five days) as penal because it is a primary obligation.



*Construction pressures can squeeze contracting parties*

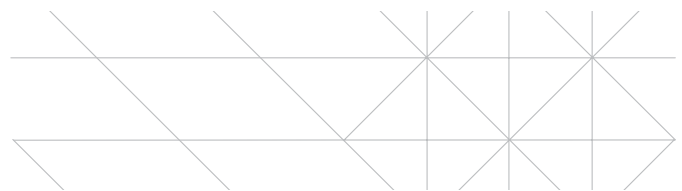
However, the penalty doctrine could arguably apply against the consequence of the failure to meet the time period (ie, being barred from pursuing an EOT claim). The consequence could be seen as a secondary obligation and therefore within the penalty doctrine’s scope. The alternative view is that the consequence simply confirms the time bar as a condition precedent and so is part of the primary obligation, meaning the penalty doctrine would not apply.

*Honey Bees* also shows a party’s broader commercial interests in imposing a consequence for failure to meet a time period will be relevant to applying the penalty doctrine.

The threshold for a “penalty” is high. A party must demonstrate that the secondary obligation is out of all proportion to the legitimate performance interests of the innocent party (*Honey Bees*, at [45]).

In the context of a time bar, this would involve an examination of the benefit to the principal of the time bar being met, and the consequences if the contractor fails to meet it. For example, if the head contractor is required to bring claims within a specific period under the head contract, it has a legitimate interest in imposing a strict time bar for claims by the subcontractor.

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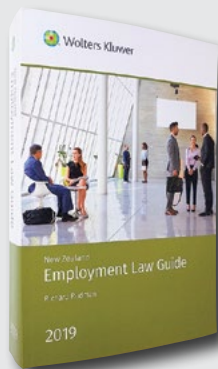
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