

Construction Law Update

Concurrent Delay: Allocating the Risk

Last year, it was held in *North Midland Building Ltd v Cyden Homes Ltd* that the prevention principle did not take precedence over freedom of contract. North Midland Building Ltd (“NMB”) appealed and the case was brought before the Court of Appeal. In its judgment handed down yesterday, the Court unanimously dismissed the appeal, confirming that contracting parties are free to allocate the risk of concurrent delay.

Background

In 2009, Cyden Homes Ltd (“Cyden”) engaged NMB under a JCT Design and Build Contract 2005. An amendment to the provisions granting extensions of time provided that:

“any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account”.

The works were delayed and Cyden refused to grant an extension of time on the basis that there was concurrent delay. The Technology & Construction Court (“TCC”) found that the clause was valid and NMB was not entitled to an extension of time.

Was the term contrary to the prevention principle?

The prevention principle dictates that where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default. NMB argued that Cyden’s actions breached this principle. However, the TCC held that the prevention principle did not arise.

The Court of Appeal agreed with the TCC and found that the extension of time clause was “crystal clear”. It held that the prevention principle did not operate so as to rescue NMB from the clause it had freely agreed for five reasons:

1. the prevention principle is not an overriding rule which strikes down liquidated damages as penalties;

2. the principle was not engaged because the contract provided for extensions of time for employer acts of prevention;
3. the principle had no obvious connection with issues arising from concurrent delay;
4. the amended clause had no connection to the principle; and
5. in any event, there was no authority in support of the proposition that the parties could not contract out of all or some of the effects of the principle.

The Court of Appeal concluded:

“The only thing that the clause does is stipulate that, where there is a concurrent delay (properly so called), the contractor will not be entitled to an extension of time for a period of delay which was as much his responsibility as that of the employer. That was an allocation of risk which the parties were entitled to agree.”

Was there an implied term preventing liquidated damages?

The Court of Appeal rejected the argument that there was an implied term preventing liquidated damages from being levied in circumstances of concurrent delay. The extension of time provision was inextricably linked to the liquidated damages provisions such that, if there was no right to an extension of time, there was no reason why liquidated damages should not apply. The Court held:

“under standard JCT extension of time clauses, it has been found that the contractor can benefit, despite his default. By [this clause], the parties sought to reverse that outcome and provided that, under this contract, the employer should benefit, despite the act of prevention. Either result may be regarded as harsh on the other party; neither could be said to be uncommercial or unworkable.”

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Analysis

The Court of Appeal has now firmly put to rest any argument that clauses which exclude the contractor's entitlement to an extension of time where there is concurrent delay are not valid or enforceable.

Contractors need to be aware of such clauses when entering into contracts and consider whether they are prepared to take on such risk. What is made abundantly clear in this case is that the courts will not interfere with an agreement which the parties have freely reached, provided that agreement is workable.

Careful consideration must be given by employers and contractors alike when negotiating contract terms dealing with concurrent delay.

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