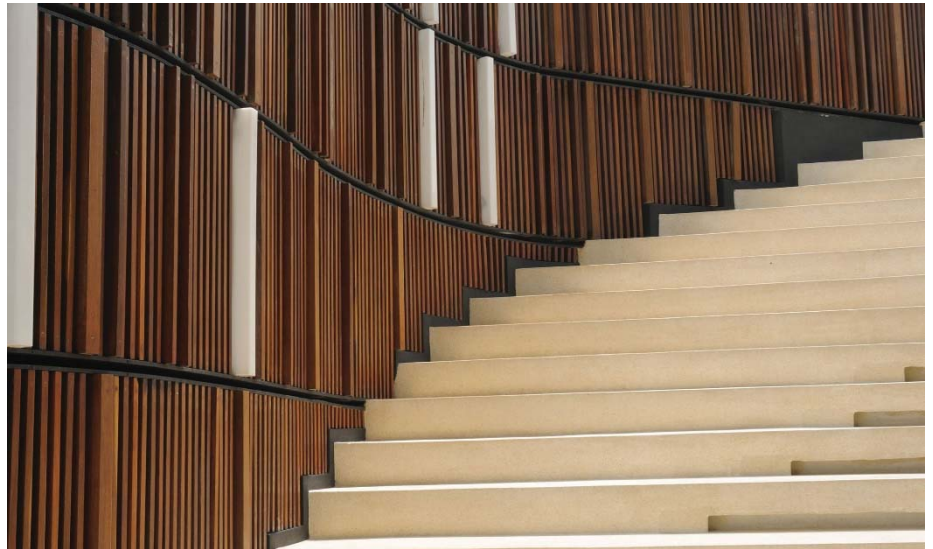


BRIEFING

RESPONSIBILITY FOR
CONCURRENT DELAY
NOVEMBER 2017

- ENGLISH HIGH COURT HOLDS THAT “CONCURRENCY ALLOCATION CLAUSES” ARE VALID AND ENFORCEABLE
- “PREVENTION PRINCIPLE” WILL NOT APPLY IN CASES OF CONCURRENT DELAY



The English High Court has clarified the application of the prevention principle in instances of concurrent delay and given the green light to contracting away such delay in its recent judgment in *North Midland Building Ltd v Cyden Homes Ltd*¹.

“THE PREVENTION PRINCIPLE DICTATES THAT CONTRACTUAL OBLIGATIONS ARE NOT ENFORCEABLE IF THE PARTY SEEKING TO ENFORCE HAS PREVENTED THE COUNTERPARTY FROM PERFORMANCE.”

The prevention principle dictates that contractual obligations are not enforceable if the party seeking to enforce has prevented the counterparty from performing. Generally speaking, the principle is encountered where an employer has prevented a contractor from completing by the agreed completion date. Although the prevention principle originates from the well-recognised rule that a party may not benefit from its own breach of contract, it differs in one key respect - the principle applies even if the preventing act is perfectly permissible under the contract.

The generally established practice of the construction industry has been that where there is concurrent delay, the contractor will usually be entitled to an extension of time. *North Midland Building* not only provides strong reinforcement for the proposition that the prevention principle will not apply unless a contractor can clearly show that the employer’s act was the cause of the delay, but also provides a clear contractual route for determining where responsibility will reside should the circumstance arise. This is to be welcomed in the interests of certainty.

¹ [2017] EWHC 2414 (TCC)

“COMPLETION WAS DELAYED AND THE CONTRACTOR APPLIED FOR AN EOT. THE EMPLOYER REFUSED, CONTENDING THAT THE DELAYS WERE CAUSED BY BOTH “RELEVANT EVENTS” AND DELAYS FOR WHICH THE CONTRACTOR WAS RESPONSIBLE CONCURRENTLY.”

Background

North Midland Building Ltd (the “Contractor”) was engaged in building an expansive residential property and Cyden Homes Ltd (the “Employer”) was a corporate vehicle through which the home owners operated.

The parties agreed bespoke amendments to the standard JCT D&B Contract 2005. The Contractor was permitted an extension of time (“EOT”) where delay caused by a “Relevant Event” caused completion to extend beyond the completion date. However, clause 2.25.1.3(b) stated 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.”

“Relevant Events” included “any impediment, prevention or default, whether by act or omission...” Significantly, acts of prevention were therefore classified as “Relevant Events”.

The Contractor also agreed to pay liquidated delay damages for every week that they were late.

Completion was delayed and the Contractor applied for an EOT. The Employer refused, contending that the delays were caused by both “Relevant Events” and delays for which the Contractor was responsible concurrently.

The Contractor commenced proceedings, seeking declarations that time was at large (i.e., the works had to be completed within a reasonable time) and that the liquidated damage provisions were void. It contended that:

1. Clause 2.25.1.3(b) contravened the prevention principle and was therefore “not permitted”. The Contractor argued that *Multiplex Construction (UK) Ltd v. Honeywell Control Systems Ltd*² necessitated an interpretation of Clause 2.25.1.3(b) in line with the principle; and
2. Regardless of the validity of Clause 2.25.1.3(b), liquidated delay damages were unenforceable in the event of the Employer preventing completion on the basis that the liquidated damages clause was said to be non-operational in circumstances where the parties had adopted bespoke provisions for when an extension of time could be granted.

Decision

Mr Justice Fraser considered that the parties’ agreement was crystal clear and no points of interpretation arose. Under English law parties are generally free to agree whatever terms they please. Therefore, the parties were able to apportion the risk of concurrent delay to the Contractor. The prevention principle was not triggered as the parties had specifically contracted out of it.

The Contractor failed to substantiate its arguments that the Employer was “not permitted” from contracting out of the prevention principle in any event. However, as a practical drafting point of note, the judge emphasised that prevention was

² [2007] BLR 195. This case set out three broad propositions when considering the relationship between the prevention principle and when time is set at large: 1) that a contractually valid action of an employer may still constitute prevention; 2) that employer’s acts of prevention do not set time at large if the contract provides for an extension in respect of those events; and 3) where an extension of time clause is ambiguous it should be construed in favour of the contractor, but that this proposition should be treated with caution. Mr Justice Fraser did not consider *Multiplex* had any effect where the contract was clear.

expressly included in the definition of a "Relevant Event"; the "final nail in the coffin" of the Contractor's submissions on this point. It could not be said that the prevention principle operated separately from clause 2.25.1.3(b) where it had been expressly brought under that clause in the drafting of the contract.

The judge also refused to make the second declaration as to liquidated delay damages. The declaration did not align with a sensible reading of the contract, and the Contractor was unable to cite authorities supporting its contention. Furthermore, it was again dispositive that prevention had been included as a "Relevant Event". The Contractor attempted to marshal an argument that prevention meant any obligation to pay liquidated damages "fell away". This contention was also given short-shift by the judge as it could not sensibly be argued that prevention was somehow a separate intervening factor from the potential causes of delay under 2.25.1.3(b) where it had been expressly included as a "Relevant Event" for the purposes of that clause.

The prevention principle and concurrent delay

Mr Justice Fraser went on to comment in non-binding *obiter* comments that the prevention principle should not be triggered in cases of concurrent delay. Where concurrent delay does occur, the contractor must establish factual causation between the employer's actions alone and prevention of timely completion.

Digging a little deeper into the analysis of the judge it is useful to remember that the primary obligation to complete the works rests with a contractor. As a matter of critical path analysis, the prevention principle cannot apply where the act of the employer is not truly an intervening event that breaks the chain of causation. For example, if a contractor's act has already delayed completion by ten days and a concurrent delay by the employer has also caused ten days of delay then as a matter of factual causation the employer has not caused any further delay. By the same token, if the employer's act caused twelve days of delay then the employer would be causatively responsible for only two days delay.

Mr Justice Fraser firmly endorsed the same conclusions reached by different specialist judges on precisely the same point in *Adyard Abu Dhabi v SD Marine Services*³ and *Jerram Falkus Construction Ltd v Fenice Investments In (No.4)*.⁴ He then helpfully advised that cost-effective resolution of disputes would be more likely if parties in other disputes were to proceed on the basis that those decisions were correct. This direction is particularly noteworthy as counsel for the Claimant had been able to point to "a variety of published articles and other passages in text books" to support its contention that the prevention principle applied in favour of the contractor in instances of concurrent delay. Such sources were arguably the source of the previous wisdom regarding the prevention principle (rather than any established authority on the point).

Conclusion

As a headline point, Mr Justice Fraser's assertion that the prevention principle should not apply in cases of concurrent delay will provide a strong rebuttal to counter the usual claims that the prevention principle has been triggered.

"WHERE CONCURRENT DELAY DOES OCCUR, THE CONTRACTOR MUST ESTABLISH FACTUAL CAUSATION BETWEEN THE EMPLOYER'S ACTIONS ALONE AND PREVENTION OF TIMELY COMPLETION."

³ [2011] EWHC 848 (Comm)

⁴ [2011] EWHC 1935 (TCC)

“THIS IS A SIGNIFICANT JUDGMENT FOR THOSE IN THE CONSTRUCTION INDUSTRY BECAUSE IT CLEARLY ESTABLISHES THE VALIDITY OF “CONCURRENCY ALLOCATION” CLAUSES.”

On a more practical note, this is a significant judgment for those in the construction industry because it clearly establishes the validity of “concurrency allocation” clauses. To date, these clauses have been rare in construction contracts as employers have been wary of having them rejected by courts in the event of a dispute. Instead, employers have tended to adopt a default position of awarding a contractor an EOT in the event of concurrent delay.

North Midland Building now provides employers with judicially approved wording that allocates more risk to the contractor in the event of concurrent delay. Employers can ensure that, in the event of concurrent delay, the contractor receives no EOT. Contractors, on the other hand, need to be alive to the fact that there is now a further obstacle to relief from liquidated damages in circumstances where a delay arising from acts by an employer (so called ‘acts of prevention’) are concurrent with delay for which the contractor is responsible.

FOR MORE INFORMATION

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