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Does the Prevention doctrine thwart contractually allocated Concurrent Delay risk? The English Court of Appeal says not

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Energy sector participants will be familiar with the law of physics that states energy is neither created nor destroyed but can be converted from one form into another. Fossil fuels in the ground contain chemical energy and air currents in our atmosphere contain kinetic energy. To exploit that energy and transform it into power, we must first construct the requisite infrastructure for its capture, physical conversion and distribution. The corresponding construction projects will vary in size, complexity and cost. However, they will all be driven by various commercial imperatives and risks: invariably the classical project 'iron triangle' constraints of cost, time and quality.

The importance of construction projects completing on time, and the adverse consequences of delay, has led to construction contracts frequently incorporating Liquidated Damages ("**LD**") clauses for compensatory payment by the defaulting contractor, and Extension of Time ("**EOT**") clauses for delays occurring outside the scope of the contractor's contractually allotted 'control'. Whittled down, these can be regarded as risk sharing mechanisms apportioning the financial consequences of delay in the manner agreed by the parties. Whilst such provisions cater for a variety of situations, their interplay often gives rise to dispute.

The recent English Court of Appeal decision in ***North Midland Building Ltd v Cyden Homes Ltd [2018] EWCA Civ 1744*** considers the relationship between an EOT clause that expressly contemplates concurrent delay and the so-called 'prevention principle', which broadly provides that an employer cannot validly enforce the completion date where culpability for the delay rests with it.

Key points from the judgment are:

1. The prevention principle arises only by way of an implied term, and can be displaced by express terms to the contrary.

2. Parties to a construction contract are at liberty to apportion the responsibility for risks as they see fit, such that an exclusion of concurrent delay entitlements within an EOT clause will be upheld.

Concurrent Delay and the Prevention Principle

The operation of EOT clauses is often complicated by the concept of 'concurrent delay' which, of itself, is a complex and controversial area of construction law insofar as there exists no universally acknowledged definition of its precise constitution. Most construction sector participants nonetheless accept that concurrent delay occurs where "*a period of project overrun is caused by two or more effective causes of delay which are of approximately equal causative potency*".[1] Put differently: concurrent delay arises when two or more delay events occur along the critical (completion) path of a project programme, at least one of which is ascribed as constituting a 'contractor culpable event' and the other an 'employer culpable event', and whose adverse effects are felt simultaneously.

This complexity and subtle ambiguity gives frequent rise to the vexed question 'which party rightly bears the risk of that concurrent delay?'. For both judicial and arbitral tribunals alike this question is crux, for they are often tasked with determining the proper allocation of that risk together with all the rights and remedies flowing from it. The answer in English law is that, absent express words to the contrary, where one of the concurrent delay causes falls within the EOT clause ambit the contractor will be entitled to an EOT even if there was another – concurrent – causative delay event of its own making.[2] However, although the contractor would be entitled to an EOT in these circumstances, ordinarily it would not be able to recover any loss and expense sustained by the delay.[3] This has catalysed employers with the stronger negotiating hand into seeking express exclusions of contractor EOT entitlements where concurrent delays occur.

Similar results may be attained by exercising the 'prevention principle', a common law doctrine that provides "*the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing*".[4] It arises as an implied term of the construction contract. Thus, where an employer has itself prevented the contractor from meeting the contracted completion date, the prevention principle operates to stop it from enforcing the stipulated completion date and any LD mechanisms against the contractor. Exercising the prevention principle does not, however, cause the completion date to be extended. Rather, it results in the time to complete the works becoming 'at large' whereby completion takes place within a reasonable time period.[5]

Accordingly, in project programming situations where 'true' concurrent delay exists (which is a question of fact), the starting position is that the prevention principle will not apply because the delay would have occurred in any event.[6] However, there is a corpus of competing English law authority on the point.

North Midland Building v Cyden Homes

This case marks the first occasion on which the English Court of Appeal has been seised to consider the effects of a clause that attempts to contractually exclude the contractor's asserted EOT entitlements in circumstances of concurrent delay.

Cyden engaged North Midland to construct an extensive residential property in East Central England. The EOT clause in the underlying construction contract, an amended JCT Design & Build Contract 2005 form, 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 "**Exclusion**")

Delay occurred and a dispute arose over the EOT sought by North Midland, in response to which Cyden contended that concurrent delay had been incurred by virtue of North Midland's own culpable delays and on that basis any EOT entitlements were negated. Centrally, for the Court's adjudication, a dispute regarding the application of the Exclusion and whether, in circumstances where true concurrent delay exists, the prevention principle would apply so as to render 'at large' North Midland's time to complete the works.

At first instance, the English Technology and Construction Court ("**TCC**") upheld the Exclusion. The TCC concluded that the prevention principle did not arise and found the EOT clause to be a "*crystal clear*" agreement that, if North Midland suffered culpable delays simultaneous to culpable delays attributable to Cyden, any EOT entitlements otherwise due would be prohibited. In judgment, Mr Justice Fraser also stated that the parties to a construction contract "*…are free to agree whatever terms they wish to agree, with the obvious exceptions such as illegality*".[7]

North Midland appealed on the basis that the Exclusion was contrary to the prevention principle and, therefore, of no legal effect. The Court of Appeal dismissed the appeal. Lord Justice Coulson, with whom the other Lords agreed, held that:

1. On a proper construction of the Exclusion, it was clear and unambiguous in its scheme that concurrent delay will not be accounted for in the calculation of any EOT entitlements otherwise owing to North Midland.

2. The prevention principle is not an overriding rule of public or legal policy, and therefore could not operate to relieve North Midland from the Exclusion reach. It is a creature of contract that operates only by way of an implied term, and the usual tests for the implication of terms must therefore be satisfied.

3. Consequently, parties to a construction contract are free to expressly contract out of the prevention principle scope and agree where the risk and responsibility for concurrent delay should lie as between themselves. That also extended to Cyden's entitlement to invoke the LD mechanism in circumstances where the Exclusion was valid and operable.

Observations

Although this case does not squarely address whether 'concurrency' factually existed, the English Court of Appeal's clarification on the enforceability of concurrent delay exclusions in EOT clauses, including their relationship with the prevention doctrine, is nonetheless highly significant for several reasons.

- First, the certainty this high watermark decision delivers will help defuse a long-contentious area of construction law. Parties may freely agree to modify or altogether abnegate any legal effects of the prevention doctrine.

- Secondly, it compounds an already increasing trend for the adoption of similar exclusion clauses into construction contracts, putting beyond doubt any ambiguity as to which party carries the concurrency risk. Indeed, this practice is reflected in both the JCT Major Projects Construction Contract 2016 and the FIDIC 2017 suite industry standard forms. Furthermore, as the precise formulation of wording adopted in the instant Exclusion clause has now received curial approval at appellate level, we can expect it being replicated *verbatim* (or near to).

- Thirdly, on the international plane, the tenet of the English Court of Appeal's judgment is so forthright that other jurisdictions (particularly common law states) may take similar heed; especially so where their domestic laws are ambiguous on the issue. For certain, this authority will be regularly ventilated by disputants involved in international construction arbitrations.

This case also serves as yet further reminders of two important principles English Courts typically uphold in matters of contractual construction. Namely, the importance of including express wording in a contract to achieve the desired result (rather than relying on implied terms) and contractual autonomy dictates that onerous terms will generally be enforced strictly even where their effects may result in harsh outcomes.

Finally, although this case concerns a residential property, its impacts will concern all energy sector participants involved in the construction of large-scale, complex energy infrastructure projects.

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[1] J. Marrin QC, "Concurrent Delay" (2002) 18 Const LJ 6 at 436, as approved in *Adyard Abu Dhabi* v *S.D. Marine Services* [2011] EWHC 848 (Comm).

[2] *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (70 Con LR 32 – 18 October 1999). See also *Walter Lilly & Co Ltd v Mackay* [2012] EWHC 1773, which is widely regarded as the leading English authority on concurrency.

[3] *De Beers UK Ltd* v *Atos Origin IT Services UK Ltd* [2010] EWHC 3276.

[4] *Multiplex Constructions (UK) Limited* v *Honeywell Control Systems Limited (No. 2)* [2007] EWHC 447 at [47].

[5] See paragraph 8-013 of 'Keating on Construction Contracts', 10th Ed.

[6] *Jerram Falkus Construction Limited* v *Fenice Investments Inc [No. 4]* [2011] EWHC 1935 at [52].

[7] *North Midland Building Limited* v *Cyden Homes Limited* [2017] EWHC 2414.