

TIME IS MONEY: AN EMPLOYER'S PERSPECTIVE ON DELAY

- The allocation of delay risk should be carefully considered by the parties.
- Drafting should be clear and unambiguous.
- Employers should be proactive in managing risk.

WHAT'S IT ABOUT?

With more than a year elapsed since the Court of Appeal handed down judgment in *North Midland Building Ltd v Cyden Homes Ltd* (NMB v Cyden), the issue of delay remains as relevant as ever. Following the confirmation in that case that a properly drafted clause allocating the risk of concurrent delay to the contractor will succeed in so doing and will not fall foul of the prevention principle many employers are seeking to allocate the risk of concurrent delay to the contractor.

For more information on this case, please see our autumn [2017](#) and [2018](#) editions of Constructive Comments.

Delay remains a common cause of disputes between parties to a construction contract. Appropriately allocating risk, understanding the contract, and taking proactive steps before a dispute arises are key to managing delay liability successfully.

This article explores the delay related considerations that an employer should take into account when entering a new contract.

1. CONSIDER DRAFTING FOR CONCURRENT DELAY

Concurrent delay is defined as '*a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency.*' In practice, this ordinarily occurs where two or more events take place at the same time thereby delaying completion; one for which the contractor is culpable (or otherwise responsible under the contract) and the other for which the employer is culpable.

The prevention principle prohibits a party from relying on its own wrong. In the context of delay claims, an employer is prevented from claiming liquidated damages where it has caused the delay in question.

Where the contractor is prevented by the employer from completing on time, time becomes at large and the contractor is only required to complete the works within a reasonable time. Accordingly, the employer can no longer claim for liquidated damages and must therefore prove any losses suffered. To avoid the operation of the prevention principle (and time becoming at large) most construction contracts include a contractual mechanism which entitles the contractor to an extension of time if he is delayed by an act of prevention by the employer.

Following the judgment in *NMB v Cyden*, employers frequently attempt to allocate the risk of concurrent delay to contractors using similar terms to that in the aforementioned case. Where doing so, the relevant clause should be unambiguous, so as not to create doubt in respect of contractual interpretation. For example, the relevant clause in *NMB v Cyden* was:

... "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".

However, given the publicity of the case, contractors are now wary of such terms and can be reluctant to bear the risk of concurrent delay.

An employer who is faced with a risk premium in the contractor's price to accept the risk of concurrent delay should consider whether it offers value for money, taking into account the likelihood of concurrent delay in the project, the court's reluctance to recognise the same and the narrow interpretation of concurrent delay. Factors to consider will include the complexity of the project, the extent of the Relevant Events (or equivalent) in the contract, whether a 'time only' position would be acceptable and the general risk appetite of the parties.

2. ENSURE THAT THE DEFINITION OF RELEVANT EVENTS (OR EQUIVALENT) IS CLEAR AND ACCURATELY REPRESENTS THE PARTIES' DESIRED RISK PROFILE

The contract should incorporate clear definitions of the events which lead to an entitlement to an extension of time, so that the parties are aware of which events may cause them to be responsible for delay. Parties should consider the wider context of the project as well as the involvement of each party.

Extension of time provisions should be equally thorough so that time does not inadvertently become at large through the implication of the prevention principle. It is worth noting that it was a factor in *NMB v Cyden* that the contract contained a comprehensive Relevant Event in relation to acts of employer prevention, so there could be no implied term on prevention.

However, in his judgment in *NMB V Cyden* Coulson LJ also stated that it is possible to contract out of the prevention principle. Having noted that a construction contract is "a detailed allocation of risk and reward", he went on to say "... But it is a completely different thing if the parties negotiate and agree an express provision which states that, on the happening of a particular type of prevention (on this hypothesis, one that causes a concurrent delay), the risk and responsibility rests with the contractor." This seemingly opens the door for the parties to agree expressly that the risk of events which would otherwise be employer acts of prevention (such as any arising from the reasonable exercise by the employer of his rights under the contract) lies with the contractor, although in some cases this may be subject to an argument as to whether this renders the resulting liquidated damages a penalty. Whilst it remains to be seen how widely this prevention 'opt out' will be allowed by the Courts, it seems clear that properly drafted 'concurrency' clauses will be upheld as valid agreements.

3. ENSURE APPROPRIATE RECORDS ARE MAINTAINED

The contractor should prepare an adequate programme showing the order in which it intends to carry out the works. This should be frequently updated to reflect the current state of the project, including any variations, delays, acceleration, etc. A properly updated programme (and contractual provisions requiring the same) will save a considerable amount of time and uncertainty later on. Irrespective of the risk allocation for delay, it should be a priority of all employers to ensure that their agent maintains adequate records throughout the lifecycle of the project.

An employer should also keep its own records and where possible, any information or documentation showing that any employer's delays are separate from the contractor's.

Whilst this is a simple step that employers can take, it is often overlooked. Delay disputes tend to concern disagreements as to numerous matters of fact (as well as law) over extended periods. Keeping adequate records may mean the difference between being able to sustain a claim for liquidated damages against the contractor, and being subject to a claim for loss and expense from the contractor.

4. DON'T WAIT UNTIL A DISPUTE ARISES

Often, in an effort to hold off incurring additional costs, parties will wait until a delay related dispute has arisen before instructing their solicitors. Obtaining proactive strategic legal advice whilst the project is underway will put employers on the best possible footing should the matter proceed to dispute. See more information on managing risk [here](#).

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