

CONCURRENT DELAY: WHAT DID WE LEARN IN LIGHT OF NORTH MIDLAND BUILDING LTD V CYDEN HOMES LTD?

- ▶ This article considers the case of *North Midland Building Limited v Cyden Homes Limited* [2017] EWHC 2414 (TCC) (**NMB v Cyden**).
- ▶ The case provided clarity as to how concurrent delays should be approached.
- ▶ The judgment highlights that the prevention principle is not triggered in some instances of concurrent delay.

Background and Factual Summary

In common law, the Prevention Principle is a doctrine which dictates that a party to a contract may not enforce a contractual obligation against the other party where it has prevented that party from performing that obligation. Therefore, in the context of an employer/contractor relationship, if an employer causes a delay and the contract does not make provision for an extension of time, the contractor is relieved of its obligation to complete by the contractual completion date and time becomes at large (i.e. the contractor is only under an obligation to complete within a reasonable time).

Additionally, as the completion date has been disregarded, liquidated damages (LADs) (i.e. an amount which is pre-defined under the building contract that the employer can claim for if the building contractor is delayed without having to quantify the actual loss suffered) no longer apply and the employer can only claim unliquidated losses.

In *NMB v Cyden*, the parties had entered into a design and build contract using an amended industry standard form contract (JCT Design and Build 2005) (Contract). The parties amended clause 2.25.1.3(b) which dealt with the calculation of an extension of time to address the situation where there were overlapping delays caused separately by both the contractor and the employer (concurrent delay): "*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*". Therefore, the contractor was not entitled to an extension of time where any delay caused by the employer was concurrent with a delay caused by the contractor. The contract also provided that acts of prevention by the employer were included in the list of Relevant Events.

The parties were in dispute because the contractor was delayed in completing the works and argued that the employer had caused a proportion of the delay, which was therefore concurrent to the delay caused by the contractor.

The contractor requested that the court interpret clause 2.25.1.3(b) to set time at large in this instance arguing that the allocation of the risk of concurrent delays under the Contract was "impermissible" as a matter of law because:

- ▶ the employer would receive LADs for a period where it had been responsible for the delay (benefitting from its own actions); or
- ▶ the contract did not provide for an extension of time where the employer contributed to the delay, therefore the Prevention Principle would be triggered and time would be at large.

Decision

Fraser J found in favour of the employer (Cyden Homes Ltd) and in doing so he accepted that the Prevention Principle would not be implied to extensions of time claims nor will time become at large simply by reason of an employer's act of prevention, if the contract expressly provides for extensions of time to be dealt with differently. Fraser J went on to highlight that the employer's act of prevention was not deemed to have caused the contractor to fail to complete on time, as the contractor could not have completed on time anyway due to its own delay. Fraser J thus confirmed that the Prevention Principle (a common law doctrine) does not take precedence over the parties' expressly agreed terms.

What now?

NMB v Cyden confirms that if the contract expressly apportions the risk of concurrent delay (even if it is contrary to the common law position), the Courts will respect the express agreement between the parties.

In passing, the judgment noted that the Prevention Principle is not triggered in the event of concurrent delays where the building contract has no extension of time mechanism, if the contractor would have not have achieved the completion date in any event (i.e. the contractor was in delay through its own fault). Therefore, the completion date and LADs remain effective.

The parties to construction contracts should consider carefully how (if at all) the risk of concurrent delay is to be apportioned and whether an amendment to the contract is required. Contractors should be aware that the Prevention Principle is not triggered in cases of concurrent delay, this is the case where there is an express clause apportioning the risk of concurrent delays but also where there is no extension of time mechanism in the contract.

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