

CYDEN HOMES AND CONCURRENT DELAY

In the recent case of North Midland Building Ltd v Cyden Homes Ltd, the Court of Appeal held that:

- ▶ parties to a construction contract are free to allocate the risk of concurrent delay by express terms of the contract;
- ▶ the prevention principle operates by way of implied term and the parties can contract out of its effects; and
- ▶ there is no connection between the prevention principle and concurrent delay.

What's it about?

North Midland, as Contractor, and Cyden Homes, as Employer, entered into a construction contract based on the JCT D&B 2005 standard form contract, with bespoke amendments.

When works on site were delayed, the Contractor sought an extension of time relying on a number of Relevant Events. The Employer, relying on the amended extension of time clause, only allowed a short extension of time, maintaining that in accordance with the amended clause, the Contractor was not entitled to an extension of time. The Employer stated that any delays caused by a Relevant Event were “consumed by culpable delays attributable to” the Contractor.

The amended clause 2.25.1.3(b) stated:

"(b) 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 Relevant Events included "act of prevention" by the Employer.

The Contractor sought a declaration that clause 2.25.1.3 was, in effect, void as it offended the prevention principle and therefore made time at large.

The Court of Appeal upheld the first instance judgment and held that the clause was unambiguous, raised no issues of contractual interpretation and did not offend the prevention principle so should be given effect.

Why does it matter?

Given the ambiguity that exists around the effects of concurrency, some contracts have included express terms to explain how concurrent delay would be dealt with in extension of time claims, but there was uncertainty as to whether these were effective. Coulson LJ's judgement clarified a number of interesting points:

- ▶ The prevention principle operates by way of an implied term, rather than as an overriding rule of public or legal policy. Parties are free to contract out of the effects of the prevention principle, either in part or in their entirety, by an express term of the contract.
- ▶ Coulson LJ stated that "*the prevention principle has no obvious connection with the separate issues that may arise from concurrent delay*".
- ▶ The Court also adopted the definition of concurrent delay from *Adyard Abu Dhabi v SD Marine Services*

"A period of project overrun which is caused by two or more effective causes of delay which are of approximate equal causative potency".

Now what?

The decision provides reassurance to parties who have sought to prevent uncertainty around entitlements to an extension of time in circumstances of concurrency by including terms in their contracts to deal with this. It is likely to prompt others to do so.

Jonathan Tattersall, Partner, commented: "We have seen an increase in Employers requiring clauses of this nature in their contracts, particularly in the context of high value and complex projects. However, we are also seeing strong resistance on the part of contractors clearly conscious of the fact that they will be depriving themselves of the entitlement to an extension of time in cases of concurrent delay. We expect to see this negotiation battle for a significant period whilst the implications of the decision are tested by the market."

Julia Court, Partner, noted "General concurrency wording will encompass Employer culpable, as well as neutral, Relevant Events, such as statutory undertaker delays, and the outcome of negotiations could be a provision that only applies to some Relevant Events."

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