

Construction contracts

Hints, tips and solution focused answers

4 December 2018



This paper considers the current state of play where there are delays during the currency of a project, which are likely to or have delayed the Date for Completion as then set.

A **“concurrent delay”** is where a period of delay arises causing delay to the Date for Completion caused by two or more events, one of which is the contractor’s responsibility and one of which is the employer’s responsibility. The focus should be on the **effects** of the delay; so, it does not matter whether the risk events occur at different times, their **effects** on the work should be felt simultaneously

Background:

Under the common law doctrine of prevention, an employer cannot enforce contractual obligations (ie specified completion date and claim for liquidated damages) where the employer has prevented the contractor from completing by the specified date. The contractor who suffered delay at the hands of the employer still may complete the works within a reasonable time.

In *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No. 2)*¹, Jackson J summarised the ambit and scope of the prevention principle in these terms:

- Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause the delay beyond the contractual completion date.
- Acts of prevention by an employer do not set time at large, if the contract provides for an extension of time in respect of those events.
- Insofar as the extension of time clause is ambiguous, it should be construed in favour of the contractor.

The courts have also indicated that implied terms are a mechanism by which the prevention principle can be implied into a contract²:

In many construction cases, employers may impede completion by failing to give possession of a site, or by

failing to provide information when they had to do so. Under the prevention principle, if the timely completion of the project is delayed, the employer may lose its entitlement to maintain a claim against the contractor for liquidated damages and/or an entitlement to rely upon a pre-agreed completion date.

Arising from (UK) court decisions³, construction contracts increasingly incorporate extension of time clauses, which provide that, on the happening of certain events (which include what might generically be described as ‘acts of prevention’ by the employer), the date for completion under the contract would be extended, so that liquidated damages would only be levied for the period after the expiry of the extended completion date.

Consequently, extension of time clauses are not designed to provide the contractor with excuses for delay, but to protect employers, by retaining their right both to a fixed (albeit extended) completion date and to deduct liquidated damages for any delay beyond that extended completion date⁴.

The recent (July 2018) UK case (*North Midland Building Ltd (NMB) v Cyden Homes Ltd*⁵ (the **“Cyden Homes”** case) considered an argument that the prevention principle is an overriding rule of public or legal policy to permit interference with the freedom of parties to allocate the risk of concurrent delay in contracts, (as between themselves). This was described as a **“bold proposition”**⁶ and was dismissed as the court upheld the rights of parties to freely negotiate their own contractual terms.

1 [2007] BLR 195.
2 *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744.
3 *Holme v Guppy* (1838) 3 M&W 387, *Dodd v Churton* [1897] 1 QB 566.
4 Lord Coulson, paragraph 12, *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744 (30 July 2018).
5 *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744.
6 See paragraph 66.

Delays to the works beyond the date for completion:

Generally, construction projects involve carrying out several activities at the same time, so it may not be immediately obvious which activity negatively impacted upon other operations.

If a delay to the Works occurs beyond the Completion Date, it often requires a forensic review of the construction activities to analyse which activities delayed the Works beyond the Date for Completion. A defined methodology for examining the progress of the works and identifying the "cause" and "effect" of delays is rarely found within the Contract itself.

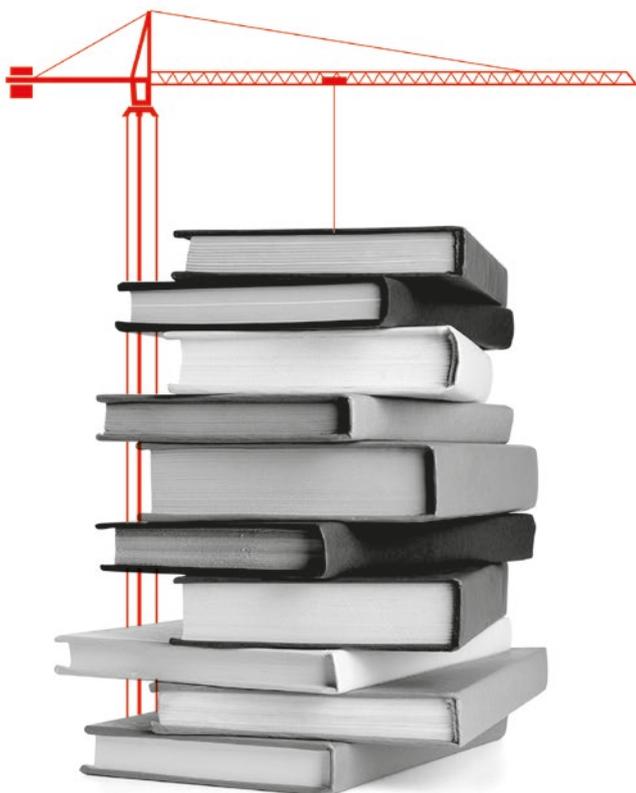
External bodies such as the Society of Construction Law have produced useful guidance notes in their SCL Delay and Disruption Protocol⁷. It is, however, noted that this does not take precedence over the express terms and governing law of the contract nor is it intended to be a statement of the law.

Coulson J. in *North Midland Building Ltd v Cyden Homes Ltd*⁸ referring to concurrency stated:

A review of the case law in the area will conclude that a contractor's entitlement to an extension of time in circumstances of concurrent delay is not entirely free from doubt. There is no Court of Appeal authority on the issue.

This uncertainty has led to practitioners within the construction sector seeking to amend standard form contracts to consider the allocation of risk on concurrency. Coulson J. stated:

...a contractor may be entitled to an extension of time for the whole period of concurrent delay (even where the work could not have been completed any earlier than it actually was because of the contractor's default), which has led employers to introduce the sort of bespoke amendment on which this appeal turns.



What is meant by a "concurrent delay"?

The concept of concurrent delay was first considered by the UK courts in the late 1990s and is today a concept known throughout the construction sector, when disputes occur.

Lord Osborne, in *City Inn Ltd v Shepherd Construction Ltd*⁹, recognised that reference to concurrent delay may refer to several situations.

- Such events may be described as being concurrent if they occur in time in a way in which they have common features.
- One might describe events as concurrent on a strict approach only if they were contemporaneous or co-extensive, in the sense that they shared a starting point and an end point in time.
- Alternatively, events might be said to be concurrent only in the sense that for some part of their duration they overlapped in time.
- Yet again, events might be said to be concurrent if they possessed a common starting point or a common end point.
- It might also be possible to describe events as concurrent in the broad sense that they both possessed a causative influence upon some subsequent event, such as the completion of works, even though they did not overlap in time. In other words, they might also be said to be contributory to or co-operative in bringing about some subsequent event.

Lord Osborne went on to state at paragraph 51:

it may not be of importance to identify whether some delaying event or events was or was not concurrent with another, in any of the possible narrow senses described, but rather to consider the effect upon the completion date of relevant events and events not relevant events.

And again at paragraph 52:

...In other words, the focus of attention has moved, rightly in my opinion, from the events themselves and their points and durations in time to their consequences upon the completion of the works.

The SCL Protocol has made reference to the concept of "true concurrency" stating:

"the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time."

The UK Courts have adopted the following definition¹⁰ of concurrent delay:

"A period of a project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency"¹¹ (the "John Marrin definition").

7 (Law, February 2017). at paragraph 17.

8 [2018] EWCA Civ 1744 (30 July 2018) at paragraph 18.

9 [2010] ScotCS CSIH_68 (22 July 2010) at paragraph 49.

10 Per Hamblen J in *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (ch). Approved most recently by the English Court of Appeal in *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ. 1744.

11 J. Marrin QC, *Concurrent Delay*, [2002] 18(6) Const. L.J. 436.

However, Keating¹² argues this definition remains too narrow, and that it needs to also incorporate the timing of the events relied upon and their delaying effect, so that they coincide.

At paragraph 1 of this paper, we defined a "concurrent delay" as being a period of delay causing delay to the Date for Completion caused by two or more events, one of which is the contractor's responsibility and one of which is the employer's responsibility. We also emphasised that the focus should be on the **effects** of the delay; so, it does not matter whether the risk events occur at different times, but their **effects** on the work should be felt simultaneously¹³.

The concept of concurrent delay was considered in Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd¹⁴ ("**Malmaison**") and noted to arise where:

"... no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event)."

Essentially, the question becomes to assess where a delay occurs occasioned by two or more events and those events in themselves do not entitle a contractor to an extension of time or an entitlement to claim for loss, then it is important to assess if the delaying events are caused by different parties; namely the contractor and the employer.

Architects assessment for eot

Concurrent delay arises where two or more delay events lead to a delay to Completion.

Most of the UK case law on this subject is based on the JCT family of contracts. An example, taken from JCT 2005, clause 2.25.1:

If on receiving a notice and particulars;

Any of the events which are stated to be a cause of delay is a Relevant Event; and

Completion of the Works or of any Section is likely to be delayed thereby beyond the relevant Completion Date.

*...the Employer shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as he then estimates to be **fair and reasonable**.*

It has been left to case-law (in the UK) to consider what constitutes a fair and reasonable assessment.



12 Keating on Construction Contracts, 10th edition.

13 A narrow definition of concurrency in The Royal Brompton Hospital NHS Trust v Hammond (2001) 76 Con. L.R. 148, where the two events in question should start and finish at the same time, was subsequently criticised as too narrow.

14 [1999] 10 WLUK 553 70 Con. L.R. 32

Causation – dominant cause & but-for test or apportionment

Determining the entitlement of a contractor to an EoT for concurrent delay remains a matter of causation and determining what caused the delay?

The starting point for the required test of causation in any extension for time claim should be from the consideration of the express terms in the contract.

Lord Osborne, in *City Inns v Shepherd Construction Ltd*¹⁵ looked at 5 scenarios namely:

- **In the first place**, before any claim for an extension of time can succeed, it must plainly be shown that a relevant event is a cause of delay and that the completion of the works is likely to be delayed thereby or has in fact been delayed thereby.
- **In the second place**, the decision as to whether the relevant event possesses such causative effect is an issue of fact which is to be resolved, not by the application of philosophical principles of causation, but rather by the application of principles of common-sense.
- **In the third place**, the decision-maker is at liberty to decide an issue of causation on the basis of any factual evidence acceptable to him. In that connection, while a critical path analysis, if shown to be soundly based, may be of assistance, the absence of such an analysis does not mean that a claim for extension of time must necessarily fail.
- **In the fourth place**, if a dominant cause can be identified as the cause of some particular delay in the completion of the works, effect will be given to that by leaving out of account any cause or causes which are not material. Depending on whether or not the dominant cause is a relevant event, the claim for extension of time will or will not succeed.
- **In the fifth place**, where a situation exists in which two causes are operative, one being a relevant event and the other some event for which the contractor is to be taken to be responsible, and neither of which could be described as the dominant cause, the claim for extension of time will not necessarily fail. In such a situation, which could, as a matter of language, be described as one of the concurrent causes, in a broad sense (see para. [48] *infra*), it will be open to the decision-maker, whether the architect, or other tribunal, approaching the issue in a fair and reasonable way, to apportion the delay in the completion of the works occasioned thereby as between the relevant event and the other event

The “but-for” test is often used by employers defending contractor’s monetary claims, with the employer relying on the argument that the employer’s events had not caused delay and that the contractor cannot establish that it would have completed on time “but-for” the event relied upon. In terms of calculation of time, we suggest that the courts appear to have

dismissed the requirement for a contractor to apply a “but-for” test for assessment of an EoT, but it would still apply where the contractor is applying for money.

It has commonly been suggested that the correct approach to the matter of causation in determining contractors’ claims is to apply the “dominant cause approach”¹⁶. The dominant cause is described as:

*If there are two causes, one the contractual responsibility of the Defendant and the other the contractual responsibility of the Plaintiff, the Plaintiff succeeds if he establishes that the cause for which the Defendant is responsible is the effective, dominant cause. Which cause is dominant is a question of fact, which is not solved by the mere order in time, but is to be decided by applying common sense standards*¹⁷.

Where there are two competing delays, the Architect may choose which cause delayed the completion of the works, applying common sense standards. It has been suggested that the dominant cause approach has difficulties because the Architect could choose between an Employer delay and Contractor delay, with the effect being that it contravenes the prevention principle.

Malmaison established that the fact that the works would have been delayed by the concurrent delay event (which was the contractor’s responsibility) does not deprive the contractor of an EoT entitlement¹⁸.

Against this we have seen that the court in Malmaison looked to the agreement between the parties, and found that the parties had expressly agreed that where “there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event, notwithstanding the concurrent effect of the other event”.

Lord Osborne in *City Inns v Shepherd Construction Ltd*¹⁹ refers to the decision of Coleman J in *Balfour Beatty Building Ltd v Chestermount Properties Ltd*²⁰:

“Fundamental to this exercise is an assessment of whether the relevant event occurring during a period of culpable delay has caused delay to the completion of the works and, if so, how much delay. There may well be circumstances where a relevant event has an impact on the progress of the works during a period of culpable delay but where that event would have been wholly avoided had the contractor completed the works by the previously-fixed completion date. For example, a storm which floods the site during a period of culpable delay and interrupts the progress of the works would have been avoided altogether if the contractor had not overrun the completion date. In such a case it is hard to see that it would be fair and reasonable to postpone the completion date to extend the contractors’ time.

15 [2010] ScotCS CSIH_68 (22 July 2010) at paragraph 42.

16 (Marrin QC, 2002).

17 Keating on Construction Law 10th edition.

18 The rationale for this is that, where the parties have expressly provided in their contract for an EoT caused by certain events, they must be taken to have contemplated that there could be more than one effective cause of delay (one of which would not qualify for an EoT) but by their

express words agreed that the contractor was entitled to more time for an effective cause of delay falling within the relevant contractual provision. This approach was approved in *Steria Ltd v Sigma Wireless Communications Ltd*; Source Practical Law, Construction Blog March 27, 2012.

19 [2010] ScotCS CSIH_68 (22 July 2010) at paragraph 30.

20 [1993] 62 BLR 1.

It appears therefore that where the contractor was in culpable delay but where there was also an intervening delay event, then the contractor should not be entitled to benefit and receive an EoT, for what is in reality his own delay event, but for the intervening act.

Where the contractor is in a period of culpable delay and then the Architect issues an instruction, then the contractor should be entitled to the "net" effect of the delay.

Equally, parties may contract out of the Malmaison approach and to agree contract provisions restricting a contractors right to secure an EoT and/or damages for loss and expense in circumstances of concurrent contractor and employer delay events occurring.²¹ This is where the real movements are in the sector and where parties need to pay attention! As such, the parties can contract out of their legal entitlements (depending on the relative bargaining powers of each party) and in these circumstances the "but for"²² test of causation will not arise. Here, the contractor will be deprived of an entitlement to make and recover on a claim for loss and expense for the delay event²³.

Some have suggested that the Architect, when determining an extension of time in a "fair and reasonable" assessment, where there are concurrent events, could consider apportioning the delays. Apportionment has, however, attracted criticism. Marrin²⁴ contends such apportionment would be contrary to the prevention principle, in that if delay was apportioned the contractor may not receive a full extension of time and the prevention principle will come into play. This was rejected in the Walter Lilly Case (see paragraph 42 below).

Effective cause, a new test?

Several recent UK authorities have moved away from the Dominant Cause test. Indeed, Moran QC²⁵, has considered the existence of a new test, which he calls "effective cause". Moran refers to an extract from Lord Clarke's judgment in *Petroleo Brasileiro SA v ENE Kos 1 Ltd*:²⁶

"It is not I think helpful to use other adjectives to describe the cause. Different adjectives have been used over the years, including "proximate cause", "dominant cause" and "direct cause". To my mind they are somewhat misleading because they tend to suggest that the cause must be the most proximate in time or that the search is for the sole cause. Lord Mance says at para 37 that the search is for "the 'proximate' or 'determining' cause". However, I respectfully disagree because such a formulation suggests that there can be only one such cause, whereas there may, depending upon the circumstances, be more than one effective cause.

Moran defines an "effective cause" as:

An effective cause is one that operates by itself or combines with another cause critical delay to the completion date of a project"

We have included a summary of two cases which illustrate the ability of a contractor to maintain claims for concurrent delays during a contract.



21 *Steria Ltd v Sigma Wireless Communications Ltd*; Source Practical Law, Construction Blog March 27, 2012.

22 The "but for" test is the basic test for causation ie the damage would not have occurred but for the occurrence of [the event].

23 *De Beers UK Ltd v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC).

24 (Marrin QC, *Concurrent Delay Revisited*, 2013).

25 (Moran QC, 2014).

26 [2012] UKSC 17 (2 May 2012) at paragraph 62.

Walter Lilly & Company Ltd V Mackay and Anor²⁷

Background

Here there were concurrent causes of delay with one cause of delay being the responsibility of the employer and another being the responsibility of the contractor. The case concerned the construction of a luxury development in London where the relationship between the employer/its design team and the contractor became very strained due to substantial delays on the contract and the contractor maintaining claims for EoTs and delay costs (for loss and expense) and where these claims were not agreed, eventually the contractor instituted proceedings seeking an EoT and damages up to the Completion Date.

The EoT clause was the unamended form in the standard form contract and required the Architect to grant an extension of time which was "fair and reasonable having regard to any of the Relevant Events", ie events where responsibility rested with the employer.

Judgment

The Court determined that most delays that had occurred related to elements of the works for which the Contractor had no responsibility and it held that an EoT should be awarded to the date of actual practical completion and it also awarded a sum of £2.3million regarding the claimed loss and expense.

The Court held that where a delay was caused by more than one event, at least one of which was the responsibility of the employer, that:

- Where there are two or more effective causes, one of which entitles the contractor to an EoT as it is a Relevant Event, and therefore the contractor could have the full EoT for that event. The rationale being that many of the Relevant Events would otherwise amount to acts of prevention and it would be wrong to deny the contractor a full EoT in these circumstances.
- When interpreting the clause in the Contract, where the Relevant Event can be shown to have delayed the works, the contractor also could have an EoT for the whole period caused by the Relevant Event. **Nothing in the clause suggested that the EoT should be reduced where the contractor can be shown to also be responsible for a concurrent delay.**

The Court did not consider what would occur if the parties had sought to amend their respective contractual rights by amending the entitlements to maintain a claim to an EoT and/or loss and expense arising under the contract. It remains our view that parties can (and do) include bespoke provisions to allow for different outcomes.

Saga Cruises BDF Ltd V Fincantieri Spa²⁸

Background

Saga (the "Owner") purchased a cruise ship and contracted with Fincantieri (the "contractor") to refurbish the ship. The contractor was responsible for delays between 2 and 16 March 2012, and the Owner was responsible for delays from 3 to 14 March 2012, ie some delays were the responsibility of the contractor and others rested with the Owners.

The contract contained a clause that imposed liquidated damages on the Contractor for delay in completing the works "for any reason whatsoever for which the Contractor is, or its employees, agents, or sub-contractors are, responsible". The damages were capped at €770,000.

The contractor sought to rely upon Walter Lilly, arguing that where the completion date was delayed by two events concurrently, one being the contractor's responsibility and another resting with the Owners that no liability for liquidated damages should arise. They argued with two concurrent causes of delay, that one event should be considered a relevant event but not the other and as such the contractor should be entitled to an EoT for the period of delay caused by the Owners relevant event, despite any concurrent contractor effect of that event.

Judgment

The court rejected the contractor's approach as too broad, holding that unless concurrency is actually affecting the completion date, the contractor could claim no benefit from it. When the Owners' delays occurred, there were already outstanding issues which were the responsibility of the contractor, (ie there was no true concurrency). The works had been delayed by the contractor to the extent that the Owner's delay had no impact on the completion date and was not the true cause of the delay event. As such, the contractor was not entitled to an EoT and the Owners were entitled to liquidated damages of €770,000.

Commentary

This case is a stark reminder that common law Judges will apply the particular facts of each individual case when reaching judgment and will not apply blanket principles for the impact of concurrent delays (as outlined in Walter Lilly, or otherwise). As such we believe that a court or arbitrator will assess claims for concurrent delay only after they have assessed the true causative effect of those delays. In other words, the causative factors of the delay event(s) will be considered, in the context of individual contract provisions and the facts of each case, when assessing an entitlement to an EoT and damages where there are concurrent delay events. There will not be an automatic entitlement to a contractor who claims an EoT and damages.

²⁷ Walter Lilly & Company Ltd v Mackay and another [2012] EWHC 1773 (TCC)

²⁸ [2016] EWHC 1985.

Can the architect consider other events when assessing a fair and reasonable extension of time?

Parties have sought to argue that based on a reasonable reading of the EoT clause, the Architect cannot consider events other than those put forward by the claimant. This scenario was considered in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*²⁹. At paragraph 15 of his judgment, Dyson J. stated:

"I accept the submissions of [counsel for the respondents]. It seems to me that it is a question of fact in any given case whether a relevant event has caused or is likely to cause delay to the works beyond the completion date in the sense described by Colman J. in the Balfour Beatty case.

And Dyson J continued:

"...When considering the matter under the contract, the architect may feel that he can decide the issue on a limited basis, or he may feel that he needs to go further and consider whether a provisional view reached on the basis of one set of facts is supported by findings on other issues. It is impossible to lay down hard and fast rules. In my judgment it is incorrect to say that, as a matter of construction of clause 25 when deciding whether a relevant event is likely to cause or has caused delay, the architect may not consider the impact on progress and completion of other events."

At paragraphs 31 and 32, Judge Richard Seymour QC in *Royal Brompton Hospital NHS Trust v Hammond & Others*³⁰, considered the question in what circumstances was it appropriate to grant an extension of time under clause 25 of the Standard Form conditions. He said:

"The answer, in my judgment, depends upon the proper construction of that clause. Leaving aside for a moment the authorities to which my attention has been drawn ..., as a matter of impression it would seem that there are two conditions which need to be satisfied before an extension of time can be granted namely: (i) that a relevant event has occurred; and (ii) that that relevant event is likely to cause the completion of the works as a whole to be delayed beyond the completion date then fixed under the contract, whether as a result of the original agreement between the contracting parties or as a result of the grant of a previous extension of time."

In Ireland, the standard forms of construction contracts generally used in the private sector include those of the RIAI and Engineers Ireland, CIF and the international forms such as NEC, FIDIC, JCT and many others. Unamended, these contracts generally provide road signs for maintaining claims for EoTs and damages by either party, but they rarely if ever specifically deal with issues of concurrent delay and this is a matter for parties to negotiate on each individual contract.

Clause 30 of the RIAI states:

If in the opinion of the Architect the Works are delayed³¹... as soon as it is possible for the Architect to do so, make a fair and reasonable extension of time for completion of the Works.... In determining what extension of time (if any) is fair and reasonable under paragraph (d)³² for loss or damage to the Works or Ancillary items the Architect shall have regard in particular to any negligence, omission or default of the Contractor which is caused or contributed thereto".

Under the form of contract, the Architect may consider a "fair and reasonable" extension of time.

The UK courts have suggested that an Architect can consider competing causes of delay³³. However, in the context of the RIAI standard wording in sub-clause 30 (d), which provides for considering concurrent events, the question arises whether this could in fact mean that the parties have ignored concurrent events relating to other Relevant Events.

The Public Works Contract at Clause 9.3.2 states:

If Substantial Completion of the Works or any Section has been, is being or will be delayed beyond the Date for Substantial Completion by a Delay Event

The UK Courts again seem to suggest that it would be unreasonable to consider events in isolation, when the actual effect of the delays would be known.

It is however becoming increasingly common for employers to incorporate additional contractual protections (and not remain silent on the allocation of risk if concurrent delay events occurs) and specifically to limit the circumstances in which a contractor may recover delay costs and EoTs where they have been culpable of concurrent delays on the contract.

Altering the contract and re-allocating risk and/or contracting-out

In any dispute involving delay, the UK courts have consistently maintained that the contract is king, ie they emphasise the importance of contractual words.

Where the contract specifies that upon a concurrent delay occurring that no extension of time will be given, and the employer will be awarded liquidated damages, then this is the contractual rule that the parties must adhere to.

29 (1999) 70 Con LR 32

30 (No 7) 2001 76 Con LR 148.

31 RIAI Clause 30 item (a) to (j) setting out the Relevant Events.

32 RIAI Clause 30 (d) reads "by reason of loss or damage to the Works ancillary items which is covered by Clause 21(A) to 26 inclusive of these Conditions".

33 (Marrin QC, 2002).



North Midland Building Ltd V Cyden Homes Ltd³⁴

Background

Here, North Midland Building Ltd (NMB) and Cyden Homes contracted under an amended Joint Contracts Tribunal Design and Build 2005 form of contract, which incorporated a standard (industry clause) permitting an EoT where delay caused by a "Relevant Event" pushed the time of actual completion beyond the contractual completion date. The parties had amended Clause 2.25.1.3(b) (the "Clause") to provide 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."

NMB argued that because of the prevention principle, the clause could not be regarded as permissible or effective to make the contractor bear the risk of concurrent delay from its Principal.

The Court of Appeal held that the Clause was "unambiguous", and it raised no issues of contractual interpretation and it did not offend the prevention principle and should be enforced. Specifically, Coulson LJ rejected the argument that the prevention principle could rescue NMB from the Clause to which it had specifically agreed, and he noted that:

- The prevention principle is not an overriding rule of public or legal policy.
- The prevention principle was not engaged here. The contract included provision for a prima facie entitlement on the part of the contractor to an EoT in the event of an act of prevention by the employer.
- The prevention principle had no obvious connections with the separate issues that may arise from concurrent delay.
- The Clause was designed to do no more than reverse the result in previous authorities for this particular contract which provided that a contractor was entitled to an EoT for concurrent delay. Those authorities were unconnected to the prevention principle.
- Most importantly, the amended Clause was an agreed term and there was no suggestion in the authorities that the parties could not contract out of some or all of the effects of the prevention principle.

Contractors Beware: this line of authority we believe will be followed in Ireland and it demonstrates that contractors cannot rely on the prevention principle to circumvent an agreed clause in a contract. The court held that the Clause was "crystal clear" and that where there was concurrent delay, the contractor bore the risk under the contract of that delay. Therefore, where parties freely enter into agreements without considering all the implications – they must be cognisant that they will not be saved at a later date by the prevention principle, or by some implied additional terms taking precedence over express and clearly negotiated and agreed contract terms.

Commentary

In future, parties should be aware that bespoke contractual provisions (such as those deployed in Cyden Homes) will make it increasingly difficult for contractors to secure EoTs and damages, if not impossible.

The effect of silence in a contract

If no provision permits an EoT for an employer's act or omission, time for completion effectively evaporates, and time is set "at large". Where time is set "at large", the contractor is left with seeking to rely upon an implied common law obligation to complete the works within a "reasonable time":

"...when time is set at large, the obligation to complete by a fixed date is replaced with an implied obligation to complete within a reasonable time..."³⁵

Where no specific provisions exist to address an entitlement under a contract to claim for EoTs and/or damages if a concurrent delay occurs under the contract, there are usually fall back and generic provisions relating back to claiming EoTs in standard form contracts, and parties are usually left to rely upon those generic provisions when maintaining their claims for an EoT and/or damages with concurrent delays. These disputes more often than not end up in a confidential and private dispute resolution process such as mediation, conciliation, adjudication and/or arbitration, and not before the courts. As such there is an element of guessing on the ultimate determination of such disputes.

Another possible remedy open to an employer for unreasonable contractor delay is to terminate the contract, where it can demonstrate that time is of the essence and failing to complete is a fundamental term and an outstanding obligation. Notice that time is of the essence can only be given where the contractor is in clear breach of contract terms, (ie once the contractor is demonstrating unreasonable delay).

Conclusion

In the wake of Cyden Homes, the construction industry is likely to see more clauses which exclude concurrent delay when calculating a Contractor's entitlement for an EoT. Contractors and subcontractors should take note and take advice when entering significant contracts to assess if their rights to make claims will be restricted in circumstances of concurrent delays.

34 [2018] EWCA Civ 1744.

35 North Midland Building Ltd v Cyden Homes Ltd [2018] EWCA Civ 1744; see also Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No.2) [2007] EWHC 447 (TCC).

For more information, please contact:



Dermot McEvoy

Partner

+353 1 6644 238

dermotmcevoy@eversheds-sutherland.ie

Mark Etherington, Acua Ltd

Director

087 401 7677

Mark.Etherington@acua.ie

Disclaimer

The information is for guidance purposes only and should not be regarded as a substitute for taking legal advice.

Data protection and privacy statement

Your information will be held by Eversheds Sutherland. For details on how we use your personal information, please see our Data Protection and Privacy Policy.

[eversheds-sutherland.ie](https://www.eversheds-sutherland.ie)

© Eversheds Sutherland 2018. All rights reserved.

EVE.DUB.2047 11/18