

The Implications of the North Midland Building Case

Marion Smith QC

39 Essex Chambers

Agenda

- The key concepts
- The story so far – the decision at first instance
- Lessons learnt
- The future

Question 1: Key Concepts

- What is the “prevention principle” and why might it matter in the construction sector?
- What is “concurrent delay”?
- How is “concurrent delay” treated?

(Answer these questions by reference to the governing law you are most comfortable with)

Question 1: The Prevention Principle

“The essence of the prevention principle is that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing.”

Multiplex Construction (UK) Ltd v. Honeywell Control Systems Ltd [2007] EWHC 447 (TCC); [2007] B.L.R. 195 Jackson J at [47]

Question 1: Why The Principle Matters

“the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from completing by that date.”

Multiplex at [48]

Question 1: Why The Principle Matters

“Instead, time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time.”

Multiplex at [48]

Question 1: Why The Principle Matters

“It is in order to avoid the operation of the prevention principle that many construction contracts and sub-contracts include provisions for extension of time. Thus, it can be seen that extension of time clauses exist for the protection of both parties to a construction contract or sub-contract.”

Multiplex at [48]

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Question 1: concurrent delay

“a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency”

Concurrent Delay by John Marrin QC (2002)
18 Const LJ No. 6 436.

Question 1: How Is Concurrent Delay Treated?

Jurisdiction	Treatment of Concurrent Delay
E & W	Contractor time but not money. Employer no LADs.
Scotland	Apportionment on time + money.
Germany	Unclear; arguments either way, but possibly time but not money depending on the facts.
Saudi Arabia	Unclear; arguments either way, but possibly apportionment depending on the facts.

Kim Rosenberg Construction Law Journal 2018

Question 2: How Common Was Contracting Out?

Did you before **North Midland** agree a contract term that took away any contractor's right to EOT in the event of concurrent delay?

Why?

The Case

**North Midland Building Limited v. Cyden
Homes Ltd [2017] EWHC 2414 (TCC)**

Peter Fraser J.

The Contract Amendment: Clause 2.25.3

"2.25.3 and provided that

(a) the Contractor has made reasonable and proper efforts to mitigate such delay; and ..."

Contract Amendment: Clause 2.25.3

*"2.25.3 and provided that
... and (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 "*

Contract Amendment?: Clause 2.26.5

*"any impediment, prevention or default,
whether by act or omission....."*

The Decision: Crystal Clear

The Decision: Crystal Clear

*“... it **is crystal clear**. The parties agreed that, ... if the contractor were responsible for a delaying event which caused delay at the same time as, or during, that caused by a Relevant Event, then the delay caused by the Relevant Event "shall not be taken into account" when assessing the extension of time. I fail to see how that raises any issues of construction whatsoever.”*

The Decision: Crystal Clear

*“The dicta of Jackson J in **Multiplex** does not have any effect upon that conclusion ... It is a clear agreement dealing with the ... appropriate extension of time in situations of concurrent delay, when one cause would otherwise entitle the contractor to such an extension (absent the concurrent event) but the other cause would not. The contractor is not entitled to an extension of time ...”*

The Decision: Party Autonomy

[19] “ ... *there is no rule of law ... that prevents the parties from agreeing that concurrent delay be dealt with in any particular way,* ”

Implications: At Present

- Party autonomy (repeatedly) recognised
- Employer - encourage amendments - judge approved – apportionment?
- Contractor – negotiation + records and programmes
- Read the contract

The Bonus Point

- **Adyard Abu Dhabi v SD Marine Services**
[2011] EWHC 848 (Comm)
- **Jerram Falkus Construction Ltd v Fenice Investments In (No.4)** [2011] EWHC 1935 (TCC)

The Decision in Jerram Falkus

“[50] ... two concurrent causes of delay, one ... the contractor's responsibility, and one ... said to trigger the prevention principle, **the principle would not ... be triggered** ... the contractor could not show that the employer's conduct made it impossible for him to complete within the stipulated time. The existence of a delay for which the contractor is responsible, covering the same period of delay ... caused by an act of prevention, would mean that the employer had not prevented **actual completion.**”

The Decision in Jerram Falkus

*“[52]:... for the prevention principle to apply, the contractor must be able to demonstrate that the employer's acts or omissions have prevented the contractor from achieving an earlier completion date and that, **if that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the contractor's own default, the prevention principle will not apply.**”*

The Decision in North Midland

“[29] If the point were open to me for decision,... , I would apply and follow the same reasoning, and come to the same conclusions, as both Hamblen and Coulson JJ did in those cases, on the very same point.”

Implications at Present

- In cases of concurrent delay, the prevention principle is not triggered
- Pending the CA, brave to challenge?
- Is it right?
- Good faith?

Permission to Appeal: Hearing July 2018

“Following a High Court ruling... , which did not support the application of the well-established 'prevention principle' in relation to this contract; the Company has been granted leave to appeal this decision by the Court of Appeal. On the advice of the Company's lawyers the Directors will vigorously pursue this appeal, but have decided to make a further provision against the outstanding debt.”

Marion Smith QC

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