No EOT for Concurrent Delay, if so Agreed

Written by Victoria Tyson

Contract clauses that deny a contractor entitlement to an extension of time for concurrent delays caused by both employer and contractor are valid in principle. In *North Midland Building Ltd -V-Cyden Homes Ltd*[1] the Court of Appeal of England and Wales has ruled that such clauses do not offend the common law prevention principle. Nor do they give rise to an implied term to prohibit the imposition of delay damages that may result.

The Court's judgment supports contracting parties' freedom to agree their own allocation of risk and whether or not the contractor should have entitlement to extension of time (EOT) in circumstances of concurrent delay. The Court also found that time at large arises by way of an implied term in response to the operation of the prevention principle.

The Prevention Principle

By the prevention principle of English common law, an employer who prevents a contractor from completing by an agreed date cannot then insist on that same completion date and on the imposition of liquidated and ascertained damages for delay (LADs). The principle underlies the contractual mechanism to extend a project's agreed time for completion in the face of employer delay. The contractor is entitled to an appropriate EOT if the employer is to remain entitled to LADs. If the contract fails to provide for this EOT regarding delay resulting from an event which is the responsibility of the employer (ERE), then the completion date simply falls away and time becomes "at large." The contractor is thereby entitled to complete in a reasonable time only and the employer must prove his damages.

Concurrent Delay

The English courts have adopted the following definition of 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.*"[2] Clauses regulating entitlement to an EOT, as drafted in many standard forms of construction contract such as the FIDIC and the UK's JCT forms, are frequently interpreted as giving that entitlement to the contractor even where there is concurrent delay caused by an event which is the responsibility of the contractor (CRE). A number of English court judgments have considered the EOT clause in the JCT form of contract for example and held that, on its wording, concurrent delay by the contractor does not negate entitlement to additional

Victoria Tyson
Partner

T +44 (0)20 3755 5733

M +44 (0)7546 695 614

victoria.tyson@howardkennedy.com

[1] [2018] EWCA Civ 1744

[2] Concurrent Delay by John Marrin QC (2002) 18(6) Const. L. J. 426, as approved in *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm).

time.[3] The *SCL Delay and Disruption Protocol* (2017 – 2nd edition) also recommends that this should be considered as a core principle.[4]

This outcome has however increasingly given rise to allegations of unfairness to employers. Why, it is asked, should the employer be required to grant relief against liability for LADs following an ERE – in circumstances when the works would have been delayed for an equivalent period anyway due to the contractor's CREs?? As a result, one now sees more contracts amended to favour the employer by disentitling the contractor to the EOT in circumstances of concurrent delay. The 2017 FIDIC clause 8.5 anticipates the possibility of the parties adopting a set of rules in this regard, such as *the SCL Delay and Disruption Protocol*. Clause 8.5 states:

> "If a delay caused by a matter which is the Employer's responsibility is concurrent with a delay caused by a matter which is the Contractor's responsibility, the Contractor's entitlement to EOT shall be assessed in accordance with the rules and procedures stated in the Special Provisions (if not stated, as appropriate taking due regard of all relevant circumstances)."

North Midland Building v Cyden Homes involved the court's scrutiny of an employer's bespoke amendment to a JCT 2005 design and build standard form of contract.

Amended JCT 2005 clause 2.25

The JCT clause 2.25 regulating EOT had been amended by the addition of clause 2.25.3 to disregard concurrent delay caused by an ERE. With the relevant amendment underlined, it provided as follows:

"*2.25.1 If on receiving a notice and particulars under clause 2.24:*

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

.2 completion of the Works or of any Section has been or is likely to be delayed thereby beyond the relevant Completion Date;

.3 and provided that

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

then, save where these Conditions expressly provide otherwise, 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 as to be fair and reasonable."

The contractor disputed the operation of clause 2.25.3(b). He attacked its validity, primarily arguing that it was of no legal effect because it was contrary to the overarching prevention principle of English law. Secondarily he argued that the resulting imposition of LADs was contrary to an implied contractual term that they were not payable in such circumstances.

Court of Appeal's Decision

The Court of Appeal endorsed propositions regarding the prevention principle laid down in *the English decision of Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No. 2)*[5]. Those were that normal and legitimate acts by an employer might still be considered acts of prevention if they caused delay to the contractor. However, they will not set time at large if the contract in fact provides for an extension of time in respect of those same acts or events. Finally, insofar as the EOT clause is ambiguous, it should be construed in favour of the contractor.

The Court then proceeded firstly to find clause 25 unambiguous and perfectly clear. By its terms concurrent delay attributed to an ERE would be excluded from consideration in the calculation of an EOT. No express term in the contract prevented the application of clause 25. Furthermore, no contrary term could of necessity be implied into the contract to

[3] *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32; *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm); *Walter Lilly & Company Ltd v Mackay and another* [2012] EWHC 1773 (TCC)

[4] Page 6.

[5] [2007] BLR 195.

fill a void, given the existence of the very clear express term on the subject.

Interestingly the Court considered that the means by which time is put at large under the prevention principle is through the deemed existence of an implied term giving the contractor a reasonable time in which to complete. However, that could not occur in present circumstances where there was an express term dealing with exactly the circumstances encountered.

The Court held that the prevention principle was not an overriding rule of public or legal policy. The principle could be displaced. It was simply not engaged here because amended clause 25 fully and expressly dealt with the circumstances encountered. Most importantly the amended clause 25 was an *agreed* term of the contract between the parties. They were free to agree how extensions of time should be dealt with and free to contract out of the prevention principle if they chose to do so. The building contract was a detailed allocation of risk and reward and here the parties had chosen to place the risk of concurrent delay squarely onto the shoulders of the contractor.

The Court also held that there was no implied term to prohibit the imposition of LADs that would flow from denial of the EOT in this case. In the face of the express terms of the contract, no such implied term was required, whether from the perspective of business efficacy or necessity.

Comment

The Court of Appeal's decision in *North Midland Building v Cyden Homes* provides judicial support for the emerging trend by employers to alter (to their benefit) the usual risk balance regarding concurrent delay. That trend now looks set to accelerate. The decision emphasises the common law's support of the parties' freedom to contract on their own terms, however harsh it may seem to deny the contractor extension of time when completion has been delayed by EREs.

Please get in touch at victoria.tyson@howardkennedy.com with your thoughts or to discuss any concern