

Client Update

English High Court Confirms Parties May Contract Out of Extending Time for Concurrent Delay

On October 4, 2017 the High Court of England & Wales gave its judgment in *North Midland Building Limited v Cyden Homes Limited* [2017] EWHC 2414 (TCC). The judgment confirms that clauses in construction contracts allocating responsibility for concurrent delay to the contractor are valid in English law.

BACKGROUND

Concurrent delay is defined as delay to completion caused by (at least) two delay events impacting the project at the same time, where one is the responsibility of the owner and the other is the responsibility of the contractor. In a typically drafted contract, a delay to completion caused by the contractor entitles the owner to liquidated damages. Similarly, a delay for which the owner is responsible allows the contractor an extension of time and prolongation costs. Concurrent delay therefore makes it difficult to reconcile such provisions because a strict reading entitles both the contractor and the owner (or neither) to compensation.

Different jurisdictions (and commentators) take different approaches to concurrent delay. Most approaches involve sharing responsibility between the parties. English courts, faced with a typically-drafted construction contract, take the approach that the contractor is entitled to an extension of time, but not prolongation costs.¹ Other jurisdictions such as Scotland have approved ‘apportionment’, whereby responsibility for the delay is split between the parties.² Standard form contracts permitting the contract manager to grant “fair” or “reasonable” time and costs to the contractor, which are permitted by courts in England and other jurisdictions,³ may also produce a variety of outcomes.

¹ See, e.g., *De Beers v Atos Origin IT Services UK Ltd* [2011] BLR 274, para. 177.

² *City Inn Ltd v Shepherd Construction Ltd* [2010] CSIH 68, para. 51.

³ Reflecting the fact that this approach is taken in the popular JCT standard form of construction contract, among others.

Because concurrent delay can create significant uncertainty, parties often seek to agree in advance that the contractor will bear responsibility. In *North Midland v Cyden*, the English court has now confirmed for the first time that English law permits this.

THE PREVENTION PRINCIPLE

The ‘prevention principle’ states that a party is not entitled to compensation where it has prevented its counterparty from carrying out its obligations. If the contract does not permit the contractor an extension of time where the owner has prevented the contractor from completing the works in time, English law sets ‘time at large’. This means that the contractor is permitted to complete the works within a reasonable time, and the owner is not entitled to levy liquidated damages, but must prove actual losses if the contractor does not complete the works within a reasonable time.

The English law approach to concurrent delay, which grants an extension of time to the contractor for the full period of concurrent delay, does not offend the prevention principle because the owner does not receive liquidated damages for any period in which its actions are inhibiting the contractor from completing on time (whether or not the contractor is also inhibiting itself from completing on time). Until now, it has been an open question whether a contract which did not grant an extension of time would offend the principle.

THE DECISION OF THE TECHNOLOGY AND CONSTRUCTION COURT

The case concerned the construction of a ‘dream home’ in England. The claimant contractor made an application under Part 8 of the Civil Procedure Rules for a declaration that a clause purporting to allocate responsibility for concurrent delay to the contractor violated the prevention principle, and therefore set time at large. The court (per Fraser J) held that:

- There was no ambiguity in the clause, which stated “any delay caused by ...[the Owner] which is concurrent with another delay for which the Contractor is responsible shall not [entitle the Contractor to an extension of time]”.⁴ The presumption should be that the parties are bound by their agreement.
- Contrary to the claimant’s argument, the clause was not invalidated by the prevention principle. Fraser J held that “the prevention principle simply does not arise” because concurrent delay does not involve prevention.⁵ He followed an earlier judgment of the same court in *Jerram Falkus*,⁶ which ruled that, as a matter of fact, owner delay events have not

⁴ *North Midland v Cyden*, para. 4.

⁵ *North Midland v Cyden*, para. 16.

⁶ *Jerram Falkus Construction Ltd v Fenice Investments Inc* (No.4) [2011] EWHC 1935 (TCC).

prevented the contractor from completing on time, where the contractor itself is concurrently responsible for the delay.

- Consequently, the clause did not frustrate the contractor's entitlement to compensation for acts of prevention by the owner, and thereby set time at large. Here, the contract contained a regime permitting the contractor an extension of time for delay caused solely by the owner.

CONCLUSION

The judgment is a helpful confirmation that parties can contract out of the uncertainty around concurrent delay, and will be particularly welcome to owners.

Fraser J's statement that concurrent delay does not involve prevention by the owner is attractive in its simplicity, but arguably fails to recognize that concurrent delay is about two delay events, which each prevent the contractor from completing in time (or, in Fraser J's own words "delay is caused by two or more different events"⁷). It is impossible to say definitively that the contractor-responsible cause has prevented the contractor, while the owner-responsible cause has not.

North Midland v Cyden may reflect a trend in English law generally towards upholding the parties' agreement, even where this treads on the edges of established legal principles. For example, as we have previously reported ([UK Supreme Court Provides Welcome Clarification to Rules on Penalty Clauses for First Time in a Century](#)), the law on penalty clauses (relevant to liquidated damages in construction contracts) has recently been widened to allow pre-estimated damages which are "not out of all proportion to any legitimate interest"⁸ of the innocent party (rather than a genuine pre-estimate of the loss from the specific breach).

It remains to be seen whether other jurisdictions will follow English courts in permitting parties to allocate responsibility for concurrent delay to the contractor.

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⁷ *North Midland v Cyden*, para. 12.

⁸ *Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, para. 32.

Please do not hesitate to contact us with any questions.

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