

BRIEFING

PREVENTING OPERATION
OF THE PREVENTION PRINCIPLE?
AUGUST 2018

- ENGLISH COURT OF APPEAL CONFIRMS THAT PREVENTION PRINCIPLE CAN BE CONTRACTED OUT OF
- LIQUIDATED DAMAGES CAN BE LEVIED IN CASES OF CONCURRENT DELAY



“THE CASE ... IS AN IMPORTANT CONFIRMATION OF THE EFFECT OF CONCURRENT DELAY ON AN EMPLOYER’S ABILITY TO LEVY LIQUIDATED DAMAGES FOR LATE COMPLETION.”

On 30 July 2018 the English Court of Appeal handed down its judgment in the case of *North Midland Building Ltd v Cyden Homes Ltd*¹, dismissing an appeal by North Midland, the Contractor under an amended JCT D&B Contract 2005. The case concerns the status of the prevention principle in English law, and is an important confirmation of the effect of concurrent delay on an employer’s ability to levy liquidated damages for late completion. The first instance decision which North Midland was seeking to overturn was reported in a [WFW briefing](#) from November 2017.

The “prevention principle” operates to prevent an employer from claiming liquidated damages in the event that their own actions cause delay to the completion of works. When such an event arises, express extension of time provisions in the contract will usually ensure that the contract completion date is extended by a corresponding period of time. The absence of such provisions renders “time at large” such that the contractual date of completion is no longer applicable and is replaced by an obligation for the contractor to complete the works within a reasonable time.

In *North Midland*, Cyden, the Employer, had contracted with North Midland, the Contractor, to build a substantial residential property, but completion was delayed and a dispute arose as to the proper extension of time due to North Midland. The contract provided, at clause 2.25.1.3(b), that “any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall

¹ [2018] EWCA Civ 1744

not be taken into account” for the purposes of calculating an extension of time. The definition of “Relevant Event” included “any impediment, prevention or default, whether by act or omission”, meaning that any act of prevention was a “Relevant Event”.

At first instance, the judge found that the contract was crystal clear in its apportionment of the risk of concurrent delay to the Contractor. Before the Court of Appeal, North Midland accepted that the relevant provisions of the contract were not ambiguous, but contended that it should nevertheless not be liable for liquidated damages for the following reasons:

- the prevention principle was a matter of legal policy which, effectively, could not be contracted out of – clause 2.25.1.3(b) was therefore unenforceable; and
- if the court disagreed with its first argument, a term should be implied into the contract that stopped the Employer from claiming liquidated damages in circumstances where there was concurrent delay. The rationale for this argument was that it would be bizarre if the Employer could recover liquidated damages for a period of delay for which it was responsible. Put another way, this was a question of causation: it could not be said that the liquidated damages flowed from a delay for which the Contractor was responsible.

In respect of the first argument, Lord Justice Coulson noted the absence of any authority for the proposition that the prevention principle was an overriding rule of public policy. He held that there was no suggestion that parties cannot contract out of some or all of the effects of the prevention principle, and in fact that the contrary is plain from the authorities. That was what the parties had done in this case, through clause 2.25.1.3(b).

“THIS JUDGMENT CONFIRMS ... THAT THE COURT SHOULD NOT INTERFERE WHERE PARTIES HAVE AGREE BETWEEN THEM HOW THE RISK OF CONCURRENT DELAY SHOULD BE APPORTIONED.”

The court also disagreed with the second argument, finding that concurrent delay was delay caused by two or more effective causes which are of approximately equal causative potency. For that reason, it was not correct that the Contractor was not responsible for the delay leading to liquidated damages. Further, by clause 2.25.1.3(b) the parties had expressly agreed that concurrent delay would not entitle the Contractor to an extension of time. Because the primary purpose of an extension of time provision is to give the Contractor relief from the levying of liquidated damages caused by delays which were not the Contractor’s responsibility, it followed that the parties were also effectively agreeing that liquidated damages could be levied in instances of concurrent delay.

This judgment confirms the position set out in the first instance decision, that the court should not interfere where parties have agree between them how the risk of concurrent delay should be apportioned. As a Court of Appeal decision which must be followed by the lower courts, that finding is significant. The case is, unfortunately, less helpful on the arguably much more important question of which party bears responsibility in cases of concurrent delay where the contract is silent on the point. The finding that a Contractor cannot argue it did not cause delay in instances of concurrent delay appears to support the position that Contractors should bear responsibility for concurrent delay. However, Lord Justice Coulson then declined to deal with the other side of the coin – whether it could be said that the Employer had delayed the Contractor in cases of concurrent delay – on the basis that there were differences of view on this question in the case law and text books and the issue needed full argument. The wait for clarity on that point must therefore continue.

FOR MORE INFORMATION

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