A nail in the coffin or a shining light? Concurrent delay exclusions and the ‘prevention principle’ explained

In an interesting judgment for the construction industry, the TCC in *North Midland Building Ltd v Cyden Homes Ltd* [2017] considered the enforceability of a bespoke exclusion in respect of concurrent delay and its impact on the ‘prevention principle’. The judgment confirms that parties can agree at the outset of a contract, who bears the risk of concurrent delay.

**Facts**

Cyden Homes Limited (the Employer) engaged North Midland Building Limited as contractor (the Contractor) for construction works (the Works) in respect of a substantial residential property and outbuildings in Lincolnshire.

The contract executed between the parties took the form of an amended JCT Design and Building Contract 2005 (the Contract) which included the usual provisions permitting an extension of time for delay caused by a ‘Relevant Event’ (i.e. an event that causes delay to the completion date, including impediments, preventions or defaults by the Employer). Under clause 2.26.5 of the Contract, a Relevant Event included “any impediment, prevention or default, whether by any act or omission….”.

The parties agreed to bespoke amendments to the Contract one of which concerned an exclusion to the Contractor’s right to extensions of time. The clause in question was clause 2.25.1.3(b) which, as amended, added into the
extension of time mechanism in the Contract, the proviso that in assessing the Contractor’s entitlement for extensions of time:

“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”.

Pursuant to the Contract, a failure to complete the works by the completion date entitled the Employer to deduct liquidated and ascertained damages (LADs) from the Contractor, at a rate of £5,000 per week.

The Works were substantially delayed and the Contractor applied for extensions of time with respect to three events regarding (i) bad weather; (ii) lighting to the main house (Delay Event 1); and (iii) Asphalt Roofing (Delay Event 9).

The Employer relied on the amended provision of clause 2.25.1.3(b) and stated that Delay Events 1 and 9 were concurrent delays “consumed by culpable delay attributable to” the Contractor. The Employer therefore argued that the Contractor was not entitled to an extension of time in respect of those delay events due to concurrency.

The Contractor disagreed and argued that as a result of the ‘prevention principle’ clause 2.25.1.3(b) could not be regarded as permissible or effective in making the Contractor bear the risk of delays by the Employer, and as such, the Contractor was only obliged to complete the Works within a reasonable time. Because the contractual completion date fell away, the Contractor argued “time was at large” and and the Employer cannot recover LADs.

The Contractor sought to rely on a number of cases including Multiplex Construction (UK) Limited v. Honeywell Control Systems Limited [2007] BLR 195 which makes clear that generally where there is concurrent delay, the contractor will be entitled to extensions of time notwithstanding its own culpable delay.

On this basis, the Contractor issued TCC proceedings for a declaration that clause 2.25.1.3(b) was effective to make “time at large”. The Contractor also contended that regardless of the court’s interpretation of clause 2.25.1.3(b), the contractor’s liability to pay LADs fell away where there was an act of prevention.

“…Delay Events 1 and 9 were concurrent delays consumed by culpable delay attributable to the Contractor.”
Judgment

Fraser J found in favour of the Employer and concluded that the prevention principle did not arise in this case. Instead, the TCC held this case was purely concerned with the correct construction of clause 2.25.1.3(b) which was agreed by the parties.

With respect to the interpretation of clause 2.25.1.3(b), the TCC held that the clause was “crystal clear” in terms of its meaning.

The TCC reiterated that (subject to obvious exceptions) parties are free to agree whatever terms they wish to agree. With this in mind, the TCC held that in effect, by clause 2.25.1.3(b), the Contractor and Employer had agreed:

“the [Contractor] would not be entitled to any extension of time for Event X (for which he was not responsible) in so far as delay caused by that event was concurrent with delay caused by Event Y (for which he was)”.

Fraser J failed to see how this “raises any issue of construction whatsoever”.

In respect of the ‘prevention principle’, the TCC noted that the prevention principle did not apply in circumstances of concurrent delay. By reference to previous decisions including Multiplex Construction (UK) Limited v. Honeywell Control Systems Limited [2007] BLR 195 the TCC confirmed that the prevention principle is something that arises where something occurs, for which it is said the employer is responsible, and that prevents the contractor from complying with his obligations (usually the obligation to complete the works by the completion date). Concurrent delays, on the other hand, were of “equal causative potency”.

In reaching this decision, the TCC noted and placed heavy reliance on the fact that clause 2.26 of the Contract expressly classified acts of prevention as a Relevant Event. This clearly demonstrated how the parties intended extensions of time to be dealt with in relation to acts of prevention, i.e. an act of prevention was a Relevant Event.

The TCC further dismissed the Contractor’s alternative argument that liability for LADs fell away as there was no authority that stated that a perfectly operable LAD clause would or could, as a result of an extension of time having been agreed by the parties to be calculated in a particular way, not be operated.

“...the clause was crystal clear in terms of its meaning.”
Comment

This decision appears to be the first time the English courts have considered the effect of a concurrent delay exclusion in construction contracts and looks to shake up the industry’s approach to concurrent delay provisions.

Standard form contracts typically focus on terms dealing with extension of time and compensation and do not cater for concurrent delay. This is in spite of the well known complexities in resolving delay claims that include elements of concurrency.

By confirming that an exclusion to an entitlement to an extension of time if there is concurrency, does not engage the prevention principle, we expect employers are likely to be encouraged to seek such a clause in their contractual provisions so as to pass the risk of concurrent delay down to the contractor.

For contractors and those further down the supply chain, such clauses should only be agreed with caution – Fraser J’s emphasis that the prevention principle is not engaged where there is concurrent delay will mean there is limited scope to arguing against such allocation of risk where an exclusion for concurrent delay is an agreed express term of the contract.

Though this may come as an unsurprising conclusion, the decision of Fraser J also confirms that where parties agree variations to standard form construction contract, courts remain reluctant to creatively construe such clauses.

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