North Midland Building Ltd v Cyden Homes Ltd

Cyden Homes Ltd (Cyden) engaged North Midland Building Ltd (Midland) to design and build a house in Lincolnshire (the Works) pursuant to a contract which incorporated the JCT Design and Build Contract 2005 (JCT DB) with bespoke amendments (the Contract).

Clause 2.25.1.3 of the Contract (an amendment to the JCT DB) stated that

‘... 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’

when deciding whether to grant an extension of time.

The Works were delayed and a dispute arose between the parties as to the proper extension of time due to Midland. Midland claimed that it was entitled to an extension of time notwithstanding the concurrent delays for which it was responsible. Cyden’s position, relying on cl 2.25.1.3, was that Midland was not entitled to an extension of time.

The TCC concluded that cl 2.25.1.3 and the intention of the parties with regard to concurrent delay was ‘crystal clear’ such that Midland was ‘not entitled to an extension of time’.

The TCC noted that there was no rule of law which prevented the parties from agreeing how to deal with concurrent delay and that the prevention principle did not override any such expressly agreed provisions.

On appeal, Midland submitted that cl 2.25.1.3 was contrary to the prevention principle and therefore of no effect.

Midland argued that Cyden should not be entitled to deduct liquidated damages for concurrent delay on the basis that:

‘... it would be bizarre if [Cyden] could recover liquidated damages for a period of delay for which it was responsible’.

Decision

The Court of Appeal dismissed Midland’s appeal. Upholding the TCC’s decision, Coulson LJ held that cl 2.25.1.3(b) was ‘unambiguous’ and that it ‘plainly seeks to allocate the risk of concurrent delay’ to Midland. Coulson LJ concluded that, where a delay was caused by Midland, even where there was an equally effective cause of that delay for which Cyden was responsible, liability rested with Midland. Midland was not therefore entitled to any extension of time for such delay.

Coulson LJ also rejected Midland’s ‘bold proposition’ that the prevention principle operated to rescue Midland from cl 2.25.1.3 to which it had freely agreed. There is no authority that the parties cannot contract out of some or all of the effects of the prevention principle.

Coulson LJ explained that ‘[a] building contract is a detailed allocation of risk and reward’ – parties to a contract are free to negotiate and agree express provisions dealing with the issue of concurrent delay.

Coulson LJ dismissed Midland’s arguments that the prevention principle meant that Cyden was not entitled to liquidated damages if it was responsible for delay. Coulson LJ considered that, whilst the resulting position may be regarded as ‘harsh’, it could not ‘be said to be uncommercial or unworkable’.

Significance

It is increasingly common for concurrent delay to be excluded from a contractor’s entitlement to an extension of time. This decision confirms that the courts are likely to enforce such exclusions.
This case also confirms that the prevention principle will not operate to save a contractor from a clause to which it has freely agreed.

**Radius Housing Association Ltd (formerly Helm Housing Association Ltd) v JNP Architects**  
[2018] NIQB 57; QB NI; Horner J

Radius Housing Association Ltd (Radius) appointed JNP Architects (JNP) in 2007 to design and oversee the procurement and construction of two social housing apartment blocks in Northern Ireland. The terms of JNP’s appointment and engagement were governed by the RIBA Standard Conditions of Engagement (the Contract).

The Contract included a net contribution clause which provided that JNP’s:

‘... liability for loss or damage [...] shall be limited to [...] such sum as it is just and equitable for [JNP] to pay having regard to the extent of his responsibility for the loss and/or damage in question’

when compared with other parties (the NCC). The terms of engagement also required JNP:

‘[n]ot to make any alteration to the specifications [...] or services or approved design without consent’.

Part of the development required waterproofing to ensure that the apartments were dry, free from damp penetration, and fit for habitation. The Contract specified the use of Hydroguard, a full tanking solution, which carries a certificate and is backed by a warranty. However, the quantity surveyor allowed for insufficient Hydroguard. JNP therefore devised a solution, substituting Hydroguard with Famguard, a partial tanking solution. There was no warranty or certificate for Famguard and JNP did not obtain consent from Radius for this change. Radius alleged breach of contract and/or negligence against JNP, as well as the contractor, the quantity surveyor, and the engineer, due to both apartment blocks suffering from serious damp penetration. The contractor entered into administration and the claims against the quantity surveyor and the engineer were not pursued. Radius and JNP agreed that the Contract contained a binding NCC. Radius alleged that JNP failed to obtain Radius’ consent to the change from Hydroguard to Famguard and that JNP should therefore be deemed ‘wholly at fault for any problems/defects which arose with regards to the application of Famguard’ so could not rely on the NCC. JNP argued that the effect of the NCC was to make it liable only for its share of the blame and therefore JNP should not be responsible for the contractor’s contribution.

The court therefore considered two issues: (1) whether JNP was in breach of contract and/or negligent; and (2) if so, what was JNP’s share of responsibility, if any, for any of the defects and their effects on the two apartment blocks.

**Decision**

Horner J found that JNP was in breach of contract and negligent in respect of the change from a ‘failsafe’ full tanking system with Hydroguard to a ‘new high risk’ partial tanking system with a Famguard skirt and also in failing to obtain Radius’ consent. Horner J considered that, had Radius been properly advised as to the advantages and disadvantages of Famguard, it would have refused to agree to the change.

However, Horner J noted that it was ‘important not just to look exclusively at the performance of [JNP] when apportioning blame’. Horner J held that ‘the level of causation has to be “just and equitable” having regard to the extent of the person’s responsibility for the damage in question’ and that both the causative potency of a particular factor and the blameworthiness should be assessed. The contractor was held to be in breach of contract and negligent having failed to apply the Famguard in a competent and workmanlike manner.

Horner J therefore dismissed Radius’ submission that JNP’s failure to obtain Radius’ consent rendered it wholly liable. It did not make commercial sense for the parties to have agreed that the NCC would apply save in circumstances where JNP was in breach of its obligation to obtain consent. The purpose of the NCC was to limit JNP’s liability to its share of the blame.

**Significance**

Whilst this is a decision of the Northern Irish courts so not binding on the English courts, it will be persuasive and is a rare case in relation to an NCC. This decision provides further reassurance to architects and other professionals that the courts will look to uphold net contribution clauses and confirms that net contribution clauses apply to all obligations under a contract. CL