

Prevention principle will not override agreed contract terms on concurrent delay

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In the recent case of *North Midland Building Limited v Cyden Homes Limited*¹ the Court of Appeal of England and Wales upheld a contract term stipulating that a contractor was not entitled to an extension of time in the event of concurrent delay.

Where a project is critically delayed by both employer-risk and contractor-risk events which are effective at the same time, it can be said that these are 'concurrent delays'. Concurrent delay can be a contentious issue, since there is no universally accepted definition of what constitutes 'concurrency'.

In light of this ambiguity, it is increasingly common practice for parties to agree terms in their contracts specifying how concurrent delay will be addressed in determining extension of time claims. This recent decision indicates that the courts of England and Wales will uphold such a clause, and that the 'prevention principle' will not operate to avoid the application of clearly drafted and freely agreed terms.

Key Facts

This case is the appeal from the first instance judgment previously reported [here](#).

The parties had agreed in the contract that in the event of concurrent delay, the contractor would not be entitled to an extension of time. The project suffered delay, including a period which was said to be concurrent delay, and the contractor sought declarations from the court that the agreement on concurrent delay was invalid and that liquidated damages could not be levied by the employer.

In particular, the contractor relied on the argument that the 'prevention principle' invalidated the agreement on concurrent delay. The 'prevention principle' is that, where the employer prevents the contractor from completing the works within the agreed time, and there is no operable contractual mechanism for time to be extended, time will be 'at large' (the contractor must complete the works within a 'reasonable time' instead of by the contract completion date) and the employer is not entitled to liquidated damages for delay to completion.

Decision

The Court of Appeal upheld the decision of the first instance judge and confirmed that the clause was valid. The Court took the following approach in its judgment:

- Since a construction contract is "a detailed allocation of risk and reward" it was therefore permissible to allocate the risk of concurrent delay, noting that previous authorities on the subject had not

¹ [2018] EWCA Civ 1744

opposed the validity of an agreement as to how responsibility for concurrent delay should be allocated between the parties.

- The prevention principle is not ‘engaged’ by concurrent delay, since it arises only where an employer is responsible for delay through its act or omissions and where the contractor would not otherwise be entitled to an extension of time for this delay. The circumstances of concurrent delay are different, and the authorities on the prevention principle do not mention concurrent delay.
- Even if the prevention principle did apply to concurrent delay, it was not an “overriding rule of public or legal policy” such as the rule which invalidates punitive liquidated damages. The Court held that the prevention principle operated merely as an implied term, which could not contradict express terms of the contract.
- If a contract validly restricts a contractor from an extension of time in the event of concurrent delay, there is no implied term that would prevent the employer from recovering damages for that delay. The Court held that there is an “inextricable... link” between lack of entitlement to an extension of time, and the employer’s right to levy liquidated damages.

Comment

This decision will be welcome to parties who seek to avoid the uncertainty surrounding entitlement to an extension of time that arises out of concurrent delay through the agreement of contractual terms. We note that the recent [2017 FIDIC](#) forms of contract contain provisions which permit parties to incorporate special conditions governing how the risk of concurrent delay is allocated.

The case is yet another reminder that the English courts generally uphold the strict terms of a contract even where this produces what the judge admitted might be a “harsh” outcome. As [White & Case reported](#), this strict approach was recently demonstrated in *Goodlife Foods Limited v Hall Fire Protection Limited*² which concerned particularly onerous and unusual terms.

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² [2018] EWCA Civ 1371