

Construction Law Update

Extensions of Time and Concurrent Delay

It is common for employers to include clauses in building contracts to the effect that the contractor is not entitled to an extension of time where there is concurrent delay. Until recently, it was not known whether such clauses are enforceable, but this has now been clarified by the courts in the recent case of *North Midland Building Ltd v Cyden Homes Ltd*.

Background

In 2009 Cyden Homes Ltd (“CH”) engaged North Midland Building Ltd (“NMB”) under a JCT Design and Build Contract 2005 Edition to construct a sizeable private home in Lincolnshire. The contract included a schedule of bespoke amendments, one of which was amended to clause 2.25 (Fixing Completion Date).

The amended clause 2.25.1.3 read:

“... and provided that

- (a) *the Contractor has made reasonable and proper efforts to mitigate such delay; and*
- (b) **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,**

then, save where these Conditions expressly provide otherwise, the Employer shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as he then estimates to be fair and reasonable.”

There had been substantial delays to the works and liquidated damages were set at £5,000 per week. NMB had claimed extensions of time of 163 days in respect of “lighting to the main house”, 26 days in respect of “asphalt roofing” and 9 days in respect of exceptionally adverse weather. However, CH’s assessment of NMB’s extension of time entitlement was that the delays resulting from lighting to the main house and asphalt roofing were “consumed by culpable delays attributable to NMB”. In other words, CH decided that there was concurrent delay, and by virtue of clause 2.25.1.3(b), NMB was not entitled to any extension of time for the

delay events (Relevant Events) which had arisen concurrently with delays for which NMB was responsible.

NMB sought to challenge the validity of clause 2.25.1.3(b) and applied to court for declarations that:

- (i) the effect of clause 2.25.1.3(b) is to make time at large where NMB has a claim to an extension of time for a delay caused by a Relevant Event where that delay is concurrent with another delay for which NMB is responsible; and
- (ii) NMB must therefore complete within a reasonable time and liquidated damages are void.

Time can only be put at large, as contended for by NMB, by operation of the prevention principle. The prevention principle arises when:

- circumstances occur for which the employer is responsible; and
- those circumstances prevent the contractor from completing the works by the completion date; and
- the contract does not provide for an extension of time to be granted to the contractor in those circumstances.

When time becomes at large, the contractor is only obliged to complete the works within a reasonable time (rather than by a specific completion date) and any liquidated damages clause becomes inoperable.

NMB’s argument appeared to be that clause 2.25.1.3(b) was not a permissible or acceptable clause and as a result there was no mechanism for NMB to be granted an extension of time for employer delay, so time became at large.

Was clause 2.25.1.3(b) enforceable?

The court stated that the meaning of clause 2.25.1.3(b) was “*crystal clear*”; it was obviously an agreement between the parties that if the contractor was responsible for a delaying event at the same time as, or

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during, delay caused by a Relevant Event, the delay caused by the Relevant Event was not to be taken into account when assessing the contractor's extension of time entitlement.

NMB's suggestion that the clause was "not permitted" was rejected – the contracting parties were free to come to this agreement on how concurrent delay should be dealt with and there is no rule of law preventing them from doing so.

Given that the meaning of the clause was perfectly clear, the prevention principle simply did not arise, despite NMB's arguments. Furthermore, the court pointed out the "final nail in the coffin" of NMB's argument; employer impediment, prevention or default is a Relevant Event under the contract, so there was (at least in theory) a mechanism for granting an extension of time for employer prevention and consequently the prevention principle could not come into play. The court stated *"Such acts of prevention were, as Relevant Events, to be taken into account expressly in the way identified in clause 2.25.1.3. This was the specific agreement of the parties."*

Analysis

This is a useful judgment because it confirms that clauses which exclude the contractor's entitlement to an extension of time where there is concurrent delay are valid and enforceable.

Contractors should be on the lookout for such clauses when entering into contracts and consider whether they are prepared to accept them. As can be seen in this case, the financial consequences of being unable to claim an extension of time where there is concurrent delay can potentially be severe.

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