

International Construction Arbitration Alert

Akin Gump
STRAUSS HAUER & FELD LLP

Concurrent Delay – Is the English Court of Appeal’s Clarification Conclusive?

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Key Points

- The Court of Appeal has held that a clause denying an extension of time to a Contractor if there is concurrent delay *is* enforceable and is not contrary to the so-called “prevention principle.”
- The Court of Appeal declined to go further and comment on what the position should be if there is no express term dealing with concurrent delay.
- On a practical level, Owners will now include in contracts an express term excluding an extension of time if there is concurrency and Contractors will want to define precisely what is meant by “concurrent delay” and steer delay analysis towards methods that undermine findings of concurrent delay.
- The Court of Appeal’s position differs from that in the United States where if there is concurrent delay, the delay is held to be an excusable non-compensable delay entitling the Contractor to only an extension of time and no additional money.

In *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744, the Court of Appeal has resolved a key issue that often troubles tribunals in international construction arbitration. The subject of concurrent delay is important on many levels, and the Court of Appeal’s decision and supporting analysis will have a tangible impact on how complex construction claims will now be articulated, pleaded, analyzed and decided by tribunals. The Court of Appeal focused on the enforceability of an express term freely negotiated and included in an agreement. Put simply, the clause stated that if there are two delaying events, Event X and Event Y, occurring at the same time and causing concurrent delay to completion of the works, with Event X otherwise entitling the Contractor to an extension of time, and Event Y being “another delay for which the Contractor is responsible”, then the Contractor would not be entitled to an extension of time in respect of those two delaying events. The Court of Appeal held that the clause was enforceable and was *not* contrary to an overarching principle of law – the so-called “prevention principle”. *North Midland Building Ltd v Cyden Homes Ltd* provides a long-awaited clarification and an important contribution to the common law. However, the position under U.S. law is different. Put simply, the Owner is not entitled to collect liquidated damages, and the Contractor is not entitled to loss/expense.

Contact

Hamish Lal
hamish.lal@akingump.com
+44 20.7012.9740
London

Scott M. Heimberg
sheimberg@akingump.com
+1 202.887.4085
Washington, D.C.

Mark J. Groff
mgroff@akingump.com
+1 202.887.4063
Washington, D.C.

Josephine Kaiding
josephine.kaiding@akingump.com
+44 20.7661.5356
London

Instead, where there is concurrent delay, the delay is held to be an excusable non-compensable delay entitling the Contractor to only an extension of time. Although a provision such as the one in *North Midland Building Ltd* would appear to be against U.S. public policy, it is still an open issue in the United States, as there does not appear to be any reported cases directly on this point.

Practical Effects

The Court of Appeal did not wish to comment on whether a Contractor would also be denied an extension of time where there *is* concurrent delay but *no* express term. On a practical level *North Midland Building Ltd* will encourage Owners to now include in contracts an express term excluding an extension of time if there is concurrency, and this in turn will encourage Contractors to define precisely what is meant by “concurrent” and to analyze the precise effect of delay to completion in ways that undermine findings of concurrent delay. It is also likely that Contractors may now seek to argue that liquidated damages are an unenforceable penalty if levied where there is concurrent delay and no extension of time.

The “Prevention Principle”

In *North Midland Building Ltd* the Contractor argued that a bespoke clause in the construction contract that stated “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 [in the assessment of an extension of time to the contract completion date]” was not enforceable because it was contrary to what has come to be known as the “prevention principle” and therefore ineffective. The Contractor’s position was that time was at large such that liquidated damages are void; the Contractor has a reasonable time to complete the works; subject to which general damages for delay are feasible. The “attack” on the express clause was based on the “prevention principle” which typically means that a Contractor cannot be held to a completion date where something occurs, for which it is said the Owner is responsible, that prevents the Contractor from complying with his obligations, usually the obligation to complete the works by the completion date. The effect of the prevention principle has not been challenged in the common law, and one typically sees references to *Dodd v Churton* [1897] 1 QB 566, where the employer ordered extra work which delayed completion and the Court held “...where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default; and accordingly a well-recognised rule has been established in cases of this kind, beginning with *Holme v Guppy*, to the effect that, if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided by the contract.” Given the inevitability of changes and delays, it is widely understood that construction contracts began to incorporate extension of time clauses (which provided that, on the happening of certain events – which included what might generically be described as “acts of prevention” on the part of the employer – the date for completion under the contract could be extended, so that liquidated damages would only be levied for the period after the expiry of the extended completion date).

It is well understood that acts of prevention by an Owner do not set time at large if the contract provides for an extension of time in respect of those events, but the Contractor argued that the prevention principle was a matter of legal policy which

would operate to rescue the Contractor from the clause to which it had freely agreed. There is no authority for the Contractor's proposition, and it was, in any event, rejected robustly. Put simply, the Court of Appeal held that the prevention principle was not an absolute rule of law but operated as an implied term in a contract which, fundamentally, could be contradicted by the express terms of the contract. Coulson LJ Judgement stated at paragraph 36:

"The final reason for my rejection of Ground 1 is perhaps the most important of all and applies even if I was wrong, and clause 2.25.1.3(b) was somehow connected with the prevention principle. Clause 2.25.1.3(b) was an agreed term. There is no suggestion in the authorities noted above that the parties cannot contract out of some or all of the effects of the prevention principle: indeed, the contrary is plain. Salmon LJ's judgment in *Peak v McKinney*, set out at paragraph 33 above (and in particular the passage in bold), expressly envisaged that, although it had not happened in that case, the parties could have drafted an extension of time provision which would operate in the employer's favour, notwithstanding that the employer was to blame for the delay".

What if There is Concurrency but No Express Term?

The Court of Appeal was invited by the Owner to hold that, the prevention principle can still be defeated where there is concurrent delay because it could not be said that the Owner had actually delayed the Contractor at all. There is no Court of Appeal authority on this specific issue. The Court of Appeal did not wish to decide this issue, stating, "other than to note that there are differences of view expressed in both the first instance cases and the textbooks, it seems to me that it would be unwise to decide the issue without full argument. There may well be cases which will turn on this point, but the instant appeal is not one of them".

It is not entirely clear why the Court of Appeal did not go further and close this specific issue too. The Court of Appeal recognized that in the absence of an express clause dealing with concurrent delay, a contractor's entitlement to an extension of time in circumstances of concurrent delay is not entirely free from doubt, and it discussed case law that allowed an extension of time for the period of the concurrent delay (*Walter Lilly and Co Limited v Giles Mackay and Another* [2012] EWHC 1773 (TCC); [2012] 28 Const. L.J. Issue 8 and also the case-law that decided that no extension of time should be granted (*Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm) and *Jerram Falkus Construction Limited v Fenice Investments Incorporated (No. 4)* [2011] EWHC 1935 (TCC)). This aspect of the judgement is disappointing, and it is perhaps an opportunity missed. There is significant interest in this issue. The Society of Construction Law Delay and Disruption Protocol Second Edition represents the widely held view and takes the position that a Contractor's entitlement to an extension of time should not be reduced if there is concurrency. However, it is now more likely that Owners will argue that where there is concurrency a Contractor is not entitled to an extension of time. This is because the Court of Appeal appeared to embrace many aspects of *Adyard Abu Dhabi v SD Marine Services* including the definition of concurrent delay, and it did not disapprove of the Judge's comments in that case that "there is only concurrency if both events in fact cause delay to the progress of the works and the delaying effect of the two events is felt at the same time"

(even though it could easily have done so). Further support for an Owner would be the fact that the case law that supports “no extension of time” in circumstances of concurrency is more recent and is supported by a leading text. It may also be compelling that the Judge at First Instance in *North Midland Building Ltd* who was keen to say that there should be no extension of time was not in any way contradicted by the Court of Appeal.

No Extension of Time and no Liquidated Damages?

The Contractor also argued that even if the express clause dealing with concurrent delay was effective it was still possible that the Owner could not levy liquidated damages on the basis that there was an implied term that prevented the Owner from recovering liquidated damages for a period of delay for which it was responsible. The Contractor did not argue that the concurrent delay made the liquidated damages an unenforceable penalty but rather that as a matter of causation in such circumstances, it could not be said that the liquidated damages flowed from a delay for which the Contractor was responsible. Put simply, this causation argument was rejected robustly by the Court of Appeal on the basis that the extension of time machinery is aligned to the provisions dealing with liquidated damages, and so once the former is operated properly the latter can also be operated. Coulson LJ was clear:

“Whilst it is certainly right that the contractual machinery for extending time and fixing a new completion date has a number of important consequences for the contract as a whole, the primary purpose of an extension of time provision is to give the contractor relief against the levying of liquidated damages for delays which were not his responsibility under the contract: see *Peak v McKinney*. Given that close linkage, there can be no basis for arguing for a result in respect of liquidated damages that is different to the result in respect of extensions of time. If there had been a right to an extension of time, the ability to levy liquidated damages would only have operated in respect of any delay after the extended date; if the right to an extension of time was expressly negated, there is no reason why liquidated damages should not apply to the delay beyond the contractual completion date. In both situations, the express provisions which either confer or deny a right to an extension of time are linked directly to the preservation of the employer’s right to liquidated damages”.

United States Law on Concurrent Delay

In the United States, absent an express contract clause to the contrary, the well-established general rule is that where both the Owner and the Contractor contribute to a delay, neither party can recover damages, unless there is proof of a clear apportionment of the delay and the expense attributable to each party. *William F. Klingensmith, Inc. v. U.S.*, 731 F.2d 805, 809 (Fed. Cir. 1984); *Blinderman Const. Co. v. U.S.*, 695 F.2d 552, 559 (Fed. Cir. 1982), citing *Coath & Goss v. U.S.*, 101 Ct. Cl. 702, 714 (1944); *RPR & Associates, Inc. v. University of North Carolina-Chapel Hill*, 570 S.E.2d 510 (N.C. 2002). In other words, the Owner is not entitled to collect liquidated damages, and the Contractor is not entitled to additional compensation. Instead, where there is a true concurrent critical path delay, the delay is held to be an excusable non-compensable delay entitling the contractor to only a time extension.

Morganti Nat., Inc. v. U.S., 49 Fed. Cl. 110, 132 (2001), aff'd, 36 Fed. Appx. 452 (Fed. Cir. 2002). HPS Mech., Inc. v. JMR Constr. Corp., 2014 U.S. Dist. LEXIS 105888 (N. Dist. Ca. August 1, 2014), *citing* 5 Bruner & O'Connor Construction Law §15:25 (2014).

It is unclear, whether a U.S. court would enforce the type of bespoke provision at issue in the *North Midland Building Ltd* case, which prohibited the Contractor from obtaining a time extension in a concurrent delay situation. In analyzing such a provision, a U.S. court may look to analogous case law interpreting no-damage-for-delay provisions, which provide that a Contractor is entitled to a time extension but no money for delays, including delays that would otherwise be compensable. No-damage-for-delay provisions are typically enforceable in the United States but, as a matter of public policy, are frowned upon and any ambiguities in such provisions are strictly construed against the Owner, as the clause attempts to exculpate the Owner from its own wrongdoing (delaying the Contractor's performance). No-damage-for-delay provisions are also subject to several well-known exceptions to their enforceability. For example, most jurisdictions in the United States hold that no-damage-for-delay provisions will not be enforced if the delays in question were caused by the Owner's fraud or bad faith or by the Owner's active interference. See *Corinno Civetta Constr. v. City of New York*, 493 N.E.2d 905 (N.Y. 1986); *Tricon Kent Co. v. Lafarge North America, Inc.*, 186 P.3d 155 (Colo. App. 2008); *Construction Scheduling: Preparation, Liability, and Claims*, §7:09, Wickwire, Driscoll, Hurlbut and Groff (Aspen Publishers, 3d Ed. 2010).

The provision enforced in *North Midland Building Ltd*, is arguably even harsher than a typical no-damage-for-delay-provision. Accordingly, if it was the Owner or its agents, actions which caused a delay which was concurrent with Contractor caused delay, it is possible that a U.S. court would look for a way to not enforce a provision which denies a Contractor a time extension for the period of concurrent delay while allowing the Owner to collect liquidated damages from the Contractor for that same concurrent delay period. However, although a provision such as the one in *North Midland Building Ltd* would appear to be against U.S. public policy, it is still an open issue, as there does not appear to be any reported cases directly on point.