Delay – Concurrent Delay – Exclusion Clauses and the Application of the Prevention Principle

North Midland Building Ltd and Cyden Homes Ltd [2017] EWHC 2414 (TCC)

This recent case demonstrates that a clause excluding a right to an extension of time in the event of concurrent delay can be valid and may not fall foul of the 'prevention principle'.

The parties in this case were in dispute over the assessment of concurrent delays to works under a JCT Design & Build Contract 2005. Of particular interest here was the fact that the employer relied on a clause that is often included by way of amendments in such contracts. This clause sought to exclude the contractor's right to an extension of time to completion where there was concurrent delay as between a relevant event and a non-relevant event.

A common counter to such an exclusion clause is based on the prevention principle - that is that (as applied in this case) any extension of time clause that seeks to exclude the contractor's right to an extension of time where the employer has itself 'prevented' the contractor from completing its works by the completion date is invalid. This argument is often tied up with arguments/misunderstandings as to the meaning of concurrency in such situations.

Here we examine the implications of the case and explain the rationale in the context of the current judicial interpretation of concurrency.

Background

North Midland Building Ltd ("**NMB**") brought a Part 8 claim against Cyden Homes Ltd ("**CHL**") in relation to the interpretation of part of the delay clause under the JCT Design & Build contract between them. Central to this dispute was that the contract contained a common form of amendment to clause 2.25; namely that the contractor's entitlement to an extension of time on the occurrence of a Relevant Event was subject to an additional proviso 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*"

The works were delayed and NMB applied for an extension of time based on a variety of reasons and delays. In relation to certain of the delays claimed, CHL relied on the above clause to deny entitlement stating that:

> "*those delays have been consumed by culpable delays attributable to NMB thus reducing entitlement to an extension of time*"

Unsurprisingly, NMB disagreed with the above and so brought proceedings in the TCC for a declaration that the clause relied upon by CHL was invalid and thereby time was set at large. Although the original Part 8 application seems to have been framed as a 'point of contractual interpretation', NMB's arguments before HHJ Fraser seem to have focused primarily on an argument that the wording offended the 'prevention principle' rather than disputing the meaning of the words themselves. In essence, where (in the case of delay) an employer 'prevents' the contractor from completing his work by the completion date (for example by instructing additional works or preventing access that delays completion) and the contractual extension of time mechanism does not allow extensions of time in such an eventuality, the completion date will be 'set at large'. This means that the contractor is then

obliged to complete within a 'reasonable time' and the employer can only claim its actual loss for contractor culpable delay as opposed to levying liquidated damages at the rates provided for in the contract.

Thus, NMB argued that by providing that Relevant Events (which includes Employer acts of prevention) were not taken into account where concurrent with NMB delays meant that the clause offended the prevention principle and was therefore 'not permitted'. The clause was consequently invalid and time must thereby be set at large.

Decision

As stated above, there did not seem to be any serious issue between the parties as to the objective meaning of the words when matters finally came before HHJ Fraser –and the judge himself described the wording as 'crystal clear'. Thus, the case turned on whether the clause was nonetheless invalidated by reason of the prevention principle.

The Court rejected that the prevention principle applied here as standard clause 2.25.1.3 (relevant events that are impediment, prevention, default….)specifically permitted extensions of time for acts of employer prevention and there was no rule of law "*that prevents the parties from agreeing that concurrent delay be dealt with in any particular way*…"

In essence, the Court found that the extension of time clause provided for employer prevention and rejected that the concurrency proviso was invalid. HHJ Fraser quoted from the earlier cases of *Adyard Abu Dhabi v SD Marine Services* [1] and *Jerram Falkus Construction Limited v Fenice Investments*[2]. In *Adyard*, the Judge stated that:

> "[The Contractor] *has to establish causation in fact, which means that* [in this case] *the variations were likely to or (as the case may be) did cause actual delay to the progress of the works*"

In *Jerram*

> "*If there were two concurrent causes of delay, one which was the contractor's responsibility and one which was said to trigger the prevention principle, the principle would not in fact be triggered, the prevention principle would not in fact be triggered because the contractor could not show that the employer's conduct made it impossible*….
>
> *Accordingly, I conclude that for the prevention principle to apply, the contractor must be able to demonstrate that the employer's acts or omissions have prevented the contractor from achieving an earlier completion date and that, if that earlier completion date would not have been achieved anyway because of concurrent delays caused by the contractor's own default, the prevention principle will not apply."*

Following on from the above, and having already found that the meaning of the wording was clear and that clause 2.25.1.3 provided for employer prevention, HHJ Fraser rejected that the prevention principle applied to concurrent delays which meant that the concurrency 'exclusion' could be relied upon by CHL. The entire extension of time clause (including the amendment) was therefore valid and excluded NMB's rights to extensions of time to the extent relevant events delays were concurrent with non-relevant event delays.

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[1] [2011] EWHC 848 (Comm)

[2] [2011 EWHC 1935 (TCC)

Commentary

Although it does not quote from all of the previous concurrency cases, the above analysis seems to be in line with their reasoning. Where a contract (such as a JCT form) provides for actions of employer prevention in the extension of time mechanism, it is not then invalidated by acts of prevention – so clause 2.25 as drafted is perfectly valid. However, in this contract, this was subject to the concurrency proviso that then excluded concurrent delay entitlement.

So why does such a concurrency amendment not offend the prevention doctrine (a common law rule) and thus be invalidated? Does this clause not negate the application of clause 2.25.1.3 by potentially preventing the contractor obtaining extensions of time for periods of employer prevention?

In order to understand the context against which the Court found that the entirety of the clause was valid and did not offend the prevention principle, it is necessary to consider HHJ's Fraser's comments as to the relationship between 'prevention and causation' (above) and the meaning of concurrency.

The only way that NMB's arguments here could have succeeded was by, in effect, establishing that during periods of contractor/employer concurrent delay, the employer's delay is actually delaying completion and the contractor must thereby be entitled to extensions of time during these periods. Thus, so the argument goes, the concurrency amendment in this contract would remove this entitlement and block the effective operation of clause 2.25 and offend the doctrine of prevention. In order to understand why this argument failed – on the basis that the prevention principle does not apply to concurrent delay, it is worth recapping on what 'concurrency' actually means - as there is a lot of misunderstanding around this issue.

The key point is that concurrent delay is often misinterpreted as meaning parallel delay effects as opposed to actual concurrent delays. Early cases such as *Henry Boot v Malmaison*[3] set out the common law position where there is concurrent delay as follows:

> *" it is agreed that if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event…"*

In case of *Royal Brompton Hospital NHS Trust v Hammond & Others*[4] the judge clarified concurrency as follows:

> ***" Concurrent delay does not mean….a situation which, works already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurs which is a relevant event and which, had the contractor not been delayed, would have caused him to be delayed but which in fact, by reason of the existing delay made no difference.*** *In such a situation although there is a relevant event, the completion of the Works is [not] likely to be delayed thereby beyond the Completion Date"*(emphasis added)

[3] *70 Con LR 32 (QBD (TCC))*

[4] [2001] EWCA Civ 550

"*…this situation* ***needs to be distinguished from a situation in which….the works are proceeding in a regular fashion and on programme, when two things happen ,either of which, had it happened on its own would have caused delay*** *and one is a relevant event, while the other is not. In such circumstances there is a real concurrency of the delay"* (emphasis added).

In *Adyard,* the judge referred back to the earlier cases and stated:

"this example [Malmaison] *involves a relevant event which caused a period of actual delay"*
"…This [Royal Brompton] *makes it clear that there is only concurrency if* ***both events in fact cause delay*** *and the* ***delaying effect*** *of the two is felt at the same time….in HHJ Seymour's first example* [relevant event during period of contractor culpable delay] ***the relevant event did not in fact cause any delay****……."*(emphasis added).

This was followed by the further case of *Saga Cruises BDF Ltd and Fincantieri SPA*[5] . In that case (which concerned late delivery of a cruise ship), the judge accepted the position put forward by the Owners of the ship and confirms the position in *Abu Dhabi* cited above which in turn considered all the earlier key 'concurrent delay' cases. Other key extracts from that judgement on points accepted by the judge are:

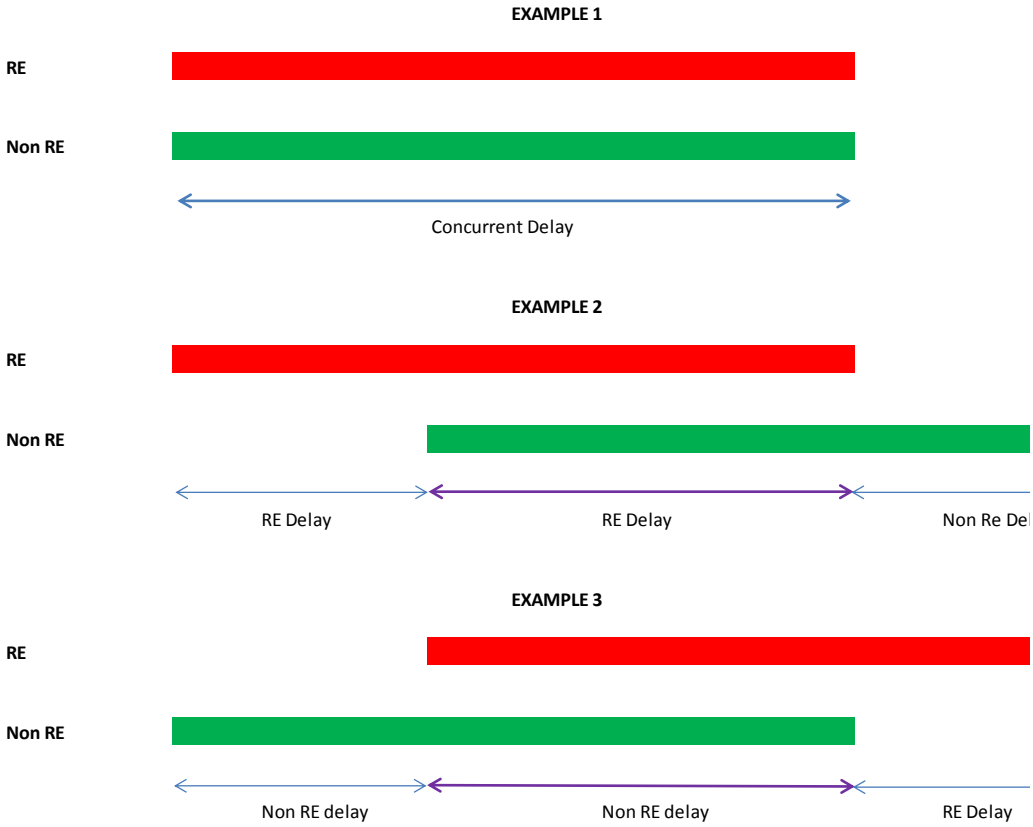
"*…in the present case the Court is* ***not concerned with concurrent delay in the Malmaison sense. If completion of the project was already delayed for reasons for which the Yard was responsible, then delays to completion of particular activities by the Owners are not examples of concurrent delay and do not give rise to any entitlement to an extension of time*** *by the Yard. That is because they do not in fact cause any delay to completion.*(emphasis added).

…the importance in concurrency arguments of ***distinguishing between a delay which, had the contractor not been delayed would have caused delay, but because of an existing delay made no difference*** *and those where further delay is actually caused by the event relied upon: "****There is only concurrency if both events in fact cause delay*** *to the progress of the works and the delaying effect id felt at the same time""….*(emphasis added).

"These extracts, in my judgement, point the way clearly. A careful consideration of the authorities indicates that ***unless there is a concurrency actually affecting the completion date as then scheduled the contractor cannot claim the benefit of it****…"* (emphasis added).

To demonstrate this current judicial rationale, consider the following three scenarios under a typical construction contract. This is where there is an extension of time clause that permits the contractor extensions of time to completion for Relevant Events and such an event then occurs alongside a 'non-Relevant Event' for which the employer is responsible and either event, had it occurred in isolation, would have delayed completion:

[5] [2016 EWHC 1875 (Comm)]



The only example of true concurrency here is example 1. In examples 2 and 3, whilst there are overlapping parallel delay 'effects', this is not concurrent delay. In example 2, the cause of delay during the overlapping period is the Relevant Event. In example 3, it is the non-Relevant Event. The logic being that introducing a later delaying event into a period where there is pre-existing delay makes no difference – the delay would have happened in any case.

Whilst the common law (from cases such as *Malmaison*) has probably established that a contractor is entitled to extensions of time where there is concurrent culpable/non-culpable critical delays, there is no reason why this cannot be abrogated by agreement of the parties (as was the position in the *North Midland* case). However, this does not mean that the parties are free to reach any agreement on extensions of time. It should be remembered that where there is true concurrency (as per example 1), it is impossible to say that the contractor or the employer event is the cause of delay so it is therefore open to the parties to agree how this should be dealt with under the contract.

If, on the other hand, an extension of time clause purported to prevent a contractor's extension of time where the employer *actually* prevented the contractor from completing on time probably would fall foul of the prevention doctrine and thereby be invalidated (for example a clause that went beyond true concurrency and purported to exclude contractor extensions for overlapping effects - as per example 2).

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