Construction Newsletter – Contracting Away Concurrent Delay

Please find below the 30th edition of 4 Pump Court's Construction Newsletter.

Foreword by George Woods: This edition features yesterday's decision of Mr Justice Fraser in which he issues a forceful approval of an employer's right to rely on a contractual provision which makes the contractor bear the risk of delays when there is a concurrent delay by the employer. He also emphasises that the 'prevention principle' is not engaged in instances of concurrent delay.

Contracting Away Concurrent Delay: The Limits to the Prevention Principle by Claire Packman

In an important decision on concurrent delay and the prevention principle, Mr Justice Fraser has confirmed the ability of parties to allocate the risk of concurrent delay to a contractor. The decision is likely to provoke widespread re-consideration of what contract terms regarding Extensions of Time are appropriate and to have a significant impact on ongoing disputes where the parties have agreed bespoke terms regarding such Extensions.

Sean Brannigan QC and Matthew Thorne of 4 Pump Court, instructed by Pinsent Masons, represented the successful defendant.

North Midland Building Limited v Cyden Homes Limited [2017] EWHC 2414 (TCC)

NMB and Cyden were parties to a contract based on an amended JCT D&B 2005 form. This included the usual clause permitting an extension of time (EOT) where delay caused by a 'Relevant Event' (including impediments, preventions or defaults by the employer) pushed the time of actual completion beyond the contractual Completion Date.

However, the parties had amended the relevant clause to state 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".

NMB, echoing arguments familiar to many practitioners dealing with disputes arising in relation to such clauses, argued that as a result of the "prevention principle" the clause could not be regarded as permissible or effective in making the contractor bear the risk of concurrent delays by an employer, with the result that the EOT mechanism, Completion Date, and ability to levy liquidated damages all fell away as a matter of law. In making that argument NMB sought to rely on the numerous cases which make clear that generally when there is concurrent delay the contractor will remain entitled to the extension of time notwithstanding its own culpable delay.

In a robust judgment, Fraser J accepted the submissions of Sean Brannigan QC and Matthew Thorne that there was no "magic" to the prevention principle, and that that principle was subject to the terms of the contract expressly agreed by the parties: they were free to agree whatever they liked in terms of how the risk of concurrent delay should be allocated. On that basis he dismissed the Claimant's claim and found for the Defendant.

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com

He also, interestingly, accepted that in any event where such concurrent delay exists the prevention principle is not even triggered, agreeing with the analyses of Hamblen J in Adyard Abu Dhabi v SD Marine Services and Coulson J in Jerram Falkus Construction Ltd v Fenice Investments Inc (No.4) in that regard.

It is likely that this case will be the subject of considerable interest for three main reasons:

Firstly, "concurrency allocation" clauses such as that considered in North Midland Building Limited are becoming more and more common, but are often met with similar arguments that they are not effective. Fraser J's emphatic decision should assist in resolving those arguments.

Secondly, the Court's clear approval of such clauses is, one would think, likely to mean that such clauses become even more common. Following Walter Lilly (in which Sean Brannigan QC also acted for the successful contractor) many parties negotiating contracts have in effect assumed a default position that where there is concurrent delay an Extension of Time is due. North Midland Building Limited demonstrates and illustrates that that need not be the case at all: that the parties can agree the precise opposite – or even agree that a Scottish-style apportionment of concurrent delay – should occur. One might think that there will be relatively few employers or main contractors who would not now consider negotiating similar clauses into their down-stream contracts. At a minimum, the case provides a Court approved set of wording to achieve that aim.

And thirdly, Fraser J's emphasis that the prevention principle is not engaged at all where there is concurrent delay, whilst built on earlier case-law, may well prove to be a point often cited by parties dealing with arguments built upon the prevention principle. It may well prove to be of particular benefit in arbitrations involving UAE law where the prevention principle is often cited in concert with the UAE duty of good faith and fair dealing to overcome notification requirements and similar issues.

The decision is therefore one likely to provoke much discussion.

4 Pump Court, Temple, London, EC4Y 7AN
T: +44 (0)20 7842 5555 F: +44 (0)20 7583 2036
DX: DX 303 LDE www.4pumpcourt.com