Remember: always read the contract

Guest editor **Michael Sharp** of **Herbert Smith Freehills LLP** says a recent Supreme Court warning to always read the contract should be taken to heart by lawyers as well as signatories to contracts. Parties are free to allocate risk as they see fit, and the courts will uphold such clauses.

The age-old adage for children about to sit exams is to 'always read the question'. Two recent decisions from the courts would suggest that construction lawyers would do well to heed that advice too – they provide a useful reminder that, before getting embroiled in a dispute, it is important to 'always read the contract'.

First, in August this year, in the final instalment of the ***MT Højgaard v E.ON*** saga, Lord Neuberger in the Supreme Court reminded construction lawyers that the whole of the contract needs to be considered (see ***MT Højgaard A/S v E.On Climate & Renewables UK Robin Rigg East Ltd [2017] UKSC 59***). It is not possible simply to ignore parts of the contract because they are 'tucked away' in the technical documents.

Now, Fraser J, in the Technology and Construction Court (TCC), has delivered a forceful judgment in ***North Midland Building Ltd v Cyden Homes Ltd [2017] EWHC 2414 (TCC)*** (2 October 2017), in which he held that the parties to a building contract are free to allocate the risk of concurrent delay to the works, and any such clauses will be upheld by the courts.

Background

North Midland Building Ltd (the contractor) had been engaged by Cyden Homes Ltd (the employer) to build what was described by the contractor as 'the most important private house to be constructed in the country for many years'.

The parties had contracted on the familiar JCT Design and Build 2005 form, which provides for the contractor to receive such extension of time for a relevant event (an event at the employer's risk) as is 'fair and reasonable'. However, the parties had amended cl 2.25 of the standard form to provide 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 the contractor applied for an extension of time. The employer sought to rely on the amendment to cl 2.25 to reject part of the contractor's application on the basis that the delays caused by relevant events were concurrent with delays that were the contractor's responsibility.

What is concurrent delay?

Before looking at the case in more detail, it is worth pausing to consider what is meant by concurrent delay. Concurrent delay arises when there are two (or more) events causing critical delay both of which are of approximately equal causative potency.

In ***Henry Boot Construction v Malmaison Hotel [2000] 1 QB 650***, probably the most well-known case on concurrent delay, Dyson J gives a 'simple example' of concurrent delay:

> '... if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week ...'

For concurrent delay to occur, the two events causing delay do not need to occur simultaneously, but the delay caused by the two events must be felt at the same time. In this regard, it is important that both events causing delay are 'of approximately equal causative potency' (ie one event is not dominant with the other being merely incidental), and both

events must, in fact, cause critical delay (see ***Royal Brompton Hospital v Hammond [1999] BLR 162***).

While it is often the subject of discussion, true concurrent delay is rare in practice – in many cases, one event will be critical to delay in completion, and the other event will simply be expanding to fill the additional time made available by the critical delay.

The contractor's claim

The contractor brought Pt 8 proceedings before the TCC seeking a declaration concerning the true interpretation of the amendment to cl 2.25. The contractor contended that the amendment was ineffective as it breached the prevention principle. As Fraser J explained:

> '… the prevention principle is something that arises where something occurs, for which it is said the employer is responsible, that prevents the contractor from complying with his obligations, usually his obligation to complete the works by the completion date.'

The contractor contended that the amendment was ineffective, therefore where delay caused by a relevant event was concurrent with delay caused by the contractor, then time became 'at large' meaning that the contractual completion date no longer applied, and the contractor was only obliged to complete the works within a reasonable time.

Earlier case law

There had been earlier case law indicating that, in an un-amended form of this type, the usual approach is to allow the contractor an extension of time in a case of concurrent delay as the employer's actions leading to a relevant event are to be treated as an act of prevention taking precedence over the contractor's delaying event.

For example, the '***Malmaison*** approach', which was referred to by Dyson J in ***Henry Boot v Malmaison***, provided:

> '… 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.'

As a result, if cl 25 had not been amended, the contractor would have been entitled to an extension of time if delay had been caused by a relevant event, notwithstanding the fact that any such delay was concurrent with delays that were the contractor's responsibility.

The ***Malmaison*** approach has been cited with approval and developed in a number of judgments of the English courts, and most notably by Akenhead J in ***Walter Lilly & Co Ltd v Mackay [2012] EWHC 649 (TCC)***.

TCC's decision

Fraser J rejected the contractor's arguments. He held the meaning of the amendment was 'crystal clear'; and:

> '[T]here is no rule of law of which I am aware that prevents the parties from agreeing that concurrent delay be dealt with in any particular way.'

In such circumstances, it was clear that the parties had agreed a mechanism for dealing with concurrent delay and the ***Malmaison*** approach did not apply.

Fraser J held that, as the meaning of the amendment was clear, the prevention principle simply did not apply – the prevention principle only arises and sets time at large where the parties have failed to provide for extensions of time under the contract in respect of acts of prevention. In this case, such acts were themselves relevant events and were to be considered in accordance with cl 25 – indeed, an extension of time could be given for such acts where the amendment did not apply. Interestingly, the court also noted (although Fraser J acknowledged that this was 'not necessary to dispose of the issues on these Part 8 proceedings') that the prevention principle did not apply at all in circumstances where there was concurrent delay.

Conclusion

This case makes clear that the court will always have primary regard in interpreting contracts to the parties' intentions as expressed in their choice of language. As Fraser J points out in his judgment,

> '… [p]arties are free to agree whatever terms they wish to agree, with the obvious exceptions such as illegality'.

It is welcome to see two recent judgments from the Supreme Court and the TCC strongly upholding this important doctrine of English law. **CL**