

# CONCURRENT DELAY - THE EXPRESS TERMS PREVAIL

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Legal Briefings - By **Michael Mendelblat**

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In a forceful judgment delivered on 2nd October 2017 in the case of North Midland Building Ltd v Cyden Homes Ltd, Mr Justice Fraser in the Technology and Construction Court (England and Wales) has held that parties to a building contract can validly allocate the risk of concurrent delay to the Works and their agreement will be upheld.

The parties had contracted on the familiar JCT Design and Build 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 the 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 contractor contended that, where delay caused by a Relevant Event was concurrent with delay caused by itself, then the effect of the amendment was that time became "at large" so that the contractual completion date no longer applied and the contractor was only obliged to complete within a reasonable time.

The court was firmly of the view that the amendment should be interpreted according to the objective meaning of the words used which was that the parties had chosen to allocate the risk of concurrent events . The extension of time clause was to be operated subject to the terms of the amendment so that no extension of time could be given. The wording of the amendment was described as "crystal clear".

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 (see [Walter Lilly v McKay](#) [2012] EWHC 1773 (TCC)).

The court held, however, that such an approach simply could not arise in the face of the clear meaning of the amendment. In any event, acts of prevention were themselves Relevant Events for which an extension of time could be given where the amendment did not apply. Time can only become at large if the contractor is impeded by an act of the employer for which no provision is made in the contract.

As to the proposition that clauses of this type (expressly addressing the consequences of concurrent delay) were "not permitted", Mr Justice Fraser stated: "*..there 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...[Counsel for the Claimant] could not direct me to any.*" This part of the judgment deals with the suggestion made by some commentators that the prevention principal is some form of overriding legal principle that overrides the clear wording of the contract. Mr Justice Fraser appears to have confirmed that it is not. His Judgment makes it clear that the court will always have primary regard in interpreting contracts to the parties' intentions as expressed in their choice of language.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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