DECODING COMPLEXITY.

WATCH OUT, WATCH OUT... CONCURRENT DELAY IS BEING STRUCK OUT!

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CONCURRENT DELAY

The subject of concurrent delay has been before the English courts on many occasions. The conventionally accepted approach of dealing with concurrency was described by Dyson J in Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con LR 33 as follows:

> *"... 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."*

It is becoming increasingly common to see contracts where employers have included clauses taking away the contractor's right to extensions of time in the event of concurrent delay. One such contract came before the court in North Midland Building Ltd v Cyden Homes Ltd [2017] EWHC 2424 (TCC).

North Midland had been engaged by Cyden to build a large residence in Lincolnshire under an amended JCT 2005 Design and Build Contract. Clause 2.25 entitled the contractor to an extension of time if it was delayed by a Relevant Event. However, the employer had amended the standard form, adding a new clause 2.25.3 (b) which said:

> *"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 argued that the clause was unenforceable since it ran against the "prevention principle" in that it would deprive the contractor of extensions of time to which it would otherwise have been entitled, thereby allowing the employer to benefit from its own breach. As a result, the contractor argued, time had been set at large and it had a reasonable time to complete.

The judge, in deciding against the contractor, said that the intent of the clause was "crystal clear" and that the "parties are free to agree whatever terms they wish to agree, with the obvious exceptions such as illegality". He continued: "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."

Therefore, in principle, at least, it is very clear. By provision of an express term in a contract, it is permissible to exclude an entitlement to extensions of time in the event of concurrent delay. The real difficulty of course is determining whether any two delays are in fact concurrent.

THE JUDGMENT OF HH RICHARD SEYMOUR QC

The judgment of HH Richard Seymour QC in The Royal Brompton Hospital National Health Service Trust v Frederick Alexander Hammond [2000] EWHC

Technology 39 has been quoted with approval in a number of cases dealing with concurrency.

> *"However, it is, I think, necessary to be clear what one means by events operating concurrently. It does not mean, in my judgment, a situation in which, work 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. The Relevant Event simply has no effect upon the completion date."*
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> *This situation obviously needs to be distinguished from a situation in which, as it were, 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 causes of the delay."*

These two paragraphs can be considered in terms of criticality.

In the first paragraph quoted above, the contractor was already in critical delay when the Relevant Event came along. At that time, the delay from the Relevant Event was not critical and simply had no effect on completion.

In the second of the quoted paragraphs, a situation arose when two events occurred at exactly the same time. Either, if considered in isolation, would have caused critical delay. In this instance, there is true concurrency.

However, in reality, this rarely happens. Since time is infinitely divisible, one event always precedes the other. The first event causes critical delay but the second, as a result of the delays caused by the first, does not (reflecting the position in the first paragraph quoted above). This emphasises the need, when analysing delay, to deal with each delay event in the order they arise.

What does all this mean for a contractor confronted with a concurrent delay clause such as that described in North Midland Building and Cyden Homes? Concurrency is a lot easier to allege than to prove and no doubt contractors will be left to demonstrate that there was in fact no concurrent critical delay. In view of the rarity of true concurrency, this should not prove too difficult provided the contractor has kept accurate, regularly updated programmes.

ABOUT THE AUTHOR

David Gainsbury is an Executive Director at HKA with more than 40 years of worldwide experience in the construction industry. An expert in delay and disruption, he has been involved in complex disputes on a wide range of projects across all sectors of the industry, including buildings, infrastructure, oil and gas, and power generation.

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