

The Prevention Principle: Recent Developments

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Concurrent delay has again become a hot topic in the UK. The recent judgment of the Technology and Construction Courts in *North Midland Building Limited v. Cynden Homes Limited* has been upheld by the Court of Appeal in its decision earlier this year. The case concerned a period of concurrent delay and whether or not contractual provisions could be relied upon to contract out of the prevention principle or whether it applied as a matter of law and so a failure to give an extension of time for a period of concurrent delay would 'set time at large'. The Court of Appeal confirmed that the contractual provision was effective and the implied term relating to the prevention principle did not operate to override express agreement between the parties.

This recent development offers a useful point at which to consider the key differences in law and in industry practice in England and Wales and in the UAE.

The Prevention Principle

The prevention principle is that 'The Employer cannot insist upon performance if he prevents the contractor performing.' In other words if, as Employer, you set a date for completion of construction works and then by act or omission prevent the Contractor from achieving that date you cannot benefit from your own actions by levying liquidated damages. In those circumstances, and in the absence of extension of time provisions, the Contractor will simply have to complete the Works 'within a reasonable time'. In the face of such uncertainty, it is a risk for Employers to try to levy liquidated damages.

The prevention principle in English Law is closely connected to the issue of causation; matters must of 'equal causative potency (effect)' to be concurrent. Law in relation to causation in the UAE is less prominent, as in many civil systems, and as such the courts tend to look to concurrent delay events not as matters of cause and effect but in an empiric sense - this approach tends to lead to parties seeking to apportion the consequences of delays to one or the other of two concurrent events.

English Position

To elaborate on *North Midland Building Limited v. Cynden Homes Limited*, the Court of Appeal considered whether the prevention principle, an established principle of English Law, could be contracted out of by the parties. The Court of Appeal confirmed the prevention principle enjoyed no special status as 'public policy' rather it is an implied term effective only where the contract does not contain anything to the contrary.

The Court of Appeal determined, upholding the first instance decision, that this is the case where there are bespoke provisions stating no extension of time is due where there is a concurrent delay. Employers have thus gained a further tool with which to limit extensions of time and control costs.

This does, of course, have its limits and careful drafting is required get the most from such a clause:

- Clear drafting will be required to contract out of the prevention principle in these circumstances.
- Thought must also be given to what a 'concurrent delay' means as there are two competing definitions of concurrency. Where concurrency is considered to be two equally causative events occurring at the exact same time, the occurrence of concurrency is likely to be limited whereas if events which overlap to some extent but the impact of which are felt at the same time then the application of concurrent delay is likely to be much wider.
- The latter approach should therefore be taken by Employer's looking to maximise the effect of North Midland by defining concurrency widely.
- A further issue which arises is that of 'causative potency' thought must be given as to whether any concurrent events will be deemed to have equal importance when considering the cause of the delay and if not which party will have the burden of proving causative potency.

DIFC Position

The DIFC Courts operate on a common law system and, in the absence of DIFC precedent, follow that of the English Courts. The decision in North Midland will apply in matters under the jurisdiction of the DIFC Courts meaning that parties can include provisions assigning risk in the event of concurrency with greater confidence that the DIFC Courts will enforce those provisions. The parties should take particular care to cover those matters identified above, if provisions are poorly drafted the Courts could still revert to the prevention principle in the absence of a clear express provision.

UAE Position

The prevention principle does not apply in the UAE, nonetheless the issue of concurrency is still an active concern contractually and the Dubai Courts willingness, in the absence of a pre-agreed and well defined risk allocation, to reassess the application of delay damages in light of the good faith duty implied into all contracts by Article 246 of the Civil Code. As noted above the UAE approach is generally to seek to apportion damages as between two causes of delay as opposed to taking a 'causative' approach and discounting one of the causes as secondary in matters of concurrency – it is important therefore that an Employer assigns the risk where there are concurrent delays to avoid 'taking a share' of the time and cost incurred as a result of those delays.

Where the Employer has, in fact, delayed the carrying out of the Works and still seeks to levy delay damages, it is no great stretch to see the Dubai Courts concluding that such behaviour is contrary to good faith and intervening in either the application of delay damages or the amount of the delay damages applicable.

Additionally, an Employer would be unjustly enriched if it were to deduct delay damages on account of delay that the Employer itself caused. This is contrary to Articles 318 and 319 of the Civil Code as well as the spirit of Article 878 of the Civil Code. However, arguments of this nature are likely to pale into insignificance if the contract clearly and expressly defines the agreed risk allocation in the event of concurrent delay.

Where the parties have clearly agreed to the allocation of risk, and one assumes taken risk into account in agreeing the contract price, it becomes more difficult to seek to argue a party has become 'unjustly enriched' as the contract gives right to the cause of that enrichment, rather it is a contractual bad bargain. Nor is enforcement of a bad bargain freely entered into by the parties necessarily contrary to good faith.

In light of the above, it is still advisable to include drafting expressly dealing with concurrent delay on terms similar to those describe above, indeed the FIDIC 2017 forms of contract now flag the issue of concurrent delay in clause 8.5 but leaves the apportionment of risk to the Special Conditions (to be agreed by the parties on a case by case basis).

Conclusions

Whether or not an Employer is operating in England or onshore the UAE (including if the relevant construction contract is subject to DIFC law) it is sensible to include express provisions dealing with the allocation of risk in the event of concurrent delay. Such drafting should:

- Define what the parties understand to be Concurrent Delay, in particular whether the two events must occur together or whether they must simply overlap in their effect and whether equal causative potency is required; and
- Deal with the apportionment or risk in terms of time and money for the period of concurrency.

Given that the position under both English and UAE law gives priority to the principle of freedom of contract, parties are free to contractually agree the risk allocation arising out of concurrent delay. In the absence of such provisions there is risk that the Employer will carry risk, whether by operation of the prevention principle in the UK and DIFC or as a result of apportionment of delay between two competing causes in the UAE Courts.

Al Tamimi & Company's [Construction & Infrastructure team](#) regularly advises on contract negotiating and dispute avoidance and resolution including in relation to matters of concurrent delay. For further information please contact [Euan Lloyd \(E.Lloyd@tamimi.com\)](mailto:E.Lloyd@tamimi.com) or [Steven Graham \(S.Graham@tamimi.com\)](mailto:S.Graham@tamimi.com).