ENGLISH COURT CLARIFIES RESPONSIBILITY FOR CONCURRENT DELAYS

On 30 July 2018, the Court of Appeal issued its decision in *North Midland v Cyden* [2018] EWCA Civ 1774. The court upheld the decision of the High Court permitting an employer to rely on a clause allocating responsibility for concurrent delay to the contractor.

What is concurrent delay?

"Concurrent delay" arises when delay occurs for two reasons, one being the responsibility of the contractor and one the responsibility of the employer.

What happened in North Midland v Cyden?

In September 2009, Cyden engaged North Midland to build a house in Lincolnshire, UK. The completion date was 18 June 2010. The parties included a clause entitling the contractor to an extension of time ("EOT") for a "Relevant Event", including a delay caused by the employer. The EOT clause included the following additional wording:

"...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..."

When a period of concurrent delay occurred, the employer refused to grant an EOT. The High Court agreed with the employer. The court concluded it was "crystal clear" that the additional wording in the EOT clause meant that the contractor was not entitled to an EOT for concurrent delays.

The contractor appealed. He argued that the High Court's decision conflicted with the "prevention principle", which he construed as a rule of law protecting him from being held to a completion date which the employer had prevented him from achieving. The Court of Appeal was not persuaded there was any authority to support the contractor's argument and upheld the decision.

The prevention principle considered

The Court of Appeal "fundamentally disagreed" with the contractor's view that the "prevention principle" could be relied upon to strike out additional wording in an EOT clause dealing with concurrent delay. The "prevention principle" applies where a contract is silent as to whether a particular act of prevention by an employer entitles a contractor to an EOT. In those circumstances, the law will imply a "non-hindrance" clause into the contract, which the employer will breach if he attempts to take advantage of his own acts of prevention. In the present case, the parties included an EOT clause which entitled the contractor to an EOT for an act of prevention by the employer, subject to an exception where there was concurrent delay. If this exception had not been stated, the contractor may have been entitled to an EOT for concurrent delay (*Walter Lilly v Mackay* [2012] EWHC 1773). The only question was whether this exception was sufficient to reverse that result. The court concluded that it was.

What does this mean for your business? Our perspective

The Court of Appeal's decision is not surprising. In common law jurisdictions, parties will generally be held to the wording of their contract. It is notable however that the court said it did not consider the result to be uncommercial. It said that when faced with a decision whether to allocate responsibility for concurrent delay to the employer or the contractor, either result may be regarded as harsh on the other party. This will not be well received by contractors who believe they are taking on more risk, and often for less money. On the other hand, whilst not entirely free from doubt, contractors will take comfort from the court's acceptance that the contractor will ordinarily be entitled to an EOT for concurrent delay absent wording to the contrary.

Should you have any questions, please do not hesitate to contact the author of this briefing:

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