CONCURRENT DELAY PARTIES FREE TO AGREE

John Walton

This paper considers the decision recent of Justice Fraser in *Midland Building Ltd v Cyden Homes Ltd* [2017 EWHC 2414 in the Technology and Construction Court in the context of accepted approaches to concurrent delay.

It is now generally accepted that under the [JCT] Standard Form of Building Contract and similar contracts a contractor is entitled to an extension of time where delay is caused by matters falling within the clause notwithstanding the matter relied upon by the contractor is not the dominant cause of delay, provided only that it has a least equal "causative potency" with all other matters causing delay.

Keating on Construction Contracts 9th Ed, para 8-026, summarising the approach taken in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [1999] 70 Con.L.R.

1. Concurrent delay

Under any construction contract, there will be provision for extensions of the time for completion caused by qualifying events, for example variations or delays by the employer or its agents (primarily the architect/engineer). The purpose of such provisions is to preserve the employer's entitlement to claim delay damages. Such extensions of time are, by necessity, creatures of contract, there being no common law right to extensions of time. Under the *prevention principle* the consequence of an act of prevention or delay by the employer is to put time at large, thereby potentially depriving the employer of delay damages until the contractor has been allowed a reasonable time to complete.[1]

What is often not covered so well in construction contracts is whether or not the extension of time is affected by delays which may be caused by an event for which the contractor is responsible, or which is otherwise not a qualifying event. A classic example would be where a contractor is in delay (prior to the due date for completion) and a qualifying event occurs; or there is a qualifying event, and coterminously the works are similarly delayed by an event for which the contractor is responsible – ie, the works could not have been carried out at that time in any event.

Should the contractor be "let off the hook" for its own delay by the qualifying event?

This issue has, in the past, not been assisted by "but for" and "dominant cause" tests, which overlook a number of fundamental issues. First, the contractor is, as a matter of general principle, entitled to organise the works as it sees fit; second, while the programme may be delayed, the contractor is not in default until the due date for completion has passed and the level of completion of the works not achieved.

Ultimately, the contractor's entitlement will depend on the terms of the contract.

2. The *Malmaison* test

The quote at the head of this article outlines the accepted test in the *Malmaison* case. The underlying principle is that the contractor is entitled to the entire project period to complete the works, and if that programme is delayed by a qualifying event, then it is entitled to an extension of time.

There is, however, a qualifying factor and that is that the event must actually have equal causative potency in relation to the delay. For example, qualifying weather event during the design phase of a project will not give rise to an extension of time, it being generally accepted that an extension of time event under most standard forms must actually affect the date for completion (ie, it must be on the critical path).

The issue is therefore one of contract interpretation.

3. Form of contract

The clause considered in the *Malmaison* case was the equivalent of clause 2.28 of the JCT Standard Form of Building Contract, commonly used in the UK. The clause provides that if in the opinion of the architect/engineer the cause of the delay is a qualifying event and completion is likely to be delayed by the event, the architect/engineer is to extend the completion date by the number of days "*as he then estimates to be fair and reasonable.*"

It is clear from that clause that the delay must be on the critical path, what is assessed is not the duration of the event but its effect on the critical path, and the determination must be fair and reasonable. Whether or not the contractor is under an obligation to mitigate the effect of the delay is open to question as most contracts now include a mitigation clause. I doubt an architect/engineer would consider an extension is fair and reasonable where the contractor simply sits on its hands for the duration of the event.

NZS3910:2013 provides in clause 10.3.1 that the engineer is to grant an extension of time if the contractor is "*fairly entitled to an extension*" by reason of the listed qualifying events, which would put the clause squarely within the *Malmaison* test.

Similarly, the FIDIC Red Book provides that the contractor is entitled to an extension of the time for completion "to the extent that" taking-over of the works is or will be delayed by the identified events.

NEC3 takes a slightly different approach, providing in clause 63.3 that a delay to the actual completion date is assessed as "*the length of time that, due to the compensation event, planned Completion is later than planned Completion as shown in the Accepted Programme.*"

First, the NEC3 clause clearly provides that it is actual completion rather than simple delay, which should remove any doubt that the event must affect the critical path. However, things then get less than clear. The measure for the delay is not the anticipated effect on the due date for completion, as outlined in FIDIC or in NZS3910; it is the actual effect of the delay on the planned completion date shown in the programme.

This will have two potential effects. First, the delay is assessed on the time due to the compensation event, which would suggest that the event must be causative – ie, the causative nature of the event must be assessed alone. Second, the Accepted Programme is effectively a contract document which must show the actual progress of the works in terms of clause 32, including how the contractor plans to deal with delays. On that basis, the Accepted Programme should already record the effect of the non-qualifying delay event.

Whether or not the *Malmaison* test applies to concurrent delay under NEC3 is yet to be tested. It should be recalled, however, that even under the *Malmaison* test both delay events must have equal causative potency, ie have the same potential for delay.

4. *North Midland Building Ltd v Cyden Homes Ltd* [2017] EWHC 2414

The issue of contracting for concurrent delay has recently been considered by the Technology and Construction Court in the case of *North Midland Building v Cyden Homes*.

In that case, the contract included a specific provision that "*any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken in to account.*" Considering the wording of the clause and the overall context in which it was negotiated[2], Fraser J held that the meaning of the clause was crystal clear, and that in the event of concurrent delay, no extension of time was to be granted.

As an interesting aside, the contractor argued in that case that by excluding an extension of time which would otherwise be a qualifying event (but for the concurrent event) offended the *prevention principle*[3]. In rejecting this argument, Fraser J observed that the prevention principle did not arise as the case concerned purely a question of interpretation of a clause agreed by the parties, and given that the clause was clear the principle did not operate. Acts of prevention or delay were included in the definition of qualifying event – the only issue was therefore how the delay was to be calculated.

This raises the rather odd result that, while an act of prevention or delay by the owner must be included as grounds for an extension of time the effect of such an event can be excluded without offending the prevention principle, provided the clause does so with sufficient clarity.

Perhaps as a saving grace, Fraser J noted that an act of prevention or delay must actually prevent the contractor from carrying out the work for the prevention principle to apply, which was arguably not the case where the act of prevention was concurrent with a non-qualifying event of delay.

5. Conclusion

The case law supports the view that the *Malmaison* test would apply to concurrent delay under NZS3910:2013.

While the *Cyden Homes* case follows the factual matrix approach to contractual interpretation outlined in recent Supreme Court cases, both here and in the UK, it does raise the rather curious argument that the parties may contract (or rather the employer may draft for) that where there is concurrent delay, then no extension of time is granted.

Whether or not this approach would find favour here remains to be seen.

End Notes

1- See Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd [1970] 1 BLR 111.

2- See Wood v Capita Insurance Services Ltd [2017] UKSC 24, discussing also Investors Compensation Scheme Ltd v West Bromich Building Society [1998] 1 WLR 896; Arnold v Britton [2015] UKSC 36 and Rainy Sky SA v Kookmin Bank [2011] UKSC 50.

3- Referring to the judgment of Jackson J in Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007] EWHC 447.

About the Author

John Walton is a commercial barrister at Bankside Chambers in Auckland, specialising in construction law.

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