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Shipbuilding contracts and the prevention principle after *Cyden Homes*

The contractor in North Midland Building Ltd v Cyden Homes Ltd *[2018] EWCA Civ 1744; [2018] BLR 565 ran a novel and ambitious argument: that the "prevention principle" could override an express term of the contract dealing with concurrent delay. The argument was rejected. That much is unsurprising. However, the Court of Appeal's analysis of the nature of the prevention principle (as an implied term) has more far-reaching implications, particularly in ship-building contracts, where "employer acts of prevention" are often less well-regulated than in the JCT Forms at issue in* Cyden Homes.

What is the "prevention principle"?

The prevention principle is concerned with two aspects of delay: liquidated damages and the contractual due date for performance. The two are invariably closely linked, the former being triggered by the failure to perform by, or within a certain period after, the latter. Phillimore LJ rationalised this in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1976) 1 BLR 111 at page 127:

> "The reason for that is that when the parties agree that if there is delay the contractor is to be liable, they envisage that the delay shall be the fault of the contractor and, of course, the agreement is designed to save the employer from having to prove actual damage which he has suffered."

The prevention principle is thus that no party may require the other to comply with a contractual obligation where that party has itself prevented it. If an employer has prevented its contractor from carrying out works by a specified time, such as by the completion date stated in the contract (and the contract does not provide for how the delay is to be dealt with), the employer cannot insist that the contractor meets the original date for completion. If a delay event occurs that is the employer's fault and the contract does not make provision for that delay, the original completion date falls away and time is put "at large". This means the contractor is obliged to complete the works within a reasonable time, rather than by the specified date, and that clauses requiring liquidated damages to be paid for delay cannot operate.

The Victorian judiciary's hostility towards penalties and its consequent suspicion of liquidated damages clauses are well-known. The prevention principle is cut from similar cloth. Its journey is most often traced from the

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Victorian decision of *Holme v Guppy* (1838) 3 M&W 387. The court in *Guppy* declared it wrong in principle for an employer to hold a contractor to a completion date, and therefore liable in liquidated damages, where at least part of the delay was caused by the employer (see Coulson LJ in *Cyden Homes*, paras 10 to 11).

Guppy and cases like it led to the development of extension of time clauses, triggered by events including "acts of prevention" by the employer (*Cyden Homes*, para 12). These clauses extend the due date for completion so that liquidated damages cannot be levied before that extended date. As Phillimore LJ put it in *Peak* (page 127):

> "However, the problem can be cured if allowance can be made for that part of the delay caused by the actions of the employer; and it is for this purpose that recourse is had to the clause dealing with extension of time. If there is a clause *which provides for the extension of the contractor's time in the circumstances which happen*, and if the appropriate extension is [on the contract in that case] certified by the architect, then the delay due to the fault of the contractor is disentangled from that due to the fault of the employer and a date is fixed from which the liquidated damages can be calculated." [Emphasis added.]

This, however, created problems when extension of time clauses were drawn too narrowly, and the courts leaned against construing times for performance as being of the essence or as conditions (see *Hudson's Building and Engineering Contracts*, paras 6-012 to 6-014). This explains the increasing complexity of extension of time clauses in the 1980s and beyond (noted by Coulson LJ in *Cyden Homes* at paras 12 and 14).

Such a clause came before the court in the important case of *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC); [2007] BLR 195. Jackson J (as he then was) set out three important propositions concerning the prevention principle (para 56) (cited in *Cyden Homes* at para 15):

> "(i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date.
>
> (ii) Acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events.
>
> (iii) Insofar as the extension of time clause is ambiguous, it should be construed in favour of the contractor."

The *Cyden Homes* case

Cyden Homes Ltd (the employer) engaged North Midland Building Ltd (the contractor) to design and build a substantial residential property under a JCT Design and Build Contract, 2005 edition (DB 2005), with bespoke amendments. The bespoke amendments included changes to the extension of time provisions. Clause 2.25.1 was amended to provide that:

> "2.25.1 If on receiving a notice and particulars under clause 2.24:
>
> 1. any of the events which are stated to be a cause of delay is a Relevant Event; and
>
> 2. completion of the Works or of any Section has been or is likely to be delayed thereby beyond the relevant Completion Date,
>
> 3. and provided that
>
> (a) the Contractor has made reasonable and proper efforts to mitigate such delay; and
>
> (b) *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*
>
> then, save where these Conditions expressly provide otherwise, the Employer shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as he then estimates to be fair and reasonable." [Emphasis added.]

Liquidated damages for delay were payable at the rate of £5,000 per week.

The works were delayed and the contractor claimed an extension of time. The employer allowed a partial extension of time. However, it cited clause 2.25.1.3(b) in order to reject other elements of the contractor's claim on the basis that those delays had been caused by a "Relevant Event" which was concurrent with delays for which the contractor was responsible.

The contractor commenced Part 8 proceedings, seeking declarations that clause 2.25.1.3(b) offended the prevention principle, rendering time at large and any liquidated damages provision void. The contractor's primary argument was that clause 2.25.1.3(b) offended the prevention principle as described by Jackson J in *Multiplex* and was impressible. The contractor's alternative argument was that, regardless of the correct interpretation of clause 2.25.1.3(b), the prevention principle operated in relation to the liqudated damages provision, so that the contractor did not have to pay liquidated damages.

The decision

At first instance Fraser J rejected the claim ([2017] EWHC 2414 (TCC); [2017] BLR 605). In particular, he held that:

> (a) The contractual wording was "crystal clear", so no point of interpretation arose. There was no support in *Multiplex* for this type of clause not being permitted. The definition of "Relevant Event" also included "any impediment, prevention or default, whether by act or omission …", which was consistent with the parties having set out a clear regime that dealt with extensions of time, including employer acts of prevention. This also

fell within the four corners of the proposition in *Multiplex* that acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events.

(b) In cases of concurrent delay, the prevention principle is not engaged. The court took the opportunity to clarify obiter dicta in previous judgments on that topic.

Coulson LJ (with whom Sir Terence Etherton MR and Sir Ernest Ryder agreed) upheld Fraser J. Coulson LJ held that a contractual provision allocating the risk of concurrent delay to the contractor was valid and effective, and was not contrary to the prevention principle. He held that the bespoke provision here was clear, and that there was no authority to suggest that parties cannot contract out of some or all of the effects of the prevention principle (paras 22 to 28). He further held that the prevention principle is not an overriding rule of public or legal policy and had no obvious connection with the separate issues that may arise from concurrent delay (paras 29 to 30).

He also rejected the contractor's second ground of appeal that, if the contractor was not entitled to an extension of time for concurrent delay, there was an implied term that prevented the employer levying liquidated damages. His numerous reasons included that the proposed implied term was contrary to the express terms of the contract, which the parties were free to agree or not (paras 36 to 39).

The prevention principle as an implied term

For many construction lawyers, the importance of *Cyden Homes* lies in its clarification of the position in relation to concurrent delay. It has been welcomed as bringing certainty to the entitlement to an extension of time arising in relation to concurrent delay, and as a vindication of parties' express choices and risk allocation. Much less remarked-upon, but with potentially troubling implications, is the following short passage in the judgment of Coulson LJ (para 28):

> "... the fact that the mechanism of implied terms does not help the appellant on the particular facts of this case does not mean that such terms are not the right vehicle by which, in a conventional case, the prevention principle is given contractual force. ... Moreover, when time is set at large, the obligation to complete by a fixed date is replaced with an implied obligation to complete within a reasonable time (see para 48 of *Multiplex*). In my view, therefore, *the prevention principle can only sensibly operate by way of implied terms*. ..." [Emphasis supplied.]

Coulson LJ drew support from the fact that Lewison, *The Interpretation of Contracts* (6th Edition) deals with the prevention principle as an implied term (para 28). That analysis is equivocal, however. As Lewison recognises (at para 6.14):

> "It is possible that the duty does not rest upon the implication of a term, but may be a positive rule of the law of contract that conduct of either the promisor or the promisee, which can be said to amount to himself of his own motion bringing about the impossibility of performance, is itself a breach of the contract."

Although he goes on to add:

> "However, since ultimately the rule of law (if such it is) depends upon the intention of the parties, it is submitted that it may properly be categorised as an implied term."

In *Cyden Homes*, Coulson LJ showed in the context of concurrent delay how the prevention principle as an implied term would cut across an express clause and so fail the test for implication. Although he said that this would not stop the prevention principle applying in "a conventional case" (para 28), it is not readily apparent what he meant by that.

Practicality

The main practical concern with the implied term analysis is its interplay with express terms. If the prevention principle is a rule of law, acts of prevention not covered by the contract will engage it. If, on the other hand, the prevention principle is an implied term, then rules of construction might prevent its implication. Indeed, where a contract contains detailed provisions dealing with the consequences of one party being prevented from performing, that is likely to militate against the implication of a term (see, for example, *Sabic UK Petrochemicals Ltd v Punj Lloyd Ltd* [2013] EWHC 2916 (TCC)).

It is here that the relegation of the prevention principle to the status of an implied term could have unexpected consequences. Consider, for example, a requirement in relation to employer acts of prevention that the employer accept that it had caused delay for time to be extended. It might well be difficult to argue that a term was nevertheless to be implied that a delay that the employer disputed should set time at large. As a matter of the construction of the contract, such an implication might well jar. Yet the non-application of the prevention principle in such a setting could produce precisely the unjust consequence that the prevention principle was developed to address.

Such a result could (depending on the facts) also be inconsistent with a long line of cases, including *Alghussein Establishment v Eton College* [1988] 1 WLR 587, establishing what Lord Ellenborough CJ described in *Rede v Farr* (1817) 6 M&S 121 at page 124 as the "universal principle of law, that a party shall never take advantage of his own wrong". In *Cyden Homes*, that problem was less pronounced because of the "Relevant Event" clause. In many construction contracts, the problem might be mitigated by an "open up, review and revise" power.

In the shipbuilding context, however, the failure to deliver on time usually gives rise not just to a right to liquidated damages, but also (if the failure continues) to a right of cancellation. This makes the ex post facto reversal by a

tribunal of an employer's rejection of a delay functionally useless as a means of re-setting the parties' positions under the contract. That is because the contract will by then – in most cases – have been brought to an end, either by the employer lawfully exercising its right of termination, or (if that purported exercise was unlawful) by the contractor's termination for repudiatory breach or renunciation.

It would be an odd outcome if the contractor's ex hypothesi wrongful refusal to accept responsibility for a delay entitled it to liquidated damages and to cancel the contract. Yet it is difficult to see how – if the prevention principle is to be viewed as an implied term – it could be avoided. This scenario was not at issue in *Cyden Homes* and so was not addressed.

It is therefore submitted that Coulson LJ's view, whilst understandable in the context in which he reached it, should be treated with caution. The prevention principle is better viewed not as an implied term, but as a rule of law that operates whenever the express terms of a contract do not exclude it.

James M Turner QC and Joseph England,
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