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*Dispatch* highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

# Dispatch

## Case update: concurrent delay

### North Midland Building Ltd v Cyden Homes Ltd

[2018] EWCA Civ 1744

We first reported on this case in Issue 208. NMBL and Cyden had agreed certain bespoke amendments to the JCT Design and Build Contract 2005, one of which concerned the way in which extensions of time would be dealt with in certain circumstances. The parties had amended clause 2.25.1.3(b) to include the following:

> *"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."*

By way of a refresher, the CA provided the following definition of concurrency as given in the case of *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm), where Hamblen J (as he then was) said:

> *"A useful working definition of concurrent delay in this context is 'a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency' – see the article Concurrent Delay by John Marrin QC (2002) 18(6) Const. L.J. 436."*

Indeed, the CA also noted that concurrent delay was not a concept that was ever considered by the courts until the late 1990's. Here the works were delayed, and a dispute arose between the parties as to the proper extension of time due to the appellant, NMBL. A major element of that dispute centred on the extent to which Cyden could take clause 2.25.1.3(b) into account. At first instance Mr Justice Fraser had decided that they could. On appeal LJ Coulson considered the concept of prevention. He referred to the three principles set out in the *Multiplex v Honeywell* case, namely that:

> "(i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause the delay beyond the contractual completion date.
> (ii) Acts of prevention by an employer do not set time at large, if the contract provides for an 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."

Note that what this case does not do, and LJ Coulson made it quite clear that this was not an issue he was considering, is to give a general statement on a contractor's entitlement to an extension of time in circumstances of concurrent delay. The court was solely considering the bespoke concurrency clause agreed by the parties.

LJ Coulson, agreeing with Mr Justice Fraser, said that:

> *"In my view, clause 2.25.1.3(b) is unambiguous. It plainly seeks to allocate the risk of concurrent delay to the appellant. The consequence of the clear provision was that the parties have agreed that, where a delay is due to the contractor, even if there is an equally effective cause of that delay which is the responsibility of the employer, liability for the concurrent delay rests with the contractor, so that it will not be taken into account in the calculation of any extension of time."*

In light of the Judge's conclusion, the only remaining issue was whether there was any reason in law why effect should not be given to that clear provision. NMBL suggested, "boldly" in the words of LJ Coulson, that the prevention principle was a matter of legal policy which would operate to rescue NMBL from the clause to which it had freely agreed. This suggestion was rejected for the following reasons:

> (i) The prevention principle is not an overriding rule of public or legal policy, like for example the rule which strikes down liquidated damages as a penalty.
> (ii) The prevention principle is not engaged because pursuant to clause 2.25.5, "any impediment, prevention or default, whether by act or omission, by the Employer" gave rise to a *prima facie* entitlement to an extension of time.
> (iii) The prevention principle has no obvious connection with the separate issues that may arise from concurrent delay.
> (iv) Clause 2.25.1.3(b) was designed to do no more than reverse the result in the *Walter Lilly* case that where delay is caused by two or more effective causes, one of which entitles the contractor to an extension of time as being a relevant event, the contractor is entitled to a full extension of time.
> (v) Clause 2.25.1.3(b) was an agreed term. This was the most important of all.

LJ Coulson noted that in the *Walter Lilly* case, it would have been open to the parties to draft "a proviso to the effect that an extension of time should be reduced if the causation criterion is established", thereby allowing for a different allocation of risk. That was what the parties here chose to do. The Judge said that:

> *"A building contract is a detailed allocation of risk and reward. If the parties do not stipulate that a particular act of prevention triggers an entitlement to an extension of time, then there will be no implied term to assist the employer and the application of the prevention principle would mean that, on the happening of that event, time was set at large. But it is a completely different thing if the parties negotiate and agree an express provision which states that, on the happening of a particular type of prevention (on this hypothesis, one that causes a concurrent delay), the risk and responsibility rests with the contractor."*

The clause here was "clear and unambiguous". It stipulated that where there is a concurrent delay (properly so called), the contractor will not be entitled to an extension of time for a period of delay which was as much his responsibility as that of the employer. That was an allocation of risk which the parties were entitled to agree.

Finally, it was suggested that even if clause 2.25.1.3(b) was enforceable (so that NMBL was not entitled to an extension of time for concurrent delay), there was an implied term which would prevent Cyden from levying liquidated damages. It would be "bizarre" if Cyden could recover liquidated damages for a period of delay for which it was responsible. It could not be said that the liquidated damages flowed from a delay for which the claimant was responsible. This suggestion was rejected for a number of reasons. These included that if clause 2.25.1.3(b) was a valid and effective clause then it would expressly permit the employer to levy liquidated damages for periods of concurrent delay, because it would not grant NMBL relief against such liability by extending the completion date. Finally, the Judge noted that:

> *"I do not consider that this result is in any way uncommercial or unreal. A period of concurrent delay, properly so-called, arises because a delay has occurred for two separate reasons, one being the responsibility of the contractor and one the responsibility of the employer. Each can argue that it would be wrong for the other to benefit from a period of delay for which the other is equally responsible. In Walter Lilly and the cases cited there, under standard JCT extension of time clauses, it has been found that the contractor can benefit, despite his default. By clause 2.25.1.3(b), the parties sought to reverse that outcome and provided that, under this contract, the employer should benefit, despite the act of prevention. Either result may be regarded as harsh on the other party; neither could be said to be uncommercial or unworkable."*

## Japanese Knotweed

### Network Rail Infrastructure Ltd v Williams & Anr

[2018] EWCA Civ 1514

Stephen Williams and Robin Waistell, the Respondents, both owned homes located in front of a Network Rail (NR) track. Behind their houses, the embankment was infested with Japanese knotweed, which was estimated to have been there for 50 years. Knotweed is a hardy plant similar to bamboo, which grows extremely quickly and is renowned for its vast root structure or "rhizomes". The plant is notorious, very invasive and requires specific treatment to remove it. A paper published in 2012 by the RICS confirmed that knotweed rhizomes have the potential to block drains; grow between slabs of concrete; disrupt brick paving; undermine garden walls; and overwhelm poorly built outbuildings.

The Respondents originally claimed that the Japanese knotweed had become a private nuisance due to its encroachment onto their properties. However, at first instance, the Recorder dismissed this claim, holding that neither side's experts had found any evidence of physical damage. However, the Recorder did find NR liable due to the disturbance of the quiet enjoyment of both Williams and Waistell. The Recorder found that since there was a risk of future damage and mortgage lenders would not be willing to lend on properties where knotweed was present within seven metres, both Respondents had a claim for a loss of amenity. The Recorder declared that the knotweed on NR's land had caused a loss of enjoyment to the property and awarded damages of £10,500 towards diminution of the property value and £5,000 for the cost of removing and disposing of the knotweed.

NR appealed this decision on two grounds. The first was that the mere presence of knotweed on their railway embankment could not possibly be the cause of an actionable nuisance to neighbouring properties. Secondly, that if it had indeed encroached onto the properties then the owners needed to prove physical damage had occurred to the property before NR would be liable. The Respondents replied that encroachment without physical damage can still lead to private nuisance and the mere presence of knotweed within the soil should constitute damage regardless of any physical effects.

The CA said that private nuisance could often be broken down into three categories: nuisance by encroachment, physical injury, and interference with quiet enjoyment. It is also accepted that damage is a quintessential requirement for a nuisance claim. However, the CA was also willing to accept that in previous cases of nuisance, damage was often an elastic value which can be difficult to pin down. Therefore, the CA has ruled that to suggest that the presence of knotweed in an adjoining property would not qualify as an actionable nuisance simply because it diminished the market value (due to lender caution) of the claimants' respective properties was wrong in principle. However, the CA did conclude that, once encroachment has been confirmed, this will automatically amount to physical damage and a right to compensation. Sir Terence Etherton MR said:

> *"As the RICS paper observed, any improvement or alteration of the property requiring the removal of contaminated soil would require disposal of the soil either on site or, more likely, off site by special, and probably expensive, procedures. For all those reasons, Japanese knotweed and its rhizomes can fairly be described, in the sense of the decided cases, as a 'natural hazard'. They affect the owner's ability fully to use and enjoy the land. They are a classic example of an interference with the amenity value of the land."*

This CA decision establishes that if a public body, company or freehold owner has allowed knotweed to spread within seven metres then they could be held liable for their negligence. Perhaps the biggest change is that this judgment moves the case law on for economic loss in tort. The CA further confirmed that definite physical damage may not be a fundamental requirement for a private nuisance claim. Here, simply the presence of Japanese knotweed rhizomes was enough to cause interference with the Defendants' quiet enjoyment of their property. As a result, both Respondents were entitled to damages for the diminution of the value of their homes purely because of the presence of knotweed.

For those buying or selling property, paragraph 7.8 of the TA6 Property Information Form asks if your property is affected by Japanese knotweed. If a dishonest answer is given, your buyer can either rescind the contract or claim damages equating to the loss of value of the property.

***Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.***

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