This edition of our construction newsletter comments on four recent and noteworthy construction cases:

- *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744
- *BDW v Integral Geotechnique (Wales) Ltd* [2018] EWHC 1915 (TCC)
- *Beach Homes Ltd v Hazell* [2018] EWHC 1847 (TCC)
- *Camway Contracts Ltd v Chapman Lang Ltd* [2018] EWHC 1711 (TCC)

North Midland Building Ltd v Cyden Homes Ltd

Judgment has now been handed down in the hotly anticipated appeal of ***North Midland Building Limited v Cyden Homes Limited*** *[2018] EWCA Civ [1744].*

The question at issue was whether contracting parties can effectively agree that the contractor bears the risk of concurrent delay (with the result that it gets no extension of time and must pay liquidated damages for the period of delay). At first instance, Fraser J held that they can. Fraser J's view was viewed positively by many in the industry, whilst some commentators – such as the Editors of Hudson's Building and Engineering Contracts, expressed doubts about the decision. A strong Court of Appeal – consisting of the Master of the Rolls, the Senior President of Tribunals and Coulson LJ - has now, in a robust and unequivocal judgment, agreed with Fraser J.

Sean Brannigan QC and Matthew Thorne represented the successful employer in front of both Fraser J and the Court of Appeal.

Background

NMB and Cyden were parties to a contract based on an amended JCT D&B 2005 form. This included the usual clause permitting an extension of time (EOT) where delay caused by a 'Relevant Event' (including impediments, preventions or defaults by the employer) pushed the time of actual completion beyond the contractual Completion Date.

However, the parties had amended the relevant clause to state that:

> *"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"..*

NMB was subsequently denied an EOT on the basis that the delay claimed was concurrent with its own delays.

It therefore brought Part 8 proceedings to challenge the clause and to obtain a declaration that it was, in effect, void. In particular it contended that, as a result of the "prevention principle", the clause could not be regarded as permissible or effective in making the contractor bear the risk of concurrent delays by an employer, with the result that the EOT mechanism, Completion Date, and ability to levy liquidated damages all fell away as a matter of law. In making that argument NMB sought to rely on the numerous cases which make clear that generally when there is concurrent delay the contractor will remain entitled

to the extension of time notwithstanding its own culpable delay.[1] Its first ground of appeal was that such an allocation was prohibited by a rule of law or public policy. Its second ground was that, in the alternative, a term should be implied to prevent the levying of liquidated damages in those circumstances.

The Judgment

The Court began by adopting the definition of 'concurrent delay' employed in *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm), as:

> *"a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency"*

In rejecting the claim, the Court of Appeal accepted the submissions of Sean Brannigan QC and Matthew Thorne that:

(a) The clause was unambiguous and *"plainly seeks to allocate the risk of concurrent delay"* to NMB. It was therefore for NMB *"to identify either another term of the contract, or some overarching principle of law or legal policy, which would render the clause inoperable"*.

(b) Parties are free to allocate the risk of concurrent delay by the terms of their contract. There was no rule of law which would render the clause inoperable; the prevention principle operates by way of implied term rather than as an overarching principle of law and policy.

(c) The express terms of the contract dealt fully with all employer delay events, and there was therefore no room for an implied term on prevention.

(d) There could also be no implied term to oust the express terms agreed by the parties, nor was such a term necessary or obvious. On the contrary, the contract worked perfectly well without such implication.

Of particular interest to the industry, the Court accepted that the clause could not be regarded as uncommercial, noting that:

> *"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."*

Does the Prevention Principle arise in the event of concurrency?

A further interesting question is whether the prevention principle is even triggered in the event of concurrent delay.

At first instance, Fraser J had accepted, *obiter*, that in such circumstances, there was no act of prevention by the employer because the contractor could not have completed on time anyway, agreeing

[1] See *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32; reiterated more recently in *Walter Lilly v Mackay* [2012] BLR 503.

with the analyses of Hamblen J in **Adyard Abu Dhabi v SD Marine Services** and Coulson J (as he then was) in ***Jerram Falkus Construction Ltd v Fenice Investments Inc (No.4)*** in that regard.

In view of its finding on Grounds 1 and 2, the Court of Appeal declined to rule on this question. Accordingly, Fraser J's judgment currently remains the last word on the matter.

Summary:

The case will be of significant interest for three main reasons:

(a) The adoption by the Court of Appeal of a definition of concurrent delay. Whilst a number of first instance decisions have tried to grapple with the concept, parties will be grateful for this guidance from the Court of Appeal.
(b) "Concurrency allocation" clauses such as that considered in ***North Midland Building Limited*** are becoming more and more common, but had previously been met with similar arguments that they are not effective. This decision puts such arguments to rest in a robust fashion.
(c) The Court's clear approval of such clauses is, one would think, likely to mean that such clauses become even more common. That was the result of Fraser J's decision at first instance and one might think that there will be relatively few employers or main contractors who would not now consider negotiating similar clauses into their down-stream contracts. At a minimum, the case provides a Court of Appeal approved set of wording to achieve that aim.

Authored by:

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BDW v Integral Geotechnique

In a Judgment released on Wednesday 25th July, Judge Stephen Davies QC has given valuable guidance in relation to both:

- when a duty of care arises where a geotechnical engineer provides a report relied upon by the purchaser of development land; and
- the importance of considering professionals' reports as a whole – and in particular their overall conclusions – when assessing allegations that such reports are negligent.

Sean Brannigan QC and Jessica Stephens jointly represented the successful defendant geotechnical engineer in these proceedings brought by BDW (a division of Barratt Homes) concerning an allegedly negligent geotechnical report that had not identified asbestos. Both conducted the advocacy.

Background

BDW sought damages representing the costs of asbestos remediation that it carried out on the basis that, had IGL's report been non-negligent, BDW would have negotiated a reduction in the purchase price of the site to reflect those costs.

IGL had been commissioned by the previous owner of the site to produce the report. IGL's appointment included a clause limiting liability for contamination. IGL undertook to produce the report on the basis and understanding that it could be assigned to any future purchaser. BDW did not take an assignment of the report and had no contractual claim against IGL. BDW argued that a tortious duty was owed on the basis that IGL knew that BDW had received a copy of the report within the technical pack that was

provided to those interested in purchasing the site; had read it and relied upon it when deciding whether or not to purchase the site; and that the fact that the report had been provided on the basis that it could be assigned was irrelevant.

Duty of Care

The Judge conducted a detailed review of the authorities relevant to the existence of a common law duty of care concluding (at paragraph 170) that *"…the assignment statement when read together in the context of the contract… made it reasonably clear, on an objective assessment, to BDW that if it wanted to place legal reliance on the report it would have to obtain an assignment or other legal document from IGL to do so (and to negotiate a waiver of the liability limitation if it wanted to ensure greater financial comfort or, on one view, to recover at least its direct clean-up costs)."*

The Judge also drew a clear distinction between a purchaser "using" the report, in the sense of reading it, asking questions and making decision based on it, and "relying" on it in the sense of having a legal right to do so. IGL's knowledge that a third party was "using" the report did not necessarily give rise to a duty of care and did not do so where IGL had provided the report on the understanding that a third party could not rely on the report without taking an assignment.

That conclusion is likely to be relevant where parties make provision for a contractual relationship that, for whatever reason, does not come to fruition: it suggests that in such circumstances it will be difficult to superimpose a common law duty of care upon that failed contractual framework merely because the report was used by the prospective claimant.

Negligence

Although not strictly necessary to decide the issue of negligence, the Court did so, stressing the importance of reading the report as a whole against the purpose for which the report had been obtained. It was not necessary to emphasise hypothetical and unquantifiable risks, particularly where it had not been instructed to advise prospective purchasers whether or not to buy the site and, if so, on what terms. The Court concluded that whilst some aspects of the report were open to criticism, taken as a whole the report was not negligent.

That "read the whole thing" approach is likely to be of interest to many professionals (and their insurers) facing similar criticism of aspects of their reports.

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Beach Homes Ltd v Hazell

Gideon Shirazi recently appeared in this case where there was a residential construction contract entered into between a consumer employer and a building contractor (and so outside the scope of the HGCRA 1996). The contract was on the building contractor's standard terms, and contained a very brief ad hoc adjudication clause that "In the event of a dispute, it shall be agreed that it would be resolved through adjudication proceedings and that the adjudicator should be appointed by the RCIS [sic]."

The building contractor referred a dispute to adjudication. Among other things, the consumer argued that the adjudication clause was unfair and so void under the Unfair Terms in Consumer Contracts Regulations 1998 (regulations which now form part of the Consumer Rights Act 2015). The court held that this ad hoc adjudication clause was fair.

This case constitutes a further development in the case law on the validity of adjudication clauses in residential construction contracts. Residential contracts are outside the scope of the HGCRA and so

there is no automatic right to adjudication and parties can refer matters to adjudication only if that is agreed in the contract. Where the employer was a consumer (an individual acting outside the course of his trade or profession), adjudication clauses are enforceable only if they passed the test of fairness under the UTCCRs (now the Consumer Rights Act 2015). The consequence of this judgment is that adjudication clauses in consumer construction contracts are likely to be generally upheld – and not just the more sophisticated clauses that appear in the standard forms.

Authored by:

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Camway Contracts Ltd v Chapman Lang Ltd

This case saw the High Court decline to enforce the decision of an adjudicator who had refused to consider the defendant's set-off defence to a claim for underpaid VAT under a contract that incorporated the JCT Minor Works Building Contract with Contractor's Design 2011 incorporating Amendment 1 on 19th September 2016. Thomas Crangle acted for the successful defendant.

Following a mistaken VAT self-certification by the defendants and a correction from HMRC, the claimants sought the underpaid amount of £147,747.24 from the defendants. The matter was referred to adjudication. In the response to the notice of adjudication, the defendants raised a counter-claim for liquidated damages under the same contract for almost £300,000.00 as a defence by way of set-off.

The claimant refused to engage with the substance of the set-off defence in the adjudication, instead maintaining that the adjudicator had no jurisdiction to deal with it. The adjudicator agreed that he did not have jurisdiction and declined to make a substantive ruling on the defence. He made an award in favour of the claimants.

The High Court disagreed with the adjudicator. Applying the well-known principles in Pilon Ltd v Breyer Group Plc, Stuart-Smith J found that the defendant's set-off defence was a proper and material defence to the claim for unpaid VAT.

The Court found that the defendant had expanded the ambit of the adjudication by raising a potentially material defence of set-off. The adjudicator had the jurisdiction to consider the matter and should have done so. Stuart-Smith J noted that whilst the obligation to pay VAT was separate from the main payment obligations there was no contractual provision in this standard contract preventing a set-off defence to the VAT payment provision and therefore the defence was possibly material.

This guidance should be of particular interest to the industry. Adjudications over non-payment of VAT owing under the contract are liable to have their scope dramatically widened by a set-off defence unless the contractual terms exclude such a defence from being raised.

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