Neutral Citation Number: [2018] EWCA Civ 1744

Case No: A1/2017/2871

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Queen's Bench Division
Technology and Construction Court
Mr Justice Fraser
HT2017000135

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2018

Before:

THE MASTER OF THE ROLLS
(Sir Terence Etherton)
THE SENIOR PRESIDENT OF TRIBUNALS
(Sir Ernest Ryder)
and
LORD JUSTICE COULSON

- -

Between:

North Midland Building Limited	**Appellant**
- and -	
Cyden Homes Limited	**Respondent**

- -
- -

Mr Simon Lofthouse QC & Mr Edmund Neuberger (instructed by **Browne Jacobson LLP**) for the **Appellant**
Mr Sean Brannigan QC & Mr Matthew Thorne (instructed by **Pinsent Masons LLP**) for the **Respondent**

Hearing date: Thursday 12th July 2018

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Judgment Approved

Lord Justice Coulson :

1. Introduction

1. The principal issue in this appeal concerns the validity of a clause in a building contract which provided that, where there was a delay caused by an event for which the contractor was responsible, and that delay was concurrent with a delay for which the employer was responsible, such concurrent delay would not be taken into account when calculating any extension of time to the contract completion date. It was the appellant contractor's case that this clause was contrary to what has come to be known as 'the prevention principle' and therefore ineffective.

2. In order to address the issues on this appeal, I set out the relevant terms of the contract. I then set out the legal background before identifying some parts of the judgment of Fraser J below. I then address Ground 1 of the appeal, namely whether the clause dealing with concurrent delay is contrary to an overarching principle of law and of no effect. Thereafter I address Ground 2 of the appeal, a related point concerning the respondent's ability to deduct liquidated damages for concurrent delay. For the reasons I explain below, it is both unnecessary and undesirable to address Ground 3, which is concerned with a subsidiary argument about the proper ambit of concurrent delay.

2. The Contract

3. Pursuant to a contract executed on 21 September 2009, the respondent engaged the appellant to design and build a large house and substantial outbuildings known as South Farm, Ashby-cum-Fenby, Lincolnshire ("the works"). The contract incorporated the JCT Design and Build 2005 Standard Terms and Conditions. These were the subject of numerous bespoke amendments.

4. The original contract completion date was 18 June 2010. The stated rate of liquidated damages was £5,000 per week.

5. For the purposes of this appeal, it is necessary only to set out clause 2.25.3, dealing with the mechanics for extending time for completion of the works, and parts of clause 2.26, setting out those delaying events, known as 'Relevant Events', which would justify an extension of time.

6. Clause 2.25.1 sets out what the employer was to do if it was in receipt of a notice from the contractor that the progress of the works was, or was likely to be, delayed. As amended, (with the amendments underlined), the clause read as follows:

> "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 as to be fair and reasonable."

7. The Relevant Events justifying an extension of time were set out in clause 2.26. As amended, the first 5 of these (of 13 in total) were as follows:

> "2.26 The following are the Relevant Events referred to in clause 2.24 and 2.25 (but only to the extent that such events are not in any way consequent upon or necessitated by any negligence, omission, default, breach of contract or breach of statutory duty of the Contractor, his servants or agents or any sub-contractor, consultant or supplier of their respective servants or agents):
>
> .1 Changes and any other matters or instructions which under these Conditions are to be treated as, or as requiring, a Change;
>
> .2 instructions of the Employer:
>
> .1 under any of clauses:
>
> - 3.10 (Instructions to postpone any work);
> - 3.11 (Instructions to expend any Provisional Sums) to the extent that the Employer's Requirements provided insufficient information to enable the Contractor to make a sufficient allowance prior to the issue of such instructions for the effects on programme of those instructions;
> - 3.16 (Instructions on antiquities); or
>
> .2 For the opening up for inspection or testing of any work, materials or goods (including making good) under clause 3.12, unless the inspection or test shows that the work, materials or goods are not in accordance with this Contract; or under clause 3.13, if it is agreed by the Parties or determined by an adjudicator that an extension of time should be awarded in respect of such instruction given under clause 3.13;

> .3 deferment of the giving of possession of the site or any Section under clause 2.4;
>
> .4 suspension by the Contractor under clause 4.11 of the performance of his obligations under this Contract;
>
> .5 Any impediment, prevention or default, whether by act or omission, by the Employer or any of the Employer's Persons, except to the extent caused or contributed to by any default, whether by act or omission, of the Contractor or of any of the Contractor's persons or, in the case of any impediment or prevention, save to the extent that the same is in consequence of the reasonable exercise of the rights of the Employer under this Contract…"

8. Despite this plethora of amendments, Mr Lofthouse QC, on behalf of the appellant, made it clear that it was only clause 2.25.1.3(b) that was in issue on this appeal.

9. The works were delayed, and a dispute arose between the parties as to the proper extension of time due to the appellant. A major element of that dispute centred on clause 2.25.1.3(b) and the extent, if at all, to which the respondent could take this into account when calculating the appropriate extension of time. We were shown the detailed response to the appellant's claim for an extension of time, provided by the Employer's Agent and dated 29 June 2011, which sought to give effect to the clause. Although the appellant contends that, in this detailed response, clause 2.25.1.3(b) was not properly applied in any event, Mr Lofthouse QC confirmed that that complaint was not a matter for this court, or the underlying Part 8 proceedings.

3. The Legal Background

10. In the 19th Century, the courts concluded that it was wrong in principle for an employer to hold a contractor to a completion date, and a concomitant liability to pay liquidated damages, in circumstances where at least a part of the subsequent delay was caused by the employer. Thus, in *Holme v Guppy* (1838) 3 M&W 387, the defendant failed to give possession of the site for 4 weeks following execution of the contract. Parke B found that there were clear authorities to the effect that "if the party be prevented by the refusal of the other contracting party from completing the contract within the time limited he is not liable in law for the default…".

11. Similarly, in *Dodd v Churton* [1897] 1 QB 566, where the employer ordered extra work which delayed completion. Lord Esher MR said:

> "…where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default; and accordingly a well-recognised rule has been established in cases of this kind, beginning with *Holme v Guppy*, to the effect that, if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided by the contract."

12. As a result of these decisions, construction contracts began to incorporate extension of time clauses, which provided that, on the happening of certain events (which included what might generically be described as 'acts of prevention' on the part of the employer), the date for completion under the contract would be extended, so that liquidated damages would only be levied for the period after the expiry of the extended completion date. Such clauses were not, as is sometimes thought, designed to provide the contractor with excuses for delay, but rather to protect employers, by retaining their right both to a fixed (albeit extended) completion date and to deduct liquidated damages for any delay beyond that extended completion date.

13. The problem was that many extension of time clauses tended to be narrowly drawn. Although that was again seen as a benefit to the employer, in fact it was not. That is graphically illustrated by the decision of the Court of Appeal in *Peak v McKinney* (1970) 1 BLR 111. In that case, McKinney were responsible for defective foundation piling. When they finally came back to carry out the necessary remedial work, it took just 6 weeks to complete. However, the overall delay to the works was 58 weeks because, prior to the remedial works being carried out, Liverpool Corporation had delayed in deciding what they should do and how the problem should be rectified. There was an extension of time provision but it was limited, and the only relevant sub-clause referred to delays as a result of "any other unavoidable circumstances". The Court of Appeal held that the delay resulting from the Corporation's indecision could not be said to have been an unavoidable circumstance. There was therefore no basis on which time could be extended as a result of the delays for which the Corporation were responsible and, in consequence, the Court found that time was set at large and no liquidated damages could be levied.

14. Unsurprisingly, perhaps, in the 1980's and 1990's, extension of time clauses became more complex. The relevant extension of time provision (clause 11) in *Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited (No.2)* [2007] BLR 195 takes up three columns in the Law Report. The argument was that, despite its length, clause 11 omitted to identify (as a relevant event justifying an extension) directions issued by the main contractor to the sub-contractor under clause 4.2 of the contract. The argument was that, although such directions were permitted by the contract, the extension of time clause did not cover them, so they constituted an act of prevention, and rendered time at large. Jackson J (as he then was) rejected that submission, holding that the relevant directions were covered by the extension of time clause, which in turn meant that time was not at large.

15. The decision of Jackson J in *Multiplex* is important because, at paragraph 56, he derived three propositions from the authorities which neatly summarise the ambit and scope of the prevention principle in the following terms:

> "(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."

16. Although in one sense of tangential relevance to this appeal, it is also necessary to say something about concurrent delay. In *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm), 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."

Like other judges dealing with concurrency, I gratefully adopt that definition.

17. Under the JCT standard forms (ie without the bespoke amendments added here), a contractor's entitlement to an extension of time in circumstances of concurrent delay is not entirely free from doubt. There is no Court of Appeal authority on the issue. In *Walter Lilly and Co Limited v Giles Mackay and Another* [2012] EWHC 1773 (TCC); [2012] 28 Const. L.J. Issue 8, page 622, Akenhead J said that a contractor was entitled to an extension of time for concurrent delay. In reaching that conclusion he referred to a number of first-instance decisions, including *Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited* [1999] 70 Con LR 32 (where the point was conceded) and the Scottish case of *City Inn Limited v Shepherd Construction Limited* [2010] BLR 473 (where a different approach was adopted). *Keating on Construction Contracts*, 10th Ed., paragraph 8-014 takes the opposite view. It states:

> "However, where there are concurrent causes of delay (one the contractor's responsibility and the other the employer's) the prevention principle would not be triggered because the delay would have occurred anyway absent the employer delay event."

Two more first instance decisions are cited in support of that proposition: *Adyard* and *Jerram Falkus Construction Limited v Fenice Investments Incorporated (No. 4)* [2011] EWHC 1935 (TCC). In *Adyard*, Hamblen J said, at paragraph 279, that "there is only concurrency if both events in fact cause delay to the progress of the works and the delaying effect of the two events is felt at the same time".

18. For reasons which will become apparent below, it is unnecessary to resolve this potential difference of opinion on this appeal. For present purposes, these authorities are relevant only of the possibility that a contractor may be entitled to an extension of time for the whole period of concurrent delay (even where the work could not have been completed any earlier than it actually was because of the contractor's default), which has led employers to introduce the sort of bespoke amendment on which this appeal turns.

4. The Judgment

19. Having set out the contract terms and dealt with some other background matters at [11], Fraser J moved on to consider the prevention principle and, at [13] set out the summary from *Multiplex*.

20. At [16] he addressed the construction issue. In that and the next paragraphs of his judgment, he concluded that, on analysis, there was no point of construction. The clause was clear in its meaning and the prevention principle did not arise. This part of his judgment culminated as follows:

> "18. The defendant submits that the amendment could be said, understandably, to be crystal clear in terms of the meaning of the words. If there is any realistic doubt about that, I am happy to confirm that in my judgment it *is* crystal clear. The parties agreed that, in the scenario I have outlined above, if the contractor were responsible for a delaying event which caused delay at the same time as, or during, that caused by a Relevant Event, then the delay caused by the Relevant Event "shall not be taken into account" when assessing the extension of time. I fail to see how that raises any issues of construction whatsoever. The dicta of Jackson J in ***Multiplex*** does not have any effect upon that conclusion at all, in my judgment. It is a clear agreement dealing with the proper approach to consideration of the appropriate extension of time in situations of concurrent delay, when one cause would otherwise entitle the contractor to such an extension (absent the concurrent event) but the other cause would not. The contractor is not entitled to an extension of time in that situation.
>
> 19. When this point was explored during oral submissions, the argument that was advanced by the claimant was that such an interpretation (if interpretation it is) was "not permitted". That phrase was expressly used. This approach is more akin to a Civil Code view of contracts, than one under the common law. Parties are free to agree whatever terms they wish to agree, with the obvious exceptions such as illegality. There is a statutory restriction within the field of construction contracts so far as dispute resolution and payment terms are concerned, as certain minimum requirements are imposed by statutes such as the Housing Grants Construction and Regeneration Act 1996 and the later statutes that govern the same areas. Parties cannot freely agree not to include certain required provisions, or if they do, Parliament has decided that those terms will be imposed upon them. But there is no rule of law of which I am aware that prevents the parties from agreeing that concurrent delay be dealt with in any particular way, and Mr Lofthouse QC could not direct me to any. ***Multiplex*** and the doctrine of prevention are so far off the point, with respect, as to be dealing with something else entirely."

21. The remainder of the judgment was largely taken up with a consideration of a slightly different point as to concurrency which did not affect his views on the construction issue. Indeed, those views were confirmed in Fraser J's reasons for refusing permission to appeal when he said:

> "Although the Part 8 claim was brought on the basis of contested construction of a contractual provision for the calculation of an extension of time, in reality there was no point of construction as the Claimant accepted during the hearing – the meaning of the words of the provision are clear and agreed by the parties. It was rather the effect of the agreed provision that was in dispute, in the sense that the claimant contractor did not consider it fair for the provision to be applied in accordance with its terms."

5. Ground 1: Clause 2.25.1.3 and the Prevention Principle

5.1 Is the Clause Clear and Unambiguous?

22. In my view, clause 2.25.1.3(b) is unambiguous. It plainly seeks to allocate the risk of concurrent delay to the appellant. As Fraser J said, the clause is "crystal clear". Mr Lofthouse QC accepted that, and did not suggest that the clause was in any way ambiguous. Thus, principle (iii) in *Multiplex* (paragraph 15 above) simply does not arise on the facts of this case.

23. The consequence of this clear provision is that the parties have agreed that, where a delay is due to the appellant, even if there is an equally effective cause of that delay which is the responsibility of the respondent, liability for the concurrent delay rests with the appellant, so that it will not be taken into account in the calculation of any extension of time.

24. In the light of that conclusion, the only remaining issue is whether there is any reason in law why effect should not should be given to that clear provision. This is not a case to which the Unfair Contract Terms Act (or any other statutory provision) applies. So the only way in which the appellant can avoid the effect of the clause is to identify either another term of the contract, or some overarching principle of law or legal policy, which would render the clause inoperable.

5.2 Other Contract Terms

25. No express terms of the contract are relied on by the appellant in support of the argument that clause 2.25.1.3(b) should be ignored or rendered nugatory.

26. In addition, Mr Lofthouse QC, eschewed the suggestion that his aim might be achieved by way of implied terms. This was despite the fact that the case of *London Borough of Merton v Stanley Hugh Leach Limited* [1985] 32 BLR 51 was included in the authorities bundle. In that case, the contractor successfully argued that there were implied terms which imposed upon the employer obligations to take all steps reasonably necessary to enable the contractor to discharge its obligations, and not to hinder or prevent the contractor from carrying out those obligations. Unlike this case, *Merton v Leach* was a case with a conventional extension of time clause.

27. As Mr Lofthouse QC recognised, the *Merton v Leach* approach cannot assist the appellant in this case. That is for two reasons. First, amongst the lengthy list of Relevant Events, at clause 2.26.5, is included "any impediment, prevention or default, whether by act or omission, by the Employer…". Those are very wide words. It

means that the appellant is entitled to an extension of time (leaving aside any question of concurrency) for any act or omission on the part of the employer which impedes or prevents the appellant's work. Such a wide-ranging express provision makes the *Merton v Leach* implied terms redundant. And secondly, at least in the context of concurrent delay, any implied term of this type would cut across clause 2.25.1.3(b), and therefore fail the test of necessary implication in any event. Mr Lofthouse QC recognised in his oral submissions that any implied terms as to hindrance and prevention (at least in the context of concurrent delay) would be contrary to clause 2.25.1.3(b).

28. However, 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. In one sense, that is what *Merton v Leach* was doing: making acts of hindrance and prevention breaches of implied terms of the contract, thereby setting time at large. 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 paragraph 48 of *Multiplex*). In my view, therefore, the prevention principle can only sensibly operate by way of implied terms. I note that, in *The Interpretation of Contracts*, 6th edition, at paragraph 6.14, Sir Kim Lewison deals with the prevention principle in the chapter concerned with implied terms.

5.3 The Prevention Principle

29. In the absence of any argument based on implied terms, Mr Lofthouse QC's attack on clause 2.25.1.3(b) was based on the bold proposition that the prevention principle was a matter of legal policy which would operate to rescue the appellant from the clause to which it had freely agreed. I reject that submission for five reasons.

30. The first is that the prevention principle is not an overriding rule of public or legal policy. There is no authority for such a proposition: it is not expressed in those terms in *Multiplex* or any of the other authorities noted above. Contrary to Mr Lofthouse QC's submission, I do not consider that it is analogous to the rule which strikes down liquidated damages as a penalty, a rule which has an entirely different legal provenance.

31. The second is that the prevention principle is not engaged here because there is no contravention of either principle (i) or (ii) identified in *Multiplex* (paragraph 15 above). As I have said, 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 on the part of the appellant to an extension of time. Those could be acts or omissions which were permitted by the contract but still gave rise to an entitlement to an extension of time (principle (i)). In this way, time was not set at large because the contract provided for an extension of time on the occurrence of those events (principle (ii)).

32. Thirdly, the prevention principle has no obvious connection with the separate issues that may arise from concurrent delay. There is no mention of concurrent delay in any of the authorities on which the prevention principle is based (i.e. *Holmes v Guppy*, *Dodd v Churton*, *Peak v Mackinney* and *Multiplex v Honeywell*).

33. At one point, I thought Mr Lofthouse QC was seeking to argue that *Peak v McKinney* was a case about concurrent delay. His skeleton argument indicated that, in this context, he relied on this passage in the judgment of Salmon LJ:

> "In my judgment, however, the plaintiffs are not entitled to anything at all under this head, because they were not liable to pay any liquidated damages for delay to the corporation. A clause giving the employer liquidated damages at so much a week or month which elapses between the date fixed for completion and the actual date of completion is usually coupled, as in the present case, with an extension of time clause. The liquidated damages clause contemplates a failure to complete on time due to the fault of the contractor. It is inserted by the employer for his own protection; for it enables him to recover a fixed sum as compensation for delay instead of facing the difficulty and expense of proving the actual damage which the delay may have caused him. If the failure to complete on time is due to the fault of both the employer and the contractor, in my view, the clause does not bite. I cannot see how, in the ordinary course, the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled: *Wells v Army & Navy Co-operative Society Ltd; Amalgamated Building Contractors v Waltham Urban District Council;* and *Holme v Guppy*. I consider that unless the contract expresses a contrary intention, the employer, in the circumstances postulated, is left to his ordinary remedy; that is to say, to recover such damages as he can prove flow from the contractor's breach. **No doubt if the extension of time clause provided for a postponement of the completion date on account of delay caused by some breach or fault on the part of the employer, the position would be different. This would mean that the parties had intended that the employer could recover liquidated damages notwithstanding that he was partly to blame for the failure to achieve the completion date. In such a case the architect would extend the date for completion, and the contractor would then be liable to pay liquidated damages for delay as from the extended completion date**." (Emphasis added)

34. However, Mr Lofthouse QC properly accepted in his oral submissions that this passage did not refer to concurrent delay. When Salmon LJ talked about the failure to complete on time being due to the fault of both the employer and the contractor, he was simply saying that, on the facts of that case, the contractor was responsible for some of the overall delay (because of the need for remedial works to the piling) and the employer was responsible for some of the overall delay (because of the inordinate amount of time it took them to work out what to do). He was not talking about a period of delay with two concurrent causes, namely two separate causes of that same period of delay. Indeed, concurrent delay was not a concept that was ever considered by the courts until the late 1990's.

35. Fourthly, as I have already indicated, in my view clause 2.25.1.3(b) was designed to do no more than reverse the result in *Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited* and *Walter Lilly* for the purposes of this particular contract. Akenhead J's analysis in *Walter Lilly* was unconnected to the prevention principle; in my view, clause 2.25.1.3(b) is equally unconnected to it.

36. The final reason for my rejection of Ground 1 is perhaps the most important of all and applies even if I was wrong, and clause 2.25.1.3(b) was somehow connected with the prevention principle. Clause 2.25.1.3(b) was an agreed term. There is no suggestion in the authorities noted above that the parties cannot contract out of some or all of the effects of the prevention principle: indeed, the contrary is plain. Salmon LJ's judgment in *Peak v McKinney*, set out at paragraph 33 above (and in particular the passage in bold), expressly envisaged that, although it had not happened in that case, the parties could have drafted an extension of time provision which would operate in the employer's favour, notwithstanding that the employer was to blame for the delay.

37. Similarly, in *Walter Lilly*, Akenhead J said at paragraph 370:

> "In any event, I am clearly of the view that, **where there is an extension of time clause such as that agreed upon in this case** and 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. Part of the logic of this is that many of the relevant events would otherwise amount to acts of prevention and that **it would be wrong in principle to construe cl.25 on the basis that** the contractor should be denied a full extension of time in those circumstances. More importantly however, **there is a straight contractual interpretation of cl.25** which points very strongly in favour of the view that, provided that the relevant events can be shown to have delayed the Works, the contractor is entitled to an extension of time for the whole period of delay caused by the relevant events in question. **There is nothing in the wording of cl.25 which expressly suggests that there is any sort of proviso to the effect that an extension should be reduced if the causation criterion is established.** The fact that the architect has to award a "fair and reasonable" extension does not imply that there should be some apportionment in the case of concurrent delays. The test is primarily a causation one. It therefore follows that, although of persuasive weight, the City Inn case is inapplicable within this jurisdiction." (Emphasis supplied)

This paragraph stressed that the result turned on "a straight contractual interpretation" of the clause in that case, and that 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 is what the parties in the present case chose to do.

38. This touches on another submission made by Mr Lofthouse QC, to the effect that it made no difference whether the contract was silent as to whether or not a particular

act of prevention entitled a contractor to an extension of time, or whether there was an express clause purporting to allocate responsibility for such an event. I fundamentally disagree with that proposition: it is contrary to the passages in *Peak v McKinney* and *Walter Lilly* to which I have just referred. It is also contrary to general principle. 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.

5.4 Summary

39. For the reasons set out in the foregoing paragraphs, I can see no basis on which clause 2.25.1.3(b) could be struck down or rendered inoperable by the prevention principle. The clause is clear and unambiguous and it does not cut across clause 2.26.2.5 (which *prima facie* entitled the contractor to an extension of time for anything that might be considered an act of prevention by the respondent). The only thing the clause does is to stipulate 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 and was the sort of agreement which was expressly envisaged in *Peak v McKinney* and *Walter Lilly*. I therefore reject Ground 1 of the appeal.

6. Ground 2: Liquidated Damages

40. As advanced at the hearing, Mr Lofthouse QC's second ground of appeal was that, to the extent that we were against him on Ground 1, he had a separate argument that, even if clause 2.26.1.3(b) was enforceable (so that the appellant was not entitled to an extension of time for concurrent delay), there was an implied term which would prevent the respondent in those circumstances from levying liquidated damages. The argument was that such a term went without saying, or was otherwise obvious and/or necessary to make the contract work. Mr Lofthouse QC said that it would be bizarre if the respondent could recover liquidated damages for a period of delay for which it was responsible. He made plain that he was not arguing that, in consequence, the liquidated damages were a penalty. Instead he put the argument as a matter of causation: that in such circumstances, it could not be said that the liquidated damages flowed from a delay for which the claimant was responsible.

41. It was accepted by Mr Lofthouse QC that this argument was not raised before Fraser J. Mr Brannigan QC pointed out on behalf of the respondent that it had not been indicated in the skeleton arguments either and was, as he put it, "wholly new". However, Mr Brannigan QC was prepared to deal with the new way of putting Ground 2 and I consider that, whatever the procedural history, it is necessary to decide this issue on its merits.

42. For the reasons set out below, I can see no basis on which the second ground of appeal can succeed.

43. The first reason is that (in the absence of any suggestion of a penalty) the liquidated damages provision must be taken to be a valid and genuine pre-estimate of anticipated loss caused by the delay. That must remain the case whether the delay is the result of just one effective cause, or two causes of 'approximately equal causative potency'. So there remains a proper causal link between the delay and the liquidated damages.

44. Secondly, and related to the first point, the extension of time provisions (the subject of Ground 1) are inextricably linked to the provisions relating to liquidated damages (the separate attack under Ground 2). Whilst it is certainly right that the contractual machinery for extending time and fixing a new completion date has a number of important consequences for the contract as a whole, the primary purpose of an extension of time provision is to give the contractor relief against the levying of liquidated damages for delays which were not his responsibility under the contract: see *Peak v McKinney*. Given that close linkage, there can be no basis for arguing for a result in respect of liquidated damages that is different to the result in respect of extensions of time. If there had been a right to an extension of time, the ability to levy liquidated damages would only have operated in respect of any delay after the extended date; if the right to an extension of time was expressly negated, there is no reason why liquidated damages should not apply to the delay beyond the contractual completion date. In both situations, the express provisions which either confer or deny a right to an extension of time are linked directly to the preservation of the employer's right to liquidated damages.

45. The third reason is that, if clause 2.25.1.3(b) is a valid and effective clause, as I consider it to be, then it would expressly permit the employer to levy liquidated damages for periods of concurrent delay, because it would not grant the appellant relief against such liability by extending the completion date. In those circumstances, any implied term which sought to take away that entitlement would be contrary to the express terms of the contract. It is axiomatic that no term can be implied into a contract if it contradicts the express terms: see *Lynch v Thorne* [1956] 1 WLR 303.

46. Fourthly, it is quite clear to me that any such implied term would not go without saying (the 'officious bystander' test, noted in *Powell v Lowe* [2010] EWCA Civ 1419) and would not be required to make the contract work, in accordance with the 'business efficacy' test explained in *A-G of Belize v Belize Telecom Ltd* [2009] 2 All E.R 1127. On the contrary, it is quite clear that the contract works in the form in which it has been executed, and there is no need of nor room for any implied terms.

47. Finally, contrary to Mr Lofthouse QC's submission, 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.

48. For these reasons, therefore, I consider that Mr Lofthouse QC's new argument in support of Ground 2 cannot succeed.

Ground 3: The Precise Ambit of Concurrent Delay

49. I have identified at paragraphs 16 and 17 above some of the cases dealing with concurrent delay. Mr Brannigan QC had an additional submission to the effect that, if Mr Lofthouse QC was right on Grounds 1 and 2, the respondent was still able to defeat the argument based on the prevention principle on the grounds that, where there is concurrent delay, it could not be said that the employer had actually delayed the contractor at all.

50. If my Lords agree, this appeal will fail on both Ground 1 and Ground 2. In those circumstances, this further issue does not arise. Moreover, other than to note that there are differences of view expressed in both the first instance cases and the textbooks, it seems to me that it would be unwise to decide the issue without full argument. There may well be cases which will turn on this point, but the instant appeal is not one of them.

51. For the reasons set out above, if my Lords agree, I would dismiss this appeal.

Senior President of Tribunals:

52. I agree.

Master of the Rolls:

53. I also agree.