CONSTRUCTION

When principles collide...

Ian Pease reviews a recent English decision focusing on the interaction of the prevention principle with extention of time clauses

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It is one of the oldest[1] of legal principles and one of the most deadly. It's known as the prevention principle. It has a particular application to the construction industry and will commonly strike fear into developers because of its dire consequences. The principle has surfaced again in the recent case of *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007].

The principle can be stated quite simply:

> If one contracting party prevents the other from completing its side of the bargain then the preventor cannot insist upon the performance of that which it has prevented.

It sounds unremarkable but consider this: what if the matter prevented is the completion of the building works upon the date stated in the contract? Now the principle prevents the developer insisting on that date for completion. In its place, the contractor just has to complete within a 'reasonable time'. Time is, as they say, 'at large'.

But worse is yet to come. Liquidated damages (LDs) require for their operation that there be a specific date for completion (without it the calculation cannot be made). As was said by Edmund Davies LJ in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970]:

> It is not open to the employer, where the contract date has ceased to be applicable, to make out a kind of debtor and creditor account, allowing so many days or weeks for delay caused by himself and, after crediting that period to the builder, to seek to charge him with damages at the liquidated rate for the remainder.

Prevention kicks away the foundation stone for both time and easily recoverable LDs, leaving the developer having to prove that the time the contractor took was an unreasonable time in all the circumstances, and also that, as a result of having the building later than that reasonable time, it has incurred actual demonstrable losses (not merely LDs).

Prevention is truly the nuclear weapon or perhaps Holy Grail (depending on which side you stand) of the construction industry.

Acts of prevention (AoPs)

Given its dire consequences, perhaps you would expect that the AoP would have to be, at the very least, a breach of contract. But you would be wrong. The most often quoted exposé (*Trollope & Colls Ltd v North West Metropolitan Hospital Board* [1973] – Lord Denning in the Court of Appeal, approved by Lord Pearson in the House of Lords) of the rule runs thus:

> ... it is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if one party by his conduct – *it may be quite legitimate conduct*, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated [emphasis supplied].

However, the case law is not consistent[2] and there must still be some room for argument as to whether there is the need for culpability on the part of the preventor.

Extend my time

Faced with such a serious downside to hindering the contractor's completion in

> 'The risk that the developer runs, if its drafting is imprecise in relation to non-neutral delays, is that prevention is not adequately covered.'

A bad case of maladministration

So you've foreseen the problems and set the lawyers to work. Happy in the knowledge that you have a well-drafted contract you can now relax – or can you? Well not quite, for the LDs and EoT clauses can still be impeached if your CA fails to perform its administration of the contract in a timely and efficient manner. For example, in *Miller v London County Council* [1934] the EoT provision allowed the CA to grant extensions of time 'either prospectively or retrospectively'. The CA issued a certificate granting an EoT but did so after completion of the works. The court decided the CA had no contractual right to fix the EoT when the work was completed. Time became 'at large' and LDs were lost.

Here again the developer faces the cleft stick of drafting. Not to be too vague nor too specific and onerous as to the CA's time limits. However, the better course once again is to be more, rather than less, specific on the procedural time limits.

any way, there is one obvious solution: give yourself a contractual right to change the date for completion when certain events occur. This is better known as an extension of time (EoT) clause. In this way there is always a known date from which to calculate the all-important LDs.

So as long as the EoT clause is drafted in wide enough terms, the developer should be shielded from the worst effects of prevention. However, what about the *contra proferentem* principle? This phrase neatly encapsulates the idea that if you leave your drafting ambiguous the courts will construe it against you. EoT and LD clauses in contracts are construed by the courts in this way. In *Peak Construction v McKinney Foundations* Salmon LJ said this:

> The liquidated damages and extension of time clauses in printed forms of contract must be construed strictly *contra proferentem*. If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employers' own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such fault or breach on the part of the employer. I am unable to spell any such provision out of clause 23 of the contract in the present case.

In short, whilst it may seem that EoT and LD clauses benefit both contractor and developer (the contractor being granted an EoT and a commensurate reduction in LDs upon the occurrence of certain events), the courts construe them strictly against the developer.

So the risk that the developer runs, if its drafting is imprecise in relation to non-neutral delays, is that prevention is not adequately covered.

Catch-all EoT clauses are a particular problem as by their nature they are general and the one in *Peak Construction v McKinney Foundations* (clause 23 of JCT 1963 (1977 revision)) was ruled out by the court. The drafter, therefore, has to exercise a difficult balancing act: be too specific and you risk not covering every eventuality, be too general and the vagueness will be construed against you.

Out of time

The other side of the decision-making coin, of course, is the imposition of a contractual obligation upon the contractor as to the manner and timing of the presentation of its claim for extension of time (and, going one stage further, that the contract administrator (CA) is not obliged to consider claims made out of time) – a so called time-bar clause. These clauses are becoming increasingly popular and they can now be found in both FIDIC (clause 20.1) and NEC3 (clause 61.3) forms of contract. (For more on the role of the CA see box, above left.)

The clash of principles

This is where we come to the clash of principles, for what is to happen if a delaying event occurs, but the contractor fails to give notification of the event such that it falls foul of the time-bar clause? The condition precedent to the extension (the making of a claim within time) has not been fulfilled. Under those circumstances, time cannot be extended and if that is the case does the delaying event become an AoP?

The argument has a certain logic about it. However, the contractor appears to be benefiting from its own default, which is generally not allowed (see *Alghussein Establishment v Eton College* [1991]). Furthermore, there are Australian cases that run against the argument, for example *Turner Corporation v Austotel* [1997] at p384-385:[3]

> If the Builder, having a right to claim an extension of time fails to do so, it cannot claim that the act of prevention which would have entitled it to an extension of time for Practical Completion resulted in its inability to complete by that time. A party to a contract cannot rely upon preventing conduct of the other party where it failed to exercise a contractual right which would have negated the effect of that preventing conduct.

In other words, the proximate cause of the contractor's inability to complete by the date for practical completion is its own action (or inaction) and the original AoP no longer constitutes the active cause.

However, there are other Australian cases that favour the argument. In *Gaymark v Walter Construction Group* [1999][4] the court was obviously troubled that if the employer's arguments on the time-bar clause succeeded, it would benefit from an unmeritorious award of liquidated damages for delays of its own making (as well as escaping paying the contractor for its loss and expense) in circumstances where the employer had not, in its drafting, covered the delay situation that had occurred (delays on both sides and the failure of the contractor to apply for an EoT within the time limit). Hence, after reciting the above remarks from Salmon LJ in *Peak Construction* as to the EoT clause being construed *contra proferentem,* it concluded:

> In the circumstances of the present case, I consider that this principle presents a formidable barrier to Gaymark's [the employer's] claim for liquidated damages based on delays of its own making. I agree with the arbitrator that the contract between the parties fails to provide for a situation where Gaymark caused actual delays to Concrete Constructions achieving practical completion by the due date coupled with a failure by Concrete Constructions to comply with the notice provisions of SC 19.1. In such circumstances, I do not consider that there was any 'manifest error of law on the face of the award' or any 'strong evidence' of an error of law in the arbitrator holding that the 'prevention principle' barred Gaymark's claim to liquidated damages.

The overriding objective

Context and distinction is always important in viewing why courts reach the decisions they do. The *Gaymark* decision was a stark choice between the two unpalatable alternatives set out above.

Honeywell is different, and the first indication of the difference is shown in the court's overriding attitude to contractual interpretation. Having reviewed the authorities on the prevention principle the court concluded:

> [56] From this review of authority I derive three propositions… (iii) In so far as the extension of time clause is ambiguous, it should be construed in favour of the contractor.
>
> [57] The third proposition must be treated with care. It seems to me that, in so far as an extension of time clause is ambiguous, the court should lean in favour of a construction which permits the contractor to recover appropriate extensions of time in respect of events causing delay.

The proposition in paragraph 56(iii) leads, it would appear, to the opposite result to that in paragraph 57. The 56(iii) line of argument runs thus:

(1) this EoT clause is ambiguous such that it may not cover the act that is claimed to have preventive effect;

(2) therefore, this is to be construed in the contractor's favour as having such a preventive effect;

(3) therefore, the contractor cannot use the EoT procedure to obtain an extension, the machinery of the contract having broken down.

This obviously leads to the opposite result to paragraph 57 where the clause is construed so as to allow the EoT clause to operate. However, Jackson J is not necessarily wrong to say what he does in paragraph 57. It is a correct statement of another rule of construction that:

> Where two constructions of an instrument are equally plausible, upon one of which the instrument is valid and upon the other of which it is invalid, the court should lean towards that construction which validates the instrument.
> [Lewison, *The Interpretation of Contracts* (third edition, 2004) para 7.14]

So which of these two contrary rules should prevail? We would suggest that the position is as stated by the Court of Appeal in *Peak Construction v McKinney Foundations* above. So paragraph 57 (in the circumstances) is not a correct deduction by the court. However, it is important to recognise that the court is looking for an interpretation of the EoT provision that will make it work rather than oust it.

Case law in England

This argument has little English authority. However, the Scottish case of *City Inn Ltd v Shepherd Construction Ltd* [2003] touches on the subject, deciding that the proximate cause of a contractor's liability to LDs, where it has failed to comply with a condition precedent to an EoT, is not the original act of delay but rather the failure:

> … if he [the contractor] wishes an extension of time, he must comply with the conditions precedent that clause 13.8 provides… if the contractor fails to take the steps specified… then… the contractor will not be entitled to an extension of time on account of that particular instruction.

However, the case is not a direct authority dealing with the prevention principle, as the arguments revolved around ousting the LDs because they were arguably 'a penalty'.

The tipping point

The stage is therefore set for a classic legal dilemma. The triangle is balanced upon its apex. If it falls one way, an employer that has redrafted a contract to its favour (excluding EoT save in defined circumstances and imposing strict time-bars) and that has caused the contractor actual delay to completion is absolved from the consequences of its own actions because the contractor has failed to comply with the time-bar requirements, resulting in it being able to charge the contractor with LDs not only for the contractor-instigated delays, but also for those instigated by itself. *Gaymark* says that this should not be allowed to happen because the employer has not drafted its contract sufficiently precisely to account for that situation (some contractor and some employer delay). However, if the prevention principle clan have their way, the contractor that has failed to timeously present its claims can nevertheless evade its potential liability to LDs and can finish within the (undoubtedly) laxer period of a reasonable time because that principle applies.

And so to *Multiplex v Honeywell*

The first thing to note in this case is that the contract was not on a standard form. However, it did contain (unlike in *Gaymark*) an EoT right in case of an AoP by Multiplex:

> 11.10 The following are Relevant Events… 7. delay caused by any act of prevention or default by the Contractor in performing its obligations under the Sub-Contract [the AoP clause].

On the time-bar side there was a clause that said:

> 11.1.3 It shall be a *condition precedent* to the Sub-Contractor's entitlement to any extension of time under clause 11, that he shall have served *all necessary notices* on the Contractor by the dates specified and provided *all necessary supporting information*… In the event the Sub-Contractor fails to notify the Contractor by the dates specified and/or fails to provide any necessary supporting information then he shall *waive his right*, both under the Contract and at common law, in equity and/or to [sic] pursuant to statute *to any entitlement to an extension of time* under this clause 11 [emphasis supplied].

Plan B… and other plans

Let's now turn to the arguments. With the inclusion of the AoP clause Honeywell first had to argue that Multiplex's actions were not covered by that clause and hence were acts of prevention in the true sense. On the facts it failed to do this.

Honeywell had a plan B. We noted above that LDs and EoT clauses can be impeached if the CA fails to perform its administration of the contract timeously. Multiplex's administration of its contract was, Honeywell said, such as to leave it not knowing how to plan its works

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Abigroup Contractors Corp Pty Ltd v Peninsula Balmain Pty Ltd
[2002] NSWCA 211

Alghussein Establishment v Eton College
[1991] 1 All ER 267

Amalgamated Building Contractors v Waltham Holy Cross Urban District Council
[1952] 2 All ER 452

City Inn Ltd v Shepherd
[2003] 1 BLR 468

Commissioner of State Savings Bank of Victoria v Costain
[1983] ACLR 1

Gaymark Investments v Walter Construction Group
(1999) NTSC 143

Holme v Guppy
(1838) 3 M&W 387

Miller v London County Council
(1934) 50 TLR 479

Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)
[2007] All ER (D) 79 (Mar)

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

Roberts v Bury Improvement Commissioners
(1869-70) LR 5 CP 310

Trollope & Colls Ltd v North West Metropolitan Hospital Board
[1973] 1 WLR 601

Turner Corporation v Austotel
(1997) 13 BCL 378

Turner Corporation Ltd v Co-ordinated Industries Pty Ltd
(1995) 13 BCL 202

(particularly in relation to programming and given the lack of EoT). This is, of course, a question of fact and the judge was not convinced that the contract's provisions were not being operated by the parties or that the time-bar was being called into play by Multiplex. So time was not at large for that reason.

Enter plan C – the *Gaymark* point. The *Gaymark* point starts with Honeywell (rather contrarily, it must be said) arguing as follows:

(1) it has failed to comply strictly with the necessary notice provisions required to allow the EoT clause to operate;

(2) as such the time-bar operates against it;

(3) this has the effect that time cannot be extended;

(4) hence time becomes at large.

After reviewing the authorities, Jackson J concluded that:

> Whatever may be the law of the Northern Territory of Australia, I have considerable doubt that *Gaymark* represents the law of England. Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent. If *Gaymark* is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option the contractor could set time at large.

No one doubts the importance of notice provisions, but this conclusion does not address the classic legal dilemma set out above. Evidently the judge felt that this was sufficient because his remarks were not going to form the basis of his decision (they were obiter). Rather, the decision was based upon distinguishing *Gaymark*:

(1) *Gaymark* had an LD provision but *Multiplex* did not. This meant that an employer, in causing delay, could not automatically recover that from the contractor. Any losses had to be proved.

(2) The notice obligation under the Multiplex contract was light and not absolute. He held that the:

> … condition precedent does not comprise or include any absolute obligation to serve notices or supporting information. The obligation imposed upon [Honeywell] is an obligation to do his best as soon as he reasonably can.

Hence the time-barring effect was rather difficult to operate and, on the facts, did not operate:

> Although Multiplex's letters are written in robust terms, they do not go so far as to assert that the last sentence of clause 11.1.3 has been triggered. In other words, Multiplex has not argued that Honeywell has waived its right to any extension of time that might otherwise be due.

Conclusion

It must be said that these are damaging obiter remarks from a much respected judge on the applicability of a *Gaymark*-type scenario in this country. There is no substantial reasoning addressing the classic legal dilemma that *Gaymark* throws up. In truth, the choice for the judge in *Gaymark* lay between over compensating the contractor by ruling time at large and over compensating the employer with some LDs which, in equity, it should not get. Yes, the notice requirements are important in contracts for all the reasons that Jackson J outlines, but that fails to adequately address this collision of legal principles. ■

Notes

(1) The case of *Holme v Guppy* [1838] is generally cited as the genesis of the principle, but by that stage the Court of Exchequer said that there were already 'clear authorities'.
(2) In *Amalgamated Building Contractors v Waltham Holy Cross Urban District Council* [1952] Lord Denning himself formulated the principle as including 'some act or default of the building owner, such as not giving possession of the site in due time, or ordering extras or something of that kind'. In *Roberts v Bury Improvement Commissioners* [1869-70] it was formulated thus: '… no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself… he cannot sue for a breach occasioned by his own breach of contract.' In *Peak Construction Ltd v McKinney Foundations*, meanwhile, the AoP was culpable and the court's pronouncements – 'I cannot see how… the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled' – have to be seen in that light.
(3) See also *Turner Corporation Ltd v Co-ordinated Industries Pty Ltd* [1995] and *Commissioner of State Savings Bank of Victoria v Costain* [1983].
(4) See also *Abigroup Contractors Corp Pty Ltd v Peninsula Balmain Pty Ltd* [2002].