

Is The Prevention Principle Still Relevant?

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The relevance of the "prevention principle" to modern construction contracts, which contain comprehensive delay clauses, has been debated for many years.

Can a contractor, who has been delayed by the principal in completing by the due date, rely on the "prevention principle" to argue that "time is at large", when there is an applicable extension of time clause? According to Justice Cole in *Turner Corporation (Receiver and Manager Appointed) v Austotel Pty Ltd* (unreported, Supreme Court of NSW, 2 June 1994) and Justice Rolfe in *Turner Corporation (In Provisional Liquidation) v Coordinated Industries Pty Ltd* (1995) 11 BCL 202, the answer is a most emphatic no!

For many years, contractors have argued that they have a choice when they have been delayed by the principal (or by those for whom the principal is responsible). According to this argument, a contractor may claim an extension of time in accordance with the contract or may simply rely on the principal's act of prevention to avoid the obligation to complete by the due date and to pay liquidated damages for failing to do so.

This argument appeared to have some support 25 years ago in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111. Lord Justice Phillimore said:

"The plaintiffs never sought any extension of time on the ground that part of the delay was due to the fault of the corporation. They never attempted to put forward the case ... no claim for extension was ever advanced. The question of whether delay on the part of the employers would have warranted extension under the wording of clause 23 in this case is, as I think, academic. In the light of the finding of this court that the corporation was partly to blame for the delay, they had no right to liquidated damages in the absence of a certificate granting the appropriate extension. The corporation accordingly had no right to deduct this money."

Lord Justice Phillimore's comments clearly suggest that contractors do have a choice. Indeed, they are the rationale for the independent discretion conferred by modern construction contracts on the superintendent to grant an extension of time, even though the contractor has

not claimed one.

The independent discretion is not included to allow the superintendent to commit an act of generosity (which may be contrary to the principal's legitimate interests) but to enable the superintendent to grant an extension of time for a delay caused by an act of prevention, where the contractor fails to claim an extension of time.

Unfortunately, Lord Justice Phillimore's comments were not considered in either of the *Turner Corporation Ltd* cases. *Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd* dealt with JCC A 1985. Clause 9.01 clearly extends to acts of prevention by the words:

"including any act ... default or omission on the part of the Proprietor, the Architect, any Separate Contractor, employee or agent of the Proprietor".

Justice Cole said:

"If the Builder, having a right to claim an extension of time fails to do so, if cannot claim that the act of prevention which would have entitled it to an extension of the 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."

Turner Corporation Ltd (In Provisional Liquidation) v Co-ordinated Industries Pty Ltd dealt with NPWC3 1981. Clause 35.4 clearly extends to acts of prevention by the words:

"any cause arising out of any breach of the provisions of the Contract or out of any other act or omission on the part of the Principal, the Superintendent or the employees, professional consultants or agent of the Principal".

Justice Rolfe carried out an extensive review of the authorities and reached the following conclusion:

"Where the contract provides an extension of time clause, which can accommodate delay caused by the principal and provides a contractual regime or mechanism whereby the delay is to be calculated, the

fact the principal may have caused delay has the effect that an allowance should be made in accordance with the contract. It does not have the effect that the contractual provisions are thereby overlooked or put aside or that time is put 'at large'."

The effect of these decisions is that the prevention principle will not be relevant to most modern construction contracts because they have comprehensive extension of time provisions, which extend to acts of prevention. However, there is still the possibility that these decisions may be reconsidered at some stage, having regard to Lord Justice Phillimore's comments in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*.

The Significance of the Turner Corporation Ltd Cases

The significance of these cases lies in the notification and claiming provisions of a contract. For example, clause 9.01 of JCC A 1985 requires the builder to give notice "as soon as practicable and in any event not later than twenty (20) days after the cause of delay arose" and clause 35.4 of NPWC3 (1981) requires the contractor to give notice "not later than twenty eight (28) days after the cause of delay arose". What happens if a contractor fails to give notice within the required time?

There is a discernible trend in recent cases to require contractors to comply strictly with notification requirements. In the context of extension of time clauses, it is appropriate to mention *Opat Decorating Service (Aust) Pty Ltd v Hansen Yuncken (SA) Pty Ltd* (1995) 11 BCL 360 and *Diploma Constructions v Rhodgkin Pty Ltd* (1995) 11 BCL 242.

The former dealt with clause 31(b) of SCNPWC3, which requires the sub-contractor to give notice:

"to the Contractor not later than fourteen (14) days after the cause of delay arose".

The Full Court of the Supreme Court of South Australia held that this was a mandatory requirement. The rationale for this decision is interesting. Justice Bollen said:

"Let me look at cl 31(b). It begins by speaking of circumstances in which the parties contemplate that the appellant might want an extension of time within which to complete work. The parties when negotiating the contract, knowing the exigencies of the trade, agreed that some such circumstances might arise. What should be done about it? They answered this question by saying that the notice should be given by the appellant to the respondent, by subcontractor to contractor. They decided something about the time within which notice should be given. What did they decide? They decided that it should be given within fourteen days after the cause of the delay arose. They knew the exigencies of the trade. They knew what practical questions or issues would arise when notice was given. They knew when it was best for notice to be given. They fixed on that fourteen day period. And they meant the clause which emerged from these

deliberations to be effective within its terms. That is to say they meant what cl 31(b) says to be the position. They meant to bind themselves to it."

To similar effect is the decision of Commissioner Anderson in *Diploma Constructions Pty Ltd v Rhodgkin Pty Ltd*, which dealt with Edition 5b Clause 24(c) which required the builder to give notice:

"within a reasonable time of it being practicable to do so".

According to Commissioner Anderson:

"The builder's entitlement to an extension of time under cl 24(b) is therefore subject to the giving of a written notice under cl 24(c) within a reasonable time of it being practicable to do so ... The works were practically complete by 22 December (1988). No notice under cl 24(c) had been given by that time on this subject. No such notice was given until 19 January 1989. I think this was too late."

Ultimately, the significance for contractors, who have been delayed by an act of prevention, is that they must claim an extension of time and **must** give the required notices within the specified time. If they do not do so, they **must** complete the work by the contract date for completion (without any adjustment for the delay caused by the act of prevention) and will be liable for liquidated damages if they fail to do so.

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