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THE PREVENTION PRINCIPLE

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The 'prevention principle' is an established principle under English law whereby a party may not enforce a contract term against the other party where it has prevented the other party from performing that obligation. The prevention principle is closely linked to the maxim that "*no party may benefit from its own breach of contract.*"

In the construction context, where the date for completion is not met, the contractor is usually exposed to liquidated damages at an agreed rate in the contract. However, when the delay is caused by the principal conduct, such as a failure to give access to site, a delay in obtaining approvals or consenting to design drawings, the principal will not normally be entitled to enforce the liquidated damages provision. This is called the 'prevention principle' and in such circumstances,

contractors are usually entitled to an extension of time.

PEAK CONSTRUCTION LTD V MCKINNEY FOUNDATIONS LTD (1970) 69 LGR 1 ('PEAK')

In *Peak*, Peak Construction Ltd ('Peak') was contracted to build three apartments for Liverpool. Peak's subcontractor discovered a fault in the Foundations and Peak subsequently asked Liverpool for directions. Liverpool's expert provided instructions three months after Peak's request. Liverpool claimed liquidated damages for the late completion of the works and Peak subsequently claimed against Liverpool. The Contract between the parties contained no provision for Peak to get an extension of time for delay caused by Liverpool.

The Court decided that Liverpool would only be entitled to liquidated damages for late completion, where the delay was caused by Liverpool's conduct, if the extension of time clause provided for such a breach by Liverpool. As the extension of time clause did not entitle Peak or Peak's subcontractor to any extension of time for Liverpool's conduct, no liquidated damages could be applied. The Court also ruled that the date for completion was meaningless and a new obligation arose to finish the works within a reasonable period of time.

***GAYMARK INVESTMENTS PTY LTD V
WALTER CONSTRUCTION GROUP LTD
(1999) 16 BCL 449***

In this case, Walter Construction Group ('Walter') was entitled to an extension of time if there was a breach by Gaymark Investments Pty Ltd ('Gaymark'), provided the application was made within the prescribed time period. Walter lodged an extension of time request due to Gaymark's delay, however the application was not made in the required time period.

The Court stated that Walter's failure to respond in time had lost them their entitlement to an extension of time, allowing Gaymark to claim liquidated damages.

***TURNER CORP PTY LTD (RECV & MGR
APPTD) V AUSTOTEL PTY LTD (1994)
13 BCL 378 ('TURNER [1]')***

In *Turner [1]*, the Court stated that the contractor's failure to lodge an application for an extension of time within the prescribed period did not mean that the contractor could later argue the prevention principle.

The Court ruled that where the contractor had an option to obtain the extension of time but failed to do so, it was not "prevented" from obtaining the extension of time.

***TURNER CORP LTD (IN LIQ) V CO-
ORDINATED INDUSTRIES PTY LTD
(1994) 11 BCL 202 ('TURNER [2]')***

The Contract in the *Turner [2]* provided that the contractor was entitled to an extension of time if the Principal breached the contract and as such the Court stated that the prevention principle did not apply in such a case.

The Court also stated that if the contract includes a provision entitling the contractor to an extension of time where there is a breach of contract by the principal, time cannot be set at large by the principal's breach.

If the contract does not contain a clause entitling a contractor to an extension of time where the principle breaches the contract, the prevention principle will apply where the principal causes actual delay.

The Court added that the impact of the principals alleged delaying action must be assessed as only significant delays will allow the contractor to rely on the prevention principle.

***PENINSULA BALMAIN PTY LTD V
ABIGROUP CONTRACTORS PTY LTD
(2002) 18 BCL 322***

The contract *Peninsula Balmain* gave the Superintendent the discretion to award an extension of time even if the contractor did not make an application within the prescribed time period. Such circumstances arose and the Court stated that the prevention principle did not apply under this contract as the

superintendent is required to award an extension of time which is due and the contractor would have been entitled to an extension of time for the principal's breach if requested within that time period.

HERVEY BAY (JV) PTY LTD V CIVIL MINING AND CONSTRUCTIONS PTY LTD (2010) 26 BCL 130 ('HERVEY BAY')

In this *Hervey Bay* the contract contained no direction giving the principal discretion to award an extension of time in favour of the contractor where an extension of time claim has not been made in time. The Court found that the Superintendent was not obliged to award an extension of time to a contractor who had not requested an extension of time within the time bar, regardless of the merits of the claim.

CMA ASSETS PTY LTD V JOHN HOLLAND PTY LTD [NO 6] [2015] WASC 217

More recently, John Holland subcontracted CMA Assets Pty Ltd ('CMA') for the demolition of a berth at Port Hedland. CMA encountered numerous difficulties during the demolition and the debris removal operation was far more expensive, time consuming and complicated than expected. In turn, CMA fell into delay but failed to submit notices of delay as required by the subcontract.

One issue in dispute before the Court related to who should bear the costs arising from the delays associated with the debris removal. The Court accepted CMA's claim that the delay was caused by the late movement of the shiploader, which was John Holland's responsibility. However, despite the delay was caused by John Holland, the Court stated

that CMA were not entitled to an extension of time due to its failure to comply with the harsh time bars in the subcontract. The subcontract required notices to be submitted within 7 days if CMA "is or will be delayed". Since notice was not provided within this time period, the Court denied CMA an extension of time and consequent delay costs.

TAKE AWAY POINT

Clearly contractors should endeavour to comply with the time bars for extension of time claims.

Contractors should also check whether contracts allow for a claim to be brought in the event of a breach by the principal. If no such clause exists and the principal delays the contractor, the time for completion will be set at large.

For more information

For more information on extensions of time and time bar contact our Principal Solicitor/ Director

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