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Prevention, Time-Bars and *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)*

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I. Introduction

Consider the situation where an Employer provides critical documentation late to the Contractor, relevantly causing a delay of two weeks. The Contractor has access to extension-of-time provisions under the contract, but only upon providing notice within 28 days. For whatever reason, whether forgetfulness or otherwise, the Contractor does not do so. Now, not only is the Contractor not entitled to an extension of time, but is also in breach of contract for completing the project later than the contractually stipulated date. The Employer rubs its hands with glee: the Contractor's failure to provide notice not only deprived the latter of its ability to claim costs for the Employer's delay; it also allows the Employer to be paid liquidated damages for the period of delay which the Employer caused.

This conclusion is based on the prevailing understanding of the prevention principle, as expressed by Lord Justice Jackson in *Multiplex*.[2]

In a different context, in 2016 the United Kingdom Supreme Court overturned the settled law of extended joint criminal enterprise for over 30 years.[3] In so doing, the Court held that the law had then taken a 'wrong turn' which now needed correction.[4] The purpose of this chapter is to examine whether the prevailing position in *Multiplex* should be reconsidered for situations arising at the intersection of the prevention principle and contractual notice and time-bar provisions.

[1] www.dougjones.info. I would like to thank the contributions of my legal assistants, Jonathon Hetherington and George Pasas, for their assistance in preparing this chapter.

[2] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] BLR 195, [2007] EWHC 447 (TCC), 111 Con LR 78 (*Multiplex*) (in obiter).

[3] *R v Jogee* [2016] UKSC 8.

[4] *R v Jogee* [2016] UKSC 8, [87].

I was delighted to accept the invitation to contribute to this *Festschrift* for Lord Justice Jackson. I join with the many other authors in this book in lauding his great contributions to the law. It would not be putting it too highly to say that he is one of the great construction law judges in England in recent decades, and his retirement will be sorely missed (though doubtless very well earned). On a personal level, I have known Lord Justice Jackson for many years, and he has always touched me with his character, his humour, his prodigious work ethic, and his integrity. This chapter proposes to continue the debate[5] on the prevention principle, which it is hoped will be welcomed by Jackson LJ in view of his renowned intellectual enthusiasm for the development of the law both in England and internationally.

The chapter is structured as follows:

1. First, I set out what is conventionally understood as the prevention principle, and attempt to crystallise the problem at hand: a party cannot prevent someone from meeting their obligations, and then punish them for not doing so;
2. Second, I summarise the two primary cases with which this chapter deals, namely *Gaymark*[6] and *Multiplex*;
3. Third, I analyse the arguments commonly used to support the view expressed by Jackson LJ, namely the role of notice provisions, the allocation of risk under contract, and the importance of certainty of contract. In doing so, I argue that a more internally consistent approach is to draw a distinction between delays caused by the Employer and delays caused by the Contractor; and
4. Fourth, I propose an alternative formulation which perhaps partly reconciles the presently differing positions advanced in this area. I suggest attaching the prevention principle to the 'remedy' of liquidated damages, and not to the 'obligation' of the Date for Practical Completion. Doing so would allow delay to be apportioned according to who was at fault, leading to a more intuitive and just outcome.

I now turn to a discussion of the prevention principle and its underlying purpose.

II. The Foundations – An Overview of the Prevention Principle

As presently formulated, the prevention principle states that if an Employer contributes or causes a delay to the Contractor then, absent any relevant extension of time being granted, the Employer is unable to claim liquidated damages for *any* delay.

[5] Begun in the 2008 TECBAR lecture: Doug Jones, 'Can Prevention Be Cured by Timebars' (2009) 26 *International Construction Law Review* 57.

[6] *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] NTSC 143 (Supreme Court of the Northern Territory).

Before proceeding to the meatier (and more controversial) section of analysis in this chapter, it is useful to say some words regarding the operation of this principle. Rather than pretend to be a comprehensive summary of all the nuances of this area, this section instead chooses to focus on two aspects of the prevention principle which are critical to note for the remainder of this chapter: first, the roots of the principle in considerations of justice and fairness and, secondly, the fact that the principle operates on the obligation of the date of completion, and not the remedy of liquidated damages.

A. Rationale for the Prevention Principle

Whilst the prevention principle is often considered to be unique to construction law, its origins derive from a more fundamental principle of contract law: a party may not rely upon the non-performance of another party to the contract where it is its own actions that have been the cause of this non-performance.[7] Effectively, if the Employer prevents the Contractor from completing on time, it is simultaneously prevented from suing the Contractor and claiming liquidated damages for that delay.

Thus, in *Multiplex*, Jackson J (correctly, with respect) described the essence of the prevention principle as:[8] 'the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing'.[9] This aligns with one of the earliest formulations of the prevention principle in *Holme v Guppy*:[10] 'there are clear authorities, 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'. The emergence and existence of this general position is not difficult to understand, and it is rooted in notions of fairness and justice.[11] Unfortunately, as will soon become apparent, it appears that these roots have been abandoned in recent judicial pronouncements.

[7] This principle is also reflected in international commercial law: see, eg, Article 7.1.2 UNIDROIT Principles of International Commercial Contracts 2010, which provides 'A party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event as to which the first party bears the risk'; see also *Perini Pacific Ltd v Greater Vancouver Sewerage and Drainage District* (1966) 57 DLR (2d) 307.

[8] *Multiplex* [2007] BLR 195, [47].

[9] *Multiplex* [2007] BLR 195, [47].

[10] *Holme v Guppy* (1838) 3 M&W 387, 389.

[11] *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391, 397; see also Crispin Winser, 'Shutting Pandora's Box, The Prevention Principle after Multiplex v Honeywell' (2007) 23 *Construction Law Journal* 512; Jeremy Coggins, 'The application of the prevention principle in Australia – part one' (2009) 21(3)–(4) *Australian Construction Law Bulletin* 30; Damien Cremean, Michael Whitten and Michael Sharkey, *Brooking on Building Contracts*, 5th edn (London, LexisNexis Butterworths, 2014) p 104.

B. Obligation and Not Remedy

Another interesting, and technical, aspect of the prevention principle is exactly *why* it operates to disable the liquidated damages clauses. It is necessary to explain this in some depth, not least because it provides a crucial springboard for the conclusion to this chapter.

The prevention principle operates in contracts where there is a date of completion specified. If the Employer relevantly delays the Contractor, this means that the contractually stipulated date of completion is no longer enforceable (for the reasons discussed above). As a consequence, all liquidated damages are similarly unenforceable, because there is no reference date of completion from which they are to be calculated.[12] Thus, the prevention principle effectively operates to set 'time at large' in the contract, meaning that the contractual date of completion is replaced with an obligation to complete within a 'reasonable time'.[13]

It is this 'peculiarity' which I suggest has led to the judicial disfavour into which the prevention principle has fallen.

Importantly, the principle does not operate to conclusively bar the Employer from remedy or redress. The Employer can still bring an action claiming that the Contractor finished even later than a reasonable time.[14] The consequence, however, is that the Employer must resort to the more challenging approach of proving loss and damages, from a date uncertain, in accordance with general common law rules, and not with the simplicity which liquidated damages offers in those common law jurisdictions where valid clauses are applied to the period of delay calculated by reference to the extension of time provisions in the contract.[15]

In order to avoid this outcome, the Employer can include extension-of-time provisions for Employer-caused delay within the contract. This allows the Employer to move the contractual date of completion to accommodate for the delays for which they are responsible and therefore claim liquidated damages for Contractor-caused delay occurring beyond this new date of completion.[16] Effectively, the preventing conduct of the Employer is 'cured' by its granting of additional time through creating a new contractual obligation from which time

[12] *Sattin v Poole* (1901), *Hudson's Building and Engineering Contracts*, 4th edn (London, Sweet & Maxwell, 1914) vol 2, 306, 310.

[13] *Gaymark* [1999] NTSC 143, [54]; *Multiplex* [2007] BLR 195, [48]; see also paras [5] and [103] of the same judgment; John Dorter and JJA Sharkey, *Building and Construction Contracts in Australia*, 2nd edn (Sydney, Law Book Co, 1990); see eg *Rapid Building Group Ltd v Ealing Family Housing Association* (1984) 29 BLR 5.

[14] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114, 121 ('Peak'); Julian Bailey, *Construction Law*, 2nd edn (London, *Informa*, 2016) p 1204.

[15] *Peak* (1970) 1 BLR 114, 121. But it must be remembered that in some common law jurisdictions such as India and Malaysia actual loss must still be proven even though liquidated damages are provided for (effectively as a limit on liability).

[16] Stephen Rae, 'Prevention and Damages: who takes the risk for employer delays?' (2006) 22 *Construction Law Journal* 307, 307; Ian Duncan Wallace, *Hudson's Building and Engineering Contracts*, 11th edn (London, Sweet & Maxwell, 1994) paragraph [10.0204].

can be measured. The mechanisms for granting extensions of time are thus of critical importance, and it is for this reason that the *Multiplex* judgment considered the construction of these terms, and how they are operated, in such depth.[17]

There are two further factors which make extension-of-time provisions essential for the Employer. The *first* is that the preventing conduct sufficient to invoke the principle does not need to be a breach of contract, but includes any conduct which prevents the Contractor from reaching the date of completion.[18] In practice, this means that even in contracts which provide for orders for variation and modification, these orders, if they cause delay, will be considered to be preventing conduct.[19] Thus, in *Multiplex*, directions and instructions given by Multiplex to Honeywell were part of the relevant delaying conduct. This delay, however, must actually occur.[20]

The *second*, and more important, factor is that the prevention principle does not distinguish between situations where it was *only* the Employer which caused delay, and situations where *both* the Employer and the Contractor caused delays.[21] The reason for this is that the courts cannot apportion delay,[22] meaning that regardless of how significant the Employer's actions were to the overall delay, liquidated damages cannot be claimed. For instance, if there is a delay of 12 weeks for which the Employer was only responsible for one week of delay, then, in the absence of an extension-of-time provision, the prevention principle prevents the Employer from claiming liquidated damages for any of the 12 weeks.

These conclusions follow from the fact that the prevention principle attaches to the obligation of the date of completion, and not the remedy of liquidated damages.[23] Consequently, any period of Employer-caused delay, even if small, will make the contractually stipulated date unenforceable absent any appropriate extension of time.

At the outset, it can be seen that this position is unsatisfactory and indeed anomalous, and it would be intuitively preferable to allow courts to apportion liability for different causes of delay, in a similar manner to how apportionment

[17] *Multiplex* [2007] BLR 195, [16]–[28].

[18] Ian Duncan Wallace, *Hudson's Building and Engineering Contracts*, 11th edn (London, Sweet & Maxwell, 1994) (vol 2) paragraph [10.0204]; *Dodd v Charlton* [1897] 1 QB 562; *Percy Bilton Ltd v Greater London Council* [1982] 1 WLR 794, 801; *SBS International Pty Ltd v Venuti Nominees Pty Ltd* [2004] SASC 151, [12]; *Multiplex* [2007] BLR 195, [48].

[19] *SMK Cabinets v Hili Modern Electronics Pty Ltd* [1984] VR 391.

[20] *Turner Coporation Ltd (in prov liq) v Co-Ordinated Industries Pty Ltd* (1995) 11 *Building and Construction Law Journal* (*BCL*) 202, 217; Julian Bailey, *Construction Law*, 2nd edn (London, *Informa*, 2016) p 1206.

[21] *Peak Construction (Liverpool) Limited v McKinney Foundations Limited* (1970) 1 BLR 111, 121: See also *SMK Cabinets v Hili Modern Electronics Pty Ltd* [1984] VR 391, 398–400.

[22] *Rapid Building Group Ltd v Ealing Family Housing Association Ltd* (1984) 29 BLR 5; See also Julian Bailey, *Construction Law*, 2nd edn (London, *Informa*, 2016) p 1204.

[23] As I noted in my earlier article the link of authority traced by Brooking J in *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391, 398 clearly indicates that the principle attaches to the obligation: see Doug Jones, 'Can Prevention Be Cured by Timebars' (2009) 26 *International Construction Law Review* 57, 72.

is carried out in the area of contributory negligence. This is not a revolutionary concept; the idea of 'time at large' and an obligation-focused approach is one exclusive to English law and its descendants. Indeed, civil law traditions have no issues, either conceptual or practical, with apportioning liability for delay caused by Employers and Contractors. I return to this later in this chapter.

III. A Fork in the Road – '*Gaymark v Multiplex*'

With these preliminary remarks in mind, I will consider the two titular cases, that of *Gaymark* in the Northern Territory Supreme Court, and that of *Multiplex*, in the English High Court. What will become immediately apparent is that, for all its hype, the ratio of *Gaymark* is quite narrow and turns on some very unique adjustments to a standard form contract.[24] Consequently, this chapter does more than seek to justify *Gaymark* on its facts; it also seeks to justify the proposition for which it is often cited. Namely, that the prevention principle remains enlivened in cases of Employer-caused delay, even where a Contractor has failed to comply with notice provisions which are conditions precedent to the granting of an extension of time.

Multiplex disagrees with this position, with Jackson LJ relevantly opining that 'if the facts are that it was possible to comply with clause 11.1.3 [the extension-of-time clause] but Honeywell simply failed to do so (whether or not deliberately), then those facts do not set time at large'.[25] The disagreement thus being squarely identified, it is necessary to note that the typically persuasively judgment of Jackson LJ also deals with a number of issues relating to the prevention principle, including arguments regarding the construction of extension-of-time clauses, and in what circumstances they become inoperable. In light of the scope of this chapter being limited to the death or otherwise of *Gaymark*, it leaves for another day discussion of those issues to the extent that they are not directly involved in the present analysis.

A. The *Gaymark* Decision

Gaymark v Walter Constructions considered a request for leave to appeal from an arbitration pursuant to section 38 of the Commercial Arbitration Act. The arbitration involved a dispute between the Contractor, Walter Construction Group Ltd (formerly known as Concrete Constructions Group Ltd) and the Employers, Gaymark Investments Pty Ltd and Darwin Central Nominees Pty Ltd, as part of the construction of the Darwin Central Hotel.[26] The arbitrator was the highly

[24] *Gaymark* [1999] NTSC 143, [68]–[71].
[25] *Multiplex* [2007] BLR 195, [105].
[26] *Gaymark* [1999] NTSC 143, [2].

respected engineer arbitrator Mr Max McDougall (father of Justice McDougall of the NSW Supreme Court). The arbitrator found that Gaymark had delayed Concrete Constructions by 77 days, and that these delays 'constituted "acts of prevention" by Gaymark with the result that there was no date for practical completion and Concrete Constructions was then obliged to complete with a reasonable time (which the arbitrator found that it in fact did)'.[27]

Importantly, and contentiously, the arbitrator found as a matter of fact that Concrete Constructions had failed to meet the appropriate notice requirements requisite to an extension of time,[28] but still held that the prevention principle was enlivened in any event.

In an appeal to the Northern Territory Supreme Court, Gaymark did not contest the arbitrator's findings on the facts but appealed the arbitrator's application of the prevention principle. The contract in question was a standard form public sector building contract – NPWC Edition 3 (1981), which had been significantly amended.[29] To understand this decision, it is unfortunately necessary to identify some provisions of the contract:

1. Clause 35.5 provided for the payment of liquidated damages in the sum of AUS$6,500 per calendar day.[30]
2. Clause 35.2 provided that the contractor was obliged to complete the works by a stipulated date of completion, or any extended date as allowed by the Superintendent.[31]
3. In the standard form template, clause 35.4 provided that where a Contractor notified of a claim for delay the Superintendent was entitled to grant extensions of time. It also provided that the Superintendent could grant extensions of time at will, regardless of any notice provided by the Contractor. However, in the contract in question, clause 35.4 was replaced by a new clause 19 which automatically entitled the Contractor to extensions of time if they gave notice, and deleted the unilateral power of the Superintendent to grant an extension.[32]

The arbitrator held that he could interpret the contract in three ways:

1. That a term could be implied, similar to that of the standard form 35.4 that allowed the employer to unilaterally provide an extension of time. The arbitrator noted that this would be difficult given the conscious efforts to replace clause 35.4;[33]

[27] ibid [50].
[28] ibid [49].
[29] ibid [47].
[30] ibid [48].
[31] ibid [56].
[32] ibid [59].
[33] ibid [62].

2. That a failure by the Contractor to comply with clause 19 has exposed them to the risk of liquidated damages. The arbitrator noted that this led to the absurd result that not only did the Employer avoid the Contractor's costs of delay but also entitled them to liquidated damages; or
3. That by amending the contract the Employer had assumed the risk that it would cause a delay and that the Contractor would not comply with the notice requirements, resulting in time being set at large.

The arbitrator adopted the third option, holding that an intention that the Employer would bear the risk was clearly manifest. Bailey J concurred with this reasoning and in the ratio of *Gaymark* held:

> 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 of SC19.1.[34]

This conclusion was clearly correct in the absence of the unilateral power to extend time. In my view, the answer should remain the same even if such a power were there and unexercised.

B. The *Multiplex* Decision

Eight years later in the English High Court, Mr Justice Jackson (as he then was) in *Multiplex* offered a critique of *Gaymark*, stating that, 'whatever may be the law of the Northern Territory of Australia, I have considerable doubt that *Gaymark* represents the law of England.'[35]

Multiplex v Honeywell concerned the construction of the new Wembley Stadium. Honeywell contended that in its sub-contract with Multiplex, Multiplex's delays had set time at large. At the outset, it is worth noting that Jackson J concluded that the factual circumstances were distinct from those of *Gaymark*, as unlike in *Gaymark*, non-compliance with the notice clause did not expose the Contractor to automatic liability. This was because liquidated damages could only be recovered for the failure of the sub-Contractor, which Multiplex, as the perpetrator of the alleged delay, was not.[36]

In obiter, Jackson J canvassed several then-recent authorities,[37] including *Gaymark*, and dismissed the appellant's attempts to set time at large, stating that notice provisions 'serve a valuable purpose' and were necessary to allow matters to

[34] ibid [71].
[35] *Multiplex* [2007] BLR 195, [103].
[36] ibid [104].
[37] Jackson J particularly focused upon the two *Turner* decisions: *Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel* (1997) 13 BCL 378; and *Turner Corporation Ltd (in provisional liquidation) v Coordinated Industries Pty Ltd* (1995) 11 BCL 202.

be investigated.[38] He also noted with concern that if *Gaymark* were good law, the Contractor would be able to disregard notice provisions with impunity.[39]

This critique was later endorsed by HHJ Stephen Davies in *Steria Ltd v Sigma Wireless Communications Ltd*, in which it was stated:[40]

> Although on the facts of that case Jackson J did not, due to the particular wording of the extension of time and liquidated damages clauses employed, need to express a final decision on the point, nonetheless I gratefully adopt his analysis and agree with his preliminary conclusion. Generally one can see the commercial absurdity of an argument which would result in the Contractor being better off by deliberately failing to comply with the notice provision.

IV. A Change in Direction – Returning to First Principles

Recall that the conventional position, which Jackson J adopted, is that where a Contractor fails to comply with notice provisions which are conditions precedent to an extension of time, the Employer may still claim liquidated damages. This is irrespective of whether the relevant delay was caused by the Contractor, by a neutral factor, or by the Employer. At this juncture, it is useful to reflect on the example given in the introduction. One cannot help but feel a sense of disquiet about forcing a Contractor to pay compensation for a delay caused by the Employer. The simple solution to this problem is to draw a bright-line distinction between Contractor-caused delay, neutral delay, and Employer-caused delay.

This part of the chapter seeks to establish the validity of this distinction, as one that is in conformity with both the rationale for the prevention principle, and broader policies of contract law. It does so through critically examining the traditional rationales for the conventional position.

It is instructive to set out the relevant paragraph justifying Jackson J's view in *Multiplex*:

> 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.[41]

It will be seen that this paragraph reflects three traditional underlying themes: first, the issue of 'causation' and its relationship with notice provisions; secondly,

[38] *Multiplex* [2007] BLR 195, [103].
[39] ibid.
[40] *Steria Ltd v Sigma Wireless Communications Ltd* [2007] EWHC 3454 (TCC), [95].
[41] *Multiplex* [2007] BLR 195, [103].

the supposed intentions of the parties in utilising extension-of-time principles; and thirdly, the desirability of certainty in contractual relations. I suggest that none of these provides a compelling justification for disabling the operation of the prevention principle in the case of Employer-caused delay.

A. The 'Cause' of the Delay?

If the Contractor fails to meet its obligations, for example through delayed mobilisation or the mobilisation of insufficient labour, then it is the Contractor who has caused the delay. Similarly, in cases of 'neutral' delays, such as weather events, unless the contract allows the Contractor relief, it will bear the risk of delays thereby arising. The relevant issue relates to delays caused by the Employer, for example through giving a variation order or providing insufficient site access, which are not the subject of extensions of time.

The judicial view with which I join issue is that if a Contractor fails to comply with the notice requirement, it is *this* failure which is the proximate cause of any delay. Consequently, the Employer's conduct is no longer relevant, and thus there is nothing for the prevention principle to attach itself to. I suggest that this view is in error through ascribing to notice provisions a greater power than they possess, and ignoring the original wrongdoing by the Employer. Before demonstrating this, however, it is necessary to discuss what this position is.

B. Notice Failure as Causation?

The starting point is the obiter of Justice Cole in *Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd*, where his Honour states: 'A party to a contract cannot rely upon the preventing conduct of the other where it *failed to exercise a contractual right which would have negated the preventing conduct*' (emphasis added).[42]

To understand this argument, it is necessary to first consider the importance of notice provisions with regards to contract management in the construction world. These provisions allow the Contractor to inform the Employer of the effects of its actions, as well as any associated delay and financial repercussions.[43] In his oft-cited article (including several citations in *Multiplex*),[44] the late Professor Wallace emphasises that Employer-caused delay commonly manifests itself in orders for

[42] *Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd* (1997) 13 BCL 378, 384. As Stephen Rae notes, this passage is merely obiter dicta, as compliance with notice provisions was not in issue in *Austotel*: Stephen Rae, 'Prevention and Damages: Who Takes the Risk for Employer Delays?' (2006) 22 *Construction Law Journal* 311–12.

[43] *Multiplex* [2007] BLR 195, [103]; *Zhoushan Jinhaiwan Shipyard Co Ltd v Golden Exquisite Inc* [2014] EWHC 4050 (Comm), [54].

[44] *Multiplex* [2007] BLR 195, [100].

variation and modification.[45] He submits that, in the majority of these cases, the Contractor will be better positioned to determine whether an Employer's action impacts upon the critical path and will cause delay. Take, for instance, an Employer's variation of the positioning of a set of electrical wires. There the Contractor will likely have unique knowledge of changed material sourcing requirements, labour availability and on-site obstacles impacting on the critical path. Notice provisions thus provide an opportunity for dialogue between the parties to determine the scale of delay and whether it should be incurred or can be mitigated or avoided.

Thus, Jackson J writes of the opportunity given to the Employer to withdraw instructions.[46] Crispin Winser notes that such 'early warning' as a form of dispute avoidance has become an increasingly featured focus of standard form contracts, particularly in the New Engineering Contract (NEC).[47] Further, several commentators have also suggested that notice provisions offer a valuable incentive to prevent meritless claims, contributing to their dispute avoidance value.[48]

It is for this reason that it is often argued that a Contractor's failure to comply with notice provisions provides the cause of the delay, and not the Employer's actions themselves. In *Multiplex*, therefore, the implied position would be that it was the failure of Honeywell to provide notice of delay and not Multiplex's variation of the communication systems. This position received some endorsement in the New South Wales Court of Appeal in *Peninsula Balmain v Abrigroup Contractors*, where Hodgson JA appeared to refer positively to this line of reasoning and Professor Wallace's views.[49]

C. Response

The approach to causation suffers two major defects.

First, it can be noted that it deals with a very favourable example. Professor Wallace, for example, considers the plight of the Employer who gives instructions in blissful ignorance of any delay caused, whilst the Contractor has knowledge of this.[50] Although on its face this situation has appeal, upon deeper inspection it raises some challenging questions. As Stephen Rae highlights, for example, what

[45] Ian Duncan Wallace, 'Prevention and Liquidated Damages: A Theory too Far' (2002) 18 *Building and Construction Law Journal* 82.

[46] *Multiplex* [2007] BLR 195, [101]–[103].

[47] Crispin Winser, 'Shutting Pandora's Box: The Prevention Principle after Multiplex v Honeywell' (2007) 23 *Construction Law Journal* 511.

[48] For a detailed discussion of this question: See E Baker, J Bremen and A Lavers, 'The Development of the Prevention Principle in English and Australian Jurisdictions' [2005] *International Construction Law Review* 198.

[49] *Peninsula Balmain Pty Limited v Abigroup Contractors Pty Limited* [2002] NSWCA 211, (2002) 18 BCL 322. The position was also later endorsed: see *Beckhaus v Brewarrina Shire Council (No 2)* [2004] NSWSC 1160, [34].

[50] Ian Duncan Wallace, 'Prevention and Liquidated Damages: A Theory too Far' (2002) 18 *Building and Construction Law Journal* 82.

happens in the situation where an Employer is aware of the ramifications of their actions.[51] Should they still be entitled to rely upon a failure of compliance with the notice provisions to be paid for their own preventing conduct?

Introducing an element of knowledge into this equation is not the solution for two reasons.[52] First, on a practical level, the prevention principle is too blunt an instrument to engage effectively with these challenging factual questions. Second, on a legal level, the prevention principle is just that – to do with *prevention*. Its underlying rationale, as previously set out, is to stop the Employer in preventing the Contractor with one hand, and then punishing it with the other. Questions of knowledge or fault are not relevant in this respect. Thus, the burden is not placed on the Contractor to establish a malicious breach of contract, or to establish knowledge on behalf of the Employer. To understand why this is the case, it is necessary to consider in a little more depth questions of risk allocation under construction contracts, which I discuss later in this chapter.

In this respect, it is challenging to observe Jackson J's reasoning where, on the one hand, he affirms the prevention principle as extending to all cases of prevention (and not just culpable prevention), and on the other he denies the application of the principle in cases where the Contractor did not give notice even if it was prevented.[53]

Second, and more troubling, the conventional approach subverts ordinary and accepted principles of causation. Recalling again the distinction between Employer-caused delay and Contractor-caused delay, the conventional approach is to treat even Employer-caused delay as a result of the Contractor's failure to provide notice.[54] This is surely erroneous: any relevant delay was set into motion (and hence caused), by the Employer, not the Contractor. At best, the Contractor who failed to give notice could be considered to have not stopped the delay, but in no way was it causative of it.

Further, it is inconsistent for it to be accepted, as a matter of law, that delay partly caused by the Contractor and partly caused by the Employer still permits the use of the principle of prevention, whereas delay entirely caused by the Employer, and allowed to continue by the Contractor, bars its use altogether. Even if a causation argument was to be attempted in this regard, at best the Contractor in the latter example could be considered to be partially causing the delay, and hence the rationale for not applying the principle as normal is by no means clear.

[51] Stephen Rae, 'Prevention and Damages: Who Takes the Risk for Employer Delays' (2006) 22 *Construction Law Journal* 307.

[52] Against: Morris Ross, 'The Status of the Prevention Principle: good from far, but far from good?' (2011) 27 *Construction Law Journal* 15.

[53] *Multiplex* [2007] BLR 195, [47]–[48], [103].

[54] *Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd* (1997) 13 BCL 378, 384; Ian Duncan Wallace, *Hudson's Building and Engineering Contracts*, 11th edn, 1st Supp (London, Sweet & Maxwell, 2004) paragraph [10.026]; *Hsin Chong Construction (Asia) Ltd v Henble* [2006] HKCFI 965, [132]–[135].

V. Parties' Intentions and Risk Allocation

Turning to the second key issue, in any construction contract there is considerable uncertainty and risk which must be contractually allocated. These include matters within the control of one party (such as the Contractor's employees), or outside the control of either party (such as weather events). Accordingly, it makes sense to speak of Contractor-caused delay, neutrally-caused delay, and Employer-caused delay. It is uncontroversial that a Contractor should accept the risk of any delay that it causes, or of any neutral delay, if that has been so agreed. What is more contentious, in my view, is the situation of Employer-caused delay.

As previously noted, in the case of a combination of Employer- and Contractor-caused delay, the total delay will not be apportioned and the prevention principle will operate to set time at large and negate all claims for liquidated damages.[55] To avoid this blanket effect of the prevention principle, extension-of-time clauses are included in contracts to allow the amendment of the date of completion to accommodate Employer-caused delay, and thus allow the Employer to claim liquidated damages from the new date of completion. However, consider again the circumstance in the Introduction. The Employer is the cause of any relevant delay. The Contractor has failed to give notice. The relevant question is to whom this risk has been allocated to under the contract. In my view, most of the judicial comments, including those in *Multiplex*, unfortunately do not engage squarely with this question.

A. Extension-of-Time Provisions and the Prevention Principle

The proposition of concern is that the inclusion of extension-of-time clauses, expressly contemplating Employer-caused delay, displaces the prevention principle. The argument goes as follows: the parties have carefully negotiated and expressly agreed on extension-of-time clauses, along with associated notice provisions and time-bars. Consequently, there is no scope for the prevention principle to operate, as it has been entirely subsumed by the parties' agreement. This perspective appears to have been endorsed in *Turner Corporation v Coordinated Industries*, which states that where an extension-of-time clause is present, 'there is no room for the prevention principle to operate.'[56] Professor Wallace agrees, stating:

> [T]here is no reason to doubt that a ground of permitted extension of time which expressly includes acts of prevention or breach by the Employer will successfully avoid

[55] *CMA Assets Pty Ltd v John Holland Pty Ltd* [2015] WASC 217, [864]; *Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd (No 2)* [2012] WASCA 53, [49].

[56] *Turner Corp Ltd (in liq) v Co-ordinated Industries Pty Ltd* (1994) 11 BCL 202, 217.

> application of the *Peak* prevention principle, and so preserve the contract liquidated damages machinery intact.[57]

For proponents of this view, the presence of an extension-of-time clause for Employer-caused delay therefore sufficiently indicates a displacement of the prevention principle for such delay. Such a finding was implicit in *Multiplex*.

B. Response

This approach suffers from a critical flaw, which was expressed by Chitty LJ in *Dodd v Churton*: '[It would] require very clear language to shew that a man has undertaken a responsibility which very few men would undertake with their eyes open'. The conventional position leads to a Contractor *paying damages* for a period of delay which was caused by the Employer. Phrased another way, the Employer is allowed to directly financially benefit from its act of prevention. Or a third way, the risk of the Employer's conduct has been shifted absolutely to the Contractor.

This is an extraordinary position, and one which is not only inconsistent with the rationale of the prevention principle, but contrary to ordinary norms of contractual interpretation. At the outset, it can be readily accepted that this result can be achieved *if the Parties so desire*. But in order to contract out of the prevention principle to this degree, and to achieve such an astonishing displacement of risk from the Employer to the Contractor, very clear language to this effect is required. The language in each of the established cases does not reach this level. The simplest way to see that fact is to imagine the situation where a provision explicitly wrote:

> The Contractor assumes the risk and liability for all delay caused by the Employer, and agrees to pay liquidated damages for such delay caused by the Employer, except in circumstances where it applies for an extension of time in accordance with the notice requirements and time-bars specified in the Contract.

I would postulate that it would be a rare Contractor who would accept such a provision. Consequently, there are conceptual difficulties in effectively implying such a term in the context of ordinary extension-of-time and notice clauses.

I do not wish, by this, to imply that notice and time-bar provisions are of limited importance. Clearly they are, as Jackson J correctly recognised.[58] They are just not of such importance that a failure to comply with them leads to the absolute imposition of liability for consequences of the other party's behaviour.

The solution is to more clearly draw a distinction between Employer-caused delay and Contractor-caused delay. In *Multiplex*, Jackson J held that if *Gaymark* was good law, a Contractor could disregard with impunity any notice provision.

[57] Ian D Wallace, 'Prevention and Liquidated Damages: A theory too Far?' (2002) 18 *Building and Construction Law Journal* 82.

[58] *Multiplex* [2007] BLR 195, [100], [103].

However, this does not pay appropriate regard to this distinction. If the delay is caused by neutral events for which the contract gives the Contractor relief, then non-compliance with a notice provision means that it will not receive an extensive of time, placing it at peril of a liquidated damages claim. It is only in the instance of Employer-caused delay that a Contractor can achieve the same result without notice. However, Jackson J does not explain why that result is unsatisfactory, particularly when it is considered that his conclusion leads to the Contractor being entirely liable for delay caused by the Employer, in the absence of an express acceptance of that risk.

As clauses which make no provision for an extension of time based on an Employer's delay require clear words to make the Contractor liable (in keeping with the principle of 'fairness'), this should also be true for a time-bar which wipes out an Employer's capacity to excise from periods of delay those of its own making.

Instead, the better position is that each party is responsible for its own conduct, absent some clear provision, or positive action, to the contrary.

VI. Certainty in Contractual Relationships

Finally, it is apposite to consider the issue of contractual certainty. Although certainty is a powerful virtue in the commercial world, it is not to be pursued at any and all costs.

A. Certainty View

This approach, namely that notice provisions and time-bars are effective even in the case of Employer-caused delay, is said to lead to greater contractual certainty. This is because, if it were otherwise, a Contractor could disregard the notice provisions of a contract with impunity, setting 'time at large' at will.[59] The application of the prevention principle has therefore been presented as an escape hatch through which a Contractor can quickly duck to avoid the date of completion.[60] Julian Bailey, for example, notes that if a breach of a condition precedent could set time at large it would subvert 'the utility and purpose of the Contractor being expressly required to follow the relevant mechanism for an extension of time.'[61]

In the English decision of *Steria Ltd v Sigma Wireless Communications Ltd*, referring to *Multiplex*, *Gaymark* was said to represent the commercial absurdity that a Contractor could benefit by disregarding the notice machinery.[62] Further

[59] *Multiplex* [2007] BLR 195, [103].

[60] Crispin Winser, 'Shutting Pandora's Box: The Prevention Principle after *Multiplex v Honeywell*' (2007) 23 *Construction Law Journal* 511, 512.

[61] Julian Bailey, *Construction Law*, 2nd edn (London, *Informa*, 2016) p 1203.

[62] *Steria Ltd v Sigma Wireless Communications Ltd* [2008] BLR 79, [95].

in *Multiplex*, Jackson J looked towards the case of *City Inn v Shepard Construction* where it was held that where a notice provision is included a 'contractor could not obtain an extension of time if it did not comply with that provision.'[63]

The argument is therefore that the preferred and certain position is that the risk of Employer-caused delay sits with the Contractor until such time that it utilises its contractual rights. While it is acknowledged that this can cause the seemingly unconscionable result that an Employer benefits from its own wrong, Jeremy Coggins finds that this is the 'lesser of two evils' and is to be preferred over depriving the Employer of a remedy in a case of Contractor non-compliance with the condition precedent.[64]

It is also often noted that the roots of the prevention principle derive from the courts' history of suspicion of liquidated damages. While such a position did exist, courts certainly no longer hold this attitude now, with several contemporary cases preserving liquidated damages.[65] Critics of *Gaymark* therefore often posit that the decision to preclude liquidated damages and require the Employer to seek damages reflects an antiquated and lingering distrust of agreements for liquidated damages.[66] They submit that liquidated damages should rather be lauded in providing commercial and case management value and that courts should be slower to intervene in valid liquidated damages agreements.[67]

B. Response

It can be recognised, of course, that certainty in contracts is an important virtue. However, once again, the arguments logically suffer from an erroneous conflation of Employer-caused delay with Contractor-caused delay. Consider the 'commercial absurdity' argument raised by HHJ Stephen Davies in *Steria*,[68] whereby a Contractor is placed in a better position through failing to comply with a notice provision. This proposition can surely be accepted with regard to neutral delays, as an extension of time gives the Contractor an *extra right which it did not otherwise have*, namely, the right to complete the Contract later than originally promised. Hence, in order to obtain that additional right, the Contractor should comply with the contractual terms. If it does not, it can be considered to have waived that right. It is unclear, however, why that proposition applies with the same force to

[63] *City Inn Limited v Shepherd Construction Limited* [2003] SLT 885; *Multiplex* [2007] BLR 195, [102].

[64] Jeremy Coggins, 'The Application of the Prevention Principle in Australia – Part 2' (2009) 21(5) *Australian Construction Law Bulletin* 45.

[65] Crispin Winser, 'Shutting Pandora's Box: The Prevention Principle after *Multiplex v Honeywell*' (2007) 23 *Construction Law Journal* 511; *Phillips Hong Kong v Att-Gen of Hong Kong* (1993) 61 BLR 41.

[66] Crispin Winser, 'Shutting Pandora's Box: The Prevention Principle after *Multiplex v Honeywell*' (2007) 23 *Construction Law Journal* 511.

[67] ibid.

[68] *Steria Ltd v Sigma Wireless Communications Ltd* [2008] BLR 79, [95].

Employer-caused delay. If non-compliance with a notice provision defeats a claim for prevention, this effectively means that non-compliance with the notice provision operates so as to place all of the Employer-caused risk on the Contractor. Adopting the words of HHJ Stephen Davies, it could well be said that it is, instead, this position which is commercially absurd.[69]

Instead, the virtue of contractual certainty can be equally well achieved by leaving responsibility where it was created, and imposing an obligation on *that* party to take some consequential action. So, for the situation of neutral delay, it is for the Contractor to establish an entitlement to an extension of time, and its failure to do so is at its own peril. Likewise, for the situation of Employer-caused delay, it is for the Employer to grant an extension of time and its failure to do so is likewise at its own peril. For this reason, if the Employer wishes to issue a variation order and request extra works, it should ensure that there will either be no delay, or that it grants an appropriate extension as a result. This is not a draconian result. The commercial reality is that most Employers are highly sophisticated, and should be aware of what is happening on their projects.

Finally, the criticism with regards to changing perceptions of liquidated damages lacks merit. At no point in *Gaymark* does Justice Bailey evince a presumption against the enforceability of liquidated damages.

VII. Embarking on a Future Journey?

For the reasons set out in the previous section, it is clear that the current development of the law pays inadequate regard to the underlying policy of the prevention principle, and its role in ensuring fairness. In my view, there are two responses to this situation.

The first, and less satisfactory, response is to retain the current focus of the prevention principle on the obligation of the date of completion. In order to alleviate the injustice of forcing a Contractor to pay damages for delay caused by an Employer, appropriate regard should be paid to the distinction between Contractor-caused delay and Employer-caused delay. This regard would have a *Gaymark*-like effect, allowing Employer-caused delay to still enliven the prevention principle even in the absence of compliance with notice conditions precedent.

The reason why this is not a satisfactory solution is evident from the tensions underlying the issues above. It is not satisfactory that a Contractor can cause multiple weeks of delay, and yet avoid liquidated damages simply because the Employer also caused some of the delay. The adage 'two wrongs don't make a right' immediately springs to mind. Another source of dissatisfaction is the result of

[69] ibid.

the prevention principle's inherent bluntness. The matter is phrased most clearly by Winser:[70]

> If the employer obstructs the contractor, yet the contractor fails to apply for an extension of time, there is something unconscionable in the employer levying liquidated damages for the consequent delay. Yet if the employer entirely unknowingly causes delay, what fairness is there in the contractor sitting back, failing to apply for an extension of time in accordance with a mechanism he agreed to, and then invoking the prevention principle to avoid the liability to pay liquidated damages.

A. A Logical Approach

The solution is to change the focus on the obligation, and instead turn attention to the remedy of liquidated damages. In circumstances where the Employer caused four weeks of delay, and the Contractor caused three weeks, the Employer is simply prevented from claiming liquidated damages for the four weeks which it caused. Matthew Bell has advocated for such a development, stating:

> It is submitted that such a middle path may be found in the ability to apportion responsibility for delay in calculating the liquidated damages payable where an act of prevention has rendered time 'at large' under a building contract.[71]

This position is more in accordance with the fairness underlying the prevention principle in any event, and leads to a more intuitive outcome.

This is not as revolutionary as it initially appears, or as has been described in the literature.[72] Happily, such an approach will likely see universal acceptance, as it fairly apportions liability for wrongdoing, and thus any difference of opinion between myself and Jackson LJ will vanish. As long as a contract is drafted with a provision which allows an arbitral tribunal or court to retrospectively exercise a power for extension of time upon proven grounds, and obliges its exercise in cases of Employer-caused delay, the same result would be achieved. This is because a court or arbitrator could simply step in the shoes of the relevant decision-maker, extend the date of completion to take into account all of the Employer-caused delay, and then hold the Contractor liable for the residual delay. Such an approach also avoids difficult questions of the burden and onus of proof, as the contract would specifically allocate these.

[70] Crispin Winser, 'Shutting Pandora's Box: The Prevention Principle after *Multiplex v Honeywell*' (2007) 23 *Construction Law Journal* 511.

[71] Matthew Bell, 'Scaling the Peak: The Prevention Principle in Australian Construction Contracting' (2006) 23 *International Construction Law Review* 318, 335, 354.

[72] Jeremy Coggins, 'The Application of the Prevention Principle in Australia – Part 2' (2009) 21(5) *Australian Construction Law Bulletin* 45, 49; Matthew Bell, 'Scaling the Peak: The Prevention Principle in Australian Construction Contracting' (2006) 23 *International Construction Law Review* 318, 335, 354.

B. Parallels in Civil Systems

This approach would have the same practical effect as that contained within Article 7.4.13, of the UNIDROIT Principles, which allows for the re-adjustment of damages in light of the actual damage suffered and therefore would, in cases of concurrent delay, allow liquidated damages to be apportioned. Article 7.4.13 provides that:

> (2) However, notwithstanding any agreement to the contrary the specified sum *may be reduced to a reasonable amount* where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances (emphasis added).[73]

While this does seem an unusual step from the 'traditional' common law view, such an apportionment of damages is a common feature in civil law systems: present in many legal systems, including China, South Korea and France.[74] For instance, in French Law, Article 1147 of the French Civil Code provides that:[75]

> A debtor shall be ordered to pay damages, if appropriate, either by reason of the non-performance of that obligation, or by reason of delay in performance, in circumstances where the non-performance does not result from an external cause which is non-attributable to the debtor, so long as there is no lack of good faith on his part.

French case law has interpreted 'external causes' to include Employer acts of delay. Article 1147 therefore operates to preclude recovery of damages to the extent that the owner was responsible for the delay, tying the preclusion of damages to the remedy rather than the date of completion.

Chinese law reaches a similar conclusion, albeit adopting a different approach. In the People's Republic of China Contract Law, Article 114 provides:[76]

> If the stipulated penalty for breach of contract is lower than the loss caused by the breach, the party concerned may apply to a people's court or an arbitration institution for an increase. If the stipulated penalty for breach of contract is excessively higher than the loss caused by the breach, the party concerned may apply to a people's court or an arbitration institution for an appropriate reduction.

While the reference to 'penalties' here will perplex some readers from common law systems, the phrase, in this context, should simply be taken to equate to 'liquidated damages'. Thus, from the provision, in cases of concurrent delay, recourse may be had to the actual loss suffered by each party when evaluating the sum of

[73] UNIDROIT, UNIDROIT Principles of International Commercial Contracts (2010) art 7.4.13.

[74] Doug Jones, 'The Prevention Principle Across the Common and Civil Law Divide and the Maritime Construction Industry' (Conference Paper, Nineteenth International Congress of Maritime Arbitrators Conference, 2015).

[75] France Civil Code, art 1146.

[76] Contract Law of the People's Republic of China (Adopted at the Second Session of the Ninth National People's Congress on 15 March 1999 and promulgated by Order No 15 of the President of the People's Republic of China on 15 March 1999).

liquidated damages. This will potentially facilitate an apportionment of damages that reflects the Employer's contribution to the delay. This conclusion was reflected in the case of *Baiti Real Estate v Zhao et al* (2011) which considered an appeal of an arbitral award, relying upon Article 114 and the principle of good faith. The Court found that as actual losses could not be proved, a reduction in liquidated damages would be appropriate.[77]

Thus, whilst differences do exist, the civil law approach generally resists the common law blanket application of the prevention principle in setting 'time at large'. Rather, it presents a more nuanced approach to the norm Jackson J recounted,[78] that a promisee cannot require performance from a promiser that it itself has prevented. By rendering liquidated damages referrable to the losses that have actually been suffered, the civil law effectively allows an apportionment of liquidated damages. While outlandish to those practising within the common law, it is a proposition not to be lightly dismissed.

VIII. Conclusion

The law surrounding the prevention principle has evolved significantly since its early-nineteenth-century roots. At times, however, it is useful to step back and consider the issue from first-principles. This chapter has sought to argue that, in cases of Employer-caused delay, greater regard needs to be paid to principles of risk allocation in order to not hold the Contractor liable for risks that it did not contractually assume.

From a legal perspective, it is instructive to reflect on the enduring words of Lord Justice Salmon in *Peak*, where his Lordship said

> 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.[79]

Like his Lordship, I struggle to see how a delay caused by the Employer somehow becomes the entire responsibility of the Contractor simply because of a failure to comply with a notice provision. For this reason, in my view, the law surrounding the prevention principle has long journeyed on a dangerous path away from its origins in principles of fairness and justice. For all the criticisms levelled at *Gaymark*, it remains the only high-profile decision to successfully balance the

[77] *Baiti Real Estate v Zhao et al* [2011] Huaian IPC, 28 March 2011.

[78] *Multiplex* [2007] BLR 195, [47]; See also UNIDROIT, UNIDROIT Principles of International Commercial Contracts (2010) art 7.1.2.

[79] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114, 121.

difficult questions that these cases raise. It is time for the courts to now take a stand and follow a path of righteousness.

Of course, the best solution is to avoid all of these difficult questions altogether. A reformulation of the principle to focus on the remedy and not the obligation would resolve the tension between *Multiplex* and *Gaymark*, and provide greater fairness to all in the construction world.