CAN PREVENTION BE CURED BY TIME BARS?*

PROFESSOR DOUG JONES

Partner, Clayton Utz, Sydney, Australia

"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."[1]

1. Introduction

This paper[2] addresses the issue of whether liquidated damages for delayed performance can be enforced against a contractor for periods of delay caused by the owner, and for which the contractor cannot obtain extensions of time due to the operation of time bar provisions in the extension of time clause. The issue has been the subject of considerable judicial and other comment in the United Kingdom and Australia.[3] It is proposed to examine the principles relevant to the issue and the debate so far, before offering some views on the question.

* This article is based upon the 2008 TECBAR lecture, delivered in London, 17 September 2008.

[1] UNIDROIT Principles of International Commercial Contracts 2004, Art 7.1.2.

[2] The author would like to gratefully acknowledge the assistance in preparation of this paper of Jennifer Ingram and Lee Power, Legal Assistants of Clayton Utz, Sydney; and that of His Honour Humphrey LLoyd, QC; Mathew Stulic, Senior Associate, Clayton Utz, Sydney; and Matthew Bell, Lecturer and Co-Director of Studies for Construction Law, The University of Melbourne, who have read and commented upon drafts of the paper. Responsibility for the contents is however my own.

[3] See *Peak Construction (Liverpool) Ltd* v. *McKinney Foundations Ltd* (1970) 1 BLR 111 (CA); *Trollope & Colls Ltd* v. *North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601; *SMK Cabinets* v. *Hili Modern Electrics Pty Ltd* [1984] VR 391; *Turner Corporation Ltd (Receiver and Manager Appointed)* v. *Austotel Pty Ltd* (1994) 13 BCL 378; *Turner Corporation Ltd (In Provisional Liquidation)* v. *Co-Ordinated Industries Pty Ltd* (1994) 11 BCL 202; *Gaymark Investments Pty Ltd* v. *Walter Construction Group Ltd* (2000) 16 BCL 449; *Peninsula Balmain Pty Ltd* v. *Abigroup Contractors Pty Ltd* (2002) 18 BCL 322; *Multiplex Constructions (UK) Ltd* v. *Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC); *Steria Ltd* v. *Sigma Wireless Communications Ltd* [2008] BLR 79; Doug Jones, *Building and Construction Claims and Disputes* (1996); *Hudson on Building Contracts* (11th ed., 2005); *Keating on Construction Contracts* (8th ed., 2006); Ian Duncan Wallace, "Prevention and Liquidated Damages: a Theory Too Far?" (2002) 18 *Building and Construction Law* 82; Ellis Baker, James Bremen and Anthony Lavers, "The Development of the Prevention Principle in English and Australian Jurisdictions" [2005] ICLR 197; Matthew Bell, "Scaling the Peak: The Prevention Principle in Australian Construction Contracting" [2006] ICLR 318; Stephen Rae, "Prevention and Damages: Who Takes the Risk for Employer Delays?" (2006) 22(5) *Construction Law Journal* 307; Hamish Lal, "The Rise and Rise of Time Bar Clauses", *Management, Procurement and Law* (February 2007) 25; Ian Pease, "The Prevention Principle", *Davies Arnold Cooper Construction Wire* (April 2007); Crispin Winser, "Shutting Pandora's Box: the Prevention Principle after *Multiplex* v. *Honeywell*" (2007) 23(7) *Construction Law Journal* 511; David Goldstein and Bree Miechel, "Fairness and Extensions of Time in Construction Contracts" (2007) 2(4) *Construction Law International* 19.

2. Origins of the prevention principle

2.1 The principle

It is useful to briefly recap what is commonly known amongst construction lawyers as the "prevention principle".

The prevention principle may be formulated as follows:

- An owner will lose the right to claim liquidated damages if some of the delay is due to its own, employees' or agents' defaults, unless:
  - the extension of time clause, strictly construed,[4] allows for extensions to be granted for delays caused by acts or defaults of the owner; and
  - an extension has been validly granted thereunder.
- This will be the case even if the owner's delays form only part of the total delay—the court will not seek to apportion delay, at least when considering the enforceability of the liquidated damages clause. In *Rapid Building Group Ltd* v. *Ealing Family Housing Association Ltd*[5] Lloyd LJ of the English Court of Appeal confirmed this result whilst expressing dissatisfaction with it.
- Even if the contractor would have been unable to complete on time in the absence of a delay by the owner, the liquidated damages clause will still cease to apply if the owner is responsible for some of the delay.[6] However, if the contractor has already breached the completion date, due to no fault of the owner, then the owner will be entitled to liquidated damages up until any act of prevention by the owner.[7]
- If the liquidated damages clause is held inoperative because of the application of this principle, the owner will still be entitled to sue the contractor for any general law damages that it can prove flow from the contractor's default.[8]

While it is easy to state the prevention principle in general terms, it is more difficult to identify just what "acts or omissions" of the owner will bring that principle into operation. The narrowest expression used to describe the types of acts or omissions required is "breach of contract".[9]

[4] *Peak Construction*, n. 3, above, *per* Salmon LJ at 121; and *MacMahon Construction Pty Ltd* v. *Crestwood Estates* [1971] WAR 162.

[5] (1985) 1 Con LR 1.

[6] *SMK Cabinets*, n. 3, above, at 398–400.

[7] *Ibid.*

[8] *Peak Construction*, n. 3, above, at 121, *per* Salmon LJ, and 126, *per* Edmund Davies LJ. The issue of whether the amount which would have been payable under the liquidated damages clause acts as a cap on the general law entitlement has been the subject of some ongoing debate—see, e.g., Nicholas Brown, "Liquidated Damages: is One Man's Floor another Man's Ceiling?" (2001) 17(4) *Construction Law Journal* 302 and Adrian Baron, "Damages in the Shadow of a Penalty Clause—Tripping over Policy in the Search for Logic and Legal Principle" (Paper presented at the Society of Construction Law, London, 2002).

[9] *Peak Construction*, n. 3, above, *per* Phillimore LJ at 127.

More commonly, however, judges have regarded any "wrongful act" or "fault"[10] as sufficient to enliven the principle. The broadest view—namely, that any act, regardless of its fault element, will be sufficient to enliven the prevention principle—is well supported by authority.[11]

In *SMK Cabinets* v. *Hili Modern Electronics Pty Ltd*,[12] the ordering of a variation by the owner was held to enliven the prevention principle. Brooking J was unconcerned by the lack of fault element in this act. Clearly if he had allowed the owner to order variations willy-nilly and still claim liquidated damages for late completion, the result would have been absurd. For this reason it is suggested that the *SMK* approach is the best one.

Leaving aside the question of liquidated damages, it is possible to express the effect of the prevention principle in terms of broader application. When the principle is brought into operation, the owner cannot require the contractor to complete by the date nominated in the contract, or by any other date which can be ascertained by reference to the specific provisions of the contract. This is the situation which is sometimes described in the industry as time being "at large", although there is no accepted legal meaning for this phrase.

What is the obligation as to completion in these circumstances? Put simply, it is to complete within a *reasonable time*, and failure by a contractor to do so will entitle an owner to common law damages,[13] though the owner may have difficulty in proving the loss suffered.

Assuming the principles to be as stated above, the logical position is that a reasonable time involves a calculation of when the contractor can be required to complete, taking into account:

- its original bargain as to the time within which he agreed to complete;
- acts of prevention by the owner; and
- neutral delaying events in respect of which the contractor is entitled to an extension of time in accordance with the extension of time clause.

On the basis of the authorities as they stand at the moment, it is not certain that this logical position will be accepted by the courts; however, it does not conflict with existing authority.

Where the owner is forced to claim common law damages due to the operation of the prevention principle, the question arises whether the amount recoverable is limited by the now disabled liquidated damages provisions. The question whether a liquidated damages clause, which is void

[10] *Ibid.*, *per* Salmon LJ at 121.

[11] E.g., *Dodd* v. *Churton* [1897] 1 QB 562; *Bruce* v. *The Queen* (1866) 2 WW & ABL 193 at 221; *Amalgamated Building Contractors Ltd* v. *Waltham Holy Cross Urban District Council* [1952] All ER 452 (CA), *per* Denning LJ (as he then was) at 455; and *Percy Bilton Ltd* v. *Greater London Council* [1982] 1 WLR 794 at 801.

[12] [1984] VR 391.

[13] *Peak Construction*, n. 3, above, *per* Salmon LJ at 121 and Edmund Davies LJ at 126.

as a penalty, sets an upper limit on the damages recoverable at common law, has received much judicial attention[14]; however, the question whether an otherwise valid liquidated damages clause, the operation of which has been disabled by the prevention principle, limits the common law damages recoverable has not been authoritatively pronounced upon in Australia.

It is suggested that the better view is that a disabled liquidated damages clause will indeed provide such a limit,[15] since if it were otherwise, the anomalous situation would be created in which the owner could profit from its own act of prevention. Since a liquidated damages clause in a construction contract normally has the effect of restricting the contractor's liability to an amount less than the damage the owner is likely to suffer from a delay, it would seem inappropriate for the owner to be able to deny the contractor the benefit of this protection by committing a preventive act and disabling the liquidated damages clause.

2.2 A fundamental principle of law

Due to the application of the prevention principle to the issues of extension of time for delay and liquidated damages for delay, those unfamiliar with the practice of construction law sometimes regard this principle as something peculiar to construction law and have been known to express surprise at the conclusions to which the principle leads.[16]

However, notwithstanding its somewhat arcane area of application, the prevention principle is rooted not in the construction law field, but in a more widely applicable and fundamental principle of law. Indeed, it can be said to be a universal legal principle encapsulated in Article 7.1.2 of the UNIDROIT Principles, quoted at the commencement of the paper, and accepted in many civil law jurisdictions.[17]

The long line of authority supporting the prevention principle (commencing with *Holme* v. *Guppy*[18]) was discussed by Brooking J in the judgment

[14] See, e.g., *AMEV-UDC Finance Ltd* v. *Austin* (1986) 162 CLR 170 at 192–193, 201–203, 212. See also the commentaries referred to at n. 8, above.

[15] See *Elsley* v. *Collins Insurance Agencies Ltd* (1978) 83 DLR (3d) 1.

[16] Lloyd LJ, *Rapid Building Group* v. *Ealing Family Association* (1984) 24 BLR 5 at 19.

[17] S. 280 (1) of the German Civil Code (BGB) (last sentence) provides a similar principle, i.e., that a party may not claim damages resulting from another party's breach, if the other party is not responsible for that breach. However, the prevention principle in a broader meaning can be derived from s. 242 BGB which incorporates the concept of "*Treu und Glauben*" (good faith). While s. 280 (1) BGB deals with the issue from a substantive law point of view, s. 242 BGB may also be used to prevent the exercising of such right ("*Unzulaessige Rechtsausuebung*").

Under French law, the equivalent to the prevention principle can be found in Art 1147 of the Civil Code, which provides that, "a debtor shall be ordered to pay damages, if appropriate, either by reason of the non-performance of the 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", on the basis that external cause (*cause étrangère*) would include, according to case law, acts by the principal.

[18] (1838) 150 ER 1195, (1838) 3 M & W 387.

of the Full Court of the Supreme Court of Victoria in *SMK Cabinets* v. *Hili Modern Electrics Pty Ltd*,[19] where he said:

> "One possible view is that the doctrine of prevention in cases like the present is a rule of law (which will, however, give way to the contrary intention of the parties) based on some such broad notion of justice as a man should not be allowed to recover damages for what he himself has caused: *cf.* 152 *American Law Reports, Annotated*, 1350. Another possible view is that, while the basis of prevention is the theory of the implied term, the term is one which is implied by the Court as a matter of fairness or policy or in consequence of a rule of law, the Court not being concerned with the intention of the parties except to the extent that the term may be excluded by an express contrary intention: see the classification suggested by Glanville Williams, 'Language and the Law' (1945) 61 LQR 71 at p. 401 and adopted in *Halsbury*, 4th ed., vol. 9, para. 351. If this be the correct view, the distinction between prevention as a rule of law and prevention as a matter of implied term is largely of academic interest. For the law will state the doctrine in the same way whether it achieves the desired result directly, by operation of a principle, or indirectly, by the introduction of a fictitious term. Glanville Williams, *op. cit.*, at p. 404 suggests that rules like the one now in question are in truth rules of law which apply in the absence of an expression of contrary intent, and that whether we choose to call them implied terms or not is simply a matter of terminology."

The fundamental proposition, in terms similar to Article 7.1.2 of the UNIDROIT Principles, was stated by Parke B in *Holme* v. *Guppy*[20] as follows: "Then it appears that they were disabled by the act of the defendants from the performance of that contract; and 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."[21]

This much is clear: the prevention principle, far from being an arcane piece of construction law, arises from the application of a fundamental legal proposition of universal legal application.[22]

3. Delay risk

The prevention principle impacts primarily upon the application of liquidated damages by an owner, for delayed performance by a contractor. For such provisions to be effective, there must be a certain date after which the contractor will be in default and liable for payment of the liquidated damages. Many of the cases dealing with the prevention principle are concerned with contract mechanisms for moving the date after which liquidated damages will apply, to take account of owners' acts of prevention.

Put simply, the mechanism of liquidated damages will be ineffective as a consequence of the prevention principle if any of the period of delay, for

[19] [1984] VR 391 at 395.
[20] (1838) 3 M & W 387.
[21] *Ibid.* at 389.
[22] The generality of the proposition is emphasised by Chitty LJ in *Dodd* v. *Churton* [1897] 1 QB 582 at 588.

which liquidated damages are sought to be applied, includes periods of delay caused by owners' acts of prevention. It is for this reason that careful drafting and clear words are necessary to avoid the application of the following:

> "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 contractor to complete on time in spite of the fact that some of the delay is due to the employer's 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."[23]

The position is quite different in respect of neutral delays, which are events outwith the control of either party, and delaying events within the control of the contractor. For these categories of delay, it is for the contractor to establish an entitlement to an extension of the due date for completion. Such events are at the risk of the contractor, absent specific contractual entitlement to extension and the proper administration by the contractor of such contract mechanisms as may exist in relation to the application for, assessment of, and granting of extensions of time for such events.

It is suggested that a bright line of distinction be drawn legally between these two categories of delay. In relation to delays caused by the owner's acts of prevention, it is for the owner to establish an effective mechanism, and to use it, for the purpose of excising these periods of delay from periods for which liquidated damages are claimed. For other delays which are at the risk of the contractor, it is for the contractor to do this.

With respect, the differences of legal analysis, which need to be brought to bear on entitlements for liquidated damages in relation to these two different categories of delay, have not necessarily been considered in some of the authorities in the area.

It is worth noting that the problems experienced with the application of liquidated damage for delay clauses are not necessarily the same with claims for general damages, where the application of the universal principle will most likely lead to exclusion of periods of delay caused by an owner from calculation of damages. It is the need for liquidated damages for delay clauses to attach to particular dates, and to have effective mechanisms for moving the dates, which causes the problem.

As the prevention principle has developed, careful drafting has avoided many of its problems, and the cases with which we are now left involve clauses that are less than adequately drafted. As will be seen below, even in relation to the question of time bars for applications for extensions of time, there is a tried and true formula now established in Australia. It avoids the argument by giving to the owner a right unilaterally to extend time for its own benefit should it wish to do so, thus enabling any periods of delay

[23] *Peak Construction*, n. 3, above, at 121, *per* Salmon LJ.

caused by owners' acts of prevention to be excised from periods of delay for which liquidated damages are sought to be applied. Indeed, it was the removal of this standard form provision from the contract in question that led to the problem in *Gaymark Investments Pty Ltd* v. *Walter Construction Group Ltd.*[24]

4. The debate

4.1 Time bars

Notice provisions are common in construction contracts. So far as notices of intention to claim for extension of time are concerned, it is important that an owner should know if and when the contractor considers that the progress of the works has been, or is likely to be, adversely affected by some event. This is so that the overall effect on a contract, and perhaps on other contracts, can be considered by the owner and steps taken in mitigation. The owner may, for example, be able together with the contractor, to deploy a wide variety of measures such as variation or change of design, or change of methods or sequence of construction to reduce delay and mitigate costs. Notices of claim provide a proper opportunity for the parties to consider how best to proceed in the interests of the project. It is also much easier to monitor the extent of delay and related financial consequences if earlier notification and details of financial implications of delay are provided promptly.

It should also be borne in mind that such notices are not provided simply for the benefit of the owner. Such provisions, properly and fairly applied, enable the contractor to claim in an orderly, timely and disciplined manner. The contractor can be confident that the claims process has begun, which, in the event of a failure to agree, may lead to invoking the dispute provisions of the contract, and much of the uncertainty and confusion which can arise when claims are postponed to the end of the works can be reduced. Therefore, there are strong policy reasons for enforcing notice clauses.

A preliminary question in relation to a clause requiring notification within a specified time of claims for extension of time is whether compliance with the notice is a condition precedent to the entitlement to an extension of time.[25] Some clauses are very specific in this regard.[26] Other clauses are less clear, but are nevertheless held to be conditions precedent to the right to an extension of time.[27]

[24] (2000) 16 BCL 449.

[25] See, generally, Brian Clayton, "Can a Contractor Recover When Time-Barred?" [2005] ICLR 341.

[26] See for instance cl. 11.1.3 in the contract the subject of *Multiplex Constructions (UK) Ltd* v. *Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC).

[27] See cl. 6.1 in the contract the subject of *Steria Ltd* v. *Sigma Wireless Communications Ltd* [2008] BLR 79.

If an analysis of the issue recognises—as proposed above—the division of risk between delays caused by acts of prevention by an owner, and other delays which, but for the contract provisions, would be the risk of the contractor, it is obvious that the more effective a notice provision is in denying an entitlement to extension of time as a consequence of non-compliance, the greater is the risk that the owner is creating a problem for itself by expressly excluding the contractor's right to an extension of time.

It is clear from *Peak* v. *McKinney*[28] that an extension of time clause that makes no express allowance to extend time for acts of prevention will be ineffective to avoid the prevention principle. At first blush, it would seem that an extension of time clause that expressly denies the contractor the right to an extension of time for an act of prevention following the contractor's non-compliance with the relevant time bar, should lead to the same legal conclusion as where no provision for extension was made in the first place. It is for this reason that prudent drafting of extension of time clauses has led to the inclusion of a power for the owner to extend time unilaterally, so as to ensure that owner-caused delays are excused from any period for which liquidated damages are sought to be applied.[29]

4.2 The cases

In *Turner Corp* v. *Austotel*,[30] on an application to the Supreme Court of NSW for leave to set aside an arbitrator's award, Cole J considered the application of the prevention principle in the context of an extension of time clause with a time bar which, on its face, was a condition precedent to the entitlement of the extension of time. In this case, involving the JCC–A (1988) Australian standard form used for the building of a Sydney hotel, an extension of time for owner-caused delays had been claimed and granted; however, the contractor had further argued that the owner's right to liquidated damages for other delays had also been lost as a result of its acts of prevention. Although not necessary for his decision, because he held that an appropriate extension had in fact been granted, Cole J said:

> "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 affect of that preventing conduct."[31]

Shortly after the *Austotel* case, there was another case in the New South Wales Supreme Court decided by Rolfe J between Turner Corporation (the

[28] (1970) 1 BLR 111 (CA).
[29] Examples of such clauses are set out, and discussed, in section 5 below.
[30] (1994) 13 BCL 378.
[31] *Ibid.* at 384, 385.

same contractor) and Co-ordinated Industries.[32] This case, involving the Australian government standard form NPWC 3 (1981) used for the construction of a hotel in Parramatta—while including a detailed discussion of the prevention principle—did not consider the effect of a time bar upon the capacity to extend time for delay caused by the owner's prevention. Rather, the contractor was found to have caused the delay, with the "delaying" acts of the owner and the superintendent not in fact causing any further delay to the contractor. Rolfe J said:

> "However there can be no doubt that cl. 35.4 contemplates fault on the part of the Principal and says so in the clearest terms. Accordingly the contractual right of the Contractor was to seek extensions of time, the mechanism for determining which was established by the Contract. The ultimate remedy, in the event of the Contractor's not being satisfied with the determinations of the Superintendent and the Principal, is reference to arbitration. Subject to the grant of extension of time the Principal retains his contractual rights."[33]

A quite contrary conclusion was reached by Bailey J of the Supreme Court of the Northern Territory of Australia in *Gaymark*. This case, involving an amended form of NPWC 3 (1981), concerned an application to appeal an arbitral award on a point of law under the Commercial Arbitration Act 1995 (NT). In this case the unilateral power to extend time had been deleted from the standard form, and no applications for extension of time had been made in accordance with the notice provision, thereby leading to the owner claiming liquidated damages for periods of delay for which the contractor had no entitlement to extensions of time, those delays having been caused by the owner's acts of prevention. Applying the established principles discussed above, Bailey J declined to give leave to appeal from a decision of the arbitrator who had held that the effect of this was to render unenforceable the owner's claim for liquidated damages.

The late Professor Ian Duncan Wallace, QC, criticised the *Gaymark* decision.[34] Professor Wallace was particularly critical of the arbitrator's decision in *Gaymark* which the court declined to grant leave to appeal from. In doing so, he opined that the prevention theory is "based partly on an early judicial dislike of liquidated damages clauses (which now no longer exists) and partly on an earlier principle of law that a party cannot benefit from its own wrong".[35] This criticism is consistent with the views which he expressed over the years and repeated in *Hudson*.[36] His interest in the subject, apart from his eminence in the field of construction law, was possibly piqued by his role as junior counsel for the losing party in *Peak* v. *McKinney*.[37]

[32] *Turner Corporation Ltd (In Provisional Liquidation)* v. *Co-ordinated Industries Pty Ltd* (1994) BCL 202.
[33] *Ibid.* at 217.
[34] "Prevention and Liquidated Damages: A Theory Too Far?" (2002) 18 BCL 82.
[35] *Ibid.* at 86.
[36] A Hudson and D Wallace, *Hudson's Building and Engineering Contracts: Including the Duties and Liabilities of Architects, Engineers and Surveyors* (11th ed., 1995).
[37] (1970) 1 BLR 111 (CA).

The article has had some influence. In *Peninsula Balmain* v. *Abigroup Contractors,*[38] a case concerning the reconstruction and refurbishment of two factory buildings in Balmain, Sydney, so as to convert them into residential flats, the New South Wales Court of Appeal expressed a view, albeit *obiter,* on the *Turner* cases and Professor Wallace's article as follows:

> "I accept that, in the absence of the Superintendent's power to extend time even if a claim had not been made within time, Abigroup would be precluded from the benefit of an extension of time and liable for liquidated damages, even if delay had been caused by variations required by Peninsula and thus within the so-called 'prevention principle'. I think this does follow from the two *Turner* cases and the article by Mr Wallace referred to by Mr Rudge."[39]

The debate moves now to England in 2007 where, in *Multiplex Constructions (UK) Ltd* v. *Honeywell Control Systems Ltd (No 2),*[40] involving one of the subcontracts for the New National Stadium at Wembley on the issue of whether time had been set at large, Jackson J said that, although he did not have to decide the point, he could:

> "... see considerable force in Professor Wallace's criticisms of *Gaymark.* I also see considerable force in the reasoning of the Australian courts in *Turner* and in *Peninsula* and in the reasoning of the Inner House in *City Inn.* 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 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]

Jackson J was not required to decide the point because he held that, even if Honeywell forfeited an entitlement to extensions of time, this did not make it liable to pay damages for delay. Under the relevant provisions of the subcontract, Multiplex could only recover in respect of loss or damage "caused by the failure of the subcontractor". His Honour noted that if in reality the relevant delay was caused by Multiplex, not Honeywell, then whatever the position under the extension of time clause, Multiplex could not recover damages against Honeywell. The effect of this conclusion is of course to leave intact the principle which it is suggested underlies the prevention theory.

Then came the decision of His Honour Judge Stephen Davies in *Steria Ltd* v. *Sigma Wireless Communications Ltd,*[42] a case arising out of a project for the provision of a new computerised system for the fire and ambulance services in the eastern counties of the Republic of Ireland. He says at paragraph 95:

[38] (2002) 18 BCL 322.
[39] *Peninsula Balmain* v. *Abigroup Contractors* (2002) 18 BCL 322 at 343, *per* Hodgson JA.
[40] [2007] EWHC 447 (TCC).
[41] *Ibid.* [103].
[42] [2008] BLR 79.

> "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 condition than by complying with it."

There has clearly been much comment on the question at hand in all the cases discussed above. The fact remains, however, that but for *Gaymark*,[43] it was not necessary to decide the issue in any of these cases. In the first of the *Turner*[44] cases, Cole J held that the concept of prevention did not apply because an appropriate extension of time had in fact been granted. In the subsequent *Turner*[45] case, Rolfe J held that the delays by the superintendent did not result in an actual delay to the work of the contractor and thus the concept of prevention and time being at large did not apply. In *Peninsula Balmain*,[46] there was no need to apply the prevention principle because Hodgson JA exercised the superintendent's unilateral power to extend time. In *Multiplex* v. *Honeywell*,[47] the contractor was not automatically exposed to liquidated damages in the event that it did not comply with the notice clause. Finally, in *Steria* v. *Sigma*,[48] the contractor met the notice requirements in relation to delay caused by the owner and therefore the issue of prevention did not arise.

Gaymark[49] is thus the only case that expressly decides whether a contractual provision entitling the contractor to an extension of time for owner-caused delay, if not exercised, may lead to two consequences; that not only will the contractor lose the right to an extension of time, but that he is obliged to pay the owner liquidated damages for the delay which the owner caused. On this point Bailey J held that such consequences did not result, instead rendering the owner's claim for liquidated damages unenforceable.

5. Views

The fact that *Gaymark* decided the issue does not of course mean that the strictly *obiter* views expressed by the other judges can or should be discounted. They are opinions which will, and should, be influential. Nevertheless the question remains open and it is proposed to look at it from first principle with a view to suggesting an answer to the question posed by the topic of the paper.

[43] (2000) 16 BCL 449.
[44] (1994) 13 BCL 378.
[45] (1994) 11 BCL 202.
[46] (2002) 18 BCL 322.
[47] [2007] EWHC 447 (TCC).
[48] [2008] BLR 79.
[49] (2000) 16 BCL 449.

A useful starting point is the following proposition by Cole J: "The act of the Proprietor does not prevent performance of the contractual obligations within time: it entitles the Builder to apply for a contractual variation extending time for performance."[50] This, coupled with his reasoning that: "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 affect [*sic*] of that preventing conduct"[51] underlies his conclusion on the point.

The first proposition seems to be deploying a causation argument. What caused the delay? The act of prevention or the failure to apply for the extension? With respect, the act of prevention causes the contractor to finish at the date said to be in breach of the obligation to complete. It then becomes the problem of the owner to avoid complaining of a breach which it has caused. To assume that this becomes the problem of the contractor would seem to misunderstand the nature of the risk, unless it has been clearly assumed by the contractor; a question which is discussed below.

The second of these propositions sits uneasily with the approach of the courts to the application of the fundamental principle at play here. This involves, in the context of owners' acts of prevention, construing extension of time clauses *contra proferentem*,[52] so as to " . . . require very clear language to shew that a man has undertaken a responsibility which very few men would undertake with their eyes open".[53]

The clear words which would make it the responsibility of a contractor to complete by a fixed date, notwithstanding being delayed by acts of prevention by an owner in the context of a time bar for applications for extension of time, are simple indeed. To provisions disentitling a contractor to extensions of time if notification of delay is not given within the time bar, there could be words added such as, "the contractor agrees to complete the works by the date specified notwithstanding having been actually delayed by acts of prevention by the owner". It is suggested that there would be hesitation to include such simple words in an industry standard form, and strong opposition by contractors to such a provision in bespoke contracts, because of the obviously unfair outcome to which the words draw attention.

This leads to a legitimate enquiry as to whether in any event the parties can be regarded as intending this outcome when simply providing, without such clear words, for a time bar within which extensions of time are to be claimed. For the reasons discussed below, it is suggested that the contrary is the case in Australia. Thus, in addition to the requirement of clear words to achieve the risk allocation to a contractor of delays caused by an owner, it

[50] *Turner Corporation Ltd (Receiver and Manager Appointed)* v. *Austotel Pty Ltd* (1994) 13 BLR 378 at 385.

[51] *Ibid.*

[52] *Peak Construction*, n. 37, above, at 121.

[53] *Per* Chitty LJ in *Dodd* v. *Churton* [1897] 1 QB 582 at 589.

may well be that, properly construed, such provisions are simply not intended by the parties to do so.

Does a requirement to give notice of claims for extension of time within a specified period satisfy the clear language requirement? It is suggested not, bearing in mind the legal distinction between the risk of neutral delays and contractor-caused delays on the one hand, and risk of delays caused by owners' acts of prevention on the other. The common sense of maintaining a close watch on contractors' entitlement to relief for those delays in the first category is obvious. This is a logical reason for time bar provisions. Here the contractor is at risk of liability to complete by the date specified unless, and until, it establishes an entitlement for relief. Such provisions take away no rights from the contractor; they in fact expand the contractor's rights. Thus it is suggested that a proper approach to interpreting such provisions is that they are intended only to deal with delay risks for which the contractor is responsible. This interpretation gives life and purpose to time bar provisions. If they are to go on and do the additional work of making the contractor liable for owners' delays, absent requisite notice, and thus fundamentally alter the risk of the owner's acts of prevention, they can and should expressly do so.

The comments on the issue by both Jackson J and HHJ Stephen Davies identify what they regard as the commercially unsatisfactory outcome of the *Gaymark* conclusion.[54] They point out the value of contractual terms requiring notice of claims for extensions of time, and that contractors could disregard such provisions if *Gaymark* is good law. With respect, this is not correct. Contractors would disregard such time bar provisions at their peril if delayed by events other than owners' acts of prevention, which entitle them to extensions of time. If the relevant clauses did not empower extension of time for the owner's acts of prevention, precisely the same commercial evil attends the process, yet this problem does not feature in any of the reasoning in the earlier cases, which concentrate not upon the commercially unsatisfactory outcome of holding the clauses ineffective, but upon the preservation of the fundamental principle with which we are concerned.

As observed earlier, the underlying principle seems to apply equally to a time bar which wipes out an owner's capacity to excise from periods of delay of which it wishes to complain, delays of its own making, and to a clause which makes no provision for extension for owner-caused delays in the first place. Just as the latter requires clear words to require the contractor to complete by the due date despite owner-caused delays, so should the former.

The late Professor Ian Duncan Wallace, QC, did not agree with this analysis. He starts from the proposition that:

[54] *Multiplex Constructions*, n. 3, above, at 100–103; *Steria Ltd*, n. 3, above, at 94–95.

> " . . . there is no reason to doubt that a ground of permitted extension of time which expressly includes acts of prevention or breach by the owner will successfully avoid application of the *Peak* prevention principle, and so preserve the contract liquidated damages machinery intact, and this has been the basis of informed drafting advice to construction owners for many years."[55]

He goes on to say that, quite apart from the *Peak* doctrine, "informed drafting" has for many years advocated strict exclusionary requirements for extension of time applications which are applicable to all grounds for extensions of time and why such provisions are desirable.[56]

With the greatest respect, it is the disconnection between the two issues which leads to difficulty with Professor Wallace's reasoning. The informed drafting with which the writer is familiar has taken account of the relationship between the so called *Peak* doctrine and time bar provisions for claims for extensions of time. In the Australian context this has taken the form of clearly preserving the capacity of owners to extend time for their acts of prevention in the absence of extension of time applications by contractors, by providing for a unilateral right for the owner to extend time at its discretion.[57]

Examples are clause 10.10 of PC1,[58] clause 35.4 of NPWC3[59] and clause 35.5 of AS 4300.[60] These provisions have led to debate as to when such unilateral powers to extend can, and should, be exercised.[61] The conclusion

[55] "Prevention and Liquidated Damages: A Theory too Far?" (2002) 18 BCL 82 at 82.

[56] *Ibid.* at 82 and 83.

[57] See, generally, Adrian Baron, "The Superintendent's Discretion to Extend Time: A Long Story Must be Told to Satisfy 'The Earnest Inquirer' " (2007) 23 BCL 410.

[58] Cl. 10.10: Unilateral extensions:

> "Whether or not the Contractor has made, or is entitled to make, a claim for an extension of time under this clause 10, the Contract Administrator may, in its absolute discretion at any time and from time to time by written notice to the Contractor and the Owner, unilaterally extend any Date for Completion.
>
> The Contract Administrator is not required to exercise its discretion under this clause 10.10 for the benefit of the Contractor."

[59] Cl. 35.4: Extension of Time for Completion

> " . . .
>
> Notwithstanding that the Contractor has not given notice of a claim for an extension of time for Practical Completion of the Works pursuant to this sub-clause, the Superintendent may, at any time and from time to time and for any reason he thinks sufficient, by notice addressed to the Contractor extend the time for Practical Completion of the Works by nominating a date specified in the notice as the date for Practical Completion of the Works and the date so specified in the notice shall, for the purpose of the Contract, be deemed to be the date for Practical Completion of the Works."

[60] Cl. 35.5: Extensions of Time for Practical Completion

> " . . .
>
> Notwithstanding that the Contractor is not entitled to or has not claimed an extension of time, the Superintendent may at any time and from time to time before the issue of the Final Certificate by notice in writing to the Contractor extend the time for Practical Completion for any reason."

[61] See *Peninsula Balmain* v. *Abigroup Contractors*, n. 3, above; *Kane Constructions Pty Ltd* v. *Sopov* [2005] VSC 237; *620 Collins Street Pty Ltd* v. *Abigroup Contractors Pty Ltd (No 2)* [2006] VSC 491; *Hervey Bay Pty Ltd* v. *Civil Mining and Construction Pty Ltd* [2008] QSC 58.

reached in the cases that have dealt with the debate is that, in some instances, the power should be exercised in circumstances where a contractor has not complied with notice provisions for claims for delays which, but for an extension of time, would be at the risk of the contractor; that is, the first legal category of delay discussed above. This paper is not the place to deal in detail with these cases but, in the writer's opinion, any analysis of the circumstances in which such a power is to be exercised needs to take careful account of whether the delay in question was one caused by the owner, or one which, but for an extension, would be at the contractor's risk.

Few, if any, contracts expressly impose upon contractors the obligation to complete by a date notwithstanding delays caused by the owner. To the contrary, the intent of such contracts is to avoid the application of the *Peak* doctrine while recognising the fundamental principle that a party cannot complain of a breach by the other party which it has caused.

As mentioned above, it was the excision of the relevant provision from the NPWC3 that led in *Gaymark* to there being no capacity for the owner to extend time for its own acts of prevention.

This seems an eminently more sensible outcome than one where, in the absence of clear words, contractors are held liable for delay of the owner's making, motivated by a desire to give undue weight to time bar clauses.

6. Consequences

What then are the consequences of the conclusion that an owner is not entitled to recover liquidated damages for delay which it has caused, and for which the contractor has not applied for an extension of time?

As mentioned above, the "traditional" view is that where there is an act of prevention and an extension of time is not granted, or is not able to be granted, time is "at large" and the owner cannot insist on compliance with the date for completion. A term is then necessarily implied that the contractor will complete within a reasonable time. As a result, the owner is not able to claim for any liquidated damages and will only be entitled to common law unliquidated damages for which it can provide proof.

This raises a critical question: does the prevention principle strike at the enforceability of the breached obligation, or does it strike at the remedy which the preventing party is seeking to enforce? The distinction is an important one. If the prevention principle applies to the obligation, the liquidated damages clause is rendered ineffectual and the owner is not able to recover liquidated damages in respect of any delay, whether it be caused by the owner or the contractor. In contrast, if the prevention principle applies to the remedy, the date for completion would remain intact and liquidated damages could be calculated by reference to this date for any delay caused by the contractor, minus those applicable to the delay resulting from acts of prevention.

There is a long line of powerfully consistent authority which supports the proposition that the prevention principle applies to the obligation rather than the remedy. The history of these authorities was helpfully summarised by Brooking J in *SMK Cabinets* v. *Hili Modern Electrics Pty Ltd* [62]:

> " . . . it has been accepted for more than one hundred years that this is not the law. The cases are all one way. The rule that prevention excuses performance of a promise to pay liquidated damages seems to have been first laid down in *Holme* v. *Guppy* (1838) 3 M and W 387; 150 ER 1195. There the delay in completion was of five weeks, the proprietor being responsible for four weeks and the contractor for one. Counsel for the contractor argued that in view of the prevention their client was not liable in any sum under the clause, and the Court of Exchequer accepted that contention. Nothing is said in the report as to whether the contractor would have been able to complete on time but for the prevention, but the Court seems to have regarded that as immaterial. In *Russell* v. *Sa Da Bandeira (Viscount)* (1862) 13 CBNS 149; 143 ER 59 the building of a ship was held up by various acts of prevention, but it was not shown that the plaintiff could, without that hindrance, have finished the ship in time. The Court of Common Pleas held that the claim for liquidated damages failed altogether, Byles J, with whom Keating J agreed, saying, at p. 206, that the claim failed because the non-delivery by the day stipulated had been in part caused by delay for which the owner was responsible. This is an express acceptance of the view that the contractor is exonerated where his own acts and omissions and those of the proprietor both contribute to the failure to finish the work within the stipulated time. In *Parle* v. *Leistikow* (1883) 4 LR (NSW) 84 the due date was exceeded by 24 weeks, the contractor being responsible for 21 weeks of that delay. The proprietor deducted liquidated damages for 21 weeks, but the Full Court of New South Wales made him disgorge on the ground that he had prevented completion by the due date. Next comes *Dodd* v. *Churton* [1897] 1 QB 562, where completion was achieved 27 weeks after the specified date and the proprietor, who had ordered extras which had necessarily prolonged the work, claimed to be entitled to liquidated damages in respect of 25 weeks, upon the footing that the extra work required only an additional two weeks for its performance. The Court of Appeal upheld the rejection of this claim. In *Baskett* v. *Bendigo Gold Dredging Co Ltd* (1902) 21 NZLR 166, Williams J decided that it was no answer to the allegation of prevention that the contractor would not have completed the work in time if no delay had been caused by the employer.
>
> The question of causation for the purposes of prevention as affecting liability for liquidated damages was discussed at some length in *Wells* v. *Army and Navy Co-operative Society* (1902) 86 LT 764; Hudson's *Building Cases*, 4th ed., vol. 2, p. 346, where the contractor was himself guilty of delay and the proprietor occasioned delay by numerous acts and omissions. The trial Judge, Wright J, found that the contractor's own delays were such as might themselves have involved him in penalties, but nonetheless regarded the hindrance on the part of the proprietor as sufficient to disentitle it to liquidated damages, and the Court of Appeal was of the same opinion. The principle of the decision is not as clear as one would wish, but appears to be that if the supposed prevention was such as would in ordinary circumstances have made it impossible for the contractor to complete in time, then prevention has in law occurred, notwithstanding that the contractor may in fact have disabled himself by his own delays from completing by the due date.
>
> The next case is *Bunning Bros* v. *Manea* (1911) 13 WALR 148. Completion was eight days late, the proprietor being responsible for five of the eight days; the Magistrate allowed three days' liquidated damages, but the Full Court considered that nothing should have been allowed. Then there is *Miller* v. *London County Council* (1934) 151 LT

[62] [1984] VR 391 at 398.

425, at pp. 426–427, where du Parcq J viewed as irrelevant the question whether the contractor was to blame for any of the delay. In 1966 came the decision of the Court of Appeal of British Columbia in *Perini* v. *Greater Vancouver Sewerage and Drainage District* (1966) 57 DLR (2d) 307. The proprietor, whose defaults had occasioned substantial delays to the contractor, alleged that the contractor would not have completed the plant by the due date even if those defaults had not occurred; so the proprietor said that its defaults had not prevented timely completion. The argument failed, but a possible difference of approach emerges from the judgments of Davey JA and Bull JA, a difference not resolved numerically by the judgment of Lord JA, who agreed with the reasons of each of the other members of the Court. Davey JA, at p. 314, considered that if the defendant proprietor's substantial defaults had delayed the plaintiff in completing the contract on time, then there was prevention even though the work would not have been completed on time if there had been no delay by the defendant. On the other hand Bull JA, at p. 319, seems to have regarded it as material that it had not been shown that the plaintiff could not by special effort have substantially completed the work by the due date if the defendant had not been guilty of its defaults which delayed the work.

In England, the Court of Appeal had occasion to consider the matter in *Peak Construction (Liverpool) Ltd* v. *McKinney Foundations Ltd* (1970) 1 BLR 111. *Perini*'s case was not cited, but the view adopted was in fact that of Davey JA. Salmon LJ, at p. 121, Edmund Davies LJ, at pp. 125–126, and Phillimore LJ, at pp. 127–128, all laid it down that a liquidated damages clause does not operate where the proprietor and contractor are both partly responsible for the failure to complete on time. Finally, in *Fernbrook Trading Co Ltd* v. *Taggart* [1979] 1 NZLR 556, where the arbitrator found that the proprietor was responsible for 41 weeks' delay out of the total of 46 weeks' delay and awarded liquidated damages for five weeks, Roper J, applying the *Perini* case, set the award aside."

These authorities clearly thwart all attempts by an owner to recover liquidated damages for any delay if it has contributed to preventing the contractor from completing by the date for completion. Rather, the preventing owner loses its right to recover the entirety of the liquidated damages provided for by the contract, including those which it otherwise would have been awarded for delay caused by the contractor.[63]

In the respectful opinion of the author, this is an unsatisfactory outcome, and one which goes well beyond giving effect to the fundamental principle being applied. In the event that, for example, there is five weeks of delay, two of which can be attributed to the owner and three of which can be attributed to the contractor, we are faced with a seemingly unjust result: the contractor's failure to give notice of its right to claim an extension of time puts time at large and absolves the contractor of the time obligation and exposure to liquidated damages which it undertook under the contract, despite being predominantly responsible for the delay, while the owner is prevented from recovering any pre-agreed compensation.

A more equitable result might be achieved by applying the prevention principle to the remedy, rather than the obligation. As outlined above, this would allow the date for completion to remain intact so that liquidated damages could be calculated from this date, with any damages attributable

[63] For further discussion of cases relating to the inability to apply such apportionment, see Bell, n. 3, above, at 326–327 and 348–353.

to periods of delay caused by the owner excised from any award, as a result of the operation of the prevention principle. If this were to occur there would be no injustice to the owner as the contractor would remain bound to complete by the specified time, as adjusted, regardless of its failure to give notice. There is also no injustice on the part of the contractor as the owner is still prevented from imposing liquidated damages for delay which it has itself caused.

To adopt such an approach would avoid the need to closely enquire into the drafting of the extension of time clause so far as owners' acts of prevention are concerned, and would effectively allow the fundamental principle itself to operate as an extending mechanism. "Time at large" would disappear from the lexicon of construction lawyers. The outcome would be similar to that likely to be achieved by application of Article 7.4.13 of the UNIDROIT Principles of International Commercial Contracts 2004.

It is acknowledged that this proposition represents a radical departure from the well established authority on the topic, and would require either a new approach by appellate courts, or legislative action. Perhaps this is unlikely given the ease with which the outcome can be and is being dealt with in existing standard form contracts.

7. Conclusion

The fundamental principle at play here requires the effect of time bars for extension of time claims to take account of a bright line between delays caused by an owner, and other delays for which a contractor would be responsible but for the operation of the extension of time clause. The debate so far has given inadequate weight to this distinction.

Although parties can expressly agree that owners may recover liquidated damages for delays which they themselves have caused, and thus cure prevention by a time bar, a bare time bar provision is not effective to do so. Indeed, leaving aside the fundamental principle, properly construed such bare time bar provisions are not an agreement for the owner to recover damages for delay which it causes the contractor.

It is perhaps time to revisit the time at large consequence of the prevention principle, and instead apply the principle to simply reduce recoverable damages by periods of delay caused by the owner.