

Time and Construction Contracts

Extensions of Time and the Prevention Principle

By Nathan Abbott

Introduction

The purpose of this paper is to expose and consider the Prevention Principle from a practical perspective. It gives rise to one of the more common claims by contractors: that "time is at large". It is also one of the most complex areas of building law. The core of the difficulty may well be that the Prevention Principle can have consequences which may seem counterintuitive. The aim of this paper is to alert construction industry participants to some of the more common traps and pitfalls.

Time for completion where none fixed

The common law provides that, where the parties to a contract do not agree upon a specific time for performance, then the contract will be required to be performed within a "reasonable time"¹.

This approach has the appeal of being obviously fair and flexible. However, it is fraught with difficulty in its application.

In his excellent paper entitled: "Calculation of a Reasonable Time to Complete When Time is at Large"², Keith Pickavance identifies at least the following factors as being potentially relevant to the calculation of a "reasonable time" for completion in any given circumstances:

- estimates of the likely duration of construction given during negotiations;
- any time risk allocation in the contract;
- the extent to which some time risks may be within the control of one or other of the parties;
- who has the onus of proof:
 - must the contractor establish that the time it has taken is reasonable; or
 - must the owner establish that it is unreasonable; and
- the critical path, whether:
 - as-planned impacted;
 - time impact; or
 - as-built but for.

The result is that it is complex and controversial to calculate what is the reasonable time for completion in accordance with the common law where a building contract does not specify the time for completion. Almost invariably, the parties to building contracts will require far greater certainty as to their respective rights and liabilities.

Fixing time for completion by allocating risks

¹ *Hick v Raymond and Reid* [1893] AC 22 at 32

² The International Construction Law Review [2006] 167

In order to achieve the commercial certainty that they both require, the parties to building contracts will almost invariably agree to contractually fix the date by which the building works must be completed as well as the liquidated damages to be paid by the contractor in the event of late completion.

However, due to the wide range of factors that may influence the progress of any building works, and the different degrees of control that each party has over them, it is obviously impossible to actually fix in advance the date by which building works will in fact be completed.

The potential for the actual date of completion to diverge from the contractual date for completion gives rise to one of the fundamental risks of any building project.

It will almost invariably be a corollary of their decision to contractually fix the date by which the building works must be completed, that the parties will also allocate between them responsibility for the time risks that they are able to anticipate. This will usually be done by each party accepting responsibility for the risks it can best control and then agreeing a commercial compromise regarding neutral risks over which the parties have limited or no control.

The result will be that the building contract fixes the date by which the building works must be completed with consequential liquidated damages, subject to the allocation between the parties of responsibility for particular time risks.

The regime for extending time for completion

The means by which the parties implement the allocation of time risks is to provide for adjustments to be made to the date fixed under the contract for completion, upon the happening of particular delaying events.

For example, AS4300 – 1995 provides:

35.5 Extension of Time for Practical Completion

When it becomes evident to the Contractor that anything, including an act or omission of the Principal, the Superintendent or the Principal's employees, consultants, other contractors or agents, may delay the work under the Contract, the Contractor shall promptly notify the Superintendent in writing with details of the possible delay and the cause.

When it becomes evident to the Principal that anything which the Principal is obliged to do or provide under the Contract may be delayed, the Principal shall promptly give notice to the Superintendent who shall promptly notify the Contractor in writing of the extent of the likely delay.

If the Contractor is or will be delayed in reaching Practical Completion by a cause described in the next paragraph and within 28 days after the delay occurs, the Contractor gives the Superintendent a written claim for an extension of time for Practical Completion setting out the facts on which the claim is based, the Contractor shall be entitled to an extension of time for Practical Completion.

The causes are-

- (a) any of the following-
 - (i) industrial conditions;

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- (ii) inclement weather; or
 - (iii) any other cause,
occurring on or before the Date for Practical Completion and which are beyond the reasonable control of the Contractor; and
- (b) any of the following other causes whether occurring before, on or after the Date for Practical Completion-
- (i) delay or disruption caused by
 - the Principal;
 - the Superintendent;
 - an employee, consultant, other contractor or agent of the Principal or Superintendent;
 - (ii) actual quantities of work being greater than the quantities in a Schedule of Rates determined by reference to the upper limit of accuracy applicable to Clause 3.30) and stated in Annexure Part A (otherwise than by reason of a variation);
 - (iii) a Latent Condition;
 - (iv) a variation;
 - (v) a change in Legislative Requirements;
 - (vi) a direction by a municipal, public or statutory authority but not where the direction arose from the failure of the Contractor to comply with a Legislative Requirement;
 - (vii) delay by a municipal, public or statutory authority not caused by the Contractor;
 - (viii) a claim referred to in Clause 17.1(iv);
 - (ix) a breach of the Contract by the Principal;
 - (x) another cause which is expressly stated in the Contract to be a cause for an extension of time for Practical Completion.

Where more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is not a cause of delay listed in Clause 35.5(a) or (b), then to the extent that the delays are concurrent, the Contractor shall not be entitled to an extension of time for Practical Completion.

Notwithstanding the preceding paragraph the Contractor shall be entitled to an extension of time if the concurrent delay occurs after the Date for Practical Completion and the cause of the delay is one or more of the events listed in Clauses 35.5(b)(i), (iv), (viii) and (ix).

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In determining whether the Contractor is or will be delayed in reaching Practical Completion regard shall not be had to-

- whether the Contractor can reach Practical Completion by the Date for Practical Completion without an extension of time; or
- whether the Contractor can, by committing extra resources or incurring extra expenditure, make up the time lost.

With any claim for an extension of time for Practical Completion, or as soon as practicable thereafter, the Contractor shall give the Superintendent written notice of the period of extension claimed.

If the Contractor is entitled to an extension of time for Practical Completion the Superintendent shall, within 28 days of receipt of the notice of the number of days extension claimed, grant a reasonable extension of time. If within the 28 days the Superintendent does not grant the full extension of time claimed, the Superintendent shall before the expiration of the 28 days give the Contractor notice in writing of the reason.

In determining a reasonable extension of time for an event causing delay, the Superintendent shall have regard to whether the Contractor has taken all reasonable steps to preclude the occurrence of the cause and minimise the consequences of the delay.

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.

A delay by the Principal or the failure of the Superintendent to grant a reasonable extension of time or to grant an extension of time within 28 days, shall not cause the Date for Practical Completion to be set at large but nothing in this paragraph shall prejudice any right of the Contractor to damages.

Some of the key features of this provision which commonly appear in building contracts are:

- prompt notice of any likely delay;
- a separate written claim for an extension of time;
- differing treatment of some time risks depending whether or not the contractual date for completion has passed;
- the identification of causes of delay commonly agreed to entitle the contractor to an extension of time for completion, including:
 - industrial conditions;
 - inclement weather;
 - causes beyond the reasonable control of the contractor;
 - delays caused by or on behalf of the owner;
 - latent conditions;
 - variations;
 - legislative requirements etc.;
- concurrent delays;
- programme contingency;
- the time within which claims should be determined; and
- the contractor's duty to mitigate the effect of the delay.

It is not within the scope of this paper to consider the myriad of issues that may arise in respect of a time extension regime like this one.

The critical points to note for the purposes of this paper are that:

- the Superintendent administers the extension of time regime;
- the extension of time regime includes time limits which purport to disentitle the contractor if not complied with;
- the Superintendent will be required to assess such matters as:
 - whether the cause of any delay is one which entitles the contractor to an extension under the contract;
 - the proper extent of any delay;
 - whether there may be concurrent causes of any delay; and
 - whether the contractor properly sought to avoid or minimise any delay;
- qualifying causes of delay include delays caused by or on behalf of the owner; and
- the Superintendent may extend time even where the contractor is not entitled to or has not claimed an extension.

The Superintendent's duties regarding extensions of time

Clause 23 of AS4300 – 1995 provides:

23. SUPERINTENDENT

The Principal shall ensure that at all times there is a Superintendent and that in the exercise of the functions of the Superintendent under the Contract, the Superintendent-

- (c) acts honestly and fairly;
- (d) acts within the time prescribed under the Contract or where no time is prescribed, within a reasonable time; and
- (e) arrives at a reasonable measure or value of work, quantities or time.

This is consistent with provisions commonly appearing in building contracts and also with the common law³.

These obligations have been found to require that the Superintendent:

- is not dishonest;
- is just and impartial; and
- conducts him or herself in a reasonable manner⁴ -

including in the administration of the extension of time regime.

The Prevention Principle

³ *Perini Corporation v Commonwealth of Australia* [1969] 2 NSW 530

⁴ *Kane Constructions Pty Ltd v Sopov* [2005] VSC 237

In *Trollope & Colls Ltd v North West Metropolitan Hospital Board*⁵, it was stated by Lord Denning, one of the twentieth century's most influential jurists, that:

"it is well settled that in building contracts - and in other contracts too - when there is a stipulation for work to be done in a limited time, if one party by his conduct - it may be quite legitimate conduct, such as ordering extra work, - renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon the strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time."

This notion has come to be known as the Prevention Principle. The relevant principle is that, if the builder is prevented by the owner from completing on time, then the contract will proceed as though no time had been fixed for completion, that is time will be "at large", and the owner will not be entitled to liquidated damages for delay.

Instead the owner will need to prove that both:

- the contractor took longer than was a "reasonable time"; and
- the owner suffered particular losses as a result⁶.

The benefits for each party of extending time for completion

The benefit to the contractor of an extension of time for completion is obvious. No matter what is the cause of delay, an extension of time will reduce the risk that the contractor will become liable for liquidated damages.

However, so far as the owner is concerned, the benefit of an extension of time is less obvious and may even seem counterintuitive, given that the extension will operate to reduce the likelihood of recovering liquidated damages.

Generally speaking, the causes of delay which will entitle the contractor to an extension of time will fall into two categories: neutral causes of delay; and causes which the owner controls. The second category, causes of delay which the owner controls, are the ones which may attract the operation of the Prevention Principle with the result that the owner may lose its entitlement to liquidated damages. However, the inclusion in the contract of an extension of time regime which will respond to such delays will keep the Prevention Principle at bay⁷.

The result is that, from the owner's perspective, the benefit of the contractor receiving an extension of time for an act of prevention by the owner is that it will preserve the owner's right to liquidated damages for the delays which are the contractor's responsibility.

The contractor who does not claim or is not entitled

The owner benefits from the contractor receiving an extension of time because this will preserve the owner's entitlement to liquidated damages for delays which are the contractor's responsibility.

⁵ [1973] 1 WLR 601

⁶ *Peak Constructions (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111

⁷ *Ibid*

It follows that there will be occasions where the contractor's interests will be better served by it sacrificing an entitlement to an extension of time in the interests of arguing that the Prevention Principle has been enlivened so that "time is at large" and liquidated damages are no longer payable.

The following three cases expose the way that these issues arise in practice.

Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd⁸

The second last paragraph of clause 35.5 of AS4300 – 1995 provides:

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.

Australian building lawyers and courts had proceeded for a number of years on the basis that the purpose of the provision was solely to protect the owner from the Prevention Principle.

This was considered to be achieved by conferring a "reserve power" on the Superintendent to extend time for acts of prevention by the owner, in particular where the contractor was not entitled to an extension, for example due to delay in claiming, or because it had not claimed at all.

The provision was thought to stop a situation arising where the contractor might enliven the Prevention Principle by showing that it had been delayed by an act of prevention by the owner in respect of which it could not receive an extension of time under the contract, including as a result of its own failure to claim in time or at all.

In such circumstances, the provision was thought to protect the owner by allowing the point to be made that the presence of the "reserve power" kept the Prevention Principle at bay because there was the potential for an extension of time under the contract. However, it was always argued that the mere presence of the "reserve power" was sufficient and that, since its existence was solely to protect the owner's interests, it was not required to be actually exercised.

In *Gaymark Investments Pty Ltd v Walter Construction Group Ltd⁹*, Bailey J in the Supreme Court of the Northern Territory found that the deletion of a "reserve power" clause where the contractor would have been entitled to an extension except it had not claimed in accordance with the contract, had the result that the Prevention Principle was enlivened and the owner lost its right to liquidated damages.

The *Gaymark* decision put owners well and truly on notice of the importance of including in building contracts a "reserve power" to extend time.

However, in the *Peninsula Balmain* case, the New South Wales Court of Appeal took quite a different approach to the "reserve power". *Abigroup* sought to make a claim for an extension for the first time after the contract had been terminated by relying on the "reserve power" and arguing that the Superintendent's obligations of fairness and independence obliged him to grant an extension even though none had been claimed.

⁸ [2002] NSWCA 211

⁹ (1999) 16 BCL 449

Hodgson JA, with whom the rest of the court agreed, found that:

- had the contract not included a "reserve power" then:
 - Abigroup would not have been entitled to any extension for an act of prevention by the owner because of its own failure to claim within time in accordance with the regime under the contract; and
 - the owner would have remained entitled to liquidated damages because the Prevention Principle would not have been enlivened where it was Abigroup's own failure to claim within time in accordance with the regime under the contract that disentitled it; and
- since the contract did include a "reserve power", it was available to be exercised honestly and impartially in the interests of the builder.

620 Collins St Pty Ltd v Abigroup Contractors Pty Ltd (No 2)¹⁰

This was a case where an arbitrator followed the decision in the Peninsula Balmain case and granted the contractor an extension of time using the "reserve power" even although the contractor had not made the claim during the course of the contract but raised it for the first time during the arbitration.

The main controversy in the arbitration and its subsequent consideration by the Supreme Court of Victoria was how the Peninsula Balmain analysis could be reconciled with the balance of clause 35.5 of the building contract which was clearly intended to strictly limit the contractor's entitlement to claim extensions of time, in particular by requiring compliance with time limits.

The arbitrator took the view that the "reserve power" conferred a wide and unfettered discretion on the Superintendent which was required to be exercised honestly and fairly. He considered the more difficult question to be "what is fair in the circumstances". He acknowledged that this was a departure from the traditional view that the "reserve power" was solely for the benefit of the owner but he saw nothing in the contract to support the argument that the "reserve power" was limited in that way.

Osborne J in the Supreme Court of Victoria agreed with the arbitrator and decided that clause 35.5 provided the "primary mechanism" for an extension of time "subject to compliance with special conditions" but that the "reserve power" was "separate and distinct" and "expressed in the broadest possible terms" so as to be "a discretionary power to grant an EOT in other circumstances effectively where it is just and equitable to do so". He also observed that the parties could easily have included words in the contract to expressly limit the operation of the "reserve power" consistently with the traditional view but had not done so.

Multiplex Constructions (UK) Limited v Honeywell Control Systems Limited (No 2)¹¹

¹⁰ [2006] VSC 491

¹¹ [2007] EWHC 447 (TCC)

This Multiplex case is a recent English decision which exposes the lengths to which a contractor (or subcontractor) will go to argue against receiving an extension of time. It also exposes a difference in approach regarding the Prevention Principle between the courts in England and Australia.

Multiplex was the head contractor for the construction of the new Wembley stadium and Honeywell was its subcontractor for the electronic systems. There were substantial delays both before and after Honeywell entered into its subcontract. The main issue in dispute was that Multiplex issued three revised programmes to Honeywell, each time extending their completion date. Honeywell argued that this had the effect of putting time "at large".

The subcontract did not provide for liquidated damages for delay but instead included an indemnity. It also included a cap on any extensions of time by reference to the extensions Multiplex was entitled to under the head contract.

Honeywell argued that:

- the revised programmes were not causes of delay under the subcontract for which an extension of time could be given;
- the delay notices and the details Honeywell provided to Multiplex of its delay claims were not sufficiently detailed to comply with the extension of time regime under the subcontract;
- the Gaymark decision should be applied such that "time was at large"; and
- since Multiplex had settled with the owner, its entitlements to extensions of time under the head contract had been compromised such that "time was at large" under the subcontract.

The court did not accept any of Honeywell's arguments. It also expressed real doubt whether Gaymark is consistent with the English law and seemed troubled that a contractor (or subcontractor) might benefit by failing to comply with the extension of time regime and thereby setting time "at large". In the event the court found that Gaymark was not relevant because there were no liquidated damages under the Multiplex and Honeywell subcontract. It also found that the settlement between Multiplex and the owner in fact benefited Honeywell because it meant that the cap on extensions of time became inoperable.

The result was that Honeywell failed to establish that "time was at large" and was therefore required to accept the benefit of the three extensions of time conferred by Multiplex having issued the revised programmes.

Conclusion

The operation of the Prevention Principle is a complex and difficult area of building law. The Australian courts have begun to adopt a new approach to the traditional "reserve power" and the English courts seem to take a different approach again.

Perhaps the most difficult aspect of the Prevention Principle is that it tends to result in the parties to a building contract taking positions which may seem at odds with their interests. Owners may wish to ensure that contractors receive more extensions of time than the contractors want. Contractors may prefer not to receive any extensions of time at all.

This is because there is potentially far more at stake than one extension of time. If the Prevention Principle is enlivened then the whole extension of time regime may fall and time may become "at large". It will then be necessary to prove what is a "reasonable time" for completion and whether any losses have actually been caused by a delay.