

Prevention and the enforceability of exclusive remedy clauses



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Introduction

Where an Owner prevents a Contractor from completing work on time, and the construction contract includes a clause stipulating liquidated damages to be the exclusive remedy for delay, an Owner may find themselves with no remedy whatsoever against the Contractor for delay.

This update identifies the legal approach to the enforcement of exclusive remedy provisions where an act of prevention by an Owner has occurred, and explains why it is necessary to ensure an extension of time clause is tightly drafted to cover any act, omission, breach or default on the part of an Owner.

The Prevention Principle

The Prevention Principle has been applied by courts in the construction context to prevent Owners from delaying Contractors in the completion of works and then claiming liquidated damages for the delay. Sometimes known as the “Peak” Principle in reference to the English case of *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*¹ where the principle was first applied, the Prevention Principle requires that each party will not do anything or prevent the other from performing the contract or delay the other party in performing it.

Where an act of prevention occurs the Contractor is no longer bound to deliver the work by the agreed completion date. Time, it is said, is set ‘at large’. As there is no longer a firm date for completion of the work, liquidated damages clauses will be unenforceable. In general this will usually leave an Owner with only the right to claim general damages at law for any delay considered by a court to be ‘unreasonable’.

The position under English law is that if the Owner prevents the completion of the works in any way, he or she loses the right to claim liquidated damages for non-completion on time.² The right can be lost if the Owner:

- fails to give possession of the site³
- fails to provide plans at the proper time⁴
- interferes improperly through his agent in carrying out the works⁵
- orders extras that necessarily delay the works⁶
- fails to deliver components he is bound to provide⁷
- delays in giving essential instructions⁸

1 (1970) 1 BLR 111.

2 *Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC* [1952] 2 All ER 452.

3 *Holme v Guppy* (1838) 3 M&W 387.

4 *Roberts v Bury Improvement Commissioners* (1870) LR 5 CP 310.

5 *Russell v Viscount Sa da Bandeira* (1862) 143 ER 59.

6 *Dodd v Churton* [1897] 1 QB 562.

7 *Perini Pacific v Greater Vancouver Sewerage and Drainage District* (1966) 57 DLR (2d) 307 (British Columbia Court of Appeal).

8 *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111.

The rule is likely to apply even if the Contractor has caused delay in addition to the delay caused by the owner.⁹

The Prevention Principle has also been applied in Australia.¹⁰

In Australia, the scope of acts of prevention has been extended significantly by *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd*.¹¹ In that case, the Contractor failed to comply with the prescribed notice or claim requirements under the contract. The court decided that the contract administrator was nevertheless required to consider the merit of the Contractor's claim honestly and fairly, and if it did not do so, this would be an act of prevention.

Exclusive remedy clauses

In some construction contracts, however, the parties may agree to exclude the right to claim general damages and make liquidated damages the exclusive remedy in respect of late completion. For example, the contract may include a clause stating:

Liquidated damages shall be to the exclusion of any other remedy of the Owner in respect of the Contractor's failure to complete the Works by the Date for Completion.

Contractors will commonly request the inclusion of such a clause to increase the certainty of their agreements, fixing their financial exposure in the event of any delay and expediting dispute resolution during the construction process.

Enforcement of exclusive remedy clauses

In interpreting any contract the courts will aim to give effect to the parties' intentions as evidenced from the terms of the contract. Therefore, where the parties have expressed an intention that liquidated damages be an exclusive remedy, the courts will not interfere with this agreement. It is clear from the authorities, however, that if a party's common law right to sue for damages for breach of contract is to be contractually removed by an exclusive remedy clause, it must be done by very clear words.

The likelihood that the courts would enforce a clearly expressed exclusive remedy clause, such as the example above, is supported by case law where less clearly worded provisions have been upheld.

For example, in *Temloc Ltd v Errill Properties Ltd*¹² clause 24 of the contract appeared under the heading "Damages for Non-Completion" and stated the amount of "liquidated and ascertained damages" to be as stated in the Appendix. The relevant section in the Appendix was filled in with the word "nil". The court held that, on the proper construction of the contract, the parties had come to an exhaustive agreement as to the damages payable by the Contractor in the event of failure to complete the work on time. That agreement was that there should be no damages of any sort for delayed completion.

The rationale underlying the above decision was aptly summarised by Justice Giles of the New Zealand High Court in *Camatos Holdings Ltd v Neil Civil Engineering*,¹³ where his Honour stated:

"Although that result [in *Temloc*] may, at first glance, seem surprising when analysed, the Court is simply holding the parties to their agreement and that is consistent with the established principles. There was no ambiguity, and the clause constituted a recognition by both parties that no compensation should be recoverable".

⁹ *Astilleros Canarios v Cape Hatteras* [1982] 1 Lloyd's Rep 518.

¹⁰ See, eg, *Gaymark Investments Property Ltd v Walter Construction Group* (1999) 16 BCL 449.

¹¹ (2002) 18 BCL 322.

¹² (1987) 39 BLR 30.

¹³ [1998] 3 NZLR 596, 609.

Implications of inclusion of exclusive remedy clause

In light of the above analysis we generally advise that the preferred position for an Owner is to not include an exclusive remedy for delay clause. However, where the Contractor insists upon an exclusive remedy for delay clause, and it is expressed in clear and unambiguous language, it is critical that the extension of time clause is tightly drafted to provide comprehensive protection for an Owner. The Prevention Principle has been said to arise in relation to ‘virtually any event not expressly contemplated by the contract and not within the Contractor’s sphere of responsibility’.¹⁴ Therefore, the extension of time clause must make an extension available not only for any breach or default on the Owner’s part, but for all acts or omissions with the potential to delay the Contractor’s work.¹⁵

Suggested drafting

We recommend the following wording is adopted in the extension of time clauses of all construction contracts:

Subject to the provisions of this GC [], the Contractor is entitled to an extension of time to the Date for Commercial Operation as the Project Company assesses, where a delay to the progress of the Works is caused by any of the following events, whether occurring before, on or after the Date for Commercial Operation:

- *any act, omission, breach or default by the Project Company, the Project Company's Representative and their agents, employees and Contractors*
- *a Variation, except where that Variation is caused by an act, omission or default of the Contractor or its SubContractors, agents or employees*
- *a Suspension of the Works pursuant to GC [], except where that suspension is caused by an act, omission or default of the Contractor or its SubContractors, agents or employees*
- *[etc].*

Where this clause is included the responsibility for claiming an extension of time rests with the Contractor. If the Contractor fails to apply for the extension of time the Contractor will not be entitled to claim that an act of prevention resulted in its inability to complete the work under the contract on time, and any liquidated damages will be payable in accordance with the contract. In these such circumstances there will be no scope for the application of an exclusive remedy clause.

Extensions at Owner’s discretion

In addition, it is usually good practice to include a general right for the Owner to grant an extension of time at any time, although such a provision must be clearly drafted to ensure the Owner has complete and absolute discretion to grant the extension, and that it is not required to exercise its discretion for the benefit of the Contractor. We recommend the inclusion of the following clause in the contract:

Despite any other provisions of this GC [], the Owner may at any time make a fair and reasonable extension of the Date for Completion.

Fail safe clauses

Lastly, to protect the Owner’s position if liquidated damages are found to be unenforceable and where there is an exclusive remedy clause, we recommend the inclusion of a failsafe clause retaining the Owner’s entitlement to claim damages at law in the event that a liquidated damages clause is found for any reason to be void, invalid or otherwise inoperative.

¹⁴ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts*, (Blackwell, 3rd ed, 2009).

¹⁵ The same issue applies in relation to an exclusive remedies clause for performance liquidated damages.

Conclusion

Prevention remains a live obstacle to the enforceability of modern construction contracts. Where an act of prevention occurs, and the contract includes a clearly worded exclusive remedy clause, an Owner may be left with no remedy whatsoever in respect of a failure on the part of the Contractor to complete work on time. It is therefore essential that care is taken with the inclusion of exclusive remedy clauses, and that any extension of time clause is carefully drafted to provide the maximum protection for Owners.

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