Is the Prevention Principle Still Relevant? A Case for Statutory Intervention

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This article analyses whether, in the context of modern-day construction contracts, the operation of the prevention principle adequately safeguards against the unfairness and unreasonableness that it was intended to address. Through the use of time bars and contractual provisions purporting to exclude its operation, the principle risks being consigned to obscurity. In circumstances where the principle is premised on a well-established need to cure unfairness in commercial transactions, a case can be made that statutory intervention is justified in order to compensate any of the principle's shortcomings.

> There is grim irony in speaking of the freedom of contract of those who, because of their economic necessities, give their service for less than is needful to keep body and soul together.[1]

INTRODUCTION

Historically the prevention principle has come to the aid of contractors who stand liable for failing to achieve timeous completion of works by reason of an employer's conduct. In order to avoid the operation of the prevention principle (and preserve entitlements to liquidated damages) construction contracts incorporate mechanisms by which the date for completion of works can be extended in circumstances of employer-caused delay. However, there has been an increasing tendency to impose onerous conditions precedent upon contractors' rights to claim extensions of time (commonly referred to as time bars), which typically prescribe the form, substance and timing of claims.[2] It is arguable that through the use of onerous time bar provisions, the prevention principle no longer guarantees the fairness and reasonableness that it was intended to create. Instead, time bars are occasioning irreparable financial harm to contractors who are forced to compensate an employer for what is arguably the employer's breach.[3] Concerns regarding the principle's efficacy are heightened by the ease with which its operation is able to be displaced by express contractual wording.

Notwithstanding the principle's shortcomings, reform of its operation is unlikely to procure a wholly satisfactory outcome. Time bars are a necessary evil and the prevention principle should not be modified so as to extend its operation to such provisions. Attempts to do so would invariably result in an unfair distribution of risk or uncertainty in respect of contractual rights. Instead, the deficiencies identified are best addressed through the statutory regulation of time bars. The proposed statutory intervention is justified in circumstances where there exists longstanding judicial acknowledgment of the need for a

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[1] An excerpt from the reasons of Harlan F Stone J, the 12th Chief Justice and 52nd Attorney-General of the United States, in *Morehead v New York ex rel Tipaldo*, 298 US 587, 632 (1936).

[2] See, eg, *CMA Assets Pty Ltd v John Holland Pty Ltd (No 6)* [2015] WASC 217, [375].

[3] For discussion on the causal nexus between the employer's preventative act, the contractor's failure to notify, and the delay, see Dado Hrustanpasic, "Time-Bars and the Prevention Principle: Using Fair Extensions of Time and Common-sense Causation" (2012) 28(5) *Construction Law Journal* 379, 384: "The argument goes that, as a matter of causation, it is not a principal's act of prevention which causes an overall delay, but the contractor's own failure to activate their entitlement to an EOT. This failure breaks the causal nexus with the original prevention, becoming the proximate cause of the overall delay. With respect, this argument in the general sense is unsatisfactory because it does not apply the principles of common-sense causation. But for the original act of prevention the delay to the project would not have occurred, but, had the contractor complied with the time bar, the delay would nevertheless remain, in the sense that the project would still be completed at a later date than originally agreed."

legal rule to combat a particular unfairness, and where the desired effect of that rule is no longer being achieved.

THE PREVENTION PRINCIPLE

The prevention principle has been described as a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned.[4] The purpose of the prevention principle is to protect a party from the consequences it would otherwise face in failing to discharge a contractual obligation by reason of a counter-party's acts or omissions. In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*[5] the House of Lords approved the following statement of the principle by Lord Denning in the Court of Appeal:

> 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.[6]

In a construction context, the prevention principle will operate to set time for completion of works at large in circumstances where the contract omits a right to have time for completion extended in instances of delay occasioned by the employer. If this occurs the stipulated time for completion of the works becomes unenforceable, and completion must instead be achieved within a reasonable time.[7] If there is no enforceable time stipulation for completion of the works (through the operation of the prevention principle), there is no date from which liquidated damages can be calculated and, thus, any provision prescribing liquidated damages becomes inoperable.

Views on the doctrinal origin of the principle have not been uniform; some consider it derived from the doctrines of waiver[8] and estoppel,[9] and others suggest that it is a positive rule of law in contract.[10] The uncertainty concerning its origin was identified in *Built Environs Pty Ltd v Tali Engineering Pty Ltd*:[11]

> It is not entirely clear what is the juridical basis of the prevention principle. It may be that it is a term generally implied into contracts requiring cooperation between the parties. It may be that it is part of the principle of avoiding circuity of action otherwise due to damages to which the employer would otherwise have been entitled for breach of the contract being recoverable back by the contractor as damages arising from the employer's own breach of contract. It may be that it is a principle in its own right derived from notions of fairness and justice.[12]

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[4] RH Kersley (ed), *A Selection of Legal Maxims: Classified and Illustrated by Herbert Broom* (Sweet and Maxwell Ltd, 10th revised ed, 1939) 233, 235; Andrew Burr, *Delay and Disruption in Construction Contracts* (Informa Law, 5th ed, 2016) 6–121.

[5] *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601.

[6] *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 607; [1973] 2 All ER 260, 266.

[7] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111, 121, 126; *Spiers Earthworks Pty Ltd v Landtec Projects Corp Pty Ltd (No 2)* (2012) 287 ALR 360, 370; 28 BCL 282; [2012] WASCA 53.

[8] *Thornhill v Neats* (1860) 141 ER 1392, 1397.

[9] See, eg, *Dodd v Churton* [1897] 1 QB 562; *Santalucia Earth Moving Contractors v Zandonadi* [1978] QSC 86; John Dorter, "Delay and Disruption" (2001) 17 BCL 372, 376.

[10] *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391, 394–396. As to the uncertainty of its origin, see also *Turner Corp Ltd (Receiver & Manager Appointed) v Austotel Pty Ltd* (1997) 13 BCL 378, 381; *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744, [29] where counsel for the appellant argued, albeit unsuccessfully, that the prevention principle exists as matter of legal policy.

[11] *Built Environs Pty Ltd v Tali Engineering Pty Ltd* [2013] SASC 84.

[12] *Built Environs Pty Ltd v Tali Engineering Pty Ltd* [2013] SASC 84, [152]; see also *Ferguson v Riviera Building & Construction Pty Ltd* [2017] NSWCATCD 16, [151].

It appears that the preferred view is that the principle is a contractual term implied at law,[13] or alternatively that it exists as a positive rule of law.[14] Some commentators suggest that implied terms differ from positive rules of law, in that the latter may be unyielding, as with, for example, the rule that a contract for an immoral or illegal purpose is void.[15] However, in Australia, it seems that the distinction is one without a difference.[16]

Doctrinal origin aside, it is clear that the prevention principle was intended as the common law panacea to the injustice of a party benefiting from its own breach, that it is premised entirely on notions of fairness and reasonableness,[17] and that its contemporary status is the product of over a century of jurisprudential application and refinement.[18]

Modern Application and Time Bar Dilemma

Initially, courts preferred the view that any right to claim an extension of time, preconditioned or otherwise, provided the contractor with a right to be compensated in respect of a dilatory act, and that accordingly the prevention principle would have no application in such circumstances. This position was articulated by Cole J in *Turner Corp Ltd (Receiver & Manager Appointed) v Austotel Pty Ltd*[19] (*Austotel*):

> 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 the 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 effect of that preventing conduct.[20]

The later decision of *Gaymark Investments Pty Ltd v Walter Construction Group Ltd*[21] (*Gaymark*) created some uncertainty in appearing to reverse the position stated in *Austotel*. The court in *Gaymark* found that despite the existence of an entitlement to claim an extension of time for employer-caused delays, the prevention principle applied by reason of inter alia time bar stipulations that conditioned the contractor's right to make such a claim. Consequently, in that instance, the contractor, who had failed to comply with the time bar stipulations, was able to avoid a significant liquidated damages liability, as the time for completion was set at large.

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[13] See, eg, *Spiers Earthworks Pty Ltd v Landtec Projects Corp Pty Ltd (No 2)* (2012) 287 ALR 360, 370; 28 BCL 282; [2012] WASCA 53: "The essence of the prevention principle is that a party cannot insist on the performance of a contractual obligation by the other party if it itself is the cause of the other party's non-performance. This may be regarded as a particular manifestation of the obligation to cooperate implied as a matter of law in all contracts: Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596 at 607."; See also *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49, [574]; *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* (2017) 95 NSWLR 82, 109 [114]; [2017] NSWCA 151; *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744, [28].

[14] See, eg, *Hera Project Pty Ltd v Bisognin (No 3)* [2017] VSC 268, [108]: "Although there is authority for the proposition that the principle arises from a term implied into the contract by law, the better view is that the principle is a 'positive rule of law' based on fairness and reasonableness." See also *Southern Foundries (1926) Ltd v Shirlaw* [1940] 2 All ER 445, 455.

[15] Richard Austen-Baker, *Implied Terms in English Contract Law* (Edward Elgar Publishing, 2nd ed, 2017) 1.29–1.32.

[16] *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391, 394–396.

[17] *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391, 397: "Whatever be the juridical basis of prevention, it is grounded upon considerations of fairness and reasonableness which are operative whether the delaying variation is ordered before or after the due date for completion." See also *Turner Corp Ltd (Receiver & Manager Appointed) v Austotel Pty Ltd* (1997) 13 BCL 378, 379; *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* (2017) 95 NSWLR 82, 109–110 [115]; [2017] NSWCA 151; *Hera Project Pty Ltd v Bisognin (No 3)* [2017] VSC 268, [108]; *Balfour Beatty Buildings Ltd v Chestermount Properties Ltd* (1993) 62 BLR 1, 29.

[18] See, eg, *Holme v Guppy* (1838) 3 M&W 387, 389: "[T]hat 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"; see also *Russell v Viscount Sa Da Bandeira* (1862) 143 ER 59, 82; *Roberts v Bury Improvement Commissioners* (1869–70) LR 5 CP 310, 326.

[19] *Turner Corp Ltd (Receiver & Manager Appointed) v Austotel Pty Ltd* (1997) 13 BCL 378.

[20] *Turner Corp Ltd (Receiver & Manager Appointed) v Austotel Pty Ltd* (1997) 13 BCL 378, 384–385.

[21] *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* (2000) 16 BCL 449.

The issue arising from the reasoning in *Gaymark* is that a contractor who enjoys an entitlement to claim an extension of time for employer-caused delays, but does not comply with the relevant preconditions, is able to avoid, through the operation of the prevention principle, the burden of liquidated damages, not just in respect of employer-caused delays, but also in respect of the delays it has committed throughout the contract term. This issue was identified in the reasons of Jackson J in the English High Court decision of *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)*:[22]

> If the *Gaymark Investments* case 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.[23]

Contemporary authority rejects the reasoning in *Gaymark*, and affirms the position stated in *Austotel*; that if there is any provision enabling time to be extended in respect of employer-caused delays, such provision will act to negate the application of the prevention principle, irrespective of onerous preconditioning.[24]

While the present position is well reasoned, it is not difficult to comprehend the injustice in an employer obtaining the benefit of liquidated damages for a period of time for which it was responsible for delaying completion of the works. That injustice becomes particularly apparent in circumstances where the employer is aware of the delay it is inflicting, the conditions precedent to claiming an extension of time are onerous, a contractor's non-compliance with same is technical and non-prejudicial, and the liquidated damages levied on the contractor are substantial. As Winser identifies, the prevention principle fails to achieve an equitable middle ground:

> 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 liability to pay liquidated damages?[25]

The prevention principle no longer provides a wholly satisfactory and just outcome in respect of delays arising under modern-day construction contracts, and the courts are being placed in a position whereby they are forced to choose the lesser of two evils;[26] to permit the use of onerous time bar provisions or allow time to be set at large as a consequence of them.

Is a Non-Statutory Solution Available?

A. Reform of the Common Law

Some have advocated reform of the operation of the prevention principle so as to contemplate, in various ways, the operation of time bars.

To date, much of the proposed reform has been premised on principles of causation.[27] For example, it has been suggested that time bars should be enforceable only in respect of contractor-caused and neutral

[22] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] 111 Con LR 78; [2007] EWHC 447 (TCC).

[23] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] 111 Con LR 78, 105; [2007] EWHC 447 (TCC).

[24] *Turner Corp Ltd (Receiver & Manager Appointed) v Austotel Pty Ltd* (1997) 13 BCL 378; *Turner Corp Ltd (in liq) v Co-ordinated Industries Pty Ltd* (1995) 11 BCL 202; *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (2002) 18 BCL 322; [2002] NSWCA 211; *Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd* (2010) 26 BCL 130; [2008] QSC 58; *Champion Homes Sales Pty Ltd v DCT Projects Pty Ltd* (2015) 18 BPR 35,707; [2015] NSWSC 616; *Spiers Earthworks Pty Ltd v Landtec Projects Corp Pty Ltd (No 2)* (2012) 287 ALR 360, 372; 28 BCL 282; [2012] WASCA 53; *CMA Assets Pty Ltd v John Holland Pty Ltd (No 6)* [2015] WASC 217, [863].

[25] Crispin Winser, "Shutting Pandora's Box: The Prevention Principle after *Multiplex v Honeywell*" (2007) 23 *Construction Law Journal* 511, 518–519.

[26] Jeremy Coggins, "The Application of the Prevention Principle in Australia – Part Two" (2009) 21(5) *Australian Construction Law Bulletin* 45, 49.

[27] See, eg, Doug Jones, "Can Prevention Be Cured by Time Bars?" (2009) 26 *International Construction Law Review* 57; Matthew Bell, "Scaling the Peak: The Prevention Principle in Australian Construction Contracting" (2006) 23 *International Construction Law Review* 318; Morris Ross, "The Status of the Prevention Principle: Good from Far But Far from Good" (2011) 27 *Construction Law Journal* 1.

delays, and that the principle ought only operate so as to reduce recoverable damages in respect of periods of delay caused by the employer.[28] This formulation would address criticisms that time bar provisions applying to employer-caused delays effect a transfer of risk for those delays to the contractor,[29] which risk is not often obvious or properly contemplated at the time of contracting.[30]

However, to extend the principle's operation to time bar provisions skews the risk of delay to dramatically favour the contractor. Notice stipulations that operate in respect of employer-caused delay are not simply a measure introduced to obtain the financial benefit of a contractor's non-compliance.[31] It is often the case that an employer will not be aware of the preventative acts it is inflicting, but that the contractor, with an intimate knowledge of the project works, will.

Time bars ensure that an employer is informed, in a timely manner, of its preventative acts, and thus provide it the opportunity to mitigate or cure its delay at an early juncture. In that sense, time bars can be utilised as a means to achieve sensible commercial risk allocation, as identified by Lord MacFaydon in *City Inn Ltd v Shepherd Construction Ltd*[32] (*City Inn*):

> What cl 13.8.1 was designed to secure was that the employer was informed if and when the contractor thought that the issue of an architect's instruction would prevent timeous completion. If so informed, the employer might in some circumstances choose to avoid the delay by having the instruction cancelled. Even if that were not done, the employer would be put in a position in which he could make advance arrangements to cope with the financial consequences of the delay. If the employer was deprived of that information through failure on the part of the contractor to comply with his obligation under cl 13.8.1, cl 13.8.5 secured that the risk of loss would remain with the contractor, by depriving him of entitlement to an extension of time. Clause 13.8.5 did not remove the contractor's entitlement to payment for the instructed work, but deprived him of the opportunity to transfer the risk of loss through delay, by depriving him of his entitlement to an extension of time. In short, cl 13.8 as a whole was concerned with allocation of the burden of risk of the cost of delay.[33]

Further, if no notice of employer-caused delay is required within a stipulated time, contractors may attempt to assert employer-caused delays upon completion of the works in an effort to extend time and reduce any existing liquidated damages liability. Late claims issued in this way would be difficult to assess; the alleged dilatory conduct may have occurred many months, or even years earlier, and evidence may not have been retained (as no notification of the alleged delay was provided).[34]

Others have suggested that time bars should only be enforceable in respect of delays *innocently* or *unknowingly* caused by the employer.[35] This formulation is sound in theory, however in practice determining what delays are innocent or unknown will involve a close scrutiny of both the nature of the delay and of the parties' respective positions at the time of the dilatory conduct. An inquiry of this kind is likely to expose divergent views which may precipitate litigation and prolong a final determination of the parties' rights.

A further reformulation of the common law principle may exist; that an employer's reliance on anything other than *reasonable* preconditioning to claiming an extension of time will be construed as an act of prevention to which the principle applies. Such matters appear to have been contemplated by Lord MacFaydon in *City Inn* where, in considering the validity of conditions precedent to claiming an extension

[28] Jones, n 27, 69, 73–74.

[29] Stephen Rae, "Prevention and Damages: Who Takes the Risk for Employer Delays" (2006) 22(5) *Construction Law Journal* 307, 307–308.

[30] Jeremy Coggins, "The Application of the Prevention Principle in Australia – Part One" (2009) 21(4) *Australian Construction Law Bulletin* 30, 33; Jones, n 27, 68.

[31] Through the use of liquidated damages machinery.

[32] *City Inn Ltd v Shepherd Construction Ltd* 2002 SLT 781; [2001] Scot CS 187; [2001] Adj LR 07/17.

[33] *City Inn Ltd v Shepherd Construction Ltd* 2002 SLT 781, 784 [6]; [2001] Scot CS 187; [2001] Adj LR 07/17.

[34] See, eg, *Re Multiplex Constructions Pty Ltd* [1999] 1 Qd R 287, 289–291.

[35] Ross, n 27, 23–26.

of time, his Lordship had regard to whether such conditions precedent created an *excessive burden*.[36] However, it is acknowledged that a test based on reasonableness will suffer the same impracticalities identified in respect of innocent and unknown delays.

B. The Superintendent's Unilateral Power

In a further attempt to avoid the operation of the prevention principle, many contracts provide the contract administrator with authority to unilaterally award contractors extensions of time notwithstanding their non-compliance with preconditions to claiming same.[37] The decision of *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd*[38] (*Peninsula Balmain*) confirmed that the prevention principle could have no application where the contract confers on the superintendent a unilateral power to extend time; any threat that a prevention argument may pose is able to be neutralised by the superintendent (or in its place, the court) exercising the unilateral power and extending time for completion by any period of employer-caused delay.[39]

However, it is submitted that the present status of the law is that provided there is a mechanism (preconditioned or otherwise) permitting claims for extensions of time in respect of employer-caused delay, the prevention principle will have no application, and the absence of a superintendent's unilateral power does not automatically engage the prevention principle. This matter was addressed in the reasons of Hodgson JA in *Peninsula Balmain*[40] which reasons were cited with approval by McLure P in *Spiers Earthworks Pty Ltd v Landtec Projects Corp Pty Ltd (No 2)*:[41]

> The New South Wales Court of Appeal in *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (2002) 18 BCL 322; [2002] NSWCA 211 upheld the correctness of the *Turner Corporation* cases. In *Peninsula Balmain*, the contractor had not sought or been granted extensions of time for a period prior to the employer terminating the building contract. However, a referee appointed by a judge pursuant to the New South Wales Supreme Court rules exercised the discretionary power of the superintendent to grant an extension of time. The building contract included the General Conditions of Contract AS 2124 - 1992, cl 35.5 of which is in materially the same terms as its equivalent in the first contract. The New South Wales Court of Appeal held that, even without the superintendent having the power to extend time, a contractor's failure to make a claim within time precludes an extension of time and the contractor remains liable for liquidated damages, even if the delay had been caused by events otherwise falling within the prevention principle [78].
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> …
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> This court is obliged to follow *Peninsula Balmain* unless convinced it is clearly wrong: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 [135]. Neither party expressly challenged the correctness of the decision.[42]

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[36] Albeit such matters do not appear to have been determinative of validity; see, *City Inn Ltd v Shepherd Construction Ltd* 2002 SLT 781, 792 [24]; [2001] Scot CS 187; [2001] Adj LR 07/17.

[37] The decision of *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* (2000) 16 BCL 449 cautioned the industry that in the absence of a superintendent's discretionary power, any attempt to stifle or condition an entitlement to claim an extension of time may trigger the application of the prevention principle.

[38] *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (2002) 18 BCL 322; [2002] NSWCA 211.

[39] However, it is interesting to note that, perhaps contrary to the drafters' intentions, unilateral powers included in some Australian standard form contracts have been found to provide superintendents with liberties beyond merely averting prevention principle/time at large threats; unilateral powers required to be exercised *honestly* and *fairly* and *for the benefit of both parties* have resulted in extensions of time being awarded despite a contractor's failure to comply with valid and operable extension of time machinery (and in circumstances where the prevention principle could have no application); see *Spiers Earthworks Pty Ltd v Landtec Projects Corp Pty Ltd (No 2)* (2012) 287 ALR 360, 373; 28 BCL 282; [2012] WASCA 53; *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (2002) 18 BCL 322, 341–343; [2002] NSWCA 211; *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* (2017) 95 NSWLR 82, 113, 115 [128], [139]–[140]; [2017] NSWCA 151.

[40] *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (2002) 18 BCL 322, 343; [2002] NSWCA 211.

[41] *Spiers Earthworks Pty Ltd v Landtec Projects Corp Pty Ltd (No 2)* (2012) 287 ALR 360; 28 BCL 282; [2012] WASCA 53; see also *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* (2017) 95 NSWLR 82, 112 [125]; [2017] NSWCA 151.

[42] *Spiers Earthworks Pty Ltd v Landtec Projects Corp Pty Ltd (No 2)* (2012) 287 ALR 360, 372; 28 BCL 282; [2012] WASCA 53.

It follows that despite its perceived importance,[43] the superintendent's unilateral power is unnecessary to displace the operation of the prevention principle, and onerous time bar provisions will survive despite the absence of such power. Even if the prevention principle was to be modified so as to require the inclusion of a unilateral power, the precise wording granting the power and the circumstances in which it must be exercised in order to address the subject unfairness would be open to similar criticisms of uncertainty that pertain to the reform proposals discussed above.[44] Accordingly, given its dispensable status and those matters concerning uncertainty of outcome, a solution to the time bar dilemma is not found in the superintendent's unilateral power.[45]

C. The Doctrine of Penalties

Whether time bars trigger the operation of the penalties doctrine has been the subject of lively debate.[46] The doctrine provides that equity will, in certain circumstances, relieve a party who is burdened with the imposition of a secondary liability (in addition to a liability for damages) upon its default under a contract.[47] It has been contended that a contractual requirement to issue an extension of time claim within a certain period of time is akin to a *primary stipulation*, and that the relevant *collateral stipulation* (imposing a secondary liability) is the barring of any claim that does not adhere to contractual preconditions together with any consequent liability to pay liquidated damages; the collateral stipulation imposed is to the detriment of the contractor and the benefit of the employer.[48]

However, the generally accepted view is that the penalties doctrine has no application to time bar provisions.[49] Support for that view can be gleaned from the decision of *Paciocco v Australia and New Zealand Banking Group Ltd*[50] where the court emphasised that the relevant inquiry in assessing whether the collateral stipulation is penal is whether the detriment it imposes is out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.[51] As stated earlier, the opportunity to mitigate delay is an obvious legitimate interest in having a time bar enforced. Additional legitimate interests of an employer in enforcing time bar stipulations were identified by McDougall J in *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd*:[52]

> Where John Goss wishes to claim an amount over and above the Contract Amount (for example, for a variation, or for delay or disruption costs), it is required, as a precondition of such a claim, to give notice under, and complying with the terms of, cl 45. It is obvious why a head contractor in Leighton's position might stipulate for such notice. Firstly, it will enable the claim to be investigated promptly (and, perhaps, before any work comprised in it is rebuilt, or built over). Secondly, it will enable Leighton to monitor its

[43] See, eg, *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* (2000) 16 BCL 449; Kirsty Smith, "Extension of Time Notification and the Superintendent's Discretion – the Ongoing Tug of War between Principle and Contractor" (2015) 31 BCL 231; Jones, n 27, 70.

[44] For example, a requirement that the superintendent exercise his or her discretion to grant an extension of time in instances of delay *knowingly* caused by the employer or where the employer is *unreasonably* relying on a time bar, lacks a sufficient degree of objectivity and certainty.

[45] Noting also that the courts have accepted that the discretionary power to extend time need not be exercised honestly and fairly by the superintendent if the contract does not stipulate same; see, eg, *Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd* (2010) 26 BCL 130; [2008] QSC 58.

[46] Andrew Downie, "Time Bars after Andrews v ANZ" (2014) 30 BCL 7; John Bond, "Contrary to What You Might Have Heard, a Properly Drafted Contractual Time Bar Will Not Attract the Penalty Doctrine" (2013) *The Arbitrator and Mediator* 69; Philip Davenport, "Andrews v ANZ and Penalty Clauses" (Paper presented at Adjudication Forum, 13 November 2012).

[47] *Legione v Hateley* (1983) 152 CLR 406, 445 and cited with approval in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205, 208; [2012] HCA 30; *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525, 545; [2016] HCA 28.

[48] Davenport, n 46, 4–7.

[49] As set out in Bond, n 46.

[50] *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525; [2016] HCA 28.

[51] *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525, 552–557, 607; [2016] HCA 28; see also *Makdessi v Cavendish Square Holding BV* [2016] AC 1172, 1204; [2016] 2 All ER 519, 538; [2015] UKSC 67.

[52] *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707; [2006] NSWSC 798.

> overall exposure to the subcontractor. Thirdly, it will enable Leighton to assess its own position vis a vis its employer. No doubt, there are other good reasons for stipulations of the kind found in cl 45.[53]

Separately, compliance with a time bar provides the contractor with a benefit; the right to obtain an extension of time to the date for completion.[54] It is doubtful whether relief from compliance is consistent with the notion that equity does not relieve a person of the consequences of their own carelessness. This principle was identified by Murphy J in *Hillier v Goodfellow*[55] which concerned the failure of an optionee to exercise an option prior to the date for its exercise expiring:

> That is not to say that if because of fraud, representation or request the optionee (purchaser) fails to declare himself before the due date, he could not be entitled to relief. Clearly he would have an equity, but if, simply by his own decision, unilateral mistake, misjudgment or even sheer incompetence, he does not in fact exercise his legal entitlement, then in my view it is doubtful whether Equity would come to his aid.[56]

The better view is that the doctrine of penalties has no application to the use of time bars that precondition a contractual right to an extension of time. Accordingly, the equitable doctrine does not compensate the shortcomings of the prevention principle or resolve the subject dilemma.

Contracting Out

If the prevention principle can be excluded by express terms, then there may be little point in theorising about its operation and whether time bars ought to offend it. There is no practical difference between unachievable time bar stipulations and a provision excluding the operation of the prevention principle.

Debate concerning a party's ability to exclude the operation of the principle intensified in the United Kingdom following the decision of *North Midland Building Ltd v Cyden Homes Ltd*[57] (*North Midland*), in which it was determined that the prevention principle would not operate in circumstances where a standard form contract had been modified so as to preclude a contractor's entitlement to an extension of time for concurrent delay. Such contractual exclusion is a modification of the common law position in England that a contractor is entitled to an extension of time for a period of delay caused by an employer, notwithstanding the concurrent effect of its own delay.[58]

In considering the validity of the exclusion clause in *North Midland*, Fraser J found that inter alia the prevention principle has no application in circumstances of concurrent delay and that accordingly the exclusion did not offend the principle.[59] While views to the contrary have been expressed in the United Kingdom,[60] the Court of Appeal in recently upholding Fraser J's findings appears to have silenced

[53] *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* (2006) 66 NSWLR 707, 722; [2006] NSWSC 798.

[54] Noting that the right to claim an extension of time is also to the employer's benefit as such right precludes the operation of the prevention principle and preserves the entitlement to liquidated damages: see *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* (2017) 95 NSWLR 82, 110 [119]; [2017] NSWCA 151; *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] 111 Con LR 78, 92 [49]; [2007] EWHC 447 (TCC).

[55] *Hillier v Goodfellow* [1988] ANZ ConvR 440.

[56] *Hillier v Goodfellow* [1988] ANZ ConvR 440, 442.

[57] *North Midland Building Ltd v Cyden Homes Ltd* [2017] 174 ConLR 1; [2017] EWHC 2414 (TCC).

[58] *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 Con LR 32, 37 [13]; *De Beers UK Ltd (formerly Diamond Trading Co Ltd) v Atos Origin IT Services UK Ltd* (2010) 134 ConLR 151, 197; [2010] EWHC 3276 (TCC), [177]; *Walter Lilly & Company Ltd v Mackay* (2012) 143 ConLR 79, 207; [2012] EWHC 1773 (TCC), [370]; Society of Construction Law, *Society of Construction Law Delay and Disruption Protocol* (Society of Construction Law (UK), 2nd ed, 2017) 10.12–10.16; see also *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744, [16]–[18] for a summary of the variance in position.

[59] *North Midland Building Ltd v Cyden Homes Ltd* (2017) 174 ConLR 1, 7–11; [2017] EWHC 2414 (TCC), [16], [29]. In support the proposition that the prevention principle will not operate in respect of concurrent delay see also *Jerram Falkus Construction Ltd v Fenice Investments Inc* [2011] BLR 644, [50]; [2011] EWHC 1935 (TCC) [50]; *Adyard Abu Dhabi v SD Marine Services* [2011] BLR 384, [257]–[292]; [2011] EWHC 848 (Comm).

[60] See, eg, John Marrin, "Concurrent Delay Revisited" (Society of Construction Law Paper 179, February 2013) 6–7; Robert Clay and Nicholas Dennys, *Hudson's Building and Engineering Contracts*, (Sweet & Maxwell, 12th ed, 2010), 6-060: "Thus, it is well established that an Employer is not entitled to liquidated damages if by their acts or omissions they have prevented the Contractor from completing their work by the completion date. Whether concurrent with another Contractor delay or not, there is no reason

debate.[61] This is consistent with the position in Australia where it has been accepted that the principle will only apply in respect of actual delay inflicted by the employer.[62] Significantly, the Court of Appeal in *North Midland* went one step further and found that even if the court was wrong in respect of those matters concerning concurrent delay, the validity of the exclusion clause would subsist as the operation of the prevention principle is able to be excluded by express terms.[63]

The courts in Australia have also confirmed that the operation of the prevention principle will yield to a contrary intention expressed in the contract. The matter of *CMA Assets Pty Ltd v John Holland Pty Ltd (No 6)*[64] (*CMA Assets*) concerned a provision that purported to expressly exclude the operation of the principle. As to the validity of the exclusion, Allanson J held:

> The application of the prevention principle must be considered in the context of the particular contract. The Subcontract between John Holland and CMA directly addressed this question in cl 10.13, providing that if CMA failed to comply with the notice procedures in cl 10.12 it shall have no entitlement to an extension of time and any principle of law or equity which might render the Date for Practical Completion unenforceable shall not apply. Expressly, cl 10.13 purports to exclude the prevention principle. In my opinion, it is effective in doing so. CMA is precluded from the benefit of an extension of time and is liable for liquidated damages, even where the relevant delay has been caused by John Holland: see *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211 [78], referred to by McLure P in *Spiers* [57].[65]

His Honour appears to have proceeded on the basis that the principle is in fact a contractual term implied at law.[66] It is trite that any term implied at law is subject to express provisions to the contrary.[67] Accordingly, that the operation of the prevention principle is capable of being excluded is difficult to refute. However, within industry circles attempts to exclude the principle's operation are often approached with a degree of apprehension.[68] Similarly, it can be observed that some courts have been less willing to make a determination on whether the principle can be excluded.[69] This may be a consequence of the apparent uncertainty concerning the principle's origin, or perhaps out of some reluctance to permit the parties to effortlessly exclude from the bargain the fairness and reasonableness that the principle effects and that the courts have long considered necessary. It may be those matters that influenced the Full Court of the Supreme Court of South Australia in the somewhat anomalous case of *Kyren Pty Ltd v Wunda Projects Australia Pty Ltd*,[70] in which the court found that an employer was unable to exercise any right to liquidated damages (presumably on the basis that time was at large) despite express wording in the

why the principle should not be the same. As Salmon LJ observed: 'If the failure to complete on time is due to the fault of both the employer and the contractor, in my view the clause (giving the employer liquidated damages) 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. … I consider that unless the contract expresses a contrary intention, the employer, in the circumstances postulated, is left to his ordinary remedy; that is to say, to recover such damages as he can prove flow from the contractor's breach'" (emphasis added).

[61] *North Midland Building Ltd v Cyden Homes Ltd* [2018] EWCA Civ 1744, [32].

[62] See, eg, *Turner Corp Ltd (in liq) v Co-ordinated Industries Pty Ltd* (1995) 11 BCL 202: "In any event the employer's actions must cause 'actual', as opposed to potential delay in the sense that the completion of the work is delayed by the actions of the employer. It is not to the point to say that there could have been a delay. It is necessary to establish that delay was caused." For a contrary position see *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391.

[63] *North Midland Building Limited v Cyden Homes Ltd* [2018] EWCA Civ 1744, [36].

[64] *CMA Assets Pty Ltd v John Holland Pty Ltd (No 6)* [2015] WASC 217.

[65] *CMA Assets Pty Ltd v John Holland Pty Ltd (No 6)* [2015] WASC 217, [865].

[66] *CMA Assets Pty Ltd v John Holland Pty Ltd (No 6)* [2015] WASC 217, [863].

[67] See, eg, *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 449–450.

[68] For example, it is commonplace for contractual provisions purporting to exclude the operation of the principle to be couched in terms such that the operation of the principle is excluded only to the extent permitted by law.

[69] See, eg, *Spiers Earthworks Pty Ltd v Landtec Projects Corp Pty Ltd (No 2)* (2012) 287 ALR 360, 373; 28 BCL 282; [2012] WASCA 53; *BAE Systems Australia Ltd v Cubic Defence New Zealand Ltd* (2011) 285 ALR 596, 611; [2011] FCA 1434.

[70] *Kyren Pty Ltd v Wunda Projects Australia Pty Ltd* [2012] SASCFC 23.

contract that the superintendent's failure to grant an extension of time will not cause time to be set at large.[71]

However, the weight of authority suggests that an express term is all that is necessary to exclude the operation of the principle. It follows that if such a term is adequately styled it will negate the requirement to incorporate any operable extension of time machinery. This is perhaps the most compelling cause for reform. If contractors are forced, *because of their economic necessities*, to take on the burden of unachievable time bar stipulations, there is little prospect that they will refuse contracts omitting any right to extend time and incorporating provisions such as that the subject of *CMA Assets*.

Statutory Regulation

The prevention principle's shortcomings are best addressed not through reform of the principle itself but through statutory regulation of time bars. To that end, statute may prescribe a minimum standard for contractual preconditioning to extension of time claims. It would be necessary for the relevant prescription to stipulate that, to the extent a time for completion of works is provided in the contract, an extension of time mechanism no harsher than that prescribed must be incorporated in order to preserve the time for completion. The proposed statutory prescription would then adequately safeguard against both unfair use of time bars and parties' attempts to contract out of the operation of the prevention principle, while also ensuring the employer obtains the benefit of reasonable notice provisions.

Alternatively, it may be possible to instead prescribe that the validity of a time bar will only subsist to the extent that its operation is *reasonable*, as assessed at the time of entering into the contract. A similar provision is included in the *Unfair Contract Terms Act 1977* (UK) (UCTA), a statute that regulates certain aspects of commercial contracts in the United Kingdom, and which provides inter alia that certain exclusions or limitations of liability must be reasonable. For instance, s 2(2) of the UCTA provides that any term included in a commercial agreement that purports to exclude or restrict liability for negligence (except in instances of personal injury or death) will be unenforceable unless it satisfies the requirement of reasonableness. However, as set out above, the difficulty with a formulation premised on reasonableness is that what is reasonable will always turn on the facts and the absence of any clear standard may encourage contractors who have failed to comply with notice provisions to commence proceedings in the hope of striking down time bar stipulations and reducing liquidated damages liabilities.[72] Reasonableness is not defined in the UCTA, however Sch 2 of the Act sets out a non-exhaustive list of matters to consider in assessing reasonableness. One such matter is "where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable". If a reasonableness test was to be adopted in respect of time bars, a similar inquiry in respect of compliance expectations could be employed.

Significantly, s 2(3) of the UCTA expressly undermines the autonomous premise of classical contract theory in providing that a party's agreement to or awareness of the limitation or exclusion clause is not of itself to be taken as indicating voluntary acceptance of any risk. Clearly the legislature considered that there was sufficient merit in compromising freedom of contract in order to procure fairer transactions, even for sophisticated parties. The case for statutory regulation of time bars is arguably stronger than that for exclusions; not only is an employer's liability limited in respect of its breach, but, in instances where onerous time bar stipulations are not strictly complied with, the employer is actually able to financially benefit from the breach by levying liquidated damages for the period that it has caused delay.

Statutory interference in commercial transactions was also considered by the Australian Productivity Commission in proposing the introduction of what was eventually styled the *Treasury Legislation*

[71] *Kyren Pty Ltd v Wunda Projects Australia Pty Ltd* [2012] SASCFC 23, [133]–[141]. The finding in *Kyren*, that a right to liquidated damages was unavailable to the employer (presumably on the basis that time was at large), is particularly unusual in circumstances where the contractor enjoyed a right to apply for extensions of time in circumstances of employer caused delay, but failed to exercise that right.

[72] For decisions concerning a *reasonable* limitation or exclusion in a construction context, see *Trustees of Ampleforth Abbey Trust v Turner & Townsend Project Management Ltd* [2012] EWHC 2137 (TCC); *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC); *Commercial Management* (*Investments*) *Ltd v Mitchell Design & Construct Ltd* [2016] EWHC 76 (TCC); *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] BLR 491; [2018] EWCA Civ 1371.

Amendment (Small Business and Unfair Contract Terms) Act 2015 (Cth).[73] In advancing a rationale for statutory intervention into small business contracts, the Productivity Commission stressed the value that all people place on *fairness*:

> A strong in-principle reason for government intervention is that fairness is a highly valued ethical norm. Most people abhor unfairness for both themselves and others. This appears to be the main basis for action identified by participants in this inquiry.[74]

In support of its proposal the Productivity Commission also cited the fact that some parties may underestimate the risk inherent in certain contract terms, resulting in an inefficient distribution of risk.[75] The same has been suggested in respect of whether contractors properly understand the risk allocation effected by time bar provisions.[76]

The wording of the proposed minimum standard would need to be informed through comprehensive industry consultation and is beyond the ambit of this article. However, once formulated, the prescription could be included in, for example, the various State and Territory statutes that regulate the construction industry,[77] some of which already regulate certain aspects of commercial building contracts.[78] Importantly, the minimum standard would need to reflect what the industry considers to be reasonable enough to justify an employer, in certain circumstances of non-compliance, levying liquidated damages for its own delay. In that sense, admittedly, a minimum standard may not be as true an antidote to the subject unfairness that statutory prescriptions premised on reasonableness might be. However, while it may not be as theoretically sound, in practice, the benefits of an objective standard are likely to extend beyond curing discrete instances of unfairness created by time bars. For instance, a statutory minimum standard would promote a clearer understanding within the industry of time entitlements under building contracts, which is likely to improve contract administration and reduce time-related litigation. A clearer understanding of parties' rights and fewer disputes are likely to improve the financial health of the construction industry,[79] as well as build trust within the industry.[80]

It is acknowledged that any proposed encroachment on the doctrine of freedom of contract must be given careful consideration and permitted in only those exceptional cases where its utility is well established. The courts have been at pains to protect and stress the importance of the laissez-faire principles that inform our contract law and policy.[81] However, notwithstanding the importance of those principles, in certain circumstances the court will intervene so as to improve the nature of bargains; for example, through its

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[73] Productivity Commission, *Review of Australia's Consumer Policy Framework*, Report No 45 (2008) 413.

[74] Productivity Commission, n 73, 413.

[75] Productivity Commission, n 73, 414.

[76] Coggins, n 30, 33; Jones, n 27, 76.

[77] See, eg, *Queensland Building and Construction Commission Act 1991* (Qld), *Building Work Contractors Act 1995* (SA), *Fair Trading Act 1987* (NSW), *Building Act 2016* (Tas), *Building Act 1993* (Vic), *Building Act 2011* (WA), *Building Act 2004* (ACT), *Building Act 1993* (NT), and the various State and Territory security of payment legislation.

[78] See, eg, *Queensland Building and Construction Commission Act 1991* (Qld) Pt 4A and separately, in respect of the entitlement to and administration of progress payments, see the various State and Territory security of payment legislation.

[79] As for the financial health of the construction industry see, eg, The Australian Senate Economics References Committee, Parliament of Australia, *"I Just Want to Be Paid" Insolvency in the Australian Construction Industry* (2015) xx–xxi: "In 2013–14 alone, ASIC figures indicate that insolvent businesses in the construction industry had, at the very least, a total shortfall of liabilities over assets accessible by their creditors of $1.625 billion. Others who have analysed the data place the amount at $2.7 billion. The construction industry consistently rates as either the highest or second highest as against all other industries when it comes to unpaid employee entitlements."

[80] Productivity Commission, n 73, 414.

[81] *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260, 267–268 (Lord Person): "[T]he basic principle that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves"; see also *Printing and Numerical Registering Co v Sampson* (1874–75) LR 19 Eq 462, 465 where Sir George Jessel MR stated: "[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice."

application of the prevention principle. The centuries of jurisprudence recognising and attempting to remedy the inequity in allowing a party to benefit from its own breach should assure stakeholders that the proposed intervention in parties' contractual relations has been given careful consideration and is justified.

It is arguable that the operation of the prevention principle is not a means of simply neutralising aspects of an uncommercial bargain but instead akin to a legal policy informed by commonsense notions of justice; that the law should not permit a party to benefit from its own wrong. It is the obvious merit in that policy, the value placed on fairness, the judicial recognition of the need for a legal rule, and the ability to truncate or exclude the effect of the rule that justifies statutory intervention.

CONCLUSION

The onerous preconditioning of extension of time entitlements in construction contracts remains an issue, and the prevention principle no longer guarantees fairness in circumstances of employer-caused delay.

Regulation of time bars in construction contracts presents the most sensible solution and imposes no greater imposition on the doctrine of freedom of contract than that imposed when the prevention principle was first introduced into common law. The principle was introduced to ensure fairness in circumstances where it was found wanting. That fairness has been eroded through the use of onerous time bars and parties' attempts to contract out of the principle's operation. In circumstances where preserving fairness has justified similar statutory intervention, regulating time bar provisions finds, at least, equal justification.