THE PREVENTION PRINCIPLE: ONSHORE v OFFSHORE AND THE PROBLEM OF TIME AT LARGE

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The Prevention Principle

The prevention principle is a general principle of the construction of contracts governed by English law, broadly derived from the well-established proposition that a party cannot, in the absence of clear terms, take advantage of his own wrong. The principle has been discussed in many cases, but the generally accepted formulation of the principle is taken from the speech of Lord Diplock in Cheall v A.P.E.X.[1]:

> *"...except in the unlikely case that the contract contains clear express provisions to the contrary, it is to be presumed that it was not the intention of the parties that either party should be entitled to rely upon his own breaches of his primary obligations as bringing the contract to an end, i.e. as terminating any further primary obligations on his part then remaining unperformed...."*

Further clarity on the principle was provided by Patten LJ in BDW Trading Limited v JM Rowe (Investments) Limited[2]:

> *"Although there has been a certain amount of academic discussion as to whether the principle has the status of a rule of law which is imposed upon the parties to a contract almost regardless of what they have agreed, it is now clear as a matter of authority that the application of the principle can be excluded or modified by the terms of the contract and that its scope in any particular case will depend upon the construction of the relevant agreement."*

This article considers how that principle has been applied when it is engaged, how the approach differs in the land-based and offshore construction contracts, and what steps might be necessary to narrow the differences.

Application of the Principle

A useful summary of the way in which the general principle has been applied in the context of a land-based construction contract can be found in the following passage from Lord Denning MR's judgment in the Court of Appeal in Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board[3]:

> *"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 strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time."*

That passage was one of a number of authorities referred to by Jackson J (as he then was) in Multiplex Ltd v Honeywell Ltd (No 2),[4] following which he set out three propositions which define the modern understanding of the application of the prevention principle to land-based construction contracts in English Law:

(1) actions by the employer, which are perfectly legitimate under a construction contract, may still be characterised as prevention if those actions cause delay beyond the contractual completion date;

(2) acts of prevention by an employer do not set time at large if the contract provides for extension of time in respect of those events;

(3) in so far as the extension of time clause is ambiguous, it should be construed in favour of the contractor.

More recently, in North Midland Building Ltd v Cyden Homes Ltd[5], Coulson LJ clarified that the principle operated as an implied term and summarised the impact of the engagement of the principle as follows:

> *"If the parties do not stipulate that a particular act of prevention triggers an entitlement to an extension of time, then there will be no implied term to assist the employer and the application of the prevention principle would mean that, on the happening of that event, time was set at large."*

Contracting Out of the Prevention Principle

What emerges from the authorities above is a very strong presumption that, unless clear words are used, the parties did not intend the contractor to bear the risk for an act of prevention by the employer. That approach is consistent with the principle that parties should not be too easily presumed to be abandoning rights under the general law (see Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd[6] and Stocznia Gdynia v Gearbulk[7]).

In theory, therefore, there must be a *"clear contractual intention to be gathered from the express provisions of the contract"* if the prevention principle is to be disapplied, Richco International v Alfred C. Toepfer International[8]. In that context, we can consider the differing approaches taken in the drafting and interpretation of land-based and offshore construction contracts.

Land-Based Construction Contracts

Land-based construction contracts have positively engaged with the prevention principle to avoid its impact. Extension of time provisions typically incorporate all potential acts of prevention so as to maintain the contractual machinery for completion and liquidated damages:

(1) NEC: 19 compensation events including:

> *"A breach of contract or act of prevention on the part of the Employer (except to the extent caused or contributed to by the Contractor or any Subcontractor or any person for whom those parties are responsible) which is not one of the other compensation events in this contract."*

(2) JCT: 14 Relevant Events including:

> *"Any impediment, prevention or default, whether by act or omission, by the Employer or any of the Employer's Persons."*

In this way the land-based construction industry has sought to include comprehensive extension of time mechanisms to avoid the potential application of the principle and the risk of time being set "at large". That approach has led to an assumption within the industry that a contract could only incorporate provisions that were consistent with the prevention principle and not directly contradict it.

That assumption in turn has led to a number of challenges to any effort made by the express terms to limit a contractor's right to rely on acts of prevention of an extension of time. However, that thinking is inconsistent with the authorities noted above, which permit the parties to allocate risk under their contract as they see fit.

It should therefore come as no surprise that more recent authorities on the principle have upheld the express terms of the contract when invited to set them aside on the grounds of the application of the prevention principle. For example, the principle is not engaged when the parties have agreed to:

(1) Make notice a condition precedent:

> *"Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent."* (Jackson J in Multiplex Construction v Honeywell Control Systems)[9]

(2) Remove a right to extensions of time where there is concurrent delay:

> *"Clause 2.25.1.3(b) was an agreed term. There is no suggestion in the authorities noted above that the parties cannot contract out of some or all of the effects of the prevention principle: indeed, the contrary is plain. Salmon LJ's judgment in Peak v McKinney ... expressly envisaged that, although it had not happened in that case, the parties could have drafted an extension of time provision which would operate in the employer's favour, notwithstanding that the employer was to blame for the delay."* (Coulson LJ in North Midland Building Ltd v Cyden Homes Ltd)[10]

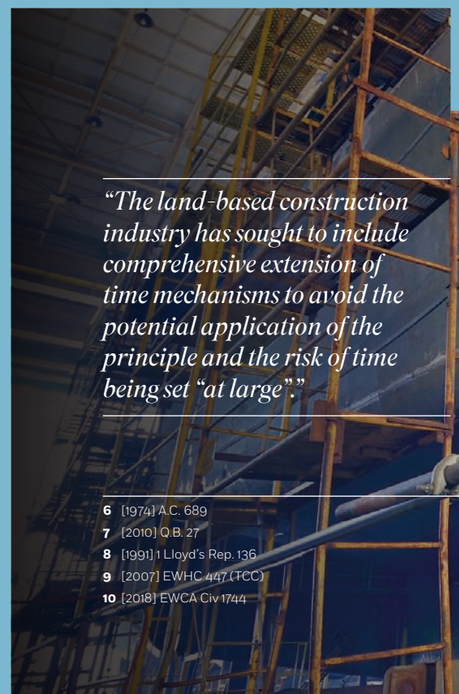
A picture therefore emerges of an industry that has appreciated the potential impact of the prevention principle, has dealt with it in the drafting of its standard forms, and is becoming more confident as time goes on in its efforts to adjust the balance of risk between the parties where that can be agreed.

"There remains considerable debate within the shipbuilding industry as to whether the prevention principle should have any application in a shipbuilding contract."

Offshore Construction Contracts

In contrast, there remains considerable debate within the shipbuilding industry as to whether the prevention principle should have any application in a shipbuilding contract. As was the case in the land-based construction industry, there is a fear of the consequences of time being set "at large" and the effective disposal of the machinery for delay, liquidated damages and termination. However, the offshore construction industry has not responded to this challenge in the same way.

To some extent the different approach is explained by the fact that the contractual machinery that has developed in the shipbuilding industry has followed a sale-of-goods mentality. In shipbuilding contracts the purchaser orders a well-specified vessel for delivery by a particular date. If the vessel is not delivered on time, the purchaser can simply cancel the order and get their money back.



"The land-based construction industry has sought to include comprehensive extension of time mechanisms to avoid the potential application of the principle and the risk of time being set "at large"."

1 [1983] 2 AC 180 at p. 188
2 [2011] EWCA Civ. 548
3 [1973] 1 W.L.R. 601 at 607
4 [2007] Bus LR Digest
5 [2018] EWCA Civ 1744
6 [1974] A.C. 689
7 [2010] Q.B. 27
8 [1991] 1 Lloyd's Rep. 136
9 [2007] EWHC 447 (TCC)
10 [2018] EWCA Civ 1744

In that context, the commonly held belief is that the builder cannot be prevented from delivering the vessel on time by virtue of instructions because it has the power to refuse to make changes to the design and can ignore defects or punches issued by the purchaser as long as the builder obtains the approval of class.

There was therefore some surprise expressed when Hamblen J concluded that the prevention principle applied to shipbuilding contracts generally in Adyard Abu Dhabi v SD Marine Services[11]:

> *"(1) In a basic shipbuilding contract, which simply provides for a Builder to complete the construction of a vessel and to reach certain milestones within specific periods of time, the Builder is entitled to the whole of that period of time to complete the contract work.*
>
> *(2) In the event that the Buyer interferes with the work so as to delay its completion in accordance with the agreed timetable, this amounts to an act of prevention and the Builder is no longer bound by the strict requirements of the contract as to time.*
>
> *(3) The instruction of variations to the work can amount to an act of prevention."*

Significantly, however, Hamblen J did not need to apply the prevention principle in Adyard. In that case the builder argued that the extension of time mechanism broke down where the parties were unable to agree to reasonable adjustments to the delivery date arising from changes to the vessel. In those circumstances it was alleged that the prevention principle would apply, rendering time at large (and defeating the termination). Hamblen J rejected that analysis on the basis that there was an alternative mechanism through which a claim for an extension of time could be made.

Thus, a trend began where judges and tribunals avoided implementing the principle by seeking to find that the contract provided an adequate and complete regime for the allocation of risk between the parties.

The key case after Adyard was Zhoushan Jinhaiwan Shipyard Co Ltd v Golden Exquisite Inc[12]. In that case, Leggatt J considered an amended SAJ form of contract and, after a lengthy analysis of the various terms dealing with time which were distributed in different places throughout the contract, concluded that there were three categories of delay defined by the express terms:

(1) *"permissible delay"* being delays for which the builder could obtain an extension of time;

(2) *"non-permissible delays"* being delays for which the builder could not obtain an extension to time; and

(3) various other types of delay which the judge called "excluded" delays as they were, under a separate term of the contract, effectively permissible delays.

At 34-35 he held:

> *"There is accordingly a tripartite classification of delays to the delivery of the vessel.*
> ...
> *I think it plain that these three categories of delay are intended to cover the whole field. It is natural to expect, and the wording of the definition in article VIII.4 makes clear, that – once excluded delays are taken out of the picture and deemed not to be delays at all – any delay which is not a "permissible" delay is a "non-permissible" delay, and vice-versa."*

As a consequence, the judge found that any breach of contract that is not a caught by the definition of permissible or excluded delay must be a non-permissible delay for which there is no relief.

Dealing with the prevention principle specifically in the context of delays allegedly caused by the conduct of the buyers' supervisors he held at 46:

> *"I of course recognise the force of the general presumption on which the Yard relies. When considering what reasonable parties would be likely to have intended, however, it is necessary to descend from generality and look closely at the specific consequences which would ensue if a particular interpretation is adopted. When the implications of a breach by the buyer of article IV are examined, I do not think it safe to assume that reasonable commercial parties would have intended that such a breach could permit the Yard to postpone the delivery of the vessel.*
>
> *Notably, while article IV.3 of the contracts (quoted at para 7 above) requires the buyer's supervisor to give prompt notice to the Yard of any construction or workmanship which does not or will not conform to the requirements of the contract, the Yard is only obliged to correct such nonconformity if it agrees with the buyer. To make the position even clearer, the clause continues:*
>
> *"In any circumstances, the BUILDER shall be entitled to proceed with the construction of the VESSEL even if there exists discrepancy in the opinion between the BUYER and the BUILDER, without prejudice to the BUYER's right to submit the issue for determination by the CLASSIFICATION SOCIETY or arbitration in accordance with the provisions hereof.*
>
> *It is therefore plain that the buyer's supervisor has no power to delay the construction of the vessel. ..."*

It is important to note that this judgment was given in the context of an appeal of an arbitrator's award on a matter of law. The judge did not therefore have to determine the facts and whilst it is not clear whether a different approach would have been taken had there been a determination that an act of prevention by the employer had caused critical delay to the delivery of the vessel, there is no indication from the analysis itself that would suggest that it would have been.

"The willingness to avoid the impact of the prevention principle has driven an approach to interpretation that assumes that the contracting parties intended to provide a complete code for the allocation of the risks of delay."

In any event, the approach taken by Leggatt J in Zhoushan appears to suggest an opposing approach to that taken in the land-based cases above. The willingness to avoid the impact of the prevention principle has driven an approach to interpretation that assumes that the contracting parties intended to provide a complete code for the allocation of the risks of delay. Therefore, if the contractor is delayed by anything that is not a permissible delay, it is a contractor's risk. That approach has been followed in a number of partially reported shipbuilding arbitrations[13].

We are therefore in an awkward position in the jurisprudence where:

(1) it is accepted that the prevention principle applies in theory; but

(2) there is no appetite to apply it, and contracts are construed to contain a complete code.

As a result, there has been no force driving a re-think of the standard forms of contract as there was in the land-based construction industry, even though it obviously would not be difficult to add to the basic shipbuilding contract (usually based on the SAJ) a catch all provision which ensures the contractual mechanisms apply to all types of acts of prevention by the owner.

"There is no reasonable justification for the prevention principle to be applied in different ways in different contracts."

Time At Large

At present it is difficult to see how the differing approaches between land-based and offshore construction contracts will be resolved. One possibility is that it is determined that (as some commentators have argued) the prevention principle should not apply to shipbuilding contracts, although we suggest that would be an unsatisfactory outcome. There is no reasonable justification for the prevention principle to be applied in different ways in different contracts.

Our view is that it is the approach in land-based construction that should be preferred because of the strength of the underlying principle that a party to a contract should not be able to rely on its own wrong to the detriment of the other contracting party. As it was put in *Keating on Offshore Construction and Marine Engineering Contracts*[14]:

> *"...the inability – absent clear words to the contrary – of party A to hold a party B to a stipulation if party A itself has prevented party B from complying with that stipulation is a basic presumption compatible with ordinary rules of construction. It is "obvious". It is no different to the rebuttable presumption when construing a contract, for example, that absent clear words a party will not give up their common law rights. The suggestion that the modern shipbuilding world is so different from other commercial and construction spheres that such an obvious starting point from which to construe a contract might be excluded is, it is suggested, wrong."*

The path to an alignment of approaches might be possible if there was a challenge to the current assumption that the effect of the application of the prevention principle was to set aside the whole of the machinery of the contract relating to time, liquidated damages, and termination for delay by setting time "at large".

The foreword to *Keating on Offshore Construction and Marine Engineering Contracts*[15], by Hamblen LJ and Sir Vivian Ramsey, indicates that there may be some judicial appetite for such a move:

> *"...There is also a very interesting analysis of the principle of prevention and time at large, which has been developed from nineteenth century decisions. It raises for consideration whether the principle is correct. The proposition that an act of prevention by the employer can, in the absence of an extension of time provision for that eventuality, lead to the replacement of the agreed time for completion by a reasonable time is startling. In Chapter 7, the authors question whether that proposition is consistent with existing case law...."*

To understand how such an approach might be possible it is appropriate to look first at the development of the orthodox

11 [2011] EWHC] 848 (Comm) at paragraph 242

12 [2015] 1 Lloyd's Rep. 283

13 (see for example London Arbitration 15/18 (22 Jun 2018), London Arbitration 2/19 (17 Jan 2019), and London Arbitration 9/19 (14 Mar 2019) in the Lloyd's Maritime Law Newsletter)

14 2nd Edition at para 7-110

15 2nd Edition

approach before considering some of the shortcomings of that approach noted in other authorities.

The Orthodox Approach

The first mention of the concept of time being "at large" as a consequence of an act of prevention appears to come from Holme v Guppy[16] in which Parke B in the Court of Exchequer held:

> *"Then it appears that they were disabled from by the act of the defendants from the performance of that contract. 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 … It is clear, therefore, that the plaintiffs were excused from performing the agreement contained in the original contract and there is nothing to show that they entered into a new contract by which to perform the work in four months and a half ending at a later period. The plaintiffs were therefore left at large. Consequently they are not to forfeit anything for the delay."*

This was developed in Dodd v Churton[17] by Lord Esher MR in the Court of Appeal who held:

> *"If the building owner has ordered extra work beyond that specified by the original contract which has necessarily the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided by the contract. The reason for that rule is that otherwise a most unreasonable burden would be imposed upon the Contractor."*

In Multiplex v Honeywell Control Systems[18], Jackson J (as he then was) concluded:

> *"In the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from completing by that date. Instead, time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time. The same principle applies as between main contractor and sub-contractor."*

He reached that conclusion relying, in part, on Peak Construction (Liverpool) Limited v McKinney Foundations Limited[19] from which he quoted the following passage:

> *"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 […] Edmund Davies and Phillimore LLJ expressed similar views in their concurring judgments".*

Finally, Coulson LJ reached the conclusion in North Midland, already set out above, that "*the application of the prevention principle would mean that, on the happening of that event, time was set at large*" relying on the authorities above and the speeches given in the House of Lords in Trollope & Colls Limited v North West Metropolitan Regional Hospital Board[20].

Coulson LJ noted that, when the case was in the Court of Appeal, Lord Denning MR held:

> *"…. 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 strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time."*

And went on to state that, "*In the House of Lords, Lord Pearson agreed with that section of Lord Denning's judgment (see 607 E-H). Lord Guest, Lord Diplock and Lord Cross agreed with the speech of Lord Pearson.*"

The orthodox approach rests on the jurisprudential foundation above. However, a deeper dive into the case law demonstrates that there is some dissent from other authorities and even some uncertainty within the examples relied on above as the basis of the orthodox approach.

Shortcomings of the Orthodox Approach

Some criticism of the impact of the orthodox approach can be found in Leggatt J's observations in Zhoushan and the introduction to *Keating on Offshore Construction Contracts*[21] provided by Hamblen LJ and Sir Vivian Ramsey. In fact, Sir Vivian Ramsey's discomfort with the orthodox position can be traced back to his comments in Bluewater Energy Services v Mercon[22]:

> *"The principle is of some antiquity and has a surprising effect of the contractual obligations as to the time of completion"*

Stronger criticism can be found in Coleman J's judgment in Balfour Beatty v Chestermount:

> *"The remarkable consequences of the application of this principle could therefore be as if…the contractor fell well behind the clock and overshot the completion date…if the architect then gave an instruction for the most trivial variation, representing perhaps only a day's extra work, the employer would thereby lose all right to liquidated damages for the culpable delay…what might be a trivial variation instruction would destroy the whole liquidated damages regime…"*

It can also be seen that the cases relied on in the development of the orthodox approach are not as clear-cut as they have been presented. For example, Peak v McKinney[23] was relied on by the judge in Multiplex, Jackson J commenting that Phillimore LLJ expressed a view that was consistent with the orthodox approach. However, Phillimore LLJ in fact said:

> *"I was somewhat startled when Mr. Gardam said in the course of his argument that the moment any part of the delay which has occurred can be attributed to the employer, then any agreement as to liquidated damages disappears. Mr. Rankin conceded that the summary of the effect of the cases… was correct save only in regard to subparagraph (d), which he suggested went too far. I think his concession was right".*

Also, although Coulson LJ's judgment in North Midland clearly supports the orthodox approach, his conclusion that Lord Pearson agreed with Lord Denning's judgment in the Court of Appeal in Trollope merits further analysis. Lord Pearson in fact held as follows:

> *"On the other hand, the majority of the Court of Appeal, Lord Denning M.R. and Phillimore L..J., decided in favour of the respondents. Lord Denning M.R. decided first on a point of construction or perhaps on a rule of law which he derived from Dodd v Churton25. I will set out a passage from the judgment of Lord Denning, inserting "(1)" and "(2)" to divide it into two parts:*
>
> *"(1) 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 strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time."*
>
> *"(2) The time becomes at large. The work must be done within a reasonable time — that is, as a rule, the stipulated time plus a reasonable extension for the delay caused by his conduct."*

Then he said:

> *"That was established by Dodd v Churton."*
>
> *"Now Dodd v Churton does establish the first part of that passage, which I have marked "(1)", but does not establish, or afford any support to, the second part of the passage which I have marked "(2)"."*

There is therefore some doubt cast in the highest authority on the application of the prevention principle that time should be set at large with the effect that the contractual completion date is replaced by an obligation to complete within a reasonable time.

Conclusion

Given that it has now been confirmed that the prevention principle is an implied term in North Midland, a possible route forward would be for the implied term to have a less draconian effect.

As the judicial criticism noted above makes clear, it is not obvious or necessary that an act of prevention should dissolve the parties' agreed extension of time and liquidated damages regimes which, after all, were agreed for the benefit of both parties.

Instead the implied term could simply permit an extension of time to the extent that critical delay was caused by an act of prevention not otherwise covered by the express terms of the contract.

Such an approach would take the sting out of the prevention principle, as perceived by the offshore construction industry, and encourage the differences between the approach taken for on and offshore construction projects to be reconciled.

16 (1838) 3 M&W 387
17 [1897] 1 QB 566
18 [2007] EWHC 447 TCC
19 [1970] 1 BLR 111
20 [1973] 1 WLR 601

21 2nd Edition
22 [2014] EWHC 2132 (TCC)
23 [1970] 1 BLR 11