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## THE PREVENTION PRINCIPLE AND LIQUIDATED DAMAGES

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### Summary

The effect of the Prevention Principle is that a “principal” (that is, an owner / developer / contractor) cannot enforce liquidated damages upon its contractor if it is responsible for its contractor’s delay.

As most parties to construction and infrastructure contracts would be aware, liquidated damages are a predetermined amount payable by a contractor/subcontractor for the period of delay until practical completion is achieved, and is usually expressed as a per day, per week or per month figure.

The Prevention Principle was usefully summarised in the case of *Spiers Earthworks Pty Ltd v Landtec Projects Corp Pty Ltd (No 2)* (2012) 287 ALR 360, where the Court stated:

- [47] ***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.***
- [48] ***The prevention principle clearly applies to delays in practical completion caused by a breach of contract by the principal. In a construction law context, it also applies to other acts (or omissions) of the principal within the scope of the contract that prevent practical completion within the fixed period.***
- [49] ***If as a result of the prevention principle the contractual date for practical completion ceased to be the proper date for the completion of the works ..., then there is no date from which liquidated damages can run and the right to liquidated damages will be lost.***

***[emphasis added]***

## Key features of the Prevention Principle

In the case of *SMK Cabinets v Hill Modern Electrics Pty Ltd* [1984] VR 391 (a Victorian case which involved a contract for the supply and installation of cupboards), the Court set out the following key features of the Prevention Principle:

1. The Prevention Principle may be excluded by agreement of the parties;
2. Any act or omission of the principal which delays the contractor can constitute an act of prevention; and
3. It is irrelevant that a contractor would have been unable to achieve practical completion by the contractual due date even if the act of prevention had not occurred.

In other words, where an act or omission of a principal prevents completion by a contractor by the contractual due date, the principal cannot argue that the contractor was already delayed for some other reason. If the principal caused or partially caused the delay, it cannot claim liquidated damages for that period of delay.

## Avoiding Liquidated Damages and the Prevention Principle Debate

In order to avoid incurring liquidated damages or the costs at adjudication or Court to argue that the Prevention Principle applies, it is recommended that parties lodge their delay notices and Extension of Time Claims (EOT claims) promptly pursuant to the terms of their specific contracts.

A timely EOT claim submitted under the terms of the relevant Contract can avoid a principal seeking liquidated damages or damages for breach of contract.

## Time Bars, EOT Claims and the case of *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211

It is important to note that a contractor can lose its right to an extension of time if it does not lodge its EOT claims on time under its respective contract. This is called a 'time bar'.

Nevertheless, it is commonplace in construction contracts for a principal or superintendent to have the power to grant an extension of time even if an EOT claim is submitted out of time.

A case that discusses this is *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (***Peninsula Balmain***).

In *Peninsula Balmain*:

1. On 20 March 1998, Abigroup entered into a contract with Peninsula Balmain in relation to a development involving the re-construction and refurbishment of two factory buildings.
2. The superintendent under that contract was an entity called East Asia Property Group.
3. Construction also commenced in or around March 1998.
4. The Contract stated that any EOT claim had to be made to the superintendent within 28 days after a delay event.
5. The date for practical completion in the contract was 1 March 1999.
6. On or about 21 February 1999, the date for practical completion was extended to 26 April 1999.

7. No further EOT claims were submitted by Abigroup.
8. Until August 1999, Abigroup made payment claims to Peninsula Balmain which were paid.
9. From August 1999 onwards, Peninsula Balmain stopped making payments and said that its claim for liquidated damages exceeded the amounts claimed by Abigroup because Abigroup was substantially delayed in achieving practical completion.
10. On 10 November 1999, Abigroup commenced proceedings for payment of its progress claims.
11. Peninsula Balmain filed a cross-claim seeking liquidated damages due to Abigroup's delay.
12. On 16 November 1999, Abigroup issued a show cause notice and foreshadowed the suspension of work.
13. The following day, Peninsula Balmain issued a show cause notice regarding Abigroup's delays.
14. On 1 December 1999, Peninsula Balmain terminated the contract and engaged another contractor.

The NSW Court of Appeal ultimately found in favour of Peninsula Balmain, the developer, and held that:

1. The prevention principle did not apply if a contractor failed to claim an extension of time when it was entitled to do so; and
2. That a superintendent's power to grant an extension of time regardless of whether the claim as submitted on time must be exercised honestly and impartially. Specifically, the Court said:

*"This power is one capable of being exercised in the interests of both the owner and the builder, and in my opinion **the Superintendent is obliged to act honestly and impartially in deciding whether to exercise this power. Of course, if a timely claim has not been made, and the ground on which an extension is claimed is one which is difficult to decide because of the time that has elapsed since the time when the claim should have been made, that may be a ground on which the Superintendent can fairly refuse the extension, but there is no suggestion that that is the case here.**"*

*[emphasis added]*

### **Growthbuilt Pty Ltd v Modern Touch Marble & Granite Pty Ltd [2021] NSWSC 290**

In the more recent case of *Growthbuilt Pty Ltd v Modern Touch Marble & Granite Pty Ltd (Growthbuilt)*, the NSW Supreme Court took the prevention principle even further having regard to a clause that allowed an EOT claim to be assessed by Growthbuilt in its "absolute discretion".

Between 2015 and 2016, Modern Touch entered into four subcontracts with Growthbuilt to design, supply and install stone, primarily for kitchens and bathrooms, at four residential building projects in Surry Hills, Mosman, Balgowlah and Putney.

The contracts stated that:

1. An EOT claim could be made if Growthbuilt was responsible for any delay;
2. Modern Touch had to make an EOT claim within 5 days of the act of prevention by Growthbuilt;
3. Modern Touch would not be entitled to any EOT for any other reason, event or circumstance; and
4. Growthbuilt may, in its absolute discretion at any time and for any reason, extend the date for completion, but that Growthbuilt was under no obligation to do so.

In the *Growthbuilt* case:

1. Modern Touch were delayed in its progress of the works under each subcontract and on 30 August 2016, Growthbuilt terminated the contracts.
2. Modern Touch had not claimed any EOTs under any of the contracts.
3. On 18 April 2017, Growthbuilt commenced proceedings seeking liquidated damages under each of the contracts and post-termination completion costs.
4. On 22 December 2017, Modern Touch filed a cross-claim for the balance of allegedly unpaid invoices and argued that it had been prevented from completing the works on time due to alleged acts of prevention by Growthbuilt.

The NSW Supreme Court found in favour of Growthbuilt, the head contractor, and held that:

1. Whilst the prevention principle can stop the recovery of liquidated damages for delay caused by a head contractor, if a party fails to seek an extension of time within the time set out in the contract, the prevention principle may not apply.
2. The above depends on the interpretation and wording contained in the contract.
3. There was no room for a finding of reasonableness or good faith to extend time in this case because of the express words of the contract which stated that Growthbuilt had “absolute discretion” in relation to this issue.

As can be seen in the *Growthbuilt* case, effective contract administration is vital, together with having a comprehensive understanding of contractual time provisions and complying with strict time clauses, particularly in the context of time bar provisions.

### **Key Take-Aways**

The key take-aways from the above cases are as follows:

1. The prevention principle means a principal cannot claim liquidated damages from its contractor if they have caused the contractor’s delay.
2. The prevention principle can be excluded by contract, so contract review prior to signing is critical.
3. The prevention principle applies even if the contractor was delayed for other reasons.
4. Effective contract administration and an understanding of specific contractual provisions is critical. EOT claims and delay notices must be served within the timeframes set out in the contract. Otherwise a party may lose the benefit of the prevention principle and be liable for liquidated damages or damages for breach of contract.
5. A principal or superintendent, when assessing EOT or delay claims, must exercise its power honestly and impartially, but this also depends on the wording of the specific contract. Contracts should therefore be reviewed or prepared (as the case may be) by a lawyer.

### **CONTACT US**

For further information or assistance regarding the prevention principle or generally, please do not hesitate to contact **Anish Wilson**, Senior Associate, on **(02) 8239 6514** or email **anish.wilson@kreisson.com.au**.