INTRODUCTION

The “prevention principle” operates to invalidate a liquidated damages clause where the owner causes completion of the works to be delayed, leaving the owner to prove its damages at large, and the contractor obliged only to complete the works within a reasonable time. The exception to the operation of the prevention principle is where the contract contains a clear and specific mechanism for extending time for owner-caused delays, and the owner or contract administrator has validly extended time. The prevention principle is founded upon the broader notion that a party cannot impose a contractual obligation if that party has prevented the other party from complying with the obligation. Lord Denning, in *Amalgamated Building Contractors Ltd v. Waltham Holy Cross UDC*, said: “... the building owner cannot insist on a condition if it is his own fault that the condition has not been fulfilled.”

Brooking J in *SMK Cabinets v. Hili Modern Electrics Pty Ltd* described the prevention principle as being “grounded upon considerations of fairness and reasonableness”.

Many standard forms of construction contract require a contractor to give notice of an event which may entitle him to an extension of time, with the rationale being that early notice enables the owner or contract administrator to verify the claim and to monitor the event and its impact upon progress of the work. These types of clauses are to be construed *contra proferentem* and are generally not regarded as conditions precedent to a contractor’s entitlement to an extension of time unless express and clear language is used, and there is usually a defined duty on the contract administrator to consider the contractor’s entitlement to an extension whether or not the contractor has made an application to extend.

More recently, some standard forms and owner’s drafted contracts stipulate contractor’s notices as “conditions precedent” to an extension of

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4. See, for example, *Aoki Corp v. Lippsland (Singapore) Pte Ltd* [1995] 2 SLR 609, per Khoo J at 615.
time. For example, subclause 20.1 of FIDIC’s new “Conditions of Contract for Plant and Design-Build” (1st Edition, 1999) (the New Yellow Book) requires the contractor to give notice to the Engineer “describing the event or circumstance giving rise to the claim ... as soon as practicable, and not later than 28 days after the Contractor became aware or should have become aware, of the event or circumstance” if he considers himself to be entitled to any extension of the time for completion, and further states:

“If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim.”

Notices of extension of time claims expressed as conditions precedent give rise to a tension between the owner’s freedom to insist on conditions precedent and the prevention principle where the owner delays completion of the works and the contractor fails to comply with the notice requirements. Commentators have referred to this tension, albeit without the benefit of authority on the point, and have suggested that an owner in these circumstances may not be able to recover liquidated damages. For example, the authors of Keating on Building Contracts state:

“There are, however, conceptual difficulties, it is submitted, where the event causing delay has been caused by the employer’s default... There is no authority on whether the employer can in those circumstances recover liquidated damages. It is arguable that although the contractor may not be entitled to an extension of time, the employer would not be able to recover liquidated damages on the basis that he cannot take advantage of his own breach of contract.”

Similarly, the author of Liquidated Damages and Extension of Time in Construction Contracts states:

“If an application by the contractor was a condition precedent to an extension, it would be at the option of the contractor whether or not the provisions were effective, and by choosing not to apply for an extension to cover acts of prevention the contractor could render the liquidated damages provisions inoperative.”

In Australia, it was thought that the courts may have been prepared to resolve the tension in favour of the owner to avoid the consequence of the owner’s prohibition on recovery of liquidated damages as a result of the contractor’s failure to exercise a “contractual right”, as a result of the dicta of Cole J in Turner Corporation v. Austotel Pty Ltd: 10

“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

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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 affect [sic] of that preventing conduct.

However, two recent Australian state courts have considered the very issue referred to by the commentators and distinguished Cole J’s dicta in Turner Corporation v. Austotel Pty Ltd on the facts, the combined effect of which may limit the extent to which owners can rely on the protection of conditions precedent to the contractor’s entitlement to an extension of time.

GAYMARK INVESTMENTS PTY LTD v. WALTER CONSTRUCTION GROUP LTD

The first of these cases is the decision of Mr Justice Bailey in the Supreme Court of the Northern Territory in Gaymark Investments Pty Ltd v. Walter Construction Group Ltd. The case arose out of the construction by Walter Construction Group Ltd (formerly Concrete Constructions Group Ltd) (“Concrete Constructions”) of a hotel in Darwin during 1996 and 1997 for Gaymark Investments Pty Ltd (“Gaymark”). At arbitration of the dispute, the arbitrator found, that:

(a) Concrete Constructions was delayed in completing the work, including a delay of 77 days by causes for which Gaymark was responsible, but its application for extension of time was barred because of Concrete Constructions’ failure to comply with the notification requirements of the contract’s extension of time clause; and

(b) the 77 days’ delay constituted “acts of prevention” by Gaymark, with the result that there was no date for practical completion and Concrete Constructions was then obliged to complete the work within a reasonable time (which the arbitrator found that it in fact did), with the consequence being that Gaymark was prevented from recovering liquidated damages for delay (totalling some $565,500).

Gaymark appealed against the arbitrator’s award under section 38 of the Commercial Arbitration Act 1984 on the basis, amongst other things, that the arbitrator erred in law in relation to the application of the prevention principle and that, as a consequence, Gaymark was entitled to the liquidated damages for delay.

Bailey J upheld the arbitrator’s award that, in the absence of strict compliance with the conditions precedent to an extension of time, and where Concrete Constructions had been actually delayed by an act, omission or breach for which Gaymark was responsible, there was no provision for an

extension of time, and therefore Gaymark was not entitled to recover liquidated damages for delay.

The contract between the parties was the Australian National Public Works Conference (NWPC) standard form of building contract, the NPWC Edition 3 (1981), amended by Gaymark in a number of substantial respects by a schedule of special conditions. The contract provided for payment by Concrete Constructions to Gaymark of liquidated damages for delay in completion of $6,500 per day, up to a maximum of $2,300,000.

Significantly, Gaymark had deleted subclause GC35.4 of NWPC Edition 3 which gave the superintendent the right to extend time for practical completion at any time and for any reason, notwithstanding that the contractor had not given notice of a claim for an extension of time. Instead, Gaymark drafted a set of special conditions dealing with Concrete Constructions' entitlement to an extension of time, which included at subclause SC19.2 that:

"The Contractor shall only be entitled to an extension of time for Practical Completion where:

... the Contractor has complied strictly with the provisions of subcl. SC19.1 and in particular has given the notices required by subcl. SC19.1 strictly in the manner and within the times stipulated by that sub-clause."

Relevantly, subclause SC19.1 provided that Concrete Constructions was obliged to give a notice of the delay to the Superintendent: "as soon as practicable and in any event not later than 14 days after the cause of delay first arose", and thereafter:

"As soon as practicable and in any event not later than twenty-one (21) days after giving the notice under the preceding paragraph, the Contractor shall where it wishes to claim an extension of time, give a further notice in writing to the Superintendent stating a fair and reasonable time by which in its opinion the Date of Practical Completion of the Works should be extended ..."

In the Supreme Court, Gaymark argued that the arbitrator erred in law in concluding that:

(1) Gaymark could have no entitlement to liquidated damages under the contract in consequence of the application of the "prevention principle"; and

(2) Concrete Constructions' obligations to complete the work under the contract by the date specified in the contract had been replaced with an obligation to complete within a reasonable time (i.e. "time at large").

Gaymark relied on the dicta of Cole J in *Turner Corp Ltd v. Austotel Pty Ltd,*13 referred to above, that Concrete Constructions cannot rely upon Gaymark's preventing conduct where it failed to meet the notification requirements for an extension of time.

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Concrete Constructions relied upon the prevention principle, as articulated by Salmon LJ in the landmark English Court of Appeal case of Peak Construction Ltd v. McKinney Foundations Ltd:\(^{14}\):

“If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employer’s own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer.”

Bailey J referred to the arbitrator’s interpretation of subclause SC19, and in particular, that it contained no reference to the superintendent having a power to “grant” or “allow” an extension of time. He then referred to the arbitrator’s reasoning on the three possible constructions of subclause SC19 and subclause GC35.2, which stipulated Concrete Constructions’ completion obligation as being subject to an entitlement to an extension of time. First, to imply a term similar to subclause GC35.4, giving the superintendent power to allow an extension in this situation. He thought this not possible, given the apparent care by which Gaymark had drafted SC19.

Secondly, to say that “it is too bad for the contractor”, that, by his own carelessness in not observing clause SC19 he has simply cost himself the right to recover delay costs, and had exposed himself to the risk of liquidated damages. The arbitrator said that the first consequence, loss of delay costs, was not an absurd result but the second consequence he considered an absurd result because it would mean that the owner would be paid for his own errors.

The arbitrator said this left open only the third alternative, that Gaymark, in redrafting the extension of time provisions, was deemed to have elected to take the risk that it would not cause an actual delay to the contractor such as actually to delay the latter in achieving completion of the works, or that, if it did, that the contractor would apply for an extension within the stipulated times.

Bailey J impliedly adopted the arbitrator’s reasoning and distinguished the decision in Turner Corp Ltd on the bases that in that case the owner had not caused the delay to the contractor achieving practical completion and that the standard form contract in that case (“Building Works Contract—JCGA 1985 with Quantities”) expressly reserved a power to the architect/superintendent to allow an extension of time, despite the loss by the builder of the right to such an extension by failure to comply with the notice provisions. He also said that the effect of Gaymark deleting subclause GC35.4 of NWPC Edition 3 was to remove the power of the superintendent to grant or allow extensions of time. Whilst clause SC19 made provision for an extension of time for delays for which Gaymark was directly or indirectly responsible, such a right was dependent on strict compliance with the notice provisions of subclause SC19.1.

\(^{14}\) (1970) 1 BLR 111 at p. 121.
The second and more recent case is the decision of Mr Justice Barrett in the New South Wales Supreme Court in *Abigroup Contractors Pty Ltd v. Peninsula Balmain Pty Ltd*,¹⁵ which involved a contract for the reconstruction and refurbishment of two factory buildings in Sydney by Abigroup Contractors Pty Ltd (“Abigroup”) for Peninsula Balmain Pty Ltd (“Peninsula”). Abigroup made claims against Peninsula for extension of time, variations and delay costs of $4.5m, and Peninsula cross-claimed for liquidated damages for delay of an amount of $1.26m. The court referred the matter to a referee for inquiry and report.

In relation to Abigroup’s extension of time claim, the referee found that the superintendent extended the date for practical completion to 26 April 1999, but that there were excusable delays of 77 days, and that an extension of that duration was warranted, and therefore the superintendent should have extended the date for practical completion to 5 June 1999 as a consequence of delays caused by Peninsula and the superintendent.

Clause 35 of the contract provided a mechanism for the contractor to apply for an extension of time, which the referee accepted was a condition precedent, and found that Abigroup failed to follow the provision. However, the referee said that the superintendent possesses a unilateral power to extend time apart from the mechanism to be initiated by Abigroup under clause 35, and said that the superintendent should have exercised that unilateral power to give Abigroup the additional 77 days.

In the Supreme Court, Peninsula argued that the referee understated its entitlement to liquidated damages by $720,000 by reason of extensions of time wrongly granted to Abigroup. Peninsula argued that because Abigroup did not comply with the contractual mechanism prescribed by clause 35, and as this was a pre-condition to an entitlement to extension, no such entitlement arose. Peninsula also argued that the referee had misunderstood the purpose of the superintendent’s extending power, arguing that it was for the primary benefit of the owner and not the contractor, relying upon an extract from *Hudson’s Building and Engineering Contracts* describing the benefits to the owner of extension of time clauses in the context of the prevention principle.”¹⁶

Barrett J said that he did not read the extract from *Hudson* as suggesting that a unilateral power of the kind in subclause 35.5 exists *prima facie* for the benefit or protection of one party or the other. He upheld the referee’s report and adopted the referee’s view that the superintendent’s unilateral power to extend time under subclause 35.5 was in the nature of an entitlement to Abigroup which the superintendent was obliged to exercise.

He concluded that in these circumstances the *dicta* of Cole J in *Turner Corp Ltd* had no application.

**DISCUSSION**

Cole J's *dictum* in *Turner Corp Ltd* had been thought to allow owners *carte blanche* to amend their extension of time clauses to provide for the giving of notice as a condition precedent. The decisions in *Gaymark* and *Abigroup* have significance for the drafting of extension of time provisions and for the superintendent's administration of the contract.

The effect of the two decisions may place a substantial fetter on conditions precedent to extensions of time. Applying the decision in *Gaymark*, if an owner wishes to require a contractor's notice of delay to be a condition precedent to an extension of time and still recover liquidated damages for owner-caused delays, one option is to include in the contract a provision giving the contract administrator a unilateral power to extend time similar to subclause GC35.4 referred to in *Gaymark*. While such a provision gives rise to some difficulties for the contract administrator as to the circumstances in which he or she should exercise the power, it at least may assist the owner in retaining its right to recover liquidated damages.

On the other hand, a similarly phrased unilateral power of the superintendent to extend time contained in the contract in *Abigroup* was interpreted by the court as the contractor's entitlement which the superintendent was obliged to exercise. This view that the superintendent's power to extend time translates into an obligation to do so is difficult to support from the wording of subclause 35.5 referred to by the court. However, both the referee and the court may have been swayed that an alternative interpretation would lead to Peninsula being rewarded for delays which it had caused.

In the light of the decisions in *Gaymark* and *Abigroup*, the condition precedent to an extension of time in subclause 20.1 of the new suite of FIDIC forms referred to in the introduction to this article,17 if governed by Australian law, could result in the employer being prohibited from recovering liquidated damages in circumstances where the employer delays the contractor and the contractor fails to comply with subclause 20.1.18 Employers using the new FIDIC forms under Australian law should therefore consider amending the FIDIC forms to take account of the *Gaymark* and *Abigroup* decisions.

Few cases have considered the issues raised in *Gaymark* and *Abigroup* and, as a consequence, the law is far from settled in this area. Both of the


18 Unlike cl. 35.4 of NPWC Edition 3 (1981), there is no provision in the new suite of FIDIC forms expressly giving the engineer a unilateral power to extend time for completion.
Australian courts in *Gaymark* and *Abigroup*, respectively, attempted to grapple with the balance between the owner's right to stipulate a notice of delay or claim as a condition precedent to an extension of time and the application of the prevention principle. The consequences for owners and contractors are to consider carefully the drafting of extension of time provisions to reflect the prevention principle, while providing for the consequences of the contractor's failure to give notice where the notice is expressed as a condition precedent to an extension of time.