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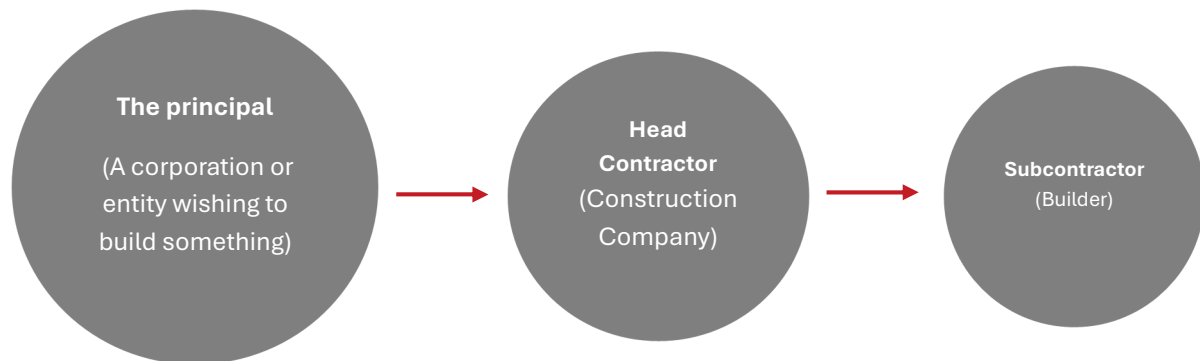
*Student 'Crash Course'
Newsletter*

Acts of Prevention



In this Crash Course, we discuss what an 'act of prevention' entails, and seminal cases which aid our understanding of them.

In the construction contracts, the chain of command is usually as follows:



If you were a builder (a subcontractor), you would require certain things from your employer (the principal or head contractor) in order to get your work done in a timely manner.

- You'd need your boss, the head contractor, to approve your plans in a timely manner.
- You'd need access to the site which you are contracted to work on, and
- You'd require certain information to begin work, such as a design or instructions.

In some occasions, parties which are higher in the chain of command may delay construction jobs through an act or omission; for example, if they don't approve the builder's plans, the builders aren't able to move forward with construction. In construction law, this is called an **act of prevention**.

If a project experiences significant delay, parties which are higher in the chain of command may seek liquidated damages from the party below it for breach of contract – For example, a principal may seek damages against a head contractor, or a head contractor may seek damages against a subcontractor. In these scenarios, the lower party will be held liable for delays caused by the higher party.

How does the law address this?

There are 3 seminal cases which influence how judges approach this issue. This Crash Course will give insights into:

- **Peak v McKinney** (Peak Construction (Liverpool) Ltd v McKinney Foundation LTD (1970) 1 BLR 111)
- **ProBuild** (ProBuild constructions (Aust) Pty Ltd v DDI Group Pty Ltd)
- **Peninsula** (Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd)

Case #1 - Peak v McKinney

Peak Construction (Liverpool) Ltd v McKinney Foundation LTD (1970) 1 BLR 111

Factual Summary

- Liverpool contracted for Peak to build several high-rise buildings, and McKinney was the nominated subcontractor to build the foundations.
 - Relevantly, clause 22 of the head contract provided that time was to be considered of the essence on the part of Peak.
 - By clause 23 of the head contract, the architect was entitled to extend time “as to him may seem reasonable” by reason of any variations to the works or other “unavoidable circumstances”.
- By chance, in early October 1964 it was discovered that a grave fault existed in one of the building’s perimeter piles; this required expert evaluation.
- The timeline of significant delays are as follows:
 - Delays (mostly on the part of Liverpool) → meant that an expert was not engaged until February of the following year.
 - The expert reported to the parties in late May 1965
 - The following day, Peak wrote to the corporation asking for an instruction to carry out the work recommended by the expert.
 - Peak heard nothing and so wrote to the corporation in late June.
 - It was not until 30 July 1965 that the expert’s recommendations were approved by the corporation.
 - The remedial work was commenced by Peak on 12 August 1965 and completed in early November 1965 – 58 weeks after the works had been suspended.
- As a result of the delay, the corporation sought Liquidated Damages from Peak. Peak, in turn, sought Liquidated Damages for that entire period from McKinney.

Issue: Whether Peak is entitled to liquidated damages.

Judgment

- The Court of Appeal held that Peak was not entitled to recover liquidated damages from McKinney, as the corporation was not entitled to recover those liquidated damages from Peak.
- As the extension of time clause did not entitle Peak or McKinney to any extensions of time for Liverpool’s breach of contract, no liquidated damages could be applied. The date for completion was disregarded; McKinney’s obligation became to finish the works within a reasonable period.

- The Court of Appeal found that at least part of the 58-week delay had been caused by the corporation itself, and the extension of time clause in the head contract did not enable the corporation to extend time for its own delays.
- Further, no attempt had been made by the corporation to extend time.

Importance to our understanding

- The judgement of this case sets out the 'Prevention Principle'.
- The traditional approach to applying this principle requires that each party does not prevent the other from performing the contract nor delay the other party in performing it.
- Where an act of prevention occurs, the contractor is no longer bound to deliver work by the agreed completion date.

Case #2 - Probuild

ProBuild constructions (Aust) Pty Ltd v DDI Group Pty Ltd

Factual Summary

- The appellant, ProBuild constructions (Aust) Pty Ltd (ProBuild), was the head contractor for the renovation of the Tank Stream Hotel on Hunter Street, Sydney.
- DDI was engaged by ProBuild as a subcontractor who assisted with renovations.
- The subcontract:
 - Provided that DDI could seek an extension of time for delays including delays caused by a variation to the subcontract
 - Gave ProBuild the discretionary power to extend time, even though DDI was not entitled to or had not claimed an extension of time.
- Ultimately, the date of completion was 28 May 2015; 144 days late.
- DDI made a payment claim for \$2.1m under the Building and Construction Industry Security of Payments Act 1999 (the Act). This included claims that ProBuild directed DDI to vary aspects of the construction work after the date for practical completion. ProBuild sought to claim a set-off against the payment for liquidated damages in the sum of \$2.2 m on the basis that DDI should have completed the works by the projected date for practical completion, and that they were not contractually entitled to an extension of time.

Issue: Whether ProBuild is entitled to liquidated damages for delay.

Procedural History

Initially, the dispute was taken to an adjudicator, who rejected ProBuild's claims for liquidated damages, saying that it was "totally inconsistent and unreasonable" for ProBuild to direct DDI to perform significant additional work after the original completion date and then make a claim against them. The adjudicator was not satisfied that ProBuild was entitled to a liquidated damages claim for 144 days. ProBuild challenged this determination in the Supreme Court. The appeal was dismissed; the trial judge held that there was no denial of procedural fairness and affirmed the adjudicator's reasoning.

Judgment

ProBuild appealed this decision in the NSWCA. The principal issues on appeal were whether the adjudicator applied the prevention principle, and if so; whether in doing so, the Adjudicator had denied ProBuild of a fair trial. The Court of Appeal determined that 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 caused the other party's non-performance. Furthermore, it determined that ProBuild was obliged to exercise their discretionary extension of time power honestly and fairly, with regard to the underlying rationale of the prevention principle. The court agreed with the adjudicator's reasoning in rejecting the liquidated damages set-off.

Importance to our understanding

- ProBuild suggests that a party to a construction contract may be obliged to exercise discretion to extend time because of an implied duty of good faith.
- The judgment also suggests that discretion is to be exercised with the "underlying rationale" of the prevention principle that a party cannot rely on a breach of contract that it has caused.
- Further, it sets the standard that the prevention principle is "grounded upon considerations of fairness and reasonableness" in the context of delaying variations made by the principal, whether ordered before or after the due date for completion.
- The "prevention principle" may preclude an owner recovering liquidated damages for delay in the completion of works by the contractor where that delay has been caused by an act or omission of the owner in breach of the contract.
- An owner is obligated to exercise their power to grant extensions (as conferred by the contract) honestly and fairly with regard to the prevention principle, or because there is an implied duty of good faith when exercising such discretion.
- The operation of the prevention principle can be modified or excluded by contract by extension of time provisions. As a general principle, both the liquidated damages and extension of time clauses in printed forms of contract must be construed strictly *contra proferentem*.

Case #3 – Peninsula

Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd

Factual Summary

- In this case, the Abigroup Contractors Pty Ltd ('Abigroup') and Peninsula Balmain Pty Ltd ('Peninsula'). The contract contained an agreement for Abigroup to perform construction work for Peninsula's development in Balmain. The development involved significant refurbishments of two factory buildings, converting them into residential flats, and an additional town house to be constructed.
- Notable parts of the contract:
 - The superintendent under the contract was an entity named East Asia Property group.
 - Stated that any extension of time claim had to be made to the superintendent within 28 days after a delay event.
 - The date for practical completion in the contract was 1 March 1999.
- .On or about 21 February 1999, the date for practical completion was extended to 26 April 1999.
- No further extension of time claims were submitted by Abigroup.
- 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.
- On 10 November 1999, Abigroup commenced proceedings for payment of its progress claims. Peninsula Balmain filed a cross-claim seeking liquidated damages due to Abigroup's delay.
- On 16 November 1999, Abigroup issued a show cause notice and foreshadowed the suspension of work.
- The following day, Peninsula Balmain issued a show cause notice regarding Abigroup's delays.
- On 1 December 1999, Peninsula Balmain terminated the contract and engaged another contractor.

Issues:

1. Did Abigroup engage in conduct that was misleading or deceptive?
2. Did the continued appointment of East Asia as the superintendent for Peninsula's building contract—while simultaneously acting as Peninsula's agent—constitute a breach of clause 23 of the building contract?

The prevention principle holds that a party cannot enforce contractual provisions if it has obstructed the other party's ability to fulfill its obligations. Therefore, if East Asia's dual role created conflicts or impediments, it may impact the enforceability of the contract.

Procedural History

- In the first instance, a referee found that Peninsula had engaged in misleading and deceptive conduct, and that the appointment of the superintendent was in breach of clause 23.

Appeal

- The appeal findings indicate that project management agreements do not need to be disclosed to potential contractors, as the industry commonly understands the agency relationship involved. This is linked to the prevention principle, which posits that a party should not benefit from their own wrongdoing or omissions.
- In this case, if Abigroup had argued that they were misled by the nondisclosure of the agency agreement, the court found that this lack of disclosure did not affect the negotiation of the building contract. The prevention principle suggests that Abigroup cannot make a claim based on information they should have reasonably known, considering the industry's norms regarding project managers' dual roles. This highlights that parties cannot hinder the fair execution of contracts by failing to disclose information that is generally understood within their professional context.

Importance to our understanding

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

However, in some construction contracts, the parties may agree to exclude the right to claim general damages, making liquidated damages the exclusive remedy in respect of late completion. This is called an exclusive remedy clause. Contractors commonly request the inclusion of such a clause to increase the certainty of their agreements, fixing their financial exposure in the event of any delay and expediting dispute resolution during the construction process.



Overview and Conclusion

- This crash course discussed the prevention principle.
- Where an act of prevention occurs, the Contractor is no longer bound to deliver the work by the agreed completion date.
- The principle has been applied by courts in the construction context to prevent owners from delaying contractors in the completion of work, and then claiming liquidated damages for the delay.
- Essentially, the prevention principle prevents a party, in the absence of clear terms to the contrary, from taking advantage of its own wrongdoing.
- In order to understand the prevention principle, we can refer to the judgment of seminal case *Peak v McKinney, Turner, and Peninsula* as explored above.

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