

THE PREVENTION PRINCIPLE IN BUILDING CONTRACTS



If a party to a contract prevents another person from performing their contractual obligations when they are due, the law provides that the person causing the problem is prevented from insisting upon strict compliance with the contract.

The legal basis of blocking the principal's right to liquidated damages is best known as the "prevention principle".

THE PREVENTION PRINCIPLE

A party who is in default under a contract should not be able to take advantage of his own wrong.

As a result, the party preventing the other party from compliance with the contract is not able to require strict compliance with contractual times and cannot claim a claim for liquidated damages (a set amount of money fixed in the contract or legislation).

This is most commonly applied in disputes in building contracts where the timing of works – both the start date and the finish date - are critical to the building schedule. This is because delay by a subcontractor can make it impossible for the next trade to progress their works in accordance with the building construction timetable. However, if a trade cannot start their work at the appointed time, they can hardly be expected to complete their works by the original completion date.

For example a common scenarios is:

1. A subcontract agreement was entered on the basis that the works for particular sub-contractor would be slotted into a program of works and be fixed to start at a particular time, and be required to finish by a particular time. The program will have allowed for a margin for error/delay. However on the face of contracts, time will be of the essence and there will be liquidated damages as a penalty for late performance;
2. Other trades whose work was carried out before the relevant sub-contractor were late/delayed, which prevented the subcontractor commencing at the nominated time;
3. At the (late) date that the subcontractor is able to commence, he has other jobs for other principals at other sites scheduled, with the workers due to be there not on the first work site. Therefore he has extreme difficulty complying; and
4. Due to the difficulties, the subcontractor is later expected to finish his work. Due to the adjusted timing, the works have cost the all parties more to complete than budgeted.

WHEN WILL THE PREVENTION PRINCIPLE BE APPLIED?

The basis at law for the prevention principle is either:

1. An implied term in the contract this must be consistent with the actual wording of the contract.

Robinson Locke Litigation Lawyers Pty Ltd
ABN 96 151 428 929

Level 4, 231 George Street
BRISBANE QLD 4000
Telephone: (07) 3210 5200
Facsimile: (07) 3210 5299

PO Box 12019
GEORGE ST QLD 4003
Email: mail@robinsonlocke.com.au
Web: www.robinsonlocke.com.au

2. Waiver/ set aside the completion date and time for work to be finished by subcontractors in the building contract.
3. Estoppel, which is the principle that prevents a person from asserting something different to what has originally been implied to be completed in the contract.

It is a fundamental term and condition of building construction contracts that the Principal make the building site available in a time that is sufficient for the contractor to perform his or her obligations. Most of the times this is just implied in the contract that it will be available and read for construction when it is stated to commence work in the contract, but it can also be expressed in many standard contracts.

An example of the operation of this principle is *H & S Alexander v. Housing Commission (Vic)* (1985) 4 ACLR 85. In that case, the facts were:

1. The contractor was to be given possession of the site on 11 July 1979;
2. Possession was not given to the contractor to commence operations until 25 July 1979;
3. In fact, possession was not given in time for the contractor to commence operations on the necessary date, namely 25 July 1979;
4. On 28 July 1979, permission to start was given, but it was not communicated until 30 July 1979;
5. Possession of the rest of the site was not given until 1 October 1979.

It was held that the Principal's behaviour went beyond just delaying progress on the building work ("the work") it was a disruption to the complete schedule of dates and times the work was to be completed. As a result, the contractor's remedies for an extension of time, together with, if the extended degree of the delay becomes more serious, suspension of building work.

The same principle of breach of time conditions applies to the contractor's obligations as to time taken in the carrying out and completing the works. That obligation of the contractor is, at common law, to carry out and complete the works within a reasonable time. When the specification of the contract which states when work has to be completed has been left blank, then the work should be conducted in a reasonable amount of time.

PRINCIPAL CONTRACTOR'S BUILDING PROGRAM

Commonly, standard construction contracts provide for a specific time to be expressed by the parties and the Principal will have a construction program to which the building contract is tied. The obligations on contractors commonly require them to commence work upon the site being made available, and thereafter proceed to execute and complete the works.

The contractor must carry out the work in accordance with the directions of the contract administrator and the contractual obligations including planning, provision of sufficient and proper materials, employment of competent trade's people, and management of workforce. The contractor must carry out his or her obligations under the contract to an acceptable standard and according to his or her time obligations.

OVERLAPPING CAUSES FOR DELAY

Commonly, there are multiple or overlapping causes for delay in a building project. As a result, the operation of the principle of prevention requires consideration of:

1. The contract, particularly any extension of time clause;
2. Causation of the delay, which usually comes down to issues of fact and common sense; and
3. The Principal Contractor seeks to apply Liquidated Damages in accordance with the contract.

CONCLUSION

Prevention can be critical to resolution of building construction disputes. The principles discussed above aim to give justice by attributing the responsibility for blame upon the party causing the problem. The application of this principle can be very complicated and requires very careful analysis.

Malcolm Robinson