Notice Provisions and Extension of Time

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A RECENT DECISION OF THE SUPREME Court of the Northern Territory *Gaymark Investments Pty Ltd v Walter Construction Group Ltd*[1] has again called into question the effect of a failure by the Contractor to seek an extension of time within the time limits of the Contract. This matter was the subject of a previous article.[2]

In *Gaymark's* case the Contract was NPWC3 with amendments. The relevant amendment was to delete clause 35.4 of NPWC3 and to substitute in place of it a Special Condition (SC 19).

S.C. 19.2 said that 'The Contractor shall only be entitled to an extension of time' where the delay was caused by (inter alia) 'any breach of the provisions of the Contract or other act or omission on the part of the Principal, the Superintendent, any agent or employee of the principal', (SC19.2(a)(i)). The terms of S.C. 19 did not use words such as 'the Superintendent shall in that event grant to the Contractor an extension of time'. Nor did S.C. 19 provide for the Superintendent (or the Principal) to extend time whether or not the Contractor had sought an extension of time.

The arbitrator found that the Contractor 'was entitled to extensions of time up until 14 January, 1997 for inclement weather and for delays for which Gaymark was responsible either directly or through the Superintendent.' He also found that the Contractor was delayed for a further 77 working days (87 calendar days) 'by causes for which Gaymark was responsible either directly or through the Superintendent but its application for extension of time was barred because of the failure of Concrete Constructions [The name of this party changed to Walter Construction Group Ltd during the course of the proceedings] to meet the notification requirements of the contract's extension of time clause (SC19.2)'.

These delays 'actually prevented Concrete Constructions from achieving Practical Completion by 14 January, 1997.' He also found that the date of Practical Completion achieved by the Contractor was some 87 calendar days after the extended date for Practical Completion.

The Court found that 'The arbitrator expressly acknowledged that the consequence of his approach to the 'prevention principle' was that on the facts as he found them, Gaymark lost an entitlement to 87 days of liquidated damages at $6,500 per day, namely a total amount of $565,500.'

One of the important findings of the arbitrator was that:

[T]he principal, in redrafting the EOT provisions, is 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 Practical Completion of the works by the due date, or that, if it did, that the contractor would apply for an extension of time within the stipulated times. In consequence, it did not provide for the possibility that this might happen, with the further risk that, if it did, the obligation to finish by a date which could be determined would be replaced by one only to complete within a reasonable time.

The arbitrator distinguished the reasoning of Cole J in *Turner Corporation Limited v Austotel Pty Ltd*[3] on the bases that:

(a) *that was not a case (such as the present) where the acts of the principal in person or through the superintendent had been responsible for actually preventing the contractor from achieving the date for completion; and*

(b) *the standard form contract under consideration in that case (Building Works Contract-JCCA 1985 with Quantities: Third Print, August 1988) expressly reserved a power (cl 9.05) 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 notice provisions.'

Counsel for the Contractor submitted that the arbitrator's construction of SC19 was correct and further that, 'the presence of a clause equivalent to GC 35.4 (of NPWC3) in the JCCA contract was vital to the reasoning of Cole J in *Turner Corporation Ltd v Austotel Pty Ltd*'.

The Court also had regard to what Rolfe J had said in *Turner Corporation Ltd v Co-ordinated Industries Pty Ltd*[4] where his honour said: 'Mr Gyles (for the principal) submitted that where one finds in a building contract a clause in terms of cl 35 and, in particular, one containing a clause such as cl 35.4, there is no room for the prevention principle to operate because it is, in effect, excluded by the express provision. The authorities to which I have referred support, in my opinion, this submission.' But of course cl 35.4 is the clause that deals with the entitlement of the Contractor to seek and be given an extension of time, as well as containing the power to the Superintendent to extend the time for Practical Completion. I suggest that, in the context, Rolfe J was referring to that part of 35.4 that relates to the entitlement of the Contractor to seek an extension of time.

In the *Gaymark* case, Bailey J, said:

I consider that the arbitrator was correct to distinguish both the Co-ordinated Industries case (above) and the Austotel case (above). In neither case were acts for which the principal was responsible the cause of actual delay in preventing the contractor from achieving the date for practical completion. As the arbitrator observed:

'The situation then, as I see it, is that in none of the cases to which I have been referred has the precise situation being considered here been looked at. (Hence I do not regard the decisions as being relevant to the present matter.)

That situation is one where, if it proves that the acts of the owner either in person or through the Superintendent, have been responsible at least in part for actually preventing the contractor from achieving the date for completion, this is in the context of a contract in which, if the detailed requirements for notifications of EOTs have not been met, the Superintendent has no independent power to extend time.'

The concept of 'actuality' arose in the *Co-ordinated* case in the context of the Referee finding that the delay by the Principal was such that in any event, because of the Builder's own delays, the Builder would have finished beyond the date for Practical Completion whether it was delayed by the Principal or not.

As the Referee in the *Co-ordinated* case found in his report (p208):

While the proper construction of this is a matter of law, it is my view that, in order to qualify for an EOT, the Contractor had to suffer an actual delay to the execution of the Works. It is not enough that the acts etc. of the Superintendent should have made it not possible to complete in time, if nevertheless the Contractor's own delays have been such that the Superintendent has not, in fact, delayed him .... It is my conclusion, as a matter of fact, that the delays by the Superintendent did not result in an actual delay to the Works of the Contractor in any of the three instances, although they went perilously close to it.

Consequently, on my view of the first paragraph of cl 35.4, I am unable to conclude that there should be a further EOT for these delays.

Now that is, apparently, not the *Gaymark* case in that the Arbitrator found that the Contractor was delayed for 77 working days in the context of a delay by the Contractor of 87 days in achieving completion.

Bailey J thought that:

[A]cceptance of Gaymark's submissions would result in an entirely unmeritorious award of liquidated damages for delays of its own making (and this in addition to the avoidance of Concrete Constructions delay costs because of that company's failure to comply with the notice provisions of S.C. 19). The effect of redrafting GC 35 of the contract (to delete GC 35.4 and substitute S. C. 19) has been to remove the power of the superintendent to grant or allow extensions of time. Special condition 19 makes provision for an extension of time for delays for which Gaymark directly or indirectly is responsible — but the right to such an extension is dependent on strict compliance with SC 19 (and in particular the notice provisions of SC 19.1). In the absence of such

strict compliance (and where Concrete Constructions has actually been delayed by an act, omission or breach for which Gaymark is responsible), there is no provision for an extension of time because GC 35.4, which contains a provision which would allow for this (and is expressly referred to in GC 35.2 and GC 35.4), has been deleted.

Respectfully, I find myself unable to agree with the reasoning of both the arbitrator and the Court. The Contractor had the right to an extension of time provided that it complied with the notice provisions of S.C. 19.1 of the Contract and provided it was delayed in the progress of the Works in such a manner which may reasonably be expected to result in a delay to the works reaching Practical Completion. (SC 19.1)

Cole J addressed this very issue in *Austotel* and his words left no doubt that his reasoning referred to a Contractor being delayed in the way contemplated by the Gaymark contract.

He said that where the Proprietor is responsible for its own act or an act of another for whom it is responsible which might be called an 'act of prevention' the Builder has a right to apply for an extension of time to the Date for Practical Completion to the extent to which it would be delayed by that act in bringing the works to Practical Completion. Cole J said at p384:

The consequence is that the Builder can never say that it was prevented from completing the works on time, that is, by the Date for Practical Completion, by the so called preventing act of the Proprietor because the preventing act of the Proprietor entitles the Builder to apply for an extension of time equivalent to the delay to the progress of the works caused by the otherwise preventing act.

And again at pp384-385 Cole J said;

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 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 effect of that preventing conduct.*** *(emphasis added)*

There were no words of Cole J suggesting that 'preventing conduct' referred to anything else other than delay to the Builder 'preventing it from completing the works on time' (p384). To suggest that Cole J was not intending that his words referred to actual delay is to suggest something that is inconsistent with what he said.

As Rolfe J said in the Co-ordinated case:

One may be forgiven for thinking that it would be strange if there was not a requirement for actual, as opposed to potential delay. In each case, in my opinion, it is necessary to determine what delay was caused and whether that delay, in truth, delayed the Contractor. (p219)

And as Rolfe J said on p221:

In any event, the principal's actions must cause 'actual', as opposed to potential delay in the sense that the completion of the work is delayed by the actions of the principal. It is not to the point to say that there could have been a delay. It is necessary to establish that delay was caused.

In the *Gaymark* case, I suggest that it is evident from the findings of the Arbitrator that the delay of 77 working days 'in truth, delayed the Contractor.'

It is somewhat difficult to see any difference in the facts of *Gaymark* that take them outside the reasoning of Cole J, and Bailey J did not seek to suggest that that reasoning was erroneous. Rather, he sought to distinguish *Austotel*. He agreed with the Arbitrator in distinguishing *Austotel* on the grounds that there was in *Austotel* no actual delay and that there was a power for the Architect in *Austotel* to extend time of his own motion, which power was absent in the Gaymark contract. (68); (and see (61) where Bailey J thought that the omission of any specific power in the contract for the Superintendent to extend time of his own motion was somehow fatal to the claim of the Principal.)

In *Austotel* the Contract before the Court was a JCCA 1985. The particular term of that Contract that gave to the Architect the power to extend time for Practical Completion of the Works of his own motion is clause 9.5 of that contract. Nowhere in the judgment of Cole J did his Honour refer to that clause other than to set out its terms when noting all of the terms of clause 9.01 to 9.07.02.

If a Contractor is going to sign a Contract including a provision requiring a notice to be given in a limited time to enable the date for completion to be extended, then it must be aware, or made aware by its legal advisers, that in those circumstances it may not be able to avoid liquidated damages notwithstanding the delay by the Principal.

But it was not ever suggested in *Austotel* that such a power was or was not relevant to the entitlement of the Principal. The thrust of the *Austotel* case was that there was available to the Contractor a right to have the time for Practical Completion extended but that the Contractor had failed to exercise that right.

Statements of principle are regularly made in judgments as part of the *ratio decidendi* and a variation of facts alone does not prevent the application of the principle were it to be applicable to the found facts.

I suggest that the variations in the facts in the *Gaymark* case do not in any way affect the application to it of the principles enunciated in the Austotel case.

Certainly one can sympathise with Bailey J when he referred to the possibility of an '*unmeritorious award*' of liquidated damages payable by the Contractor arising out of delay caused by the Principal. But surely the answer lies rather in the understanding by the parties of the terms of the Contract into which they intend to enter. In *Gaymark* it may be said that the contract was a hard one but nonetheless it is still the contract that the parties have made.

It would not be at all difficult to provide that, in the event of liquidated damages being imposed in respect of a period which was due entirely to the act or omission of the Principal amounting to an act of prevention, the Contractor would not be liable to the Principal for the payment of liquidated damages for that period whether or not the Contractor gave the required notice to have the time extended. This is a matter for the Contractor at the time of entering into the contract; if it does not obtain the agreement of the Principal thereto then it knows the risks were it to enter into the contract.

The time for completion would still be the earlier date (i.e. unextended for the failure of the Contractor to give the appropriate notice) but the contract could provide that the Contractor would not, for example, be entitled to recover delay costs for the time of delay in respect of which it failed to give the appropriate notice.

If a Contractor is going to sign a Contract including a provision requiring a notice to be given in a limited time to enable the date for completion to be extended, then it must be aware, or made aware by its legal advisers, that in those circumstances it may

not be able to avoid liquidated damages notwithstanding the delay by the Principal.

On the other hand, Doug Jones[5] believes:

[I]t is arguable as a matter of general principle that it should be the principal's duty to mitigate the effects of its own act of prevention by ensuring that the appropriate extension is granted.

This is redolent of what the Arbitrator in the *Gaymark* case said at G33 (repeated in the judgment at (62) (supra)).

But is it the duty of the Principal to mitigate the effects of its own act or omission where delay therefrom is identified and dealt with in the Contract? I think that where the parties have in those circumstances by agreement between them said that an extension will be granted but that the Contractor is to give notice thereof within a certain time or else not be entitled to the extension, then that is how the parties have agreed to deal with the matter. Where the Contractor fails to give the appropriate notice there is nothing to mitigate.

A failure by the Contractor to give the notice required by its agreement is the causative factor giving rise to the non-extension of time; not the act of prevention.

As Cole J said: 'Whether there has been prevention … must depend upon the terms of the contract.' (Supra)

Bailey J at (71) thought that 'this principle (as enunciated by Salmon LJ in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd.*[6]) presents a formidable barrier to Gaymark's claim for liquidated damages based on delays of its own making'.

But what Salmon LJ was saying was that:

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.*** *(emphasis added)*

In *Gaymark* such a clause is found in the contract; the Contractor is perfectly entitled to an extension of time for the delay caused by the Principal but it is agreed that any notice thereon must be given within an agreed period. The Contractor did not give such a notice within the agreed period and thus forfeited its entitlement.

It cannot be suggested that by such failure of the Contractor, the Principal is deprived of its liquidated damages. The effects of the delay by the Principal have been subsumed into an entitlement of the Contractor which it has failed to exercise with the agreed result.

There is no obligation on the part of the Superintendent to enlarge the time in circumstances where time has been forfeited by the Contractor and the non existence of such a power in the Contract is thus irrelevant. Any alleged estoppel arising from the conduct of the Principal which gave rise to the delay does not arise.

This area of the law may yet be the subject of determination by a higher court; the matter 'awaits authoritative resolution'.[7]

References

1. 16 BCL, 449

2. 'Extensions of Time and Damages' 14 BCL , 434

3. 13 BCL, 378

4. 11 BCL, 202

5. Doug Jones, *Building and Construction Claims and Disputes,* (Construction Publications Pty Ltd; 1996), 110

6. (1970), 1 BLR, 111.

7. Doug Jones, *Building and Construction Claims and Disputes*, 110 ◙