CONTRACTS

GAYMARK INVESTMENTS PTY LTD v WALTER CONSTRUCTION GROUP LTD—REVISITED IN THE LIGHT OF MULTIPLEX CONSTRUCTIONS (UK) PTY LTD v HONEYWELL CONTROL SYSTEMS PTY LTD AND PENINSULA BALMAIN PTY LTD v ABIGROUP CONTRACTORS PTY LTD

Adrian Bellemore, General Counsel
Colin Biggers & Paisley, Sydney

The writer has previously sought to demonstrate the error in the decision of Gaymark Investments Pty Ltd v Walter Construction Group Pty Ltd (Gaymark). Shortly, that decision upheld an award of the arbitrator which found that the contractor was entitled to certain extensions of time but not to a further period of 87 calendar days where that latter delay was caused by the principal (and for which an extension of time was claimable) but where the contractor had not abided by the strict notice provisions of the contract for claiming an extension of time.

The arbitrator further found that this delay of some 87 days prevented the contractor from achieving practical completion by the time (as extended) provided for in the contract. The arbitrator further found that this delay by the principal constituted ‘acts of prevention’ so that there was no actual date for completion and thus the principal was not entitled to impose liquidated damages. This determination was upheld by the Supreme Court of the Northern Territory.

The relevant contract did not contain any provision whereby the superintendent was entitled to grant an extension of time whether or not the contractor had made application therefore. The conditions of contract (NPWC 3) had been amended to strike out clause 35.4 and there was inserted a special condition whereby the contractor was required to adhere to a strict obligation with respect to notices when applying for an extension of time. That special condition, in the words of the arbitrator: ‘afforded the superintendent no general discretion to extend time in the absence of such strict compliance’ of the terms of the special condition.

The burden of what the writer sought to point out in the previous article was that (quoting Cole J in Turner Corporation Limited v Austotel Pty Ltd1) ‘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 the preventing conduct’. Thus the failure of the contractor, in Gaymark, to follow the regime of notices required by the contract would, in the view of the writer, have disentitled the contractor to an extension of time, notwithstanding the result that the contractor would be liable for the payment of liquidated damages for that period.

In the matter of Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (Multiplex), Honeywell (a subcontractor to Multiplex) contended that time had become ‘at large’ on four separate grounds including what was called the Gaymark Point i.e. that the terms of the requirement as to notices resulted in the barring of Honeywell’s claim because of its failure to abide by this requirement. If it were otherwise, said Honeywell, then Multiplex would be able to recover damages for a delay that it had itself caused.

The contract included a condition precedent whereby Honeywell’s entitlement to an extension of time was conditional upon the service by Honeywell upon Multiplex of ‘all necessary notices’ and further provided that if there were a failure by Honeywell to ‘provide any necessary supporting information then he shall waive his right, both under the contract and at common law, in equity and/or pursuant to statute to any entitlement to an extension of time under clause 11’.

During the course of the works, Multiplex issued revised programs to Honeywell under the terms of the contract. Honeywell sent notices of delay and requested an extension of time. Multiplex rejected the notices as not complying with the requirements of the contract. Thus Multiplex advised Honeywell that it was unable to assess any entitlement of Honeywell to an extension of time. Honeywell claimed that it was impossible to provide the information sought by Multiplex for inclusion in the notices.

Jackson J (in Multiplex) noted that the correctness of the decision in Gaymark has ‘been a matter of some debate’. He noted that Keating on Building Contracts (8th Edition) 2006, however, took the view that there was no English authority on the matter but inclined to the view that the decision was rightly decided.

His Honour took note of what had been written by the late Professor Ian Duncan Wallace in his article ‘Prevention and Liquidated Damages: A Theory Too Far?’ where Professor Wallace argues that both the arbitrator...
and the judge came to the wrong conclusion in Gaymark. In Professor Wallace's view, Gaymark extends the prevention principle too far. And later on his Honour said that I am bound to say that I see considerable force in Professor Wallace's criticisms of Gaymark. He thus considered that time was not 'at large'.

His Honour also noted that the NSW Court of Appeal had, in the matter of Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd, declined to follow Gaymark and preferred the reasoning of Professor Wallace in his article Prevention and Liquidated Damages: A Theory Too Far. In Multiplex there was no clause similar to that of clause 35.5 of AS 2124 (1992) that was considered by the NSW Court of Appeal in the Peninsula Balmain matter. Thus the issues considered in the Peninsula Balmain matter were not matters in issue in Multiplex.

In the circumstances, it is suggested that the matter of Multiplex was correctly decided especially in dealing with what was called, in that case, the Gaymark point.

The matter of Gaymark was not referred to specifically in the judgment of the Court of Appeal in Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd but in the judgment of Hodgson JA who delivered the judgment of the court he said

I accept that, in the absence of the superintendent's power to extend time even if a claim had not been made within time, Abigroup would be precluded from the benefit of an extension of time and liable for liquidated damages, even if delay had been caused by variations required by Peninsula and thus within the so-called ‘prevention principle’. I think that this does follow from the two Turner cases and the article by Professor Wallace QC referred to by Mr Rudge SC. Has the decision in Peninsula Balmain brought about a need to revise the principles that flowed from the decisions in the two Turner cases i.e. Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd and Turner Corporation Ltd (In Provisional Liquidation) v Coordinated Industries Pty Ltd and Ors?

In the case of Austotel the contract there being considered was in the form known as JCCA 1985 which included provision for the builder to seek an extension of time where it had been delayed in the progress of the works. The contract provided for a regime of notices to be given to the architect in the event of such delay occurring and where the builder sought an extension of time. Clause 9.05 of the contract provided that: ‘Notwithstanding that the builder has not given either of or both notices pursuant to cl 9.01 and cl 9.02 the architect may at any time by notice in writing addressed to the builder extend the time for practical completion of the works if in his opinion the builder would otherwise be entitled to such an extension.’

Further, by the terms of cl 5.02.02 the architect was ‘authorised to act as the assessor, valuer or certifier in respect of, inter alia, (f) extensions of time (clauses 9.03 and 9.05);

The terms of the clauses giving to the superintendent (in the case of AS 2124 (1992) and to the architect in the case of JCCA, the power to extend time in the absence of an application therefore by the contractor or the builder, are not dissimilar in any essential degree. In each contract the superintendent or the architect is given the power to extend the time for practical completion notwithstanding the failure of the contractor or builder to comply with the clause requiring the giving of the relevant notices.

It may be argued that in the case of AS 2124 (1992) there is an express provision that the superintendent shall act honestly and fairly (cl 23(a) whereas there is no such express provision in JCCA. But notwithstanding the absence of such an express provision in the JCCA contract, it is suggested that in the case of the discretion conferred upon the architect by the terms of cl 9.05, there is an implied term requiring the architect to act fairly and lawfully.

The builder in Austotel argued that ‘achievement of its contractual obligation of practical completion by the extended date for practical completion was prevented by the late receipt of those instructions. This latter aspect was said to result in the proprietor not being entitled to recover any sum by way of liquidated damages pursuant to the provisions of the contract because it had prevented performance.’

But as his Honour pointed out, ‘the builder could 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 an extension of time' where the contract provides for an extension of time for delay caused by the actions or omissions of the proprietor.

The arbitrators had awarded a sum of $1,725,000 by way of liquidated damages to be paid by the builder and his Honour refused leave to appeal on this point.
The provisions of clause 9.05 of the contract were not the subject of a submission nor was it adverted to by his Honour. It is suggested that had the matter of Peninsula Balmain predated the decision in Austotel, then it may well be that a different conclusion may have been arrived at by his Honour on the matter of liquidated damages.

It is agreed that time would not be ‘at large’ but it may well have been the case that the amount of liquidated damages would have to have been re-assessed in the light of any such preventing conduct of the proprietor for which the architect may not have allowed an extension of time under clause 9.05. If the builder had failed to make the application for an extension of time in accordance with the terms of the contract, then in any event the architect would, post Peninsula Balmain, have been required to consider the entitlement of the builder to an extension of time as a part of his obligation to exercise the power under clause 9.05 in the interests of both the builder as well as the proprietor.

In the case of Turner Industries and Coordinated Industries, the contract in question was NPWC3 (1981) which had been amended but not in any way affecting the provisions relating to extensions of time.

The terms of clause 35.5 of the conditions of contract included the terms of clause 35.5 which inter alia provided that ‘Notwithstanding that the contractor has not given notice of a claim for an extension of time for practical completion of the works pursuant to this sub-clause, the superintendent may, at any time and from time to time and for any reason he thinks sufficient, by notice addressed to the contractor, extend the time for practical completion of the works and the date so specified in the notice shall, for the purposes of the contract, be deemed to be the date for practical completion of the works’.

The terms of the contract did not expressly provide for the actions of the superintendent to be fair and honest, or some such formula, but, again, the writer believes that there would be implied a duty on the superintendent to act fairly and lawfully. In that matter, Rolfe J, in dealing with the concept of ‘prevention’, spoke of delay caused by a default of the principal, for which the contract grants an entitlement to an extension of time, and added ‘However, there can be no doubt that cl 35.4 contemplates fault on the part of the principal and says so in the clearest terms. Accordingly the contractual right of the contractor was to seek extensions of time, the mechanism for determining which was established by the contract. The ultimate remedy, in the event of the contractor’s not being satisfied with the determination of the superintendent and the principal is reference to arbitration. Subject to the grant of extension of time the principal retains its contractual rights.

The effect of Peninsula Balmain on the decision of Coordinated had it been decided before the decision in Coordinated, would not have in any way affected the decision or the reasons for the decision by Rolfe J other than possibly to have required an assessment of any liquidated damages had there been a failure by the contractor to seek an extension of time in accordance with the procedure of the contract and which had had the effect of exposing the contractor to liquidated damages for that period.

The principles established by the judgments in both of the Turner cases are, it is suggested, still authoritative, especially on the issue of prevention where there is a provision for the grant of an extension of time where the delay is caused by the principal/proprietor.

REFERENCES
1. 76 ACLN 5
2. 16 BCL 449
3. 13 BCL 378
4. 13 BCL at 385
5. CILL May 2007 2458
6. CILL May 2007 2462
7. 18 BCL 82
8. CILL May 2007 2462
9. CILL May 2007 2463
10. 18 BCL 322
11. CILL May 2007 2463
12. 18 BCL, 343
13. 11 BCL202
14. 11 BCL 202
15. John Barker Construction Ltd v London Portman Hotel Ltd 50 Con.LR 43; Northern Regional Health Authority v Derek Crouch Construction Co Ltd, (1984) 2All ER 175
16. 13 BCL at 380
17. 13 BCL at 384
18. 11 BCL at 217