PREVENTION AND THE ALLOCATION OF THE RISK OF PROJECT DELAYS: EVOLUTION OR REVOLUTION?

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Allocation of the risk of project delays

Many contracts allocate the commercial risk of delays to completion by use of the following matrix:

(a) An obligation to achieve completion by a specified date for completion;[1]

(b) A process which applies objective criteria to determine when completion has occurred;

(c) Commercial consequences (namely in the form of the contractor's liability to pay pre-agreed liquidated damages (LDs)) for the duration of any project overrun;[2]

(d) A mechanism by which the date for completion may be extended (namely in the form of an extension of time (EOT)) to provide the contractor with relief against LDs. The EOT mechanism is usually triggered when employer-caused delays (or any specifically agreed neutral delaying events) impact upon the achievement of completion.

Within this type of framework, it is usually the commercial intention of the parties that the contractor bears the risk of all delays (and thereby a potential LDs liability) except for those events that are specifically pre-agreed qualifying causes of delay (including employer-caused delays) for which it may obtain an EOT. Preserving the pre-agreed model of risk allocation depends (in part) upon an administrative interaction between the contractor and the employer or the contract administrator – namely, the contractor correctly identifying those qualifying causes of delay which cause a project overrun and EOTs being granted. In practice, the theory of this model of risk allocation is often challenged when EOTs are not granted, even though

1 The cases referred to in this paper refer variously to the 'date for completion', 'date for practical completion' and 'completion date'. For ease of reference this paper adopts the terms, first, 'date *for* completion' to refer to the various formulations of the contractually specified date by a which a contractor is obliged to complete the parts of the project works specified as being required for 'completion' and secondly, 'date *of* completion' to refer to the date upon which this obligation is actually satisfied.

2 The term project overrun is used in this paper to denote the time period by which the date of completion exceeds the contractually specified date for completion.

qualifying causes of delay are the drivers of a project overrun. This is usually an issue when either:

- there is disagreement between the employer or contract administrator and the contractor as to which causes of delay are critical (often caused by divergent methods of modelling the causes of delay); or
- the contractual machinery for granting EOTs is not invoked.

The prevention principle

The principle is relatively simple, namely that a party to a contract cannot insist upon performance of a contractual provision, if the acts or omissions[3] of the party insisting on that condition are the reason that the provision has been breached.[4] It is integrally tied up with notions of equity, justice and fairness.[5]

The principle in construction contracts is usually traced back to the decision of *Holme v Guppy*.[6] The principles that may be distilled from *Holme* are that when acts of the employer prevent the contractor from achieving completion by the date for completion, if there is no contractual machinery to extend the date for completion:

- the contractor is excused from completing by the date for completion;
- there is therefore no anchor date from which to calculate the LDs liability;
- time is said to be left at large;
- the employer may still have rights against the contractor for general damages but may not recover the liquidated sum for the project overrun.

The modern history of the prevention principle is usually traced back to *Peak v McKinney*.[7] There were two relevant dimensions in *Peak*: first, there had been no EOT granted to extricate the effects of delay caused by the owner under the head contract, and secondly, the EOT clause was not adequately

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3 The question as to which acts or omissions of the employer constitute acts of prevention in construction contracts is reasonably well settled: *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391 (Victoria Supreme Crt). At page 395, Brooking J described in detail the types of acts which have been held to be acts of prevention by the employer. The orthodox view is that it potentially includes any act and is not limited to breaches or 'wrongs'. Acts of prevention may include acts which are expressly permitted under the contract such as ordering of variation work.

4 Brooking J in *SMK Cabinets* (at page 395) posited that there are divergent views between whether the doctrine of prevention is a rule of law or a theory of the implied term, but concluded that the distinction was 'largely of academic interest'.

5 The prevention principle therefore is an issue in the context of employer-caused delays as opposed to neutral or contractor-caused delays.

6 *Holme v Guppy* 150 ER (Exchequer) 1195 (Parke B).

7 *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111 (CA).

drafted so as to permit EOTs for the owner's fault or breach in any event. Since the owner's delays could not be (and were not) contractually disentangled, Peak could not rely upon the extant date for completion as against McKinney because of the operation of the prevention principle. In turn, the LDs regime was unenforceable.

Since the modern restatement in *Peak*,[8] most construction contracts provide contractual machinery to overcome the potential effects of the prevention principle undoing the pre-agreed commercial allocation of risk of project delays (by, where necessary, re-setting the date for completion) through use of two main techniques:

(a) Clauses (which may require compliance with notice provisions) whereby the contractor may apply for EOTs for a range of enumerated qualifying causes of delay (including but not necessarily limited to employer-caused delays) and if objective criteria are met, an EOT must be granted (described in this paper as a mandatory EOT clause); and

(b) Complementary clauses which may be used to re-set the date for completion when mandatory provisions miscarry.[9] Whilst there are several techniques used for these complementary clauses, a common approach is a clause that allows the date for completion to be extended at any time and for any reason, irrespective of the engagement (or otherwise) of the mandatory provision. These are often referred to as unilateral or discretionary EOT clauses.

The issue

There is a movement in recent English caselaw towards holding that, if employer-caused delays cause a project overrun but mandatory EOT notice provisions are not complied with, the mere fact of such non-compliance breaks the causal link between the employer's act of prevention and the contractor's liability for LDs.

Though this matter has not been finally and authoritatively decided, the recent cases of *Multiplex v Honeywell*[10] and *Steria v Sigma*[11] are at the vanguard of this movement. Both these cases have moved towards this position in reliance upon:

- the Australian decisions in *Austotel*[12] and *Peninsula Balmain*;[13]

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8 *Peak v McKinney*, note 7.

9 The term 'miscarry' is not used in this paper to denote blameworthiness, but rather that objectively the mandatory clause has not engaged for any reason (including by reason of claims not being made within time or at all) to re-set the date for completion.

10 *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC).

11 *Steria Ltd v Sigma Wireless Communications Ltd* [2007] EWHC 3454 (TCC).

12 *Turner Corporation Ltd v Austotel Pty Ltd* (1997) 13 BCL 378 (New South Wales Supreme Crt).

- the criticisms of a third Australian decision in *Gaymark*;[14] and
- the Scottish decision in *City Inn.*[15]

By reference to a detailed analysis of these cases, the central contentions of this paper are that:

1. Neither *Austotel*, *Peninsula Balmain* nor *City Inn* stand for the proposition that mere non-compliance with mandatory notice provisions (unless the contract expresses a contrary intention) excludes the application of the prevention principle;
2. As a result, any further development of the prevention principle on the basis of the *obiter* comments in both *Multiplex* and *Steria* may comprise a new branch of authority which could have the effect of altering the intended contractual allocation of the risk of time;
3. Parties seeking to achieve a commercial allocation of risk such that failure to comply with mandatory EOT notice provisions (and nothing more) *is intended to* exclude the application of the prevention principle, ought to reflect this model of risk allocation in express contract provisions to that effect, rather than relying upon courts to impose this allocation of risk for them.

Austotel[16]

Austotel was a decision of the Supreme Court of New South Wales.[17] It involved an appeal by the contractor from an earlier arbitral award.[18] The contract was the JCC-A 1985 form.[19] The date for completion could be extended under a mandatory EOT clause for delays, 'beyond the reasonable control of the Builder….' (clause 9.01). This mandatory EOT clause

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13 *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211 (New South Wales Crt of Appeal).

14 *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* (1999) NTSC 143 (Northern Territory Supreme Court).

15 There are two relevant decisions. *City Inn Ltd v Shepherd Construction Ltd* [2003] BLR 468 (*City Inn No 1*) (Crt of Session Inner Hse) and *City Inn Ltd v Shepherd Construction Ltd* [2007] CSOH 190, [2008] BLR 269, (2008) 24 Const LJ 590 (*City Inn No 2*) (Crt of Session Outer Hse). For a discussion of *the City Inn* decisions, see Jeremy Winter 'How Should Delay be Analysed – Dominant Cause and Its Relevance to Concurrent Delay' SCL Paper 153 (January 2009) <www.scl.org.uk>.

16 *Austotel*, note 12.

17 In *Peninsula Balmain* (note 13) (and by cross-reference, subsequent English cases), reference was made to the 'Turner cases' (by Hodgson JA, para [78]). The reference was presumably intended as a reference to both *Austotel* and also the separate decision delivered shortly thereafter in *Turner Corporation Ltd v Co-Ordinated Industries Pty Ltd* (1994) 11 BCL 202 (New South Wales Supreme Crt). It is the *dictum* of Cole J in *Austotel* that has been emphasised in subsequent cases. *Austotel* and *Co-Ordinated Industries* have different sets facts and relate to different standard forms and referring to them collectively must be treated with caution.

18 Under section 38(5) of the New South Wales Commercial Arbitration Act 1984.

19 Building Works Contract JCC-A 1985 with quantities, which is the product of a joint committee of the Royal Australian Institute of Architects, Master Builders and the Property Council of Australia.

contained notification provisions (clauses 9.01 and 9.02). There was a complementary discretionary EOT clause (clause 9.05) where the date for completion could be extended notwithstanding the miscarriage of the mandatory provisions.

There was a finding of fact that there was an employer-caused delay arising out of the late provision of instructions for a gas leak detector. A claim was made in the arbitration in respect of this delay and a seven day EOT was granted by the tribunal. It is not entirely clear from the judgment whether the tribunal granted the EOT on mandatory or discretionary grounds. There was evidence before the tribunal that the work consequent upon the gas detector being installed which was required to commission the building 'could have occurred' past the certified date of completion. The contractor's argument on appeal from the award appears to have been that because there was evidence that the contractor theoretically 'could have' been delayed past the date that was ultimately certified as the date of completion (even though the date for completion was extended by seven days because of the delay) the prevention principle operated to invalidate the entire LDs regime. This argument was (it is suggested, correctly) rejected.

The matters which were essential to the result in *Austotel* were:

(a) an EOT for the impugned employer-caused delay was claimed before the tribunal and *was actually granted* (thereby disentangling the delay and preserving the pre-agreed risk allocation model); and

(b) irrespective of the theoretical possibility that there may have been a further delay in achieving completion past what was ultimately certified as the date of completion, this was not a case of the employer benefiting from LDs over periods for which it was found to have caused delay.

Obiter however, Cole J went on to say:

> 'It follows, in my view, that under the JCCA form of contract, the prevention principle has no application in relation to failure to perform the contractual obligation to bring the works to practical completion by the Date for [Practical] Completion as a result of an asserted preventing act for which the Proprietor is responsible. Essentially that is because that act is one beyond the control of the Builder, or flows from a variation, and each entitles the Builder to an extension of time to the Date for [Practical] Completion equivalent to the delay which it would suffer in bringing the works to [Practical] Completion.
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> 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 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.'[20]

This *dictum* has been the most quoted part of *Austotel*, though it has been taken out of context in subsequent cases, in an unqualified manner and does not reflect the *ratio* of the case. The context is a discussion about EOT entitlements under a *mandatory* EOT regime. If it is a condition precedent to an entitlement to an EOT, procedural non-compliance may indeed invalidate an EOT entitlement under the mandatory EOT regime. However, the subsequent equating of a loss of mandatory EOT entitlement with a negation of the prevention principle (unless the contract expresses a clear, contrary intention) it is suggested, is an overstatement of the position arising out of *Austotel*.

In *Austotel* there was, in any event, a discretionary EOT power which could be exercised in the event of miscarriage of the mandatory provisions. Selective quoting of the passage above as the fulcrum of the proposition that miscarriage of mandatory provisions by reason of procedural non compliance (with nothing more) negates prevention, involves a leap of logic. The actions of the tribunal in re-setting the date for completion (whether it was under the mandatory or discretionary EOT power) had the practical effect of overcoming the issue of prevention (and thereby preserving the pre-agreed allocation of risk).

Gaymark[21]

By contrast, *Gaymark* was a rare modern case in which it was held that the prevention principle *did* operate so as to render time at large and to deprive the employer of the right to any LDs. The outcome in *Gaymark* has been heavily criticised.[22]

Much of the judicial criticism of *Gaymark* is focussed on the issue of the practical utility of notice provisions – not on its unique facts and contract provisions (or lack thereof). Whilst notice provisions may serve a useful practical purpose and lack of compliance may negate mandatory EOT entitlements, with respect, those matters are largely irrelevant to the issue of prevention. Prevention is about the inequity of an employer benefiting from LDs for periods where it has demonstrably caused delay (which does not usually reflect the pre-agreed risk model). It is suggested that these alone are not compelling legal reasons for impugning the correctness of *Gaymark.*

There is however, another more compelling reason to question the correctness of *Gaymark* which has largely escaped a detailed analysis in Anglo-Australian

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20 *Austotel*, note 12, page 384.

21 *Gaymark*, note 14.

22 Professor Ian Duncan Wallace QC, 'Prevention and Liquidated Damages: A Theory Too Far?' (2002) 18 Building and Construction Law 82.

caselaw. *Gaymark* involved another appeal from an award of an arbitrator.[23] In the course of the arbitration, the employer counterclaimed for an entitlement to LDs. The contract was based on the NPWC3 standard form, however the EOT clause had been deleted and substituted with a bespoke clause.[24] The new EOT clause contained a mandatory EOT clause but the complementary discretionary EOT power had been deleted.

The arbitrator found that the contractor complied with the mandatory notice provisions in respect of certain delays, was therefore properly entitled to some EOTs under the mandatory clause and proceeded to extend the date accordingly. There were however additional employer-caused delays where the contractor had not complied with the mandatory notice provisions. In the absence of any contractual entitlement or power to extend the date for completion under the mandatory EOT clause, in the face of the employer's insistence on its right to the entirety of the LDs for periods of employer-caused delay, the arbitrator held that the prevention principle operated to render time at large. The employer was not entitled to any LDs as a consequence: it was held that to rule otherwise would result in an entirely unmeritorious award for delays of its own making. In upholding the award, Bailey J distinguished *Austotel*:

(a) In *Austotel*, there was no finding of fact that the potential delays in question *actually* prevented the contractor from completing by the date for completion;

(b) The contract in *Austotel* in any event contained a discretionary EOT power in the event that the mandatory regime miscarried. This would enable the disentangling of the employer-caused delay and thereby avert the operation of the prevention principle. No such power existed in the contract in *Gaymark*.

Whilst at a level of general principle, it suggested that distinguishing *Austotel* in this manner was correct, there was a lack of detailed analysis in *Gaymark* of how the unique contract provisions (which reflect the particular commercial bargain of the parties) may have displaced that position.

Part of clause 19.1 of the contract provided that:

> 'The Contractor hereby accepts the risk of liability for completion of the Works strictly in accordance with the provisions of the Contract notwithstanding encountering delay or disruption in the execution of the Works except to the extent provided in this clause.'[25]

Counsel for the employer argued that this provision was ignored by the arbitrator. The judgment also appears to have overlooked it and with respect, subsequent cases have also overlooked it, with the result that they have

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23 Under section 38 of the Northern Territory Commercial Arbitration Act (which is in the same terms as that in the New South Wales Act cited in *Austotel*).

24 National Public Works Conference Edition 3 Conditions (1981).

25 The 'extent provided for' in the clause was that the contractor was relieved of the risk of LDs to the extent that a mandatory EOT was granted to extend the date for completion.

focussed on overly simplistic (and it is suggested, irrelevant) reasons for questioning *Gaymark*.

The arbitrator took the view that in re-drafting the EOT provisions, the employer was deemed to have 'taken the risk' that if there were employer-caused delays and the mandatory EOT regime miscarried, time would be rendered at large. This is the key contractual assumption in *Gaymark* from which its ultimate outcome flows. The corollary is that it also assumes that the deletion of the discretionary EOT power was a drafting error.

However, the words in the part of clause 19.1 quoted above seem to suggest the converse, namely that this particular contractor freely 'took the risk' that the employer could potentially benefit from LDs for periods of employer-caused delay if the mandatory regime was not engaged. This would also provide a rationale for the view that the deletion of the discretionary EOT power (which is rare in post-*Peak* Australian contracts) was deliberate rather than an error. If that part of clause 19.1 had the converse effect to that held by the arbitrator (and upheld on appeal) as has been suggested, then there would be no need for a discretionary EOT clause because the part of clause 19.1 quoted above, coupled with the lack of compliance with mandatory notice provisions, *would* negate the effects of the prevention principle (as counsel for the employer argued). The reason for the traditional inclusion of the discretionary EOT power since *Peak* would have been removed by express contractual drafting in clause 19.1.

It would be of assistance to the ongoing development of the prevention principle if any future judicial criticism of *Gaymark* went beyond simple arguments about the value of notice provisions and embarked upon a detailed analysis of the commercial allocation of the risk of delays reflected in the specific contract provisions in this case.

Peninsula Balmain[26]

Peninsula Balmain was a decision of the New South Wales Court of Appeal, upholding the decision of Barrett J at first instance,[27] in which His Honour adopted the report of a court appointed referee in relation to disputes arising out of a residential apartment development.

The contract between the parties was based on AS2124-1992, a different form of contract to those considered in both *Austotel* and *Gaymark*.[28] Before the referee, there was a claim for LDs made by the employer. The date for completion was extended once by the contract administrator. No further claims for EOT were made throughout the course of the project. During the course of the reference, the contractor made claims for EOT in relation to

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26 *Peninsula Balmain*, note 13.

27 *Abigroup Contractors Pty Ltd v Peninsula Balmain Pty Ltd* [2001] NSWSC 752 (New South Wales Supreme Crt).

28 Australian Standard General Conditions of Contract for Construction Projects, Standards Association of Australia.

several delays which were not made at any time during the project. The referee found (based on a joint report prepared by the programming experts for both sides) that the contractor was delayed by 77 days for these 'excusable delays' the majority of which were employer-caused.

The contract contained both a mandatory and a discretionary EOT clause.[29] There was no dispute that the contractor did not comply with the mandatory EOT notice provisions for the 77 days worth of delay and the contract administrator had not, as at the time of the hearing, extended time. The referee went ahead and exercised the discretionary EOT power himself in the reference, based on the view that he was entitled to open up and review the decisions (including non-decisions) of the contract administrator. This action averted the issue of prevention.

Barrett J found no error in this aspect of the referee's report[30] and it was upheld on appeal. It seems implicit in the employer's argument on appeal that the contractor should have remained liable for LDs for the entire period of employer-caused delay. The employer said the referee erred on several counts, including that the failure of the contractor to comply with the mandatory notice provisions disentitled the contractor from relying upon the 'prevention principle' at all (relying upon what were described globally as 'the Turner cases' and the highly influential article by Professor Ian Duncan Wallace QC[31]).

The appeal was dismissed, the Court of Appeal holding that the referee did not err in extending time himself in the reference. The Court of Appeal held that the discretionary power was capable of being exercised after termination and in the manner exercised by the referee.

Though it did not affect the result, *obiter* the Court agreed with the employer's submissions that in the absence of a discretionary EOT power, if the contractor did not comply with the mandatory notice provisions, then because of the 'Turner cases' and the article by Professor Duncan Wallace, the prevention principle would not operate.[32]

To the extent that this statement of Hodgson JA (with which the rest of the New South Wales Court of Appeal agreed) is taken as an unqualified statement of the effect of *Austotel*, with respect, it is suggested that it is not based upon an accurate view of the effect of that case for the reasons discussed

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29 The employer in *Peninsula Balmain* also had an express obligation to ensure that in the exercise of the functions of the contract administrator (including administration of the discretionary EOT clause), the contract administrator exercised those functions honestly and 'fairly'.

30 *Abigroup Contractors*, note 27, paras [28]-[32].

31 Ian Duncan Wallace, note 22.

32 See note 17. It is suggested that Hodgson JA's reference to the 'Turner cases' was intended as a reference to Cole J's regularly quoted dicta in *Austotel*. *Co-Ordinated* involved a different contract and different set of facts which makes it a fraught exercise to rely on both of these cases as standing for a singular legal proposition of universal application.

above. Further, the sole reliance on Professor Duncan Wallace's argument (which criticised *Gaymark*) without taking the opportunity to deeply examine the contractual risk allocation models in *Gaymark* and how it compared and contrasted to those in *Austotel* and *Peninsula Balmain* was a lost opportunity. Relevantly, the contract in *Peninsula Balmain* did not contain the equivalent of the part of clause 19.1 quoted above in the *Gaymark* case. If the alternative critique of *Gaymark* offered in this paper is correct, then the absence of an express provision in the *Peninsula Balmain* contract comparable to clause 19.1 in *Gaymark* casts doubt on the result which Hodgson JA hypothesised would ensue if there was no discretionary EOT power in *Peninsula Balmain*.

For these reasons, Hodgson JA's *dictum* must be treated with a degree of caution if it is to be used as a basis for the future development of the prevention principle. In any event, because of the action of the referee in exercising the unilateral discretion himself (and this being upheld), *Peninsula Balmain* was not ultimately a case about prevention.

The *City Inn* decisions[33]

City Inn No 1 and *City Inn No 2* are Scottish decisions relating to a hotel development. The contract was a version of JCT 80 (private edition with quantities)[34] which contained a date for completion and entitlement to LDs for each week of the project overrun. There were two contractual mechanisms by which the date for completion could be extended:

(a) a mandatory provision (clause 25.3.1) which required compliance with certain notice provisions;[35] and

(b) a discretionary provision (clause 25.5.3) which did not require compliance with the mandatory notice provisions, nor for that matter did the clause require a claim to be made at all by the contractor.[36]

In *City Inn No 2*, Lord Drummond Young made findings of fact that there were 11 'relevant events' which delayed the contractor in achieving completion.[37] The cumulative effect was that it was held that the contractor had been delayed by nine weeks worth of employer-caused delays and the court determined that the date for completion ought to be extended by nine weeks as a result.[38]

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33 *City Inn No 1 and No 2*, note 15.

34 Standard Form of Building Contract, 1980 edition, Joint Contracts Tribunal.

35 If the objective criteria were met, the quantum of the EOT entitlement was to be determined on the basis of an estimate of what was 'fair and reasonable'.

36 The guiding criterion for the exercise of the discretion was what the contract administrator considered to be 'fair and reasonable' and there was a time limit (12 weeks after the date of completion) within which the discretion could be retrospectively exercised by the contract administrator.

37 *City Inn No 2*, note 15, para [159].

38 *City Inn No 2*, note 15, para [161].

In respect of all except one event, Lord Drummond Young held that the mandatory notification provisions had been complied with such that the mandatory provisions had not miscarried.[39] The exception was in respect of delays arising out of a gas venting issue. In respect of that issue, it was held that there was a 'waiver' such that the notice provisions could not be relied upon so as to deny a mandatory EOT entitlement.[40]

These aspects of *City Inn No 2* are significant. The Court held that the mandatory EOT clauses 'did their work' (preserving the pre-agreed risk allocation model) and therefore prevention did not arise as an issue.

City Inn No 2 was decided after both *Multiplex* and *Steria*. Obviously, the reliance placed upon *City Inn* in both *Multiplex* and *Steria* was in relation to the earlier interlocutory decision in *City Inn No 1*. The term 'prevention' is not used in *City Inn No 1*. In *City Inn No 1*, it was held that non-compliance with mandatory notice provisions would disentitle the contractor to a mandatory EOT entitlement unless there had been a waiving of the notice requirement by the architect.[41]

There are two relevant aspects to the earlier decision in *City Inn No 1*:

(a) The court itself did not equate miscarriage of the mandatory regime with a negation of the prevention principle. The decision was about the effect of non compliance with notice provisions on mandatory EOT entitlements, not the effect of miscarriage of mandatory EOT clauses on LDs entitlements in the face of employer-caused delays. These are two distinct issues.

(b) In the subsequent decision in *City Inn No 2*, it was held that there was no relevant miscarriage of the mandatory EOT provisions because the two preconditions referred to in *City Inn No 1* had been fulfilled, namely either:

    (i) the mandatory provisions had been complied with (for all except one delaying event); and

    (ii) there was a finding that there had been a 'waiver' of the agreed mandatory provisions for the remaining delaying event.

As a result, reliance in any subsequent cases on *City Inn No 1* without having regard to *City Inn No 2* misses the key analysis of the case which demonstrates its limited application in relation to the prevention principle.

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39 *City Inn No 2*, note 15, para [144].
40 *City Inn No 2*, note 15, para [151].
41 *City Inn No 1*, note 15, para [23].

Multiplex[42]

Multiplex involved a dispute between a head contractor and one of its subcontractors. The subcontractor was required to complete the subcontract works within a fixed period. The contract contained a mandatory EOT clause whereby the fixed period could be extended. On the basis of the extracts of the contract in the judgment it appears that:

(a) there was no LDs provision;

(b) Multiplex was entitled to a *contractual indemnity* for any damage, loss, cost and/or expense suffered or incurred by the contractor and caused by the failure of the subcontractor to complete the subcontract works during the specified period;

(c) it seems that for this reason, there was evidently no discretionary EOT clause.

These differences are significant. LDs liability is determined by multiplying the pre-agreed rate by the project overrun. The indemnity however requires the head contractor to establish the causal link between delays caused by the subcontractor and specific heads of loss suffered by the head contractor. This difference informed the outcome in *Multiplex*. The subcontractor employed three arguments to seek to establish that time was at large under the subcontract. The first was that the EOT machinery had been rendered inoperable; secondly its own non-compliance with the conditions precedent in the mandatory EOT provision put time at large (it based this argument on *Gaymark*) and finally, an argument based upon the construction of an upstream settlement deed between the contractor and the owner. All three arguments were rejected by the court.

The subcontractor's argument in relation to *Gaymark* was based upon a flawed interpretation of *Gaymark* (on any view of that case). To the extent that the court's decision is based upon a rejection of the subcontractor's view of what *Gaymark* stands for, it is suggested that this aspect of *Multiplex* is correct.

Multiplex however must be treated with great caution if it is to be the launching pad for the future development of the prevention principle. His Honour stated:

> 'I am bound to say that I see considerable force in Professor Wallace's criticisms of *Gaymark*. I also see considerable force in the reasoning of the Australian courts in *Turner* and in *Peninsula* and in the reasoning of the Inner House in *City Inn*. Whatever may be the law of the Northern Territory of Australia, I have considerable doubt that *Gaymark* represents the law of England. Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity

42 *Multiplex*, note 10.

> to withdraw instructions when the financial consequences become apparent. If *Gaymark* is good law, then a contractor could disregard with impunity any provisions making proper notice a condition precedent. At his option the contractor could set time at large.'[43]

If His Honour was seeking to attribute a meaning to *Austotel*, *Peninsula Balmain* or *City Inn* to the effect that mere non-compliance with mandatory notice provisions breaks the causal *nexus* of the prevention principle (unless the contract expresses a clear contrary intention), for the reasons set out above, there is significant doubt about the correctness of this as a statement of existing Australian and Scottish authority.

Secondly, the criticism of *Gaymark* is focussed on narrow notice provision issues without a detailed analysis of the unique contractual provisions and risk allocation model in that case. His Honour stated that if *Gaymark* were good law, failure of mandatory conditions precedent would automatically render time at large. Whilst it has been suggested in this paper that there are doubts over *Gaymark*, as a matter of general principle, the automatic linkage of the two concepts of mandatory miscarriage and prevention does not necessarily follow. The reasoning in *Gaymark* was based upon an assumption as to the contractual allocation model which does not sit well with the express contract provisions in that case. If mandatory provisions miscarry, an analysis must always be undertaken about whether there are other contractual provisions which indicate that either:

(a) the parties intended that prevention could nevertheless still be overcome by other contractual means (namely discretionary EOTs); or

(b) whether other express contract provisions indicate that the intended risk allocation model was that failure of mandatory EOT provisions was intended to be at the contractor's risk.

Multiplex did not (and did not need to) undertake this detailed analysis. For these reasons, it is suggested that it ought to be of limited utility to the future development of the prevention principle.

Steria[44]

Steria shortly followed *Multiplex*. This case involved claims for additional payment by a subcontractor against a head contractor arising out of a contract for the provision of a computerised ambulance system. Part of the counterclaim against the subcontractor was for LDs for late completion.

The subcontract contained mandatory EOT provisions. The court held that:

- there were significant delays that were not the responsibility of the subcontractor;

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43 *Multiplex*, note 10, para [103].
44 *Steria*, note 11.

- the subcontractor had complied with the relevant mandatory notification provisions;
- the subcontractor was therefore entitled to have the date for completion extended;
- the head contractor retained a right in respect of LDs for only one week's worth of delay once the contract date was properly extended.

As a result of the findings of fact set out above, the prevention principle did not arise as an issue in this case either. Notwithstanding this, the court cited with approval the *obiter* comments in *Multiplex* (critiqued above) where it was stated that:

> 'I am extremely fortunate in that I have the benefit of the analysis of Jackson J in the *Multiplex* case of the conflicting Australian authorities (*Turner*, *Gaymark* and *Peninsula*), the decision of the Court of Session in *City Inn v Shepherd Construction* ... and the views expressed both by the editors of Keating on Building Contracts and by the late Professor Wallace QC ...
>
> ... [A]lthough on the facts of that case Jackson J did not, due to the particular wording of the extension of time and liquidated damages clauses employed, need to express a final decision on the point, nonetheless I gratefully adopt his analysis and agree with his preliminary conclusion. Generally, one can see the commercial absurdity of an argument which would result in the contractor being better off by deliberately failing to comply with the notice condition than by complying with it.'[45]

Multiplex was not a case which related to recovery of LDs: it was a case about a contractual indemnity. This is a significant distinguishing factor.

Secondly, there is significant doubt that the Australian authorities or the *City Inn* decisions are authority for the proposition that non compliance with mandatory EOT provisions alone negates the operation of the prevention principle. Whilst His Honour did not have the benefit of *City Inn No 2* at the time of the judgment in *Steria*, subsequent cases will need to give it due consideration.

Whilst there is little doubt that the outcome of both *Multiplex* and *Steria* are ultimately correct, the outcomes were not dependent upon the analysis of the prevention principle in each case. The cases were correctly decided on grounds other than the prevention principle. However any development of the prevention principle in the future based on the *obiter* comments in *Multiplex* (based as it is on assumptions about the effect of *Austotel*, *Peninsula*, and *City Inn* which are doubtful) and *Steria* (based on *Multiplex*), it is suggested would represent a new line of authority that is not consistent with the earlier cases in England, Australia or Scotland.

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45 *Steria*, note 11, para [94-95].

Conclusion

The current state of Anglo-Australian authorities has suffered from:

(a) a lack of a detailed consideration of the risk allocation models adopted by parties as reflected in express contract conditions; and

(b) a tendency towards extrapolation of principles of universal application from cases which often turn on their unique contract provisions and findings of fact.

Multiplex and *Steria* have indicated that English law may be willing to move towards a robust position, namely a general principle of universal application that mere non compliance with mandatory EOT clauses excludes the application of the prevention principle. Both cases suggest that this is simply an evolutionary step in judicial reasoning, by following Australian and Scottish authorities. One of the central themes of this paper is that it is doubtful that the Australian and Scottish authorities cited in support of this proposition have that effect.

It is suggested that if English law authoritatively and finally decides to adopt the position that mere non compliance with mandatory EOT clauses excludes the operation of the prevention principle:

(a) this would represent a new path, rather than a small evolutionary step based on existing authority; and

(b) whilst such a doctrine might in theory be perceived in some quarters to remedy the employer's residual risk of the extreme application of the prevention principle, practically this would entail the law imposing a default model of risk allocation for project delays that potentially involves a higher risk profile for contractors than is often the intended commercial bargain.

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