What is the state of play in the concurrent and dominant delay debate?

(1) Commencement

Definitions

1. What are we talking about? In the *Society of Construction Law Delay & Disruption Protocol, 2nd edn*, the following statements are made:

> '***Meaning of concurrent delay***
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> 10.3 True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. True concurrent delay will be a rare occurrence. A time when it can occur is at the commencement date (where for example, the Employer fails to give access to the site, but the Contractor has no resources mobilised to carry out any work), but it can arise at any time.
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> 10.4 In contrast, a more common usage of the term 'concurrent delay' concerns the situation where two or more delay events arise at different times, but the effects of them are felt at the same time.
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> 10.5 In both cases, concurrent delay does not become an issue unless each of an Employer Risk Event and a Contractor Risk Event lead or will lead to Delay to Completion. Hence, for concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event must be an effective cause of Delay to Completion (not merely incidental to the Delay to Completion).'

2. In ***Royal Brompton Hospital NHS Trust v. Hammond (No. 7)*** **(2001) 76 Con. L.R. 148**, it was said that as a matter of impression there are two conditions which need to be satisfied before an extension of time can be granted under a JCT form, namely:-

- that a Relevant Event has occurred; and
- that that Relevant Event is likely to cause the completion of the works as a whole to be delayed beyond the Completion Date then fixed under the contract, whether as a result of the original agreement between the contracting parties or as a result of the grant of a previous extension of time.

3. The Court said that it was necessary to be clear what was meant by events operating concurrently. It did not mean a situation in which, work already being delayed, let it be supposed, because the contractor has had difficulty in obtaining sufficient labour, an event occurred which was a Relevant Event and which, had the contractor

not been delayed, would have caused him to be delayed, but which in fact, by reason of the existing delay, made no difference. In such a situation although there is a Relevant Event, *"the completion of the Works is* [not] *likely to be delayed thereby beyond the Completion Date."*

4. It was said that the Relevant Event simply has no effect upon the completion date. This situation obviously needs to be distinguished from a situation in which, as it were, the works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a Relevant Event, while the other is not. In such circumstances there is a real concurrency of causes of the delay.

5. An analysis was made of what was meant by events operating concurrently, and it was suggested that there were two different situations, namely:

   - a situation in which, work already being delayed by matters which do not amount to Relevant Events, an event occurs which is a Relevant Event and which, had the contractor not been delayed, would have cause him to be delayed, but which, in fact, by reason of the existing delay, made no difference, and
   - a situation in which, the works are proceeding in a regular fashion and on programme, when two things happen, either of which, had it happened on its own, would have caused delay, and one is a Relevant Event, while the other is not.

6. It was held that in the first situation the completion of the works would not be delayed by the Relevant Event beyond the Completion Date and no extension should be granted because the Relevant Event would simply have no effect upon the Completion Date. In the second situation there was a real concurrence of causes of the delay and it was a question of fact whether the Relevant Event had caused or was likely to cause delay beyond the completion date.

7. Apart from the inconsistent use of the term 'concurrent delay', it is worth pointing out that there are a number of other expressions used by claims consultants and experts in this field. For example, a distinction has been drawn between primary, secondary and tertiary causation. This has been drawn from the ***Royal Brompton*** case referred to above. Basically, this is rather a grand way of saying that (1) a relevant event has occurred, (2) delay must have been caused by that event, which is (3) delay to completion after the completion date.

8. Then there is 'parallel delay' and 'parallelism', the latter being a term to describe the responsibility of only one party for more than one cause of the same delay. This is distinguishable from 'concurrent delay', which requires more than one cause, one (or some of which) is (or are) the responsibility of one party and one (or some of which) is (or are) the responsibility of the other party.

9. In addition, there are 'sequential delays', which operate sequentially causing the same amount of delay, two separate sequential delays with the same effect, or two separate sequential delays each of which contribute to a part of the total delay.

10. Finally, the American concept of 'pacing' is sometimes raised in relation to 'concurrency'. This is a defence relied on by a contractor in response to an allegation of concurrent delay by the employer, whereby the employer is saying that his failure in, say, supplying information has not delayed the contractor because the contractor was making such slow progress. The contractor replies that he has reduced his resources in response to the delay caused by the employer's failure, in other words, he has 'paced' his progress as a result of a delay for which the employer is responsible and there is not concurrency.

(2) Impact and duration

11. One of the most stimulating contributions to the debate concerning 'concurrent delay' is contained in ***Concurrent Delay Revisited***, a paper presented by Mr John Marrin QC to the Society of Construction Law. In it he refers to a definition of concurrent delay that he had previously proposed and which had since been approved[1] and adopted:[2]

> '... the expression "concurrent delay" is used to denote a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency.'[3]

12. As Mr Marrin says, it has been pointed out that true concurrency in this sense will only arise in exceptional factual situations.[4] He suggested in 2002:

> ' ... where there are two competing causes of delay, they often differ in terms of their causative potency. Even where both competing causes are effective causes of delay, in the sense that each taken on its own would be regarded as the cause of the whole delay, the two may be of unequal causative potency. It is a commonplace to find that during the course of the factual enquiry, it becomes obvious as a matter of common sense that the two supposed causes of delay are of markedly different causative potency. One is then regarded [by the tribunal] as the effective cause and the other as ineffective. In other words, the minor cause is treated as if it were not causative at all.'[5]

(3) Overlapping events - the Decision in *North Midland*

Introduction

1 *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm), [2011] BLR 384, 136 Con LR 190, [277] (Hamblen J).
2 Keating, note 3, para 8-025.
3 John Marrin QC, SCL paper, note 1, page 2.
4 Keating, note 3, para 8-025.
5 John Marrin QC, SCL paper, note 1, page 2.

13. In ***North Midland Building Ltd v Cyden Homes Ltd*** **[2017] EWHC 2414 (TCC)** the contract provided that in the giving of an extension of time:

> 'any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account'.

14. The Contractor contended that the effect of this was to make time at large where the claimant had a claim to an extension of time for a delay caused by a Relevant Event where that delay was concurrent with another delay for which the claimant was responsible; and in such circumstances, the claimant had to complete within a reasonable time and liquidated damages were void.

15. Reliance was placed by the Contractor upon the doctrine of prevention. Fraser J said that the wording was 'crystal clear'. The parties agreed that, if the Contractor were responsible for a delaying event which caused delay at the same time as, or during, that caused by a Relevant Event, then the delay caused by the Relevant Event should 'not be taken into account' when assessing the extension of time. He failed to see how that raised any issues of construction whatsoever.

16. Because Relevant Events included: 'any impediment, prevention or default, whether by act or omission' acts of prevention were, as Relevant Events, to be taken into account expressly in the way identified in the contract. The Court held that ***Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*** **(1970) 1 BLR 111**, was not authority for the proposition that an operable liquidated damages clause would or could, as a result of an extension of time having been agreed by the parties to be calculated in a particular way, not be operated. Fraser J also pointed out that in ***Adyard Abu Dhabi v SD Marine Services*** **[2011] EWHC 848 (Comm)** Hamblen J had said:

> 'The conduct therefore has to render it "impossible or impracticable for the other party to do the work within the stipulated time" The act relied on must *actually prevent* the contractor from carrying out the works within the contract period or, in other words, must cause some *actual delay.*'

17. The Court then relied on an interpretation of this passage by Coulson J in ***Jerram Falkus Construction Ltd v Fenice Investments In (No.4)*** **[2011] EWHC 1935 (TCC)** as follows:

> 'Hamblen J's analysis indicated that, if there were two concurrent causes of delay, one which was the contractor's responsibility, and one which was said to trigger the prevention principle, the principle would not in fact be triggered because the contractor could not show that the employer's conduct made it impossible for him to complete within the stipulated time. The existence of a delay for which the contractor is responsible, covering the same period of delay which was caused by an act of prevention, would mean that the employer had not prevented actual completion. Throughout his analysis, Hamblen J stressed the importance of the contractor proving delay to the actual progress of the work as a result of the alleged act of prevention.'

18. From this and other sources Coulson J had drawn the conclusion that for the prevention principle to apply, the contractor must be able to demonstrate that the employer's acts or omissions have prevented the contractor from achieving an earlier completion date and that, if that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the contractor's own default, the prevention principle will not apply.

19. Fraser J found it unnecessary to decide this point but commented:

> 'In so far as there may be other disputes where the parties find themselves at odds concerning the dicta in both ***Adyard*** and ***Jerram Falkus*** on the one hand, and other writing, commentary or articles which suggest such dicta are wrong on the other, cost-effective resolution of those other disputes is more likely if those parties proceed on the basis that the two authorities to which I have referred are correct. In my judgment, I agree with the analysis of each of them and would proceed on the basis that they both clearly are.'

20. The Contractor appealed, but in ***North Midland Building Ltd v Cyden Homes Ltd*** **[2018[EWCA Civ 1744** that appeal was dismissed, the Court of Appeal holding that clause 2.25.1.3(b) was unambiguous and plainly sought to allocate the risk of concurrent delay to the appellant. The only remaining issue was whether there was any reason in law why effect should not should be given to that clear provision. Coulson LJ, who gave the leading judgment said:

- The prevention principle was not an overriding rule of public or legal policy.
- "Any impediment, prevention or default, whether by act or omission, by the Employer" gave rise to a *prima facie* entitlement on the part of the appellant to an extension of time. Those could be acts or omissions which were permitted by the contract but still gave rise to an entitlement to an extension of time. In this way, time was not set at large because the contract provided for an extension of time on the occurrence of those events.
- The prevention principle had no obvious connection with the separate issues that may arise from concurrent delay. There was no mention of concurrent delay in any of the authorities on which the prevention principle was based.
- Clause 2.25.1.3(b) was designed to do no more than reverse the result in ***Henry Boot Construction (UK) Limited v Malmaison Hotel (Manchester) Limited*** **and** ***Walter Lilly*** for the purposes of this particular contract.
- Clause 2.25.1.3(b) was an agreed term. There was no suggestion in the authorities that the parties could not contract out of some or all of the effects of the prevention principle.
- There was not an implied term which would prevent the respondent from levying liquidated damages. In the absence of any suggestion of a penalty, the liquidated damages provision must be taken to be a valid and genuine pre-estimate of anticipated loss caused by the delay. That must remain the case whether the delay was the result of just one effective cause, or two causes of 'approximately equal causative potency'. So there remained a proper causal link between the delay and the liquidated damages.
- If there had been a right to an extension of time, the ability to levy liquidated damages would only have operated in respect of any delay after the extended date; if the right to an extension of time was expressly negated, there was

no reason why liquidated damages should not apply to the delay beyond the contractual completion date. In both situations, the express provisions which either confer or deny a right to an extension of time are linked directly to the preservation of the employer's right to liquidated damages.

- If clause 2.25.1.3(b) was a valid and effective clause, then it would expressly permit the employer to levy liquidated damages for periods of concurrent delay, because it would not grant the appellant relief against such liability by extending the completion date. In those circumstances, any implied term which sought to take away that entitlement would be contrary to the express terms of the contract.
- Any implied term would not go without saying (the 'officious bystander' test and would not be required to make the contract work.
- This result was not in any way uncommercial or unreal.

21. How should this result be viewed? Counsel for the Contractor had said that it would be bizarre if the Employer could recover liquidated damages for a period of delay for which it was responsible. He made plain that he was not arguing that, in consequence, the liquidated damages were a penalty. Instead he put the argument as a matter of causation: that in such circumstances, it could not be said that the liquidated damages flowed from a delay for which the claimant was responsible.

The Prevention Principle

22. This principle was summarised by Lord Denning MR in the Court of Appeal in ***Trollope & Colls v North West Metropolitan Regional Hospital Board*** as follows:

> '... It is well settled that in building contracts - and in other contracts too - when there is a stipulation for work to be done in a limited time, if one party by his conduct - it may be quite legitimate conduct, such as ordering extra work - renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for the non-completion in that time. '[6]

23. In *Multiplex v Honeywell* Jackson J said:

> 'The essence of the prevention principle is that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing. '[7]

He also said:

> 'From this review of authority I derive three propositions:

6 *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 607 (HL).
7 *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* [2007] EWHC 447 (TCC), [2007] BLR 195, [47].

(i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date.
(ii) Acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events.
(iii) Insofar as the extension of time clause is ambiguous, it should be construed in favour of the contractor.'[8]

24. In ***North Midland Building Ltd v Cyden Homes Ltd*** Coulson LJ said:

> 'In the absence of any argument based on implied terms, Mr Lofthouse QC's attack on clause 2.25.1.3(b) was based on the bold proposition that the prevention principle was a matter of legal policy which would operate to rescue the appellant from the clause to which it had freely agreed. I reject that submission for five reasons.
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> The first is that the prevention principle is not an overriding rule of public or legal policy. There is no authority for such a proposition: it is not expressed in those terms in ***Multiplex*** or any of the other authorities noted above. Contrary to Mr Lofthouse QC's submission, I do not consider that it is analogous to the rule which strikes down liquidated damages as a penalty, a rule which has an entirely different legal provenance.'

25. Now it might be worth looking at this aspect of the matter a little more closely. It is a maxim of law that no man shall take advantage of his own wrong,[9] acknowledged in Coke on Littleton[10] and the Code Napoleon.[11] As Lord Jauncey said in ***Alghussein Establishment v Eton College*** :

> '[I]t is well established by a long line of authority that a contracting party will not in normal circumstances be entitled to take advantage of his own breach as against the other party. In ***Rede v Farr*** **(1817) 6 M & S 121** at 124–125 Lord Ellenborough CJ said:
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> > 'In this case, as to this proviso, it would be contrary to an universal principle of law, that a party shall never take advantage of his own wrong, if we were to hold that a lease, which in terms is a lease for twelve years, should be a lease determinable at the will and pleasure of the lessee; and that a lessee by not paying his rent should be at liberty to say that the lease is void. On this principle, even if it were not borne out so strongly as it is by the current of authorities, it would be sufficient to hold that the lease was only void as against the lessee, not against the lessor.'
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> In ***Doe d Bryan v Bancks*** **(1821) 4 B & Ald 401** at 402 a lease of a coal mine contained the following proviso:

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8 *Multiplex*, [56].
9 Nullus commodum capere potest de injuria sua propria.
10 Co Litt 148 b.
11 Co Nap 727.

'Provided also, and it is mutually agreed between the parties hereto, that the aforesaid works should commence and begin within one year from the date thereof, and *if the same should stop or cease working at any time two years, this lease shall be* deemed void to all intents and purposes.' (My emphasis.)

Bayley J said (4 B & Ald 401 at 406–407):

'I am of opinion, that the true construction of the proviso in this lease, "that it shall be null and void to all intents and purposes upon a cesser of two years," is, that it shall be voidable only at the option of the lessor, and that it does not lie in the mouth of the lessee, who has been guilty of a wrongful act, in omitting to work in pursuance of his covenant, to avail himself of that wrongful act, and to insist, that thereby the lease has become void to all intents and purposes.'

Holroyd J concluded that the tenant could not insist that his own act amounted to a forfeiture and Best J said (4 B & Ald 401 at 409–410):

'Besides, I take it to be an universal principle of law and justice, that no man can take advantage of his own wrong. Now it would be most inconsistent with that principle, to permit the defendant to protect himself against the consequences of this action, by afterwards setting up his own wrongful act at a former period.'

In the Court of Appeal in the ***New Zealand Shipping*** **case [1917] 2 KB 717 at 723**–724 Viscount Reading CJ said:

'Unless the language of the contract constrains the Court to hold otherwise, the law of England never permits a party to take advantage of his own default or wrong. In ***Malins v Freeman*** **((1838) 4 Bing NC 395 at 399, 132 ER 839 at 841**) Coltman J. said: "It is so contrary to justice that a party should avoid his own contract by his own wrong, that unless constrained, we should not adopt a construction favourable to such a purpose." That appears to me to be the true underlying principle of the cases in which the word "void" has been construed as if it meant voidable. Unless there are clear words to the contrary, a clause making a contract void must be read subject to the condition that the party who is seeking to set up the invalidity is not himself in default.'

And Scrutton LJ said:

'… I think that clause 12 and all other clauses are to be read subject to an overriding condition or proviso that the party shall not take advantage of his own wrong, and therefore is estopped from alleging invalidity of which his own breach of contract is the cause.'

On appeal to this House, Lord Finlay LC said ([1919] AC 1 at 8):

'Questions of this sort have often arisen in case of provisions that a lease should be void on non-payment of rent or non-performance of covenants by the lessee. It has always been held that the lessee could not take advantage of his own act or default, to avoid the lease, and the expression generally employed has been that such proviso makes the lease voidable by the lessor, or void at the option of the lessor. The

> decisions on the point are uniform, and are really illustrations of the very old principle laid down by Lord Coke (Co. Litt. 206b) that a man shall not be allowed to take advantage of a condition which he himself brought about.'

The speech of Lord Atkinson contained the following passage ([1919] AC 1 at 9, [1918–19] All ER Rep 552 at 556):

> 'It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard … But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract. The application to contracts such as these of the principle that a man shall not be permitted to take advantage of his own wrong thus necessarily leaves to the blameless party an option whether he will or will not insist on the stipulation that the contract shall be void on the happening of the named event. To deprive him of that option would be but to effectuate the purpose of the blameable party. When this option is left to the blameless party, it is said that the contract is avoidable, but that is only another way of saying that the blameable party cannot himself have the contract made void, cannot force the other party to do so, and cannot deprive the latter of his right to do so. Of course, the parties may expressly or impliedly stipulate that the contract shall be voidable at the option of either party to it. I am not dealing with such a case as that.'

In the Privy Council case of ***Quesnel Forks Gold Mining Co Ltd v Ward*** **[1920] AC 222** the Board had to consider a provision in a mining lease for forfeiture in the event of the lessee ceasing for two years to carry on mining operations. In giving the advice of the Board Lord Buckmaster said (at 227):

> 'If the covenant does not effect this, then, although the word used is "void," the meaning is "void at the option of the lessor," or in other words "voidable." Their Lordships have no hesitation in saying that that is the true meaning of the covenant. Substantial obligations are imposed upon the lessee under the terms of the lease; and it would not be consistent with the ordinary rules of construction applicable to such a document to hold that these obligations could be completely avoided by the lessee omitting to perform any work. It is of course possible so to frame a lease that this must be the effect, and it would result that the term was then a term which ended on the happening of a condition solely in the power of a lessee. This, however, is not the language used in the lease.'

He later referred to the ***New Zealand Shipping*** **case [1919] AC 1**, as authority for well-known rules of construction.

Finally, in ***Cheall v Association of Professional Executive Clerical and Computer Staff*** **[1983] 2 AC 180 at 188–189**, Lord Diplock, referring to the ***New Zealand Shipping*** case, said:

> 'In the course of the speeches, which are not entirely consistent with one another, reference was made by all their Lordships to the well-known rule of construction that, except in the unlikely case that the contract contains clear express provisions to the contrary, it is to be presumed that it was not the intention of the parties that either party should be entitled to rely on his own breaches of his primary obligations as bringing the contract to an end, ie as terminating any further primary obligations on his part then remaining unperformed. This rule of construction, which is paralleled by the rule of law that a contracting party cannot rely on an event brought about by his own breach of contract as having terminated a contract by frustration, is often expressed in broad language as "A man cannot be permitted to take advantage of his own wrong".'

26. It should be reasonably clear from this survey by Lord Jauncey that the prevention principle is one expression of a rule that has been described as 'based on elementary principles', 'fully recognised in Courts of law and equity' and 'admits of illustration from every branch of legal procedure'.[12] That it is directly referable to a general principle is confirmed by ***Dodd v Churton*** **[1897] 1 QB 562, 566** where Lord Esher MR said:

> "The principle is laid down in Comyns' Digest, Condition L (6), that, where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default; and, accordingly, a well recognised rule has been established in cases of this kind, beginning with *Holme v Guppy* to the effect that, if a building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is therefore disentitled to claim the penalties for non-completion provided for by the contract. The reason for that rule is that otherwise a most unreasonable burden would be imposed on the contractor.

Chitty LJ said at 568:

> 'The case of ***Holme v Guppy*** and the subsequent cases in which that decision has been followed are merely examples of the well-known principle stated in Comyns' Digest, Condition L (6.), that, where performance of a condition has been rendered impossible by the act of the grantee himself, the grantor is exonerated from performance of it.'

27. Further light is shed on the prevention principle and its relationship with the general rule in ***Roberts v Bury Improvements Commissioners*** **(1869-70) LR 5 CP 310, 326**, where Kelly CB said in relation to breach of an implied term that the employers would 'do their part within a reasonable time':

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[12] *Broom's Legal Maxims*, 10th ed, 1939, 191.

'..if they broke that implied contract, the contractor would have a cause of action against them for any damages he might sustain and the commissioners would be precluded from taking advantage of any delay occasioned by their own breach: for it is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself; see Com. Dig. Condition (L); and also that he cannot sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract. These principles have been applied to contracts very analogous to the *present, in the cases of* ***Holme v Guppy, Russell v Da Bandeira and Westwood v Secretary of State for India***'.

28. It is clear from these decisions that the prevention principle was considered to be an application of a general rule of law, namely that a party cannot bring a claim arising from his own wrong. The passage directly above from *Roberts* confirms that the prohibition does not arise directly from an implied term not to prevent completion but by application of the general rule of law to breach of a term to cooperate.

29. This analysis, if it is correct, does does not sit well with the approach adopted in ***North Midland***. There, Coulson LJ said at [28]:

'However, the fact that the mechanism of implied terms does not help the appellant on the particular facts of this case does not mean that such terms are not the right vehicle by which, in a conventional case, the prevention principle is given contractual force. In one sense, that is what ***Merton v Leach*** was doing: making acts of hindrance and prevention breaches of implied terms of the contract, thereby setting time at large. Moreover, when time is set at large, the obligation to complete by a fixed date is replaced with an implied obligation to complete within a reasonable time (see paragraph 48 of ***Multiplex***). In my view, therefore, the prevention principle can only sensibly operate by way of implied terms. I note that, in ***The Interpretation of Contracts***, 6th edition, at paragraph 6.14, Sir Kim Lewison deals with the prevention principle in the chapter concerned with implied terms.'

30. The mechanism whereby the principle is operated in the older authorities is not explained in terms of implied terms, however. The basis is that the employer is not entitled to liquidated damages for delay because of the application of a rule of law:

- 'if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default (1 Roll. Abr. 543; Com. Dig. Condition, L.(6)). It is clear, therefore, that the plaintiffs were excused from performing the agreement contained in the original contract; and there is nothing to shew that they entered into a new contract by which to perform the work in four months and a half, ending at a later period. The plaintiffs were therefore left at large; and consequently they are not to forfeit anything for the delay': ***Holme v Guppy*** **(1838) 150 E.R. 1195**, Parke B at 1196;
- 'when by agreement of the parties a portion of the work is not to be done within the stipulated time, the right to claim compensation is waived. It

appears to me that that is substantially what was decided in ***Holme v Guppy*****': *Thornhill v Neats* (1860) 141 E.R. 1392** Willes J at 1398;

- '***Holme v. Guppy*****, 3 M & W 387**, decides that, where a contractor undertakes, under pain of a certain penalty or forfeiture, to perform a work within a given time, and the performance within the time is prevented by the act of the party with whom he contracts, the contractor is exonerated from the penalties': ***Russell v Viscount Sa Da Bandeira* (1862) 143 E.R. 59** Erle CJ at 82**;**
- '***Holme v. Guppy*****, 3 M. & W. 387**, is substantially in point.... It is founded upon an old and well-understood rule of law. The authorities will be found collected in Comyns's Digest, Condition (L. 6). Where the condition has become impossible of performance by the act of the grantee himself, the grantor is excused': ***Russell v Viscount Sa Da Bandeira* (1862) 143 E.R. 59** Byles J at 83**;**
- 'he cannot sue for a breach of contract occasioned by his own breach of contract, so that any damages he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract': ***Roberts***; and
- 'he is therefore disentitled to claim the penalties for non-completion provided for by the contract. The reason for that rule is that otherwise a most unreasonable burden would be imposed on the contractor': ***Dodd***.

31. Salmon LJ addressed the question of dual causation in ***Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111** as follows:

> 'The liquidated damages clause contemplates a failure to complete on time due to the fault of the contractor. It is inserted by the employer for his own protection; for it enables him to recover a fixed sum as compensation for delay instead of facing the difficulty and expense of proving the actual damage which the delay may have caused him. If the failure to complete on time is due to the fault of both the employer and the contractor, in my view, the clause does not bite. I cannot see how, in the ordinary course, the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled: ***Wells v Army & Navy Co-operative Society Limited; Amalgamated Building Contractors v Waltham Urban District Council*****; and *Holme v Guppy***. I consider that unless the contract expresses a contrary intention, the employer, in the circumstances postulated, is left to his ordinary remedy; that is to say, to recover such damages as he can prove flow from the contractor's breach. No doubt if the extension of time clause provided for a postponement of the completion date on account of delay caused by some breach or fault on the part of the employer, the position would be different. This would mean that the parties had intended that the employer could recover liquidated damages notwithstanding that he was partly to blame for the failure to achieve the completion date. In such a case the architect would extend the date for completion, and the contractor would then be liable to pay liquidated damages for delay as from the extended completion date.
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> The liquidated damages and extension of time clauses in printed forms of contract must be construed strictly *contra proferentem*. 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 fault or breach on the part of the employer.'

32. It is noticeable that Salmon LJ referred to: delay that was '***partly*** [the employer's] own fault'; the position where '[the employer] was ***partly*** to blame for the failure to achieve the completion date; and 'the fact that ***some*** of the delay is due to the employer's own fault' (emphasis added). He was obviously not referring to the position where the delay is *wholly* caused by the employer and he did not address the position where the employer would have caused all of the delay in the absence of the contractor's delay.

33. One of the older authorities that directly addresses this point is ***Wells v Army & Navy Co-operative Society Ltd*** **(1903) Hudson's Building, Engineering & Ship Building Contracts, 4th ed, Vol 2, 346, 355**, where Vaughan Williams LJ said:

> '[Counsel for the building owners] having admitted really that, if you take the findings in fact of the learned judge, the building owners had so delayed the works as to prevent their execution within the time limited, and to deprive the builder of the benefit of that time, meets the case by saying "Oh, yes, that might be so, but the builder did not get on as fast as he might have got on, and I say, therefore, on behalf of the building owners, that you cannot say that the conduct of the building owners and the delay caused by them prevented the execution of this work within the time, because another contributory cause was the fact the builder did not get on as fast as he might have done." It seems to me that there are one or two answers to that – one an answer in fact, and the other an answer in law. The answer in fact is, that although there might have been some delay on the part of builder, … even assuming that it was not in fact the delay of the builder or any delay by those for whom he was responsible which prevented the execution of this work within the contract time, in my judgment, whatever the builder might have done, the delay of the building owners and their architect was such as to render the performance of work within the contract period impossible. In law, I wholly deny the proposition Mr Bray put forward, which was really in effect: "Never mind how much delay there may be caused by the conduct of the building owner, the builder will not be relieved from penalties if he too has been guilty of delay in the execution of the works." I do not accept that proposition in law.'

34. All of this may be irrelevant, however, if, dual causation can be accommodated by a suitably worded extension of time clause. None of the cases other than ***North Midland*** seem to address this point, no doubt because the introduction of such provisions had been a comparatively recent development. ***North Midland*** decides that it is possible to accommodate dual causation, but on the basis that the prevention principle arises from implied terms and not a general principle of law. This seems inconsistent with the approach in the older authorities, particularly ***Roberts v Bury Improvements Commissioners***, where the general principle pf law was applied to breach of an implied term of cooperation by the employer.

A Penalty?

35. The point was not taken in ***North Midland*** that the liquidated damages provision might give rise to a penalty where the employer has caused the delay as much as the contractor. The law relating to penalties has, of course, been reviewed by the Supreme Court in ***Cavendish Square Holding BV v Talal El Makdessi*** **[2015] UKSC 67, [2016] AC 1172**, where it was held that the real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a pre-estimate of loss, The question whether it is enforceable should depend on whether the means by which the contracting party's conduct is to be influenced are 'unconscionable' or (which will usually amount to the same thing) 'extravagant' by reference to some norm. The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. This is as opposed to the conventional approach of deciding whether the provision is a genuine pre-estimate of loss.

36. Does the application of the revised test to a provision that compels the contractor to pay the employer a sum where the latter has himself caused the delay and has suffered no damage as a result of the contractor having also caused the same delay result in the conclusion that it is a penalty? Some would say that there is a strong argument that it could do.

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