

**PEAK CONSTRUCTION (LIVERPOOL) LTD v MCKINNEY FOUNDATION LTD
(1970) 1 BLR 111**

FACTS

Peak Construction (Liverpool) Ltd ('Peak'), the head contractor, contracted with the employer, Liverpool Corporation ('the corporation') for the erection by Peak of certain high rise buildings. McKinney Foundation Ltd ('McKinney') was the nominated subcontractor for the foundations. Relevantly, clause 22 of the head contract provided that time was to be considered of the essence on the part of Peak. By clause 23 of the head contract, the architect was entitled to extend time "as to him may seem reasonable" by reason (inter alia) of any variations to the works or other "unavoidable circumstances".

By chance, in early October 1964 it was discovered that a grave fault existed in one of the building's perimeter piles. Delays, mostly on the part of the corporation meant that an expert was not engaged until February of the following year. He reported to the parties in late May 1965. The following day Peak wrote to the corporation asking for an instruction to carry out the work recommended by the expert. Peak heard nothing and so wrote to the corporation in late June. It was not until 30 July 1965 that the expert's recommendations were approved by the corporation. The remedial work was commenced by Peak on 12 August 1965 and completed in early November 1965 – some 58 weeks after the works had been suspended. As a result of the delay, the corporation sought Liquidated Damages from Peak. Peak, in turn, sought Liquidated Damages for that entire period from McKinney.

ISSUE

Whether Peak was entitled to Liquidated Damages.

FINDING

The Court of Appeal held that Peak was not entitled to recover Liquidated Damages from McKinney as the corporation was not entitled to recover those Liquidated Damages from Peak. The Court of Appeal found that at least part of the 58-week delay had been caused by the corporation itself, and the extension of time clause in the head contract did not enable the corporation to extend time for its own delays. Further, no attempt had been made by the corporation to extend time. Accordingly, there was no date from which Liquidated Damages under the head contract could commence.

QUOTE

Lord Salmon LJ held at page 121: "A clause giving the employer liquidated damages as so much a week or month which elapses between the date fixed for completion and the actual date of completion is usually coupled, as in the present case, with an extension of time clause ... 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."

Further, at page 121: "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."

His Honour also commented: "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."

Similarly, Edmund Davies LJ at page 126 said that: "The stipulated time for completion having ceased to be applicable by reason of the employer's own default and the extension clause having no application to that, it seems to follow that there is in such a case no date from which liquidated damages could run and the right to recover them has gone."

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Phillimore LJ at page 127 also considered that: “If there is a clause which provides for extension of the contractor’s time in the circumstances which happen, and if the appropriate extension is certified by the architect, then the delay due to the fault of the contractor is disentangled from that due to the fault of the employer and a date is fixed from which the liquidated damages is calculated.

IMPACT

This case stands for the proposition that a principal may lose the right to claim liquidated damages if some delay is due to the principal’s defaults or the defaults of its employees or agents and the contract does not provide for an extension of time in that event.

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