

**TURNER CORPORATION PTY LTD v AUSTOTEL PTY LTD
(1994) 13 BCL 378**

FACTS

Turner Corporation Pty Ltd ('Turner'), as Builder, entered into a "Building Works Contract – JCCA 1985 with Quantities" with Austotel Pty Ltd ('Austotel'), the Proprietor. The Architect certified an entitlement to Austotel to liquidated damages and ascertained damages in the sum of \$2,250,000 calculated at the rate of \$75,000 per week from the period 3 October 1991, being the Date for Practical Completion certified by the Architect, to 1 May 1992, being the Date of Practical Completion certified by the Architect. During the course of the project Turner requested an instruction from the Architect regarding the provision of a gas leak detector. The Architect provided an instruction five months later which was after the Date for Practical Completion. Turner claimed an extension of time of seven days to the critical path as a result of the late provision of instructions, which was granted. In addition, Turner was awarded \$13,500 per day, namely, \$94,500 being delay costs for that seven days.

Further, Turner asserted it was not only entitled to an extension of time to the Date for Practical Completion arising from the delay in provision of instructions, thus minimizing the time for which it might be liable for liquidated damages for failure to achieve practical completion by the Date for Practical Completion, but 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.

ISSUE

Whether prevention principle applies in relation to failure to perform contractual obligation to bring works to practical completion by agreed date as a result of asserted preventing act for which proprietor is responsible.

FINDING

The Court found that the prevention principle had no application due to the existence of the clause entitling the contractor to an extension of time in respect of preventative acts by Austotel. Further, the prevention principle did not apply to JCCA form of contract.

QUOTE

Cole J reasoned as follows: "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."

Further: "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 party where it failed to exercise a contractual right which would have negated the effect of the preventing conduct. ... the act of the proprietor does not prevent performance of the contractual obligations within time: it entitles the Builder to apply for a contractual variation extending time for performance. Here the Builder claimed an extension of seven days arising from the alleged act of prevention. It was granted the time it claimed. Thereafter, so it seems to me, it cannot assert that it was prevented from completing on time ... in consequence of the alleged prevailing act. ... The act of the Proprietor does not prevent performance of the contractual obligations within time: it entitles the Builder to apply for a contractual variation extending time for performance."

IMPACT

The prevention principle has no application to the JCCA form of contract due to the existence of an extension of time clause entitling the Builder to an extension of time in respect of the preventative acts by the Proprietor. Further, Builders who fail to comply with the notice requirements for extensions of time may remain liable for liquidated damages while losing their right to extension of time for the acts in question.

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NSW

Jim Doyle
P: 02 9283 5388

E: jdoyle@doylesconstructionlawyers.com

QLD

Frank Nardone
P: 07 3221 2970

E: fnardone@doylesconstructionlawyers.com

VIC

Vinodhini Krisnan
P: 03 9620 0322

E: vkrisnan@doylesconstructionlawyers.com