

**TURNER CORPORATION LTD v CO-ORDINATED INDUSTRIES PTY LTD & ORS
(1995) 11 BCL 202****FACTS**

Turner Corporation Ltd ('Turner'), the Contractor, entered into a standard form contract, NPWC Edition 3 (1981) with Co-ordinated Industries Pty Ltd ('Co-ordinated'), as Principal, for the erection and completion of a hotel development at Church Street, Parramatta.

The development was delayed and Co-ordinated sought to apply liquidated damages. Turner submitted that Co-ordinated delayed the works and that the prevention principle should apply to invalidate the liquidated damages, even though at the time of the Co-ordinated acts complained of Turner had been disabled by his own fault from completing to time, and that potential or notional delay of this kind rather than actual delay was sufficient to activate the prevention principle.

Clause 35.4 of the contract enabled the contract administrator to grant extensions to the date fixed for practical completion where (inter alia) the employer was the cause of the delay. This power was available where the contractor notified the contractor administrator of his claim for extension within 28 days after the cause of the delay arising.

ISSUE

Whether the prevention principle applied.

FINDING

The Court held that the prevention principle could not be activated under the NPWC 3 standard form contract as clause 35.4, the extension of time clause governed the act of prevention.

QUOTE

Rolfe J described the "prevention principle" at page 212 as: "Essentially it is that a party to the contract has been prevented from fulfilling its contractual obligations by virtue of conduct of the other party. The consequence is said to be that the 'preventing party' cannot rely upon the failure by the other party to comply with its contractual obligations, even if the other party is otherwise in breach so that it could not have complied with its contractual obligations in any event. It is said that this flows from a generally stated principle that a party cannot benefit from its own wrong. Whilst the so-called principle may be stated it seems to me it can only have that application, usually in circumstances where the contract does not provide for the effect of breach causing prevention."

Rolfe J said at page 217: "there can be no doubt that clause 35.4 [the extension of time clause] contemplates fault on the part of the Principal and says so in the clearest terms. Accordingly the contractual right of the Contractor was to seek extensions of time, the mechanism for determining which was established by the contract. The ultimate remedy, in the event of the Contractors not being satisfied with the determination of the Superintendent and the Principal, is reference to arbitration."

Further, his Honour considered that: "It is necessary to determine what delay was caused and whether that delay, in truth, delayed the contractor ... [I]t would be almost ludicrous, in the event of a contractor having delayed by say six months and thereafter some requirement of the principal causing a further delay of say two weeks, if the principal could not recover liquidated damages for six months less two weeks. I am assuming that the first delay was without the principal's fault and the second delay was without the contractor's fault. In those circumstances it cannot be, in my opinion, that the contractor can escape the consequences of delay for the period of months, although he is able to for the period of weeks."

IMPACT

This case confirms that for a building contract which contains a clause in the terms of clause 35.4, there is no room for the prevention principle to operate because it is, in effect, excluded by the express contractual provision.

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