THE PREVENTION PRINCIPLE AND THE EXTENSION OF TIME CLAUSES IN ENGLISH LAW SHIPBUILDING CONTRACTS

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This paper deals with a well-established English law principle known as the "prevention principle" in the context of shipbuilding contracts. Under the principle, no party to a contract should benefit from its own failure to perform. In the context of shipbuilding contracts, this principle should give protection to a shipyard in the event of delays in delivery of the vessel that are caused by the buyer, and no liquidated damages should be payable by the shipyard, and the contractual delivery date should be replaced by a time reasonably required to complete the vessel. In other words, where the buyer's default (such as delay in the buyer's supplies, interfering with agreed modifications, failure to promptly provide and approve the vessel's design and drawings, late payments of the contract price, etc.) affect the build schedule which results in a delay in construction and in the delivery of the vessel. Such actions by the buyer might represent an act of prevention. In consequence, the delivery date set out in the shipbuilding contract should not be further binding on the builder and the contractual time for delivery of the vessel should become time at large.

On the other hand, it is equally common that most shipbuilding contracts contain extension of time clauses granting shipyards an extension of the delivery period in certain events. However, pursuant to a number of English court cases, the prevention principle does not apply where the shipbuilding contract contains extension of time clauses governing permissible delays, and the liquidated damages shall still be payable, subject to extension of time clauses.

This paper deals with a difficult question: if the shipyard fails (or is time barred) to claim the application of the extension of time clauses for delays caused by the buyer's default(s), does the prevention principle still apply?

***Keywords**: shipbuilding contract; prevention principle; delivery of vessel; time at large; concurrent delays; extension of time; notice of delay; liquidated damages; court cases.*

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1. INTRODUCTION

The most common cause of disputes in the shipbuilding industry worldwide is the shipyard's failure, or alleged failure, to deliver the vessel on the delivery date set out in the shipbuilding contract.

Since English law governs a large number of shipbuilding contracts worldwide,[1] this paper deals with the prevention principle and extension of time clauses in shipbuilding contracts under English law.

A vessel under construction under English law is a future good for sale by description.[2] Since during construction there is no vessel, under English law the buyer shall acquire the title over the vessel only upon her delivery or in stages following the phases of the vessel's construction.[3]

In the case of *Stocznia Gdanska S.A. v Latvian Shipping Co. and Others* (1998), the House of Lords described the nature of an English law shipbuilding contract. It portrayed it as a complex sale agreement with elements of a building contract where the consideration for the contract price is not only the sale of a vessel and the transfer of title over the vessel but also the performance of certain phases in the construction of the vessel.[4]

If the shipyard does not deliver the vessel on the contractual delivery date, the buyer would normally argue that either the shipyard has breached the contract by failing to deliver the vessel within the contractual delivery period, or by failing to deliver it in a condition that complies with the contract and technical specification. It is common that in such an event the shipbuilding contract provides for liquidated damages payable by the shipyard to the buyer, in the agreed daily amounts, as compensation for the buyer's estimated loss. Alternatively, if the vessel on delivery fails to meet her description set out in the shipbuilding contract, the buyer might be entitled to reject the vessel, terminate the contract and claim a refund of the instalments of the contract price already paid to the shipyard with interest and/or damages.[5]

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1 "Despite this shift to the East, English law and London arbitration are still crucially important for shipbuilding". *The Shipping Law Review - Edition 6 Shipbuilding*, thelawreviews.co.uk/edition/ the-shipping-law-review-edition-6/1198-shipbuilding, July 2019.

2 Curtis, Simon, *The Law of Shipbuilding Contracts*, Third Edition, LLP, London, Hong Kong, 2002, p. 4.

3 Ibid, p. 125. It is probably unheard of that the shipbuilding contract makes no express provision as to the transfer of title.

4 *Stocznia Gdanska S.A. v. Latvian Shipping Co. and Others*, 1998; www.publications.parliament/uk, visited on 23 January 2020.

5 On damages in the case of the shipyard's repudiation of contract, see Tasić, Zoran, Legal Aspects of Construction and Delivery of a Vessel in *INT-NAM 2018 3rd International*

On the other hand, it is equally common that in such a situation the shipyard argues that the buyer either acted contrary to the terms of the contract or omitted to act in accordance with the contract, actually preventing the shipyard from performing the contract. By doing so, the buyer is in breach of the prevention principle under English law.

2. THE PREVENTION PRINCIPLE

The prevention principle is a well-established principle of English law, probably created in the early 19th century as a "universal principle of law that a party shall never take advantage of his own wrong".[6]

The prevention principle has developed since then, and a number of English court cases where performance of a contract by one party was dependent on the performance by the other refer to the principle. It has become highly relevant in the shipbuilding industry where English law governs shipbuilding contracts.

The case of *Multiplex v Honeywell*, heard before the High Court of Justice, Queen's Bench Division, Commercial, Technology & Construction Court,[7] has become one of the most relevant prevention principle cases and is frequently referred to in shipbuilding disputes where the late delivery of a vessel has been an issue. In that case, Judge Jackson made it clear that if an employer interferes with work so as to delay its completion, this is an act of prevention and the contractor is no longer bound by the strict requirements of the contract as to time; the instruction of variations to the work can amount to an act of prevention.

The High Court of Justice Commercial Court followed Judge Jackson's views in a shipbuilding dispute before it between Adyard shipyard and SD Marine Services.[8] The dispute in this case was about responsibility for the design de-

Naval Architecture and Maritime Symposium, V. 3, Yildiz Technical University, Istanbul Turkey, p. 929-941.

[6] Many authors and English court decisions refer to the case of *Rede v Farr* (Lord Ellenborough CJ (1817) 6 M & S 121, 105 ER 1188), including Joanne Wicks QC, Contractual terms relating to performance and breach: Implication, presumption or rule of law?, *Wilberforce Chambers* 10. 10. 2019; https://www.wilberforce.co.uk/contractual-terms-relating-to-performance-and-breach-implication-presumption-or-rule-of-law /, visited on 24 January 2020.

[7] Judge Jackson has further expressed his views that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing; *Multiplex v Honeywell*; http://www.bailii.org/ew/cases/EWHC/TCC/2007/447.html, visited on 24 January 2020.

[8] *Adyard Abu Dhabi LLC v SD Marine Services*, [2011] EWHC 848 (Comm); https://www.incegd.com/en/knowledge-bank/prevention-not-cure-for-delayed-shipbuilding-contract, visited on 24 January 2020.

velopments that were not the responsibility of the shipyard but rather resulted from variations of the design requested by the buyer in consequence of a change in classification or other regulatory requirements. The shipyard argued that through its own wrongdoing (omitting to act in accordance with the shipbuilding contract) the buyer prevented the shipyard from tendering the vessel for delivery on the contractual delivery date. Therefore, the buyer should not be entitled to claim liquidated damages or to cancel the shipbuilding contract and to claim a refund, interest and damages. This is because in such a case the contractual date of delivery becomes time at large.[9]

However, following the *Multiplex v Honeywell* case, the Court decision in the *Adyard* case confirmed that:

(i) in a basic shipbuilding contract which provides for a builder to complete the construction of a vessel or achieve certain milestones within a specific period of time, the builder is entitled to the whole of that period of time to complete the work;

(ii) if the buyer interferes with the work so as to delay its completion, this is an act of prevention and the builder is no longer bound by the strict requirements of the contract as to time;

(iii) the instruction of variations to the work can amount to an act of prevention; but

(iv) the prevention principle does not apply if the contract provides for an extension of time in respect of the relevant events.

It is a question of fact whether a relevant event has caused or is likely to cause delay to the works beyond the completion date. In other words, the act relied upon must actually, not theoretically, prevent the contractor from carrying out the works within the contract period, that is, it must cause some *actual* delay to the progress of the works.

Time at large, referred to above, is, subject to contract, a matter of law that replaces the contractual delivery date by an implied obligation of the shipyard to deliver the vessel within a reasonable period of time in the light of all relevant circumstances. This was confirmed in 2005 by the Supreme Court of Judicature, Court of Appeal (Civil Division), in the case of *Shawton Engineering v DGP International*, 2005.[10]

[9] Meaning that the contractual date of delivery is no longer binding.

[10] *Shawton Engineering v DGP International*, 2005; http://www.bailii.org/ew/cases/EWCA/Civ/2005/1359.html, visited on 23 January 2020.

3. EXTENSION OF TIME CLAUSES

The application of the prevention principle is excluded by the inclusion of extension of time provisions in the shipbuilding contract either in the form of permissible delays allowing the shipyard to extend the delivery date or in the form of provisions adjusting the date of completion in the event of modifications to the technical specification.

This was confirmed in the above-mentioned case of *Multiplex v Honeywell*.[11]

There is no need for the application of the prevention principle if the contract already protects the shipyard.

4. EXTENSION OF TIME CLAUSES: EXAMPLES IN A SHIPBUILDING CONTRACT

The most common provisions in a shipbuilding contract governing extension of time relate to (without limitation to) late payment of the contract price, modifications of the technical specification, delays in the buyer's supplies and force majeure events, such as:

- The buyer's late payment of the contract price is usually stipulated in a way that the builder has the right to extend the delivery date of the vessel for the same number of days equal to the delay in the payment of any instalment, or a part thereof.
- The buyer's modifications are usually subject to an agreement in writing between the builder and the buyer in respect of the costs of such modifications and the effect of such modifications on the vessel's delivery date. In addition, any time lost in achieving an agreement regarding any modifications, interpretations, modifications, deletions or additions (including the consequences of the same) (…) shall be deemed a permissible delay under the contract.
- Should the buyer fail to deliver any of its supplies within the time designated in the contract, the delivery date shall be automatically extended for the period of such delay in delivery.

[11] See *Supra*, footnote 7, para 56. The prevention principle does not apply if the contract provides for an extension of time in respect of the relevant events. Acts of prevention by an employer do not set time at large if the contract provides for an extension of time in respect of those events.

- Time lost in waiting for the expert's determination and time lost in waiting for the buyer's decision on execution of the modifications is usually deemed in the contract as permissible delay of the vessel's delivery.
- Any delay of speed trials caused by unfavourable weather condition commonly operates to postpone the delivery of the vessel.
- The events of delays due to causes, which under the contract terms permit extension of the time of delivery, give the builder the right to extend the delivery date accordingly.
- The contract usually provides that any delay or default or failure of the buyer to perform any of his obligations shall entitle the builder to extend the vessel's delivery date.

5. CONDITIONS FOR EXTENSION

5.1. Causation

Not all extensions of time take place automatically. It is always a question of fact whether a relevant event has caused or is likely to cause delay to the works beyond the completion date.

The shipyard may be entitled to rely on the above contractual provisions when it can prove that the project was not already in critical delay before the buyer's delaying conduct. It should be able to prove that, without prevention by the buyer, it would have still been possible to complete the vessel by the agreed date in spite of the shipyard's own delays.

In the case of *Jerram Halkus Construction Ltd v Fenice Investments Inc*,[12] Judge Coulson expressed his views as follows:

"[…] 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."

Even if the buyer's acts of prevention were concurrent with the delays caused by the shipyard's own default, the prevention principle will not apply.

[12] *Jerram Halkus Construction Ltd v Fenice Investments Inc*, (No. 4) [2011] EWHC 1935 (TCC), para. 52; http://www.adjudication.co.uk/archive/view/case/1322/jerram_falkus_v_fenice_investments_inc_[2011]_ewhc_1935_(tcc)/, visited on 20 January 2020.

In the case of *North Midland Building Limited v Cyden Homes Limited*,[13] the Court of Appeal referred to a contractual provision pursuant to which any delay caused by any event which is stated to be a cause of delay and which is concurrent[14] with another delay for which the builder is responsible shall not be taken into account. Obviously, such a provision was not helpful to the builder.

Although the contractual provision on concurrent delay was clear and although the builder had partly caused the delay, it still argued that the prevention principle was a matter of legal policy that should operate to the benefit of the builder and set aside the clause to which it had agreed in the contract. The Court of Appeal rejected that argument because (*inter alia*) "the prevention principle is not an overriding rule of public or legal policy" and the contract contained a clear provision as to what happens in the case of concurrent delay.

The issue of concurrent delays in the context of the prevention principle resolved in the above-mentioned *Adyard* case was dealt with in a similar manner in the recent case (2016) of *Saga Cruises BDF Limited & Others v Fincantieri SpA*.[15]

In that case, the High Court of Justice Commercial Court established (*inter alia*) that although the shipyard caused the delay in delivery of the vessel, there were also alleged delaying events caused by the owner that created concurrency. In consequence, the shipyard claimed that it had the right to rely on extension of time clauses in the contract for the concurrent period of the delay and that it was not liable to pay liquidated damages.

However, the Court held that "the Yard was responsible for a number of delays beyond the Scheduled Completion Date (SCD) extending to the date of redelivery under the Protocol of Delivery and was not entitled to rely on delays for which the Owners were responsible during this period, as stopping time running under the liquidated damages clause".[16] This judgment limited the application of the prevention principle to strict interpretation of the concurrency, i.e. "There is only concurrency if both events in fact cause delay to the progress of the works and the delaying effect of the two events is felt at the same time".[17]

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13 *North Midland Building Limited v Cyden Homes Limited*, [2018] EWCA Civ 1744; https://www.bailii.org/ew/cases/EWCA/Civ/2018/1744.html, visited on 24 January 2020.

14 Concurrent delay is "a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency". See Marrin, John QC, Concurrent Delay Revisited, p. 2, 2013; https://tecbar.org/wp-content/uploads/2016/05/2014-Concurrent-Delay-Revisited-John-Marrin-QC.pdf, visited on 24 January 2020.

15 *Saga Cruises BDF Limited & Others v Fincantieri SpA*, [2016] EWHC 1875 (Comm); https://www.bailii.org/ew/cases/EWHC/Comm/2016/1875.html, visited on 24 January 2020.

16 Ibid, para 326 (iv).

17 See *Supra*, footnote 8, para 279.

5.2. Notice of delay

The application of extension of time provisions is normally subject to the provision of a notice by the shipyard to the buyer of the shipyard's intention to claim an extension of the delivery date.

A common provision in a shipbuilding contract in this respect reads, for example, that within fourteen running days from the date of commencement of any delay in the vessel's construction, on account of which the builder claims that it is entitled as per the contract to an extension of the time of delivery of the vessel, the builder shall advise the buyer by email of the date on which the delays commenced, and the reasons thereof.

A number of English court cases have established that sending a notice to the buyer is not just a formality required under the contract. Its purpose of it is to enable the buyers to reach an informed decision as to how to act in the circumstances of the delayed delivery of their vessels.

In the above-mentioned *Adyard* case,[18] the shipyard failed to send a notice to the buyer, claiming that it was entitled to an extension of the time due to the alleged buyer's acts of prevention. If a builder seeks extra time to deliver the vessel, it must give notices where it is required to do so pursuant to the contract. In this case, the shipyard's claim for extension of time failed due to its failure to give notice of a delay pursuant to the terms of the shipbuilding contract.

In the case of *Zhoushan Jinhaiwan Shipyard Co. v Golden Exquisite and Others*,[19] the shipyard argued that the buyer failed to "carry out his inspections in accordance with the agreed inspection procedure and schedule and usual shipbuilding practice and in a way as to minimize any increase in building costs and delays in the construction of the Vessel". The consequences of such a breach were a delay to the agreed inspection and construction schedules. In addition, the buyer allegedly had unreasonable requirements, contrary to those specified in the contract or required by the classification society. The shipyard's argument was that the shipbuilding contract governed such delays by extension of time clauses in the form of permissible delays. The same contractual provisions required the shipyard to send a notice to the buyer of any such delays. However, the shipyard failed to send such notices before the buyer cancelled the contract due to delay in the vessel's delivery. In consequence of its failure to send the required notices,

[18] See *Supra*, footnote 8.

[19] *Zhoushan Jinhaiwan Shipyard Co. v Golden Exquisite and Others*, [2014] EWHC 4050 (Comm); https://www.bailii.org/ew/cases/EWHC/Comm/2014/4050.html, para 4, visited on 23 January 2020.

the Court decided that the shipyard had lost the right to claim delays allegedly caused by the buyer's breach of contract.

6. CONCLUSION

Shipyards should bear in mind that "the prevention principle is not an overriding rule of public or legal policy".[20] The prevention principle is not applicable when there are extension of time clauses in the shipbuilding contract, either in the form of permissible delays or otherwise. If shipyards seek to rely on extension of time clauses set out in their shipbuilding contracts they should make sure that they have a very strict documentary policy in place, a system of prompt notifications to the buyer, a system of recording relevant events that are causing delays in construction, critical path diagrams, etc. Otherwise, they face the risk of losing the right to rely on extension of time provisions, and the prevention principle would not be applicable. Consequently, they might be liable to pay liquidated damages or face a potential termination of contract by the buyer and a claim for a refund of the contract price, interest and/or damages.

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Sažetak:

NAČELO ZABRANE SPRJEČAVANJA ISPUNJENJA I ODREDBE O PRODULJENJU ROKA ISPORUKE U UGOVORIMA O GRADNJI BRODA PREMA ENGLESKOM PRAVU

Ovaj rad razmatra općeprihvaćeno načelo engleskoga prava poznato kao "načelo zabrane sprječavanja ispunjenja" u kontekstu ugovora o gradnji broda.

Sukladno tome načelu, ni jedna ugovorna strana ne bi trebala uživati plodove neispunjenja svoje ugovorne obveze. U kontekstu ugovora o gradnji broda ovo načelo bi trebalo zaštititi brodograditelja u slučaju njegovog kašnjenja s isporukom broda, a koje kašnjenje je prouzročio sam naručitelj, te brodograditelj ne bi trebao plaćati ugovornu kaznu uslijed takvoga kašnjenja. Nadalje, u takvim okolnostima ugovoreni rok isporuke broda prestaje biti relevantan, a umjesto njega rok isporuke postaje razuman period vremena koji je potreban za izgradnju i isporuku broda. Drugim riječima, kada naručitelj ne ispunjava svoje ugovorne obveze (npr. kasni s dostavom svoje opreme i materijala, zahtijeva nepotrebne izmjene u projektu broda, ne dostavlja ili ne odobrava na vrijeme projektnu i radioničku dokumentaciju, kasni s plaćanjem ugovorne cijene i dr.) on time utječe na plan gradnje broda, a što za posljedicu može imati kašnjenje isporuke broda. Takvo postupanje naručitelja može se tumačiti kao sprječavanje brodograditelja u ispunjenju njegovih obveza. Uslijed takvoga postupanja ugovoreni rok isporuke više ne bi obvezivao brodograditelja te bi bio bez pravnog učinka.

S druge, pak, strane uobičajeno je da ugovori o gradnji broda sadržavaju odredbe temeljem kojih se, uslijed određenih okolnosti, ugovoreni rok isporuke može odgoditi. Međutim, značajan broj odluka engleskih sudova upućuje na zaključak da se načelo zabrane sprječavanja ispunjenja neće primijeniti u slučajevima kada sam ugovor sadržava odredbe o produljenju roka Tada će se odredbe o ugovornoj kazni i dalje primjenjivati, ovisno o odredbama o produljenju roka isporuke.

U ovome se radu razmatra složeno pitanje: ako brodograditelj propusti (ili je u zastari) primijeniti ugovorne odredbe o produljenju roka isporuke broda, do kojeg produljenja je došlo uslijed propusta naručitelja, može li se načelo o zabrani sprječavanja ispunjenja primijeniti ili ne?

Ključne riječi: *ugovor o gradnji broda; načelo zabrane sprječavanja ispunjenja; isporuka broda; irelevantnost ugovorenog roka; istodobna kašnjenja u ispunjenju obveza; produljenje roka isporuke broda; obavijest o kašnjenju; ugovorna kazna; sudske odluke.*