

**DELAY AND EXTENSION OF TIME: THE REAL ISSUE IN CONFLICTS
BETWEEN TIME-BAR PROVISIONS AND PREVENTION PRINCIPLE**

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DEDICATION

I dedicate my dissertation work to my beloved wife and children who have been my constant source of inspiration.

Thank you for your support and patience during one of our most difficult time.

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ABSTRACT

This study looks at the real issue in the conflicts between time-bar provisions and prevention principle in construction contracts. Prevention principle normally refers to acts of prevention which prevent the contractor from completing on time which resulted in time to be “at large”. The employers introduced conditions precedent or time-bar clauses to alert them to the contractors’ claims for delays and extension of time. However, prevention principle still presents a formidable barrier to the employers. It is not fair to the contractors because extension of time has not been granted and delay damages deducted merely because of the failure to give notice rather than for failure to progress with the works. This study was carried out mainly through documentary analysis of law cases reported in Lexis Nexis, construction law journals and articles. It does not cover concurrent delay. Case law on this point is divided. In an Australian case of *Gaymark v Walter Construction* the court decided in favor of prevention principle. In a more recent Scottish case of *City In v Shepherd Construction* the notice requirement as a condition precedent overrides the prevention principle. When the conflict finally tested in England in 2007 in the case of *Multiplex v Honeywell*, the judge doubted that *Gaymark* was correctly decided and represents the law of England. In another case of *Steria Ltd v Sigma* in the same year the English court arrived at the same conclusion that the prevention principle does not mean that failure to comply with time-bar provision put time at large if the contract provides for extension of time. The real issue is not so much on the conflicts between time-bar clauses and prevention principle but rather between such provisions and the doctrine of freedom of contract. Prevention principle is not a rule of law but merely a rule of construction and proximate causation analysis can exclude its operation if there is a properly drafted time-bar clauses. It is hoped that this study may help construction practitioners such as arbitrators and contract administrators in dealing with time-bar disputes at a preliminary stage with less time and cost.

ABSTRAK

Kajian ini melihat kepada konflik di antara terma kontrak notis had masa dan “prinsip menghalang”. “Prinsip menghalang” merujuk kepada situasi di mana pihak majikan menghalang pihak kontraktor dari menyiapkan kerja-kerjanya dalam masa yang ditetapkan yang menyebabkan masa menjadi tidak pasti lagi. Pihak majikan memperkenalkan notis had masa sebagai satu amaran awal bila berlaku kelewatan. Namun “prinsip menghalang” masih merupakan halangan besar kepada majikan. Adalah tidak adil menidakkan hak kontraktor untuk lanjutan masa tetapi mengenakan denda hanya kerana gagal menghantar notis sebagaimana yang dikehendaki bukan kerana kegagalan untuk menjalankan kerja mengikut kemajuan yang ditetapkan. Kajian ini telah dijalankan berdasarkan kes-kes mahkamah yang dilaporkan di dalam Lexis Nexis, analisis dokumen kontrak pembinaan dan rencana. Ianya tidak melibatkan kes di mana kelewatan pihak majikan berlaku serentak dengan kelewatan pihak kontraktor. Undang-undang di dalam hal ini berbelah bahagi. Di dalam kes *Australia Gaymark v Walter Construction* telah diputuskan bahawa prinsip menghalang ini lebih utama. Tetapi di dalam kes *Scotland City Inn v Shepherd Construction* telah diputuskan sebaliknya. Apabila konflik ini diuji di England pada tahun 2007 di dalam kes *Multiplex v Honeywell*, hakim memutuskan bahawa kes *Gaymark* telah diputuskan dengan cara yang salah dan ianya tidak melambangkan undang-undang di England. Di dalam kes *Steria v Sigma* pada tahun yang sama telah diputuskan bahawa prinsip menghalang tidak bermakna kegagalan mematuhi terma had masa bermakna masa untuk siap menjadi tidak pasti jika kontrak ada terma untuk melanjutkannya. Isu sebenar bukanlah konflik di antara terma-terma tersebut tetapi lebih kepada kebebasan kontrak. Prinsip menghalang bukanlah satu peraturan undang-undang tetapi ianya lebih kepada bagaimana ianya terbina di dalam sesuatu kontrak dan analisis sebab utama boleh menyebabkan prinsip ini tidak terpakai jika terdapat terma notis had masa yang jelas. Adalah diharapkan bahawa kajian ini akan membantu mereka yang terlibat di dalam industri binaan seperti pakar timbang tara dan penyelia kontrak dapat dalam menangani

permasalahan yang timbul dari konflik ini pada peringkat awal pada masa yang singkat dan kos yang masih rendah lagi.

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LIST OF ABBREVIATIONS

AC	Appeal Cases, House of Lord
All ER	All England Law Reports
BLR	Building Law Reports
Ch	Law Reports: Chancery Division 1991
CLJ	Current Law Journal (Malaysia)
Con LR	Construction Law Reports
CSOH	Outer House, Court of Session
ER	Equity Reports
Exch	Exchequer Reports
EWHC	England and Wales High Court
HKCFA	Hong Kong Court of Final Appeal
HKCFAR	Hong Kong Court of Final Appeal Review
HL	House of Lords
Hudson	Hudson Law Reports
ICR	Industrial Case Reports
JCT	Joint Contract Tribunal
KB	Law Reports: King's Bench Division
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
MLJ	Malaysian Law Journal
M&W	Melson and Welsby
PAM	Pertubuhan Arkitek Malaysia
QB	Law Reports: Queen Bench's Division
SC	Session Cases
SCLR	Scottish Council of Law Reporting
SLT	Scots Law Times
WLR	Weekly Law Report

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CHAPTER 1

INTRODUCTION

1.1 Background of Study

There is a growing use of time-bar clauses in construction contracts in which they are generally provisions which require giving of a notice by a contractor usually within a specified period of time for to claim extension of time and loss and expense. The notices are drafted as conditions precedent so that if the contractor does not give notices as required then he is not entitled to extension of time or is “time-barred”.

The purpose of the clause is to cover all possible omissions or acts of default by the employer which would prevent the contractor from performing its contractual obligations. Such clauses can also alert the employer to the contractor’s claim at an early stage so that the employer can take preventive measures to either avoid any delay or additional cost being incurred or ensure that the effects are mitigated as far as possible. The primary aim is to preserve the employer’s entitlement to liquidated damages if there is a delay to completion. In this study the time-bar and condition precedent phrases are used interchangeably and can mean the same thing depending on the context of the sentence.

In general, the contractor must take notice of properly drafted time-bar clauses and undertake careful commercial and contract management in order to understand the consequences of failing to comply as a properly constructed clause of this nature will be enforceable. In *Bremer v Vanden*¹ Properly drafted time-bar clauses should be accompanied by a clear indication of the impact of failing to issue the notice and clearly state that the right would be lost in the event notice is not given.

However, time-bar provisions have not worked as expected to the benefit of the employer who drafted it. The above position is contrary to a fundamental principle called “prevention principle” which says that a party to a contract cannot benefit from its own breach to the detriment of the other party. Despite the attempt by employers to protect their interests by employing time-bar clauses, the prevention principle still present a formidable barrier to them in enforcing the clause.

It is thus argued that if the employer delays the contractor in completing the works, then generally he is not entitled to deduct liquidated damages for that delay because of his prevention acts that actually cause the delay to completion. It is even said that such a provision is a penalty because extension of time had not been granted and delay damages deducted merely because of the failure to give

¹ (1978) 2 Lloyd’s Rep 1-9

notice rather than as a consequence of acts of prevention by the employer which has hindered the contractor to progress with the works.

The contractor will often argue that because notice is not served for extension of time, time will become at large and the obligation to complete by specified date is replaced by an implied obligation to complete within reasonable time. The employer cannot impose liquidated damages because time for completion has not been fixed for liquidated damages to run. The contractor also claim that notice for extension of time can still be submitted later when the effect of the delaying events cease to operate and there is sufficient information to make up mind. The contractor can also argue that in the project set up the employer is also well aware of what happenings on the project and should extend time upon happening of delaying event. What if the employer did not know he had caused a delay? Would the contractor still be right?

On the employers' side, it can be argued that if the contractor fails to give notice within the specified time as a condition precedent to its entitlement to extension of time, the employers have a right to the benefit of liquidated damages even though he is the cause of the delay. This argument is on the basis that extension of time cannot be granted if the contractor fails to invoke the notice requirement as a condition precedent in a timely manner. It was argued that even if the contractor fails to comply with the time-bar clause, it does not necessarily mean that the time for completion is at large. By allowing the contractor to rely on

the prevention principle as its defense, the contractor could disregard with impunity any provisions making proper notice a condition precedent. In such a scenario, the contractor could set the time at large at his own option. This is commercially absurd given that it would result in a contractor being better off by deliberately failing to comply with the notice condition than by complying with it. By allowing the contractor to submit extension of time later, it means to allow such claims and disputes to lie dormant and may be used as a 'threat' in subsequent settlement negotiations.

1.2 Problem Statement

To what extent has the prevention principle been successful to be used as a defense against time-bar clause? There is no direct authority (in English law or otherwise) on the question whether the employer can exercise his contractual rights and remedies where he has caused delay and the contractor has simply failed to follow the notice requirements. Because of the draconian effect of time-bar clause, the English courts have always appeared reluctant to extinguish contractor's rights to extension of time simply because of the contractors' failure to comply with the notice requirements. The courts have not always used the term prevention principle to defeat time-bar clause. The case laws in this area have either relied on the prevention principle or have simply failed to uphold time-bar clause.

The case laws in this area have been mixed and the results depend on the facts of each case and the wording of the respective contract. In an Australian case of *Gaymark Investment v Walter Construction*², the Supreme Court of the Northern Territory of Australia has allowed prevention principle to deny the employer from benefiting liquidated damages for delays due to its own making. However, in a more recent Scottish case of *City Inn v Shepherd Construction Ltd*³, it was recognized that notice was a condition precedent and it was held that the contractor's failure to give the notice meant that the contractor lost its rights for extension of time but the employer retained the right to deduct liquidated damages. It was said that *Gaymark* was wrongly decided because the judge failed to take note of the practical purposes of the condition precedent which was to alert the employer in the event of delay. Since then the courts have adopted a more flexible approach and view condition precedent clauses as a commercial bargain entered into with the full knowledge of both parties which should, as a result, be enforced.

Since it is more common now to find contracts employing time-bar clauses such as FIDIC and NEC3, disputes will most likely arise touching on this issue. This study seeks to analyze the conflicts between conditions precedent and prevention principle and establish the real issue facing the construction practitioners such as arbitrators and contract administrators.

² (1999) 16 BCL 449

³ (2001) SCLR 961

1.3 Objective of Research

The objective of this research is to establish the real issue in the conflict between notice requirement as a condition precedent and prevention principle.

1.4 Scope of Study

The research will focus on the following matters:

1. The related provisions in the standard forms of contracts used internationally, namely FIDIC, NEC, JTC and amendments to them.
2. Court cases related to the issue particularly cases in countries like United Kingdom, Singapore, Australia and Hong Kong and a few Malaysian cases.

The study does not include concurrent delay which probably the most conceptually challenging aspect of delay analysis requiring a separate study.

1.5 Significance of Study

This study will encourage both parties to be familiar with contractual terms in particular condition precedent clauses and help them to understand their position better in regards to condition precedent clause and take necessary steps to avoid repeating past mistakes. Contractors must take notice of properly drafted condition precedent clauses and undertake careful commercial and contract

management in order to ensure they do not fall foul of these provisions. It hoped that better understanding by both parties will help reduce disputes which can be time consuming.

1.6 Research Methodology

The research was done based on descriptive methodology through document analysis. Data collection was done by searching through Lexis Nexis by typing key words “building contract” and “condition precedent” to find case laws from England and other Commonwealth countries such as Australia, Scotland, New Zealand, Hong Kong and Malaysia.

From the previous court cases found, analysis was done to study the link between condition precedent and prevention principle to make inferences. Materials from text books and internet also were used to reconfirm and compare the understanding. The process is depicted as per Figure 1.1 below.

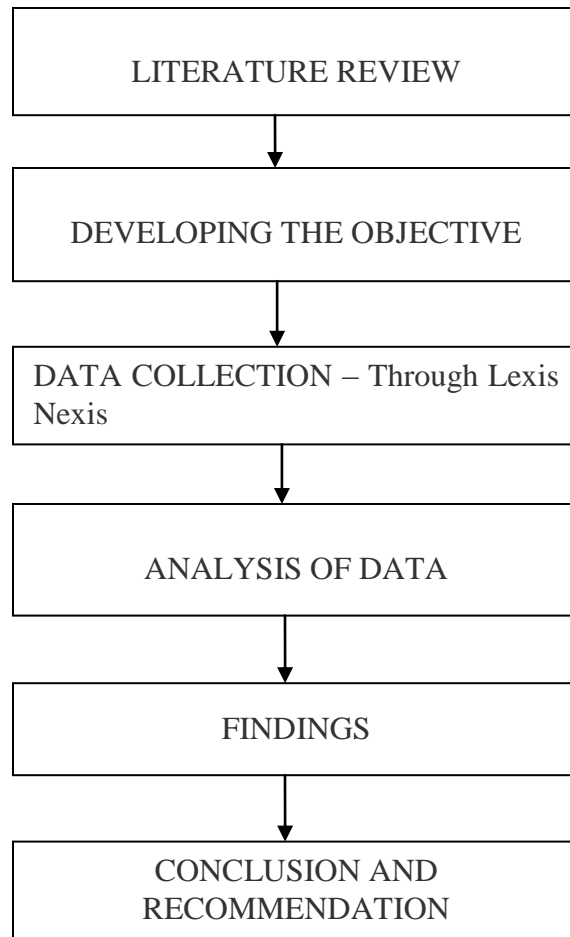


Figure 1.1 Flow of Methodology

1.7 Chapter Organization

This thesis consists of six chapters as outline below:

Chapter 1: Introduction

This chapter introduces the focus and direction of the research and gives background information regarding the problem under investigation. It also explains the importance of notice as condition precedent and why it is worthwhile studying. It also presents the objective, scope, significance of study, methodology as well as the summary of the content of each chapter that will comprise the study.

Chapter 2: Delay and Extension of Time

This chapter explains the basic principles of grounds for extension of times in construction contracts, the relevant events, the meaning of time at large, liquidated damages and procedures for claiming extension of time and liquidated damages.

Chapter 3: Prevention Principle

This chapter defines and explains the basic principles of the prevention principle, when and how it can be relied and cannot be relied by a contractor in advancing its claims against the employer.

Chapter 4: Condition Precedent

This chapter gives the definition, purposes, importance and effects of condition precedent clauses and ways round it. It also looks at notices and certificates as condition precedent to payment, termination and imposition of liquidated damages.

Chapter 5: Analysis and discussion

It looks at the standard forms of contracts and sample bespoke contracts where condition precedent requiring notice to be served within a period specified. It also looks at clauses that are not expressly stated as condition precedent but can be a trap to the contractor. It then look at court cases to see how the clauses are interpreted whether it can be successfully argued against condition precedent clauses.

Chapter 6: Conclusion

This chapter discusses any limitation of the study and gives final recommendation – practical suggestions for implementation of the findings or for additional research that may be carried out to complement the findings of this study.

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