

GAYMARK INVESTMENTS PTY LTD V WALTER CONSTRUCTION GROUP LTD

[1999] NTSC 143

Supreme Court of the Northern Territory, 20 December 1999

FACTS

Gaymark Investments Pty Ltd ('Gaymark') entered into a modified NPWC 3 contract with Walter Construction Group Ltd ('Walter') to construct the Darwin Central Hotel complex. The modified extension of time clause, SC 19.1 provided that the contractor was "only to be entitled" to an extension of time where (inter alia) the cause of the delay arose out of "any breach of the provisions of the contract or other act or omission on the part of the Principal, the Superintendent, or their agents... and where the Contractor had complied strictly with the notices required..."

Walter claimed \$4,900,341 on a number of bases, principally for variations, prolongation and disruption/acceleration.

Gaymark counter-claimed for \$1,554,059, principally arising through the application of liquidated damages in accordance with the contract. The dispute was arbitrated, the arbitrator concluding that Gaymark was not entitled to liquidated damages.

Walter had been delayed for 77 days "by causes for which Gaymark was responsible either directly or through the Superintendent". This delay constituted "acts of prevention" by Gaymark with the result that there was no date for practical completion and Walter was obliged to complete within a reasonable time.

The arbitrator adopted the view that the modified extension of time clause provided an entitlement (or right) to an extension of time provided Walter complied strictly with its requirements. However, it afforded the Superintendent no general discretion to extend time in absence of such strict compliance notwithstanding that Walter had been actually delayed by act, omission or breach of contract for which Gaymark was responsible.

Gaymark appealed under the Commercial Arbitration Act, that there was a manifest error of law on the face of the award.

ISSUE

Whether the prevention principle should be applied and whether the fixed date for practical completion should be replaced with an obligation to complete within a reasonable time.

FINDING

The Court held that the effect of modifying the extension of time clause of the contract removed the power of the Superintendent to grant or allow extensions of time. The Court considered that the contract between the parties failed to provide for a situation where Gaymark caused actual delays to the contractor in achieving practical completion by the due date coupled with a failure by the contractor to comply with the

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notice requirements of SC 19.1. Therefore, the arbitrator had not erred when he determined that the prevention principle barred Gaymark's claim to liquidated damages.

QUOTE

Bailey J, after quoting Salmon LJ in *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111 ('Peak'), said at paragraph 71:

"In the circumstances of the present case, I consider that this principle [as enounced in Peak] presents a formidable barrier to Gaymark's claim for liquidated damages based on delays of its own making. I agree with [the] arbitrator that the contract between the parties fails to provide for a situation where Gaymark caused actual delays to [Walter] achieving practical completion by the due date coupled with a failure by [Walter] to comply with the notice provisions of SC 19.1.

In such circumstances, I do not consider that there was any "manifest error of law on the face of the award" or "strong evidence" of an error of law in the arbitrator holding that the 'prevention principle' barred Gaymark's claim to liquidated damages."

IMPACT

Acts of prevention, if extensions of time are subject to strict unconditional requirement of contemporary notice, may invalidate the contract's liquidated damages machinery under the prevention principle, unless the Superintendent has express power to extend time for reasons covering the acts of prevention.

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