

## PERINI PACIFIC LTD V GREATER VANCOUVER SEWERAGE & DRAINAGE

### FACTS

The owner, Greater Vancouver Sewerage and Drainage District ('GVSD') failed to deliver in good repair certain engines to be incorporated into a building and that was shown by the builder, Perini Pacific Ltd ('Perini') to have caused material delay in the work. The trial judge found that Perini would not have finished the work on time even if this delay had not occurred. GVSD sought to apply liquidated damages and Perini submitted that the works could not have been completed on time as GVSD had prevented performance.

### ISSUE

Whether liquidated damages could be applied and whether the prevention principle could be enlivened.

### FINDING

The Court held that "in the absence of evidence that the builder could not, by special effort, have otherwise completed the work on time" was not sufficient to preserve the application of a penalty or liquidated damages clause. His Honour quoted the extension of time clause and held that the words "or other causes beyond the contractor's control" had to be construed narrowly, as had been done in *Wells v Army and Navy Co-operative Society [1902-1903] Hudson's Building Cases*, 4th Ed, and did not include "defaults of the owners which would unreasonably result in making them judges in their own default". In these circumstances he concluded that the extension of time clause did not prevent the relief to the plaintiff from the application of the liquidated damages clause. The Court concluded that the extension of time clause did not prevent the relief of to Perini from the application of the liquidated damages clause.

### QUOTE

Davey JA said, at 314:

*"As I understand those authorities, neither the fact that the work would not have been completed in time if there had been no delay by the defendant, nor the fact that the plaintiff's tardiness or wrongful acts caused some of the delay, prevents the plaintiff's being released of its liability for the liquidated damages through the defendant's substantial defaults that delayed it in completing the contract on time."*

At 316 Bull JA said:

*"As the right to grant an extension of time and to extend the contract date of completion is one only within the jurisdiction and discretion of the respondent under the contract, it is, of course, beyond the jurisdiction of the Court to order an extension of time or change the completion date because one party claiming under the clause has been guilty of default causing a delay. Accordingly the relief to the appellant of forty five days' liquidated damages called for by the contract would appear to have been allowed under the authority of *Legge v Harlock (1848) 12 QB 1015 .. or on the basis of an equitable set-off or equivalent damages for the breach of contract of the respondent causing the delay ...*" and at 320: "Accordingly, it is my respectful view that it can be fairly said that the respondent acted in a manner in breach of its contract that actually*

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*prevented or made it impossible for the appellant to perform its obligation at the proper time. To hold that despite this absolute prevention, the appellant under the circumstances could not have so performed, would, I suggest with respect, have the effect of permitting the respondent to take full advantage of its own wrong ...”*

*(In his consideration of the effect of the extension of time clause) “It has been suggested that the relief of a contractor from liability for liquidated damages under a completion clause, as I have indicated is appropriate here, cannot take effect where the contract has an extension of time clause whereby mechanics to establish a new and later completion date are provided. ... I agree that an extension of time clause has such effect if it is clearly applicable and clearly covers the acts of prevention which have in fact occurred. Where it does not cover such acts, any decision under the clause will not bind the contractor or preserve a liquidated damages clause...”*

## **IMPACT**

This case confirms the proposition that where the Principal prevents the actual performance of a Contractor’s contractual obligations and the contract does not clearly allow for the granting of an extension of time, the liquidated damages clause is inapplicable.

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