

**S M K CABINETS V HILI MODERN ELECTRICS PTY LTD [1984] VR 391**

Full Court Supreme Court of Victoria, 28 September 1983

**FACTS**

S M K Cabinets ('SMK'), the contractor, contracted with Hili Modern Electric Pty Ltd ('Hili'), the proprietor, to supply and install cupboards at premises in Fawkner. The contract required the work to be completed by 15 July 1980, and there was no extension of time clause.

The contract was delayed and Hili sought to claim liquidated damages to 23 December 1980 at \$35 a day. SMK submitted that its prevention principle applied, and the liquidated damages clause was unenforceable.

The matter proceeded to arbitration. The arbitrator found that Hili's acts or omissions had delayed the completion of the works and went on to find that SMK could not in any event have completed the works by 15 July 1980.

**ISSUE**

Whether the contractor had been prevented by the proprietor from completing by the date allowed by the liquidated damages clause.

**FINDING**

The Full Court of the Supreme Court of Victoria held:

that under a building contract, the proprietor cannot recover liquidated damages from the contractor for delay where the proprietor himself delays completion by ordering extras or other variations, unless the contract makes it clear that the contractor is undertaking to complete by the due date notwithstanding extras or other variations unless resort can be had to an appropriate extension of time clause;

the ordering of variations after the due date for completion which substantially delays completion will, unless the contract provides otherwise, and in the absence of an applicable extension of time clause, disable the proprietor from recovering or retaining liquidated damages which might otherwise have accrued after the giving of the order, although the proprietor's rights in respect of amounts already accrued by way of liquidated damages will not be affected; and unless the contract provides otherwise, liquidated damages for delay in completion cannot be recovered by the proprietor where the ordering of extras or other variations causes or contributes to the delay in completion, notwithstanding that the contractor may in fact have disabled himself by his own delays from completing by the due date.

**QUOTE**

Brooking J adopted as a matter of principle:

*"That the ordering of variations after the due date which must substantially delay completion will, unless the contract provides otherwise, and in the absence of an applicable extension of time clause, disable the*

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*proprietor from recovering or retaining liquidated damages which might otherwise have accrued after the giving of the order, the employer's right in respect of amounts that have already accrued by way of liquidated damages not being affected."*

## **IMPACT**

This case confirms that the prevention principle can be enlivened by the act of ordering variations after the due date for completion which substantially delays completion, unless the contract contains an appropriate extension of time clause.

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