I. INTRODUCTION

The worldwide shipbuilding industry has experienced some dramatic changes over the last decade. The shifting of the economic power of shipbuilding from Europe to Asia continued and yet English law continues to represent the most commonly chosen law for large-scale export newbuilding contracts. Whilst the legal principles applicable to shipbuilding contracts are (in general terms) no different from those applicable to contracts generally, particular features of the shipbuilding business require extra care when applying land based contract principles. The last decade has seen a number of English judicial decisions of importance to shipbuilding industry particularly in relation to complex, commercially significant disputes relating to allegations of delay. There are two cases of particular interest to this paper where the English courts considered the application of the prevention principle in shipbuilding context. In both cases the shipyards tried to rely on the prevention principle to discharge their duty to pay liquidated damages and prevent the buyer from cancelling the shipbuilding contracts. It is apparent from the cases that the prevention principle is not an easy escape for the delayed shipyards.

II. PREVENTION PRINCIPLE IN CONSTRUCTION CONTRACTS

The prevention principle first arose in construction cases, and was formulated by Jackson J in Multiplex Construction (UK) Limited v Honeywell Control Systems Limited\(^1\) in the following terms:

"(i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause the delay beyond the contractual completion date.

(ii) 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.

\(^1\) Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd [2007] BLR 195
(iii) Insofar as the extension of time clause is ambiguous, it should be construed in favour of the contractor."

Hence, the argument goes, if the buyer has prevented the yard from tendering the vessel in time, the buyer cannot rely on that lateness to cancel; and the contractual deadline is replaced with an obligation to complete within a reasonable time. What is a “reasonable time” is a question of fact determined in light of all relevant circumstances.

In construction contracts, it is well established that the principle does not apply at all if there is a contractual machinery to permit the contractor an extension of time. The reason is that the contractor does not need the prevention principle because his position is protected by the agreement. In this part, we will consider how this common principle is applied in the shipbuilding context by a closer study of two cases. The possible role of this principle in shipbuilding context was first considered in Adyard Abu Dhabi v SD Marine Services in 2011.

III. THE ADYARD

Facts

In this case, Adyard contracted to build two vessels for SDMS. The shipbuilding contracts gave buyer a right to rescind in the event that the contractual delivery date, as extended by any permissible delay, was missed. In the event that the sea trials date was missed by seven days on one vessel and one day on the other vessel, the buyer exercised its right of rescission of both contracts. Subsequently, the builder commenced proceedings against the buyer. The builder did not dispute that the vessels were incomplete by the original sea trials date, but argued, inter alia, that the purchaser was not entitled to cancel on the ground that its acts had prevented their completion.

The contracts provided that each vessel should be built for registration under UK flag and included a detailed mechanism under which changes in the regulatory regime relevant to such flag would be addressed. In essence, if such change occurred during the construction period, the buyer could either (i) agree to “reasonable adjustment” required by the shipbuilder to the contract price, completion date and other terms of contract, in which case the relevant modifications would be implemented, or (ii)

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3 Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd [2007] BLR 195, [49]
4 Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm)
instruct the builder not to effect the modification. However, the buyer disagreed with the modification requested and did nothing else.

The builder argued that the buyer’s failure to decide promptly whether or not to implement the modifications delayed the completion of the vessels and brought the “prevention principle” into play. On this basis, the builder contended that the purchaser’s cancellation were premature and unlawful.

The buyer on the other hand argued that the contract did in fact contain provisions entitling the builder to an extension of time and that the prevention principle could not apply. The buyer also emphasized that article VIII of the contract requested the builder to furnish notice for the delay, hence the builder was barred from claiming for extension due to the failure in giving notice.

**Decision:**

Hamblen J found for the buyers and upheld their cancellation. He applied *Multiplex v Honeywell* case and held that the prevention principle does not apply if the contract provides for an extension of time in respect of the relevant events. Where such a mechanism exists, if the relevant act of prevention falls within the scope of the extension of time clause, the contract completion dates are extended as appropriate and the builder must complete the work by the new date or pay liquidated damages. He further held that any claim for extension for time under Clause VIII would fail due to lack of notice as prescribed in this Clause. In any event, even if no such notice is required, any extension of time will depend on proof of actual delay. The judge found that as a matter of fact the project was already in critical delay well before the design changes occurred and that Adyard was not entitled to additional time simply because the events did not actually cause delay. He said that 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.”

In reach his decision, the judge was clearly worried that the wholesale importation of “prevention principle” into English shipbuilding contract law might upset a long established commercial balance between ship owners and shipbuilders – he referred in particular to concerns expressed by Colman J.

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5 Ibid. [244-245]
6 Ibid. [243]
7 Ibid. [299]
8 Ibid [277]
in *Balfour Beatty Building Ltd v Chestermount Properties Ltd*\(^9\) that the operation of the principle might mean that the existence of a “trivial variation” could cause the employer (or buyer) to forfeit a significant entitlement to liquidated damages for a long period of culpable delay.

**Implications:**

It can be said that this case set out the tone that the application of the “prevention principle” to most shipbuilding cases is likely to be limited, unless for example the buyer was required to provide a significant element of the design or buyer changed instruction on a large scale. Even then, the principle cannot be invoked successfully if the contract itself includes express provisions dealing with the consequences of the relevant action or inaction as it is usually the case in form of shipbuilding contract.

This case is also significant in confirming in a shipbuilding context the determination of the builder’s entitlement to extension of time. Given that the project in this case was in “irretrievable critical delay” long before any of the buyer’s alleged delaying conduct had occurred, the shipbuilder was unable to reply on the prevention principle. Therefore, the builders can only seek protection from the prevention principle only if without such prevention by the buyer, in light of the builder’s own delay, it is still possible to complete the project by the agreed deadline.

**IV. GOLDEN EXQUISITE**

The *Adyard* approach was followed in a more recent case, *Zhoushan Jinhaiwan Shipyard Co v. Golden Exquisite and others*\(^10\), an appeal from an arbitration award in the buyers’ favour. This decision analyzed in more detail the issues that are likely to arise under SAJ-type contracts.

**Facts:**

The Chinese company Zhoushan Jinhaiwan Shipyard Co. Ltd. as builder entered into four separate shipbuilding contracts with four special purpose companies, together called the Golden Ocean Group, to build four vessels. In each case, the buyer purported to exercise the contractual right to cancel the shipbuilding contract for delay in delivery of the vessel, whilst the yard contended that the

\(^9\) *Balfour Beatty v Chestermount Properties* (1993) 62 BLR 1, 27

\(^10\) *Zhoushan Jinhaiwan Shipyard Co Ltd v Golden Exquisite Inc and others* [2014] EWHC 4050 (Comm)
cancellations were wrongful on the ground that a relevant part of the delay that caused by the buyer’s own breach.

Pursuant to Articles III.1(c) and VIII.3 of the shipbuilding contract, there were three types of delay:

i. Excluded Delays: delays excluded from consideration when determining whether the buyer was entitled to reduce the contract price or cancel the contract but may allow the yard an extension to the delivery date. Broadly speaking, delays under this type are delays which are caused by the buyer.

ii. Permissible Delays: delays outside the control of the yard which are caused by force majeure events that allowed for an extension of time for delivery of the vessel. However, if the delay was for 225 days after the contractual delivery date, the buyer could cancel the contracts and recover the instalments (without interest). In order for this delay to count, the yard had to give notice to the buyer of the start date and the end date, and also give notice of the delay cause by it.

iii. Non-permissible Delays: delays that allow the yard no extension of time for delivery. If the delay was for 210 days after the contractual delivery date, the buyer could cancel the contracts and recover the instalments (with interest); and

Separately, the contract also provide a 270-day delay to the contractual delivery date resulting from a combination of permissible and non-permissible delays which also allowed the buyer to cancel.

The court found that in each case the cancellation of the contract followed a similar pattern:

1. The delivery of the vessel was delayed beyond the delivery date as agreed in the contract;

2. The buyer gave notice of cancellation of the contract on a date which was more than 270 days after the delivery date;

3. Before such notice of cancellation was given, the yard had not given notice to the buyer of any delay which the yard claimed had been caused by a breach of contract by the buyer (or any other cause for which the Yard was not responsible);

4. After notice of cancellation had been given, however, the yard alleged that breaches by the buyer had resulted in delays in the construction of each vessel totalling not less than 90 days. In each case, these were alleged breaches of Article IV, which made provision for inspection
of the vessel by a supervisor appointed by the buyer throughout the period of construction. The yard alleged that the buyer’s supervisor worked very short hours, imposed unreasonable requirements, and delayed unreasonably in returning procedures or drawings of the vessel.

The yard said that, on a proper interpretation of the contracts, delays caused by these alleged breaches of contract by the buyer could not be relied on in calculating any of the periods of delay which entitled the buyer to cancel the contract. When such delays were excluded, it followed that in each case the cancellation was wrongful and the buyer’s actions amounted to a repudiatory breach of the contract. The disputes were referred to arbitration in London. There were four arbitrations but only two hearings.

The tribunal found that the builder was precluded from claiming any relief for failing to give notice to the buyer of delays caused by their purported default and, as the delay was not a ‘permissible’ delay under Article VIII. The yard then appealed the award.

Decision:

Mr Justice Leggatt, hearing the appeal in the Commercial Court in London dismissed the yard’s appeal.

The Judge found that there was a tripartite classification of delays related to the delivery of the vessels where permissible and excluded delays could result in an extension of the time for delivery of the vessels without any reduction in the contract price, whereas non-permissible delays did not give rise to any extension of the time for delivery and, if they caused the delivery to be delayed by more than 30 days beyond the delivery date, they resulted first in a reduction in the price and then, after 210 days, in a right on the part of the buyer to cancel the contract and recover the instalments of the price paid with interest. Permissible delays resulted in an extension of the delivery date but nevertheless, if they accumulated beyond a certain point (either on their own or when added to non-permissible delays), triggered a right to cancel the contract, though no interest was payable on the instalments of the contract price which became repayable on such a cancellation. Excluded delays were not counted as delays for the purpose of any right of cancellation.

The yard had argued that there was a fourth and separate category of “buyer’s breach delays”. This was rejected by the Judge for a number of reasons.

Firstly, Article IV on which the yard relied, did not contain any provision for an extension of time in the circumstances relied on by the yard.
Secondly, the Judge considered that it was intended that the abovementioned three categories of delay was a complete code that would “cover the whole field”.

Thirdly, the delays in delivery of the vessels allegedly caused by the buyer's breaches of Article IV were not permissible delays. It had been argued on behalf of the yard that the long list of causes set out in Article VIII.1 conspicuously did not include breach of contract by the buyer but instead was made up solely of “supervening events which arise without the fault of either party and for which neither of them has undertaken responsibility”\(^{11}\). In view of this and the fact that buyer’s breaches were dealt with elsewhere in the contract, there was, in the Judge’s view, no need to read Article VIII.1 as encompassing buyer’s breach delays. Further, the buyer was entitled to cancel the contracts in circumstances where the delay had in each case continued for more than 210 days. Even if the delays could be characterised as permissible delays, this would not enable the Yard to avoid the conclusion that the buyer was entitled to cancel the contracts, since the delay in each case exceeded the length of time which gave rise to a right of cancellation under Article VIII.3.

Finally, the yard would not be entitled to rely on the delays alleged as it had failed to provide the relevant notices as required under the shipbuilding contracts.

**Implications:**

The case provides useful guidance to shipyards and buyers that cancellation provision will be applied clearly and strictly. It shows that the court was not prepared to look beyond the strict terms of the contract. Shipyards should be well advised to document delays, variation orders and the like in accordance with the contractual framework if they wish to rely on their contractual terms. When buyers grant yard extra time in relation to delivery, it is important they should not delete but only amend the provision which allows the yard extra time if buyers' actions cause delay. This is because it could potentially open up a strong argument for the yard that the prevention principle will come into play.

**V. CONCLUSION**

The two cases send clear message that though English courts have opened the door for the application of prevention principle, there is an apparent tendency toward restricted application of it in the shipbuilding context. Thus, the prevention principle is by no means an easy escape for shipyards.

When establishing a delay claim it is crucial that parties have the records available to demonstrate that a delay has occurred and the documentation to show which party is responsible for that delay. It is imperative that parties to a shipbuilding contract prioritise the creation and logical storage of contemporaneous records that can establish the existence and cause of delays. Bad record keeping may directly affect how robustly a party is able to make or defend a delay claim.