



## CONSTRUCTION LAW UPDATE No. 901

### Filling in the contract form

#### Introduction

Standard form contracts are widely used in the construction industry because they provide a ready to use and economical written contract that is familiar to the parties.

When parties use a standard form contract, they tailor it to their own needs by deleting inapplicable clauses, filling in the blanks, the names of the parties, the price, and other important project related information.

Recently, in *Sizer v Squarcini*, the WA Supreme Court examined how to interpret the standard form contract known as AS2124-1992 where the parties had used inconsistent language when completing the contract.

#### The facts

A dispute arose between the builder and the developer about delays that had occurred during the construction of the project. The builder said that the signed contract terms prevented the developer from claiming delay damages. The developer disagreed. They attempted to resolve the dispute by arbitration. The arbitrator agreed with the developer. The builder applied to the Supreme Court for leave to appeal.

#### The contract terms

AS2124 is comprised of three sections: the General Conditions, Annexure A and Annexure B. The General Conditions include a number of alternative clauses. When forming the contract, the parties agree which alternative is to apply.

The preface to AS2124 states that clauses prefixed by an asterisk are optional and may be omitted as necessary, but that “such omission should be clearly shown on the face of the contract by striking out these clauses or indicating clearly elsewhere that they are not to apply”.

In *Sizer* the parties had ruled a line through some of the alternative clauses of the contract and initialled next to the deletion. However, the as-completed Annexure A made it unclear whether other clauses were also deleted.

#### The Annexure to the contract

Part A to the Annexure to AS2124 is comprised of two columns. The left hand column lists various items and the relevant clause number. The right hand column has space for the parties’ input adjacent to each of the left hand column items. For example, one item in the left hand column is “Bonus per day for early Practical Completion”. Usually, the parties would write a number of dollars in the adjacent space in the right hand column.

In *Sizer* the parties wrote “N/A” in this space and also wrote “N/A” in the right hand column against a number of other left hand column items where one would expect dollar values or numbers to be written.

However, against the item “Value of materials to be supplied by the Principal” the parties put the word “NIL”.

Part B to the Annexure to AS2124 is designed for the listing of all clauses in the contract that have been deleted, amended or added. In this instance, the parties failed to include all of the amended, deleted or added clauses in Part B. The Court said that, in this case, Part B confused the position rather than clarified it.

#### The main issue

The main issue at stake was the interpretation of the liquidated damages clause. This clause provides that if the builder breaches the contract by failing to bring the project to practical completion by the due date (or any extended date), it will pay to the owner, for each day until the project is complete, the amount specified in Annexure A. It is necessary to explain the difference between liquidated damages and general damages to underline the significance of the issue.

#### Liquidated damages or general damages

Usually, where a party breaches a contract, the other party is entitled to general damages but has to prove the loss it has suffered as a result of the breach to obtain appropriate

compensation. It is often difficult to prove the amount of loss caused by delayed completion. Many factors can contribute to delay. Usually, not all of them can be attributed to the builder.

Liquidated damages clauses are intended to give certainty to the amount of compensation that must be paid for late completion. Usually, where a liquidated damages clause is agreed a party can only claim delay damages under the liquidated damages clause and cannot also claim general damages.

In *Sizer*, adjacent to the item “Liquidated Damages per day (Clause 35.6)” the parties wrote “N/A”. Adjacent to the item “Limit of Liquidated Damages (Clause 35.7)” the parties again wrote “N/A”.

#### **The competing arguments about “N/A”**

The parties argued for two different meanings of “N/A”. The builder said the liquidated damages clause was not deleted in the General Conditions and that “N/A” meant that the quantum of the liquidated damages was limited to nil. Therefore, said the builder, the contract also precluded the developer from recovering any general damages for delay.

The developer said that “N/A” meant that the entire liquidated damages clause was “Not to Apply” and was therefore deleted. Hence, given that there was no liquidated damages clause at all, it was entitled to claim general damages for delay.

#### **The Court’s decision**

The Court commenced its analysis by commenting that the test to be applied is to work out from the words of the contract what a reasonable person would understand was the intention of the parties, considering the whole of the document.

The Court said that the use of “NIL” and “N/A” in the same Annexure supported the conclusion that they had differing meanings and rejected the builder’s contention that liquidated damages had been agreed at nil by inserting “N/A”.

The Court agreed with the developer and said that in this instance, “N/A” meant that the entire liquidated damages clause was “Not to Apply”. Therefore, the developer was entitled to general damages for the delay. If the word “NIL” had been used instead of “N/A” the clause would have remained effective and the developer would not have recovered any general damages.

For a party to give up the right to general damages for delay, the contract must be clear

and unequivocal to that effect. A valid mandatory liquidated damages clause in a building contract is evidence of the parties’ intention to exclude liability for general damages for delay. Here, the Court found there was no such applicable clause.

#### **Conclusion**

When using a standard form contract it is necessary to take the time to consider all of the blanks and to fill in information in a consistent and meaningful manner. The parties should consider carefully significant terms such as delay damages. If the parties agree that no delay damages are to be paid, they should expressly limit both liquidated and unliquidated damages. Abbreviations should be defined.

If the liquidated damages had been specified at say \$1 per day, the result would have been very different.

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