



CONSTRUCTION LAW UPDATE No. 905

Is inserting “nil” enough to avoid delay damages?

Introduction

Recently, in *J-Corp v Mladenis*¹ the WA Court of Appeal was asked whether a clause limiting liquidated damages to “NIL” prevented the owners from claiming general damages for delay when the builder ran late finishing their home.

General Damages

If a party breaches a contract, the other party can claim money to compensate for the breach. When assessing the amount of compensation, a court considers what would be sufficient to place the innocent party in the same position that they would have been in if the contract had not been breached. The compensation should equal the actual loss suffered as a result of the breach.

Often it is difficult to prove to a court the amount of money that is necessary to compensate for the breach. This is particularly the case when a building project runs late. How does the owner establish their loss? Where the loss is small, the cost of proving the amount of the loss will probably exceed the potential recovery.

Liquidated damages

To avoid the difficulties associated with proving the loss, rather than use the general damages path, building contracts often include a liquidated damages clause to deal with late completion. By using a liquidated damages clause, the parties avoid the necessity to prove the actual loss. Instead, they agree a pre-estimate of the loss for each day or week that the project runs late and insert this amount into the contract.

Almost all commercial building contracts include a liquidated damages clause. The amount must be a genuine pre-estimate. If the owner tries to compel the builder into meeting a tight timeline by inserting an excessive amount of liquidated damages, it is likely to be void and of no effect. The courts have adopted

a policy that it is not permissible to penalise a party by specifying an entirely unreasonable amount of liquidated damages.

The facts in *J-Corp*

Mladenis was one of a number of owners who engaged J-Corp to build homes as part of a subdivision development. The Mladenis home was to be a three level brick construction residence.

J-Corp supplied its own standard form building contract. The contract included a detailed clause headed “Commencement, Completion and Delays”. The clause excluded J-Corp’s responsibility for a range of listed delays. The list was extensive and included variations, inclement weather, strikes, delays by the owner in giving instructions and delays by the owner in agreeing to variations.

Building work was to commence within 21 days of the issue of building permission and was to be completed within 52 weeks. The clause concluded by stating that if J-Corp breached the clause, that is completed the house after the specified date for practical completion, it would pay to Mladenis:

“NIL DOLLARS (\$00.00) per day for each day beyond the date for practical completion until practical completion is deemed to have taken place”.

The question to the Court

The home did not reach practical completion until after the date specified in the contract and the parties entered into dispute as to whether the owners were entitled to compensation by general damages for the late completion.

The Court was asked to determine a preliminary question of law: Did the clause specifying “NIL” liquidated damages exclude the right of the owners to claim general damages for the loss they suffered due to the builder’s failure to complete the house on time?

¹ [2009] WASCA 157

Regular readers of our Construction Law Updates will recall Update 901, where the Supreme Court of WA considered² whether placing “N/A” adjacent to the liquidated damages rate in an AS2124 contract ruled out a claim for general damages. In *Sizer*, the Court said that “N/A” meant that the entire liquidated damages clause was “Not to Apply” but that the developer remained entitled to general damages for the delay. The *Sizer* decision left open the possibility that inserting “NIL” liquidated damages might preclude a claim for any damages for delay.

The Court’s deliberations in J-Corp

In *J-Corp*, the Court examined the contract terms to make its decision but first reviewed earlier conflicting authorities on the point.

On the one hand, the 1987 English decision of *Temloc v Errill* came to the conclusion that all delay damages were under the one head and that by setting liquidated damages to nil, the parties had agreed to exclude delay damages altogether. But other more recent decisions have criticised *Temloc* and have decided that each case needs to be decided by a careful consideration of the terms of the contract.

For example, the 1990 Australian case of *Baese v Bracken* concluded that setting liquidated damages to “NIL” was not an exhaustive statement as to an entitlement to delay damages. In the 1925 English decision of *Cellulose Acetate*, the court said that even if the amount of liquidated damages specified is obviously too low and cannot be a genuine pre-estimate of a party’s expected loss, it still operates to limit any delay damages that can be claimed.

J-Corp said the fact that liquidated damages was specified as “NIL” meant that all liability for damages for late completion was excluded.

Mladenis said that it was only liquidated damages that were specified as “NIL”, and the contract did not limit the amount of general damages they could claim.

The Court said that the guiding principle can be stated as follows:

“Clear words are needed to rebut the presumption that a contracting party does not intend to abandon any remedies for breach of contract arising by operation of law”.

The Court found that there were no “clear and unequivocal words” in the J-Corp contract that

excluded the owners from claiming general damages for delay. The Court said that the words “NIL liquidated damages” meant precisely that; there could be no recovery for liquidated damages. However general damages were still available to the owners.

However, the Court noted that:

“in the event of delay the owner will be left with a potentially costly and time-consuming remedy in unliquidated damages, a remedy that in any circumstances, particularly in respect of a contract for the construction of a house, it may not be practical or worthwhile to pursue”.

The Court commented that the position may well be different where a contract provides for the liability of the builder for liquidated damages in a positive amount.

Conclusion

If parties wish to exclude delay damages from their contracts, they need to expressly limit both liquidated and general damages arising from delay.

If the parties had agreed on say \$1 per week in the liquidated damages clause it would have been unlikely that they intended that the owner would have the benefit of both liquidated and general damages for the same delay.

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² *Sizer v Squarcini* [2008] WASC 246