



## No liquidated damages does not necessarily mean "no damages"

When drafting, negotiating or reviewing standard form contracts, some parties (usually the contractor or sub-contractor) often prefer to set the applicable liquidated damages amount at 'Nil', 'zero' or 'N/A', assuming that this will exclude any damages being claimed in the event of late completion of work.

Various legal cases in Australia have dealt with the issue of whether or not, by agreeing to an amount of "nil" (or similar wording) for liquidated damages, the parties have in fact agreed that no damages will be claimable in the event that the contract work is completed later than agreed.

As discussed below, setting the liquidated damages value at 'Nil', 'zero' or 'N/A' will not necessarily exclude a party's right to common law damages.

### RELEVANT CASES

In the decision of *J-Corp v Mladenis*<sup>1</sup> ("*J-Corp*"), the Western Australia Court of Appeal considered whether a clause limiting liquidated damages to "NIL" prevented the owners from claiming general damages for delays in completion caused by the builder.

In the decision the WA Court of Appeal:

- a. considered the case of *Gilbert-Ash*<sup>2</sup> where it was held that "clear words" were required to express an intention for the respondents not to be entitled to claim unliquidated damages (or common law damages) for delay; and
- b. found that, in this case, there were no "clear and unequivocal words" in the contract that excluded the owners from claiming general damages for delay; it only provided that no liquidated damages could be claimed.

The decision in *J-Corp* followed similar reasoning to that of the WA Supreme Court in *Silent Vector v Sizer Builders*.<sup>3</sup> ("*Sizer*"), where the contractor set the value for liquidated damages as "N/A".

Like in *J-Corp*, the Court in *Sizer* held 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 more recent ACT judgment of *Adapt Constructions Pty Ltd v Whittaker & Anor*<sup>4</sup> held that a rate of 'zero' liquidated damages in the MBA New Dwellings Contract did not preclude the owners for claiming general damages for actual delay costs.

This case also highlighted that if parties wished to exclude delay damages from their contracts, they needed to expressly limit both liquidated and general damages arising from delay in completion.

### WHAT IS THE SOLUTION?

In light of these cases, it is clear that that setting liquidated damages at 'Nil', 'N/A' or 'zero' may lead to an uncertain exposure to damages unless the parties have clearly and unequivocally expressed their intention(s).

Precise and clear wording is required in dealing with liquidated damages clauses so that it reflects the parties' intention(s).

If the parties agree that both liquidated and unliquidated

damages for delays to completion are not to apply to the Contract, then a properly drafted exclusion clause (that clearly and unequivocally excludes liquidated and unliquidated damages and/or damages generally) needs to be inserted into the Contract.

Her Honour Jenkins J in *Silent Vector Pty Ltd v Squarcini*<sup>5</sup> did caution:

*“What is clear to me is that parties to such contracts should be careful to delete, amend or add clauses to such contracts in a consistent and clear manner. The uncertainty that exists in this area of commercial law, primarily exists because parties have failed to adhere to this principle.”*

### WHAT IF AN AMOUNT (GREATER THAN ZERO) FOR LIQUIDATED DAMAGES IS AGREED?

Judgments in Australian courts have drawn a distinction between contracts that provide for ‘Nil’ damages and those that provide for damages in a positive amount. The general principle is that if the parties have agreed to a positive amount (that is, an amount greater than zero) for liquidated damages, then this is evidence of an intention by the parties to exclude the right to recover common law damages for late completion of work.<sup>6</sup>

On that basis, if the parties had agreed on any positive amount (even \$1 per week) in the liquidated damages clause it would have been unlikely that they intended that the principal (or owner) would have the benefit of both liquidated and general damages for the same delay.

### CONCLUSION

Contractors should think carefully before setting liquidated damages at “nil”, “n/a” or “zero”. Depending on circumstances, it may be preferable for contractors to nominate an amount greater than zero for the relevant liquidated damages provision. By setting the amount for liquidating damages at any positive amount (whether that be \$1 a day or \$100 a day), contractors may limit their exposure to general damages for late completion of work.

Alternatively, the parties may prefer to insert an exclusion clause dealing with damages for late completion work. In that case, the contract must be properly amended to clearly and unambiguously exclude both common law damages and liquidated damages for late completion of work.

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<sup>1</sup>[2009] WASCA 157.

<sup>2</sup>*Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689, 717-718.

<sup>3</sup>*Silent Vector Pty Ltd t/as Sizer Builders v Squarcini* [2008] WASC 246.

<sup>4</sup>[2015] ACTSC 188.

<sup>5</sup>[2008] WASC 246 at [99].

<sup>6</sup>*J-Corp v Mladenis* [2009] WASCA 157, 51.

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