

## Article Information

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# Can a principal elect to claim general damages rather than liquidated damages?

**Agreements on liquidated damages for delay provide certainty for principals and contractors alike. But what happens if your actual loss arising out of a delay far exceeds the rate of your liquidated damages?**

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## Liquidated Damages and General Damages

Contracts contain obligations that parties are required to perform. If one party fails to perform an obligation then the other party may suffer loss and damage. Damages for breach of contract are calculable by reference to the loss actually suffered and that was foreseeable at the time the contract was entered into. These damages are referred to as 'general' or 'unliquidated' and are usually calculated after the event of breach has occurred.

In contrast to this, liquidated damages are a way of pre-estimating the loss that will be suffered, usually as a result of delay, at the time that the contract is entered into. In this sense liquidated damages provide certainty to both parties whose rights and liabilities are now fixed.

## Can you elect to claim general damages?

A serious issue will arise for a principal, however, when the rate of liquidated damages which has been nominated under the contract is disproportionately small compared to the actual damage which has been incurred as a result of the contractor's delay.

In such circumstances, a principal will wish to claim general, or unliquidated, damages instead. The question that arises is whether the Principal is entitled to elect to claim general damages or is only able to claim liquidated damages.

Where a contract contains a liquidated damages clause, it will be a matter of construction (or interpretation) as to whether or not such a clause extinguishes the right to claim general damages. It has been found that 'a valid and mandatory liquidated damages clause' which 'stipulates a positive amount of liquidated damages' will evidence an intention by the parties that general damages cannot be claimed.

The case law therefore demonstrates that two factors, in particular, will weigh in favour of a finding that the liquidated damages clause provides an exhaustive remedy for delay:

1. A positive sum of liquidated damages has been stipulated under the contract; and
2. The liquidated damages clause is mandatory.

## Where a positive sum of liquidated damages has been stipulated

Firstly, if the contract specifies that a positive sum has been stipulated as payable for liquidated damages then this will weigh heavily in favour of a construction that the parties intended for liquidated damages only to be levied in the event of a delay. On this interpretation, the parties will be held to their bargain and the principal cannot elect to recover general damages. This will be the case even if it eventuates that the sum of liquidated damages nominated is far exceeded by the actual loss of the principal as a result of the delay.

This principle was noted by Burns J in *Adapt Constructions Pty Ltd v Whittaker*:

*... it does not matter whether the actual losses are greater or smaller than the amount fixed, the parties are bound by the agreement.*

A similar finding was made by Jackson J in *IPN Medical Centres Pty Ltd v Van Houten*:

*In any event, the plaintiff would not be entitled to ignore the agreed amount of damages ... and elect to claim a larger amount as damages for breach of contract at common law. To hold that the agreed damages are a genuine pre-estimate of the damages "does involve an implied limitation on the liability to pay damages".*

The issue was recently considered in the New South Wales Civil and Administrative Tribunal in the case of *Onethree Pty Ltd v Seaman*.<sup>[5]</sup>

In that case the builder achieved practical completion around six months after the date which had been stipulated in the residential building contract. As such, the owners claimed damages for the delay totalling \$36,037.00 which was comprised of 29 weeks' worth of rent, travelling costs to the site and general damages for loss of enjoyment, stress and financial pressure. That is, the owners were claiming for the *actual* damage which they had suffered as a result of the delay.

However, unfortunately for the owners, the contract contained a liquidated damages clause which provided that \$1.00 was payable for each day that the project was delayed. The Senior Member found that the owners were bound by their agreement and that they could not now claim general (or actual) damages for the delay:

*[31] So far as the rate of liquidated damages is concerned, the owners submissions state that the fact that the rate has been set at such a low amount should be seen as a factor which should allow the owners to avoid the consequences of having agreed that rate and to pursue common law rights as to damages arising on the builder's failure to bring the building works to practical completion by the end of the building period.*

*[32] I reject that submission. In my view an owner should not be permitted to resile from a clear contractual provision because he or she may, with the benefit of hindsight, consider that the subject matter of what was agreed is not acceptable or in his or her best interests. I find that the owners should remain bound by their agreement in connection with liquidated damages.*

The case law makes it clear that where a positive sum of liquidated damages has been stipulated, then this will weigh heavily in favour of a finding that the liquidated damages clause has provided an exhaustive remedy for the contractor's delay.

It should be noted that this position has been interpreted somewhat differently in contracts where amounts of \$nil have been stipulated or N/A inserted into the relevant annexure. However, in such circumstances the mandatory nature of a liquidated damages clause may still extinguish the right to claim general damages.

### **Where the liquidated damages clause is mandatory**

Where a liquidated damages clause is expressed as being mandatory, that is, the contractor 'shall pay' liquidated damages in the event of a delay, then this will also weigh in favour of a finding that the right to claim general damages has been extinguished.

In *Baese Pty Ltd v RA Bracken Building Pty Ltd*, Giles J found that a principal could claim general damages even though the liquidated damages clause specified that a rate of \$nil was payable. This finding was made partially on the basis that the clause in the present case was not 'imperative'.

The issue came again before Giles J in the later case of *CS Phillips Pty Ltd v Boulderstone Hornibrook Pty Ltd*. In that case it was found that the liquidated damages clause did extinguish the right to claim general damages as it specified 'that the sub-contractor "shall" pay or allow the calculated sum'.

Words to the effect that a contractor 'shall pay' the rate specified for liquidated damages will render the clause mandatory and the principal will therefore be barred from electing to claim general damages - even where the parties have specified that the rate is \$nil.

### **Conclusion**

Principals should take care in selecting the rate of liquidated damages which is to be levied in the event of contractor delay. If the rate is a positive sum and the clause is mandatory then the principal will be bound by the chosen rate even if it is significantly lower than the actual loss which has been incurred.