

## Liquidated damages clauses may not always work

Are you a Principal involved in a construction project? Are you positive that your contracts' liquidated damages provisions are enforceable if a contractor fails to complete its work within the specified time?

### Construction Update

A recent WA Court of Appeal decision *Spiers Earthworks Pty Ltd v Landtec Projects Corp Pty Ltd* (No. 2) [2012] WASCA 53 serves as a cautionary tale for Principals. It provides important advice on both how to calculate liquidated damages and what circumstances, at the time of drafting, are taken into account in working out if the liquidated damages provisions are enforceable.

#### Case Overview

In this recent case, Spiers (the Contractor) was engaged to provide "stage-one" works as part of a larger development. Their works were to include earthworks, drainage and the construction of one section of a laneway. The Local Shire had imposed upon Landtec (the Principal) a condition which required the entire laneway to be completed before Landtec could subdivide the lots and sell them.

The liquidated damages were calculated at \$13,846 for every week past the agreed date of completion.

#### The Claim

The Contractor failed to complete the "stage-one" works in the time specified in the contract and the Principal sought to claim its liquidated damages of \$13,846 per week.

#### The Appeal

The Contractor argued that the liquidated damages clause was not enforceable as the delay did not have any adverse financial affect on Landtec. This was due to the local shire's imposed condition of the full-completion of the laneway prior to the subdivision of the lots. They argued that because the lots had not been subdivided, the lots were not sellable and therefore there was no financial impact on Landtec

#### Who does this affect?

This publication provides a case study that all builders and sub-contractors should be aware of when entering into a contract.s.

#### Article Highlights

- Liquidated damages clauses will only cover financial losses and cannot be used as a form of penalty for breaches in the contract.
- Only if ntenation is shown to complete all provisions outlined in the development contracts, can liquidated damages for a breach be awarded.



for finishing late. The liquidated damages clause was a penalty, and unenforceable.

The Court of Appeal analysed the circumstances at the time the Contract was entered into. It decided that:

1. the Principal had no intention of satisfying the Local Shire's condition and completing the construction of the entire laneway prior to the subdivision and sale of the lots; and
2. at the time the Contract was entered into for the "stage- one" works, these works were not on the 'critical path' for the overall development.

### The Outcome

The liquidated damages provision were not enforced by the Court and were struck down as a penalty.

### The Lesson

If the Principal had engaged other contractors to complete construction of the laneway, with a correlating completion dates, then the 'intention' to complete the laneway as prior as per the shire's condition, could have been shown and the liquidated damages clause would not have been struck down as a penalty.

Liquidated damages clauses are a frequent cause of dispute between the parties. If you are unsure as to whether the liquidated damages provisions in your current contracts are enforceable you should seek specialist legal advice BEFORE you enter into contract.

*Disclaimer: The contents of this article is not intended to be relied upon as legal advice.*

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