Liquidated Damages: does ‘$nil’ mean ‘no liability’?

Contractors beware: even if your contract says your liability for liquidated damages is “$Nil”, “N/A” or “Zero”, that may not be the end of the principal’s rights against you for late completion.

Consider this scenario:

You are a contractor late in achieving completion of your construction works.

Your contract states that the rate for liquidated damages is “$Nil”, “N/A” or “Zero”.

Does this mean that you have no liability for late completion?

Below we look at this issue in the context of three different decisions.

What are liquidated damages?

Liquidated damages are a pre-agreed amount of damages payable by the contractor to the principal if completion is delayed due to circumstances for which the contractor has no entitlement to an extension of time.

Often, but not always, a principal’s sole entitlement to compensation for late completion is liquidated damages.

However, a principal may be entitled to recover general (unliquidated) damages for the loss suffered due to late completion where:

- the contract is silent on liability for late completion; or
- there is uncertainty as to the interpretation of the liquidated damages clause.

What a principal will actually recover in a general damages claim for late completion is uncertain. There is a risk that a principal will be better off (or worse off) by recovering
general damages instead of liquidated damages.

An award of general damages could include recovery of:

- increased interest and financing costs;
- losses associated with terminated sales contracts due to late completion; and
- all other costs and losses incurred by the principal due to late completion.

Significantly, the risk of liability for general damages may occur even if the rate for liquidated damages is “$Nil”, “N/A” or “Zero”.

Below we discuss some examples of contractors being liable to principals for late completion, even though the liquidated damages rate in the contract was “$Nil”, “N/A” or “Zero”.

**Liquidated Damages as “$Nil”**

Baese Pty Ltd v RA Bracken Building Pty Ltd (1990) 6 BCL 137

The contract provided that the rate for liquidated damages was “$nil”.

The contractor was late completing the works. The contractor argued that it was not liable for any damages for late completion because the rate for liquidated damages was “$nil”.

Despite the rate for liquidated damages being “$nil”, the contractor was liable for general damages suffered by the principal due to late completion. The Court found that the liquidated damages clause was not an exhaustive remedy for the loss suffered by the principal.

**Liquidated Damages as “N/A”**

Silent Vector Pty Ltd t/as Sizer Builders v Squarcini [2008] WASC 246

The contract provided that the rate for liquidated damages was “N/A”.

It was found that “N/A” simply meant that the liquidated damages clause did not apply.

The principal could claim general damages for the delay caused by the contractor.
Liquidated Damages as “Zero”

Adapt Constructions Pty Ltd v Whittaker [2015] ACTSC 188

The contract provided that the liquidated damages payable for late completion “is a sum calculated using the rate in Item 17 of Appendix A...”.

Item A17 of Appendix A provided:

Rate of Liquidated Damages per week $________________

(if nothing stated, Zero)

The principal suffered loss due to late completion, but could not recover liquidated damages, as the “Rate of Liquidated Damages per week” was, by default, zero.

The principal sought to recover general damages for its loss suffered due to late completion.

The court had to decide what the “blank space” meant in terms of the principal's right to recover general damages.

The court found that although the liquidated damages clause was inoperable, this did not prevent the principal from claiming general damages for the loss it suffered due to late completion.

What does this mean for me?

Both principals and contractors have high financial liability at stake when projects are delayed.

Principals will seek to maximise their recovery for loss suffered due to late completion.

Contractors will want to minimise their liability to the principal for late completion.

Even though a contract may specify that the rate for liquidated damages is “$nil”, “N/A”, or “Zero”, that is not the end of the story for damages for late completion.

In many instances, a principal’s right to general damages for late completion will be preserved.
To safeguard against unexpected liability for damages for late completion, contractors must ensure that their contracts are expressed clearly. If the intent is that liquidated damages are a principal’s sole remedy for delay, then the contract should clearly state that.