

# Liquidated damages clauses are just the beginning – It's not a cap on liability in construction contracts

Liquidated damages clauses are a common feature of construction contracts. They typically provide a fixed amount per day as the amount that can be claimed due to a delay. However, *liquidated damages clauses are often just the beginning and do not provide a cap on liability in many construction contracts.*

When the rate of liquidated damages nominated under the contract is disproportionately small compared to the actual damage incurred as a result of a principal's or contractor's delay, one may be able to elect to claim general, or unliquidated, damages instead of or a supplement to claiming liquidated damages.

The question that arises is whether a party is entitled to elect to claim general damages for a delay caused by a breach of the contract or whether it is limited to a claim for liquidated damages only. That requires a careful consideration of the contract terms.

In *Cappello v Hammond & Simonds NSW Pty Ltd* [2020] NSWSC 1021 at [30] – [32], the Court held that the use of 'NIL', \$0, or a nominal amount such as \$1 in a liquidated damages clause did not exclude a right to claim unliquidated damages for delay. Further, if the clause had sought to make a nominal amount of damages the only remedy for delay, it would have been void under section 18G of the Home Building Act 1989 (NSW) ('HBA').

As the Court noted, two interpretations of a clause in a contract are available, and on one interpretation, the clause would be rendered void, the alternative should be preferred (see *Wentworth Shire Council v Bemax Resources Ltd* (2013) 278 FLR 264, [2013] NSWSC 1047 at [50] citing *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897 at 906D).

The contract interpretation task in *Cappello* was made relatively clear by the HBA. Section 18B(1)(d) of the HBA implies into a contract that the HBA applies to a warranty that the work will be completed within the time stipulated in the contract. Under section 18G of the HBA, a clause of a contract that purports to restrict or remove a person's right in respect of such a warranty is void. However, the Court's comments in *Cappello* highlight that, regardless of whether the HBA applies, one cannot assume that a liquidated damage clause has the effect of preventing a claim for general damages due to a delay seeking a higher amount than the liquidated damages clause amount.

**In our opinion, a contract that the HBA applies cannot validly limit a principal to claiming the liquidated damages amount for a delay due to s18G of the HBA. It should also not be assumed without careful consideration that any liquidated damage clause in any contract limits a party to claiming a liquidated damages amount for a delay.**

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