Nine Lives For A Contractor To Avoid Or Reduce Liquidated Damages

Rachel Mulheron, Lecturer, College of Law, The University of Notre Dame Australia.¹

INTRODUCTION

The price that the contractor must pay for the failure to finish a project by the (adjusted) date for practical completion is ordinarily the payment of liquidated damages. It is not necessary that the principal should have suffered any actual loss or damage for the liquidated damages to be payable. The entitlement of the principal arises upon the occurrence of the triggering event (i.e. the failure to achieve practical completion by the due date).

A liquidated damages clause in a construction contract has benefits for both the principal and the contractor. On the one hand, such a clause is “inserted by the principal for his own protection; for it enables him to recover a fixed sum as compensation for delay instead of facing the difficulty and expense of proving the actual damage which the delay may cause him”.² The other obvious advantage for the principal is that a liquidated damages provision induces the contractor to complete punctually (even if that sounds like a heretical statement that the purpose of the clause is to serve as a penalty).³

Liquidated damages clauses can work for the benefit of the contractor, too:

- a liquidated damages clause makes the tendering process more certain, in that the contractor knows the liability that will result if delay occurs and can price that risk into the tender;
- during the project, the contractor can plan the work more appropriately - if progress is behind schedule, he can make a commercial decision as to whether it is more economical for him to add manpower or otherwise accelerate the works, or pay the liquidated damages to the principal; and
- the liquidated damages clause effectively operates as a ceiling for the damage for which a contractor may be found liable - the damage to the aggrieved principal attributable to the delay could exceed the liquidated damages sum, in which case the contractor is better off with the liquidated damages provision which limits his payout.⁴

Notwithstanding, however, that the liquidated damages clause represents the compensation which the contractor and the principal agreed would be paid upon late completion at the time of executing the contract, there have been many attempts by contractors to avoid or reduce the liquidated damages imposed in the event of late completion.

The purpose of this article is to consider nine arguments which have succeeded for the contractor in that regard.

One contention to avoid the operation of a liquidated damages clause is reliance by the contractor upon the prevention principle. Under that principle, a contractor will not be liable for liquidated damages if some of the delay is due to acts or defaults on the part of the principal (or his agent or employees) unless the extension of time clause allows for extensions to be granted for delays caused by such acts or defaults, and an extension has been validly granted under that clause. The meaning of “acts and defaults” has been widely construed in Australia. It constitutes much more than a breach of contract on the part of the principal, and it is now unarguable that the prevention principle is enlivened upon the ordering of a variation by the principal, regardless of any fault.⁵

It is not proposed to canvass this argument (and the various complexities associated with it, such as where the principal’s delay is only a part cause of the delay, or where the contractor would not have been able to complete on time even in the absence of a delay by the principal). Those issues have been comprehensively dealt with elsewhere and will not be repeated here.⁶

1. NOTICE IS A CONDITION PRECEDENT

Liquidated damages are not recoverable by a principal in circumstances where:

(1) a notice from the architect/superintendent/engineer (“ASE”) to the contractor stating a date which, in the opinion of the ASE, the works ought reasonably to have been brought to practical completion, is a condition precedent to the deduction of liquidated damages; and
(2) such a notice is not given.

Only some of the standard form Australian and English contracts require such notices by the ASE:
Where a notice is required, there are two categories of cases. In the first category, the notice by the ASE is a condition precedent to the deduction of liquidated damages so that the absence of a notice means liquidated damages have been lost. In the second category, the converse has been held to be true so that even without the notice, liquidated damages can be levied. At the outset, it should be noted that the weight of authority is with the former category.

Where liquidated damages have been lost

In Phillip Lipman Pty Ltd v Bay Home Unit Pty Ltd, the contractor agreed to construct a 34 home unit development at Manly. The contract the subject of the project was the standard form building contract JCC B 1985. A dispute arose between the contractor and the principal as to the latter’s entitlement to deduct liquidated damages. The relevant dates and events were as follows:

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>13 January 1993</td>
<td>date for practical completion</td>
</tr>
<tr>
<td>18 February 1993</td>
<td>progress certificate no. 12 certifies $817,215 as payable; accompanying letter refers to &quot;provisional amount&quot; of $102,857 for liquidated damages; principal pays certificate in full without deduction</td>
</tr>
<tr>
<td>16 March 1993</td>
<td>progress certificate no. 13 certifies $596,974 as payable; accompanying letter refers to &quot;provisional amount&quot; of $262,856 for liquidated damages; principal again pays certificate in full without deduction</td>
</tr>
<tr>
<td>26 March 1993</td>
<td>date of practical completion</td>
</tr>
<tr>
<td>19 April 1993</td>
<td>progress certificate no. 14 certifies $613,221 as payable; accompanying letter refers to &quot;provisional amount&quot; of $411,429 for liquidated damages; principal deducts liquidated damages</td>
</tr>
</tbody>
</table>
Upon the proprietor deducting liquidated damages in the sum of $411,429 from progress certificate no. 14, the contractor sought summary judgment for the full amount of that progress certificate on the ground that the architect had not, at any stage, given a notice pursuant to clause 10.14 of JCC B 1985. The contractor argued that the letter of 19 April 1993 did not constitute an opinion by the architect as to when the works ought reasonably to have been brought to practical completion, and that the consequent deduction by the proprietor was not authorised by the contract.

The court agreed with that contention. There was no statement in the letter to indicate when the architect thought practical completion should have been achieved. All three letters clearly based the calculation of liquidated damages upon the date of 13 January 1993 (it was common ground between the parties that this was the date for practical completion). However, it was not enough to do a mere calculation of liquidated damages which used, as its basis, the original date for practical completion. The issue of a notice by the architect of the type described in clause 10.14 was a condition precedent to the deduction of liquidated damages by the proprietor.  

A written notice from the ASE to the contractor has also been held to be a condition precedent to the proprietor’s entitlement to impose liquidated damages under the standard form building contract E5b and the Standard Form Conditions of Contract SBW1.  

**BOX 3**

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 October 1991</td>
<td>date by which the Architect nominated the works ought reasonably to have been brought to practical completion</td>
</tr>
<tr>
<td>22 November 1991</td>
<td>the adjusted date for practical completion set by the arbitrators</td>
</tr>
<tr>
<td>1 May 1992</td>
<td>date of practical completion</td>
</tr>
<tr>
<td>7 May 1992</td>
<td>architect issued notice under clause 10.14.01: nominated date of 3 October as to when works ought to have been practically completed</td>
</tr>
<tr>
<td>12 November 1993</td>
<td>award of arbitrators declaring various extensions of time</td>
</tr>
</tbody>
</table>

The contractor argued that because the arbitrators granted extensions of time which resulted in the date for practical completion being pushed out to 22 November 1991, the date specified by the architect in its notice by which the works ought reasonably to have been brought to practical completion (i.e. 3 October 1991) was earlier than the date for practical completion. Thus, the contractor argued that clause 10.14.01 was contravened and that the principal had lost the right to liquidated damages in that event. That was rejected. His Honour said:

“*It could never have been the contractual intention of the parties that any extension of time granted by Arbitrators having the effect of delaying the Date for Practical Completion, no doubt at the Contractor’s request, could produce the technical as distinct from substantive consequence that no liquidated damages were payable.*”

The tenor of these decisions is that, upon the issue of a notice certifying practical completion or within a short time thereafter, the contractor is entitled to know where it stands as to liquidated damages. By incorporating the requirement for such a notice, the parties’ intention is to introduce a degree of certainty about the respective financial positions of the principal and contractor following the achievement of practical completion.

As Judge John Newey QC said in *A Bell & Son (Paddington) Ltd v CBF Residential Care & Housing Association*:

“I think that this construction accords with the setting of the contract: contractors and employers using it need above all certainty and the issue of a fresh certificate will provide it.”

### Right to liquidated damages retained

Clause 10.14.01 of the standard form building contract JCC provides that the date nominated by the architect should not be a date earlier than the date for practical completion.

However, the architect’s notice will not fail as a condition precedent if the date for practical completion is subsequently extended by an arbitrator, so that it falls after the date fixed by the architect. So held Cole J in *Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd.* The scenario in that case is outlined in the box below:
Moreover, where the requisite notice is not given by the ASE, the principal may still have its entitlement to damages preserved if it gives a notice of dispute to the contractor within the time provided in the contract. The ambit of the dispute which is referred to arbitration must cover the entitlement of the principal to liquidated damages. In that event, the proprietor can take advantage of the arbitration provision in the contract to overcome the failure of the ASE to give the notice.

That was the outcome permitted by Smart J in *FH Compton & Sons Operations Pty Ltd v Umpty Pty Ltd.* The architect had failed to give a notice under clause 27 of the E5b contract stating his opinion as to when the works ought reasonably to have been completed. However, the principal asserted an entitlement to liquidated damages.

Clause 32 of the contract provided for the referral of disputes to arbitration. His Honour Smart J considered that if a notice of dispute is given by the principal concerning the moneys owing by one party to the other, the arbitrators had jurisdiction to decide all matters necessary to resolve the dispute, including the question of liquidated damages. As a result, the architect’s failure to give notice under clause 27 did not lead to the loss of the principal’s right to liquidated damages.16

The absence of a valid (or any) certificate or notice may have no ultimate consequence where either of the parties exercises its right to invoke the jurisdiction of an arbitrator to determine the amount of outstanding moneys in dispute.17

2. WAIVER

**General**

Where it is obvious that the works will not be practically completed by the contractual date, the contractor may claim to have been led to expect that the liquidated damages clause would not be enforced.

The question is whether an express undertaking by the principal (or its agents or employees) not to enforce the right to liquidated damages constitutes an effective waiver of the principal’s entitlement.

The better view appears to be that a contractor has a good defence to a claim for liquidated damages if the principal undertakes not to levy liquidated damages, notwithstanding that the contractor has given no consideration for the promise.18 In practice, waiver is very difficult to prove. This is especially so in light of clauses in the standard contracts that require a principal’s waiver to be in writing.19

**Where principal fails to deduct liquidated damages from progress certificates**

A principal faced with the problem of a contractor who is delayed and financially strapped may prefer to nurse the contractor through to completion, rather than risk the contractor’s financial failure by deducting liquidated damages from progress certificates and so reducing its cashflow. It may be essential for the practical viability of the contract that the contractor continues to receive full progress payments so that it is enabled to perform its obligations. Otherwise, the efficient performance or completion of the contract may be put at risk, which is not in the interests of either party.20

If the contract provides that liquidated damages are to be deducted from time to time as progress payments are made, and the principal fails to deduct them, the principal may be disentitled from recovering the liquidated damages at a later stage from a subsequent certificate. This result depends upon both the wording of the particular clause and the circumstances giving rise to the principal’s conduct in not levying the liquidated damages, as the following older cases demonstrate:

### BOX 4

<table>
<thead>
<tr>
<th>THE CASE</th>
<th>CLAUSE</th>
<th>CONDUCT OF THE PRINCIPAL</th>
<th>WERE LIQ. DAMAGES LOST?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Laidlaw v Hastings Pier Co. (1874) Hudson’s BC 13</td>
<td>C to “forfeit and pay to [P] £20 a week, to be paid to and retained by [P] ... for each and every week during which such work shall remain unfinished.”</td>
<td>After date for completion passed, interim payments made by P to C for 14 months without retaining any sum for liquidated damages.</td>
<td>Yes21</td>
</tr>
<tr>
<td>Baskett v Bendigo Gold-Dredging Co (1902) 21 NZLR 166</td>
<td>“the sum of £2 for every working day ... will be deducted from any money due to [C] by way of liquidated damages ... ”</td>
<td>P paid moneys (three separate certificates over a 7 month period) to B without deducting liquidated damages.</td>
<td>Yes22</td>
</tr>
<tr>
<td>Clydebank Engineering &amp; Shipbuilding Co. Ltd v Yzquierdo y Castaneda [1905] AC 6</td>
<td>“The penalty for later delivery [of torpedo boats] shall be at the rate of £500 per week for each vessel.”</td>
<td>The boats were required urgently for war by the Spanish Government, and it was not prepared to risk further delay in delivery by deducting liquidated damages. However, the Government claimed liquidated damages 5 years after practical completion.</td>
<td>No23</td>
</tr>
</tbody>
</table>
In Australia, in the absence of any contractual provision to the contrary, the view has been expressed in *Aurel Forass Ltd v Graham Karp Developments Ltd* that waiver is not a basis for making a liquidated damages provision inapplicable.  

In order to expressly clarify the position, certain Australian standard form construction contracts provide that the issue of a payment certificate for the full amount does not prejudice any claim or negate any remedy by the principal.  

However, while the commercial intent of these clauses is undoubtedly to ensure that the principal will not lose the right to liquidated damages by paying the contractor moneys otherwise due to him without deduction of liquidated damages, a recent decision of the Queensland Court of Appeal shows how carefully the subject clauses must be construed in order to achieve that result for the principal. That decision was *Blue Chip Pty Ltd v Concrete Constructions Group Pty Ltd* and the contract under consideration was AS2124-1992.  

Concrete Constructions was engaged by Blue Chip to build an apartment building in Brisbane. There were delays on the project which meant that when progress claim no. 16 was received, work had run 126 days beyond the date for practical completion. At that point, the total amount of liquidated damages then claimable by Blue Chip was $630,000. The superintendent told the principal this, and asked the principal whether it wished the liquidated damages amount to be deducted from certificate no. 16. However, Blue Chip requested that the accrued liquidated damages not be deducted from progress certificate no. 16, but did ask the superintendent to reserve its rights to deduct the amounts in the event that the principal “determines such a deduction is appropriate”. The superintendent did this in a covering letter to the contractor which accompanied progress certificate no. 16 in the sum of $887,304.  

However, in a turnaround about two weeks later, Blue Chip instructed the superintendent to inform Concrete Constructions that the overrun was then 154 days, the total liquidated damages which had accrued to that point was $770,000, and that this would be deducted from progress certificate no. 16. A cheque for the balance of $117,304 was then handed to the contractor.  

The contractor promptly objected and notified Blue Chip that it was in substantial breach of the contract by failing to pay that amount shown in progress certificate no. 16.  

Blue Chip responded that, under the contract, it had the power to reserve the right to deduct liquidated damages from those amounts certified by the superintendent for payment to the contractor. The difficulty with that argument was that there was no express provision allowing the principal to deduct liquidated damages in the AS2124-1992 contract. At best, the superintendent was the person who had to allow, in any certificate issued under clause 42.1 of the contract, amounts due from the principal to the contractor. However, Blue Chip referred to clause 35.6 of the contract, which required the principal to pay back any excess liquidated damages where “the principal has deducted liquidated damages, [and] the time for practical completion is extended.” If there was no express provision allowing it to deduct liquidated damages, then Blue Chip argued that clause 35.6 must contemplate that it had the right to do so, otherwise that clause would not refer to the “principal” deducting liquidated damages. Therefore, Blue Chip contended that there ought to be implied into the contract a power on the part of the principal to make a deduction for liquidated damages from the amount that the superintendent had certified as payable, in order to make sense of clause 35.6.  

The Court of Appeal unanimously rejected that contention and declined to imply the term. Its reasons were essentially twofold:  

1. Progress certificate no. 16, as with all progress certificates under AS2124-1992, was always intended to be provisional only. The fact that Blue Chip had to pay the full amount of progress certificate no. 16 did not determine its right, further down the track, to deduct liquidated damages.  

2. The court was simply not prepared to imply the term that Blue Chip had the right to deduct liquidated damages because it considered that the contract made sense enough without it. The court said that clause 35.6, which referred to a deduction of liquidated damages by the principal, was satisfied if the deduction was made by the architect at the principal’s insistence. Also, the court again took the opportunity to state that, in a contract such as AS2124 which contains extensive and detailed provisions regulating the rights of the parties, to imply a term is most uncommon.  

The decision places the onus squarely on the principal to ensure that if liquidated damages have accrued, it must insist that the architect deduct the amount from each progress certificate. There is absolutely no other right under any other provisions of AS2124-1992 by which the principal is entitled to deduct those damages itself. If the principal missed the opportunity, it would have to wait for a later progress claim or until the final claim was certified, and insist upon the deduction then.  

The decision has since been endorsed by the Supreme Court of New South Wales in *Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd* where Rolfe J had occasion to consider the almost identical terms of AS2545-1993. His Honour stated:  

“In my opinion Blue Chip is clearly authority for the proposition that the defendant was not entitled to deduct liquidated damages ... from a progress claim, and it is consistent with other authority to which I have referred. Of more importance, in my
opinion, is that it is consistent with the words of the contract ... The failure by the defendant to avail itself of the services of a person in the role of a certifier merely returns the parties to the position where there is an obligation on the defendant to pay against the progress certificate. Thus the defendant has, by failing to rely upon certificates issued by its representative, disentitled itself to the advantage of such a certificate ... As I understand it Blue Chip is not authority for the proposition that the superintendent in that case could not have deducted the amount of liquidated damages, but rather that as this had not been done the obligation was to pay the amount specified in the certificate.”

These decisions illustrate the dilemma whereby the principal is permitted by the machinery of the contract to deduct liquidated damages from amounts certified in progress certificates, but would prefer not to invoke that procedure to ensure the continued financial well-being of the contractor, and consequently of the project. The principal must ensure that payment without deduction does not give rise to a waiver of the right to liquidated damages at a later stage of the project.

3. GRANT OF AN EXTENSION OF TIME

Obviously, a principal will not be entitled to liquidated damages where an extension of time has been granted for the delaying event.

However, there are two scenarios which are not quite so obvious whereby a principal may lose its right to liquidated damages in circumstances where an extension of time has been granted.

3.1 A deemed extension of time

The principal will be prevented from claiming liquidated damages where an extension of time has been deemed. That may well occur without the principal’s realisation.

In that respect, a useful example is provided by clause 9 of the JCC contract. Clauses 9.01 and 9.02 provide that, where the works are delayed, the contractor is required to give a notice to the principal of the cause of the delay, and then give a second notice stating what the contractor believes to be a fair and reasonable time by which the time for practical completion of the works should be extended.

Under clause 9.03, the architect must determine the extension of time within 20 days of receiving the contractor’s second notice. If the architect does not do so, then clause 9.04 provides as follows:

“9.04 Deemed Extension
If the Architect does not notify the Builder in terms of clause 9.03 the time for the Practical Completion of the Works or any Separable Part thereof shall be deemed to be extended by the time stated in the Builder’s notice given under Clause 9.02.”

Pursuant to clause 9.04, the failure of the architect to deal with an extension of time claim operates to prevent the principal claiming liquidated damages for that period by which the date for practical completion is deemed to be extended.

These clauses of JCC A 1985 were considered by Cole J in Northbourne Constructions Pty Ltd v Civil & Civic Pty Ltd where His Honour said:

“Bearing in mind the provisions of clause 9.04 which automatically extends time by the amount notified by the builder under clause 9.02 if the architect does not notify the contractor in terms of clause 9.03, the parties must be in a position to know with certainty whether clause 9.03 has been complied with. This is only achieved by a unified construction of clause 9.03 which requires both determination and notification within the 20 day period referred to.”

Another standard form contract which contains a deemed extension of time provision is in E5b (clause 24(c)).

There is no equivalent provision in the NPWC contract. Clause 35.4 of NPWC3 does not specify a time within which the superintendent is to determine an extension of time claim whatsoever.

In clause 35.5 of AS2124-1992, all the contract says is that failure of the superintendent to grant an extension of time within 28 days does not cause the date for practical completion to be set at large. Therefore, the right to liquidated damages is not lost in that event.

3.2 What does the EOT cover?

It is important to construe carefully the extension of time claim and liquidated damages clause to determine for what the extension of time has been granted.

The facts of Surrey Heath Borough Council v Lovell Construction and Hayden Young Ltd demonstrate this. The contractor Lovell Construction agreed to construct an office building for the Surrey Heath Borough Council. Before practical completion was achieved, the building was partially destroyed by fire. Allegedly, this occurred because of the negligence of the electrical subcontractors engaged by Lovell. Lovell rebuilt the damaged roof and top floor of the building.

Because of the fire and other unrelated events, the principal granted to Lovell 67 weeks’ extension of time such that the date for practical completion was extended to the date of practical completion. Therefore, no liquidated damages were payable by the contractor.

However, various losses flowed from that fire for the council, principally because it was unable to vacate the old premises on the date it had expected to take up occupation of the new building. Some of those losses are set out in the box below:
BOX 5

- interest on capital invested up to the date of expected completion.
- furniture storage costs.
- additional staff costs.
- continued car parking charges incurred at the old premises.
- additional costs of repairs and modifications to telephone installation at the old premises.
- additional maintenance costs incurred at the old premises.

Clause 24 of the contract between the parties provided, in part:

"24 Damages for Non-Completion.

..."

24.2.1 Subject to the issue of a notice under clause 24.1 the Contractor shall... pay or allow to the Employer the whole or part of a sum calculated at the rate stated in Appendix 1 as liquidated and ascertained damages for the period between the Completion Date and the Date of Practical Completion ..."

The court regarded it as settled that clause 24 was exhaustive so far as damages for non-completion were concerned. The clause was exhaustive of all damages which the principal could recover for late completion, liquidated or unliquidated.

As no liquidated damages were payable, the question was whether the heads of damage referred to in the box above were damages for non-completion. If those items were not in respect of loss or damage for late completion, the council could recover them (subject to actions in tort or contract being made out against the contractor). However, if those heads of loss or damage caused by the fire were to be attributed as damages for late completion, the council could not recover those heads of damage either as liquidated damages (because there was no late completion) or unliquidated damages (because clause 24 was a code).

The court concluded that damage occasioned by fire was a relevant event for the purposes of an extension of time. Valid extensions of time had been granted in respect of that delaying event. Further, all of the heads of damage referred to in Box 5 were damages for late completion for which a full extension of time had been granted. Therefore, none of those damages were recoverable by the council.

The view that the council was unable to recover the heads of damage as unliquidated damages because the liquidated damages clause represented a code has not been followed in Australia, at least as far as the JCC contract is concerned. In *Baese Pty Ltd v RA Bracken Building Pty Ltd*, Giles J considered that if the architect did not give notice under clause 10.14, then the principal could not recover liquidated damages. However, in that event, the principal would be entitled to rely upon its common law right to unliquidated damages. In this respect, Giles J did not believe clause 10.14 to be a code.

4. LIQUIDATED DAMAGES CLAUSE IS A PENALTY

An agreed liquidated damages clause will not be enforced by the courts if the clause is regarded as a penalty. Equity will intervene to prevent a party imposing a penalty upon the other party for breach of contract.

In construction contracts, there are two possible methods by which a principal will seek to obtain an ascertained or pre-determined monetary recompense for damage suffered as a result of a breach by the contractor:

1. negotiating a formula for liquidated damages and levying liquidated damages under that clause; and
2. forfeiting retention moneys.

Whether each of these categories of pre-ascertained compensation constitute a penalty is governed by the same principles of law which were expressed so succinctly by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd v New Garage & Motor Co. Ltd*. The benefit of a liquidated damages clause for the principal is that it does not have to prove its loss. A good example of this occurred in *BFI Group v DCB Integration Systems*. The contractor DCB ran 6 weeks late installing roller doors on vehicle bays at a transport depot. The principal BFI suffered no loss since it had to fit out the rest of the building and was still doing that for the entire 6
week period. However, the principal purport to counterclaim for liquidated damages.

The arbitrator held that no liquidated damages were payable by the contractor because the principal could not prove any loss, and the liquidated damages clause presupposed some loss. If, and only if, that hurdle could be overcome, the liquidated damages clause quantified in advance the loss suffered.

However, His Honour Judge Davies QC considered that view to be wrong at law. The trigger for the liquidated damages clause was simply delay beyond a certain point in time. Once that occurred, the clause applied.

The arbitrator had found that if it had applied, the clause was not a penalty, it was a genuine pre-estimate of damage. In those circumstances, the Court held that the principal’s entitlement to liquidated damages was enforceable.

It is now convenient to consider those Australian cases in which the courts have had to consider whether the two types of pre-ascertained damage referred to above constitute penalties.

Formula for liquidated damages

In Multiplex Constructions Pty Ltd v Abgarus Pty Ltd special condition 16 of the contract contained a liquidated damages clause by which the liquidated damages were to be calculated by means of the following formula:

“`A Interest at a rate per annum equal to the maximum rate of interest then charged by Trading Banks on overdraft accounts over $100,000 calculated on daily balances of the total of the items listed hereunder for the period commencing on the date so specified by the Architect during which the Works shall remain or have remained not brought to Practical Completion:

(i) $30 million being the value of the Site at the date of this agreement.
(ii) Payments made by the Proprietor under any contract relating to the execution of the Works.
(iii) Preliminary expenses incurred by the Proprietor.
(iv) Rates and taxes and other statutory charges assessed against or incurred by the Proprietor in connection with the Site or the Works.
(v) Reasonable costs and expenses incurred by the Proprietor in enforcing or attempting to enforce any contract relating to the execution of the Works.
(vi) Reasonable costs and expenses incurred by the Proprietor in insuring the Works.
(vii) Fees paid to architects, surveyors, engineers, consultants, project managers, and other experts engaged in the execution of the Works.
(viii) Salaries paid to the building clerks of works and mechanical clerks of works.

(ix) All other cost and expenses incurred by the Proprietor which were reasonably necessary to the execution of the Works ...’”

The architect certified that the construction of a Sydney office building was brought to practical completion almost seven months after the date for practical completion, and that the contractor was liable to pay the sum of $4,500,000 by way of liquidated damages. The contractor alleged that the liquidated damages clause was penal and thus should be struck down.

The contractor’s first argument was that the clause addressed wrong aspects for determining a pre-estimate of damage flowing from a breach of contract consisting of delayed completions. The contractor argued that the proper measure of damages should be determined by reference to the “obvious losses” resulting from a delay in completion. These, it was alleged, were likely losses where the principal was unable to lease the building while the delays occurred, viz lost or deferred rentals, or a deferred receipt of the sale price if the building was to be sold on completion. What the special conditions prescribed were a series of holding costs of accumulated expenditure for the period of the delay.

The court rejected that argument. The clause was a valid liquidated damages provision. Whilst both parties must have known at the date of execution that a delay in completion would result in the deferred receipt of rental or sale moneys, the parties must equally have known at the date of the contract that delay in achieving practical completion would necessarily result in the principal incurring additional holding costs until realisation of the benefit of the project via sale or lease. Further, there were no Australian or English authorities to compel a view that liquidated damages could only be calculated by reference to the loss or deferment of income, or that holding charges were an inappropriate measure of damage.

Second, the principal was permitted under the contract to have access to certain areas of the building which had achieved a certain state of completion so that it could go about its business of fitting the building out for sale and lease. However, the liquidated damages clause gave no credit for that benefit, so (it was argued by the contractor) the clause was not a genuine pre-estimate.

Cole J also rejected that argument. The principal’s access to the building to fit out was not a “benefit”, it was a right elsewhere under the contract so it was quite separate and irrelevant to the liquidated damages clause.

The contractor forfeits retention moneys

In the tenth edition of Hudson, the author suggested that a provision for forfeiture of retention moneys in the event of late completion would constitute a penalty, since there should be a reduction in potential damage for late completion as the work nears completion, whereas the amount of retention moneys increases progressively in amount as the work is carried out. As such, it was suggested that a forfeiture of retention moneys could not consist a genuine pre-estimate of damage.
However, in Australia, the weight of authority has been to preserve the forfeiture of retention moneys as a genuine pre-estimate. In Kratzmann Holdings Pty Ltd v University of Queensland, the contract provided for a retention of 10% from each progress payment, with the aggregate not to exceed 5% of the contract sum. At the date of termination of the contract, the retention moneys totalled $48,000. The Full Court of Queensland held that since the retention moneys could never exceed 5% of the contract sum, and since outstanding progress payments could never exceed more than one month’s work, the amount forfeited at any given point in time would be moderate when compared with the contract sum. As such, it did not constitute a penalty.

In the eleventh edition of Hudson, the learned author notes the view expressed in Kratzmann to be “well-reasoned and persuasive” and that the modern tendency is not to subject forfeiture provisions to too close analysis.

5. USE AND OCCUPATION OF THE WORKS

Under the scheme of modern building contracts, liquidated damages cease upon practical completion of the project. However, liquidated damages may be reduced, or even avoided, if the works are used or occupied prior to that date.

There are two possible scenarios:

5.1 Practical Completion is deemed to have occurred

The harshest category of case is where practical completion is expressly deemed in circumstances where the principal occupies and/or uses the works prior to actual practical completion being achieved. As from that deemed date of practical completion, the principal’s right to liquidated damages is curtailed.

This is provided in clause 9.10.04 of the JCC contract. The clause provides that if the principal occupies or uses the works (or part thereof) prior to practical completion without a written agreement or notice between the principal and contractor, the whole of the works shall be deemed to have reached practical completion on that date. However slight or limited the occupation or use of the works may be, the works are deemed to have reached practical completion and no liquidated damages can thereafter be deducted.

Under clause 25(f) of the ESb contract, there is also a provision for deemed practical completion if the principal “occupies and/or uses the Works prior to the issue by the Architect of the Notice of Practical Completion”. In contrast to the JCC, the omission in ESb of the words “or part thereof” raises the question as to what happens to the principal’s entitlement to liquidated damages if only part of the works is used or occupied. If the principal only occupies one level of a four level building prior to practical completion, it is arguable that, under ESb, the principal’s entitlement to liquidated damages is preserved, and that there has been no deemed practical completion in that event.

None of the other Australian standard contracts provide for deemed practical completion. In fact, clause 35.3 of NPWC3 and clause 9.7.3 of NZ S 3910-1987 specifically provide that use or occupancy by the principal prior to practical completion shall not limit or affect the contractor’s obligations under the contract.

5.2 Partial occupation either with consent or without consent

Some of the modern sophisticated construction contracts provide that, in the case of partial reoccupation by the owner, the amount of liquidated damages will be rateably reduced in proportion to the relative value of the occupied part to the value of the whole works.

The last paragraph of clause 35.5 of NPWC3 provides for the reduction of liquidated damages by “an amount determined by the Superintendent” (i.e. not necessarily rateably).

Clause 18 of the 1980 JCT form also provides for partial occupation resulting from entry into a part of the project by the owner with the consent of the contractor prior to completion of the whole. If that occurs, the liquidated damages sums stated for the whole project will be rateably reduced in proportion to the relative value of the occupied part to the value of the whole.

Under AS2124-1992, where part of the works has reached practical completion which the principal wants to use, there is a power given to the superintendent to create separable portions. In respect of that separable portion which has reached practical completion, the liquidated damages shall be reduced to the proportion which the value of the separable portion bears to the value of the whole of the works (clause 35.3). However, this depends upon either the parties agreeing upon the creation of a separable portion, or the superintendent creating one himself. If neither of those events occurs, it is unclear under AS2124-1992 how the principal’s entitlement to liquidated damages will be affected by early use or occupation of the works.

In circumstances where a liquidated damages clause gives no credit for a “benefit” which the proprietor may derive from being able to engage in a fit out during the period of delayed practical completion, the clause will not fail as a genuine pre-estimate of damage. In Multiplex Constructions Pty Ltd v Abgarus Pty Ltd, the contractor agreed to the proprietor having access “to each floor of the works as it becomes sufficiently complete to allow tenancy fit out to proceed.” That was without prejudice to the date for practical completion.

Cole J held that if there was any such benefit, that fell within the area of discretion which the law allows to the parties in agreeing upon a quantum of damage, in that “the very circumstance that the liquidated damages are a ‘pre-estimate’ involves that it will not be precise”. Any benefit derived by the principal by that ability to fit out during the period of delay fell within the tolerance allowed to the parties when setting their genuine pre-estimate.
6. LIQUIDATED DAMAGES CLAUSE VOID FOR UNCERTAINTY

This argument is very much dependant upon the facts and the clause in question. It was successfully argued in Arnhold & Co. Ltd v Attorney General (Hong Kong) ("Arnhold").50

Clause 63 was the liquidated damages clause in that contract. The relevant parts of that clause, together with the appendix and special condition 2, are set out below:

"63(1) If the Contractor shall fail to complete the Works or any portion thereof within the time prescribed by clause 58 or extended time, then the contractor shall pay to Government the sum stated in the Appendix to the Form of Tender as liquidated damages for such default [emphasis added] ..."

63(4) If before the completion the Works, any part of the Works, is capable of occupation or use by Government and has been certified by the engineer as completed pursuant to clause 64, the liquidated damages (if any) prescribed for delay to the whole of the works shall for any period of delay after such certification be reduced in the proportion, which the value of the part so certified bears to the value of the whole of the Works.

Appendix Amount of Liquidated Damages ...
$HK400.00 (min) per day
$HK2,700.00 (max)

Special Condition 2:
Notwithstanding the provisions of clause 63(4) hereof, the resulting amount of liquidated damages after reduction in accordance with that clause shall not be less than the minimum amount of liquidated damages as stated in the Form of Tender."

The intention of the parties from the above clauses was that if the whole of the works was delayed, the sum of $2,700 per day would apply. However, if the government was able to use or occupy the works, the liquidated damages would be reduced in the proportion which the value of the part capable of occupation bore to the value of the works. That sum was supposed to be reduced rateably from $2,700 down to a minimum of $400 per day.

Obviously, clause 63(1) contained a mistake by including the words "or any portion thereof". The clause should only have referred to the works as a whole, as clause 63(4) dealt with what was to happen if some part of the works had been completed and was either being used by the Government or capable of being occupied. Under clause 63(4), the liquidated damages were to be reduced proportionately, having regard to the value of work completed, down to a figure of $HK400 (which figure applied whatever the state of completion of the works).

By inclusion of the words "or any portion thereof", the sum for liquidated damages could range between $400 and $2,700 for any day that the whole of the works was delayed or a portion was delayed. There was nothing in the contract to fix the liquidated damages between those two sums, or explain how the fixing was to be done. Hence, the clause failed for uncertainty, and no liquidated damages were recoverable for a delay that amounted to 393 days.

This decision has received criticism by writers51 on the basis that the commercial intention of the parties was perfectly clear and the slip in clause 63(1) was capable of rectification.

Subsequently, in 1993, in the case of Philips Hong Kong Ltd v Attorney General of Hong Kong ("Philips"),52 the Privy Council had cause to consider clause 29(4) of the contract between the contractor Philips and the Government of Hong Kong in respect of a highway project. The clause provided that liquidated damages were to be reduced in proportion to the value of that completed section of the work as was required by the Government and capable of occupation and use.

Ultimately, it was held that clause 29(4) did not apply to the works since they were not of a kind which in ordinary parlance were capable of "occupation" or "use" by the Government prior to completion.53 However, the Privy Council considered that the rateably reduced liquidated damages provision had an ascertainable meaning and was therefore valid.54

As an alternative ground in Arnhold, Special Condition 2 was considered by the High Court of Hong Kong to be a penalty. If the percentage of the works certified as capable of occupation exceeded 85% ($2,300/ $2,700), then the amount of liquidated damages should ultimately decrease to zero. However, with $400 stipulated as the minimum liquidated damages applicable per day, the court declared the operation of Special Condition 2 to be a penalty rather than a genuine pre-estimate of loss.55

This conclusion may be contrasted to that of the Privy Council in Philips. The proviso to Clause 29 read as follows:

"Notwithstanding any provisions of this clause or of the Contract providing for the reduction in liquidated damages for the early completion of any Section of the Works, the resulting amount of liquidated damages shall not be less than the minimum amount of liquidated damages as stated in the Form of Tender."

The contractor argued that the provision made the entire clause 29 penal because the reduced sliding scale stopped at a minimum level, no matter how close the work was to completion. The Privy Council rejected this and noted that the correct test is whether the provision was a genuine pre-estimate of what the loss is likely to be, not whether there are possible circumstances where a lesser loss would be suffered.56
In any event, the government would continue to incur expenses (supervision costs, architect’s fees and the like) irrespective of how little of the work was left outstanding. Even if the minimum liquidated damages were greater than those continuing expenses of the government, the minimum figure was a genuine pre-estimate of those expenses.57

7. NO ENTITLEMENT AFTER TERMINATION

Whether the principal ("P") is entitled to recover liquidated damages from the first contractor ("C1") where the employment of C1 is terminated and a second contractor ("C2") is engaged to complete the project depends upon which of the following applies:

1. Termination of C1’s employment prior to the date for practical completion;
2. Termination of C1’s employment post the date for practical completion;
3. An express provision in the contract governing the principal’s rights after termination of C1’s employment.

### Diagram 1

<table>
<thead>
<tr>
<th>Date for Practical Completion</th>
<th>Date of Practical Completion</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Termination 1</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td>$A</td>
</tr>
<tr>
<td>$B</td>
<td>$C</td>
</tr>
</tbody>
</table>

Dealing with each of these in turn:

7.1 Termination prior to the date for practical completion

The better view appears to be that if C1 repudiates the contract prior to the date for practical completion (or otherwise commits a breach entitling the principal to determine C1’s employment), and C2 completes the project and the date of practical completion is later than the contractual date for practical completion, C1 is not liable for liquidated damages ($A) occasioned by the late completion.58

This fact scenario arose in *British Glanzstoff Manufacturing Co. Ltd v General Accident Fire and Life Assurance Corporation Ltd*.59 C1 became bankrupt and suspended the works prior to the date for practical completion. C2 completed the works but completion was delayed until 6 weeks after the date for practical completion specified in the original contract. P claimed from C1 liquidated damages in respect of that delay. The House of Lords held that the liquidated damages clause could not be relied upon by P. The clause contemplated completion by C1 without his being dismissed, and it was wrong (without express provision) to apply the clause to completion by another contractor.60

An alternative reason for this conclusion is that once P has prevented the contractor from completing the contract, the contract is no longer on foot. In that event, the principal cannot enforce the liquidated damages clause when liquidated damages eventually start to accrue.61 Moreover, although rights accrued prior to the termination, including rights of payment up to that point, are enforceable by the principal, there were no accrued liquidated damages prior to termination of C1’s contract.

7.2 Termination post the date for practical completion

It follows from the above that if C1’s services are terminated after the date for practical completion but before the date of practical completion, the better view seems to be that the liquidated damages accrued to the date of termination ($B) are recoverable by P from C1.62

However, thereafter the contractor’s liability to pay damages ($C) for late completion depends upon P proving its damage (if any) as general damages63 or by relying on an express provision of the types described below.

7.3 Express provision governing rights

If the principal terminates pursuant to an express right of termination in the contract, the principal’s right
to damages depends upon the wording of the termination clause. An early example is provided by *Re Yeadon Waterworks Co. and Wright.* The liquidated damages clause permitted P:

"to terminate the contract, so far as respects the performance of the same under the directions and by means of the contractor, but without thereby affecting in any other respects the liabilities of the said contractor." [emphasis added]

C2 took over the works after the contract was terminated because of undue delay on the part of C1. C2 agreed to complete the works in accordance with the original contract. However, because of C1’s delay, C2 could not complete by the contractual date. The Divisional Court held that P’s right to deduct liquidated damages from retention moneys was kept alive by the words bolded above. This meant that C2 was subject to the deduction of liquidated damages until actual completion.

Under clause 35.6 of AS2124, liquidated damages are recoverable by the principal until the contract is terminated under clause 44 (if that occurs before the date of practical completion). Following termination, the rights of the parties are as they would be following a common law termination: clause 44.10. Therefore, for any delay occurring after the termination, the principal will be required to prove his damages (if any) by seeking unliquidated damages.

8. **CHALLENGE THE STARTING DATE (I.E. THE DATE FOR PRACTICAL COMPLETION)**

There must be a date from which liquidated damages can run. The time usually starts to run from the day after the date for practical completion. There are commonly two problems with setting that date for practical completion that may beset a principal.

8.1 **No initial date for practical completion**

First, there may not be any such date, or it may be imperfectly expressed.

If the parties have forgotten or omitted to insert the date for completion of the works into the contract, liquidated damages will not be recoverable. In *Kemp v Rose,* no date for completion was inserted. The architect had told each party the date, but that was inadmissible evidence, so liquidated damages were irrecoverable.

Similar difficulties can occur where a single sum is stipulated for liquidated damages but the works are to be completed in sections at different times. If the provision cannot effectively and with certainty divide the single sum between the sections, a claim for liquidated damages will fail. This happened in *Bruno Zornow (Builders) Ltd v Beechcroft Developments Ltd.* The contract provided for liquidated damages of £200 per week. However, the contract did not expressly contain any sectional dates for completion to correspond with the phased handover of the building. The court declined to imply into the contract sectional dates for completion when to do so would be to the obvious detriment of the contractor. His Honour Judge Davies QC stated:

“It would be a blatant contradiction to say that it was necessary for the business efficacy of an entire contract to imply in it a term [3 sectional dates for completion] which would make it a contract of a different kind. There is no question of any course of dealing or trade usage which would justify its inclusion.”

As a result, the amount of liquidated damages payable by the contractor on the entire project was significantly reduced.

In the context of subcontracts, there is a practice in Australia of not providing a precise date for completion of the subcontract works, but instead, providing that the works shall be completed “in accordance with the head contractor’s current programme”. The problem with this is that it may be impossible to identify from the construction programme a precise completion date for each and every subcontract. As one author notes, the practice should be avoided by head contractors as it leaves a serious question mark over the enforceability of liquidated damages.

8.2 **No extended date for practical completion**

The second problem associated with setting a date for practical completion is that it is important that the power to extend the date for practical completion is exercised correctly, otherwise the right to liquidated damages may be lost.

Under the modern construction contracts, a new date for practical completion can only be substituted for the original date where an extension of time is given strictly in accordance with the contract upon the happening of the events provided for in the contract. The power to extend time, if exercised incorrectly, will cause the time for completion to be set at large, so that no liquidated damages are recoverable by the principal. The most common problem occurs where the ESA fails to decide an extension of time claim within the time which the contract permits for that decision.

In order to examine the Australian and English cases on this point, the extension of time (“EOT”) clause in each case requires a three-part analysis:

1. In whom is the power to extend time for the particular delaying event vested?
2. When should the decision about the EOT be made?
3. What is the consequence under the clause of failing to make the decision about the extension within time?

This is described in the following Box 6.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Murdoch v The architect ordered extras.</td>
<td>The architect</td>
<td>At the time of giving the order for extras.</td>
<td>No EOT granted.</td>
<td>No. Architect had no power to extend time because extras had to be in writing but were not.</td>
<td>Yes.</td>
<td></td>
</tr>
<tr>
<td>Anderson v The engineer ordered extra work.</td>
<td>The engineer</td>
<td>No time specified, only as the engineer “shall think adequate”.</td>
<td>No EOT granted.</td>
<td>No. The court considered that the power should have (impliedly) been exercised at the time of ordering the extras.</td>
<td>Yes.</td>
<td></td>
</tr>
<tr>
<td>Miller v London County Council</td>
<td>The engineer ordered extras.</td>
<td>An EOT could be granted &quot;from time to time and at any time or times ... either prospectively or retrospectively ...&quot;</td>
<td>An EOT granted 5 months after the date of practical completion which extended the date for practical completion retrospectively.</td>
<td>No. The clause would permit an extension given within a reasonable time of the delay coming to an end, but did not allow an extension to be given after the substituted date for completion.</td>
<td>Yes.</td>
<td></td>
</tr>
<tr>
<td>Amalgamated Building Contractors Ltd v Waltham Holy Cross Urban District Council</td>
<td>Non-availability of the contractor’s labour and materials.</td>
<td>The architect</td>
<td>No time specified.</td>
<td>An EOT granted after the date of practical completion and after the substituted date for practical completion.</td>
<td>Yes. The power to extend could be exercised at any time.</td>
<td>No.</td>
</tr>
<tr>
<td>MacMahon Construction Ltd v Crestwood Estates Ltd</td>
<td>The engineer ordered variations.</td>
<td>The engineer</td>
<td>No time specified under clause 35.2 - if the Engineer thinks “that the cause of the delay is such as to justify an extension of the time ... [he] shall grant such extension of time as he shall think fit”.</td>
<td>AN EOT granted prior to the date of practical completion but after the substituted date for practical completion (that date having been retrospectively extended).</td>
<td>No - the power to extend must be exercised within a period of time either fixed or reasonable; the power was exercised outside a reasonable time of the order for variations being given.</td>
<td>Yes70</td>
</tr>
<tr>
<td>NZ Structures Ltd v McKenzie</td>
<td>The engineer ordered extras.</td>
<td>The engineer</td>
<td>No time specified.</td>
<td>An EOT granted at the end of the contract so that the engineer could give himself an opportunity to assess the full effect of the delaying events.</td>
<td>Yes. The power could be exercised at any time after the date of practical completion until the engineer was functus officio.</td>
<td>No71</td>
</tr>
<tr>
<td>Fernbrook Trading Ltd v Taggart</td>
<td>Delays by other contractors.</td>
<td>The engineer</td>
<td>No time specified (same clause as above).</td>
<td>An EOT granted after the original date for practical completion.</td>
<td>Yes. The power could be exercised after the original date for practical completion.</td>
<td>No.</td>
</tr>
</tbody>
</table>
The standard CA24.1/1964 construction contract reviewed in *MacMahon Construction Ltd v Crestwood Estates Ltd* did not provide a time within which the engineer was to grant an extension of time for completion of the works. The modern Australian construction contracts continue to provide the ASE with a wide discretion as to whether to grant an extension of time, and when it is to be granted.

**BOX 7**

<table>
<thead>
<tr>
<th>CONTRACT</th>
<th>CLAUSE</th>
<th>WORDING</th>
</tr>
</thead>
<tbody>
<tr>
<td>E5b</td>
<td>24(f)</td>
<td>“From time to time and at any time after the occurrence of any delay or delays in the progress of the works ... the Architect shall make a fair and reasonable extension of the date for practical completion should he be of the opinion that the Contractor is entitled to the same.”</td>
</tr>
<tr>
<td>JCC</td>
<td>9.05</td>
<td>“... the Architect may at any time ... extend the time for practical completion of the works if in his opinion the Contractor would otherwise be entitled to such an extension.”</td>
</tr>
<tr>
<td>NPWC3</td>
<td>35.4</td>
<td>“… the Superintendent may, at any time and from time to time and for any reason he thinks sufficient, by notice addressed to the Contractor extend the time for practical completion of the works …”</td>
</tr>
<tr>
<td>AS2124-1992</td>
<td>35.5</td>
<td>“If the Contractor is entitled to an extension of time ... the Superintendent shall, within 28 days after receipt of the notice of the number of days extension claimed, grant a reasonable extension of time.”</td>
</tr>
</tbody>
</table>

“Notwithstanding that the Contractor is not entitled to an extension of time, the Superintendent may at any time and from time to time before the issue of the Final Certificate by notice in writing to the Contractor extend the time for Practical Completion for any reason.”

There are two points to note in relation to these provisions.

First, the wide discretion given to the ASE to exercise his discretion “at any time” and “from time to time” will not necessarily be construed as widely as the words indicate. Those same words were used in *Miller v London County Council*, but Du Parcq J held that the grant of an EOT five months after the date of practical completion was too late to constitute a valid exercise of the power to extend time.

Second, the author of *Hudson* expresses reservations with the notion that delay in granting an extension of time should automatically result in the loss of liquidated damages:

“Given the quite different attitudes at the present day to liquidated damages provisions, and bearing in mind that producer pressures have meant that many liquidated damages clauses are effectively damage limitation clauses, and also having regard to the obvious advantages to contractors of deferred decisions on extensions of time, thereby postponing any drain on their cashflow by way of deduction, there no longer seems any sufficient reason, it is submitted, for according the contractor any remedy other than a right to damages, if provable, in the event of an extension of time decision being unnecessary or unreasonably delayed in breach of contract.”
AS2124 (1992) reflects that notion by providing that the failure by the Superintendent to grant a reasonable extension of time or to grant an extension of time within that 28 day period referred to in clause 35.5 will not cause the date for practical completion to be set at large, but the failure will not prejudice any right of the Contractor to damages.

This seems to be a reasonable compromise between the entitlement of the principal to retain liquidated damages in the event of late completion, and the entitlement of the contractor to know the target date for completion of the works and so adjust his resources accordingly.

9. CHALLENGE THE FINISHING DATE (i.e. THE DATE OF PRACTICAL COMPLETION)

At the other end of the timeous scale, the contractor’s liability for liquidated damages ceases upon the achievement of practical completion.

We have already considered in Part 5 those scenarios where liquidated damages can be reduced or avoided by the contractor if the contract expressly deems practical completion to have occurred when the principal uses or occupies the works prior to actual practical completion, or where separable portions can be created.

Careful attention must be paid to the actual clause in order to determine what constitutes “completion”. In the standard form contracts, the meaning of “practical completion” is defined. In contrast, the non-standard form construction contracts sometimes do not define “practical completion” which makes the principal’s proof of non-completion more difficult.

In Murphy Corporation Ltd v Acumen Design & Development (Queensland) Pty Ltd and Anor, Williams J noted that in broad terms, the words mean “completion for all practical purposes, that is to say, for the purpose of allowing the principal to take possession of the works and use them as intended.”

His Honour’s subsequent comments may assist a contractor to define the end-point of liquidated damages in an appropriate case:

“Ordinarily the best evidence that such a stage has or has not been reached will be a certification from the contract Superintendent. But that does not mean, in my view, that in the absence of a certification for practical completion the contractor can never prove in legal proceedings that such a stage had in fact been reached. One situation where the contractor could prove that such a stage has been attained ... would be where the employer had taken possession of the works as completed on the express or implied understanding that a stage of practical completion had been reached and then used them for the intended purpose; that would particularly be so where the intended use involved opening the works to the public for the profit of the employer. I find that that is what happened here.”

Obviously, a court will only conclude practical completion in such circumstances after receiving evidence from both the contractor’s representatives as to when they allege the project was completed, and from the principal’s staff as to the items alleged to be outstanding as at the date at which the contractor alleges practical completion to have been achieved.

CONCLUSION

When evaluating the preceding nine arguments, it is important to keep in mind that liquidated damages provisions are a double-edged sword for contractors and principals.

Where damages for late completion are crippling, the principal must adhere to the limit set by a valid and enforceable liquidated damages clause. Conversely, in the particular circumstances of the case, a contractor may be worse off if a liquidated damages provision is overturned. If, in the absence of that provision, the contractor is liable for even greater damages at common law, it will be highly desirable for the contractor to ensure that his damages are liquidated.

Moreover, for both principal and contractor, the prospect of a protracted and costly dispute to prove or disprove the quantum of actual damages is generally most unattractive. However, in an appropriate scenario, one of the nine arguments outlined above may be useful for a contractor to consider where the project overruns the (adjusted) date for practical completion.
FOOTNOTES

1. The author wishes to thank the research assistance rendered by Kylie Skeahan in the preparation of this paper.

2. Peak Constructions (Liverpool) Ltd v McKinley Foundations Ltd (1970) 1 BLR 111, 121 per Salmon LJ.


4. Id 2, 15-17.

5. SMK Cabinets v Hili Modern Electronics Pty Ltd [1984] VR 391.


8. However, if the architect did not give a notice pursuant to clause 10.14.01 as to when the works ought to have been practically completed, the proprietor was still permitted to claim for damages under the general law. “The decision not to embark upon the regime prescribed in clause 10.14 may be inspired by a belief or hope on the part of the proprietor or the architect that the damages which can be recovered under the general law will be greater than those recoverable as liquidated or ascertained damages”: at 7. This view is consistent with the previously expressed opinion of Giles J in Baese Pty Ltd v RA Bracken Building Pty Ltd (1990) 6 BCL 137 at 140 that the JCC standard form building contract does not constitute a code for the recovery of damages.


10. Stevan Constructions Pty Ltd v Frazer Court Committee (1993) 9 BCL 272, 276-7 per Giles J.


16. Id 140.


20. This point was made by Smith J in LU Simon Contractors Pty Ltd v HD Fowles & Ors (unreported, Supreme Court of Victoria, 18 December 1991), 9.

21. The learned author of Hudson has questioned the correctness of this obiter authority at 1168. In the later case Baskett v Bendigo Gold-Dredging Co. (1902) 21 NZLR 166, the New Zealand Court of Appeal expressed some difficulty with the reasoning of the Court of Exchequer Chamber in Laidlaw, in that the contract in that case gave the principal the right of action for, as well as the right to deduct, liquidated damages, so that the mere failure to deduct may not have constituted a waiver.

22. In contrast to Laidlaw, there was no power in Baskett to recover penalties except by way of deduction, thus a failure to deduct did indeed give rise to a waiver of the right of the principal to deduct liquidated damages.

23. In relation to the 5 year delay, the Earl of Halsbury LC said “... there comes the further question as to waiver. I am not certain that I understand the application of the doctrine of waiver to such a question as we are now dealing with of the release of a right of action already vested; but, assuming we get over that difficulty, I do not feel as a matter of fact that there is any evidence upon which anybody could reasonably rely that there was an agreement assented to by both parties that these damages should be waived.”: at 14.


25. Id 215.

26. e.g. clause 42.6 of AS2124-1992; clause 42.5 of NPWC3 (1981).


28. Unreported, Supreme Court of New South Wales, Rolfe J, 1 August 1997. Leave to appeal from this decision was refused.

29. Id 37. Unlike the Queensland Court of Appeal in Blue Chip, Rolfe J also derived support from a line of cases which demonstrated that, on a proper construction of the particular contract in question, the principal was unable to raise any cross-claim for liquidated damages under the contract in answer to a claim by the builder for payment on progress certificates, and that the proprietor's claim should be dealt with under other mechanisms in the contract, such as by giving a notice of dispute: Triden Contractors Pty Ltd v Belvista Pty Ltd (1987) 3 BCL 203; Sabemo Pty Ltd v De Groot (1991) 8

31. Id 255.
32. For discussion of this deemed extension of time provision, see Stuart Bros (Holdings) Pty Ltd v Posei Pty Ltd (1994) 12 BCL 442.
34. The court relied upon Temloc v Errill Properties Ltd (1987) 31 BLR 30, in which Nourse LJ said “I think it is clear, both as a matter of construction and as one of common sense, that if (1) clause 24 is incorporated in the contract and (2) the parties complete the relevant part of the appendix, either by stating a rate at which the sum is to be calculated or, as here, by stating that the sum is to be nil, then that constitutes an exhaustive agreement as to the damages which are or are not to be payable by the contractor in the event of his failure to complete the works on time.”: at 39.
35. (1989) 6 BCL 137.
36. A discussion of the principal’s right to unliquidated damages where the principal cannot obtain liquidated damages is beyond the scope of this paper.
40. Id 521.
41. Id 524.
42. Id 528. For another decision where the principal successfully upheld a liquidated damages clause containing a formula, see Philips Hong Kong Ltd v Attorney General of Hong Kong (1993) 61 BLR 49.
44. [1982] Qd R 682. Also see Bysouth v Shire of Blackburn [1928] VR 562.
45. Hudson, 1141.
46. Id 1144.
47. However, under NPWC3, clause 37.1 provides that, where the principal has used or occupied a part of the works, the defects liability period for that part of the works will commence on the day of that use or occupancy.
49. Id 527.
51. See the editors’ commentary in (1989) 47 BLR at pages 131-132; also Hudson, 1142.
52. (1993) 61 BLR 49.
53. Id 52.
54. Id 63.
57. Id 62-3.
59. [1913] AC 143.
60. Id 144. This reflects the obiter comment of the court in Re Yeaton Waterworks Co. and Wright (1895) 72 LT 538 where the court said “having elected to dispossess the contractor and take the performance of the contract out of his hands [P] must have been taken to abandon its right to these damages”: at 540 per Kennedy J.
63. Hudson, 1163. That view expressed in the text was cited and followed by Bugold JA in the New Brunswick Court of Appeal in City of Moncton v April (1980) 29 NBR 631, 603.
64. (1895) 72 LT 538.
65. (1858) 1 Giff 228. exercised, that English case does not appear to have dispossess the contractor and take the performance of the contract out of his hands [P] must have been taken to abandon its right to these damages”: at 540 per Kennedy J.
67. Id 32.
68. A. Fletcher, “Minimizing Risk in the Current Economic Climate - Subcontracts” in Building and Construction Intensive (Brisbane: Queensland Law Society CLE Department, 1990), 12.
69. The learned author of Hudson notes that, unlike the contract considered in Murdoch v Lockie, the contract in Anderson was silent as to the precise time for granting the extension. The author doubts whether a clause that the extension should have been considered at the time of ordering the extras should have been implied by the New Zealand Court of Appeal: at 1184.
70. Despite the similarity with ABC Ltd v Waltham Holy Cross UDC in that neither contract specified a time within which the power to extend should be exercised, that English case does not appear to have been cited before the Western Australian Supreme Court. Indeed, the engineer in MacMahon improved upon his counterpart’s position in ABC in that the extension of time was made before the work was finished, but that did not save the principal’s right to liquidated damages.
71. However, it was held that the contractor was entitled to a full extension of time so that no liquidated damages were recoverable.
73. For example, clause 2 of NPWC3 (1981); clause 2 of AS2124-1992; clause 25(a) of ES5b; clause 1.06.09 of JCC; clause 16.1 of SBW1; clause 9.4.1 of NZS 3910 (1987).
75. Id 294.
76. Id 294-5.