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 by using $0 or a nominal amount such as $1 in the liquidated damages clause. 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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