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CAN A PRINCIPAL STILL RECOVER LIQUIDATED DAMAGES IF THE CONTRACT RATE IS 'NIL' 'N/A' or \$0?

INTRODUCTION

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.

THE EFFECT OF N/A, \$0 OR NIL

If a contract states that the rate for liquidated damages in the construction contract is "\$Nil", "\$N/A", or "Zero", is the contractor exposed to liquidated damages for late completion?

The short answer is NO. The contractor may be liable for general damages for the loss suffered due to the late completion of works.

PRINCIPAL'S RIGHT TO GENERAL DAMAGES

General or unliquidated damages are available to principals when the contract is silent on liability for late completion or when there is uncertainty as to the interpretation of the liquidated damages clause. General damages usually consist of increased interest and

financing costs, losses arising from terminated sales contracts due to late completion and other costs and losses suffered by the principal arising from late completion.

General damages may be awarded where a contract provides that liability for liquidated damages is "\$Nil", "\$N/A", or "Zero".

- For example, if a contract provides that the rate for liquidated damages is \$NIL and a contractor is late in completing works, the court may still allow a principal to recover general damages (*Baese Pty Ltd v A Bracken Building* (1990) 6 BCL 137).
- Alternatively, if a contract provides that the rate for liquidated damages is \$N/A and a contractor is late in completing works, the court may find that the liquidated damages clause does not apply but still allow the principal to claim general damages (*Silent Vector Pty Ltd trading as Sizer Builders v Squarcini* [2008] WASC 246).

- Finally, if a contract provides that the rate for liquidated damages is \$0 and a principal suffers loss due to late completion, the principal may be allowed to recover general damages (*Adapt Constructions Pty Ltd v Whittaker* [2015] ACTSC 188).

TAKE AWAY POINT

Principals and contractors should be aware that an award of general damages for late completion is highly uncertain. To avoid unexpected results, contractors and principals should ensure that their contracts clearly express liability for liquidated damages. If the parties' mutual intention is that liquidated damages are a principal's sole remedy for delay, then the contract should clearly state that.

For more information

For more information on issues relating to liquidate damages, contact our Principal Solicitor/ Director

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