




Liquidated Damages

Loss calculations and the claims procedure

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Liquidated Damages

Loss calculations and the claims procedure

- What are liquidated damages (LADs) and unliquidated damages?
- Why use LADs?
- How much should they be?
- Penalties and enforceability of LADs
- Claiming LADs in Construction Contracts




What are liquidated damages (LADs) and unliquidated damages?

- ▶ Remedy for a breach of contract
- ▶ General damages
- ▶ Compensatory - to put the wronged party back to the position it would have been in if the breach of contract had not occurred

Hadley v Baxendale [1843 - 60] All ER Rep 461

Part (1) Direct losses – those which naturally arise from breach
Part (2) Losses in the contemplation of the parties when the contract was made

- ▶ Claimant proves suffered losses & amount of loss suffered
- ▶ Tribunal (court/arbitrator/adjudicator) calculates sum of damages




What are liquidated damages (LADs) and unliquidated damages?

- ▶ Liquidated and ascertained damages (LADs)
 - ▶ Agreed before contract is made
 - ▶ Fixed sum/rate
 - ▶ Claimant applies rate once damages triggered
 - ▶ Actual loss is irrelevant
- ▶ Exclusive remedy


Examples:

Trigger – breach of contract	LADs
Late completion	Rate per day/week
Underperforming plant	Rate per measure of reduced performance
Target gross/net internal area not met	Rate per ft ² /m ² by which area falls more than a specified % above/below target area




Why use LADs?

- ▶ Clarity and certainty – neither party exposed to less predictable remedy
- ▶ Simplicity/speed of making claim
- ▶ Difficult to calculate actual loss
- ▶ Avoids litigation
- ▶ Contractor factors risk into price
- ▶ Contractor weighs up cost of re-directing/increasing resources -v- risk of triggering LADs




How much should they be?

- ▶ Calculation of likely actual losses
 - ▶ Example – delay LADs
 - ▶ Financing costs
 - ▶ Abortive costs
 - ▶ Lost rent/income
 - ▶ Ongoing rent on other premises
 - ▶ Fees/fines
 - ▶ Lost profit
 - ▶ Other contractor costs
- ▶ Under estimation can prove costly to Employer
- ▶ Capping LADs
- ▶ Evidence the calculation

Penalties and enforceability of LADs 

- ▶ Damages compensatory under English Law not punitive
- ▶ Penalty unenforceable
- ▶ View clause at time contract made, not with hindsight – actual losses are irrelevant


Penalties and enforceability of LADs 

Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1914-15] All ER Rep 739


Contract to supply tyres and other goods to a garage.
Resale price maintenance clause (now unlawful but back in 1914 legitimate restriction on competition)
£5 for each tyre sold by the garage in breach of the provisions of the agreement.
Garage argued the charge was a penalty.

Court set out tests to be applied to decide if a penalty.

Proved to be difficult to apply to more complex commercial arrangements.
Interpreted in later cases as a rule that LADs should be a genuine pre-estimate of loss

Penalties and enforceability of LADs 


- ▶ Test for a penalty - Supreme Court has re-stated the law
- ▶ In *Dunlop* there was a legitimate business interest to protect, being price maintenance.
- ▶ Whilst it would prove difficult to assess actual losses arising from a breach this was not the only factor to consider.
- ▶ The LADs were not out of proportion to anticipated actual losses which might arise following a breach.

Penalties and enforceability of LADs 

Cavendish Square Holding v El Makdesi and ParkingEye v Beavis [2015] UKSC 67


Cavendish v Makdesi

- ▶ Sale of 60% share in advertising business in Middle East by Mr Makdesi to Cavendish
- ▶ Restrictive covenants preventing Mr Makdesi competing with/solicit clients of company after sale
- ▶ Severe consequences for breach included loss of payment and forced sale of remaining shares at under value
- ▶ Mr Makdesi argued restrictive covenants were a penalty


Penalties and enforceability of LADs 

ParkingEye v Beavis

- ▶ Car park in retail park owned by British Airways Pension Fund. ParkingEye managed car park.
- ▶ Signs at car park were clearly displayed - 2 hours maximum stay (and no return within an hour) - failure to comply will result in Parking Charge of £85 (reduced to £50 for prompt payment).
- ▶ Mr Beavis overstayed by 1 hour. He complained the £85 Parking Charge was a penalty

Penalties and enforceability of LADs 


- ▶ Artificial categorisation of distinctions between:
 - penalty
 - genuine pre-estimate of loss
 - deterrent
- ▶ Underlying rationale is public policy - damages are to be compensatory.
- ▶ Considering a term to be a deterrent is unhelpful. A deterrent is a term designed to influence conduct it is not necessarily a penalty.
- ▶ Good reasons for terms influencing conduct:
 - ▶ Difficulty proving losses
 - ▶ Difficulty detecting breach
 - ▶ Damages not an adequate remedy
 - ▶ Loss will arise for a 3rd party also

Penalties and enforceability of LADs 

- ▶ The real questions to be answered is whether the means by which conduct is to be influenced is "unconscionable" or "extravagant"?

(1) is there a legitimate business interest served and protected by the clause?

(2) is the provision out of all proportion to any legitimate interest of the innocent party?


Penalties and enforceability of LADs 

Cavendish v Makdesi

- ▶ (1) legitimate business interest - reduced value in shares/goodwill where Mr Makdesi in breach of restrictive covenants;
- ▶ (2) pricing formula reflected reduced value of goodwill, subject of negotiation between parties of equal bargaining strength who both had legal representation.

ParkingEye v Beavis


- ▶ (1) legitimate business interest - manage efficient use of parking spaces & provide income stream to ParkingEye to operate service, which otherwise would not be available;
- ▶ (2) £85 not extravagant or out of proportion (local authority fines are less, but free parking is not usually on offer, and in any case the difference is not substantial).

Claiming LADs in Construction Contracts 

- ▶ Notification process
- ▶ Condition precedent to making a claim?
- ▶ JCT contracts require 4 notices (non-completion, notice may require payment/to withhold or deduct LADs, notice of requiring payment/will withhold or deduct LADs, Pay Less Notice)


Certainty is key

- ▶ Trigger must be unambiguous
- ▶ Rate to be applied must be clear
- ▶ Delay LADs - sectional completion and partial possession
- ▶ The LADs should specify the rates for each Section
- ▶ Section works must be clearly defined – or risk LADs clause is unenforceable

Claiming LADs in Construction Contracts 

Taylor Woodrow Holdings Ltd and another v Barnes & Elliott Ltd [2004] EWHC 3319 (TCC)


- ▶ Building of duplex units in blocks with ancillary bin stores, parking spaces, garages and footpaths
- ▶ Division into 6 sections – terms provided that section completion would require units to be viable from a services and access point of view (this was also to include the appropriate no. of garages, parking spaces and bin stores).
- ▶ There was uncertainty as to which ancillary works were required to achieve completion of a Section
- ▶ On partial possession of a Section the rate of LADs to be calculated pro-rata to value of works completed and value of works left to complete
- ▶ Court held couldn't calculate the LADs as scope of Sections not sufficiently defined.

Claiming LADs in Construction Contracts 

- ▶ Exclusive remedy for breach of contract
 - ▶ Under calculation can prove costly to Employer
 - ▶ "Nil" or "N/A"

Temloc Ltd v Errill Properties Limited 12 ConLR 109 [1987]

- ▶ JCT Standard Form Building Contract (1980 Edition) – Appendix (now the Contract Particulars) entry for LADs was "ENIL"
- ▶ Where the Appendix provides a rate, then LADs were an exclusive remedy under the contract
- ▶ Where the rate is "Nil" there can be no alternative claim for unliquidated damages

Claiming LADs in Construction Contracts 

Chattan Developments v Reigill Civil Engineering [2007] EWHC 305 (TCC)

- ▶ Parties agreed that the LADs clause was "N/A"
- ▶ On the facts of the case court decided parties intended there would be no damages for delay whether liquidated or un-liquidated

QUESTIONS

