

Insights

CAN LIQUIDATED DAMAGES CLAUSES SET GENERAL CAP?

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SUMMARY

A pair of cases in the past two years have come to opposite conclusions about whether general damages can be capped by contract provisions for liquidated damages.

Liquidated damages clauses are a common feature of construction contracts, and often include a cap on the overall amount that can be claimed. What is less clear is whether the cap on liquidated damages can also limit general damages, in the event that the relevant clause is found to be void or unenforceable.

This was the subject of two Technology and Construction Court (TCC) decisions in recent years. But these came to opposite conclusions based on the wording used, highlighting the need for clear and certain drafting.

HOW CLAUSES WORK – AND CAN BE CHALLENGED

The definition of a liquidated damages clause provided by Lord Leggatt in [Triple Point Technology, Inc v PTT Public Company Ltd](#) [2021] UKSC 29 is clear and concise: '... a clause in a contract [that] stipulates what amount of money will be payable as damages for loss caused by a breach of the contract[,], irrespective of what loss may actually be suffered if a breach of the relevant kind (typically, delay in performance of the contract) occurs'.

Such clauses provide some certainty for both parties to the contract, allowing them to manage the allocation of risk and predetermine their maximum liability.

In cases such as the two considered below, though, a party to the contract may challenge the clause. A number of potential grounds for doing so have been established by the courts over the years, including:

- the clause is invalid or void for uncertainty, or otherwise inoperable

- the clause is a penalty; for example, it cannot be justified by a legitimate commercial reason, monetary or otherwise – such as the desire to compensate or protect a legitimate interest, or is out of all proportion to the legitimate interests of the innocent party
- the clause does not cover the breach in question, which is out of scope, or
- the party did not comply with a condition precedent; for example, it did not give the notice required in a certain format or within a set time frame.

The list above is not exhaustive, in part because the courts are reluctant to find liquidated damages clauses unenforceable – particularly when negotiated between commercial entities, as most commercial construction contracts will be.

If the clause is not enforceable, though, a party may usually still claim general damages.

However, in order to do so, they must meet the usual requirements associated with such a claim, including proving the amount of losses suffered, which the liquidated damages clause was designed to overcome.

The liquidated damages are a contractual obligation to pay a fixed or ascertainable sum in the event of certain specified breaches occurring.

Ultimately, whether or not unenforceable clauses can cap general damages is a question of contract interpretation, depending on the facts of the case and the construction of the clause in question. In other words, there is not a clear yes or no answer – as two TCC cases highlight.

COURT FINDS IN FAVOUR OF CAP IN NON-BINDING DECISION

Eco World v Dobler [2021] EWHC 2207 (TCC) involved a claim under Part 8 of the Civil Procedure Rules – Alternative Procedure for Claims, for declarations as to the proper construction and effect of the liquidated damages provision in the contract, where the claimant had taken over part of the works as completed.

Eco World contracted with Dobler to carry out the design, supply, and installation of the façade and glazing works on three buildings in a development. The contract did not contain any provision for sectional completion of the works but did allow Eco World to take over parts of them before practical completion.

The contract specified that the rate of liquidated damages was nil for the first four weeks, but they would then apply 'at the rate of £25,000 per week (or pro rata for part of a week) up to an aggregate maximum of 7% of the final Trade Contract Sum'. There was no mechanism in the contract to adjust the rate of liquidated damages payable on partial possession of the works.

Following several adjudications, the court was asked to determine two questions. The first was whether the liquidated damages provisions were void or unenforceable. The arguments about this were primarily based on the lack of a mechanism to reduce such damages in the event of partial possession.

The second question was that, if the provisions were void or unenforceable, was Eco World entitled to claim general damages for delay; and if so, were any recoverable damages limited by reference to the void or unenforceable provision of the liquidated damages clause, as a limitation of liability? In other words, could the liquidated damages clause act as a cap on general damages?

The court held that the liquidated damages clause was valid and enforceable. The provision was 'not extravagant, exorbitant or unconscionable'.

Although it did not provide for a reduction on partial possession, it was clear and certain about the amount payable by Dobler. A failure to provide for partial possession did not automatically make a clause penal.

On the second question, the court did not need to provide a view because it had found the liquidated damages clause to be valid. However, *obiter* – that is in passing, and therefore not creating binding authority – the court considered it briefly and said Eco World would be entitled to claim general damages, and that the clause would act as a cap on these.

In the court's view, the liquidated damages clause 'would operate as a limitation of liability provision, even if the liquidated damages were void or a penalty'.

Further, the court stated that the clause served two purposes: 'first, to provide for, and quantify, automatic liability for damages in the event of delay; second, to limit Dobler's overall liability for late completion'. It was the 'clear intention' of the parties that delay damages would be limited.

SIMILAR QUESTIONS PRODUCE DIFFERENT ANSWER

Buckingham Group v Peel [2022] EWHC 1842 (TCC) also involved Part 8 proceedings.

Peel engaged Buckingham as its contractor to design and build parts of a manufacturing plant. The basic structure of the contract was JCT Design and Build 2016, but there were schedules of bespoke amendments.

These included Schedule 10, which set out the liquidated damages due in the event of certain milestone dates being missed and provided an overall cap on liquidated damages.

Schedule 10 stated, in a table, that there was a 'Cap on Maximum LADs' liquidated and ascertained damages, being another term used for liquidated damages, and provided both a percentage and specified monetary amount based on the contract sum analysis figure in the schedule.

The schedule was not drafted specifically for the contract but was created during negotiations. This did lead to some ambiguities, which were identified when Peel claimed liquidated damages after the works were delayed.

Buckingham relied on the ambiguities in the Part 8 proceedings, claiming that the liquidated damages clauses were so defectively drafted that they were void for uncertainty or unenforceable – though it did not argue they were a penalty at any point – and that the clause acted as a cap on general damages.

The court was asked to make declarations similar to those in *Eco World*, including the following.

- Were the terms of Schedule 10, concerning liquidated damages, void for uncertainty or unenforceable?
- Did the financial cap for liquidated damages for delay in the schedule operate as a cap on liability for general damages for delay?

The court held that the liquidated damages clause was 'certain and enforceable'.

Despite the ambiguities or errors, such as different dates and rates, it concluded that it was 'possible to find an interpretation of the provisions [that] gives effect to the intention of the parties and there is no uncertainty'.

The courts will not readily find a clause void for uncertainty and are not likely to see technical objections – such as those put forward by Buckingham – in a favourable light.

Once again, the court did not need to provide a view on the general damages point, as it had found the liquidated damages clause enforceable, but nonetheless decided to offer a view.

In this case, the decision was opposite to that in *Eco World*, with the court stating that it saw 'no basis for concluding that the clause should serve the additional function of operating as a cap on ... overall liability'. The cap was on liquidated damages only.

The court considered the language used in this contract and concluded that 'the language of the provision is quite clear [...] The cap is "on Maximum LADs", not on anything other than LADs. There is nothing ... [that] suggests that any alternative liability for any general damages would be capped'.

This was supported by the clause being contained in a separate schedule that exclusively dealt with liquidated damages.

CONTRACT AMBIGUITIES POINT TO NEED FOR CLARITY

Clearly, the relevant clauses in the two cases were different. But it is difficult to see much variance in the wording, or why the decisions were polar opposites.

Two decisions on two different clauses do not tell us much about the law or how it might be interpreted in future cases. Indeed, in *Buckingham* the court itself stated that 'limited benefit is to be gained from seeing how a different clause in a different contract was interpreted'.

The main observable difference is that, in *Buckingham*, the clause was in a separate schedule to the contract dealing exclusively with the topic of liquidated damages, whereas in *Eco World* it was contained in the body of the contract.

The two decisions demonstrate the courts' unwillingness to find a liquidated damages clause void or unenforceable, either for uncertainty or because it was a penalty.

It is in unusual cases that the courts will find that such a clause amounts to an unenforceable penalty – all the more so following the guidance from the Supreme Court in [Cavendish Square Holding BV v Talal El Makdessi \(Rev 3\)](#) [2015] UKSC 67.

Failure to provide for partial possession was an argument in the lawyer's toolkit for unenforceability claims, but even that is far less likely to succeed after *Eco World*.

Because such clauses are generally found to be enforceable, we are unlikely to get a definitive answer on whether these clauses will still have effect as caps if the liquidated damages are unenforceable, at least not on anything more than an *obiter* basis.

Nonetheless, in order to prevent the argument being raised in the first place, parties should ensure that their contracts are clear and well drafted. It is best to set out general caps separately and make it clear that the cap on liquidated damages is not a general limitation of liability.

Parties should also consider whether liquidated damages clauses should allow for reductions for sectional or partial completion or possession and ensure any last-minute contract amendments do not create conflicting provisions. So, avoid inserting negotiating documents into a contract without considering their effect.

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