

Implications of partial possession

STUART JORDAN* looks at the scenario where the owner takes over partial possession of construction projects and analyses the issue of delay liquidated damages with reference to a recent UK court case.

CONSTRUCTION contracts almost always provide for the payment of liquidated damages for delayed completion – and at the same time, these contracts often provide for the taking over of those works either partially or in pre-set sections.

In either case, the contract will usually provide for the calculation or recalculation of liquidated damages to match the situation:

- Where the works are set out in sections, each such section is usually treated like a mini-version of the whole works; with its own required completion date and its own rate of liquidated damages payable for late completion.
- Where the works are not set out in sections, but there is provision for the owner to take possession of completed parts of the works before all works are complete, the contract will usually make provision for the consequences of partial possession, including reduction of delay liquidated damages. This is usually set out as a proportionate reduction of the rate of damages, comparing the value of the handed over part of the works with the whole works.

So our questions for today are:

- (i) What happens if a contract provides for partial possession but does not provide for a commensurate reduction in liquidated damages?
- (ii) Are the liquidated damages void and unenforceable?
- (iii) If so, can the owner claim general damages instead – and would those general damages be capped to the same level as any agreed cap on the liquidated damages?

These questions came up in a recent case in England, which has important points for the industry everywhere, given the very common situation of partial possession, especially in commercial and residential real

estate development.

The project here involved the development of high-specification residential units. The developer was Eco World – Ballymore Embassy Gardens Company Limited (EWB) and they engaged Dobler UK Limited to carry out glazing and façade installation in Blocks A, B and C of the development.

The contracting structure was Construction Management and the contract was based on a standard published form of trade contract.

The trade contract allowed for partial possession. Clause 2.33 stated: “*If at any time or times prior to the date of issue by the Construction Manager of the certificate of practical completion for the Works or such works in a Section that the Employer wishes to take over any part or parts of the Works...then, notwithstanding anything expressed or implied elsewhere in this Trade Contract, the Employer may take over such part or parts.*”

The contract went on to provide for certain consequences of partial possession, including obligations as to protection of the works taken over, defects correction and release of retention, but it did not provide for adjustment of the obligation to pay delay liquidated damages, which remained to be paid at the full £25,000 (\$33,941) per week (and pro rata for part week) following a four-week grace period – capped at seven per cent of the contract price.

EWB made use of the partial possession provisions, taking over Blocks B and C. Block A was completed late. The parties fell into dispute about the cause of that delay and, following some adjudications, the matter came to the Technology and Construction Court in London, for answers on



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the three questions above.

Relying on an adjudicator’s decision, EWB did not claim liquidated damages but argued instead that they were entitled to general damages for the delay – uncapped. Their reasoning was that the application of the “full” rate of liquidated damages for delay in just one block, is a penalty and is, therefore, void and/or unenforceable.

The judge disagreed. Following relatively recent case law which effectively broadened the scope for recognising liquidated damages provisions as legitimate, the judge upheld this one on the basis that the provision was in support of EWB’s legitimate interest in enforcing the contractor’s obligation to complete all of the works by the required date. The judge noted that the rate of liquidated damages was not disproportionate to EWB’s potential losses from delayed completion of all or any of the blocks – and noted the widely-accepted commercial benefits

to parties in pre-agreeing damages.

Because of the above ruling, the court did not need to consider the EWB argument about any general damages being uncapped but the judge still considered the point and decided that the liquidated damages provision had a second purpose, which was to state the “clear intention” of the parties that Dobler’s exposure to delay damages was to be limited to seven per cent of the contract price.

The “rule against penalties” is one of the few well-known English Law constraints on parties’ freedom to agree terms they want – and even this one is in retreat. As we have discussed before, the outcome under Gulf law principles might be very different, involving a retrospective assessment of the liquidated damages against actual losses.

To me, the most interesting aspect of this was to see a developer arguing against the validity of its own liquidated damages entitlement – and failing! ■

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