

# Perhaps the Liquidated Damages ("LD") Clause does not always work! A recent Court Case – *Spiers Earthworks Pty, Ltd. v Landtec Projects Corporation Pty, Ltd. (No.2) [2012]*



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## Introduction

In principle, the money recoverable as damages due to a breach of contract is the sum that will place the innocent party in a position as if the breach had not occurred. The law allows the parties to fix and agree on the sum payable for special breaches at the time a contract is signed.

The sum so specified, usually termed liquidated damages ("LD"), is not enforceable if it is a "penalty," but only if it is a genuine pre-estimate of the likely loss to result from a delay of completion.

## **Spiers Earthworks v Landtec [2012]**

This case examines the enforceability of an LD clause and the factors that must be taken into consideration when determining if the LD are, in fact, a genuine pre-estimate of the loss that the innocent party is likely to suffer.

## Facts

1. A developer developed land in stages.
2. The contract came with a practical completion date of 6 May 2005 and the LD, in Australian Dollars, were A\$13,846 per week.
3. The contractor was late in completing the stage-one works and LD were applied.
4. The contractor claimed that the LD were unenforceable, as they were a penalty.
5. The developer calculated the LD by using a bank's interest rate during the sale.

6. The contractor argued that the developer could not incur interest on sales due to a delay.

## Held

1. The majority of the judges claimed that the delay in the performance of the first contract could not have caused any relevant financial loss to the developer.
2. Only one judge decided that the stipulated weekly sum was not disproportionate to the actual loss amount.
3. All three judges agreed that a determination of a sum's extravagance or unconscionableness is made at the time a contract is signed.
4. The LD were not a genuine pre-estimate.
5. The losses that might have been foreseeable were entirely unrelated to the anticipated losses that were used by the employer to calculate the LD.
6. The LD were struck down as a penalty and the employer was not entitled to an award.

## Conclusion

This case re-affirmed that LD may be voided as penalties and stipulated that when calculating a genuine pre-estimate, the losses incurred must be directly related to any delay in the completion of the works by the contractor. Otherwise, they may simply be a penalty and are not claimable.

Finally, LD clauses are frequently sources of dispute between the parties to a contract. It is, thus, advisable for each party to consult expert advice before entering into any LD clause in the contract if either party has doubts. ■