5
Liquidated and Ascertained Damages

5.1 What is the difference between liquidated damages and a penalty?

5.1.1 The terms liquidated damages and penalty are often interpreted wrongly. Liquidated damages are enforceable whereas a penalty is not.

Lord Dunedin had this to say of liquidated damages in the case of Dunlop Pneumatic Tyre Co Ltd v. New Garage & Motor Co Ltd (1915):

The essence of a penalty is payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

Lord Dunedin also went on to say:

If the sum is ‘extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed the breach’ it will be regarded as a penalty and unenforceable.

5.1.2 In the case of Public Works Commissioner v. Hills (1966), in deciding what constituted a penalty, the judge said:

The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach.

Where the stipulated liquidated damages are held to be a penalty, the employer will be able to recover only the amount of unliquidated damages he can prove.

5.1.3 It does not affect the situation as to whether the sum included in the contract is referred to as a penalty or liquidated and ascertained damages. Keating on Building Contracts 5th edition at page 225 states:

‘Though the parties to a contract who use the words “penalty” and “liquidated damages” may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages.’
5.1.4 In the case of Jeancharm Ltd v. Barnet Football Club Ltd (2003) Jeancharm undertook to supply football kits to Barnet. If Barnet paid late they were required under the terms of the contract to pay interest at a rate of 5% per week. Jeancharm were obliged to pay 20p per garment for each day’s delay in delivery. Claims were levied by both parties and the judge in the lower court ordered Barnet to pay Jeancharm the sum of £5000. It was argued by Barnet before the Court of Appeal that 5% per week equated to 260% per annum and was a penalty. It was argued by Jeancharm that in deciding whether 5% per week was a penalty the court should examine fully the risk borne by both parties which would include the 20p per garment per day for late delivery. The Court of Appeal held that on any basis 260% per annum interest should be regarded as a penalty.

5.1.5 Lord Justice Peter Gibson in the Jeancharm case considered there were four principles relating to liquidated damages which differentiated them from a penalty:

(1) The court had to look at the substance of the matter rather than the form of words used in order to identify the parties’ intentions.
(2) The essence of a penalty would be distinct from a genuine pre-estimate of loss. In other words, the provision would not be construed as a penalty where a genuine pre-estimate had been carried out.
(3) The question of whether such a clause was to be treated as a penalty was a question of construction or interpretation of the contract at the time of making the contract, not at the time of the breach.
(4) If the amount was extravagant or unconscionable in comparison with the greatest loss that could be perceived, the clause would be a penalty.

SUMMARY

Liquidated and ascertained damages are a reasonable pre-estimate of the losses the employer is likely to incur if work is completed late. Such a sum is enforceable if due to his own default the contractor completes work late. A penalty on the other hand is a sum included in the contract which is intended to penalise the contractor and is far greater than the employer’s estimated loss. Such a sum would be unenforceable.

5.2 If the employer suffers no loss as a result of a contractor’s delay to completion, is he still entitled to deduct liquidated damages?

5.2.1 Contractors often argue that if they can show that when delays to completion occurred the employer suffered no loss or a substantially reduced loss then the liquidated damages expressed in the contract will not become payable.

5.2.2 The essence of liquidated damages is that they are a genuine covenanted pre-estimate of loss: Clydebank Engineering and Shipbuilding Co v. Don José Yzquierdo & Castaneda (1905).
It was said by Lord Woolf in the Hong Kong case of Philips Hong Kong Ltd v. The Attorney General of Hong Kong (1993):

Since it is to [the parties’] advantage that they should be able to know with a reasonable degree of certainty the extent of their liability and the risk which they run as a result of entering into the contract. This is particularly true in the case of building and engineering contracts. In the case of those contracts provision for liquidated damages should enable the employer to know the extent to which he is protected in the event of the contractor failing to perform his obligations.

Liquidated damages are therefore a reasonable pre-estimate of the loss the employer anticipates he will suffer if the contractor completes late. Its advantage is that the contractors know in advance the extent of risks they are taking and employers do not have the expense and difficulty of proving their loss item by item.

5.2.3 In the case of BFI Group of Companies Ltd v. DCB Integration Systems Ltd (1987) a contract had been let using the JCT Minor Works Form to alter and refurbish offices and workshops. A dispute arose concerning liquidated damages and was referred to arbitration. The arbitrator held that there had been a delay in completion but declined to award liquidated damages on the grounds that the employer had suffered no resulting loss.

An appeal was lodged against the arbitrator’s award and heard by Judge John Davies QC. He decided that the liquidated damages clause automatically came into play when the contractor completed late without a contractual justification and the employer was not required to demonstrate that he had suffered loss. The arbitrator was wrong in law in refusing to award payment of liquidated damages.

5.2.4 In the case of Bovis Construction v. Whatling (1995) it was held that a clause, such as a liquidated damages clause which limits liability, should state clearly and unambiguously the scope of the limitation and should also be construed with a degree of strictness.

SUMMARY

It was made clear by the decision in BFI Group of Companies v. DCB Integration Systems Ltd (1987) than an employer may, where they are provided for in the contract, deduct liquidated damages even though in the event he has suffered no loss.

5.3 If a delay is caused by the employer for which there is no specific entitlement to an extension of time expressed in the extension of time clause, will this result in the employer losing his right to levy liquidated damages?

5.3.1 One purpose for including an extension of time clause in a contract between employer and contractor is to provide a mechanism for adjusting the completion date where delays which affect completion are caused by the
architect, engineer or employer and so preserve the employer’s right to
deduct liquidated damages in the event of further delay through the fault of
the contractor.

However some contracts, including the JCT and ICE 6th Edition, do not
provide within the extension of time clause for every conceivable type of
delay which may be caused by the employer.

5.3.2 Vincent Powell-Smith, in The Malaysian Standard Form of Building Contract as
at p88, had this to say on the matter:

‘Clause 23 is greatly defective in many important respects and is in need of urgent
amendment. The grounds on which an extension may be granted are very limited
and do not cover many common delaying events e.g. failure by the Employer to
supply materials to the contractor, failure to give agreed access and failure to give
possession of the site on the due date. If such events occur and cause delay to
completion the Architect has no power to grant an extension with the result that
time will be “at large” and the Employer will lose his right to liquidated damages.’

The Malaysian Standard Form in this respect is identical to JCT 63.

In Rapid Building Group v. Ealing Family Housing (1984) the employer
granted possession late and was prevented from levying liquidated dam-
ges in respect of delays subsequently caused by the contractor. The contract
used was JCT 63. A similar situation arose in Thamesa Design SDN BHD v.
Kuching Hotels SDN BHD (1993).

JCT 98 clause 23.1.2 now overcomes one of the criticisms of Vincent
Powell-Smith by providing for delay in the granting of possession for a
period of up to six weeks.

5.3.3 Lord Justice Phillimore in the case of Peak Construction (Liverpool) Ltd v.
McKinney Foundations Ltd (1970) said:

I would re-state the position because I think it needs to be stated quite simply. As I
understand it, a clause providing for liquidated damages [clause 22] is closely
linked with a clause which provides for an extension of time [clause 23]. The
reason for that is that when the parties agree that if there is delay the contractor is
to be liable, they envisage that the delay shall be the fault of the contractor and, of
course, the agreement is designed to save the employer from having to prove the
actual damage which he has suffered. It follows, once the clause is understood in
that way, that if part of the delay is due to the fault of the employer, then the clause
becomes unworkable if only because there is no fixed date from which to calculate
that for which the contractor is responsible and for which he must pay liquidated
damages. However, the problem can be cured if allowance can be made for that
part of the delay caused by the actions of the employer, and it is for this purpose
that recourse is had to the clause dealing with extension of time. If there is a clause
which provides for extension of the contractor’s time in the circumstances which
happen, and if the appropriate extension is certified by the architect, then the delay
due to the fault of the contractor is disentangled from that due to the fault of the
employer and a date is fixed from which the liquidated damages can be calculated.

5.3.4 To ensure that all delays by employer, architect or engineer are properly
catered for in the extension of time clause fully comprehensive wording is
required similar to GC Works/1 1998 which states under condition 36(2):
'The PM shall award an extension of time under paragraph (1) only if he is satisfied that the delay, or likely delay, is or will be due to -

... (b) the act, neglect or default of the employer, the PM or any other person for whom the Employer is responsible...

5.3.5 The ICE 7th Edition shows a change to the 6th Edition where in clause 44(1)(e) there is a comprehensive clause which covers all delays caused by the employer, the wording being 'any delay impediment prevention or default by the Employer'.

SUMMARY

If the contract does not provide grounds for extending the completion date due to Employer’s delays employers who cause delay to completion will lose their rights to deduct liquidated damages in respect of the contractor’s delays. Effective contracts avoid this by having a fully comprehensive extension of time clause.

5.4 Are liquidated damages based on a percentage of the contract sum enforceable?

5.4.1 It is not uncommon for contracts to include liquidated damages which have been calculated in accordance with some sort of formula. MF/1 provides in clause 34.1 for liquidated damages to be expressed as a percentage of the contract value. A limit to the contractor’s liability is achieved by making provision for the amount of damages to be capped.

5.4.2 It has been argued that as the definition of liquidated damages is a genuine covenanted pre-estimate of loss (Dunlop Pneumatic Tyre Co Ltd v. New Garage & Motor Co Ltd (1915) damages based upon a formula which includes an estimate only of the value of the work cannot be a genuine pre-estimate of damage.

However Lord Dunedin in the Dunlop case made the following important comment:

It is no obstacle to the sum stipulated being a genuine pre-estimate of damages that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.

5.4.3 Certain projects, for example a new road, a school or church, would present the parties to a contract with a difficult task in pre-estimating the loss for late completion. These are the types of projects which Lord Dunedin probably had in mind.

In Robophone Facilities v. Blank (1966) Lord Justice Diplock said:

And the more difficult it is likely [to be] to prove and assess the loss which a party will suffer in the event of a breach, the greater the advantages to both parties of fixing by the terms of the contract itself an easily ascertainable sum to be paid in that event.
Lord Woolf in the same case said:

The court has to be careful not to set too stringent a standard and bear in mind what the parties have agreed should normally be upheld. Any other approach will lead to undesirable uncertainty especially in commercial contracts.

5.4.4 In the case of *J.F. Finnegan v. Community Housing* (1993) the calculation of liquidated damages included the following formula

\[
\text{Liquidated Damages} = \frac{\text{Estimated Total Scheme Cost} \times \text{Housing Corporation Lending Rate} \times 85\%}{52}
\]

The court held that the formula was a genuine attempt to estimate in advance the loss the defendant would suffer from late completion. Judge Carr concluded by saying:

I find that the formula used was justified at the time the parties entered into the contract.

**SUMMARY**

It would seem that provided:

- the calculation of an accurate estimate of liquidated damages is difficult or impossible
- the intention is not to penalise the contractor for completing late but to compensate the employer
- the formula is a genuine attempt to estimate in advance the employer’s loss

a court will not refuse to enforce liquidated damages which have been calculated by applying a percentage to the contract sum.

5.5 Where liquidated damages are expressed as so much per week or part thereof, and the contractor overruns by part of a week only but is charged a full week’s liquidated damages, are the courts likely to consider this a penalty and therefore unenforceable?

5.5.1 It has been suggested that liquidated damages expressed at a rate per week or part of a week cannot be a genuine pre-estimate of anticipated loss. The reasoning runs that the loss must differ for each additional day and therefore the same figure cannot apply for a day and also a full week.

5.5.2 Forecasting losses which may or may not occur in the future is not a precise science. Even where they are relatively easy to forecast they do not always increase proportionately with the passage of every day. For example an overrun to a completion date for a new office block may involve an employer remaining in existing premises for a longer period. It would be difficult to
imagine a situation where extending an existing lease could be arranged on a
daily basis. In all probability extensions to the lease for a three month or six
month period is more likely to be the norm. Extending periods of employ-
ment are also unlikely to be arranged on a daily basis – a week or month
would in all probability be the minimum period.

5.5.3 In Philips Hong Kong Ltd v. The Attorney General of Hong Kong (1993) a daily
rate was included in the contract in respect of liquidated damages. The
contract provided for the amount to be reduced if parts of the work were
handed over in the delay period. A minimum daily rate was stipulated
which would apply irrespective of how much of the work was handed over
short of completion of all the work. It was argued that the minimum daily
rate constituted a penalty and was thus unenforceable as a situation could be
envisaged where the minimum daily rate well exceeded the employer’s
estimated losses. The court rejected the argument and upheld the sum
included in the contract as liquidated damages.

SUMMARY

There is no report of liquidated damages expressed at a rate per week or part
thereof ever having been argued before a court as being a penalty. It seems
unlikely however that liquidated damages expressed in this form would be
held to be a penalty and unenforceable merely on account of the manner in
which the damages were expressed.

5.6 If the architect or engineer fails to grant an extension of time
within a timescale laid down in the contract, will this prevent
the employer from levying liquidated damages?

5.6.1 Many modern contracts such as JCT 98 and ICE 6th and 7th Editions lay
down timescales within which extension of time awards are to be decided.
(see 3.8.1).

• In JCT 98, by clause 25.3.1, the architect, if it is reasonably practicable having
regard to the sufficiency of information submitted by the contractor, must
make a decision within 12 weeks of the receipt of that information.

• The ICE 6th Edition requires the engineer under clause 44(5) to make
decisions concerning extensions of time within 14 days of the issue of the
certificate of substantial completion. The 7th Edition gives the engineer 28
days.

• GC/Works/1 1998 in condition 36(1) provides for the project manager to
make a decision within 42 days of receiving the contractor’s written notice.

Will a failure by the architect or engineer to comply with these timescales be
fatal to the employer’s right to deduct liquidated damages?

5.6.2 There have been two legal cases where this question has been considered.
Temloc v. Errill Properties Ltd (1987) and Aoki Corp v. Lippoland (Singapore) Pte
Ltd (1994).
5.6.3 The case of *Temloc v. Errill* arose out of a contract let using JCT 80. By the terms of this contract the architect is required to make decisions concerning extensions of time within a set timescale. With regard to the effect on the employer's entitlements should the architect fail to give his decision within the timescale, Lord Justice Croom-Johnson in the Court of Appeal had this to say:

In my view, even if the provision of clause 25.3.3 [requirement for the architect to review extensions of time within 12 weeks of practical completion] is applicable, it is directory only as to time and is not something which would invalidate the calculation and payment of liquidated damages. The whole right of recovery of liquidated damages under clause 24 does not depend on whether the architect, over whom the contractor has no control, has given his certificate by the stipulated day.

5.6.4 A similar matter was the subject of the decision in *Aoki Corp v. Lippoland (Singapore) Pte Ltd* (1994).

Clause 23.2 of the SIA Conditions of Contract makes it a condition precedent that the contractor notifies the architect of any event, direction or instruction which the contractor considers entitles him to an extension of time. The architect is then required to respond in writing within one month indicating whether or not in principle the contractor is entitled to an extension of time. As soon as possible after the delay has ceased to operate and it is possible to decide the length of the extension, the architect will notify the contractor of his award. If the contractor fails to complete the work by the completion date or extended completion date, the architect must issue a delay certificate as soon as the latest date for completion has passed.

The contractor notified the architect of delays but the architect failed to notify the contractor of whether in principle an entitlement to an extension of time existed. Eventually, the architect, without giving his decision in principle, refused all requests for extension except one for which he allowed 15 days.

The employer deducted liquidated damages.

It was held:

- A decision by the architect on the principle of the contractor’s right to an extension was not a condition precedent to a valid determination of the contractor’s entitlement. The contractor could, however, claim damages as a result of the architect’s failure to make a decision which might include the cost of increasing the labour force.
- There is no rule that delay in the issue of the delay certificate after the date for completion or the latest extended date for completion, renders the delay certificate invalid.

5.6.5 It would seem that failure by the architect or engineer to make a decision concerning extensions of time within a timescale laid down in the contract is not fatal to the employer’s rights to deduct liquidated damages.
SUMMARY

Unfortunately contracts such as JCT 98 which provide a timescale within which the architect must grant an extension of time do not state what effect a failure to comply with the timescale will have upon the employer’s rights to deduct liquidated and ascertained damages. However the decisions in Tenloc v. Errill Properties Ltd and Aoki Corp v. Lippoland suggest that, provided a proper decision is made by the architect at some stage concerning extensions of time, a failure to meet the deadline will not affect the employer’s rights.

5.7 If the contractor delays completion but no effective non-completion certificate is issued by the architect/engineer under a JCT contract, will this mean that the employer loses his right to deduct liquidated damages?

5.7.1 JCT 98 is an example of a contract which makes reference under clause 24.2.1 to the architect issuing a certificate when the contractor fails to complete on time. The question frequently asked is whether in the absence of the architect’s certificate the employer remains entitled to deduct liquidated damages where the contractor finishes late.

5.7.2 This procedure was the subject of a decision of the High Court in the case of A Bell & Son (Paddington) Ltd v. CBF Residential Care & Housing Association (1989). A Bell, the contractors, entered into a contract with CBF Residential Care for the construction of an extension to a nursing home. The contract was JCT 80 Private Edition with Quantities with a date for completion of 28 February 1986. Liquidated damages for late completion were stated to be £700 per week.

5.7.3 Work commenced on time but completion was not achieved by 28 February 1986. The contractor served a delay notice and the architect granted an extension of time to provide a new completion date of 25 March 1986. Completion was not, however, achieved by this new date. At this stage the employer, CBF Residential Care, considered that as completion was late, liquidated damages would be due. JCT 80 requires the architect to issue a certificate of non-completion and provides for the employer to write to the contractor indicating an intention to deduct liquidated damages. Both architect and employer complied with this procedure. However the architect subsequently had second thoughts and granted two further extensions of time. The first extended the completion date to 14 April 1986, the second further extended the date to 21 April 1986. Unfortunately the contractor did not complete the work until 18 July 1986 when the architect issued a certificate of practical completion. A long delay then occurred before the architect on 3 December 1987 granted another extension of time extending the completion date to 20 May 1986. There was still, however, a shortfall between the date of 20 May 1986 by which time the contractor should have completed at 18 July 1986 when practical completion was achieved.
5.7.4 The architect issued a final certificate on 25 February 1988 but the balance due was reduced by £4,900 before payment in respect of liquidated damages. It was argued by the contractor that liquidated damages should not have been deducted as the procedures required by JCT 80 had not been properly complied with. Following his first granting of an extension of time showing a revised date for completion of 14 April 1986 the architect had issued a non-completion certificate indicating that the contractor had failed to achieve this date but following the grant of further extensions of time the non-completion certificate was not re-issued to reflect the revised dates for completion. It was argued that it should have been and, in the absence of properly re-issued non-completion certificates, the employer lost the right to deduct liquidated damages. The architect had issued a final certificate and it was therefore too late to re-issue the non-completion certificate.

In finding in favour of the contractor and ordering that the £4,900 be paid, plus interest and costs, the court held:

Construing clause 24.1 strictly and in accordance with its plain and ordinary meaning, it demands the issue of a certificate when a contractor had not completed by ‘the completion date’. I think that when a new completion date is fixed, if the contractor has not completed by it, a certificate to that effect must be issued, and it is irrelevant whether a certificate has been issued in relation to an earlier, now superseded completion date.

Construing clause 24.2.1 in a similar manner to clause 24.1, since the giving of a notice is made subject to the issue of a certificate of non-completion, if the certificate is superseded, then logically the notice should fall with it. If a new completion date is fixed, any notice given by the employer before it is at an end.

Accordingly the condition precedent to the permissible deduction of liquidated damages, i.e. the issue of an architect’s non-completion certificate, had not been fulfilled and the employer therefore lost the right to deduct liquidated damages.

5.7.5 The matter of a non-completion certificate was again referred to in *J.F. Finneghan v. Community Housing* (1993) when it was held that a written notice from the employer under JCT 80 is a condition precedent to the right to deduct liquidated damages.

5.7.6 The wording has been tightened up in JCT 98 where in clause 24.2.1 it states:

‘Provided:
- the Architect has issued a certificate under clause 24.1

... The Employer may...
require in writing the Contractor to pay to the Employer liquidated and ascertained damages...’

**SUMMARY**

The employer will lose the right to deduct liquidated damages where JCT 98 applies if the architect fails to issue a proper non-completion certificate under clause 24.1.
5.8 Can a subcontractor who finishes late have passed down to him liquidated damages fixed under the main contract which are completely out of proportion to the subcontract value?

5.8.1 This question presumes that the subcontractor has a contractual obligation to finish within a timescale and is in breach of the obligation if he completes late. Where a subcontractor is in breach he will have a liability to pay damages to the main contractor.

The general principles covering damages for breach of contract are explained in *Hadley v. Baxendale* (1854) and later fully considered in *Victoria Laundry (Windsor) Ltd v. Newman Industries* (1949).

5.8.2 Briefly the injured party is entitled to recover any loss likely to arise in the usual course of things from the breach, plus such other loss as was in the contemplation of the parties at the time the contract was made and which is likely to result from the breach.

The contractor, as injured party, is entitled to levy a claim for damages against a subcontractor who completes late. These damages should include only those losses which under normal circumstances are likely to arise and are within the contemplation of both parties. In all probability a court would hold that the contractor’s claim should include his own additional costs plus any legitimate claims received from the employer and other subcontractors who have suffered financially as a result of the subcontractor’s late completion. If the normal standard forms of contract are employed the employer will levy a claim for liquidated damages against the main contractor if the main contract completion is delayed due to a default on the part of a subcontractor. Under normal circumstances these liquidated damages will form a part of the main contractor’s claim against the defaulting subcontractor irrespective of the value of the subcontract works.

5.8.3 This rule will apply in all cases except where the subcontractor is nominated and the terms of the main contract provide the main contractor with an entitlement to an extension of time where delays are caused by a nominated subcontractor’s default. Delays by the nominated subcontractor would result in an extension of time being granted to the main contractor and hence no claim from the employer for liquidated damages.

5.8.4 Where the sum for liquidated damages under the main contract could be classed as out of the ordinary and therefore not within the contemplation of the subcontractor, it may be argued that the subcontractor is obliged to reimburse the main contractor only that element of the employer’s liquidated damages which is normal and usual. Two problems arise out of this type of argument. Firstly, the question of what we mean as normal and usual; and secondly, if the sum for liquidated damages is so out of the ordinary, it might be regarded as a penalty and unenforceable.

5.8.5 Usually main contractors will send to subcontractors, with the tender enquiry, details of the main contract including the sum for liquidated damages. This procedure prevents subcontractors from arguing that the sum was outside their contemplation when they entered into the subcontract.
One way out for subcontractors is to include in the subcontract an amount for liquidated damages which provides a cap on their liabilities.

In *M.J. Gleeson plc v. Taylor Woodrow Construction Ltd* (1989) Taylor Woodrow were management contractors for work at the Imperial War Museum and entered into a subcontract with Gleeson. The management contract provided for liquidated damages at £400 per day and clause 32 of the subcontract provided for liquidated damages at the same rate. Clause 11 (2) of the subcontract also provided that if the subcontractor failed to complete on time the subcontractor should pay:

‘a sum equivalent to any direct loss or damage or expense suffered or incurred by [the management contractor] and caused by the failure of the subcontractor. Such loss or damage shall be deemed for the purpose of this condition to include for any loss or damage suffered or incurred by the authority for which the management contractor is or may be liable under the management contract or any loss or damage suffered or incurred by any other subcontractor for which the management contractor is or may be liable under the relevant subcontract.’

Gleeson finished late and they received from Taylor Woodrow a letter as follows:

‘We formally give you notice of our intention under clause 41 to recover monies due to ourselves caused by your failure to complete the works on time and disruption caused to the following subcontractors. The following sums of money are calculated in accordance with clause 11(2) for actual costs we have incurred or may be liable under the management contract.’

Then followed a summary of account showing deductions of £36,400 for liquidated damages, being £400 per day from 31 May 1987 to 31 August 1987, and £95,360 in respect of ‘set-off’ claims from ten other subcontractors.

Gleeson applied for summary judgment under Order 14 in respect of the retained sum of £95,360 and were successful. Judge Davies found that Taylor Woodrow had no defence:

On the evidence before me, therefore, Taylor Woodrow’s course of action against Gleeson in respect of set-offs is for delay in completion. It follows that it is included in the set-off for liquidated damages, and to allow it to stand would result in what can be metaphorically described as a double deduction.

**SUMMARY**

Subcontractors who, in breach of their subcontract, complete late will be liable to pay the resultant damages incurred by the contractor. These damages will include any liability the main contractor has to pay liquidated damages to the employer which result from the delay. This procedure will apply irrespective of the value of the subcontract works.

It is open to the subcontractor to argue, if the main contract liquidated damages are extremely high, that the sum involved was outside his contemplation at the time the contract was entered into. To forestall this type of argument main contractors, usually with the tender enquiry documents,
will set out details of the main contract (including the sum included for liquidated damages).

Where the subcontractor is nominated and the main contract provides for an extension of time where work is delayed by the subcontractor no claim from the employer for liquidated damages will arise provided that the contractor has properly claimed the extension of time.

5.9 What is meant by ‘time at large’? How does it affect the employer’s entitlement to levy liquidated damages for late completion?

5.9.1 ‘Time at large’ means there is no time fixed for completion or the time set for completion no longer applies.

Agreements for work to be carried out are often entered into without a completion period being stated. Letters of intent often contain instructions to commence work without a completion date being agreed. In these cases time is said to be ‘at large’.

5.9.2 Contractors can find themselves trapped into contracts where the time allowed for completion is too short and the amount of money to which they are entitled is insufficient to meet their additional costs. In these circumstances they may turn to alternative means of rectifying the situation other than the normal claims for extensions of time and additional payment.

5.9.3 For some time contractors have used the ‘time at large’ argument in an attempt to avoid paying liquidated damages. Their normal approach is to say that the contract period has either never been established or that, due to delays caused by the employer for which there is no express provision in the contract for extending the completion date, time becomes at large (see 5.3). This being the case, the contractor’s obligation is merely to finish within a reasonable time.

5.9.4 The contractor successfully used this argument in the case of Peak Construction (Liverpool) Ltd v. McKinney Foundations Ltd heard before the Court of Appeal in 1970. It was held that, as delays on the part of the City Council in approving remedial works to the piling were not catered for in the extension of time provisions, the right to liquidated and ascertained damages was lost and time became at large. The Corporation was left with an entitlement to claim such common law damages as a result of the contractor failing to complete within a reasonable time as it was able to prove.

5.9.5 The case of Rapid Building Group v. Ealing Family Housing, heard before the Court of Appeal in 1984, involved a contract let using JCT 63. Unfortunately, due to the presence of squatters, the housing association was unable to give possession of the site to the contractor on the due date. There was no provision in JCT 63 for extensions of time for late possession. The contractor was therefore able to argue successfully that time became at large. The obligation was altered to completing within a reasonable time and the employer lost its rights to levy liquidated and ascertained damages.

5.9.6 In the case of Inserco Ltd v. Honeywell Control Systems (1996) Inserco contracted to complete all work by 1 April 1991. Due to additional and revised
work, and lack of proper access and information, Inserco was prevented from completing on time. There was no provision in the contract for extending the completion date and time was held to be at large.

5.9.7 If time does become ‘at large’, the contractor’s obligation is to complete within a reasonable time. What is a reasonable time is a question of fact: Fisher v. Ford (1840). Calculating a reasonable time is not an easy matter and would depend on the circumstances of each case. As Emden’s Building Contracts’ 8th edition puts it in Volume 1 at page 177:

‘Where a reasonable time for completion becomes substituted for a time specified in the contract … then in order to ascertain what is a reasonable time, the whole circumstances must be taken into consideration and not merely those existing at the time of the making of the contract.’

5.9.8 Vincent Powell-Smith in his book Problems In Construction Claims at page 78 has this to say concerning ‘time at large’:

If for some reason time under a building contract becomes ‘at large’, the Employer can give the contractor reasonable notice to complete within a fixed reasonable time, thus making time of the essence again: Taylor v. Brown (1839). However, if the contractor does not complete by the new date, the Employer’s right to liquidated damages does not revive, and he would be left to pursue his remedy of general damages at common law.’

5.9.9 Time may also become at large where the architect or engineer fails properly to administer the extension of time clause as required by the contract. An example would be where an architect or engineer fails to make any award where a proper entitlement exists.

**SUMMARY**

Time is at large when a contract is entered into with no period of time fixed for completion. Where this occurs the contractor’s obligation is to complete work within a reasonable time.

There may also be circumstances which arise rendering a completion period fixed by the contract as no longer operable, again rendering time at large. An example is where a delay is caused by the employer and the terms of the contract make no provision for extending the completion date due to delays by the employer.

5.10 Can a contractor challenge the liquidated damages figure included in a contract as being a penalty and unenforceable after the contract is signed? If so, will it be a matter for the employer to prove the figure to be a reasonable pre-estimate of anticipated loss?

5.10.1 A golden rule when interpreting contracts is that both parties are bound by the terms of the contract into which they enter. With this in mind can a contractor, having signed the contract which includes a sum for liquidated damages, later, challenge the figure as being a penalty?
Two fairly recent cases have brought the question of liquidated and ascertained damages and their enforceability into focus: Philips Hong Kong v. The Attorney General of Hong Kong (1993) and J. Finnegan Ltd Community Housing Association (1993).

5.10.2 Both contracts included a clause relating to liquidated and ascertained damages. In the Finnegan case liquidated damages were stated to be £2,500 per week or part thereof. The Philips case involved a contract in which the liquidated damages varied between HK$ 77,818 per day and HK$ 60,655 per day depending on how much of the works had been handed over.

The parties in both cases entered into the contracts without the contractors challenging the sums included as liquidated damages at that time.

5.10.3 In the Finnegan case a housing association let a contract based upon JCT 80 to construct eighteen flats. The contractual date for completion was 1 March 1988 and the liquidated and ascertained damages were fixed at £2,500 per week or part thereof.

The contractor failed to complete the works by the contractual date for completion and liquidated and ascertained damages of £47,500 for the period 1st March to 13th August were deducted from monies due to the contractor.

The contractor then challenged the liquidated damages as being a penalty and unenforceable. The court held that the figure (although based on a formula) was a genuine pre-estimate of loss and therefore enforceable (see 5.4.4). It was, however, at no time suggested that the contractor was unable to challenge the liquidated damages amount on the ground of his having signed the contract.

5.10.4 In the Philips case the contractor again made a late challenge to the liquidated damages figure on the grounds that it was a penalty. Again there was no difficulty in leaving it until the end of the day. However the contractor, in like manner to Finnegan, was unable to demonstrate that the liquidated damages clause was a penalty and so unenforceable.

In arriving at a decision in the Philips case the court was influenced by Robophone Facilities Ltd v. Blank (1966) where Lord Justice Diplock stated that:

The onus of showing that a stipulation is a penalty clause lies upon the party who is sued upon it

In other words the contractor facing a claim for liquidated damages which he challenges as being a penalty is put to proof that his allegation is correct. It is not for the employer to prove that the liquidated damages figure is a reasonable pre-estimate of loss.

SUMMARY

A contractor who enters into a contract which contains a liquidated damages figure can at a later stage challenge the amount as being a penalty and unenforceable. However where he makes such a challenge it is up to him to demonstrate that the amount is a penalty and not a reasonable pre-estimate of the employer’s loss. It is not for the employer to justify the figure.
5.11 If liquidated damages to be enforceable must be a reasonable pre-estimate of loss, how can public bodies or organisations financed out of the public purse be capable of suffering loss?

5.11.1 It is an established principle that for liquidated damages to be enforceable the sum claimed should be a genuine pre-estimate of anticipated loss. From this, contractors often argue that organisations such as health authorities, education trusts and the like are financed from the public purse and as such can never suffer loss. This argument if successful would be unsavoury to any right-minded person.

5.11.2 The effect of public money was at issue in a construction case Design 5 v. Keniston Housing Association Ltd (1986). In this case the plaintiffs were a firm of architects and the defendant a registered housing association. The plaintiffs sued for unpaid fees. It was argued by way of defence that failures on the part of the plaintiffs in their design, supervision and contract administration had resulted in an increase in expenditure amounting to £14m. In answer to the counterclaim the architects maintained that, whether or not they had been at fault and whether or not the costs of the scheme had been increased, the housing association had suffered no loss. This was because the housing association was entitled to receive Housing Association Grant (HAG) from the Department of the Environment in a sum equal to the actual cost of the scheme regardless of any fault by the architects.

Judge Smout, in finding for the housing association, said:

It is pertinent to note that the general rule, that only nominal damages can be awarded where there has been a wrong but no loss, has never been absolute. Various exceptions are as old as the rule itself, others have developed piecemeal…

In this respect it is sufficient to echo the comments expressed in the argument of the defendants, namely that the purpose of Housing Association Grants is to provide housing for the needy, and not to be used to relieve professional advisers from the financial consequence of breach of contract and negligence.

The housing association did not get a ‘windfall’ as the grant was reduced accordingly.

SUMMARY

It would seem that it is not open to a contractor or professional adviser who is liable for breach of contract to argue that, as the employer is publicly funded and hence incurs no loss, only nominal damages should be awarded.
5.12 If liquidated damages become unenforceable and hence an entitlement to unliquidated damages arises, can the unliquidated damages be greater than the liquidated damages?

5.12.1 An extension of time clause serves two purposes. In the first instance it enables a contractor to be relieved from the obligation to complete on time if events occur which would otherwise be at his risk – for example excessively adverse weather provided for in JCT 98. Secondly an extension of time clause provides a mechanism for adjusting the completion date to take account of delays caused by the architect, engineer, employer and those employed or engaged by the employer. In the event of there being no such provision, time can become at large and the right to levy liquidated damages for any delays caused by the contractor is lost if delays are to any of these reasons.

This is not a satisfactory situation. In *Rapid Building v. Ealing Family Housing* (1994) Lord Justice Lloyd commented

Like Lord Justice Philimore in *Peak Construction (Liverpool) v. McKinney Foundations Ltd* (1969) I was somewhat startled to be told in the course of the argument that if any part of the delay was caused by the employer, no matter how slight, then the liquidated damages clause in the contract, clause 22 becomes inoperative.

In *Peak Construction* it was held:

If the Employer is in any way responsible for the failure to achieve the completion date, he can recover no liquidated damages at all and is left to prove such general damages as he may have suffered.

5.12.2 Where liquidated damages become unenforceable it will be for the employer to prove such general or unliquidated damages as he is claiming. This is in contrast to liquidated damages which require no proof to be enforceable. The question then arises as to whether, should the general damages which the claimant is able to prove exceed the liquidated damages included in the contract will payment become due for the greater amount so proved.

5.12.3 There is little in the way of case law concerning this matter. In the old case *Wall v. Rederiaktienbolaget Luggade* (1915) it was held that, where a liquidated damages figure was held to be inappropriate, the unliquidated damages which were proved to have been incurred could be levied in full even though they exceeded the amount of liquidated damages. In contrast a more recent Canadian case, *Elsley v. Collins Insurance Agency Ltd* (1978), provided an opposite view. The question of whether a general damages claim is limited to the amount of liquidated damages included in the contract was referred to in *Cellulose Acetate Silk Co Ltd v. Widnes Foundry* (1933) but was left open.

5.12.4 As the case law on this subject is sparse and inconsistent, it may be relevant to apply an old rule to the situation, namely that a party cannot benefit from his own breach.

*In Alghussein Establishment v. Eaton College* (1988) it was held:

It has been said that, as a matter of construction, unless the contract clearly provides to the contrary it will be presumed that it was not the intention of the
parties that either should be entitled to rely on his own breach of duty to avoid the contract or bring it to an end or to obtain a benefit under it.

It would seem that in the light of this decision an employer who caused a delay for which there was no provision for an extension of time and so rendered time at large should not be able to recover in respect of the contractor’s delays general damages which exceed the liquidated damages stated in the contract.

**SUMMARY**

There is little consistant authority on this point but is seems unlikely that unliquidated damages would be held to be enforceable to an extent which exceeds the amount of liquidated damages.

5.13 **Where a contract includes a single liquidated damages amount for failing to complete the whole of the works by the completion date, what entitlement does the employer have to claim from the contractor who has failed to complete parts of the work by the milestone dates written into the contract?**

5.13.1 Most standard forms of contract provide for a date by which all work should be completed. If the contractor fails to complete the work by that date, then he is in breach of contract. JCT 1998, ICE 7th Edition, FIDIC 1999 Edition and GC/Works/1 (1999), together with most other standard forms of contract, provide the employer with a right to deduct a liquidated damages sum written into the contract for each day or week the contractor is late completing. An exception to the norm can be found in the ECC. Where this contract is used, liquidated damages for delay are not provided for unless Option J – Delay Damages applies. Where no provision for liquidated damages is included in the contract, the contractor, if he completes late, will be liable for unliquidated damages. For these to apply, the employer will be required to produce proof of the losses he has sustained as a result of the contractor’s failure to complete on time.

5.13.2 The employer may, in addition to including a date by which all of the work must be completed, provide for the handover of the work in stages. Handover dates are usually provided and some standard forms of contract include special conditions which apply. JCT 1998, for example, has a Sectional Completion Supplement, whilst ICE 7th Edition includes in the Form of Tender provision for completion dates for sections of the work, sometimes referred to as milestone dates. With this type of arrangement separate liquidated damages amounts may be inserted into the contract in respect of each section. A failure on the part of the contractors to finish work by the section completion date will leave him open to a claim from the employer for the recovery of liquidated damages.

5.13.3 Where the contract provides for section completion dates but there are no liquidated damages stated, then if the contractor completes a section or more
than one section late, he will be liable to pay the employer unliquidated damages.

5.13.4 It is sometimes the case that there is a liquidated damages sum written into the contract for a failure on the part of the contractor to complete the whole of the works, but no liquidated damages included for failing to achieve the sectional completion dates. Under these circumstances, if the contractor is late in completing the whole of the works, he will be obliged to pay to the employer liquidated damages. Failure to complete by the sectional completion dates will leave him exposed to a claim from the employer to pay unliquidated damages.

In claiming liquidated damages for failure on the part of the contractor to complete by milestone dates, the employer may be challenged to demonstrate as to whether, at the time of tender, they represented a reasonable pre-estimate. In some cases, it may be impossible to show that very much loss could be expected to result from a failure to meet the milestone dates. This being the case the employer will be unable to apply the liquidated damages.

SUMMARY

Contractors often include a single liquidated damages figure in respect of the whole of the works but no liquidated damage figures for the milestone completion dates. The employer will be entitled to levy a claim for liquidated damages if the contractor fails to complete the whole of the works by the completion date, and for unliquidated damages for a failure to complete by the milestone dates. However, the employer will be required to prove the losses he has incurred due to the contractor’s failure to complete by the milestone dates.

5.14 Is it possible to include in a subcontract an all embracing sum for liquidated and ascertained damages for delay to completion?

5.14.1 It is common practice for a daily or weekly sum to be included in a standard main form of contract in respect of liquidated damages. These damages become payable by the main contractor to the employer in the event of a delay to completion of the works. The sum for liquidated damages must be a reasonable pre-estimate of the loss the employer is expected to incur should the work be completed late.

5.14.2 It is rare, however, to find a standard form of subcontract which includes provision for the deduction of liquidated damages should the subcontractor complete late. The Public Sector Partnering Contract Option 8 is however an exception. The normal procedure is for the main contractor to levy a claim against the subcontractor in respect of actual loss incurred. The delay by the subcontractor may result in delay to the completion of the main contract works, resulting in the employer levying against the contractor liquidated damages. The contractor would then pass down the liquidated damages
claim to the subcontractor. The contractor may also incur costs of his own resulting from the subcontractor’s delay, which may include the cost of accommodation, supervisory staff and plant retained on site during the delay period. These costs will usually be added to the employer’s liquidated claim damages and charged against the subcontractor.

5.14.3 One of the difficulties for the subcontractor is that when pricing for the work he has no idea what the financial liability will be in the event of his late completion. If the subcontract delay does not affect the main contract completion date, the main contractor’s claim may be modest. Alternatively, a substantial claim can be expected if the subcontractor’s delay affects the main contract completion date. This type of uncertainty can be avoided if a liquidated and ascertained damage amount is included in the subcontract. The contractor, however, may be in a dilemma in calculating the daily or weekly sum. Should it be assumed that any delay by the subcontractor will automatically affect the main contract completion date and therefore the amount when calculated ought to include the liquidated damages in the main contract? If this is the case, subcontractors may be put off from submitting a tender by the size of the resultant amount.

5.14.4 The main contractor may decide to include the liquidated damages from the main contract when calculating the amount to be included in the subcontract. This figure could then be included in several subcontracts as delays on the part of any of those subcontractors could affect the main contract completion date. If, in the final analysis, many weeks’ delay to each of these subcontracts occurred, which did not affect the main contract completion date, the claims from the main contractor would result in a windfall profit. Would courts be prepared to enforce claims of this nature? The view may be taken that it would be unreasonable to assume that all subcontract delays would affect the main contract completion date. Therefore only those subcontracts in respect of work which was on the critical path current at the time the subcontract was entered into should provide for a subcontract liquidated damage amount which includes the liquidated damages in the main contract.

**SUMMARY**

There should be no impediment to the inclusion of a sum for liquidated and ascertained damage in subcontracts. The Public Sector Partnering Contract Option 8 Subcontract includes for such a provision. The main contractor may experience some difficulties with enforcement if, in calculating the liquidated damages, the sum includes the liquidated damages under the main contract. This may well be the case if subcontract work was not on the critical path current at the time the subcontract was entered into.