

Liquidated damages and partial possession

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A recent TCC decision has enforced a liquidated damages clause which did not allow for a proportionate reduction in liquidated damages following partial possession of completed sections of a development. The court rejected arguments that the clause was a penalty relying on principles established by the Supreme Court in the recent Makdessi case. The court also considered a number of alternative arguments of general interest, including whether the employer had an obligation to consider levying a reduced amount of liquidated damages and whether an otherwise invalid liquidated damages clause could nevertheless operate as a cap on liability.

Eco World – Ballymore Embassy Gardens Company Limited v Dobler UK Limited

Eco World engaged Dobler to carry out the design, supply and installation of façade and glazing works for a residential development in Nine Elms, London. Dobler were engaged on three parts of the development: Block A, comprising high value residential apartments and Blocks B and C, comprising affordable housing units. The contractual date for completion was 30 April 2018. On 15 June 2018, Eco World took over Blocks B and C. On 20 December 2018 all of Dobler's works were certified as achieving practical completion.

Following practical completion, a dispute arose as to the level of liquidated damages Eco World were entitled to for Dobler's delay. After an initial grace period after the Date for Completion, the contract provided for a single weekly sum as follows:

“Liquidated damages will apply thereafter 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...”

The contract also contained equivalent provisions to those contained in the JCT suite of contracts which required Eco World to notify that it required Dobler to pay liquidated damages at the rate stated in the contract “or lesser rate stated in the notice”.

Following a number of adjudications Eco World commenced Part 8 proceedings in the TCC seeking declarations as to (1) the validity and/

or enforceability of liquidated damages in circumstances where Eco World had taken possession of Blocks B and C and there was no mechanism for a proportionate reduction in the amount of the damages, and (2) if the clause was void, whether it nonetheless imposed a cap on the level of general damages EcoWorld were entitled to claim for delay.

Did partial possession make the liquidated damages clause unenforceable?

The TCC determined that the liquidated damages provision was valid and enforceable. Whilst the provision did not provide for a reduction in liquidated damages on partial possession, there was no uncertainty as to the amounts payable. The full amount of liquidated damages was payable for each week of delay regardless of any partial possession taken by Eco World.

The court then considered whether such a clause offended the rule against penalties laid down most recently by the Supreme Court in the *Makdessi* case. That required the court to consider whether the clause was “extravagant, exorbitant or unconscionable” and whether it was “out of all proportion to” to Eco World's legitimate interest in securing timely completion of the Works. Applying this test, the court determined that the provision did not amount to a penalty for the following reasons:

- The clause was negotiated by commercial parties and their lawyers and enabled each party to better manage the risk of delay in the completion of the project.





- Eco World had an interest in enforcing completion of the works as a whole by the contractual completion date as late completion would have an adverse impact on the rest of the project by delaying following trades, exposing Eco World to liability and put at risk prospective sales of the apartments.
- Alternative quantification of Eco World's damages would be difficult, particularly following partial possession. Different combinations of partially incomplete blocks could result in a wide range of loss scenarios. Stipulating a single rate for all scenarios avoided these complexities.
- No evidence had been submitted to suggest that the level of liquidated damages agreed was unreasonable or disproportionate to the likely losses in the event of late completion to any one or more of the blocks.

Did Eco World have an obligation to reduce the rate of liquidated damages?

Dobler also contended there was a contractual mechanism for reducing the level of liquidated damages payable. They relied on the standard JCT wording noted above, which allowed Eco World to stipulate a "lesser rate" of liquidated damages. Dobler claimed this language conferred a discretion on Eco World as to the amount of liquidated damages to be levied and that this discretion was required to be exercised reasonably and not in a capricious or irrational manner. It claimed that Eco World could not reasonably insist on the full amount of liquidated damages in circumstances where it had taken partial possession of Blocks B and C.

The court rejected these contentions, finding that the ability of Eco World to levy a reduced amount of liquidated damages was an absolute contractual right, not one conferring a discretion with implied limitations.

Did the liquidated damages clause set a cap on liability even if penal?

Dobler also argued that if the liquidated damages clause was found to be penal/unenforceable then general damages should be capped at the level of liquidated damages otherwise payable. The court agreed. Despite *Makdessi* providing support for the view that general damages should not be

limited to the amount of any penalty found to be unenforceable, the court considered the clause in this case had two parts; firstly containing a weekly rate for liquidated damages but also stipulating an overall cap on liability for delay. Were the rate of liquidated damages to be struck down due to the rule against penalties, the overall cap on liability could nonetheless be given effect to.

Conclusions and implications

This decision provides an interesting insight into how the court's approach to penalty arguments has changed in light of the *Makdessi* decision. Dobler had relied on extracts from leading construction texts *Keating* and *Hudson* expressing the view that the absence of a mechanism for reducing liquidated damages on account of partial possession would cause a claim for liquidated damages to fail. However, the court's analysis shows there are good reasons why a single liquidated damages sum might be agreed despite (and precisely because of) the prospect of many different partial possession scenarios. It was not sufficient for Dobler simply to show that the same amount liquidated damages would be payable in partial possession scenarios where Eco World's loss would be much lower than without partial possession. Dobler needed to go further and show that the liquidated damages agreed

on were out of all proportion to Eco World's legitimate interest in securing timely completion of the works.

Given the greater breadth of this new test, it is surprising that Dobler did not seek to lead evidence as to the actual losses Eco World would suffer in particular scenarios nor as to the likelihood of partial possession when the contract was entered into. Had it been favourable, such evidence may have lent greater weight to Dobler's arguments, although it is plain from the judgment that such evidence would need to have been sufficiently strong to characterise the liquidated damages agreed upon as being "extravagant, exorbitant or unconscionable".

Other similar cases dealing with the enforceability of liquidated damages provisions in partial possession scenarios have been decided differently, because the drafting of the relevant provisions were void for uncertainty. This reiterates the importance of clearly and unequivocally reflecting the parties' intentions when drafting. If the contract allows for partial possession and the parties intend for liquidated damages to be reduced accordingly, the contract must state that. It must also be clear what the relevant reduction will be and/or provide a mechanism for determining that reduction.

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¹ *Eco World – Ballymore Embassy Gardens Company Limited v Dobler UK Limited* [2021] EWHC 2207 (TCC).

² *Cavendish Square Holding BV (Appellant) v Talal El Makdessi (Respondent)* [2015] UKSC 67.

