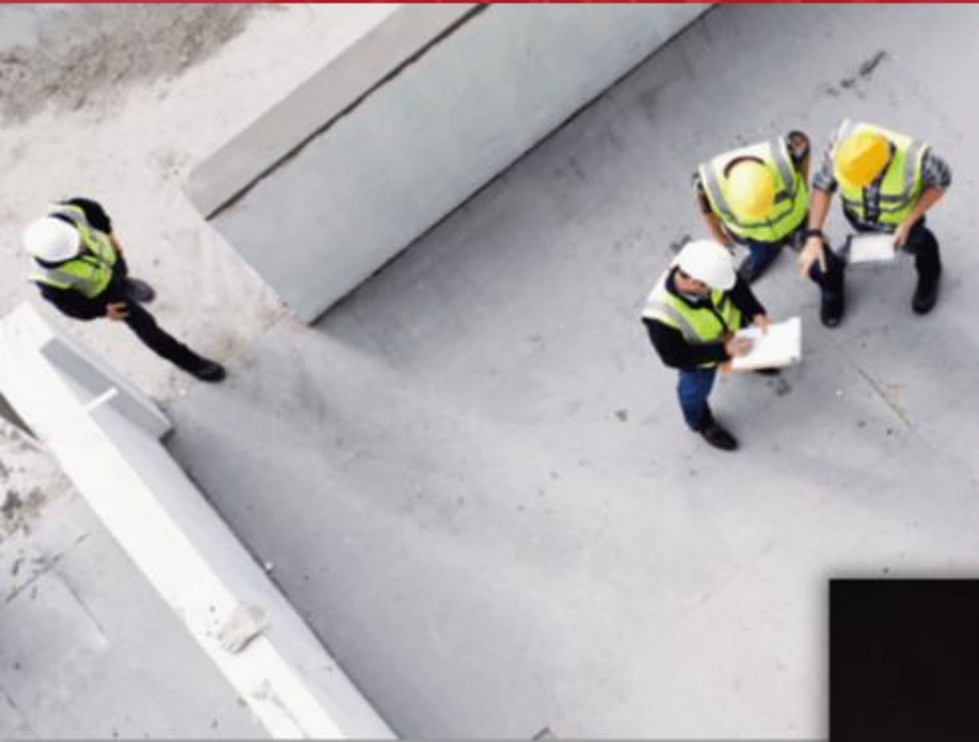


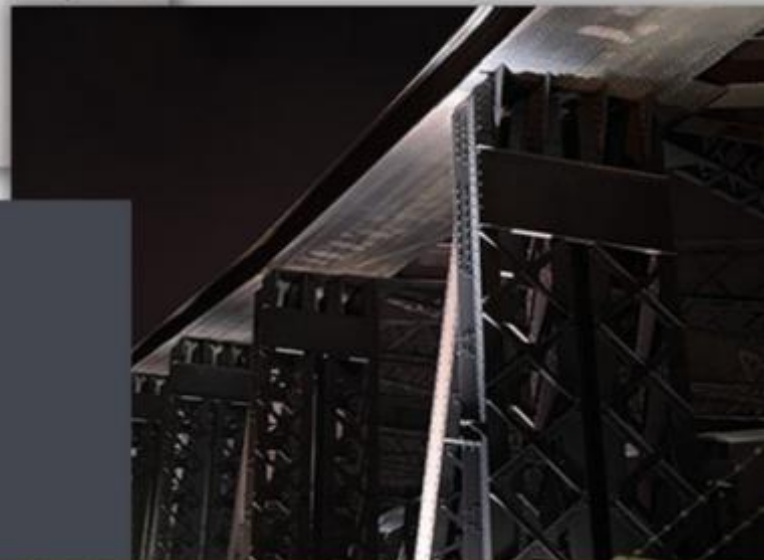
Can You Prevent a Contractor from their Common Law Entitlement?



**CRISP
LAW**

Newsletter

February 2024: Issue 1



In this Newsletter, we discuss the English and Australian legal position on the issue of whether a contractor can be prevented from their Common Law entitlement to seek remedies; that is, whether a contractor can be disentitled to make a claim by express words in a contract.

Introduction

The Australian and English courts have demonstrated a common agreement for the view that a Contractor's right to claim common law remedies can be expressly excluded in a contract by clear and unambiguous words.

Commonly, in instances where a delay cost clause or liquidated damages clause fails to provide an avenue for costs under the contract, the Contractor would still be entitled to a remedy by claiming Common Law damages.

However, should an express clause be included in the contract prohibiting the right to Common Law Damages, the Contractor may be left without any rights or remedies under the contract.

This newsletter will provide a summary of the case law that demonstrates this position.

Importance and Relevance of this Newsletter

This newsletter is highly relevant for Contractors as they must be aware of the importance of clauses that exclude Common Law rights and remedies from being obtained.

This is important as a Contractor may find themselves in a situation where they have not read and understood the contractual terms in a contract and are left without any means of damages or compensation. At this stage, it may be too late.

Therefore, as a preventative measure, it is crucial that Contractors closely examine contractual clauses prior to entering into a contract so that they are aware of their options if any delay and disruption occurs, including where an act, default, or omission of the Principal breaches the contract.

English Case Law

English and Australian case law have remained consistent on the position that where common law damages are excluded under a contract, it can only be done so by clear words. The following cases provide examples of the way the law deals with these types of clauses, such as where damages are excluded by a specified 'Nil' amount or by specific clauses in the contract. These cases will demonstrate when common law damages can still be made available and the extent to which they can be excluded.

Temloc Ltd v Errill Properties (1988) 4 Const LJ 63 ('Temloc')

The English Court of Appeal dealt with this matter in the case of *Temloc* in the context of obtaining liquidated damages.

A JCT Contract was used which inserted 'Nil' into the appendix instead of inserting an amount for liquidated damages. As a result, the court found that the principal was not entitled to recover any damages for delay as it was clearly excluded under the contract. Nourse LJ stated that:

[39] I think it is clear, both as a matter of construction and as one of common sense, that if (1) clause 24 is incorporated in the contract and (2) the parties complete the relevant part of the appendix, either by stating a rate at which the sum is to be calculated or as here, by stating that the sum is to be nil, then that constitutes an exhaustive agreement as to the damages which are or are not to be payable by the contractor in the event of his failure to complete the works on time.¹

Baese Pty Ltd v Bracken Building Pty Ltd (1990) 6 BCL 137 ('Baese')

Alternatively, the court in the case of *Baese* held that the issue depends on the construction of the particular contract. Similarly, the case concerned the specification of a "Nil" clause for liquidated damages. As such, Bracken Building Pty Ltd had argued that where a delay event occurs, Baese's only entitlement would be Nil damages. Giles J thus stated:

[142] "...it would require clear words...before it was held that a liquidated damages clause was the entirety of the proprietor's rights, because the proprietor would be exposed to being left with no entitlement at all to damages for delay if by

¹ *Temloc Ltd v Errill Properties* (1988) 4 Const LJ 63, [39] (Nourse LJ).

reason of his own contribution thereto, he was unable to rely upon the liquidated damages clause.”²

Resultingly, Bease was entitled to general damages under common law.

Turner Corporation Ltd (Receiver & Manager Appointed) v Austotel Pty Ltd (1994) 14 BCL 378 (‘Turner’)

In the case of *Turner*, the court specified that the exclusion of the rights to common law damages will depend on the construction of the contraction. Cole J stated that the phrase ‘clear words’ does not mean express words in every situation, but it may be sufficient where a general intention to exclude common law damages is found. He expressly stated that:

[36] If on the proper construction of the contract as a whole, it can be said that a party has surrendered its common law rights to damages, that construction must be given effect to, notwithstanding absence of express words surrendering the common law rights to damages.³

Australian Case Law

High Court of Australia

Concut Pty Ltd v Worrell [2000] HCA 64 (‘Concut’)

In the High Court case of *Concut*, the court reiterated at [23] that ‘clear words are needed to rebut the presumption that a contracting party does not intend to abandon any remedies for breach of contracting arising by operation of law’.⁴

This is important as it means that the contract will require clear and unambiguous terms if it intends to exclude any remedies for breach of contract.

Toll (FHCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52 (‘Toll’)

In the case of *Toll*, the court reaffirmed the principle of objectivity by which the rights and liabilities of the parties to a contract are determined. The court stated that they will not look at what each party understands their rights and liabilities to be, but rather the clear meaning

² *Baese Pty Ltd v Bracken Building Pty Ltd (1990) 6 BCL 137, [142] (Giles J).*

³ *Turner Corporation Ltd (Receiver & Manager Appointed) v Austotel Pty Ltd (1994) 14 BCL 378.*

⁴ *Concut Pty Ltd v Worrell [2000] HCA 64, at [23].*

of the 'words and conduct that would have led a reasonable person in the position of the other party to believe'.⁵

Thus, the reasonable person test will be used to determine what a reasonable person would understand the words of the contract to mean. The court may also consider the surrounding circumstances that are known to the contracting parties.

Federal Court of Australia

Lucas Earthmovers Pty Limited v Anglogold Ashanti Australia Limited [2019] FCA 1049
(*Lucas Earthmovers*)

The case of *Lucas Earthmovers* is significant as it specifically deals with an express clause stating, 'No Damages for Delay'. The case provides an important discussion of how the court will consider the interpretation of a clause excluding damages arising out of a construction contract.

In this case, Lucas Earthmovers contracted with AGA for the construction of an access road to a remote mining site. There was a significant delay resulting in the Contractor incurring additional costs to complete the project. Lucas Earthmovers brought a claim against AGA for delay and disruption costs, however, the contract included clause 18.8, the 'No Damages for Delay' clause which provided the following:

"Notwithstanding any other provision of this Contract, the Contractor will not be entitled to claim any Liabilities resulting from any delay or disruption (even if caused by an act, default or omission of the Company or the Company's Personnel (not being employed by the Contractor) and a claim for the extension of time under Clause 18.3 will be the Contractor's sole remedy in respect of any delay or disruption and the Contractor will not be entitled to make any other claim."

The Federal Court of Australia confirmed that it will enforce a clause relating to no damages for delay, including where the delay occurs due to a variation under a contract.

The court found that the contractor could not recover prolongation costs, because the plain wording precluded the recovery of any damages for delay and disruption. The court went on to state:

[292] In my opinion, when cl 18.8 is construed in the context of the Contract as a whole, it is to be understood as making it plain that Lucas was not to have any claim for losses, costs and expenses which result from any delay or disruption. The word

⁵ *Toll (FHCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52.

"any" is significant. It indicates that cl 18.8 is directed to delays or disruptions of all kinds.⁶

As such, the case shows that plain wording in the contract can exclude the right to damages including common law damages even if it is caused by the act, default or omission of the Principal.

In Practice:

Extract of significance

An example of a clause that may exclude rights and remedies at common law for delay and disruption is as follows:

'The sums payable under this clause represent the Contractor's sole entitlement to compensation for delay or disruption, including delay or disruption caused by the Principal, whether in breach of the Contract or otherwise and is in substitution for and excludes the Contractor's rights and remedies at common law (including the right to recover damages for breach of contract or otherwise).'

In the example above, the sole remedy for delay and disruption was an extension of time which was expressly stated in the contract. However, any damages for delay and disruption were prohibited.

It is important to be able to spot these clauses so that contractor's are aware if they are excluded from obtaining damages and compensation under common law remedies before it is too late.

Conclusion and Implications

Overall, it is evident that that Australian case law support the English case law in the proposition that damages can be excluded where expressly stated in the contract. This can be through a clause specifying 'Nil' or by clear words in a contract excluding common law damages.

As such, damages can be excluded if done so by clear and unambiguous words. This can have serious implications as it may leave Contractors without any means of damages and compensation.

Thus, Contractors must read and understand their contractual rights and remedies under a contract so that they know what they will be entitled to if a delay or disruption event occurs. This includes where the event is out of the control of the contractor, such as a variation or a breach of contract by the act, default, or omission of the Principal.

⁶ *Lucas Earthmovers Pty Limited v Anglogold Ashanti Australia Limited* [2019] FCA 1049, [292].