

**Spiers Earthworks Pty Ltd v Landtec Projects Corp Pty Ltd (No 2) (2012)
287 ALR 360; [2013] WASCA 53**

FACTS

Landtec contracted with Spiers on 21 February 2005 to carry out works for the subdivision of a parcel of land in line with the general conditions of AS2124-1986 (first contract) with a potential completion date of 10/5/2005. Approval of the subdivision contained a Condition 25 which required Landtec to construct and seal a 1.2 km stretch of adjoining road. Landtec therefore entered a subsequent agreement with Spiers to construct the road (second contract) with a practical completion date of 11 September 2005. Practical completion of the first contract was achieved on 26 July 2005. Landtec claimed liquidated damages for the period between 10/5/2005 and 26/7/2005.

ISSUES

Whether the liquidated damages sum was a penalty on the basis that the principal was unlikely to suffer any delay due to the condition 25

FINDING

President McLure with reference to leading authorities of *Ringrow Pty Ltd v BP Australia Pty Ltd* and *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* reaffirmed that liquidated damages will be a penalty if they are "out of all proportion" with the amount of unliquidated damages that may have been recovered. The liquidated damages formula under the first contract provided for \$13,846 per week which was based on the intention to compensate Landtec for the loss of the proceeds of sale at settlement. Therefore it was decided that the sum was "out of all proportion" and was a penalty as Landtec could not suffer any financial loss from any delay in practical completion under the first contract given condition 25.

QUOTE

President McLure stated at para 40:

...The liquidated damages clause cannot be characterised as a genuine pre-estimate of the damages to which the developer would be entitled under the general law. Delay in performance of the first contract was incapable of causing any relevant financial loss to the developer until condition 25 was satisfied or its performance deferred (or waived) by the Shire. Thus, the sum stipulated is extravagant in amount in comparison with the greatest loss that could potentially be suffered by delay in practical completion under the first contract. I would uphold grounds 1 and 2."

IMPACT

This decision reaffirms that liquidated damages may be void as penalties. If challenging a liquidated damage clause a full review of the circumstances at the time the contract should be conducted.

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