

Carbone v Fowler Homes Pty Ltd [2024] NSWCA 192

FACTS

Giuseppe and Matthew Carbone (the Owners) entered into standard form contracts with Fowler Homes Pty Ltd (the Builder) for the construction of duplexes on their properties in Oran Park, NSW. The contracts specified a "Building Period" of no more than 48 weeks and included a liquidated damages clause that set a nominal amount of AUD 1 per day for delays.

The Builder delayed completion beyond the agreed period, and the Owners sought general (unliquidated) damages for lost rent due to the delay. The Builder argued that the nominal liquidated damages clause was the sole remedy available to the Owners, effectively barring them from claiming any further damages.

ISSUES

Does a nominal liquidated damages clause (AUD 1 per day) prevent an owner from claiming general damages for delay?

FINDING

The NSW Court of Appeal (Ward P, Leeming JA, Mitchelmore JA) held that the nominal liquidated damages clause did not exclude general damages, absent explicit contractual language stating otherwise. Key findings from the judgment include:

"...the better interpretation of the liquidated damages clause is the one that avoids that consequence. On that interpretation, the liquidated damages clause in this case should not be interpreted as providing an exclusive remedy for delay. Rather, by specifying the amount of liquidated damages at \$1 per working day, the parties intended not to provide for a substantive right to claim liquidated damages and intended instead to leave the plaintiffs a right to claim damages they could prove they had actually suffered."

"...clear words would be required before it was held that a liquidated damages clause was the entirety of a proprietor's rights."

"...the appellants adduced sufficient evidence, including of comparable leases, to prove damages of lost rent."

"...the trial was conducted on the basis that damages for breach of contract was claimed, and the primary judge erred in declining to determine that issue."

IMPACT

This case highlights the importance of clear drafting in construction contracts, particularly when dealing with liquidated damages provisions. If parties intend for liquidated damages to be the sole remedy, this must be expressly stated to avoid claims for general damages. Project managers and contract administrators should ensure that liquidated damages clauses are clear.

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