

A building contract is where one person, the contractor, agrees to supply labour and materials for the construction of a building (or other works) for the benefit of the proprietor who agrees to pay for such works.



### **A. TIME FOR COMPLETION**

In most cases, the time for completion of the building will be agreed upon between the parties and stipulated in the contract. Where time for completion is not stated in the contract, a term that the work is to be done within a reasonable time will be implied having regard to the interests and convenience of both parties.

The contractor or builder is bound to complete the work by the stated date or the date as extended in accordance with the provisions of the contract and will be liable for damages if not completed on time.

### **B. TIME OF THE ESSENCE**

If the contractor fails to complete within the stipulated time and time is of the essence<sup>1</sup> the employer can treat the contract as at an end. However, the normal rule is that time is not of the essence in building contracts, especially where the contract includes provisions for extension of time and the payment of liquidated damages for delay.

### **C. EXTENSION OF TIME**

It is to be noted that the nature of the industry and the complexity of procedures associated with large scale construction make extension of time a necessary feature of the contract.

The ground on which extension of time may be granted is by any cause or causes beyond the control of the contractor. If the contractor can show that the progress of the works has been affected, extension of time will normally be approved.

<sup>1</sup>Time being an essential condition of the contract

<sup>2</sup>Forestry Commission of NSW v Stefanetto (1976) 133 CLR 507 at 519, Wollondilly Shire Council v Picton Power Lines Pty Ltd (1994) 33 NSWLR 551 at 555.

<sup>3</sup>Citicorp Australia Ltd v Hendry (1985) 4 NSWLR 1 at 23.

<sup>4</sup>Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234

<sup>5</sup>[1915] AC 79 at 86-8.

The proprietor should include a time for extension for the default of the proprietor (causing any delay) so that the proprietor would not have difficulty in enforcing a liquidated damages claim.

### **D. LIQUIDATED DAMAGES OR PENALTY**

Building contracts may include a provision for liquidated damages covering delayed completion. A liquidated damages provision is a genuine pre-estimate of loss or damage<sup>2</sup>.

However, the contractor may contend that the sum sought to be recovered is in truth a penalty and not liquidated damages. If the provision is held to be a penalty, it has no legal effect<sup>3</sup> but the contractor may not entirely escape liability and will be liable to pay damages which the proprietor is able to prove.

But where the claim is for a reasonable sum it is no objection that the damages figure arrived at exceeds the figure payable had the contract been performed<sup>4</sup>.

The principle for determining whether an amount included in the contract is a penalty or not was considered in Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd<sup>5</sup>. In that case, it was held that a sum is a penalty if:

1. The payment money is stipulated as a threat to the offending party.
2. The sum stipulated for is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach.
3. The breach consists only in not paying a sum of money, and the sum stipulated is greater than the sum which ought to have been paid.

Where the contract provides for the payment to or deduction by the proprietor of liquidated damages for delay in completion at a stated rate per day, week or other period, the provision will not be regarded as a penalty unless the sum stipulated is unreasonable.

While provision for the payment of damages for delay at a specified rate is normally not exceptionable, a provision which includes payment of a lump sum will usually be liable as a penalty.

### **E. OTHER FORFEITURES**

It is to be noted that there may exist clauses in building contracts which provide for the forfeiture of materials.

In *Forestry Commission of NSW v Stefanetto*<sup>6</sup>, upon the default of the contractor, the proprietor had the right to take possession of any materials and construction equipment on site owned by the contractor. The proprietor can take possession without payment or responsibility for any wear and tear.

### **F. LOSS OF RIGHT TO LIQUIDATED DAMAGES**

There are other grounds, besides penalty, on which a contractor may rely upon as defence when a proprietor seeks to claim liquidated damages.

It is an accepted principle that one party may not rely upon the failure of the other party to perform the contract where it is the former who has prevented the performance. Therefore a proprietor may not recover damages for delay in completion where by the proprietor's own act has prevented the work to be completed.

Usually liquidated damages for delay in completion cannot be recovered by the proprietor where the ordering of extras or other variations causes or contributes to the delay in completion, notwithstanding that the contractor may in fact have been disabled from completing by the due date by the contractor's own delays.

<sup>6</sup>(1976) 133 CLR 507

### **G. DETERMINATION OF CONTRACT**

Under a building contract the proprietor may terminate the contract where the contractor fails to proceed the work with reasonable diligence. If the proprietor accepts a repudiation of the contract by the contractor, the proprietor can recover liquidated damages up to the time of the determination.

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