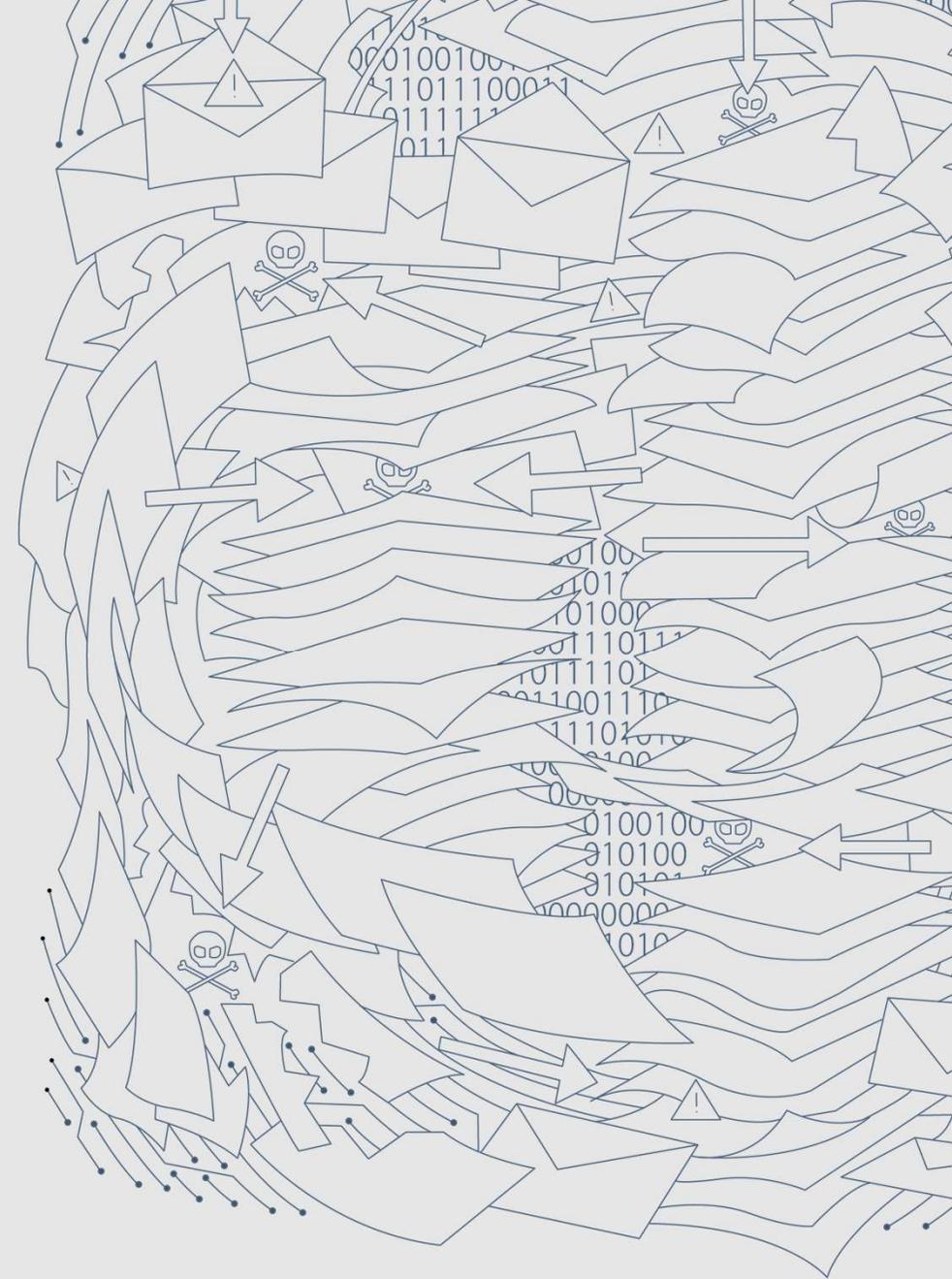


LIQUIDATED DAMAGES SOLUTIONS

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GENERAL PRINCIPLES ON LIQUIDATED AND ASCERTAINED DAMAGES (LADs)

Parties pre-agree a defined sum payable for breaches of contract

Payable for contractor delay on completion by the agreed date for completion of the Works

Limits the Contractor's liability for damages of an unknown and open ended kind

By use of LADs, Employer does not have to quantify its loss, which may be difficult and time consuming to do

Agreed rate per day/week

Standard construction contracts include LADs and Extension of Time (EoT) provisions

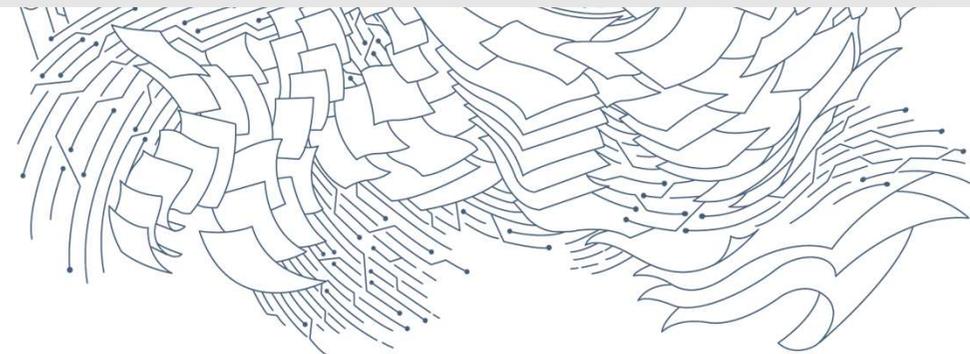
Relief from LADs where Contractor receives an EoT

The parties manage the risk of delay in completion of the Works

LADs NOT A PENALTY

LADs:

- A genuine pre-estimate of the loss to be suffered
- A penalty - payment of money held “*in terrorem*” over contract party
- LADs - must not be extravagant and unconscionable
- Its a question of construction of the contract whether the sum is a penalty or genuine pre-estimate of the loss
- LADs or penalty – to be judged a the time of entry into the contract



PENALTIES v. LADs



CASE LAW

Dunlop Pneumatic Tyre Co. Limited v. New Garage & Motor Co. Limited [1915] AC

Establishing guidance on penalties v. LADs

Tyre manufacturer case against tyre retailer on non-compete clause and payment of LADs for breach

Four tests:

1

If sum stipulated is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed the breach

2

If breach consists of not paying a sum of money and the LADs figure is greater than such sum which ought to be paid - a penalty

3

Assumption it is penal if lump sum payable for event or series of events giving right to varying degrees of loss

4

If the consequences of a contract breach are difficult to quantify they are likely to be judged as LADs and enforceable

MOVE AWAY FROM *DUNLOP*



Cavendish Square Holdings BV v. Makdessi [2015] UKSC

- move away from genuine pre-estimate of loss – distinguishes primary and secondary obligations under the contract
- party may have an interest in protecting more than monetary compensation for the loss
- seller breached share purchase agreement
- seller's loyalty was an issue

Parking Eye Limited v. Beavis

- overstay in car park - £85.00 payable
- not a genuine pre-estimate of loss
- charge had two legitimate functions:
 - efficient use of the car part for benefit of other premises
 - financing costs of running the car park.
- courts concerned that penalty rule is an interference in freedom to contract

- when provision challenged as a penalty – ask is it penal, not whether it is a genuine pre-estimate of the loss
- the true test is whether the impuned provision is a secondary obligation, which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation
- whether the sum payable as a consequence of breach is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the Contract
- “an extravagant disproportion between the LADs and the highest level of damages that could possibly arise from the breach would amount to a penalty and thus be unenforceable”



APPLICATION OF *MAKDESSI*



Mansion Place Limited v. Fox Industrial Services Limited [2021] EWHC

Contract for student accommodation development

Contractor - LADs penal as no bespoke assessment, same level regardless of room type

Developer - LADs were negotiated, not disproportionate in context of the breach, loss of rental income and alternative accommodation costs

Court – Developer had significant interest in completion on time

Parties were in a strong negotiating position

Contractor had accepted those rates

Not disproportionate

SECTIONAL COMPLETION AND LADs

- Standard forms allowing sectional completion and reductions in LADs
- Difficulty in application where one sum for LADs but Works to be completed in sections
- Possibility that LADs will fail; void for uncertainty
- Scope of Works falling within sections – carefully define, must be ascertainable

Eco-World - Ballymore Embassy Gardens Company Limited v. Dobler Limited [2021] EWHC

- Contract clauses allowed for LADs for failure to complete sections of the Works by dates for completion
- LADs were “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”
- Contract Particulars only included one rate of LADs for delay in completing the Works
- No LAD rate for any one of the three blocks or part of the Works
- Dobler argued LADs void and unenforceable as no mechanism to reduce on early possession
- LADs were negotiated, lawyers for each party
- EWB had legitimate interest in enforcing the completion of the Works as a whole
- Quantification of damages if part and not all of the Works were completed on time would be difficult
- No evidence that the LADs were unreasonable or disproportionate to the likely losses for late completion
- Not extravagant, exorbitant or disproportionate



PROCEDURAL REQUIREMENTS

1

Comply with
contract procedures
for making a claim

2

Architects
Certificate re non-
completion

3

Deduction and
withholding from
sums due to the
Contractor



POST *MAKDESSI*

- Position not settled in Ireland
- UK Courts giving greater deference to parties freedom to contract
- In construction cases in devising LADs parties still look at the genuine pre-estimate of loss for the delay
- Is the LADs provision imposing a detriment out of all proportion to the legitimate interest of the innocent party seeking enforcement of completion:
 - Factors for consideration:
 - Nature of the detriment suffered and likely losses
 - Proportionality
 - Bargaining power of the parties – negotiating at arm's length and on the basis of legal advice
 - Difficulty in calculating the losses
- Employer, in setting LADs, should devise LADs having regard to these principles - maintain records of calculations.
- Acknowledgement that LADs in the contract represent a genuine and reasonable pre-estimate of the loss
- Sectional completion – avoid ambiguity
- Careful drafting

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