Montana Law Review

Volume 3
Issue 1 *Spring 1942*

Article 3

January 1942

Damages: Liquidated Damages for Delay in an Abandoned Construction Contract

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Court as agreed upon. The principal alleged basis for damages in the *Keller* case was mental anguish resulting from certain alleged slanderous statements, which might possibly be used as a basis for explaining the Court's action therein in contrast with many previous cases.[39] Actually, however, it has used remittitur in many cases where the damages were no more certain.[40] It should further be noted that the case does not specifically modify any of the rules as to the conditions under which remittitur *may* be applied, laid down in the recent cases discussed above. It is therefore impossible to determine whether this case augurs still a fourth period in the use of remittitur in Montana.

—Harrington Harlow.

DAMAGES: LIQUIDATED DAMAGES FOR DELAY IN AN ABANDONED CONSTRUCTION CONTRACT

In a recent Federal case, the plaintiff contractor entered into a contract to build a road for the defendant district. The agreement provided that the contractor was to pay $500 per day as liquidated damages for every working day elapsing between the agreed and the actual completion dates. Twenty days after the agreed date the plaintiff abandoned the work; new bids were advertised and a new contractor started work after a delay of 149 days and completed the work in 264 days. The court allowed the defendant, under its cross-complaint, damages for the 20 and 264 day periods at the stipulated rate but not for the 149 day period that the employer was looking for a new contractor.[1]

In holding that the liquidated damage provision is applicable even where there has been a total abandonment of work by the contractor, the principal case rejects the view of the earlier cases and Williston's original view.[2] Under the old theory as

[39]" . . . the amount of an award in a slander case depends so greatly upon the effect of the slander on the plaintiff . . . " Keller v. Safeway Stores, Inc. (1940) 111 Mont. 28, 108 P. (2d) 605, 614.

[40]In fact in most of the cases the court itself frankly admits the impossibility of definitely determining the *effect* of the injury on the plaintiff. Tanner v. Smith (1934) 97 Mont. 229, 33 P. (2d) 547; Ashley v. Safeway Stores Inc., (1035) 100 Mont. 312, 47 P. (2d) 53.

[1]Six Companies of California v. Joint Highway District No. 13 of State of California (1938) 24 F. Supp. 346, affirmed 110 F. 2d 620, reversed on other grounds 311 U. S. 180, 85 L. Ed. 114, 61 S. Ct. 186.

[2]WILLISTON, CONTRACTS (Rev. Ed. Vol. 3, 1935) §785, P. 2210. But see 1941 Cum. Supp. §785, P. 44 wherein the rule of the principal case is approved as preferable to the old, apparently not recognizing still another possible alternative use of the clause.

originally stated if the provision was not applicable as part of the contract it was not applicable for any purpose;[3] and the rule, that such a provision contemplates a breach by mere delay but not a breach by abandonment, was supported by the conclusion that the breach finally materializing was not apposite to the intention of the parties,[4] and by an initial presumption that such a subordinate clause is limited by the period of time the parties attempt to perform under the main contract.[5] This position is entirely consistent with the uniform tendency of the older common law to construe strictly liquidated damage clauses.[6] However, the older view was often unjust in practical application, in that the employer did not receive any damages for the delay.[7] This objection has sometimes been stated thus: "The older view, then, is anomalous in that the more flagrant the breach and the greater likelihood of delay, the more difficult it will be for the owner to recover for the delay he was guarding against."[8]

Such objections resulted in the rule asserted in the principal case that a *per diem* clause applies even though the contract is abandoned. However, this rule has not been applied absolutely, but the courts have imposed a standard of reasonableness as to what delay after abandonment will be deemed subject to the clause.[9] But, on whatever grounds the *per diem* clause may be

[3]Bacigalupi *et al.* v. Phoenix Bldg. & Const. Co. *et al.* (1910) 14 Cal. App. 632, 112 P. 892.

[4]Moses v. Autuono (1918) 56 Fla. 449, 47 So. 925, 20 L. R. A. (N. S.) 350.

[5]Watson v. DeWitt County (1898) 19 Tex. Civ. App. 150, 46 S. W. 1061. This case has been cited in other decisions as authority for the newer line of decisions. The case allowed liquidated damages only from completion date until the contractor formally abandoned the contract, i. e., only so long as performance under the contract continued, and therefore, it is not authority for the proposition that the clause is applicable even *after* the contract is abandoned. See note 9. *infra.*

[6]City of Rainier v. Masters (1916) 79 Ore. 534, 154 P. 426, L. R. A. 1916E 1175: "Forefitures are to be strictly construed, and he who would avail himself of them must bring himself precisely within the letter of the contract authorizing them." McCormick, Damages (1935) §147, P. 600; Elliott, Contracts (1913) Vol. 2, §1559, P. 848.

[7]*Supra* note 3; Shields v. John Shields Const. Co. (1913) 81 N. J. E. 286, 86 Atl. 958.

[8]*Liquidated Damages-Clause Relating to Delay Held Applicable Where Contractor Abandons Work* (1938) 52 Harv. L. Rev. 160.

[9]*Supra* note 1; Southern Pac. Co. v. Globe Indemnity Co. (1927) 21 F. 2d. 288; McCormick, Damages (1935) p. 155 (approves Southern Pac. case). It is not altogether clear whether Williston intends to say that a *per diem* damage clause should not apply for any purpose where there is finally an abandonment, or simply that it should not be applied to any time elapsing *after* the actual abandonment. The Southern Pac. Co. case interprets it as declaring that the plaintiff should not recover under the contract clause even for the period of time elapsing

deemed to control in case of an abandonment, it would seem that it should include a reasonable period of time to secure a new contractor.[10] Surely, if abandonment has any place in the intentions of the parties, it is difficult to see why they would not intend the clause to cover that period. Nevertheless the principal case, and others,[11] refuse compensation for that delay.

The lack of uniformity in the decisions and discontent expressed in the opinions in both lines of authority raise the query whether a still better rule may not be formulated.[12] It is submitted that, instead of approaching the problem from a contract standpoint, a fairer result would be reached by admitting the clause for whatever evidentiary value it may have, under the facts of the particular case, of the per day *rate* of actual damage caused to the employer. Treating it in this manner the question will always be: "What are the real damages" for the delay? Under this rule the employer would be permitted to prove greater damage, or the contractor would be permitted to prove that the employer suffered less damage, than the amount stipulated for. In the absence of such proof the court would treat the provision as the best evidence available, unless so clearly out of line as to amount to a penalty. Surely, when from the nature of the case it would be impracticable or extremely difficult to fix the actual damage, which is the very basis for enforcing liquidated damages, the contracting parties by agreement could estimate better than anyone else the damage suffered.[13] Their agreement to guard against that loss should be given full consideration to that extent.

Such an approach would undoubtedly bring up many objections to its use, some of which can be forseen and others not. If we consider the question to be, "What are the real damages from loss of use," presumably the general rules governing damages for breach of a contract will control. So, one might well ask, "Are the damage items covered by the *per diem* damage clause of such character that, but for the binding nature of the

between the completion date and the abandonment date. This supposed aspect of Williston's rule is a strongly contributing factor in causing the Court in the Southern Pac. case to repudiate that rule. On principle it seems that the clause should govern strictly, so long as performance *under* the contract is being attempted.

[10] *Supra* note 8.

[11] Southern Pac. Co. v. Globe Indemnity Co. *supra* note 9.

[12] *Supra* note 1; Board of Education v. Sandman (1929) 134 Misc. 456, 234 N. Y. Supp. 665, affirmed 229 App. Div. 853, 243 N. Y. Supp. 805.

[13] SUTHERLAND, DAMAGES (1916) §283, P. 843, quoting Chief Justice Best in Crisdee v. Bolton, 3 C. P. 240

"I think that parties to contracts, knowing exactly their own situations and objects, can better appreciate the consequences of their failing to obtain these objects than either judges or juries."

contract, the law won't recognize them, as being too indefinite and uncertain?'' If they are, of course there would be no place for evidence pertaining to such items. Hence, as evidence, our clause would be irrelevant to the issue of damages.

It may be well to stop at this point and determine the purpose or function of a provision guarding against these particular damages. The courts have not been careful to analyze the provision but have followed the aphorism of Williston,[14] or the new line of authority, without further inquiry into its nature.[15] The provision is intended to cover those cases where from the nature of the contract and of the breach the actual damages are difficult to compute mathematically, though the fact of there being substantial injury be established. The provision is, in final analysis, intended to cover those damages caused by the loss of use.[16] Loss of use includes those items such as compensation for loss of enjoyment,[17] change of position of the parties to their detriment in reliance upon the completion date,[18] rental[19] and any other damage the owner may suffer by failing to have the use of the property which is being constructed.[20] At least some of these damages from their nature are difficult to ascertain or expensive to compute. Yet, they are as real as those that may be easily reduced to mathematical certainty.[21]

[14]Village of Canton v. Globe Indem. Co. (1922) 201 App. D. 820, 195 N. Y. Supp. 445.

[15]Clemente Const. Corporation *et al.* v. P. T. Cox Contracting Co., Inc. (1939) 172 Misc. 904, 16 N. Y. Supp. 483. However, in McKegney v. Illinois Surety Co. (1917) 180 App. Div. 507, 167 N. Y. Supp. 843, the court recognizes there may be special loss by reason of delay.

[16]Streeper v. Williams (1865) 48 Pa. 450.

[17]*Supra* note 16, 48 Pa. at P. 455; City of Bristol v. Bostwick (1922) 146 Tenn. 205, 240 S. W. 774.

[18]*Supra* note 16, 48 Pa. at P. 455.

[19]If the employer were intending to rent the building when completed to a third party, then the damages, under most circumstances, would be easily computable and there would be no basis for applying the provision. However, if the delay should cause him to lose a more desirable tenant than he should obtain thereafter, then there is some reason to apply the clause to cover his disappointment and whatever inconvenience the new tenant may cause. In rental cases the provision would be most applicable where the employer intends to occupy the premises himself and has given up his old lease or made other preparations in reliance thereon. In such cases it would cover any rental paid elsewhere plus the damage caused by extra moving, such as destruction and loss of household goods, time spent in locating a place in which to live in the interim and those innumerable other losses attendant upon such moving. Where some items are readily computable and some are not, common sense will dictate the manner and extent to which our clause will be used as evidence of real damages.

[20]Edward E. Gustin & Co. v. Neb. Bldg. and Inv. Co. *et al.* (1923) 110 Neb. 241, 193 N. W. 269.

[21]Southern Menhaden Co. v. How *et al.* (1916) 71 Fla. 128, 70 So. 1000, McKegney v. Illinois Surety Co. *supra* note 15.

There is little suggestion in the cases applying the *per diem* damage clause to abandoned contracts as a binding provision of the contract, that they do so because the employer could recover nothing otherwise. As a matter of fact, there is little in the general statements found in the cases or the authorities, as to the relationship of liquidated damage clauses to the general law of damages, suggesting that such clauses are a means of giving effect to damages which otherwise would not be recoverable because of their uncertainty in amount.[22]

It is possible that under Montana's applicable Code Sections the suggested objection might be pressed further than would seem justified under the cases.

R. C. M. 1935, Section 8668 provides:

> No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.

R. C. M. 1935, Section 7556 provides:

> Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.

And R. C. M. 1935, Section 7557 provides:

> Exception—The parties to a contract may agree therein upon an amount which shall be presumed to be an amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

However, it would seem that these sections can best be harmonized simply by interpreting them as being declaratory of the common law. That is, Section 8668 requires that substantial damages actually be sustained, and that they be the consequences of the defendant's breach. Section 7557 is a special application of Section 8668, in that it provides for a special method for determining the measure of certain damages fully satisfying the requirements of certainty of their existence and causal

[22]A Pennsylvania case may be thought inconsistent with this statement. Streeper v. Williams, *supra* note 16, suggests that because of the circumstances and nature of the breach it may have been the intention of the parties to stipulate those damages which would not otherwise be recoverable under the general rules of damages. Even if it be thought that the law of damages in the past did not directly permit recovery for the bulk of those items covered by a *per diem* delay clause, it is submitted that to so allow recovery whenever provided for by mutual agreement of the parties, except as modified by proof of the actual damages, would be a desirable development in the law of damages.

connection required by Section 8668, but the *measure* of which is uncertain because of their special character.[23]

If we grant that the real question in every case of abandonment is "What are the real damages?", another objection may be raised, stated in somewhat this form: "How can the parties' approximation or compromise agreement as to what is a reasonable stipulated sum for each day's delay, arrived at months before the breach, be relevant even, in establishing the *real* damages flowing from abandonment?" The answer to this objection turns on the nature of the fact sought to be proved. If that fact were susceptible of direct proof, resulting in a simple mathematical computation, the objection raised would be tenable. In fact, though, the basic assumption as to this particular kind of damage is that it will be no more susceptible of exact ascertainment *after* breach than *before*. Hence, as is well stated in Sutherland on Damages:[24]

> "Where a contract is of such a character that the damages which must result from a breach of it are uncertain in their nature and not susceptible of proof by reference to any pecuniary standard, it is deemed especially fit that the parties should liquidate them, and any stipulation they make ostensibly for that purpose receives favorable consideration."

As suggested above, the amount stipulated in the *per diem* damage clause is likely to be simply a *compromise* between two divergent views or opinions as to how much the owner may be damaged for loss of use. Hence, it is rather difficult to fit it into any of the recognized categories of evidence. However, it may be objected that this is opinion evidence and should be excluded on that ground. But, according to Wigmore it is not a matter of opinion at all; rather is it a question of testimonial qualification under which either party might well be termed an expert.[25] Even though the court should treat this as opinion evidence it still might be admitted as an opinion of value.[26] Another evidentiary objection might be that this clause does not satisfy the Best Evidence Rule, and so should be excluded. Of course, much would depend upon what the particular court construes the Best Evidence Rule to mean; but, if Wigmore's interpretation be accepted, one could not successfully object to it on this ground.[27] Further, it may be argued that the clause should

[23]McCormick, Damages (1935) §148, Notes 23 and 24, P. 606.
[24]Sutherland, Damages (1916) Vol. 1. §289, P. 868.
[25]Wigmore, Evidence (1940) §557, P. 637.
[26]Wigmore, Evidence (1940) §1923, P. 21 and §1940, P. 47.
[27]Wigmore, Evidence (1940) §§1173, 1174.

be admitted as an admission.[28] Whether or not that is correct, it is submitted that there are no insurmountable evidentiary objections to the use of this provision as the best evidence available of the damage for loss of use.

Treating the clause as the best evidence available is not a pure invention. It is a formulation of a rule that the courts may have been applying but not recognizing. The principal case allows damages only for the period of time which it thinks "fair," saying that "obviously, the *per diem* arrangement does not run during the entire period of delay." In other words, it allows damages at the stipulated rate only for the period of time which it thinks reasonable under the circumstances, and as there is no evidence to the contrary this will be the amount of damage suffered. A Texas Court allowed recovery for part of the delay, "there being no evidence of the amount of actual damages," and the court did not see any reason why it should not apply the provision as such.[29] A Kansas Court allowed the employer what it thought was a reasonable length of time under the circumstances within which to make new arrangements.[30] Another case held that the employer was entitled to claim damages at the stipulated rate for such delay as directly resulted from the original contractor's abandonment of the work, such period of time to be shown as a matter of evidence at the trial.[31] Perusal of these cases makes it apparent that the courts are willing to accept the per day *rate* of damage, but only for such *length* of time as it deems reasonable under the circumstances, and the result in each falls squarely within the proposed rule of best evidence. However, no evidence of actual damage for loss of use was submitted, and it does not appear in the reports that any such offer was made in the foregoing cases. If the liquidated per day rate is applied as a binding provision of the contract such evidence is not pertinent, but that these cases did not intend any such result, is strongly suggested in *National Loan and Exchange Bank v. Gustafson,*[32] in which the Court said:

[28]WIGMORE, EVIDENCE (1940) §§1048, 1049.

[29]Kaufman *et ux.* v. Christian-Watham Lumber Co. *et al.* (1916) 184 S. W. 1045.

[30]School District No. 3 v. United States Fidelity and Guaranty Co. (1915) 96 Kan. 499, 152 P. 668. The employer waited 4 months, 21 days before hiring a new contractor to complete. In computing the period for allowing damages for delay, the court decided, having in mind all the circumstances of the case, that 1 month and 21 days was a reasonable period. The result is justified by the duty to mitigate. SUTHERLAND, DAMAGES (1916) §149, P. 458.

[31]City of Reading v. United States Fidelity and Guaranty Co. (1937) 19 Fed. Supp. 350.

[32](1930) 157 S. C. 221, 154 S. E. 167.

"Certainly if the $30.00 per day clause for delay does not apply, as such, it does fix a measure for the damages which would be suffered by the school district in the event the building was not completed in accordance with the terms of the contract. This measure of damages was agreed upon by the parties and on account of the uncertainty and the impossibility of applying the ordinary rules in measuring damages, I think that this clause in the contract affords the safest and most equitable rule to apply."

If the provision is to be applied only to delays which the court thinks reasonable, why not forget all about binding provisions of contracts, and simply treat the provision as the best evidence available, under the circumstances, of the damages for loss of use to the employer?

—Bjarne Johnson.

MUNICIPAL CORPORATIONS: LIABILITY OF COUNTIES FOR NEGLIGENT ACTS AND OMISSIONS OF THEIR EMPLOYEES AND OFFICERS.

In *Jacobey v. Chouteau County,*[1] the defendant county maintained a ferry for use of the general public crossing the Missouri river. In the winter time when a boat could not be used, the defendant provided a basket or aerial carrier operated upon a long cable. On the south side of the river there was constructed and maintained a tower near the embankment of the river to sustain the cable, and an elevated platform to provide means of getting into or on the basket. Plaintiff, desiring to cross the river, went up the tower to the platform and awaited the approach of the basket; and while he was on the platform the tower collapsed and fell, causing injury to him. Defendant was charged with negligence in the construction and maintenance of the tower. The court held that the county was liable for the injury sustained by the plaintiff; that the county was acting in a proprietary capacity in operation of the ferry; and that there was evidence from which the jury was warranted in finding active negligence on the part of the officers of defendant county, so that it was not necessary to determine whether a county's liability is limited to cases of active negligence. In thus holding counties liable for torts of its officers and employees when engaged in proprietary, but not governmental functions, the court followed *Johnson v. City of Billings.*[2]

[1](1941) ..... Mont. ....., 112 P. (2d) 1068.
[2](1936) 100 Mont. 462, 54 P. (2d) 579, 75 A. L. R. 1196.