



LIQUIDATED AND ASCERTAINED DAMAGES POLICY AND PROCEDURES GUIDELINES

Date Approved	Proposed Review Date
September 2017	September 2020
Chair Person/Office Bearers Signature:	

CASSILTOUN HOUSING ASSOCIATION LTD
Castlemilk Stables, 59 MACHRIE ROAD, GLASGOW G45 OAS

Cassiltoun Housing Association is a recognised Scottish Charity no. 035544

LIQUIDATED AND ASCERTAINED DAMAGES POLICY AND PROCEDURES GUIDELINES

1.0 POLICY OBJECTIVE

- 1.1 The objective of this policy is to ensure that Cassiltoun HA includes a clause within main building contracts that addresses how it will recoup the losses that it can reasonably expect to occur if the main contractor fails to complete the building works within the contractually agreed timescale. These are commonly known as “liquidated and Ascertained Damages’ or ‘L+A Damages’.

2.0 LEGAL AND REGULATORY FRAMEWORK

- 2.1 As a registered social landlord, Cassiltoun HA must comply with the Regulatory Standards of Governance and Financial Management set out by Scottish Housing Regulator.
- 2.2 Standard 2- *‘The RSL manages its resources to ensure its financial well-being and economic effectiveness’*, and Standard 4- *‘The governing body bases its decisions on good quality information and advice and identifies and mitigates risks to the organisation’s purpose’* are of relevance to this Policy.
- 2.3 By stipulating a set level of L + A damages within a development contract, the Association is ensuring contractual recourse should losses be sustained as a result of late handover of a development.

3.0 EQUAL OPPORTUNITIES STATEMENT

- 3.1 We recognise our pro-active role in valuing and promoting diversity, fairness, social justice and equality of opportunity by adopting and promoting fair policies and procedures. We will check this policy and associated procedures regularly for their equal opportunity implications, taking appropriate action to address inequalities likely to result or resulting from the implementation of the policy and procedures. We are committed to providing fair and equal treatment to all applicants including tenants and will not discriminate against any on the grounds of race, colour, ethnic or national origin, religion, age, gender, sex, sexual orientation, marital status, family circumstances, employment status or physical ability.

4.0 RESPONSIBILITY

- 4.1 It shall be the responsibility of the Association’s Development Consultant to liaise with the Quantity Surveyor/ Employer’s Agent to ensure that a figure for L+A damages is included within the contract documents that are issued to contractors for pricing.
- 4.2 The Development Consultant will keep full records of the basis for the calculation.

5.0 BACKGROUND TO THE NEED FOR L+A DAMAGES

- 5.1 In development contracts, it is important to ensure adequate control of project costs and minimise cost over-runs. In standard building contracts it is normal to find a provision for ‘liquidated and ascertained damages’ to the effect that the contractor will pay or allow the employer a sum for each specified period that the works remain incomplete after the contractual date for completion.

By failing to complete the works within the contractual time for completion, taking into account any valid extensions to the contract completion date, then the contractor is in effect in breach of contract.

6.0 LIQUIDATED AND ASCERTAINED DAMAGES

- 6.1 A valid liquidated and ascertained damages clause removes the need for proof of actual loss, which can be difficult and costly. If therefore, the liquidated and ascertained damages clause is valid and applicable, employers are entitled to the agreed liquidated and ascertained damages even if they have in fact sustained no loss. In contrast if the liquidated and ascertained damages clause is inapplicable, the employer must prove the loss he has incurred due to the contractor's breach.
- 6.2 In applying such damages the Association must always ensure that it is doing so in full accordance with the conditions of contract under which the contract is being carried. Should a delay occur the contractor has an obligation under the contract to endeavour to minimise its effect and should provide full and accurate documentation and written evidence in support of any delays for which he/she is seeking an extension to the contract period.
- 6.3 The inclusion of a liquidated damages clause enables both parties the certainty of knowing in advance the amounts or part thereof that will be applicable should the contractor fail to complete the works within the contractual period and avoids the time and expense of having to prove actual loss. The amount to be paid generally represents the Association's pre estimated loss in the event completion is not achieved within the contractual period. Effectively, the Association and the Contractor have, by contract, agreed the value of the liquidated and ascertained damages to be applied should the contractor fail to complete the works within the contractual period whatever may be the actual damage. A reasonably sensible pre-estimate figure should be put forward; otherwise it could have a detrimental effect when the risk is translated into the Contractor's tender.
- 6.4 There are particular issues that the Association should be aware of in relation to projects where sectional completion or partial possession of the site is required. In such projects, the liquidated damages provision should confirm how the monies payable in the event of late completion are apportioned between the different stages of work or by reducing that sum by reference to the part of which possession has been taken. A failure to do so can be critical to the Association's claim for liquidated damages. Where contractual terms relating to Liquidated and Ascertained Damages are inconsistent with other related terms this may have the effect of rendering the Liquidated and Ascertained Damages unenforceable. To avoid this the Director of Operations (usually via the Development Consultant) must seek confirmation from the project Cost Consultant that the amounts stated for liquidated and ascertained damages could not be deemed a penalty and are in fact a reasonable pre-estimate of the potential loss in terms of the contract and will not fail under challenge, should L&A damages be applied.

7.0 PRE-ESTIMATING L & A DAMAGES

- 7.1 L&A damages provide certainty for both parties. In the case of the contractor he is aware from the outset of his liability for every week, day or month (depending on how they are calculated) that the works remain incomplete where an extension of time has not been granted. For the Association, a valid L&A damages clause removes the need for proof of actual loss suffered in lengthy and costly dispute resolution proceedings following any over run in the project.
- 7.2 Notwithstanding the element of certainty, a contractor when faced with the cumulative total may seek to challenge the validity of the amount claimed. They may do this by arguing

that rather than being a genuine pre-estimate of the Association's loss, the L&A damages actually amount to a penalty clause that is unenforceable.

- 7.3 L&A damages should always be calculated to reflect, as closely as possible, the loss likely to be suffered by the Association in the event of late completion, taking into account the facts of each situation on an individual basis.
- 7.4 There should be no standard formula that is applied time after time - the rate should be specific to each project. Evidence should be retained whenever possible showing how the L&A damages figure was agreed and calculated to show that the L&A figure was a genuine attempt to pre estimate loss (as anticipated at the time the contract was entered into).
- 7.5 In the event of a challenge, the burden is on the contractor, as the party liable for the damages, to establish that the specified sum is excessive in the context of the likely losses that could be suffered in the event of delay. Should the contractor be successful the Association would have to bring a claim and prove actual losses (or un-liquidated damages) instead of recovering the L&A damages figure contained in the contract. It is also important to recognise the fact that should the Liquidated and Ascertained damages amount be valid and applicable, employers are entitled to the agreed liquidated and ascertained damages even if they have sustained no loss. Where the liquidated and ascertained damages clause is inapplicable then the employer must prove the loss that has been caused as a result of the contractor's breach of contract.
- 7.6 As noted above, there should be no standard formula. However, the following headings give guidance on the cost areas that may occur in standard Housing Association developments, should an over-run be experienced. All reasonable expenses must be considered when calculating the daily, weekly or monthly level of L&A Damages to be included within the building contract, to give a fair and reasonable pre-estimate of loss that may be sustained by the Association in the event that the contractor fails to complete the works by the contractual date.

a) Rent loss

The Development Consultant should seek confirmation from the Housing Manager (Services) of the anticipated rents that will be charged as at the date that they are contractually due to come off-site. It is likely that this information will already be in the possession of the Development Consultant as it forms an integral part of the grant calculation process. The 'lost rent' will ordinarily be a major component of the Association's L & A damages.

b) Effects on Private Finance Calculation

One effect of a delay in the completion of a contract is that the 'first rental charge' on the property falls into a new financial year from that initially envisaged. A consequence of this is that a higher anticipated rent will be charged which will alter the ratio of Grant to Private Loan when the HAG/ Completion calculation is carried out for submission to Glasgow City Council. Therefore, as well as rent lost being a constituent part of L & A damages, the increased private loan requirement and subsequent and commensurate loss in HAG award should also be considered when calculating L & A damages.

c) Consultant fees and VAT charges.

Depending on the nature and scale of the over-run, consultants may have additional costs. It is therefore necessary to give due consideration to possible 'on-costs' in the form of additional fees from the whole design team. In particular, additional fees are most likely payable to the Clerk of Works who will be required on site for a longer timescale than initially commissioned. Hence, when tendering for Clerk of Works fees, even if a percentage of works cost is quoted, it is advisable to ensure that an hourly rate, applicable if additional services are required, is also provided.

d) Staff time

Additional Association staff resources are likely to be required to manage any period additional to the contractual stage of the development. It is therefore essential that a reasonable estimate of staff costs be considered for inclusion in the L& A damages calculation. The Maintenance Manager should seek advice from the Finance Manager on the true cost of the employing the affected personnel (including salary, NIC, pension, overheads) on a weekly basis. From this, an estimate should be made on the proportion of each staff member's time that is attributable to the scheme to which the L& A damages calculation is related.

e) Other cost headings

Consideration must be given to any other issues, specific to the particular site that, in the event of a delay to completion, would cost the Association expenditure or would limit the Association's anticipated income. These may include additional insurances and legal fees. To reiterate, the above list is illustrative and not exhaustive. Appropriate deliberation must be given to the specific development.

8.0 APPLYING L & A DAMAGES

8.1 The Association will apply L+A damages if contractually able to do so, in order that financial loss is minimised.

8.2 Any deviation from this policy position – e.g. waiving the right to a claim- requires the approval of the Board of Management.

8.3 The Building Contract specific to each development will include a clause on L & A Damages. When applying L & A damages, the terms of the Building Contract must be referred to and adhered to. The advice of the Association's Cost Consultant should be sought in this respect, to ensure that contractual procedures are followed.

8.4 The following should be noted in most cases for the application of L & A damages, although as stated above, the Building Contract on each project will specifically layout the procedure for applying L& A damages.

- 1) A Certificate of Non-Completion must be issued before applying L&A damages.
- 2) L&A damages cannot be applied after the date of Final Certificate.
- 3) There must be a rate for L&A damages stated in the contract documentation.
- 4) The Association's intention to apply L&A damages must be stated in writing.
- 5) If the Architect / Employers Agent fixes a later completion date, the Association shall pay or repay amounts recovered for L&A damages to the Contractor up to such later Completion Date.
- 6) Confirmation in writing from the Architect / Employers Agent should be secured to confirm that that there have been no claims or further claims for extension of time by the contractor (even informal letters/verbal indication).
- 7) Confirmation in writing from the Architect / Employers Agent should be secured to confirm whether the contractor has disputed and / or returned the Certificate of Non-Completion.
- 8) Further clarification from Architect / Employers Agent should be sought regarding the validity of the Certificate of Non-Completion prior to applying L&A damages.
- 9) Director of Operations to sign letter to contractor informing that L&A damages are to be applied.

9.0 REVIEW OF POLICY

9.1 This policy should be reviewed every 3 years.