

No Damages for Delay Charge – Delays Not Contemplated by the Parties

This charge is to be inserted on p. 793 of the 2010 edition of Volume 2 before the first full paragraph of commentary (that begins “Delay damages are not recoverable”) with the introductory text below:

Another model charge to be used in a case involving a “no damages for delay” exculpatory clause follows. It is to be used when one party claims the clause should not apply because the causes of the delays were not anticipated or foreseen and reasonably could not have been anticipated or foreseen by the parties when they made the contract.

PJI 4:20.3 Contract for Construction – Action by Contractor – Delay Damages – “No Damages for Delay” Exculpatory Clause – Delays Not Contemplated by the Parties

As you have heard, the plaintiff, AB, is suing the defendant, CD, for damages because AB claims it was delayed by CD in finishing its work for reasons that were not anticipated or foreseen by the parties when they made the contract. AB entered into the contract with CD for the (*specify contract work e.g. construction of a building, installation of a sewer project, structural repairs on a housing development*) in accordance with certain plans and specifications.

The contract between AB and CD provided that the work was to be completed by _____, _____. AB did not finish the job until _____, _____, _____ days after the scheduled date for completion of the job, and AB claims that CD caused the delays and that AB was damaged by the delays. [CAVEAT:

This charge assumes that there is no dispute with respect to the scheduled date for completion of the job or the date on which AB finished the job.]

The contract contained what is known as a “no damages for delay” clause that provided that AB could not recover damages if the delays in completing the work were caused by circumstances that were anticipated or foreseen by the parties, or by circumstances that reasonably could have been anticipated or foreseen by the parties.

CD claims that AB may not recover on its claim for delay damages because CD did not cause the delays. CD also claims that even if it did cause the delays, AB may not recover because of the “no damages for delay” clause.

The “no damages for delay” clause in the contract does not automatically prevent AB from recovering on its claim for delay damages. The “no damages for delay” clause does not apply when the causes of the delays were not anticipated or foreseen and could not reasonably have been anticipated or foreseen by the parties when they entered into the contract.

AB claims that the delays were the result of (*specify AB’s claims as to the causes of the delays e.g. subsurface conditions not disclosed on CD’s plans; CD’s failure to adequately fund the project*) and that the causes of the delays were not anticipated or foreseen and also could not reasonably have been anticipated or foreseen by the parties.

CD denies that it caused the delays. CD also claims that even if it did cause the delays, the reasons for the delays were anticipated or foreseen by the parties, or [*where appropriate replace “or” with “and”*] that the reasons for the delays

reasonably could have been anticipated or foreseen by the parties.

AB has the burden of proving, first, that CD caused the delays and, second, that the “no damages for delay” clause does not apply because the causes of the delays were not anticipated or foreseen and reasonably could not have been anticipated or foreseen by the parties when they entered into the contract.

You must decide whether AB has proved that CD caused the delays and that the “no damages for delay” clause should not apply because the causes of the delays were not anticipated or foreseen and could not reasonably have been anticipated or foreseen by the parties when they entered into the contract. In deciding whether or not the “no damages for delay” clause should apply because the reasons for the delays were caused by circumstances that were not anticipated or foreseen and could not reasonably have been anticipated or foreseen by AB and CD when they entered into the contract, you should consider the terms of the contract [*where appropriate add: and the evidence about what the parties did foresee or anticipate and reasonably could have foreseen or anticipated when they entered into the contract*].

I am going to provide you with a verdict sheet [*See PJI 4:20.4 SV*] that will contain two questions on this claim. Question 1 asks: “Did CD cause the delays?” If you find that CD did not cause the delays, you should answer this question “No,” and skip Question 2. However, if you find that CD caused the delays, you should answer this question “Yes,” and go on to answer Question 2.

Question 2 asks: “Has AB proved that the reasons for the delays in finishing the job were not anticipated or foreseen and could not reasonably have been

anticipated or foreseen when the contract was made?” If you find that AB has proved that the reasons for the delays in finishing the job were not anticipated or foreseen and reasonably could not have been anticipated or foreseen by AB and CD when the contract was made, you should answer this question “Yes” and proceed to consider AB’s claim for damages against CD [or, if appropriate, additional claims between the parties]. If your answer to this question is “No,” you should [where appropriate state] return to the courtroom [or, if appropriate, state consider additional claims between the parties].

[CAVEAT: Where there are other claims between the parties, add the appropriate charges before discussing damages then proceed to charge on the law of damages, see PJI 4:20.4 below.]

PJI 4:20.4 Contract for Construction – Action by Contractor – Delay Damages

My charge to you on the law of damages must not be taken as a suggestion that you should find for AB. It is for you to decide on the evidence presented and the rules of law I have given you whether AB is entitled to recover from CD.

AB claims that its damages consisted of additional costs in the amount of \$_____ as a result of the delays. [Where appropriate specify AB’s delay damages claims.] CD denies that AB incurred any additional costs as a result of the delays. [Where appropriate specify CD’s response to AB’s delay damages claims.] AB has the burden of proving the amount of the additional costs it incurred as a result of the delays.

I am going to provide you with a verdict sheet [See PJI 4:20.4 SV] that will

contain a question about AB’s claim for damages. Question 3 asks: “State the amount of additional costs, if any, AB incurred as a result of the delays.” After you answer this question, you should return to the courtroom.

[CAVEAT AS TO THE SPECIAL VERDICT FORM: *Where there are other claims between the parties, the jury should be instructed that after answering the questions relevant to the “no damages for delay” claim, the jury should proceed to answer questions relevant to the other claims before considering, if appropriate, the issue of damages. The court may wish to change the order in which the liability claims are submitted to the jury and whether the damages issue is decided sequentially after each liability issue.*]

SPECIAL VERDICT FORM 4:20.3 SV

Answer the following:

1. Did CD cause the delays?

Yes No

At least five jurors must agree on the answer to this question. If your answer to this Question is Yes, proceed to Question 2. If your answer to this Question is No, return to the courtroom [*or where there are other claims between the parties, proceed to Question _*].

2. Has AB proved that the reasons for the delays in finishing the job were not anticipated or foreseen and could not reasonably have been anticipated or foreseen when the contract was made?

Yes No

At least five jurors must agree on the answer to this question. If your answer to this Question is Yes [*and there are no other claims, proceed to consider AB’s claim for damages in Question 3*]. If your answer to this Question is Yes [*and there are other claims, proceed to answer Question _ about the other claims. After you answer the other questions relating to the other claims, proceed to consider AB’s claim for damages*

against CD in Question _.] [**CAVEAT:** *The Court should incorporate the charge and special verdict form in 4:20.4 in preparing its charge and verdict form on damages.*] If your answer to this Question is No, return to the courtroom [*or where there are other claims between the parties*], proceed to Question _].

SPECIAL VERDICT FORM 4:20.4 SV

3. State the amount of additional costs, if any, AB incurred as a result of the delays [*unless there are other damages claims to consider*].

\$ _____

At least five jurors must agree on the answer to this question. After you answer this question, return to the courtroom [*unless there are other damages claims to consider*].

Comment

Based on *Corinno Civetta Construction Corp. v City of New York*, 67 NY2d 297, 502 NYS2d 681, 493 NE2d 905; *Kalisch-Jarcho, Inc v City of New York*, 58 NY2d 377, 461 NYS2d 746, 448 NE2d 413; *Visconti Corp. v LaBarge Bros. Co., Inc.*, 272 AD2d 948, 707 NYS2d 566; *Blau Mechanical Corp. v City of New York*, 158 AD2d 373, 551 NYS2d 228; *Buckley & Co., Inc v City of New York*, 121 AD2d 933, 505 NYS2d 940.