

## How long do the Liquidated Damages continue?

The Court of Appeal has recently given an important and wide-ranging judgment on the application of liquidated damages in ***Triple Point Technology, Inc. v PTT Public Company Limited [2019] EWCA Civ 230.***

The question at issue concerned the period for which liquidated damages could be levied in the event that a contractor or supplier never achieves completion.

### Background

Triple Point was a designer of software for commodities trading. PTT carried out commodities trading in oil, refined products and petrochemicals. The parties entered into a contract on 31 January 2013 for the provision of a commodities trading system.

The contract contained a liquidated damages clause, Article 5.3, in the following terms:

*"If CONTRACTOR fails to deliver work within the time specified and the delay has not been introduced by PTT, CONTRACTOR shall be liable to pay the penalty at the rate of 0.1% (zero point one percent) of undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work, provided, however, that if undelivered work has to be used in combination with or as an essential component for the work already accepted by PTT, the penalty shall be calculated in full on the cost of the combination."*

Completion was to be by reference to two "Phases", each of which had a number of stages. A percentage of the contract price was expressly referable to those various stages.

Work proceeded slowly and the system did not have the specified functionality.

Stages 1 and 2 of Phase 1 were completed some 149 days late. Triple Point invoiced, and PTT paid, for this work. Triple Point then invoiced for other work which was not yet completed, in reliance on calendar dates for payment specified in order forms. PTT refused to pay based on the failure to achieve the milestones. Triple Point thereafter suspended work in May 2014, and PTT accordingly terminated the contract in February 2015 on the basis of wrongful suspension.

Triple Point commenced High Court proceedings for the sums it said were due. PTT counterclaimed for damages for delay and damages upon termination. Jefford J dismissed the claim ([2017] EWHC 217) and awarded PTT \$4,497,278.40 on their counterclaim. Of this sum, \$3,459,278.40 were liquidated damages for delay pursuant to Article 5.3 of the contract.

(It would appear that the argument that succeeded on appeal, namely that the liquidated damages clause only applies when work was completed and accepted, may not have been raised before Jefford



J: no authorities were cited to the Judge on this issue. Relevant authorities, including *Glanzstoff*, were only provided to the Court of Appeal at its request.)

### The Appeal

A number of issues were raised on appeal. Of particular interest, however, is the consideration given to liquidated damages. Triple Point argued that “*Liquidated damages for delay under Article 5 are irrecoverable*”.

- (a) Applying *Cavendish v Makdessi* [2016] AC 1172, the Court rejected at [71] a suggestion that the clause was a penalty despite the use of the word ‘penalty’ in Article 5.3. It was held to be a genuine pre-estimate of loss.
- (b) The Court also rejected at [72] a suggestion that it permitted double recovery when construed alongside a separate clause providing for liability for losses caused by breaches. The Court pointed out that a “*liquidated damages clause (if valid) operates in substitution for a general assessment of the claimant’s losses caused by delay*”.
- (c) However, a more formidable obstacle was then raised: Triple Point said that Article 5.3 was only engaged when work was delayed but subsequently completed by the contractor and accepted. It does not apply in respect of work which the employer never accepted. As the Court noted, this “*raises questions of general principle concerning the operation of liquidated damages clauses in termination or abandonment cases*”.

The court reviewed the case law relevant to liquidated damages clauses running from the early 1900s onwards, and at [106] categorised them according to three different approaches:

- (i) Cases where the clause does not apply at all (such as *Glanzstoff*; *Chanthall*; *Gibbs*) since it had only been intended to apply where the contractor completed the works.
- (ii) Cases where the clause applies up to termination of the first contract but thereafter the employer must prove its actual losses (e.g. *Greenore*; *Shaw*; *LW Infrastructure*; *Bluewater*).
- (iii) Cases where the clause continues to apply until the second (replacement) contractor achieves completion (e.g. *Hall*; *Crestdream*; *GPP*).

Jackson LJ noted that “*much will turn on the precise wording of the liquidated damages clause in question*”. He indicated at [110] that the approach in category (ii) is treated by the textbooks as the orthodox analysis, though it is “*not free from difficulty*”; expressed some doubt at [108] about the cases in category (iii); and said at [109] that he saw much force in the House of Lords’ reasoning in *Glaszstoff* in category (i).

On the facts of the case, Article 5 fell within category (i) since it was “*focused specifically on delay between the contractual completion date and the date when Triple Point actually achieves completion*”. In view of the termination, it had “*no application in a situation where the contractor never hands over completed work to the employer*”. PTT was therefore entitled to liquidated damages for the 149 delay to the completed stages 1 and 2, but not to any of the other stages. Such damages would be ‘at large’ and were to be assessed on ordinary principles.



## Discussion

This decision will be of great interest to construction and technology practitioners, particularly given the relative frequency of works started by one contractor and completed by another.

Both liquidated damages clauses and termination clauses are widespread in many standard forms, and very rarely is provision expressly made as to what happens to such liquidated damages in the event of termination or non-completion.

Until now, liquidated damages clauses have generally been construed as applying only up to termination of the first contract, the customer being entitled to liquidated damages for delay up to the date of termination and general damages thereafter.

As a result of this decision, parties and their advisors will be keen to make express whether or not liquidated damages are to be engaged (a) only in the event of delayed delivery by the initial supplier or (b) regardless of whether or not there is delivery by the initial supplier. They would also be wise to make clear how and until when any liquidated damages are to be calculated in the event of delivery by a third party.

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