



CLIENT UPDATE

TRIPLE POINT TECHNOLOGY INC V
PTT PUBLIC COMPANY LTD
[2021] UKSC 29

13 JUNE 2022



INTRODUCTION

The Triple Point Technology case settled the law on the application of liquidated damages in circumstances where a contract is terminated before the works are completed.

In overturning the decision of the Court of Appeal, the Supreme Court reverted to an orthodox approach whereby the right to liquidated damages accrues until the termination of the contract and thereafter general damages may be sought.

The approach taken by the Court of Appeal contemplated *"that a contractor would not be liable for payment of accrued liquidated damages for an incomplete milestone in the event of termination"*.



FACTUAL BACKGROUND

PTT Public Company Ltd ("PTT") and Triple Point entered into a contract pursuant to which Triple Point was to provide software and related services to PTT. The works under the contract were divided and subdivided into a number of phases. Payment under the contract was provided for at milestone achievements, although the contract also included specific payment dates.

Triple Point sought payment against the specific dates set out in the contract, which PTT refused to pay on the basis that Triple Point had failed to achieve the relevant milestones as the works to which payment had related, had been delayed. Subsequently, Triple Point suspended the contract for non-payment and in turn PTT terminated the contract.

Triple Point had completed stages 1 and 2 of phase 1 of the works prior to termination however the other works remained incomplete.

The liquidated damages clause provided as follows:

"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% (zeropoint one percent) of undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work..."



PREVIOUS CASE LAW

The case law in this case was developed on a case-by-case basis following the specific liquidated damages provisions based on the contractual provision as drafted. This resulted in a variety of possible outcomes. Three different approaches began to emerge in a scenario where a contractor was subject to previously accrued liquidated damages but the contract was then terminated with those remaining works being immediately completed by another contractor:

(A) The orthodox view had generally been that accrued liquidated damages were recoverable up to the date of termination irrespective of whether the milestone had been finally achieved or not;

(B) In *British Glanzstoff Manufacturing Co. Ltd v General Accident Ltd* it was decided that a liquidated damages clause applied only where the contractor had actually completed the works but had been late in doing so. It did not apply where completion of the works had not been achieved; and

(C) In another case a position developed in that liquidated damages may be recoverable beyond the date of termination and up to the date that the works were completed by another contractor.

Each of these positions could result in a markedly different outcome for both a contractor and an employer.

FIRST INSTANCE DECISION

At the first instance, Triple Point claimed for payment of its invoices, denied that the termination was lawful and claimed payment for the value of services performed prior to termination.

PTT disputed that any payment was due and counterclaimed the liquidated damages for delay and unliquidated loss and damage resulting from the termination.

In the first instance the Court held that Triple Point was responsible for the delay that had occurred to the project when it ceased to perform. As Triple Point was not entitled to cease performance, it was consequently found to be responsible for the further delay up to the date of termination.

It was subsequently held that liquidated damages applied up to the date of termination in respect of both of the two phases of the works and that general damages were recoverable thereafter. This can be considered the orthodox approach.

DECISION OF THE COURT OF APPEAL

An appeal with respect to liquidated damages was allowed by the Court of Appeal and this was the main focus of the decision.

In the appeal, Triple Point argued that the liquidated damages provision did not apply in that the provision only applied when work was delayed and subsequently completed (and then accepted the meaning that liquidated damages does not apply in respect of work that the employer never accepted). This was described by Sir Rupert Jackson as a "*formidable argument which raises questions of general principle concerning the operation of liquidated damages clauses in termination or abandonment cases*". It was held by the Court of Appeal that the approach applied to interpreting a liquidated damages clause would depend upon the drafting of the relevant clause and noted that there is no firm rule that liquidated damages must be used as a formula for compensating the employer for part of its loss.

The Court of Appeal also noted that (whilst the approach that liquidated damages are recoverable up to the date of termination irrespective of whether the milestones had been finally achieved, was considered the orthodox approach) this was not an

approach free from difficulty, noting that in circumstances where *"a construction contract is abandoned or terminated, the employer is in new territory for which the liquidated damages clause may not have made provision"*.

Applying this rationale, the Court of Appeal held that where a liquidated damages clause focused specifically on the delay between the contractual completion date and the date when completion was actually achieved upon the construction of the works in the clause, liquidated damages would not apply if the completion of those works were never in fact achieved.

PTT was only entitled to recover liquidated damages in respect of stages 1 and 2 of phase 1 of the works in light of the specific wording of the liquidated damages clause in question, which Triple Point had completed prior to termination of the contract.

DECISION OF THE SUPREME COURT

The Supreme Court unanimously overturned the Court of Appeal's decision on 16 July 2021, on whether liquidated damages were payable with respect to the incomplete works.

The Supreme Court identified that a difficulty with the Court of Appeal's conclusion on the interpretation of the liquidated damages provision was that it was *"inconsistent with commercial reality and the accepted function of liquidated damages"*. The parties ultimately agreed on a liquidated damages clause so as to provide *"a remedy that is predictable and certain for a particular event" and so "the employer does not then have to quantify its loss, which may be difficult and time-consuming for it to do."*



Lord Leggatt also identified that a liquidated damages regime (which would not be effective unless a contractor completed the works) brought with it an outcome that was contrary to the accepted or expected standard or practice. Such a provision would *"give a contractor who badly overruns the time specified for completion an incentive not to complete the work in order to avoid paying liquidated damages for the delay which its breach of contract has caused. It makes no sense to create such an incentive"*.

The Supreme Court restated the general law which is that the accrual of liquidated damages comes to an end upon termination of the contract (after which a party must seek damages for breach of contract under the general law) but those rights accrued as at the date of termination survive. It also held that a liquidated damages clause does not expressly need to provide for such an outcome.

CLOSING REMARKS

The principles from this case will always depend on the precise language of the contract in question.

However, parties to a contract containing an appropriately drafted liquidated damages clause can take some comfort that in circumstances where the contract is terminated, in the absence of express wording to the contrary, an orthodox interpretation of that liquidated damages clause should prevail.

Interestingly, the issue of whether or not liquidated damages were payable where Triple Point never completed the works and PTT never accepted them, was only raised orally in the Court of Appeal. Lady Arden noted that there were no skeleton arguments for this point in the Court of Appeal and the Supreme Court could not tell precisely how the argument was put.



As such, a residual risk does remain where case law is not settled, namely the point noted by Lady Arden, i.e. the question as to what happens in the event where the Contractor never completes the works and the Employer never accepts them.

If you require any further information or wish to discuss any matter further, please contact:

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