

MDA PRESENTS



FIRST AID FOR CONTRACTS



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ARE LIQUIDATED DAMAGES RECOVERABLE IN THE EVENT OF TERMINATION?

TRIPLE POINT TECHNOLOGY INC V PTT PUBLIC COMPANY LIMITED

+ *Author: Arvitha Singh*

The scenario in the Triple Point case was that of a contractor who agreed to pay liquidated damages (LD's) in the event that completion was not achieved by the required date and the contract was terminated.

This 2019 case before the Court of Appeal in the United Kingdom, highlighted a critical area of importance in the construction industry – an Employer's entitlement to LD's in the event of termination.

Background

A software supply agreement (the Contract) was concluded between PTT Public Company Ltd (PTT) and Triple Point Technology Inc. (Triple Point) in 2013. The Contract entailed an upgrade of PTT's CTRM

(Commodities Trading, Risk Management and Vessel Chartering System). The work was split into 2 phases, each phase was further split into various stages/milestones, each stage/milestone had a fixed completion date.

Triple Point was 149 days late in completing phase 1 and 2 of the first phase. This work was invoiced and paid for by PTT. Triple Point then asked for further payments for incomplete work where the fixed completion date had arisen. This request was refused by PTT who contended that payment fell due only upon the achievement of a phase/milestone. Triple Point refused to continue with any work without the additional payment. It proceeded to suspend the work and abandon the site. PTT terminated the Contract.

Triple Point instituted proceedings in the Technology and Construction Court in respect of the outstanding sums invoiced. PTT defended the action and counterclaimed LD's for the delay. PTT was successful on the counterclaim and was awarded USD 4,497,278.40. Triple Point then approached the Court of Appeal.

Issue for determination

Was PTT entitled to the award of LD's USD 4,497,278.40?

Triple Point argued that it had not completed and PTT had not accepted the phases upon which it claimed LD's, the LD's clause did not apply. The Court considered this a formidable argument.

Law and application

Sir Rupert Jackson considered various authorities which dealt with similar scenarios where the contractor had failed to complete the works and where the works were thereafter completed by another contractor. The various authorities supported 3 different approaches.

- The first approach with reference to *Glanzstoff*¹ was that the clause did not apply as the contract was terminated before the original contractor could complete the works (see also *Chantall*²).
- The second approach supported the view that the clause was applicable but only as an agreed measure up to the date of termination (see *Greenore*³; *Shaw*⁴).

- The third approach was that the clause provided an agreed measure of damages until the replacement contractor achieved completion (see *Hall*⁵; *GPP*⁶).

The Court of Appeal found that the first approach held “*much force*” with specific reference to the decision in *Glanzstoff* where the Court held that LD's were only applicable where the delay in completion was by the contractor itself.

Approach two was regarded as “*artificial and inconsistent with the parties' agreement*” and approach three was disregarded as this essentially placed the employer and the replacement contractor in control of the completion date and therefore the LD's to be imposed.

Sir Rupert Johnson held that the precise wording of the clause was key in reaching his decision. The LD's clause 5.3 reads as follows:

“If Contractor [Triple Point] fails to deliver within the time period specified and the delay has not been introduced by PTT, Contractor [Triple Point] 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,...

1 *British Glanzstoff Manufacturing Co Ltd v General Accident Fire and Life Assurance Corp Ltd* 1912 SC591 and 1913 SC (HL) 1

2 *Chanthall Investments Ltd v F.G. Minter Ltd* 1976 SC 73

3 *Greenore Port Ltd v Technical & General Guarantee Company Ltd* [2006] EWHC 3119 (TCC)

4 *Shaw v MFP Foundations and Pilings Ltd* [2010] EWHC 1839 (TCC)

5 *Hall v Van Der Heiden (No 2)* [2010] EWHC 586 (TCC)

6 *GPP Big Field LLP v Solar EPC Solutions SL* [2018] EWHC 2866 (Comm)

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.”

He accordingly found that the clause 5.3 did not apply where the contractor never completed the work. Post termination, the Employer would need to pursue a general damages claim.

Future considerations

This decision has far reaching implications which extend to construction contracts. Parties to a construction contract should carefully consider whether LD's are to apply in the event of termination and if so, clearly incorporate this into standard form contracts as these contracts, do not contain a uniform approach to the interaction between LD's and termination provisions:

Clause 15.4(c) of FIDIC Silver Book 2 states that on termination, the employer is entitled to LD's for the incomplete work between the time of completion and the termination date. FIDIC therefore anticipates the effect of termination on LDs and accordingly supports approach two.

The NEC4 (2017) provides for an optional LD's clause as “*Option X7*” which states that the contractor is liable to pay damages for each day from the completion date to the earlier of completion and/or the date on which the employer takes over the work. The termination provisions are silent in relation to the

operation of the LDs clause in the event of termination prior to completion.

Clause 5.13 of GCC for Construction Works (2015), 3rd edition provides for penalties for delay. If the contractor fails to achieve completion by the date fixed in the contract, the contractor is liable to pay the penalty as stipulated in the contract up to the date on which Practical Completion is achieved. Here too, the termination provisions are silent in relation to the operation of the LD's clause in the event of termination prior to completion.

- Contracting parties should therefore carefully consider and agree how LD's and termination provisions are to apply in both pre and post termination scenarios.
- Each contract will turn on the wording of the clause in question as there is no universal approach to the interplay between LD's and termination.
- Where a construction contract is based on standard form, care must be taken to ensure that the LD's clause interacts with the termination and limitation of liability clauses.
- Due consideration should be given to the Conventional Penalties Act 15 of 1962 insofar as this limits a party's rights to recover penalties.
- An employer should also be cautious in making a LD clause an exclusive remedy clause – this could limit or even exclude its claim for general damages.

- Proving general damages can be a challenge, hence an employer should seek to ensure that their claim for LD's survives termination. A contractor who realises that an employer only has recourse in general damages may see this as an easy escape if it weighs up exposure to LD's for late completion and may instead opt to terminate. This would leave the employer in a disadvantaged position in recovering its loss.

This decision should be borne in mind in the drafting of construction contracts to pre-empt disputes around the entitlement to LD's on termination. This can be achieved by clear and unambiguous drafting.