

Liquidated damages: Supreme Court Overturns Court of Appeal

Calculating the costs for delay - damages for pre and post-termination delay to be treated differently

Triple Point Technology, Inc -v- PTT Public Company Ltd [2019] EWCA Civ 230

In the recent Supreme Court Decision of *Triple Point*, the Supreme Court disagreed with the judgment of the Court of Appeal as to whether liquidated damages for delay occurring prior to termination could be claimed from the contractor where the contractor's works were incomplete at the time of termination by the employer. This recent decision of the Supreme Court on the law that is applicable to construction contracts is essential reading for those who: negotiate contracts; and make decisions on the termination of contractors from site.

What are liquidated damages?

In the construction industry we are familiar with use of liquidated damages. It is commonly used in construction industry. We do not get many decisions from the Supreme Court so relevant to construction and this decision is well worth knowing about. That being said, the contract in *Triple Point* was not a construction contract. It was for the design and installation of a software system. There was no supply of hardware and no actual physical installation of site.

As a starting point it is useful for us to repeat what liquidated damages are. They are a genuine pre-estimate of loss by the employer of the losses he will incur in the event of the contractor's culpable delay in completing the works by the contractual completion date. Liquidated damages must be a genuine estimate of the employer's loss that will be caused by such a delay. If they are not a genuine pre-estimate of loss the liquidated damages may be found to be a penalty clause and unenforceable.

How will a liquidated damages clause benefit me?

It is often thought that liquidated damages clauses are solely for the benefit of the employer. In fact, liquidated damages are also of benefit to the contractor. They mean that the contractor knows what he will be paying to the employer in the event that he is late completing the works without a relevant excuse, that gives him an extension of time to the contractual completion date. Of course, the employer also has the benefit of not having to prove any loss should he be entitled to claim liquidated damages. However, if employer's losses for delay are in fact greater than the liquidated damages the employer cannot seek to recover that additional sum. So, the contractor has the benefit of knowing what he is going to pay in the event of his culpable delay and, theoretically at least,

the contractor can seek to manage that risk in the terms that he negotiates into the contract and subsequently with his management of the project on site.

Prior to the decisions in *Triple Point* an area where there was perhaps a lack of clear court guidance was how liquidated damages were to be applied (if at all) when a contractor is in delay at the time when their employment is terminated. Were liquidated damages payable to the employer for the total delay to the works or simply to the delay that had occurred up to the date of termination, with the balance of the delay claim being subject to unknown levels of general damages (the employer's actual loss)? Alternatively, did the liquidated damages simply fail to survive the termination at all and the employer have to prove all his actual losses for the delay?

The position of any contractor following a valid termination is an unhappy one. The lack of certainty as to how damages might be applied in a claim by the employer did not improve that position. For that reason, this clarification by the Supreme Court is welcomed.

The decision in *Triple Point*

Prior to the case of *Triple Point*, the general understanding was that liquidated damages could be rendered for the delay period up to termination but thereafter damages were general and had to be proven by the employer.

Triple Point has been subject to three court decisions (the proceedings having commenced over six years ago in February 2015) culminating in the decision of the Supreme Court on 16 July 2021. There was a reasonable sum at stake here

with the employer in the first decision being awarded US\$3,459,274.40 liquidated damages US\$630,000.00 damages for wasted hardware costs prior to termination and US\$10,574,756.78 for post-termination losses for the costs of procuring a new system from a replacement contractor. The first decision was in line with the generally understood position as to the application of liquidated damages.

As was subsequently noted in the Supreme Court's judgement, it was not clear whether the Court of Appeal's judgment was a matter of interpretation of the term of the particular contract in *Triple Point* or based on a broader principle of law. Commercially that created a further confusion for those who negotiate and administer contracts.

In its decision of 16 July 2021, the Supreme Court has clarified the laws and confirmed the previously understood position that liquidated damages are recoverable for delay prior to termination whether or not the works are complete. Thereafter general damages are recoverable. The Supreme Court (in the leading judgement of Lady Arden) stated that the approach of the Court of Appeal was "inconsistent with commercial reality and the accepted function of liquidated damages". Continuing its focus on the commercial world, the Supreme Court noted that parties agreed contractual terms such as liquidated damages to "provide a remedy that is predictable and certain" in light of what parties are to have understood the law to have been. The Supreme Court considered that the Court of Appeal was incorrect to treat termination of the contract as "new territory" which a liquidated damages

clause may require to make specific provision for if it is to survive that termination. Rather, the Supreme Court understood that the failure to complete works by the original contractor was a “territory [that] is well-trodden”.

Conclusion

The Supreme Court has restored us to the orthodox understanding of liquidated damages on termination. In doing so it has removed the uncertainty that flowed from the Court of Appeal decision. This is to be welcomed by those who have to draft and negotiate contracts. Inevitably there will be ongoing claims, whether they are proceeding in court or subject to adjudication, where parties will now be amending their submissions to reflect this new decision of the Supreme Court.

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