

8 OCTOBER 2021

Liquidated Damages And Limitation Of Liability: *Triple Point Technology Inc v PTT Public Company Ltd* [2021] UKSC 29

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Liquidated damages are an important aspect of every construction and commercial contract. It provides a certain degree of certainty to the allocation of risks in the event of a delay to completion of a contract. Liquidated damages are a pre-agreed estimate of predicted losses which may occur as a result of a project being delayed. It enables parties to assess the potential cost and liability exposure under a contract.

The United Kingdom's Supreme Court recently contemplated on liquidated damages in the case of *Triple Point Technology Inc v PTT Public Company Ltd* [2021] UKSC 29. The case clarifies the position in relation to the drafting and interpretation of liquidated damages clauses. It also addresses the relationship between a liquidated damages clause and caps on liability.

Facts

This case concerned a dispute between Triple Point (a designer and developer of software) and PTT (a commodities trader). PTT had appointed Triple Point under a software contract for the design, installation (by data transmission), maintenance and licencing of software to assist PTT to carry on its business in commodity trading.

The parties agreed to substantial limitations on the remedies in the event of delay. Liquidated damages were available for delay and there was a non-financial remedy for certain breaches of contract in specified circumstances, where Triple Point had an opportunity to cure the defect. If it failed to do so, damages were payable but were limited to the fees paid for the relevant work¹. The relevant parts of the agreement are reproduced below for ease of reference.

¹ [2021] UKSC 29 para 2

“Article 5

1. *The Services to be performed by the CONTRACTOR shall be in conformance with the Schedule for the Services ('Project Plan') as proposed by the CONTRACTOR and accepted by PTT.*
2. *The CONTRACTOR shall use its best effort and professional abilities to complete Phase 1 of the Project within 460 calendar days after the Effective Date. If however such date is not attainable due to a delay out of the control of the CONTRACTOR, the CONTRACTOR shall continue to perform the Services for the time necessary to complete the Project. This extension will require written approval from PTT (Para numbers added)*
3. *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, 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 (para numbers added)”².*

“Article 12

- 12.1 *CONTRACTOR shall exercise all reasonable skill, care and diligence and efficiency in the performance of the Services under the Contract and carry out all his responsibilities in accordance with recognised international professional standards. [...]*
- 12.3 *CONTRACTOR shall be liable to PTT for any damage suffered by PTT as a consequence of CONTRACTOR's breach of contract, including software defects or inability to perform 'Fully Complies' or 'Partially Complies' functionalities as illustrated in*

² [2021] UKSC 29 para 12

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Section 24 of Part III Project and Services. The total liability of CONTRACTOR to PTT under the Contract shall be limited to the Contract Price received by CONTRACTOR with respect to the services or deliverables involved under the Contract. Except for the specific remedies expressly identified as such in this Contract, PTT's exclusive remedy for any claim arising out of this Contract will be for CONTRACTOR, upon written notice, to use best endeavour to cure the breach at its expense, failing that, to return the fees paid to CONTRACTOR for the Services or Deliverables related to the breach. This limitation of liability shall not apply to CONTRACTOR's liability resulting from fraud, negligence, gross negligence or wilful misconduct of CONTRACTOR or any of its officers, employees or agents"³.

The project encountered delay, with PTT asserting that:

- a) Triple Point was not entitled to payment for incomplete works.
- b) Triple Point would only be entitled to payment once it had met the appropriate contract milestone.

Triple Point disagreed with PTT's view and stopped all work on the grounds of non-payment. PTT then terminated the contract on the basis that Triple Point had wrongfully suspended work under the contract⁴.

In the Technology and Construction Court, Triple Point sought to recover outstanding sums on unpaid invoices. Meanwhile, PTT counterclaimed for damages for wasted costs prior to termination, liquidated damages up to the date of termination, and for the costs of procuring a replacement system as a result of the termination⁵.

The contract included a liquidated damages provision for delay to the works (see Article 5.3 above). Article 12.1 of the contract required Triple Point to exercise "*all reasonable skill, care and diligence and efficiency in the performance of the*

³ [2021] UKSC 29 para 11

⁴ [2021] UKSC 29 para 18

⁵ [2021] UKSC 29 para 19

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Services under the Contract". The contract also contained a limitation of liability clause (see Article 12.3 above).

Issues Before The Supreme Court

The main issues in this case were:

- Are Liquidated damages payable under Article 5.3 of the CTRM contract, where Triple Point never completes the work and PTT never accepts it?
- Are damages for Triple Point's negligent breach of the CTRM contract within the liability-limitation exception in the final sentence of Article 12.3?
- The capping of liquidated damages issue – Are liquidated damages subject to the cap in Article 12.3?

Determination

The majority of the Supreme Court held that PTT was entitled to recover damages assessed by the judge of the Technology and Construction Court in London, which was an amount just exceeding US\$14,500,000.00, without limitation of liability on the recovery. The Supreme Court held that:

- Liquidated damages were to be calculated up to the date of termination, even though the works had not been accepted by PTT at that point, for the following reasons:
 - a) The wording in the liquidated damages clause "*up to the date PTT accepts such work*" was not a condition for the award of liquidated damages, but rather simply made clear the point at which liquidated damages would cease to continue accumulating on a delay. To limit the liquidated damages clause to where the work is completed/accepted "*is inconsistent with commercial reality and the accepted function of liquidated damages*"⁶.

⁶ [2021] UKSC 29 para 35

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- b) The Supreme Court observed that a liquidated damages clause which only applied on completion of works “*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.*” In addition, such a position would force upon the claimant the burden of demonstrating its loss and facing arguments as to mitigation in a claim for general damages, rather than being able to rely on the pre-determined rates⁷.
 - c) The accurate interpretation of Article 5.3 was therefore that the clause provided for liquidated damages where the contractual completion date was delayed, regardless of whether or not PTT had accepted such work.
1. In relation to the second issue, the interpretation of the cap carve-out for negligence, a majority of the Supreme Court reversed the decision of the Court of Appeal. They decided that including the word negligence in the exclusion to the contractual cap had the effect of excluding all breaches of the duty of contractual skill and care from the cap. Breach of the contractual obligation to use reasonable care and skill should be equated with contractual negligence, within the meaning of the carve-out for “negligence” within the liability cap. To restrict negligence to tortious negligence would give the word a meaning other than its ordinary and natural meaning. Accordingly, Triple Point’s liability to pay liquidated damages was not capped.
 2. Despite the liquidated damages not being capped, as they resulted from contractual negligence and fell within the carve-out to the cap, sums payable as liquidated damages should still count towards the

⁷ [2021] UKSC 29 para 81

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exhaustion of Triple Point's general cap that applied to the claim for wasted costs, other damages and etc.

Conclusion

The Supreme Court's decision indicates a return to the orthodox position regarding liquidated damages i.e., liquidated damages would cease to accrue on termination of a contract but rights which accrue until the date of termination survive the termination of a contract. Whilst the Supreme Court considered a very specific clause, the following observations can be made:

- The right to liquidated damages will not be lost due a failure to accept work done and/or the termination of the contract;
- The word "negligence" covers a negligent breach of contract;
- Liquidated damages will count towards a cap on liability; and
- Clear and express wording should be used if a party intends to depart from the orthodox position regarding liquidated damages.

Authored by Shaun Tan, a Senior Associate with the firm's Dispute Resolution practice.

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