Damages at Large: *Triple Point*, FIDIC and the TCC

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

Triple Point Technology, Inc v PTT Public Company Ltd [2017] EWHC 2178 (TCC)

PBS Energo AS v Bester Generacion UK Ltd and others [2020] EWHC (TCC)

Triple Point was a case heard in the English Court of Appeal in March 2019 concerning the operation of liquidated damages clauses in the event of termination of a bespoke form of software contract. Sir Rupert Jackson gave the leading judgment, suggesting that where the contractor fails to complete the project, general damages at common law may be a more logical remedy than liquidated damages up to the date of termination, with general damages thereafter. This was a major departure from construction industry practice and understanding. _Triple Point_ was considered by Mrs Justice Cockerill DBE in the TCC. It was held that _Triple Point_ did not apply to an amended 1999 Silver Book. _Triple Point_ is under appeal. It remains to be seen what the Supreme Court will make of Sir Rupert's judgment.

Facts

PTT contracted with Triple Point to replace an existing commodities trading system and develop it to accommodate new types of trade. The contract was subject to the laws of England and Wales.

The work was delayed and, following a dispute concerning the payment of invoices, PTT terminated the contract. Triple Point issued proceedings for the recovery of outstanding sums. PTT denied that any further payments were due and counterclaimed liquidated damages for delay and damages due upon termination of the contract.

Paragraph 3 of Article 5 'Schedule of Services' ('Article 5.3') provided for liquidated damages to be paid at a rate of 0.1% of '*undelivered work per day of delay from the due date of delivery up to the date PTT accepts such work*'.

Article 12.3 'Liability and Responsibility' concerned the cap on damages. Sentence 2 of the clause stated: '*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 this Contract.*' *Sentence 3 stated: '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 receipt of written notice, to use best endeavour [sic] to cure the breach at its expense, or failing that, to return the fees paid to CONTRACTOR for the Services or Deliverables related to the breach.*'

At first instance, Jefford J held that PTT was entitled to recover liquidated damages for delay pursuant to Article 5.3 up to the date of termination. It was held that these damages were not subject to the cap under Article 12.3 because they fell under the 'specific remedies' referred to in Sentence 3: '*...Article 5 provides such an exception since it expressly allows the recovery of a percentage of the value of undelivered work (which by definition has not been paid for).*' [275]

Triple Point appealed. Amongst other things, Triple Point claimed 1) that liquidated damages for delay were irrecoverable and 2) should liquidated damages be recoverable, they would be subject to the Article 12.3 cap.

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Court of Appeal judgment

Having reviewed a number of authorities, Sir Rupert Jackson identified three different approaches to the application of liquidated damages clauses post-termination:

1) The clause does not apply – general damages have to be proved[1];
2) The clause applies up to termination of the first contract (the 'orthodox analysis')[2];
3) The clause continues to apply until the second contractor achieves completion.[3]

Despite noting that '*much will turn on the precise wording of the liquidated damages clause in question*', it is clear from his judgment that Sir Rupert doubted the approaches in 2) and 3).

Regarding approach 2) he stated: '*If a construction contract is abandoned or terminated, the employer is in new territory for which the liquidated damages clause may not have made provision. Although accrued rights must be protected, it may sometimes be artificial and inconsistent with the parties' agreement to categorise the employer's losses as £x per week up to a specified date and then general damages thereafter. It may be more logical and more consonant with the parties' bargain to assess the employer's total losses flowing from the abandonment or termination, applying the ordinary rules for assessing damages for breach of contract.*' [110]

Sir Rupert expressed doubts about approach 3) on the grounds that the employer and second contractor could control the period for which liquidated damages run [108].

He referred to an early 20th century House of Lords case, *British Glanzstoff Manufacturing Co Ltd v General Accident Fire & Life Assurance Corp Ltd* 1913 SC (HL) 1 as support for approach 1). At paragraph 109 of the Triple Point judgment, Sir Rupert stated: '*I see much force in the House of Lords' reasoning in Glanzstoff. In some cases, the wording of the liquidated damages clause may be so close to the wording in Glanzstoff that the House of Lords' decision is binding.*'

The court found that PTT was entitled to recover liquidated damages for the delay in completion of two stages in Phase 1, as these were completed prior to termination. However, PTT was not entitled to recover liquidated damages for any of the other delays as Triple Point had not completed any other sections of the work prior to termination. Damages were instead at large and to be assessed on ordinary principles. Sentence 2 of Article 12.3 imposed an overall cap on Triple Point's liability and this encompassed general damages for delay.

Discussion

Many practitioners have taken issue with Sir Rupert's judgment. Approach 2) was described as orthodox for a reason, it being upheld in both *Hudson's Building and Engineering Contracts* and *Keating on Construction Contracts*.[4]

Important questions have been raised concerning the binding nature of Glanzstoff, with both commentators and courts[5] considering that it ought to be confined to the facts of the case. In Glanzstoff, liquidated damages were claimed until the actual date of completion by the second contractor and the time for completion had not passed at the date of the first contractor's insolvency.

[1] British Glanzstoff Manufacturing Co. Ltd v General Accident, Fire and Life Assurance Co. Ltd 1913 SC (HL) 1; Chantall Investments Ltd v F.G. Minter Ltd 1976 SC 73; Gibbs v Tomlinson (1992) 35 Con LR 86

[2] Greenore Port Ltd v Technical & General Guarantee Company Ltd [2006] EWHC (TCC); Shaw v MFP Foundations and Pilings Ltd [2010] EWHC 1839 (TCC); LW Infrastructure PTE Ltd v Lim Chan San Contractors PTE Ltd [2011] SGHC 163; [2012] BLR 13; Bluewater Energy Services BV v Mercon Steel Structures BV [2014] EWHC 2132 (TCC)

[3] Hall and another v Van Der Heiden (No 2) [2010] EWHC 586 (TCC) and GPP Big Field LLP v Solar EPC Solutions SL (Formerly Prosolia Siglio XXI) [2018] EWHC 2866 (Comm)

[4] Both have subsequently treated Triple Point with caution (see [6-039] of Hudson 14th Ed. and [10-039] of the Supplement to Keating 10th Ed.)

[5] Cameron-Head v John Cameron & Company (1919) SC

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The crux of the distinction between approach 1) and approach 2) concerns the concept of accrued rights, which is dealt with very briefly by Sir Rupert in the Court of Appeal. At [110] he states that '*accrued rights must be protected*' but without further comment.

Liquidated damages are pre-agreed so that the parties have certainty in the measure of loss. Employers benefit by not having to establish and mitigate their loss at common law and contractors benefit from knowing their potential liability for delay. Therefore, where termination occurs prior to completion but, because of the wording of the clause, entitlement to liquidated damages is considered not to have accrued, there may be additional consequences which the parties may not have considered:

- If the contract contains an exclusive remedies clause this may (if it survives termination) prevent the employer from relying on its common law right to general damages which may be its only remedy for delay in the absence of liquidated damages.
- The liquidated damages may have been calculated to include loss of profit, the right to which may otherwise be excluded under the contract. An employer may find itself unable to recover loss of profit with general damages.
- Liquidated damages are often deducted in interim payments. Some contracts provide for the mandatory deduction of liquidated damages as they accrue otherwise entitlement is lost. It would certainly be unattractive for an employer to have to return these liquidated damages to a contractor, particularly if the contractor has in the meantime become insolvent.
- A cap on liquidated damages may survive an unenforceable liquidated damages clause if time becomes at large due to employer prevention or where the clause is a penalty[6]. Would it also survive to cap general damages where liquidated damages have not accrued because of termination prior to completion?
- The contract may provide a right of termination once a maximum sum for liquidated damages has been exceeded. What happens if the contract is terminated for this reason, but before completion? Does the right to termination itself fall away?
- The employer may be liable to a third party for liquidated damages, for example, under a power purchase agreement. The employer may have thought this liability was back-to-back with its entitlement under the contract to liquidated damages from the contractor. This back-to-back cover would fall away if the employer had to prove general damages against the contractor.

FIDIC 1999

At first blush, the wording of Sub-Clause 8.7 mimics the liquidated damages provision in *Triple Point*: '...[the delay damages] *shall be paid for every day which shall elapse between the relevant Time for Completion and the date stated in the Taking Over Certificate*.' As the senior courts have been clear that the literal wording of the contract must prevail,[7] it would be wrong not to give due consideration to the clear words of the sub-clause.

However, it is followed by the wording: '*These delay damages*[8] *shall be the only damages due from the Contractor for such default, other than in the event of termination under Sub-Clause 15.2*

[6] See *Hudson's Building and Engineering Contracts 14th Ed.* [*6-028*] and *Keating on Construction Contracts 10th Ed. [10-036*].

[7] Arnold v Britton [2015] UKSC 36, Lord Neuberger at [17]: 'the reliance placed in some cases on commercial common sense and surrounding circumstances… should not be invoked to undervalue the importance of the language of the provision… the clearer the natural meaning the more difficult it is to justify departing from it'.

[8] Delay damages' is not defined.

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[Termination by Employer] prior to completion of the Works.'

This clause can be read in two ways: 1) The delay damages are the only damages due for delay to completion, other than in the event of termination, in which case the Employer shall be entitled to delay damages before termination and general damages for delay afterwards; or 2) The delay damages are the only damages due for delay to completion, other than in the event of termination, in which case the Employer shall be entitled to general damages for delay only.

Such wording gives rise to ambiguity, in which case, business common sense may prevail.

This is to be read against the provision in Sub-Clause 15.2 that '*The Employer's election to terminate the Contract shall not prejudice any other rights of the Employer, under the Contract or otherwise*'.

Further, the operation of Sub-Clause 17.6 (exclusion for loss of use, profit and contract, or other 'indirect or consequential loss') would severely diminish any general damages for delay. This cannot have been the intention of the contracting parties.

Triple Point's impact on the FIDIC 1999 Silver Book was considered in the recent case *of PBS Energo AS v Bester Generacion UK Ltd and others* [2020] EWHC (TCC). The Contract in question was an amended 1999 Silver Book, but the findings of Mrs Justice Cockerill DBE on the impact of the liquidated damages provisions are pertinent.

Cockerill J noted that *Triple Point* is under appeal and is authority '*for the proposition that when considering damages for delay which are included in contracts it is necessary to consider the drafting of the contract carefully to assess whether the clause allows that any Liquidated damages will survive termination and particularly whether they will survive termination in circumstances where the contract is terminated with the works incomplete.*' Notably, she does not state that it is authority for Sir Rupert's Approach 1. [438]. Indeed, she stated that *Triple Point* '*makes clear that what is perhaps the orthodoxy is that the clause applies until the termination of the first contract – and also that in deciding which of three outcomes (no application, application up until termination, and application beyond termination) is correct in any given case will turn on the wording of the clause in each case.*' [441].

Cockerill J held that the liquidated damages clause in the instant case was different. This was because there was a "First Spark Discount" which was the Employer's (here a Main Contractor) only remedy for delay for a period of time. If the Contractor's argument was correct and the claim was only available if there was completion, the Employer would have neither a contractual nor a common law right to compensation in relation to that period. [444]. This is relevant to the loss of profit and exclusive remedies arguments above.

The judge then referred to the concept of accrued rights, referring to Clause 21.9 of the Contract which stated that '*save as otherwise provided in this Contract (a) termination of this Contract shall be without prejudice to any accrued rights and obligations as at the date of termination.*' This wording is similar to 1999 Silver Book Sub-Clause 15.2: '*The Employer's election to terminate the Contract shall not prejudice any other rights of the Employer, under the contract or otherwise.*' [445]. She said that Clause 21.9 '*makes it plain that termination operates without prejudice to accrued rights or obligations.*' [446]. Although Sub-Clause 15.2 does not make express reference to 'accrued rights', nonetheless Cockerill J's interpretation is persuasive.

The judgment then turned to Clause 8.7 of the Contract, which, although amended appears to be substantively the same as the 1999 Silver Book Sub-Clause 8.7. Here Cockerill J stated that the clause is '*looking at the time for completion, not the actual completion – and is therefore significantly different to the clause under consideration in Triple Point. It would appear to give an accrued right from the time at which the Works should have been completed. As such this was an accrued right under Clause 21.9 – which was therefore explicitly agreed to be unaffected by termination.*' [448].

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Further, Cockerill J stated that there was nothing in Clause 15.7 which purported to override an accrued right to delay damages and that Bester acquired an *additional right* under Clause 15.7. This provides a persuasive argument for interpretation 1) of the second paragraph of Sub-Clause 8.7 above.

FIDIC 2017

Sub-Clause 8.8 contains the same bookends for the application of delay damages as in the 1999 editions, i.e. between the 'Time for Completion' and the 'Date of Completion of the Works or Section' and thus engages the reasoning of *Triple Point*.

However, Sub-Clause 15.4(c) allows the Employer to recover Delay Damages (now a defined term) if the Works or a Section have not been taken over and if the date of termination occurs after the date corresponding to the Time for Completion of the Works or Section. The contract therefore expressly provides for the recovery of delay damages in the event of termination, up to the date of termination, i.e. Sir Rupert's approach 2) or the 'orthodox position'.

Sub-Clause 15.2.1(c) also gives the Employer a ground for termination where the maximum amount of Delay Damages (as stated in the Contract Data) has been exceeded.

Conclusion

There is force in Sir Rupert's literal reading of the liquidated damages clause in *Triple Point* and avoiding 'adding oranges and apples' as the orthodox position prescribes.

However, the judgment of Mrs Justice Cockerill DBE in *PBS Energo v Bester* indicates judicial reluctance to follow *Triple Point*. Sir Rupert's judgment has substantial ramifications for the construction industry. Employers may be deprived of a remedy and the convenience of not having to establish loss on general common law principles. Contractors may lose the comfort of a defined risk.

Permission to appeal was granted by the Supreme Court on 6 November 2019[9]: the judgment is eagerly awaited, particularly in light of the TCC decision to side-step *Triple Point*.

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[9] https://www.supremecourt.uk/news/permission-to-appeal.html

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