

## The Baby Is Back in the Bath: Liquidated Damages in the UK Supreme Court

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In March 2019, in the English Court of Appeal, Sir Rupert Jackson upended the orthodox approach to the operation of liquidated damages clauses in commercial contracts. Sir Rupert had suggested 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.

Order has been restored in the UK Supreme Court, which recently held in *Triple Point Technology, Inc v PTT Public Company Ltd*<sup>1</sup> that liquidated damages for delay were payable in respect of work which had not been completed before the contract was terminated. To follow the reasoning of the Court of Appeal *'would be to render the liquidated damages clause of little value in a commercial contract. To use an idiomatic phrase, the interpretation accepted by the Court of Appeal in effect threw out the baby with the bathwater.'*<sup>2</sup>

### Background

PTT engaged Triple Point to replace an existing commodities trading system and develop it to accommodate new types of trade. The project was structured in two phases. Phase 1 involved replacing PTT's existing software system. Phase 2 involved developing the Triple Point system for new types of trade. Triple Point was to be paid by reference to milestones. The contract was subject to the law of England and Wales.

Triple Point fell into delay during the Phase 1 works and never completed the works for Phase 2. 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) of the contract 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'*.

At first instance,<sup>3</sup> the court held that PTT was entitled to recover liquidated damages for delay pursuant to Article 5.3 up to the date of termination.

In the Court of Appeal,<sup>4</sup> Sir Rupert Jackson found that PTT was only entitled to liquidated damages arising out of works which had been completed (i.e., Phase 1). This was on the basis that, under Article 5.3, PTT's acceptance of the work was a precondition to PTT's entitlement to liquidated damages. If the works had not been accepted, liquidated damages were not due. Damages were instead held to be at large and to be assessed on ordinary principles.

Sir Rupert Jackson identified in past authorities three different approaches to the application of liquidated damages clauses post-termination:<sup>5</sup>

<sup>1</sup> [2021] UKSC 29

<sup>2</sup> *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29 [48]

<sup>3</sup> *Triple Point Technology, Inc v PTT Public Company Ltd* [2017] EWHC 2178 (TCC)

<sup>4</sup> *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230

<sup>5</sup> *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 [106]

- 1) the clause does not apply - general damages have to be proved;<sup>6</sup>
- 2) the clause applies up to termination of the first contract (the 'orthodox analysis');<sup>7</sup>
- 3) the clause continues to apply until the second contractor achieves completion.<sup>8</sup>

Regarding category 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.'*<sup>9</sup>

## The Supreme Court

The Supreme Court held that the Court of Appeal fell into error in its approach to the liquidated damages clause, 'which failed to take account in the process of interpretation of the legal incidents and function of such clauses.'<sup>10</sup>

The key reasoning comes from the judgment of Lady Arden:<sup>11</sup>

*'The difficulty about this approach is that it is inconsistent with commercial reality and the accepted function of liquidated damages. Parties agree a liquidated damages clause so as to provide a remedy that is predictable and certain for a particular event (here, as often, that event is a delay in completion). The employer does not then have to quantify its loss, which may be difficult and time-consuming for it to do. Parties must be taken to know the general law, namely that the accrual of liquidated damages comes to an end on termination of the contract (see Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, 844 and 849). After that event, the parties' contract is at an end and the parties must seek damages for breach of contract under the general law. That is well-understood: see per Recorder Michael Harvey QC in Gibbs v Tomlinson (1992) 35 Con LR 86, p 116. Parties do not have to provide specifically for the effect of the termination of their contract. They can take that consequence as read. I do not, therefore, agree with Sir Rupert Jackson when he holds in the second sentence of para 110 of his judgment that "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." The territory is well-trodden, and the liquidated damages clause does not need to provide for it.'*

The force of the reasoning concentrated on commercial reality and the generally understood legal position. It also referred to the protection of accrued rights.<sup>12</sup>

<sup>6</sup> *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

<sup>7</sup> *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)

<sup>8</sup> *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)

<sup>9</sup> *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 [110]

<sup>10</sup> *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29 [6]

<sup>11</sup> *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29 [35]

<sup>12</sup> *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29 [36] and [37]

## Delay Damages in FIDIC 2017

To test whether the ‘*orthodox analysis*’ was really reflective of commercial reality, Lord Leggatt asked counsel for Triple Point whether they could give an example of a standard form of contract which provides that liquidated damages for delay will be payable only if the contractor actually completes the work.<sup>13</sup>

Counsel gave as an example the 2017 FIDIC Yellow Book. However, Lord Leggatt rightly noted that Sub-Clause 15.4(c) of those conditions provides that where the contract is terminated for the contractor’s default, liquidated damages are payable for every day that has elapsed between the due date for completion of the works and the date of termination, i.e., an example of the ‘*orthodox analysis*’.

Sub-Clause 15.4(c) provides as follows:

*‘After termination of the Contract under Sub-Clause 15.2 [Termination for Contractor’s Default], the Employer shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to payment by the Contractor of:*

...

*(c) Delay Damages, if the Works or a Section have not been taken over under Sub-Clause 10.1 [Taking Over the Works and Sections] and if the date of termination under Sub-Clause 15.2 [Termination for Contractor’s Default] occurs after the date corresponding to the Time for Completion of the Works or Section (as the case may be). Such Delay Damages shall be paid for every day that has elapsed between these two dates.’*

Sub-Clause 15.4(c) was therefore not an example of a standard form of contract which provides that

liquidated damages for delay will be payable only if the contractor completes the work.

Lord Leggatt concluded that ‘*The fact that no standard clause could be found which falls into Sir Rupert Jackson’s category (i) reinforces my view that such a clause is not one which parties to a commercial contract would think it sensible to choose.*’<sup>14</sup>

## Delay Damages in FIDIC 1999

It is debateable whether counsel for Triple Point could have pointed to the FIDIC 1999 conditions as an example of Sir Rupert’s category 1).

At first blush, the wording of Sub-Clause 8.7 mimics the liquidated damages provision in *Triple Point*.

*‘If the Contractor fails to comply with Sub-Clause 8.2 [Time for Completion], the Contractor shall subject to Sub-Clause 2.5 [Employer’s Claims] pay delay damages to the Employer for this default... [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.’*

It is followed by the wording:

*‘These delay damages shall be the only damages<sup>15]</sup> due from the Contractor for such default, other than in the event of termination under Sub-Clause 15.2 [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,

<sup>13</sup> *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29 [82]

<sup>14</sup> *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29 [82]

<sup>15</sup> The term ‘*delay damages*’ is not defined in FIDIC 1999.

in which case the Employer shall be entitled to general damages for delay only.

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

Given the Supreme Court's judgment in *Triple Point*, it is suggested that under English law, Sub-Clause 8.7 of the 1999 FIDIC conditions should be interpreted according to the orthodox position, i.e., liquidated damages are recoverable up until termination, with general damages thereafter. Accrued rights should be protected, following a Sub-Clause 15.2 termination.

## Conclusion

The UK Supreme Court judgment is likely to be welcomed by both employers and contractors who will benefit from the certainty of liquidated damages provisions. Although the 2017 FIDIC contracts expressly provide for the recovery of delay damages even in the event of an Employer termination, many standard form construction contracts do not, including the 1999 FIDIC forms. While a decision of the UK Supreme Court is of course not binding in other jurisdictions, *Triple Point* may well restore orthodoxy both in the UK and in the interpretation of FIDIC forms internationally.



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