International Arbitration Alert

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The Supreme Court favours "orthodox approach" to liquidated damages clauses: Triple Point Technology, Inc v PTT Public Company Ltd – Court of Appeal Overturned

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Sir Rupert Jackson sitting in the Court of Appeal had found that the liquidated damages clause providing for liquidated damages to be paid for each day of delay by the contractor "from the due date for delivery up to the date [the employer] accepts such work" did not require liquidated damages to be paid in respect of work which had not been completed (and thus had not been accepted by the employer) before the contract was terminated. The approach taken by the Court of Appeal had raised concern. To many, it seemed odd that a contractor could miss a completion date but still avoid payment of liquidated damages simply because the contract was terminated before the obligation was fully completed. Whether the approach taken by the Court of Appeal was based on a principle of law or on the construction of the particular clause was not entirely clear. The fundamental point is now clear: the Supreme Court in *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29 handed down on Friday, 16 July 2021 decided that it is a principle of law that the accrual of liquidated damages comes to an end on termination of the contract and after that event, the parties' contract is at an end and the parties must seek damages for breach of contract under the general law (this is the so-called "orthodox approach"). Further and importantly for contract drafters, Parties do not have to provide specifically for the effect of the termination of their contract: they can take that consequence as read. In short, the earlier approach in the Court of Appeal on liquidated damages has been overruled, with the Supreme Court making clear:

- It is well understood that parties agree a liquidated damages clause to provide a remedy that is predictable and certain for a particular event: 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 captured in the "orthodox approach", namely that the accrual of liquidated damages ends on termination of the contract such that thereafter the parties' contract is at an end and the parties must seek damages for breach of contract under the general law.
- That there are cogent commercial reasons why parties who include a liquidated damages clause in their contract would be unlikely to intend the employer's right to

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receive such damages for delay by the contractor to be conditional upon the contractor actually completing the work[1]. The Supreme Court could see no reason why, in the event that the contract is terminated before the work is completed, employers would wish to forgo those benefits of certainty, simplicity and efficiency in quantifying the damages in relation to delay which has already occurred.

- The Court of Appeal took the view that the wording of the liquidated damages clause in the present case could be so close to the wording in *Glanzstoff* that *Glanzstoff* is binding. However, the clauses in question in *Glanzstoff* were not said to be some market-accepted wording or clauses from some standard form recognised in the industry where the interpretations of the courts in reported cases may, in practice, be treated as binding in later cases involving the same wording. With those exceptions, in general, the decision of one case as to the meaning and effect of a clause cannot be binding as to the meaning and effect of even a similar clause in another case. This is important.

The Facts

On 8 February 2013, PTT entered into a contract with Triple Point whereby Triple Point was to design, install (by data transmission), maintain and license a customised software system for PTT to assist in its commodities trading business. The project had two phases. Phase 1 involved replacing PTT's existing software system and Phase 2 involved developing the Triple Point system for new types of trade. Triple Point was to be paid by reference to "milestones" with particular work to be completed by each milestone. Triple Point achieved completion of the first two stages of Phase 1 on 19 March 2014, 149 days late. PTT paid Triple Point's invoice for that work. PTT terminated the CTRM Contract on 23 March 2015. As readers may be aware, Triple Point commenced proceedings in the Technology and Construction Court (TCC) to recover outstanding sums on unpaid invoices. PTT counterclaimed for damages and liquidated damages for delay. Article 12.3 placed a cap on the amount of damages that could be recovered and contained an exception from that cap for "negligence". Jefford J dismissed Triple Point's claim, holding that PTT was entitled to damages of US$4,497,278.40, under the heads of: liquidated damages for delay (uncapped), the costs of procuring an alternative system and wasted costs (both subject to the article 12.3 cap). Triple Point appealed and PTT cross-appealed against the finding that any of the damages were capped. As discussed above, the Court of Appeal set aside the judge's award of liquidated damages, holding that PTT was only entitled to liquidated damages for work which had been completed prior to termination of the contract, that all damages were subject to the cap and that the exception for "negligence" applied only to freestanding torts and not to breaches of the contractual obligation to exercise care.

The Law

Lady Arden, giving the leading judgment, noted that the Court of Appeal had departed from the generally understood and principle of law that, subject to the precise wording of the clause, liquidated damages accrue until the contract was terminated (at which point the contractor would become liable to pay damages for breach of contract). The Court of Appeal had suggested it might be inconsistent with the parties' agreement to categorise the employer's losses as subject to the liquidated damages clause until contractual termination and thereafter as general damages. However, the Supreme

Court decided that the Court of Appeal's approach was itself inconsistent with commercial reality and the accepted function of liquidated damages. The Supreme Court found that the parties' aim was that the employer should not have to quantify its loss, which may be difficult for it to do, and that the parties should be taken to know that liquidated damages would cease to accrue on termination; and that they did not have to provide for that expressly. Overall, reading the clause in that way reduced the risk that the contractor was not liable for liquidated damages for delay and the extinction of accrued rights to liquidated damages. *Glanzstoff* (the "the little-known case of …[that] led the Court of Appeal to their radical re-interpretation of the case law on liquidated damages clauses") was said to turn on the interpretation of the particular clause in that case and did not create a special rule or principle applying to liquidated damages clauses more generally.

In the Court of Appeal, Sir Rupert Jackson set out three options on the application of liquidated damages clauses where a contractor fails to complete and a second contractor steps in:

"(i) The clause does not apply: the *Glanzstoff* case [1913] AC 143; the *Chanthall* case 1976 SC 73; the *Gibbs* case 35 Con LR 86.

(ii) The clause only applies up to termination of the first contract: the *Greenore* case [2006] EWHC 3119 (TCC); the *Shaw* case [2010] EWHC 1839 (TCC); the *LW Infrastructure* case [2012] BLR 13, [2011] SGHC 163; the *Bluewater* case 155 Con LR 85. ["the orthodox approach"]

(iii) The clause continues to apply until the second contractor achieves completion: the *Hall* case [2010] EWHC 586 (TCC); the *Crestdream* case (2013) HCCT 32/2013; the *GPP* case [2018] EWHC 2866 (Comm)."

The Supreme Court having rejected the application of *Glanzstoff* and making clear that it was not authority for any legal principle (in either Scottish or English law) supported strongly the orthodox approach on the basis that it was a widely understood principle of law in the context of liquidated damages clauses for delay. Lord Leggatt was also keen to explain that "accrued rights must be protected" and that the effect in law of termination of a contract on the parties' rights and obligations is prospective only, stating at [79] "In other words, subject to contrary agreement, the parties are discharged from their obligations under the contract which would otherwise arise after termination but not those which have arisen before: see eg Burrows, A Restatement of the English Law of Contract, 2nd ed (2020), section 19(4). In principle, therefore, where at the time of termination delay for which liquidated damages are payable has already occurred, there is no reason - in law or in justice - why termination of the contract should deprive the employer of its right to recover such damages, unless the contract clearly provides for this."

The last word on this topic must go to Lady Arden who, at para 36, said:

Of course, the parties may out of prudence provide for liquidated damages to terminate on completion and acceptance of the works so as to remove any question of their being payable thereafter. But if they do, it is in my judgment unrealistic to interpret the clause as meaning that if that event does not occur the contractor is free from all liability for liquidated damages, and that the employer's accrued right to liquidated damages simply disappears. It is much more probable that they will have intended the

provision for liquidated damages to cease on completion and acceptance of the works to stand in addition to and not in substitution for the right to liquidated damages down to termination.

[1] Lord Leggatt was keen to understand if there were any standard form contracts that provided for payment of liquidated damages for delay *only* if the contractor actually completed the work. See [82]:

> "I therefore thought it would be a useful cross-check to ask counsel for Triple Point if, after the hearing, 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. The example they produced was the 2017 FIDIC Conditions of Contract for Plant & Design Build (the Yellow Book). However, clause 15.4(c) of these 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; ... In other words, this is an example of the "orthodox" approach. 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".