

Case Comment

**REVISITING LIQUIDATED DAMAGES FOR DELAY –
UPDATES ON THE CASE OF TRIPLE POINT**

Triple Point Technology Inc v PTT Public Company Ltd
[2021] 3 WLR 521

[2022] SAL Prac 7

In 2019, the English Court of Appeal in the case of *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 took a generally novel approach to the question of liquidated damages for delay, ie, that liquidated damages will not accrue for works which have not been completed. This differed from the approach in Singapore and gave rise to potential implications and considerations for the industry. The English Supreme Court has since overturned the earlier judgment and its decision is worthy of further examination given the relevance of the issues to practice.

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I. Introduction

1 In the case of *Triple Point Technology, Inc v PTT Public Company Ltd*¹ (“*Triple Point CA*”), the English Court of Appeal (“*EWCA*”) addressed the question of an owner’s entitlement to

1 [2019] EWCA Civ 230.

liquidated damages from a contractor who had not completed its works, either because the contract was suspended or terminated.

2 In doing so, the EWCA considered three potential approaches, namely:

- (a) to hold that the liquidated damages clause did not apply *at all* when a contractor fails to complete the works (“First Approach”);
- (b) to hold that the liquidated damages clause only applies up to the termination of the contract (“Second Approach”); or
- (c) to hold that the clause continues to apply until the replacement contractor achieves completion (“Third Approach”).

3 At the time, the EWCA took the First Approach, and was the subject of some industry discussion (including an earlier commentary by the same authors²). In doing so, the EWCA considered the Singaporean case of *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd*³ (which generally followed the Second Approach), but declined to follow suit.

4 With the decision by the English Supreme Court in *Triple Point Technology, Inc v PTT Public Company Ltd*⁴ (“*Triple Point SC*”), *Triple Point CA* was overturned and it was held that liquidated damages were to apply to delays up to the point of termination and thereafter, the employer is entitled to make a claim for damages. This coincides with the Second Approach and the approach in *LW Infrastructure* and will likely have the effect of fortifying the position in Singapore. The reasoning of the Supreme Court is worth evaluating as it reconciles the legal position with practical considerations.

2 Sathiaselan Jagateesan & Kelvin Kek, “Breaking Down Three Alternative Approaches to Liquidated Damages for Delay” [2019] SAL Prac 24.

3 [2011] 4 SLR 477.

4 [2021] 3 WLR 521.

II. Brief facts of the case

5 Triple Point Technology, Inc (“Triple Point”) was engaged to design a customised software system and provide software implementation services to PTT Public Company Ltd (“PTT”) (an oil and gas company) pursuant to a bespoke contract dated 8 February 2013⁵ (“Contract”). The Contract was subject to English law.

6 Under the Contract, the Parties agreed to a timetable for the completion of each phase of the works and the individual milestones within each phase. Payment would be made on completion of the individual milestones,⁶ and liquidated damages would be payable by Triple Point in the event of delay. The liquidated damages clause was set out in Art 5.3 of the Contract:⁷

If [Triple Point] fails to deliver work within the time specified and the delay has not been introduced by PTT, [Triple Point] 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 ...

7 Pursuant to Art 12.3 of the Contract, damages for breach of contract were subject to a cap of the fees paid for the relevant work. There was also an exception in Art 12.3 of the Contract to the cap on damages in the event of “fraud, negligence, gross negligence or wilful misconduct” on the part of Triple Point.

8 However, the completion of the first phase was significantly delayed.⁸ Preparation for the second phase was therefore never commenced by Triple Point. On 31 March 2014, Triple Point agreed that if PTT made payment for the first payment milestone, Triple Point would not suspend its works.⁹ Triple Point subsequently demanded for payment of its invoices but PTT refused to make payment, denying that the sums were due under the Contract. Triple Point refused to continue its works if it was not paid.

5 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521 at [2].

6 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521 at [14].

7 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521 at [87].

8 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521 at [18].

9 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521 at [18].

9 On 23 March 2015, PTT terminated the Contract. Triple Point did not complete the works in respect of any other part of the first phase or any part of the second phase prior to termination. PTT instructed a new contractor to carry out the works.

A. The decisions in the lower courts

10 On 12 February 2015, Triple Point commenced legal proceedings in the Technology and Construction Court for payment of its unpaid invoices for software licence fees.¹⁰ PTT counterclaimed for liquidated damages for delays up to the point of termination, as well as for other losses arising therefrom.¹¹

11 Jefford J dismissed Triple Point’s claim and, amongst other things, awarded PTT liquidated damages for delays up to termination, holding that the first two heads were subject to the cap under Art 12.3 of the Contract.¹²

12 Triple Point appealed to the EWCA, and PTT cross-appealed against the finding that damages awarded were capped.¹³ The EWCA held as follows:¹⁴

- (a) PTT was only entitled to liquidated damages for work which had been completed prior to the termination of the Contract;
- (b) the carve-out in respect of “negligence” in Art 12.3 only applied to freestanding torts or deliberate wrongdoing, as opposed to contractual breaches of reasonable care and skill; and
- (c) all damages were subject to the cap under Art 12.3.

13 In relation to liquidated damages, the EWCA identified three possible scenarios when a contractor fails to complete its works and a second contractor steps in:¹⁵

10 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521 at [19].
11 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521 at [19].
12 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521 at [21].
13 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521 at [23].
14 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521 at [18].
15 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521 at [28].

- (a) the liquidated damages clause does not apply;
- (b) the liquidated damages clause applies only up to termination of the initial contract; and
- (c) the liquidated damages clause applies until the second contractor achieves completion.

14 Jackson LJ reasoned that Art 5.3 of the Contract was similarly worded to the clause in *British Glanzstoff Manufacturing Co Ltd v General Accident, Fire and Life Assurance Corp*¹⁶ (“Glanzstoff”), where the House of Lords held (at [27]):¹⁷

If the contractors have actually completed the works, but have been late in completing the works, then, and in that case only, the clause applied.

The EWCA thus followed the *Glanzstoff* approach by finding that the liquidated damages clause had no application in a situation where the contractor never handed over the completed work to the employer.

15 As Art 5.3 did not suggest that liquidated damages were payable if the works were not completed, the EWCA decided that PTT was only entitled to liquidated damages in respect of works that it had *actually* completed prior to termination and not for works which remained outstanding.¹⁸

B. Decision of the Supreme Court

16 PTT appealed to the Supreme Court on all three issues. The central issue was the approach in interpreting liquidated damages clauses. The Supreme Court unanimously *reversed* the decision of the EWCA on this and, in doing so, favoured the orthodox approach, *ie*, that liquidated damages apply to delays up to the point of termination and thereafter, the employer is entitled to make a claim for damages.

16 [1913] AC 143.

17 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521 at [30].

18 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521 at [31].

17 In particular, the Supreme Court opined that Rupert Jackson LJ’s approach was “inconsistent with commercial reality and the accepted function of liquidated damages”, which is to provide a “predictable and certain” remedy with accrued rights of liquidated damages surviving up to the date of termination.¹⁹

18 The Supreme Court found that Art 5.3 applied if Triple Point did not discharge its obligations within the time fixed by the contract *irrespective of whether the works that were completed late had been accepted by PTT*.²⁰

The function of the words on which the Court of Appeal relied [in Art 5.3] was to provide an end date for liquidated damages on acceptance of the works by PTT to ensure that in that event there was no further claim for liquidated damages in respect of the relevant delay. But it did not follow that there were to be no liquidated damages if there was no such acceptance. To reach that conclusion 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.

19 The Supreme Court’s view on the case of *Glanzstoff* was that it should be limited to its facts, and does not justify a departure from the orthodox interpretation. Crucially, the clauses in question in *Glanzstoff* were not market-accepted wording, or standard form.²¹ Thus, the Supreme Court did not agree with the finding that the wording of the liquidated damages clause in *Glanzstoff* was similar. The Court of Appeal had erred in following *Glanzstoff*, which turned on the interpretation of a contractual clause.²²

C. The “commercial realities” of a liquidated damages clause

20 It is apparent from the Supreme Court’s decision that commercial reality behind why parties choose to have a liquidated damage clause is critical to the analysis. Central to that

19 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521at [35].

20 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521at [48].

21 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521at [30].

22 *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] 3 WLR 521at [33].

commercial reality is the fundamental consideration of certainty in contracts. This is both to the advantage of the employer and the contractor. Lord Legatt in *Triple Point SC* puts it best (at [74]):

Such a clause serves two useful purposes. First, establishing what financial loss delay has caused the employer would often be an intractable task capable of giving rise to costly disputes. Fixing in advance the damages payable for such delay avoids such difficulty and cost. Second, such a clause limits the contractor's exposure to liability of an otherwise unknown and open-ended kind, while at the same time giving the employer certainty about the amount that it will be entitled to recover as compensation. Each party is therefore better able to manage the risk of delay in the completion of the project.

21 The rationale articulated in *Triple Point SC* was similarly cited in the recent case of *Eco World – Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd*.²³

22 Although the Supreme Court in *Triple Point SC* did not refer to the Singapore case of *LW Infrastructure*, the fact that the Supreme Court had taken an approach which is similar all the more affirms the likely position in Singapore moving forward until the Singapore Court of Appeal has had the opportunity to hear a case and decide definitively on the issue.

23 [2021] EWHC 2207 (TCC).