BCLP. Client Intelligent

Insights

THIRD TIME LUCKY: SUPREME COURT ALLOWS RECOVERY OF LIQUIDATED DAMAGES IN TRIPLE POINT V PTT

Jul 29, 2021

Those of you with an interest in construction law will no doubt have heard of the case of *Triple Point v PTT*, which concerned whether *liquidated damages* (LDs) are payable in the event of termination.

The *first judgment* was given by Jefford J in 2017 and the Court of Appeal gave *judgment* on the appeal in 2019. The final decision by the Supreme Court has been long awaited… and we now have the answer to one of the trickier questions of construction law.

Background

By way of reminder, PTT Public Company Ltd (PTT) and Triple Point Technology Inc (Triple Point) entered into a contract in 2013. Under the contract, Triple Point agreed to design, install, maintain and license software to help PTT carry out its business in commodity trading in Thailand. The contract was governed by English law. Payment under the contract was by reference to the achievement of milestones. The contract included a completion date for Phase 1 (Phase 1 consisted of nine stages, of which Triple Point completed only two) and a price (USD$6.9m).

Although this was a bespoke contract for the provision of software, rather than a construction contract, it had many similar features, including LDs for delay in meeting the completion date. Throughout their decisions, the judges made numerous references to the commercial rationale for the use of LDs in construction contracts.

What went wrong

The project did not go well, and Triple Point was significantly delayed in completing the work. The parties disagreed over the amount of payment due and, when PTT refused to make payment, Triple Point refused to perform the contract. As a result, PTT terminated the contract and sought to recover a number of heads of loss, including LDs and the costs of procuring a replacement system.

The issues

There were several issues before the *Supreme Court*, the most prominent of those for construction lawyers being: were LDs payable for the period between the contractual completion date and termination?

By the time of termination, Triple Point had missed the contractual completion date and was accruing liability for LDs. PTT argued that it was entitled to recover LDs that had already accrued between the contractual completion date and the date of termination (and general damages thereafter). However, in fact, PTT did not claim such damages, which in itself is telling about just how useful LDs provisions are to employers. On the other side, Triple Point argued that, on termination, the LDs regime fell away in relation to work that was uncompleted as at termination, and PTT was only entitled to general damages for such delay (and not LDs that had accrued prior to termination).

The issue was of great financial importance. If PTT was entitled to LDs for the delay in delivering all uncompleted work up to the date of termination, it would be entitled to around USD$3.5m (representing some 3,220 days of delay) subject to any contractual cap on liability. If Triple Point was correct in its contention that it was only liable to pay LDs for delay in respect of work completed and accepted, it would be liable to pay only around USD$150,000 (149 days of delay in delivering two stages of Phase 1).

Earlier decisions

At first instance, Jefford J decided that PTT was entitled to LDs for the period between the contractual completion date and termination. However, in a judgment that surprised many, the Court of Appeal found in favour of Triple Point.

In reaching its conclusion the Court of Appeal (in a judgment given by Sir Rupert Jackson), placed heavy reliance on the 1913 House of Lords decision in *British Glanzstoff.* This generated substantial interest in the case, which had previously been largely unknown to many construction lawyers.

The wording of the LDs clause in this case is important:

> *"If Contractor [Triple Point] 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% … of undelivered work per day of delay from the due date of delivery up to the date PTT accepts such work… ."*

As Triple Point never delivered the majority of the work and there was therefore no corresponding acceptance date, the Court of Appeal found that the clause could not apply, as the clause did not specify an end date for that scenario. It held that the LDs clause only applied where PTT did eventually complete and deliver the work itself, not where another contractor completed the work.

Supreme Court decision

The Supreme Court roundly disagreed with the Court of Appeal, and unanimously held that Triple Point was liable to pay LDs to PTT for the period of delay up to termination. Lady Arden, who gave the leading judgment, thought that the difficulty with the Court of Appeal's approach "is that it is inconsistent with commercial reality and the accepted function of liquidated damages".

The Supreme Court was persuaded by the "orthodox" position, finding that LDs are a valuable right to protect both the employer and contractor. It held that it was unlikely that an employer would (without clear words) agree that it would not be entitled to LDs prior to termination, as that is one situation where the employer would want to recover LDs, rather than going through the difficult and time-consuming task of quantifying its loss. It could even create an incentive on the part of the contractor to invite termination, as in that case it would avoid its LDs liability (the Supreme Court recognised that this could go the other way if the LDs are lower than the actual loss).

Central to Lady Arden's reasoning was that it was unlikely that the parties would agree that accrued rights should be eliminated on termination, as generally, accrued rights survive termination. This principle was held to be a tenet of English law that the court felt would form part of the parties' knowledge of general law, when negotiating an English law contract.

Glanzstoff was sent back to oblivion with the court deciding that it was a case that turned on the interpretation of a particular clause, and not one that created some special rule of principle applying to LDs clauses. In addition, it appears from the Supreme Court's reasoning that this decision could be limited to its particular facts: the contractor in *Glanzstoff* ceased work before the contractual completion date and a third party was engaged to complete the work **before** the contractual completion date was reached. The Court of Appeal had understood the decision in *Glanzstoff* to set out a general principle that a contractual LDs regime simply would not apply if the first contractor failed to complete the work. Lord Leggatt considered there was a clear end point at which the liability to pay LDs stopped running – the point at which the contract was terminated, when Triple Point ceased to be under an obligation to deliver work with which it was failing to comply.

Thoughts

The decision in this regard makes the position in relation to how LDs are dealt with in the event of termination more certain. In his judgment, Lord Leggatt, relied on the fact that no standard form contract makes provision for LDs, that have accrued before termination, to fall away upon termination. It is therefore now clear that the orthodox position reigns, and clear words will be needed for any alternative approach.

The court did need to strain the wording of the clause to reach this conclusion, because it read "up to the date PTT accepts such work" as meaning "up to the date **(if any)** PTT accepts such work". However, both Lady Arden and Lord Leggatt relied on "commercial common sense" in reaching their decisions, finding that:

> *"the territory is well-trodden, and the liquidated damages clause does not need to provide for it."*

This is another area where the Supreme Court and Sir Rupert Jackson appear to disagree, with *Sir Rupert Jackson observing in S&T v Grove* that:

> "*[j]udges should not generally impose their notions of commercial common sense upon the parties to business disputes*."

Much of the Supreme Court's reasoning relies on the parties being familiar with commercial conventions in the construction industry, and I wonder if Triple Point, a software company based in the US would have understood the "orthodox" position to be the case.

Triple Point is essentially a case about contractual interpretation, and we may be seeing the start of a renewed fondness for "business" or "commercial common sense" on the part of the Supreme Court. In this respect, see my colleague Shy's prescient *blog* from February of this year.

RELATED PRACTICE AREAS

- Construction Disputes

MEET THE TEAM

Shy Jackson

London

shy.jackson@bclplaw.com
+44 (0) 20 3400 4998

James Clarke

London

james.clarke@bclplaw.com
+44 (0) 20 3400 3507
