

Insights

TRIPLE POINT V PTT: UK SUPREME COURT ALSO INTERPRETS A CONTRACTUAL CAP ON LIABILITY

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SUMMARY

The UK Supreme Court recently handed down a highly anticipated judgment on the interpretation of clauses which pertain to liquidated damages and limitations on a contractor's liability for damages. Most notably, the Supreme Court restored the "orthodox" position that, where the contract has been terminated, liquidated damages remain payable by the contractor from the point of delay to the time of termination. The judgment also offers useful insight as to the court's approach in interpreting a contractual cap on liability.

Background and Introduction

The Supreme Court decision and the appellate history of the case of *Triple Point v PTT* have attracted much attention and discussion among stakeholders and practitioners in the construction field. This case primarily concerned whether liquidated damages were payable by the contractor for work which had not been completed before the contract was terminated.

Although the case concerned a bespoke software contract for a Thai commodity trading company which has little to do with construction, the principal issue is one which commonly arises in construction disputes. The judgment also made multiple references to construction contracts and authorities.

The principal issue of whether liquidated damages are payable in respect of uncompleted work from the time of the delay to the time of termination has been discussed widely from the time when the [Court of Appeal judgment](#) was released.

We previously discussed and published thoughts on this principal issue on our blog: [Third time lucky: Supreme Court allows recovery of liquidated damages in Triple Point v PTT](#), and therefore the same discussion on this issue will not be repeated here. Although the Supreme Court restored the "orthodox" position with regard to liquidated damages, which represents the position generally

accepted by the construction community, this case essentially is a case about contractual interpretation rather than a case establishing a point of principle regarding liquidated damages.

In addition to the principal issue regarding liquidated damages, the facts of the case also turned on the interpretation of a clause which placed a limitation upon the liability of the contractor (Triple Point).

Caps on liability are not uncommon in the construction field. Some standard contract forms such as the 2017 FIDIC Conditions of Contract for Plant & Design Build (the Yellow Book) and the optional clauses in the NEC3 suite of contracts contain provisions which place limitations upon the contractor's liability. A total cap on liability is the best way to limit a contractor's exposure to liability under a contract. However, depending on the bargaining power and the result of commercial negotiations, the cap more often operates as a limitation on liability subject to exceptions.

The UK Supreme Court in *Triple Point v PTT* scrutinised the liability cap in this software contract. The Court's analysis was set out in detail in the leading judgment delivered by Lady Arden.

The Issues before the Supreme Court

Article 12.3 of the contract comprised four sentences. Both the Court of Appeal and the Supreme Court dissected the clause into four parts and interpreted them as separate but related limbs forming this clause.

The four sentences, in essence, provided that:

1. Triple Point was liable to pay for the damage suffered by PTT arising from its breach of contract. Express reference to software defects and contractual functionality requirements were made here.
2. Triple Point's total liability to PTT under the contract was capped at the contract price received by Triple Point under the contract (i.e. a global cap).
3. Except for specific remedies expressly identified elsewhere in the contract, PTT's only remedy for claims under the contract was for Triple Point to use best endeavours to cure the breach, or failing that, for Triple Point to return the fees it received for the services or deliverables related to the breach (i.e. a limitation on the form of remedy).
4. Liability resulting from fraud, negligence, gross negligence or willful misconduct were carved out from the limitation on liability (i.e. the cap carve-out).

Aside from the principal issue on the availability of liquidated damages, the following two related issues came before the Supreme Court:

(i) Whether an exception from the cap in article 12.3 for “negligence” removed from the cap losses caused by Triple Point’s negligent breach of contract or only losses for the commission of an independent or freestanding tort (the “Carve-out for Negligence Issue”).

(ii) Whether liquidated damages payable by Triple Point were capped under article 12.3 (the “Capping of Liquidated Damages Issue”).

The Decisions of the Courts

At first instance, the judge held, first, that Triple Point’s liability in respect of wasted costs and termination loss was capped at the amount paid by PTT under the contract prior to termination, but, secondly, that PTT’s entitlement to liquidated damages was not subject to the liability cap.

The Court of Appeal construed and applied article 12.3 in the following way:

(i) The carve-out for negligence applied only to cases of freestanding torts or deliberate wrongdoing. It did not capture Triple Point’s breach of the express contractual obligation to exercise reasonable care and skill. The reasoning behind this conclusion was that given that the centerpiece of the contract was the provision of services, the cap would be emasculated if breaches of the contractual duty of care were carved out.

(ii) Triple Point’s liability to pay liquidated damages was subject to the cap in article 12.3, together with all other entitlements to general damages.

At the Supreme Court, Lady Arden disagreed with the Court of Appeal in that, in her judgment, liquidated damages fell within the cap carve-out if they resulted from a negligent breach of Triple Point’s contractual obligation to use reasonable care and skill. Subject to this carve-out for negligence, the Supreme Court agreed that liquidated damages fell within the global cap and were to count towards the maximum damages recoverable under the cap.

The Carve-Out for Negligence Issue

Regarding this issue, Lady Arden pointed out that the concept of “negligence” generally has an accepted meaning which covers both the freestanding tort of failing to use reasonable care, and also a party’s breach of contract to exercise the contractually required standard of care. However, looking at the specific clause in question, she found it unlikely that the parties contemplated that tortious breaches were to be captured by the carve-out, because article 12.3 made repeated references to “contractual” liabilities.

She commented further that the Court of Appeal overlooked or put too little consideration on the fact that Triple Point’s obligation not only was to provide services carefully, but also to provide defect-free software and contractual deliverables with an agreed level of functionality.

On the facts of this case, Lady Arden held that the provision of defect-free deliverables to an agreed level of functionality fell within the compliance of specific contractual terms expressly referenced in the first sentence of article 12.3; and that said provision did not fall under the remit of the contractual obligation to use reasonable care and skill. Excluding liability for negligent breach of contract from the cap carve-out actually would not emasculate the cap, because the provision of services with due care and skill was not the core obligation under the contract.

Accordingly, Lady Arden completely reversed the Court of Appeal's finding on this point and held that the cap carve-out for "negligence" included breaches of contractual duty of care but excluded independent torts. This meant that liability arising from negligent breaches of the contractual duty of care were not subject to the liability cap.

Note that the masters of the Supreme Court were divided on the interpretation of "negligence" under article 12.3:

- Lord Leggatt and Lord Burrows concurred with Lady Arden. Lord Leggatt found that by accepting that "negligence" meant the freestanding tort of negligence, the Court of Appeal sought to build into the word a convoluted meaning which the word cannot reasonably bear.
- On the other hand, Lord Sales (with whom Lord Hodge agreed) agreed with the Court of Appeal's interpretation that Triple Point's core obligation under this contract was to exercise reasonable care and skill; and accordingly article 12.3 should be interpreted in a way which allowed Triple Point to be protected in respect of ordinary breaches of this core performance obligation.

The Capping of Liquidated Damages Issue

On this issue, the Supreme Court agreed with the Court of Appeal. The court looked specifically at the third sentence of article 12.3, and considered it in the context of other provisions in the contract.

Unlike defects, delay is not something which usually can be "cured" by the contractor. Accordingly, there were specific provisions elsewhere in the contract to value delays and liquidated damages as remedies for delays. The third sentence of article 12.3 therefore was meant to deal with breaches not involving delays.

Lady Arden held that the second sentence (i.e. the global cap) and the third sentence (i.e. the limitation in the form of remedy) of article 12.3 served separate functions; one did not qualify the other. In this case, the limitation in the form of remedy should not be written into the global cap. This meant that liquidated damages fell under the global cap so that they counted towards the maximum damages recoverable by PTT under the second sentence of article 12.3.

Key Points to Take Away

The extensive references to contract-specific matters found in the judgment indicate that this case essentially is one about contractual interpretation of the particular contract in question.

The leading judgment by Lady Arden featured the application of the notion of business common sense and relied on the fact that certain concepts have well-established and accepted meanings. We can see from the judgment that the court looked at the substance of the transaction and the contract when interpreting clauses in dispute, rather than simply applying “business common sense”. However, this area of the law still is subject to development. As mentioned in [Alexandra’s blog](#) mentioned at the start of this note, the different masters of the court held different views as to whether and when the notions of business common sense should be applied by judges to contractual disputes.

A relatively clear point to take away from the *Triple Point v PTT* dispute is that when faced with concepts with straightforward and ordinary legal meanings, clear words are necessary before the court will conclude that a contract has taken away valuable rights or remedies (here, the availability and the capping of liquidated damages) which one of the parties to it would have had. The assumption is that parties normally do not give up valuable rights without making it clear that they intend to do so. Exceptions and carve-outs which are realistic, well-defined and in accordance with commercial sense are more likely to be upheld by the courts.

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