

## TRIPLE POINT – THE UK SUPREME COURT ENDORSES THE ORTHODOX INTERPRETATION OF LIQUIDATED DAMAGES CLAUSES

### Overview

The Courts' approach to an Employer or Client's entitlement to liquidated damages for delay in contract termination scenarios has taken a new turn in the latest instalment of the Triple Point saga. In *Triple Point Technology Inc v PTT Public Company Ltd* [2021] UKSC 29 (*Triple Point v PTT*), the UK Supreme Court has endorsed the orthodox position: that liquidated damages for a Contractor's delayed completion of works will accrue only until contractual termination (subject to any express wording which provides otherwise), with a right to claim general damages for the period thereafter (subject to any contractual limitations or exclusions). This briefing follows our earlier briefing on the Court of Appeal decision.<sup>1</sup>

### Background

The case concerned a dispute between a US-based software developer (Triple Point) and the state-owned Thai oil and gas firm (PTT) over the former's failure to complete a series of works. PTT contracted with Triple Point to deliver works in a series of phases: Phase 1 concerned replacement of an existing system, with Phase 2 consisting of system enhancements to accommodate new categories of trade. Triple Point completed some elements of Phase 1, but no elements of Phase 2 prior to PTT's termination of the relevant contract.

Following the termination, Triple Point claimed outstanding sums, with PTT counterclaiming for losses arising out of termination and liquidated damages for delayed completion of the works. The contractual liquidated damages clause provided that:

*"If Contractor 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 for delivery up to the date PTT accepts such work [...]"*

The key question to be determined was how the clause operates when termination occurs before the delayed works are completed or accepted by PTT.

### Key Takeaways:

- The UK Supreme Court has overturned the decision of the Court of Appeal of England and Wales in *Triple Point v PTT* and endorsed the orthodox interpretation of liquidated damages clauses: liquidated damages for a Contractor's delayed completion of works will accrue only until contract termination, with a right to claim general damages for the period thereafter (subject to any contractual limitations or exclusions).
- If parties intend for liquidated damages to continue to accrue after termination, clear wording will be required.
- The Court emphasised its support for upholding liquidated damages clauses, in particular noting their commercial benefits, including the certainty provided to Clients and Contractors as to their respective risk allocations.
- This decision also reflects developments in some standard form construction contracts.

<sup>1</sup> Clifford Chance briefing on the Court of Appeal decision - [Termination - what's the Triple Point of delay liquidated damages?](#)

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At first instance, Jefford J in the Technology and Construction Court (TCC) upheld the orthodox position (described in Option 2 below) that liquidated damages accrued until the date of termination for both phases of works, with general damages being recoverable afterwards.<sup>2</sup>

Jefford J's judgment was appealed to the Court of Appeal, which reviewed three alternative operations of liquidated damages clauses in contract termination scenarios, each of which was supported by earlier case law:

- **Option 1** – delay liquidated damages are not applicable at all where contract is terminated while the works are late and incomplete. Instead, a general damages claim may be available, subject to any contractual limitations or exclusions, such as an exclusive remedies provision or a loss of profit liability exclusion.
- **Option 2 (the orthodox position)** – delay liquidated damages apply to any period of culpable delay up until termination, but not afterwards. Afterwards, a general damages claim may be available, subject to any contractual limitations or exclusions.
- **Option 3** – delay liquidated damages continue to apply post termination until the works are completed by replacement Contractors.

The Court of Appeal decided that Option 1 (and not the orthodox position) was the position, based on the language of the contract. Accordingly, it held that the liquidated damages clause (1) allowed PTT to claim liquidated damages for delayed Phase 1 works, to the extent that these had been completed and handed-over at the point of termination, but (2) that PTT was not entitled to claim liquidated damages for Phase 2 of the works as no section of Phase 2 had been completed or accepted.

The Court of Appeal's decision had major implications for the construction industry where language similar to the Triple Point contract language is a feature of a significant proportion of construction contracts (including popular domestic and international standard forms such as the JCT and FIDIC 1999 suites).<sup>3</sup>

## The Supreme Court returns to the orthodox position

On further appeal, the Supreme Court unanimously overturned the Court of Appeal's decision, endorsing the orthodox position: that delay liquidated damages will apply to any period of culpable delay until termination, and that general damages may be recoverable from termination onwards (subject to any relevant contract terms).<sup>4</sup>

First, the Supreme Court emphatically supported the commercial benefits of liquidated damages provisions and the certainty provided to parties as to what risk each would bear. That certainty would be compromised if the parties' entitlement was conditional on the Contractor ultimately completing its work.

Second, the Supreme Court held that an interpretation that a Client should only receive liquidated damages for work that was eventually completed by the original Contractor was "*inconsistent with the commercial reality*", the likely intention of the parties, and "*the accepted function of liquidated damages*". The Court further noted that the Court of Appeal's interpretation (Option 1) would

<sup>2</sup> *Triple Point Technology Inc v PTT Public Co Ltd* [2017] EWHC 2178 (TCC)

<sup>3</sup> *Triple Point Technology Inc v PTT Public Company Ltd* [2019] EWCA Civ 230; see the previous Clifford Chance briefing on the Court of Appeal decision - [Termination - what's the Triple Point of delay liquidated damages?](#)

<sup>4</sup> *Triple Point Technology Inc v PTT Public Co Ltd* [2021] UKSC 29

incentivise a Contractor in delay to not complete the works at all, in order to avoid liquidated damages liability. This incentive made no commercial sense and would "*render the liquidated damages clause of little value in a commercial contract*". Instead, the parties should be taken to know that, as a matter of law, liquidated damages stop accruing on termination, with any accrued entitlements retained. No specific wording was required to produce that result.

The Supreme Court also clarified that the 1913 decision in *British Glanzstoff Manufacturing Co Ltd*<sup>5</sup>, which supported the Option 1 approach, and on which the Court of Appeal had placed some weight, turned on the specific facts of that case. It did not establish a particular rule of law that applies generally to liquidated damages provisions.

### Comment

This judgment makes clear that, in the absence of clear wording to the contrary, delay liquidated damages will accrue and apply to a period of culpable delay until termination, with general damages being recoverable for the period afterwards (subject to the relevant contract terms). If parties intend for liquidated damages to continue to accrue after termination, clear wording will be required.

This judgment, taken together with the Supreme Court's decision in *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, which narrowed the circumstances where liquidated damages clauses can be construed as penalties, reinforces the English law position that upholding liquidated damages clauses is important and desirable. By contrast, in civil law jurisdictions the courts have greater freedom to adjust the parties' agreed measure of damages to reflect actual loss. Likewise, in Australia the courts potentially have the power to scale down liquidated damages entitlements in order to avoid a liquidated damages provision being determined to be a penalty.

The Triple Point saga also reflects developments in standard form construction contracts, for example with the FIDIC 2017 Silver Book and NEC4 Option X7 moving towards the orthodox position, providing that liquidated damages liability continues until termination. Triple Point also potentially assists in clarifying the position in other common law jurisdictions (shown in the comparative table of jurisdictions below), where there is limited authority on this question.

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<sup>5</sup> *British Glanzstoff Manufacturing Co Ltd*<sup>5</sup> v *General Accident, Fire and Life Assurance Co Ltd* [1913] AC 143 (**British Glanzstoff**)

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Jurisdiction	Courts' position
England & Wales	The Courts now adopt the orthodox position - <i>Triple Point Technology Inc v PTT Public Company Ltd</i> [2021] UKSC 29.
Australia	The Courts' position is unclear but there is some limited commentary indicating a tendency towards the orthodox position – <i>Brooking on Building Contracts</i> , 5 <sup>th</sup> Ed., page 105.
Singapore	The Courts in Singapore generally adopt the orthodox position - <i>LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd</i> [2011] 4 SLR 477
Hong Kong	In a case in 2014 where the defendant was unrepresented the Courts found that liquidated damages clauses continue to apply after termination ( <i>Crestdream v Potter Interior Design</i> [2014] HKEC 1209). However, <i>Triple Point</i> is likely to be persuasive and the Courts may adopt the orthodox position in future.
Abu Dhabi Global Market (ADGM)	ADGM law incorporates English common law, so the Courts can be expected to follow Supreme Court's decision in <i>Triple Point</i>
Dubai International Financial Centre (DIFC)	The Courts' position is unclear and we are not aware of any decisions that have considered this specific issue. However, <i>Triple Point</i> likely to be persuasive and it is therefore reasonable to expect that the Courts might adopt the orthodox position on this issue.

The Supreme Court's confirmation of the right to claim liquidated damages up to the point of termination irrespective of whether the works have been completed or accepted may be welcomed by Clients who, in the absence of such rights, may have faced difficulties in establishing an equivalent entitlement in general damages. However, Clients should note that whether a construction contract is terminated at common law or pursuant to a termination clause may impact any assessment of general damages to which Clients are entitled. While Clients may attempt to specify the damages that flow from various different contractual termination scenarios, Clients should note the risk of such damages provisions being held to be disproportionate to the interest being protected, and on that basis being held to be void as a penalty in certain common law jurisdictions.

Conversely, Contractors may take comfort from the fact that, where (as is common) the rate of liquidated damages is actually lower than the losses incurred by the Client due to the Contractor's delay, the rate of liquidated damages will cap their liability at the pre-agreed level.

However, parties should always remember that their rights and obligations (including the position on liquidated damages) will ultimately be determined by the terms of their contract and seemingly innocuous provisions, for example preserving a Client's rights on termination, can potentially result in Options 1 or 3 applying instead of the orthodox position in Option 2.

Overall, the Supreme Court's endorsement of Option 2 brings greater clarity to the operation of liquidated damages provisions. However, as discussed in our earlier briefing on the Court of Appeal's decision, it bears noting that in practice we often see (and indeed we help parties draft and negotiate) an Option 3 approach to liquidated damages on project financed construction deals across the international construction industry.

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