



Liquidated damages following termination

Triple Point Technology, Inc v PTT Public Company Ltd [2021] UKSC 29

The Supreme Court has recently answered the question about what parties are entitled to by way of liquidated damages in the event of termination of a contract, reversing the decision of the Court of Appeal and providing welcome certainty.

Background

A liquidated damages clause is an agreement that a particular breach of contract will have a certain consequence. In construction contracts, liquidated damages clauses are most often used in respect of delay; where the date for completion is exceeded, then the employer is entitled to damages at a pre-agreed rate per day or week of delay, regardless of what their actual losses are. This provides both parties with certainty and prevents the employer from having to provide evidence of the actual losses it has suffered in order to successfully claim damages.

There has however been a question mark over how liquidated damages should be applied where a contract is terminated.

The facts

PTT, an oil and gas company, employed Triple Point to provide a software system to assist PTT in its commodity trading and risk management. The contract included a liquidated damages clause.

Triple Point's work was significantly delayed. PTT terminated the contract and claimed liquidated damages. Only stages 1 and 2 of phase 1 of the work had been completed ("accepted" in the language of the contract), leaving much of the work incomplete – phase 2 had not even been commenced. An argument arose as to how the liquidated damages clause was to apply. The relevant clause in this particular contract states:

"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 Court of Appeal

The Court of Appeal reviewed the previous cases on liquidated damages in the event of termination and identified three different approaches in the previous judgments up to that point. Either:

1. The liquidated damages clause would not apply.
2. Liquidated damages would apply up to the date of termination and the Employer would thereafter be entitled to general damages (i.e. its actual losses).
3. Liquidated damages would continue to apply until the works were eventually completed at some future point (by the employer or others).

The Technology and Construction Court (the TCC) had in the first instance decided that the second possibility applied so the employer was entitled to liquidated damages up to the date of termination,

regardless of whether the particular phases had been completed or not, and then general damages after the date of termination.

On appeal, the Court of Appeal identified the second option as the “orthodox” approach, but concluded that the outcome would depend on the particular wording of the clause in question.

The Court of Appeal went on to overturn the TCC decision and decided that in this particular case, the employer was entitled to 1) liquidated damages in respect of the phase of work which the original contractor completed, and 2) its actual losses as a result of delay to the phase of works which were never completed by the original contractor. In other words, the liquidated damages clause did not apply where the original contractor never completed the relevant work.

The Supreme Court

The employer appealed the decision to the Supreme Court.

The Supreme Court overturned the Court of Appeal, deciding that its approach was “inconsistent with commercial reality and the accepted function of liquidated damages”. The Supreme Court emphasised that liquidated damages clauses allowed parties to agree a remedy which was predictable and certain for a particular event and saved the employer from having to quantify its loss.

Whilst the Supreme Court agreed with the Court of Appeal that the outcome would depend on interpretation of the wording of the liquidated damages clause, clear wording would be required in order for the second possibility not to apply, stating: “It is ordinarily to be expected that, unless the clause clearly provides otherwise, a liquidated damages clause will apply to any period of delay in completing the work up to, but not beyond, the date of termination of the contract.”

The employer was therefore entitled to liquidated damages for all of the work up to the date of termination and general damages for the period after termination.

What does this mean for other contracts?

Whilst the issue ultimately remains a point of contractual interpretation, the confirmation that liquidated damages are likely to apply up to the date of termination unless the relevant clause clearly says otherwise provides a greater degree of certainty of the consequences of termination. Termination is already often a fraught issue with arguments over whether parties lawfully terminated, and with very different consequences depending on whether they did or not, so this judgment should assist parties in coming to a more robust conclusion of the likely consequences of termination where a project has been delayed.

The fundamental point remains that liquidated damages clauses will often be enforced and parties must make themselves aware of what is meant by the clauses they are signing up to, and ensure that what they have agreed is sufficient to make their intentions clear to a third party such as a court or an adjudicator.

Free initial consultation

If you have a contractual problem, are involved in a project which is going wrong, or if you have a dispute, we can assist. We offer a *free one hour initial consultation* to all clients. Please get in touch for more information.



**CONTRACT &
CONSTRUCTION
CONSULTANTS**

Contract & Construction Consultants

Cavendish House
15 Whiteladies Road, Clifton
Bristol, BS8 1PB

T: +44 (0) 117 925 9001

E: enquire@contract-consultants.com

W: www.contract-consultants.com