

Liquidated Damages in the Context of a Termination: Supreme Court Reverts to the Status-Quo

Update

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The English Supreme Court has delivered its long-awaited judgment in Triple Point Technology, Inc v PTT Public Company Ltd [2021] UKSC 29. Although the case concerns a commodity trading software system, it has broad application, notably to the construction industry. This is, in particular, because the decision concerns the application of liquidated damages provisions in circumstances where a contract has been terminated.

The key points arising from the decision are:

1. Liquidated damages provisions must be construed by applying the usual rules of contractual interpretation.
2. Absent wording to the contrary, the accrual of liquidated damages ends on the termination of the contract.
3. As a matter of English law, the word “negligence” covers both the separate tort of failing to use due care and also the breach of a contractual provision to exercise skill and care.
4. Clear words are required to take away valuable rights or remedies provided under common law or statute.

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Case Summary

What was the dispute about?

PTT engaged Triple Point to design, install and maintain a software system for use in PTT's commodity trading business. The works were not completed and PTT terminated the contract.

Triple Point commenced proceedings claiming that PTT had failed to pay amounts due. PTT counterclaimed for damages for breach of contract, including liquidated damages for delay under the terms of the contract up to the date of termination.

Jefford J in the High Court found that Triple Point had negligently breached its contractual obligation to exercise reasonable skill and care. She dismissed Triple Point's claims and granted PTT, among other things, liquidated damages for delays prior to termination of the contract.

The decision was appealed to the Court of Appeal. The Court of Appeal overturned part of Jefford J's decision. It found that PTT was not entitled to liquidated damages for phases of work that were never completed by Triple Point, on the basis that the liquidated delay damages clause in question focused "*specifically on delay between the contractual completion date and the date when Triple Point actually achieves completion*". This significantly reduced PTT's entitlement. The Court of Appeal also decided that the reference to "negligence" in the limitation on liability provision in the contract only applied to "*free standing torts or deliberate wrongdoing*" and not in respect of a breach of the Triple Point's contractual obligation to exercise skill and care.

The decision was appealed to the Supreme Court.

What were the key issues for the Supreme Court to decide?

The Supreme Court had to decide whether:

1. liquidated damages were payable under the contract in respect of work which had not been completed or accepted before the contract was terminated ("**Issue 1**");
2. "negligence" in the limitation of liability provision referred to a breach of the express contractual duty of reasonable skill and care as well as to the tort of negligence ("**Issue 2**"); and
3. liquidated damages were subject to the cap on liability in the contract ("**Issue 3**").

What was the result?

Issue 1 – Liquidated damages and termination

In respect of Issue 1, the Supreme Court unanimously overturned the decision of the Court of Appeal. It found that the contract provided for liquidated damages to be paid for delay even though the work had not been completed or accepted prior to the contract being terminated.

Lady Arden, delivering the leading judgment, emphasised the importance of interpreting liquidated damages provisions in accordance with the usual principles of contractual interpretation. She noted 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”¹ and that it “in effect threw out the baby with the bathwater”.² She stated that the Supreme Court’s interpretation “meets with commercial common sense and prevents the unlikely elimination of accrued rights”.³

Lord Leggatt, who agreed with Lady Arden, added 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”*.⁴

Issue 2 – Limitation of liability for “negligence”

In respect of Issue 2, again overturning the Court of Appeal’s decision, the majority of the Supreme Court found that the word “negligence” in the limitation of liability provision included a breach of the express contractual duty of reasonable skill and care.

Lady Arden stated that *“the word ‘negligence’ has an accepted meaning in English law... It covers both the separate tort of failing to use due care and also breach of a contractual provision to exercise skill and care”*.⁵ She concluded that the limitation of liability provision *“should be given its natural and ordinary meaning of removing from the cap all damages for negligence on Triple Point’s part, including damages for negligent breach of contract”*.⁶

Lord Leggatt agreed, emphasising also the oft-quoted principle that *“clear words are necessary before the court will hold that a contract has taken away valuable rights or remedies which one of the parties to it would have had a common law (or pursuant to statute)”*.⁷

Lord Sales, with whom Lord Hodge agreed, gave a dissenting judgment on this issue. He disagreed with the majority, preferring the Court of Appeal’s analysis. He stated that *“the core obligation of Triple Point under the [contract] is to exercise reasonable skill and care... The limitation of liability provisions... form part of the same article [and] have to be read in that context”*.⁸

Issue 3 – Liquidated damages and the cap on liability

In respect of Issue 3, the Supreme Court agreed unanimously with the Court of Appeal. It concluded that, based on the wording of the provisions in question, PTT’s entitlement to liquidated damages was subject to the cap on liability in the contract.

Comment

The aspects of the Court of Appeal’s decision concerning liquidated damages have been much debated. The Supreme Court’s decision has removed the uncertainty that it created and highlights that liquidated damages provisions must be construed by applying the usual rules of contractual interpretation. It is

a return to the status-quo that will likely be welcomed in the construction industry, where many projects are in delay and terminations are increasing.

Debate may now focus on the Supreme Court's judgment on Issue 2 and the meaning of "negligence" in limitation of liability provisions, which could have wider implication. Lord Sales' dissenting judgment may fan the flames of that debate, although he noted in his judgment that "*this is a one-off provision and the question of law to which it give rise has no wider significance than this case*".⁹

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1. At paragraph 35
 2. At paragraph 48
 3. At paragraph 37
 4. At paragraph 86
 5. At paragraph 54
 6. At paragraph 68
 7. At paragraph 106
 8. At paragraph 130
 9. At paragraph 126