



Court of Appeal gives liquidated damages a reboot

The Court of Appeal has held that a clause imposing liquidated damages for delay did not apply in circumstances where the supplier had not completed the project (***Triple Point Technology, Inc. v PTT Public Company Ltd*** [2019] EWCA Civ 230).

This judgment will be of particular interest to both customers and suppliers that are embarking on technology projects, where delay is not uncommon and liquidated damages clauses are often included as a compensatory mechanism.

Background

Triple Point Technology, Inc. (Triple Point) is a Delaware-based software supplier that designs, develops and implements commodities trading software. PTT Public Company Ltd (PTT) is a Thailand-based company that undertakes commodities trading.

Triple Point and PTT entered into a contract (the Contract) to implement a new commodities trading risk management and vessel chartering system (the CTRM system). The CTRM system was to be developed in two phases, the first of which was to replace PTT's existing system with the CTRM system. The total sum payable under the Contract to Triple Point was \$6.92 million.

Key provisions of the Contract included the following:

Article 5.3: "[Triple Point] shall use its best effort and professional abilities to complete Phase 1 of the Project within 460 calendar days after the Effective Date...If [Triple Point] fails to deliver work within the time specified and the delay has not been introduced by PTT, [Triple Point] shall be liable to pay the penalty at the rate of 0.1% (zero point one percent) of undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work..."

Article 18.1: "Payment shall be made by milestone as indicated in the below table..." (The table allocated payments at varying percentage levels against various milestones).

Triple Point completed the first milestone of Phase 1, invoiced for the relevant percentage in the Contract (\$1,038,000) and was paid. Completion of that milestone, however, was 149 days late.

No further Phase 1 milestones were met but Triple Point then asked PTT to pay other invoices, which had been raised on the basis of Order Forms agreed by the parties, and which provided for payment by certain dates rather than by achievement of milestones (the Invoices). PTT refused to pay the Invoices on the basis that no other milestones in the Contract had been met.

Triple Point maintained that payment was due and, as no such payment was made, it downed tools. PTT accordingly sought to terminate the Contract. Triple Point then issued proceedings for payment of the Invoices and PTT counterclaimed for loss/damage, including for liquidated damages for delay pursuant to Article 5.3.

At first instance, Mrs Justice Jefford dismissed Triple Point's claim and awarded PTT loss/damage on the counterclaim. The majority of the award was liquidated damages for delay (\$3,459,278.40) with additional general damages capped at sums paid to Triple Point (\$1,038,000).

Triple Point appealed on a number of grounds, including on the basis that liquidated damages for delay were not recoverable. Triple Point's argument was that Article 5.3 was not engaged because it only applied when work was delayed but subsequently completed and accepted; it did not apply in respect of work that was never accepted.

Court of Appeal Judgment

On the matter of liquidated damages, Sir Rupert Jackson, giving the leading decision, considered conflicting authorities which gave rise to three alternative approaches to the clause in issue:

- (i) the clause did not apply where the work had not been completed; general damages were instead recoverable (pursuant to the House of Lords decision in *British Glanzstoff Manufacturing Co Ltd v General Accident, Fire and Life Assurance Co Ltd 1913 SC (HL)*).
- (ii) alternatively, the clause only applied up to termination of the first contract; general damages were recoverable thereafter (as per Sir Rupert Jackson's own decision in *Greenore Port Ltd v Technical & General Guarantee Company Ltd [2006] EWHC 3119 (TCC)*).
- (iii) alternatively, the clause continued to apply until a second contractor achieved completion (*Hall v Van Der Heiden (No 2) [2010] EWHC 586 (TCC)*).

Sir Rupert Jackson noted that the decision of the High Court in *Glanzstoff*, in which the clause in question was similar to Article 5.3, had never been disapproved but had unfortunately not been cited in most decisions post 1992. He also noted that his own decision in *Greenore* may have been different if *Glanzstoff* had been cited.

In Triple Point's case, on the basis that:

- Article 5.3 seemed to be focussed specifically on delay between the contractual completion and actual completion; and as
- the phrase in article 5.3 "up to the date PTT accepts such work" meant up to the date when PTT accepted completed work from Triple Point,

Sir Rupert Jackson favoured the first alternative and held that Article 5.3 had no application in a situation where the contractor never handed over completed work. PTT was still entitled to recover loss/damage for breach of contract as general damages, although this was capped pursuant to the liability caps in the Contract.

Comment

Prior to this judgment, the traditional approach was to apply a liquidated damages clause for delay until the contract was terminated. The Court of Appeal's judgment in *Triple Point* signals a shift away from this traditional approach.

The Court stressed that the application of liquidated damages clauses will depend on the precise wording in issue. Accordingly, if a contract includes a liquidated damages clause relevant to delay, parties should ensure that it is clear on its face when they intend the clause to apply.

That said, following this judgment, it is likely that clauses that provide for liquidated damages to accrue up to the date of delivery/completion will be disapplied if a contract is terminated before delivery/completion has occurred.



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