

Case Comment

**BREAKING DOWN THREE ALTERNATIVE
APPROACHES TO LIQUIDATED DAMAGES
FOR DELAY**

Triple Point Technology, Inc v PTT Public Company Ltd
[2019] EWCA Civ 230

[2019] SAL Prac 24

The ubiquity of liquidated damages clauses in construction contracts cannot be gainsaid as parties have become accustomed to not having to prove damages from first principles, whether due to convenience, costs or the difficulty of quantifying losses. This note serves as a commentary on the *Triple Point Technology, Inc v PTT Public Company Ltd* (“*Triple Point*”) case and its potential implications on the construction industry. In the light of *Triple Point*, parties should be mindful of the drafting of contractual provisions in order to make expressly clear whether the mutual intentions are for liquidated damages clauses to survive the termination or suspension of a contract.

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I. Introduction

1 The case of *Triple Point Technology, Inc v PTT Public Company Ltd*¹ (“*Triple Point*”), a decision by the English Court of Appeal (“EWCA”), addresses the question of an owner’s

1 [2019] EWCA Civ 230.

entitlement to impose liquidated damages on a contractor who had either suspended its works or whose contract had been terminated.

2 In the course of its decision, the EWCA considered the Singapore case of *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd*² (“*LW Infrastructure*”) but ultimately took a different approach.

3 In essence, the EWCA in *Triple Point* held that liquidated damages will not accrue for work which has not been completed (ie, suspended or for contracts which had been terminated). This is different from *LW Infrastructure*, which had long stood for the proposition in Singapore that, unless there is express agreement to the contrary, a party is entitled to liquidated damages even though a contract is terminated (at least in respect of the period before termination).

4 Although *LW Infrastructure* is likely to remain the authority in Singapore, it is worth examining the reasoning of *Triple Point* and its potential impact on the development of the law in future.

II. Brief facts of *Triple Point Technology v PTT Public Company*

5 The claimant, Triple Point, was engaged by the respondent, PTT, to provide a new software system for commodities, trading, risk management and vessel chartering. The works were split into multiple phases with multiple payment milestones.

6 In brief, Triple Point completed the first two stages of phase 1 of the works (albeit late), for which it was duly paid by PTT. Triple Point continued to do the remainder of the work and demanded payment from PTT even though these works were incomplete when the calendar dates stipulated in the order

2 [2011] 4 SLR 477.

forms arrived. PTT disagreed with Triple Point's entitlement to payment on the basis that the actual completion milestones had not been met. This led to Triple Point suspending its works and leaving the site. PTT then terminated the contract and Triple Point commenced proceedings for payment.

7 A number of arguments were raised in the proceedings, but of particular relevance to the present question is PTT's claim for liquidated damages against Triple Point. On this point:

(a) The trial judge awarded the sum of \$3,459,278.40 as liquidated damages for delay pursuant to Art 5.3 of the contract.³

(b) This was made up of \$154,662.00 for the delay in the first two stages of phase 1 of the works and, more crucially, \$3,304,616.40 for the delays on all other elements of the work from the specified completion dates to 15 February 2015 (when the contract was terminated).⁴

(c) Article 5.3 of the contract reads:⁵

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 ...

(d) Triple Point's contention was that Art 5.3 of the contract was not engaged and that it only applied when work was delayed, but subsequently completed and then accepted, *ie*, it does not apply in respect of work which the employer never accepted.⁶

3 *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 at [42(ix)].

4 *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 at [74].

5 *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 at [16].

6 *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 at [75].

III. Holding by the English Court of Appeal

8 The EWCA in *Triple Point* considered three alternative approaches in determining the application of the liquidated damages clause, namely:⁷

- (a) to hold that the liquidated damages clause did not apply at all when a contractor fails to complete the works (“First Approach”);
- (b) to hold that the liquidated damages clause only applies up to the termination of the contract (“Second Approach”); or
- (c) to hold that the clause continues to apply until the replacement contractor achieves completion (“Third Approach”).

9 The EWCA eventually adopted the First Approach and upheld Triple Point’s appeal on this point. In doing so, the court expressed doubt over the Third Approach where liquidated damages for delay are allowed to continue beyond termination. In the EWCA’s view, this approach means that the employer and subsequent contractor can control the period of liquidated damages to be imposed on the first contractor.

10 Between the First Approach and the Second Approach, the EWCA showed a preference for the First Approach based on the reasoning in the English case of *British Glanzstoff Manufacturing Co Ltd v General Accident, Fire, and Life Assurance Corp, Ltd*⁸ (“*British Glanzstoff*”). In particular, it was observed that Art 5.3 of the contract in *Triple Point* stated that payment should be made “up to the date PTT accepts such work” and thus had *no application* where the contractor (*ie*, Triple Point) has not handed over the completed work to the employer.

7 *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 at [106].

8 1912 SC 591 (Court of Session) and 1913 SC (HL) 1.

11 A number of crucial comments were made by the EWCA in *Triple Point* on the Second Approach (which is the prevailing approach in Singapore) and specifically on the case of *LW Infrastructure*:

(a) The EWCA opined that whilst this approach may be said to preserve rights which have already accrued prior to termination, it would be artificial and inconsistent to categorise the employer’s loss using liquidated damages up to a specified date and then by general damages thereafter.⁹

(b) Instead, the EWCA preferred to assess the employer’s total losses flowing from the abandonment or termination *as a whole* by applying the ordinary rules for assessing damages for breach of contract.¹⁰

(c) The EWCA also observed that although the case of *LW Infrastructure* considered but distinguished the case of *British Glanzstoff*, the judge in *LW Infrastructure* did so without having sight of the full speeches and reasoning of the House of Lords in that case.¹¹

IV. Practical considerations – Is the First Approach truly “more consonant with the parties’ bargain”?

12 At the outset, it is important to clarify that *Triple Point* is not binding on the Singapore courts and *LW Infrastructure* still remains good law. It is nonetheless worthwhile considering whether the law in Singapore should develop in a similar fashion, especially since *LW Infrastructure* is a High Court decision and this particular legal question has not been tested at the level of the Singapore Court of Appeal.

9 *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 at [110].

10 *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 at [110].

11 *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 at [104] and [105].

13 In the case of *Triple Point*, the EWCA had heralded the First Approach as being “more consonant with the parties’ bargain”.¹² One of the main reasons underlying the decision there was the EWCA’s desire to simplify the process of assessing damages for abandonment or termination. This was used as a reason to avoid a situation where liquidated damages are imposed for at least a portion of the delay (*eg*, until termination) and general damages for termination thereafter.

14 However, when examining the above rationale in the context of the very *raison d’être* for the imposition of liquidated damages for delay (from both the employer’s and contractor’s points of view), different considerations may arise.

A. From the employer’s perspective

15 From the employer’s perspective, a liquidated damages clause provides commercial certainty by averting the effort and expense in having to prove actual loss. This is particularly so in a situation where, for example, it is foreseen that the nature of the project will make it difficult to quantify actual loss in monetary terms. One real manifestation of this is where statutory authorities undertake public works and face difficulties in quantifying the social, political and economic impact of delays to the completion of works intended for public benefit.

16 Hence, taking this to its logical conclusion, there may be situations where an employer (which may be otherwise entitled to impose liquidated damages on a contractor for delay) is prevented from doing so because it elected to terminate the contract. This imponderable result may be that (in practical terms) the employer will be unable to recover due to the practical difficulties of proving loss.

17 Such a scenario will leave the said employer in an awkward Catch-22 – continue with the contract in the hope that

12 *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 at [110].

the errant contractor completes, thus preserving its right to liquidated damages, or terminate the contract and complete the works by other means but lose the practical right to recovery for the contractor's delay.

B. From the contractor's perspective

18 Genuine practical considerations also arise on the other side of the fence. From the contractor's perspective, a liquidated damages clause also provides commercial certainty on the extent and, in some instances, limits of the contractor's total liability for delayed completion. For a contractor, it may have bargained for a lower contract price on the assurance and with the certainty that its liability for delay is subject to a relatively low liquidated damages rate and/or a relatively low cap as compared to the much higher actual loss that may be suffered by the employer.

19 Hence on one view, the effect of the EWCA's interpretation of applying the First Approach may well upset the balance of the contractual bargain made by the parties – the employer takes the benefit of a lower contract price (for works completed up to termination) and also the benefit of recovering its higher actual loss consequent upon delayed completion.

20 The above considerations do no more than shed light on the tension between the approaches in *Triple Point* and *LW Infrastructure*. There may well not be a complete solution to the competing concerns until the question is settled determinatively by the Court of Appeal here in Singapore.

V. Concluding remarks – Contract drafting considerations

21 It is imperative to recognise that the key cases mentioned (ie, *Triple Point*, *British Glanzstoff* and *LW Infrastructure*) are all aligned in holding that the interpretation of the liquidated damages clause is ultimately highly dependent on the wording of the clause itself.

22 Thus, in order to pre-empt the issue, clauses governing the right to impose liquidated damages should make expressly clear that their operation survives termination. This already exists in some of the standard form contracts commonly used in Singapore – see, for example, cl 31.2(4) and 31.3 of the Public Sector Standard Conditions of Contract for Design and Build 2014,¹³ cl 32(8)(i) of the Singapore Institute of Architects Building Contracts 2016 and cl 30.3.5 of the Real Estate Developers' Association of Singapore Design and Build Conditions of Main Contract.¹⁴

23 Moving forward, with *Triple Point* in mind, parties can consider the contractual provisions in these standard forms as a starting point for incorporation into their own contracts and in accordance with the particular circumstances.

13 6th Ed, July 2014.

14 3rd Ed, 2010.