

# Supreme Court Revisits Liquidated Damages Clauses in *Triple Point v PTT*

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The Supreme Court has handed down its highly anticipated judgment in the case of *Triple Point Technology Inc v PTT Public Company Ltd* [2021] UKSC 29, providing clarification on the extent to which a liability for liquidated damages will survive the termination of a contract.

By unanimous decision, the Supreme Court reverted to the decision at first instance and in doing so has signalled a return to the previous orthodoxy that liquidated damages will cease to accrue on termination, but any accrued rights (and liabilities) will survive.

**Background.** PTT Public Company Ltd (“PTT”) contracted with Triple Point Technology Inc (“Triple Point”) for the design, installation, maintenance and licensing of a commodity trading software system. The contract provided for the work to be delivered in two phases, with payment to be made in accordance with certain milestones. The contract also included a liquidated damages provision in the following terms:

*“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...”*

By all accounts, the work proceeded very slowly following commencement, and “Phase 1” of the work was delivered 149 days late. PTT paid Triple Point for that portion of the work but refused to pay any of the other invoices that Triple Point had issued with respect to “Phase 2” on the basis that the relevant milestones had yet to be completed. By that point, Phase 2 was also in delay.

Matters came to a head when Triple Point purported to suspend the works for nonpayment and abandoned the site. PTT relied on that suspension of the works as a repudiatory breach and proceeded to terminate the contract.

**The Proceedings.** Following PTT’s termination, Triple Point brought proceedings in the Technology and Construction Court (the “TCC”) claiming payment against its

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outstanding invoices. PTT in turn counterclaimed for its losses arising out of the termination as well as liquidated damages for the delays that had been incurred up to the date of termination.

The trial judge at first instance dismissed Triple Point's claim for unpaid invoices and instead awarded PTT its costs of procuring a replacement system (subject to certain limitations that had been set out in the contract) together with approximately USD 3.5 million in liquidated damages for delays that had been incurred prior to termination. In making that ruling, the court held that the contract's liquidated damages regime applied up to the date of termination (in respect of both Phase 1 and 2 of the works), with PTT entitled to recover general damages thereafter.

Triple Point appealed to the Court of Appeal and PTT cross-appealed. One of Triple Point's five grounds of appeal concerned the extent to which it could be held liable in liquidated damages for works which were in delay but which—as a result of termination—Triple never actually completed.

The Court of Appeal (with Sir Rupert Jackson delivering the judgment) identified three possible outcomes in a situation where a contractor is in culpable delay, but the contract is terminated before the works are completed:

- (i) The liquidated damages clause ceases to have any application;
- (ii) The clause only applies up to the date of termination, with any liability for delay sounding in general damages thereafter; or
- (iii) The clause continues to apply beyond termination and all the way up to the point at which the works are eventually completed.

Sir Rupert Jackson expressed some scepticism regarding category (iii), noting that if it were correct, it would mean "*the employer and the second contractor can control the period for which liquidated damages will run*".

As for category (ii), the court noted that while it was generally treated as the "orthodox analysis" (with a wealth of case law behind it), it was not "*free from difficulty*". According to Sir Rupert Jackson, when a construction contract is terminated, the employer is in "*new territory*" for which a liquidated damages provision may be inapt. While emphasising that the question would always turn on the express wording of the clause in question, Sir Rupert Jackson noted that there was some artificiality to subjecting a contractor's liability for delay to two different regimes depending on whether that delay was incurred before or after termination. The court was of the view that it may be "*more logical*" and "*more consonant with the parties' bargain*" to adopt category (i) and replace

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any liability for liquidated damages in its entirety with general damages, assessed according to the ordinary principles.

In that respect, the court appeared heavily influenced by *British Glanzstoff Manufacturing Co Ltd v General Accident, Fire and Life Assurance Co. Ltd*<sup>1</sup>, a little-known House of Lords decision that loomed large in Sir Rupert Jackson’s reasoning. Following what he identified as the precedent in that case, Sir Rupert Jackson concluded that the words “*up to the date PTT accepts such work*” in the contract between Triple Point and PTT meant that the clause had no application where Triple Point never actually completed—and by definition, PTT never accepted—the works in question.

Overtaking the judgment of the TCC, and in a decision that was widely commented on at the time, the Court of Appeal held that Triple Point was entitled to liquidated damages in respect of the “Phase 1” works but could only recover general damages with respect to the “Phase 2” delays, notwithstanding that they occurred prior to termination.

**The Supreme Court Decision.** The Supreme Court found little justification for what Lady Arden (delivering the leading judgment) termed the Court of Appeal’s “*radical re-interpretation*” of the case law on the survivability of liquidated damages clauses.

Lady Arden noted that while Sir Rupert Jackson had acknowledged the importance of accrued rights in his analysis, under the approach that was adopted by the Court of Appeal, “*accrued rights are not protected [...] [t]hey are lost*”. Moreover, Lady Arden observed that the judgment was “*inconsistent with commercial reality and the accepted function of liquidated damages*”, which is to provide a remedy that is “*predictable and certain*”. To have a liability for liquidated damages simply disappear on termination upends that expectation.

She also had little sympathy for the proposition that the termination of a contract places the employer in “new territory”, observing that parties “*must be taken to know the general law*” that liquidated damages will cease to accrue on termination. Thereafter, the contract is at an end and any subsequent liability will sound in general damages. According to Lady Arden, the territory is in fact “*well-trodden*”.

As far as the language in the contract between Triple Point and PTT was concerned, the better interpretation was that “*out of prudence*” the parties had provided for liquidated damages to terminate on completion and acceptance of the works “*so as to remove any question of their being payable thereafter*”. In other words, the acceptance of the works by PTT was no more than a bookend (and not a condition) to Triple Point’s liability. That,

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<sup>1</sup> [1913] AC 143.

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according to Lady Arden, was the interpretation that has the benefit of “*meet[ing] commercial common sense and prevent[ing] the unlikely elimination of accrued rights*”.

Similarly, Lord Leggatt (agreeing with Lady Arden) noted that there are “*cogent commercial reasons*” why parties who include a liquidated damages clause in their contract would be unlikely to intend for any existing liability under that provision to fall away on termination. Lord Leggatt could “*see no reason why, in the event that the contract is terminated before the work is completed, [the parties] would wish to forego those benefits of certainty, simplicity and efficiency [...] in relation to delay which has already occurred*”. Absent clear and express language to the contrary, “*there is no reason—in law or in justice*” why termination should deprive the employer of the right to recover liquidated damages.

Lord Leggatt also made the interesting observation that the approach adopted by the Court of Appeal had the potential to create perverse incentives: in circumstances where a contractor has badly overrun the time for completion, it might have every reason not to complete the works so as to avoid any attendant liability for liquidated damages.

Allowing PTT’s appeal, the Supreme Court ruled that PTT was entitled to liquidated damages for any delay that had accrued up to the date of termination, regardless of whether or not that work had been completed by Triple Point.

**Conclusion.** As noted by Lord Leggatt in his judgment, liquidated damages provisions are a “*standard feature of major construction and engineering contracts*”, and they play a vital role in providing certainty for both the employer and contractor regarding the extent of a contractor’s liability for delay.

While the Court of Appeal’s decision in *Triple Point* had always left open to parties the possibility of preserving that certainty by catering for the consequences of a termination in clear and express terms—and it bears emphasising that the question will always be one of interpretation—the Supreme Court has provided a much welcome return to the orthodox position when it comes to the fate of a party’s accrued rights. Absent some clear indication to the contrary, most commercial parties would expect those rights to remain undisturbed by termination.

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Please do not hesitate to contact us with any questions.

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