

Atkin Chambers Barristers

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

Unresolved Issues and Future Challenges

James Howells Q.C.



The Liquidated Damages Clause

The Services to be performed by the CONTRACTOR shall be in accordance with the Schedule for the Services (“Project Plan”) as proposed by the CONTRACTOR and accepted by PTT.

The CONTRACTOR shall use its best efforts and professional abilities to complete Phase 1 of the Project within 460 calendar days after the Effective Date. If however such date is not attainable due to a delay out of the control of the CONTRACTOR, the CONTRACTOR shall continue to perform the Services for the time necessary to complete the project. This extension will require written approval from PTT.

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% (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, provided, however, that if undelivered work has to be used in combination with or as an essential component for the work already accepted by PTT, the penalty shall be calculated in full on the cost of the combination. [emphasis added]

The Court of Appeal Judgment

[2019] EWCA Civ 230, [2019] 1 WLR 3549, [2019] 3 All ER 767, [2019] BLR 271

Three categories of LD clauses:

1. LDs do not fall due until works are completed (or entitlement lost if contract terminated prior to completion by contractor).
2. LDs accrue from contractual completion date to earlier of (a) actual completion or (b) termination.
3. LDs accrue from contractual completion date to actual completion of works (even if by a different contractor after termination of relevant contract).

Supreme Court Judgment(s)

Unanimous decision on Liquidated Damages

The two reasoned Judgments (Lady Arden JSC and Lord Leggatt JSC (Lords Hodge, Sales and Burrows JJSC agreeing)) were highly critical of CA's approach to categorisation (e.g. paras 30, 36, 37, 42, 48, 79), both as to the approach and the outcome.

Per Lady Arden JSC: It was wrong to undertake a 'radical re-interpretation' of the case law on the basis of the little-known case of *Glanzstoff*.

Key Points from Supreme Court Judgment(s)

Unanimous confirmation of commercial purpose of LDs clauses and the relevance of that purpose to their construction:

Per Lady Arden JSC (para 35):

“Parties agree a liquidated damages clause so as to provide a remedy that is predictable and certain for a particular event (here, as often, that event is a delay in completion). The employer does not then have to quantify its loss, which may be difficult and time-consuming for it to do. [...]”

(See also Lord Leggatt JSC (para 74))

Key Points from Supreme Court Judgment(s)

A presumption as to meaning and intention of parties who agree LDs clause?

Per Lady Arden JSC (para 35):

“Parties must be taken to know the general law, namely that the accrual of liquidated damages comes to an end on termination of the contract (see Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, 844 and 849), After that event, the parties’ contract is at an end and the parties must seek damages for breach of contract under the general law. That is well-understood: see per Recorder Michael Harvey QC in Gibbs v Tomlinson (1992) 35 Con LR 86, p 116. Parties do not have to provide specifically for the effect of the termination of their contract. They can take that consequence as read. [...] The territory is well-trodden, and the liquidated damages clause does not need to provide for it.”

(see also Lord Leggatt JSC (para 86))

Future Issues: Sources beyond Construction/IT Contracts

PTT's arguments to the Supreme Court identified the significant alignment in commercial purpose of time/delay related liquidated damages clauses in other commercial contracts:

- Ship Building: numerous current standard forms include liquidated damages clauses for delayed completion and other breaches
- Offshore Infrastructure/structures: liquidated damages clauses for late arrival/start/completion of operations for both equipment and commercial operations
- Demurrage/Boil Off Clauses: charterparty standard forms include delay-related fixed rate damages as demurrage or other for other losses

Future Issues for termination and LDs: Party Choice

The Supreme Court Judgments recognised the potential that parties may contract on express terms to achieve different results to the “*generally understood position as to the meaning of liquidated damages clauses*” .

In principle, parties may contract to achieve, for example, the outcome in either of the Court of Appeal’s ‘category 1’ (no liquidated damages until actual completion/extinguishment of right on termination) or ‘category 3’ (liquidated damages continue beyond termination).

The extent to which these issues may arise will be influenced by the commercial risk(s) to be addressed by the parties’ agreement to use liquidated damages as a mechanism for compensation.

Future Issues for Termination and LDs: ‘Category 1’

Clear words would be required to extinguish the right to LDs - per Lady Arden (para 40) – such a clause would run counter to the *Photo Production v Securicor* analysis of English law on effects of termination.

Examples of ‘extinguishment’ exist in ship-building contracts:

- Shipbuilders’ Association of Japan Standard Form Contract (Art III)
- CMAC Standard Newbuilding Contract (Art VI)

BUT: in reality these are examples of agreed buyer rescission for (inter alia) excessive delay in delivery.

If a ‘category 1’ outcome is to be agreed, employer must take due account of (a) need to prove ‘general’ (actual) damage and (b) relationship with any limitation on liability

Future issues for Termination and LDs: ‘Category 3’

Hall v van der Heiden (No. 2) [2010] EWHC 586 (TCC) (and *GPP Big Field v Solar EPC Solutions* [2018] EWHC 2866 (Comm)) are to be doubted. English law is that entitlement extends to termination but not beyond :

- implicit in para 35 of Lady Arden’s reasons and para 85 of Lord Leggatt’s reasons
- logically correct: LDs are a contractual entitlement to be replaced on termination by a right to damages – *Photo Production v Securicor*.

Arguably, the current position in Hong Kong remains that ‘category 3’ applies - *Crestdream v Potter Interior Design* (2013) HCCT 32/2103

Parties may expressly provide for liquidated damages to extend beyond termination – cf. *Old Colony Construction, LLC v Town of Southington* 316 Conn. 202 (2015) (Supreme Court of Connecticut).

Areas to watch: Applicability to ‘non-delay’ liquidated damages clauses

Supreme Court (Lady Arden JSC, paragraph 47 and Lord Leggatt JSC, paragraph 74) expressly recognised the use of LDs clauses for ‘breach’ events other than delay.

No differentiation was made as to the effects of the Supreme Court’s reasoning on other applications of liquidated damages. All are (or should be) accrued rights protected on termination:

- Non-completion (Lady Arden’s example from *Interpretation of Contracts* (Lewison))
- Non-performance of non-time-related obligations
- Inadequate Operational Performance (e.g. failed performance guarantee tests etc. (often seen in Process Engineering/Power contracts))

Areas to watch: Applicability to ‘non-delay’ liquidated damages clauses (2)

The effects of the Supreme Court Judgments on non-delay liquidated damages clauses should not lead to any particular difference as a matter of principle – essential point is that accrued rights are protected.

Question to be asked will be whether a right to liquidated damages has accrued prior to termination.

This will often be clear in both delay and non-delay cases.

More difficult will be cases where liquidated damages are payable on termination, for the breach giving rise to termination or for the fact of termination.

Areas to Watch: Payment on/for termination

An agreement that a liquidated amount is payable/deductible on termination will require care:

- Is the payment/deduction in respect of non-performance/breach in the context of termination – if so, subject to the test in *Makdessi*, the right should be protected
- Is the payment/deduction a payment for the ability/privilege to terminate (e.g. termination fee on termination for convenience) – this is not, properly, a question of liquidated damages

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James Howells QC specialises in international commercial arbitration with particular expertise in infrastructure, construction, engineering, shipbuilding and IT disputes. His experience in energy-related cases includes oil and gas production platforms and rigs, FPSOs, gas storage caverns, desalination plants, power stations and renewables. He has extensive experience of international infrastructure projects. His IT experience includes commercial and technical disputes in projects ranging from commercial systems to major government projects. Much of his work is international in nature and throughout his career he has advised on disputes in jurisdictions such as Hong Kong, Thailand, Singapore, Philippines, Indonesia, Australia, India, Russia, UAE, Oman, Continental Europe, Tanzania, South Africa, Channel Islands and Caribbean.

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