



CAN LIQUIDATED DAMAGES BE RECOVERED AFTER TERMINATION?

On 5 March 2019, the English Court of Appeal in *Triple Point Technology Technology Inc v PTT Public Co Ltd* [2019] EWCA Civ 230 held that an employer could not rely on a clause imposing liquidated damages (LDs) for delay in circumstances when the contract was terminated.

“It is unusual to find a situation in which the courts in Hong Kong, England and Singapore adopt such different positions.”

In reaching this decision, the Court of Appeal has adopted a different position from that adopted in Hong Kong and Singapore, where LDs can be recovered up to termination (in Singapore) and beyond (in Hong Kong). This article considers the respective positions in these three jurisdictions and how the Hong Kong court might answer the question if it were posed again today.

Three different approaches

Three different approaches have emerged in answer to the question of whether an employer can rely on a clause imposing LDs for delay in circumstances where the contractor never achieved completion due to termination:

1. The clause does not apply (English position);
2. The clause only applies up to termination of the contract (Singapore position); and
3. The clause continues to apply until the replacement contractor completes the works (Hong Kong position).

The textbooks (for example, *Keating on Construction Contracts* (10th Edition, 2018)) generally treat category 2 as the orthodox analysis.

Singapore position: the orthodox analysis

In Singapore, in *LW Infrastructure Pte Ltd v Lim Chan San Contractors Pte Ltd* [2011] SGHC 163, the courts adopted the orthodox analysis in holding that the LD clause only applies up to termination of the contract. *LW Infrastructure* was a dispute between a contractor and sub-contractor in relation to the construction of an industrial building. The contractor terminated the sub-contract and appointed a replacement sub-contractor to complete the works. The contractor sued for delay and claimed damages, including LDs. The matter came before the Singapore High Court. Judith Prakash J held that LDs were payable up to the date of termination, but not after termination.

Hong Kong position: the LD clause survives termination

In Hong Kong, the courts adopted a different approach. In *Crestdream v Potter Interior Design* [2014] HKCFI 1283, the Court of First Instance held that an LD clause could continue to apply after termination. The case concerned fitting-out and building works at a residential flat in Causeway Bay. The contractor walked off

site, and the employer terminated the contract and appointed a replacement contractor to complete the works. The employer claimed damages, including LDs. Master S Lo was referred to the orthodox analysis that the LD clause only applies up to termination of the contract. He was also referred to the lesser known English case of *Hall & Shivers v Jan Van Der Heiden* [2010] EWHC 586 (TCC), in which Coulson J rejected the orthodox analysis and held that the contractor's liability to pay LDs did not come to an end when the contract was terminated. Master Lo followed *Hall & Shivers* and found the contractor liable for LDs until the replacement contractor completed the works.

English position: the LD clause does not apply

In *Triple Point*, the contractor supplying a new software system wrongfully sought to suspend the works and the contract was terminated by the employer, who appointed a replacement contractor to complete the works. At first instance, the English court ordered that the employer was entitled to recover the costs of procuring an alternative software system, wasted costs and LDs for delay. The contractor appealed on a number of grounds, including that



the LD clause only applies when work is delayed, but subsequently completed. It did not apply in respect of work which was never completed.

The Court of Appeal reviewed the past English authorities, including *Hall & Shivers*, and the positions adopted in Singapore and Hong Kong. Sir Rupert Jackson said that the question must depend upon the wording of the clause itself. The clause in question in *Triple Point* stated that LDs were payable from the contractual completion date until the date when the contractor achieved completion. Therefore, Jackson held that the clause had no application at all in a situation where the contractor never completes the works due to termination. The employer was still entitled to general damages for the contractor's breach of contract, but those damages were assessed on ordinary principles and not by reference to the LD clause.

How might the Hong Kong courts determine the issue if it were asked to consider the position again today?

It is unusual to find a situation in which the courts in Hong Kong, England and Singapore adopt such

different positions. It would appear to be open to the Hong Kong court in the future to adopt an approach that departs from *Crestdream*, notwithstanding the fact that this case is binding precedent in Hong Kong and *Triple Point* and *LW Infrastructure* are not. The contractor was not represented in *Crestdream* and, in accepting the submissions of the employer that the LD clause could survive termination, Master Lo commented that he did not have the benefit of argument by the contractor. Had Master Lo had the benefit of such argument, the contractor may have alerted the judge to the fact that the editors of *Hudson's Building and Engineering Contracts* (13th edition, 2015) describe the decision in *Hall & Shivers* (which was followed in *Crestdream*) as "questionable": see footnote 156 on page 733. There are similar comments in other textbooks.

It remains to be seen whether such arguments will be persuasive and, if so, which alternative analysis might be adopted: the Singapore position or the English position. Nonetheless, the Hong Kong court is likely to accept the fundamental point made by Sir Rupert Jackson in *Triple Point* that the extent to which an employer can rely on a

clause imposing LDs for delay in circumstances where the contractor never achieved completion will depend on the wording of the clause itself.

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