



TRIPLE POINT: SUPREME COURT REVERSES COURT OF APPEAL'S DECISION ON WHEN LIQUIDATED DAMAGES CAN BE RECOVERED AFTER TERMINATION

In March 2019, we reported on the English Court of Appeal's decision in *Triple Point Technology Technology Inc v PTT Public Co Ltd* [2019] EWCA Civ 230.¹ The Court of Appeal held that an employer could not rely on a clause imposing liquidated damages ("LDs") for delay in circumstances when the contract was terminated.

In reaching that decision, the court 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).

¹ <https://www.hfw.com/Can-liquidated-damages-be-recovered-after-termination-April-2019>



On 16 July 2021, the UK Supreme Court overturned the Court of Appeal's decision and held that the employer could rely on the LD clause, albeit that LDs could only be recovered up to termination. The Supreme Court decision means that the English and Singapore positions are once more aligned. However, the position continues to be different in Hong Kong.

Background

In *Triple Point*, a 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 said that the LD clause did not apply in respect of work which was never completed.

The Court of Appeal's decision

In the Court of Appeal, Sir Rupert Jackson said that the question of how and when the LD clause applies depends on the wording of the clause

itself. The clause in question in *Triple Point* stated that LDs were payable from the contractual completion date until up to "the date [the employer] accepts such work". Therefore, Jackson held that the clause had no application at all in a situation where the contractor never completes the works due to termination and therefore the employer never accepts the works. 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.

The Supreme Court's decision

Overturning the Court of Appeal's decision, the Supreme Court construed the LD clause as providing for LDs if the contractor did not discharge its obligations within the time fixed by the contract. The reference in the LD clause to "the date [the employer] accepts the works" was a reference to an end date for LDs, but it did not follow that there were to be no LDs whatsoever if there was no such acceptance.

The Supreme Court went on to say that it is ordinarily to be expected that, unless the LD clause clearly provides otherwise, the employer will be entitled to recover LDs in respect of any period of delay up to the date

when the contract is terminated. After that, the employer will only be entitled to general damages (not LDs) in respect of losses flowing from the termination, including in respect of any further delay.

Significance

In reaching this decision, the Supreme Court endorsed what most textbooks consider the orthodox analysis of the application of LDs when a contract has been terminated, i.e. that the clause only applies up to termination of the contract. See, for example, *Keating on Construction Contracts* (11th Ed.) para. 10-039). Their decision also aligns with the position in Singapore. In *LW Infrastructure Pte Ltd v Lim Chan San Contractors Pte Ltd* [2011] SGHC 163, the Singapore court adopted the orthodox analysis in holding that the LD clause only applies up to termination of the contract, but not after termination.

Hong Kong position: the LD clause survives termination

In Hong Kong, the courts continue to adopt a different approach. In *Crestream 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

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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 LD 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.

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 and England/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, however, whether such arguments will be persuasive.

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