

# A return to orthodoxy—Supreme Court decides that accrued liquidated damages remain enforceable after termination (*Triple Point v PTT*)

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**Commercial analysis: Commercial analysis: This is the long-awaited Supreme Court judgment on the applicability of liquidated damages where the contractor never completed the work. The case involved a software development contract which provided for liquidated damages per day of delay ‘from the due date for delivery up to the date PTT accepts such work’. The Court of Appeal had previously decided that each case turned on the wording of the clause, and that the liquidated damages clause in this case had no application where the work was never completed. The Supreme Court has now reversed the Court of Appeal’s decision and confirmed that liquidated damages typically apply up to the point of termination, as the contrary view is inconsistent with commercial reality and the function of liquidated damages. This gives contracting parties, including those in the construction and infrastructure industry, renewed certainty over the recoverability of accrued liquidated damages in the event of work not being completed before the contract is terminated. Written by Mathias Cheung, barrister at Atkin Chambers.**

[Triple Point Technology, Inc v PTT Public Company Ltd \[2021\] UKSC 29](#)

## What are the practical implications of this case?

The Supreme Court’s latest judgment has wider implications for those commercial sectors, including the construction and infrastructure industry, where liquidated damages clauses for delay and other contractual breaches are commonplace. The importance of certainty over the court’s usual interpretation of such clauses cannot be overstated, as parties who have signed up to various standard form liquidated damages provisions need to know where they stand in the event a contracting party fails to complete the work: can they recover accrued liquidated damages up to the point of termination, or will they have to rely on a claim for delay in general damages across the board?

Prior to the Court of Appeal’s decision in this case, the orthodox position accepted in most textbooks (although there were a number of conflicting authorities) was that liquidated damages applied up to the point of termination, and any delay-related losses post-termination would form part of general damages. This position was doubted by Sir Rupert Jackson, as he considered that it could be ‘artificial’ and it ultimately depended on the contractual language (*Triple Point Technology Inc v PTT Public Co Ltd* [2019] EWCA Civ 230 (paras [108]–[110])). Sir Rupert Jackson’s view was that the orthodox approach would potentially create considerable uncertainty and more disputes, which would in turn undermine the purpose of liquidating damages clauses.

The Supreme Court’s judgment helpfully clarified that liquidated damages will typically apply up to termination. This restores much-needed confidence to parties who have the benefit of liquidated damages clauses. There is no need for parties to expressly provide for the effect of termination. Where parties provide for liquidated damages to apply until completion and acceptance, if that event does not occur, it does not mean that liquidated damages will not accrue up to the date of termination. On the other hand, if parties intend that liquidated damages should not apply in the event of termination before the works are completed, then this consequence will have to be provided for using clear and express wording.

Further, the majority’s ruling on the scope of the liability cap demonstrates that clear wording is required to exclude liquidated damages from an overall liability cap, and the exclusion of ‘negligence’ claims from a liability cap needs to be carefully drafted and defined if a party does not intend to exclude breaches of contractual duties from the cap.

## What was the background?

PTT Public Company Ltd (PTT) engaged Triple Point Technology Inc (Triple Point) under a contract dated 8 February 2013 (Contract) to design, install, maintain and license a customised software system, for the purpose of assisting PTT to carry on its commodity trading business. The works were divided into Phases 1 to 9, and payment was to be made according to the prescribed milestones.

The Contract was terminated on 23 March 2015, and by that time, Triple Point had completed the first two stages of the Phase 1 works 149 days late, with the remaining stages of the works still incomplete and delayed for a total period of 3,220 days. PTT therefore sought to recover \$US 3,459,278.40 of liquidated damages for the 3,220 days which had accrued up to the point of termination.

Article 5.3 of the Contract provided that liquidated damages would be payable at the agreed rate 'per day of delay from the due date for delivery up to the date PTT accepts such work'. Further, Article 12.3.2 provided that Triple Point's 'total liability...under the Contract shall be limited to the Contract Price received by Contractor', although this limitation of liability did not apply to 'liability resulting from fraud, negligence, gross negligence or wilful misconduct'.

The Court of Appeal held that liquidated damages under Article 5.3 did not apply where Triple Point had not completed the work prior to termination (Issue 1), and that both damages for breach of the contractual duty of skill and care (Issue 2) and liquidated damages (Issue 3) were subject to the liability cap under article 12.3.2. Liability for negligence was excluded but applied only to freestanding torts and not to breaches of the contractual obligation to exercise skill and care.

PTT appealed to the Supreme Court on those issues, given the substantial sum of liquidated damages at stake. In essence, PTT contended that:

- liquidated damages should be payable in respect of work which had not been completed prior to termination
- 'negligence' means not only freestanding torts but includes breaches of the contractual obligation to exercise skill and care
- the liability cap did not apply to either damages for breach of contractual duties or liquidated damages

## What did the court decide?

### Overview

The Supreme Court unanimously held on Issue 1 that liquidated damages under Article 5.3 applied for failure to complete the work up to the point of termination, and on Issue 3, the court further concluded that liquidated damages were subject to the liability cap under Article 12.3.2. Lady Arden gave the leading judgment, and Lord Leggatt provided some additional observations.

The majority also held on Issue 2 that the exclusion of 'negligence' claims from the liability cap covered breaches of contractual duties of care as well as negligence in tort, but Lord Sales and Lord Hodge dissented on this point.

### Issue 1—liquidated damages clause

The bulk of the court's decision was devoted to Issue 1. Lady Arden considered that the Court of Appeal's approach was 'inconsistent with commercial reality and the accepted function of liquidated damages', which was to provide a predictable and certain remedy for a particular event such as delay. It was unrealistic to interpret Article 5.3 as meaning that a contractor would be free from all liability for liquidated damages if completion was not achieved before termination (paras [35]–[36]).

Importantly, Lady Arden observed that parties must be taken to know this position, as this was well-trodden territory which did not have to be specifically provided for by a liquidated damages clause

(para [35]). Lord Leggatt similarly noted that there was ‘no reason—in law or in justice—why termination of the contract should deprive the employer of its right to recover such damages, unless the contract clearly provides for this’, as it would simply incentivise a contractor not to complete the works, and this was reinforced by the absence of standard clauses providing for such a consequence (paras [79]–[82])

Therefore, the court rejected the Court of Appeal’s interpretation of Article 5.3 and held that the clause should instead be construed as providing for liquidated damages ‘up to the date [if any] PTT accepts such work’ (in other words, completion or acceptance of the works was not a prerequisite for liquidated damages to accrue). In Lady Arden’s colourful words, the Court of Appeal’s approach ‘in effect threw out the baby with the bathwater’ (paras [37]–[38] and [48]). This provides welcome clarity and certainty on the continuing entitlement to accrued liquidated damages after termination.

In reaching this conclusion, Lady Arden also explained that the Court of Appeal’s reliance on the House of Lords decision in *British Glanzstoff Manufacturing Co Ltd v General Accident, Fire and Life Assurance Corporation Ltd* [1913] AC 143 was misplaced, as the clause and facts in that case were distinguishable (liquidated damages were claimed up to the completion of the works by a substitute contractor) and there was no special rule applying to liquidated damages clauses (paras [42]–[47]).

### Issues 2 and 3—liability cap

Turning to Issue 3, the court had no hesitation confirming that the liquidated damages for delay were subject to the liability cap under Article 12.3.2—this was not affected by the wording of the separate limitation on the form of remedy under Article 12.3.3, which was heavily relied on by PTT (para [71]).

On Issue 2, however, the court parted company on the interpretation of the word ‘negligence’ in the context of the exclusions from the liability cap. The majority held that the word ‘negligence’ had ‘an accepted meaning in English law’ covering both contractual and tortious breaches of duty, and it was important that Triple Point’s contractual obligations included both a duty to provide services with skill and care and strict/absolute contractual warranties (paras [52]–[55]). This meant that there were strict contractual liabilities which were obviously subject to the liability cap even if contractual breaches of duty were not.

In contrast, Lord Sales and Lord Hodge considered that the majority’s interpretation of the word ‘negligence’ would ‘nullify the limitation of liability’ in circumstances where Triple Point’s core liability under the Contract was to exercise reasonable skill and care in carrying out its works (paras [130]–[133]). There is an apparent tension between the more textual analysis preferred by the majority which focused on the natural meaning of the word, as compared to the purposive and contextual approach in the dissenting judgment—a tension which the Supreme Court last grappled with in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

This much is certain—parties who wish to exclude liquidated damages or damages for particular contractual breaches from a liability cap should strive to specify an express and unambiguous carve-out which does not have to be elucidated by reference to neighbouring clauses. Otherwise, there will inevitably be scope for conflicting interpretations and long drawn-out disputes.

#### Case details:

- Court: Supreme Court of the United Kingdom
- Judge: Lord Hodge, Lady Arden, Lord Sales, Lord Leggatt, Lord Burrows
- Date of judgment: 16 July 2021

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