Construction Law Update

Supreme Court Decide That Liquidated Damages Accrue Up Until Termination of the Contract Whereby Works Never Completed

On Friday, the Supreme Court handed down its judgment in *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29, unanimously overturning the Court of Appeal's earlier decision relating to liquidated damages ("**LADs**") where a contract has been terminated prior to completion.

Background

On 8 February 2013, PPT Public Company Limited ("**PTT**") engaged Triple Point Technology ("**Triple Point**") under a bespoke contract (the "**Contract**") to design, implement, support and maintain a software only IT system to assist PTT in its business in commodity trading (the "**Services**").

Under the Contract, Triple Point was obliged to ensure an agreed level of functionality and provide itemised documentation at the end of each step in the development and installation of the system, verifying that step had been completed. Payment was to be made by reference to 'milestones' set out in the Contract based upon the stages completed.

The Services were broken down into 9 distinct phases and the Contract included a 'Schedule of Services' which set out a timetable for performance of those phases and, at Article 5.3, provided for LADs in the event of delay.

The completion of Phase 1 of the Services was significantly delayed and Triple Point did not commence preparation of Phase 2 at all. Discussions were held and it was agreed that, despite the fact the same was incomplete, PTT would accept the Services provided to date as satisfying the first payment 'milestone' and make payment. Payment was made as agreed but Triple Point demanded further sums and refused to continue performance without payment of the same. On 23 March 2015, PTT gave notice that it was terminating the Contract.

Triple Point's Claim and PTT's Counterclaim

On 12 February 2015, Triple Point commenced proceedings against PTT for failure to pay software licence fees. PTT counterclaimed for general damages for breach of contract and LADs up to the date of termination.

Triple Point denied liability and sought to rely on a liability cap included at Article 12.3 of the Contract which provided that the total liability of Triple Point under the Contract would be capped at the sums already received by Triple Point under the Contract, save for where said liability was a result of "*fraud, negligence, gross negligence or wilful misconduct*" by Triple Point.

The case was initially heard in the TCC where it was held that the delay had been caused by Triple Point's negligent breach of its express obligation to exercise reasonable skill, care and diligence, amongst other things. Triple Point's claim was dismissed and PTT was awarded general damages for breach and LADs for delays prior to termination. Whilst Triple Point's liability for general damages was subject to the liability cap in the Contract, PTT's entitlement to LADs fell outside the cap due to the delays being a result of Triple Point's negligence.

Triple Point appealed to the Court of Appeal (the "**CoA**") and PTT cross appealed. Applying *British Glanzstoff Manufacturing Co. Ltd v General Accident, Fire and Life Assurance Co. Ltd* [1913], the CoA overturned the TCC's ruling in relation to LADs concluding that, because Article 5.3 provided for LADs "*up to the date PTT accepts such work,*" and the Contract had been terminated prior to PTT's acceptance, there was no entitlement to LADs. The CoA also disagreed with the TCC's position that LADs would fall outside Triple Point's liability cap, stating that the exception to the liability cap for negligence only

17 Navigation Court, Wakefield, WF2 7BJ | 28 Queen Street, London, EC4R 1BB
Tel: 01924 258719 | Fax: 01924 257666 | enquiries@hklegal.co.uk | www.hklegal.co.uk

applied to "*freestanding torts or deliberate wrongdoing,*" which had not occurred in this case.

The Decision of the Supreme Court

Following the CoA's judgment, the case was appealed to the Supreme Court (the "**SC**"). The SC gave judgment on each issue in turn.

Issue 1 – Were LADs payable where Triple Point had never completed the Services and PTT had never accepted the same?

The SC was critical of the CoA's view that it was bound by *Glanzstoff,* emphasising that each case is fact specific and stating that "*in general the decision of one case as to the meaning and effect of a clause cannot be binding as to the meaning and effect of even a similar clause in another case*".

In particular, the SC held that the CoA's view that it should not be assumed that a LADs clause has any operation beyond the precise event for which it provides (in this case PTT's acceptance) was "*inconsistent with commercial reality and the accepted function of liquidated damages*". Instead, "*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*" meaning "*the liquidated damages clause does not need to provide for it*".

In short, save for specific wording to the contrary, if the event provided for in the LADs clause does not occur, an employer's right to LADs accrued prior to termination nevertheless remains. The SC thus concluded that the words "*up to the date PTT accepts such works*" should be interpreted as "*up to the date (if any) PTT accepts such work*".

On its true construction, Article 5.3 provided for LADs if Triple Point did not discharge its obligations within the time fixed by the contract irrespective of whether PTT accepted any works which were completed late. The wording "*up to the date PTT accepts such work*" merely provided an end date for liquidated damages.

Issue 2 – Did damages for Triple Point's negligent breach of contract fall within the exception of Article 12.3?

Once again disagreeing with the CoA, the SC held that Triple Point's liability for negligence was not limited to a "*freestanding*" or "*independent*" tort but instead included a breach of a contractual duty of care.

The CoA's reasoning for finding that the word 'negligence' in Article 12.3 excluded breaches of contractual duty was it felt that such an interpretation would 'carve-out' the bulk (if not the entirety) of the claims under the Contract rendering the cap pointless. The SC, however, found that the Contract included various 'obligations of result' on the part of Triple Point which were not obligations of skill and care. Taking this into account, Article 12.3 drew a distinction between damages for breaches of strict obligations (which were capped) and contractual obligations of skill and care (which were not capped). The general damages flowing from Triple Point's negligent breach of contract were, therefore, not capped.

Issue 3 – Were LADs subject to the cap in Article 12.3?

Agreeing with the CoA, the SC held that, based upon the specific wording of Article 12.3, LADs fell within the liability cap. There was nothing in the wording of Article 12.3 which would indicate that LADs would be an exception to the global liability cap.

Analysis

The clarity provided by the SC's decision in this case will be welcomed by construction industry professionals of all kinds. Whilst much emphasis must still be placed on the specific wording of LADs clauses, it is now clear that the default position is that accrued rights to LADs should not be dismissed simply because a contract is terminated prior to completion.

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CONSTRUCTION & ENGINEERING SOLICITORS

17 Navigation Court, Wakefield, WF2 7BJ | 28 Queen Street, London, EC4R 1BB
Tel: 01924 258719 | Fax: 01924 257666 | enquiries@hklegal.co.uk | www.hklegal.co.uk