

# What Happens to Delay LD After Termination?



by Steven SY Tee and Nuraini Lau



Where the employer terminates a construction contract and there is already delay in achieving completion by the target date, will the employer still be entitled to delay liquidated damages (**LD**)? This was a question addressed by the UK Supreme Court (**UKSC**) on 16 July 2021 in the case of *Triple Point*.<sup>1</sup> Given that Malaysian courts often take their cue from English law developments, its decision would be of interest to Malaysian lawyers.

## UK position

Prior to the *Triple Point* case, there were three different approaches taken by English judges in deciding how delay LD clauses will operate where the contract is terminated, namely, either:

- (a) the delay LD clause applies only where the original contractor completed the works and is not applicable upon termination;<sup>2</sup>
- (b) the employer is entitled to LD for delay up to the date of termination and general damages thereafter (often understood as the orthodox approach);<sup>3</sup> or
- (c) the delay LD clause continues to apply until the second contractor achieves completion.<sup>4</sup>

## Current position in the UK

In 2019, the Court of Appeal (**CoA**) in the *Triple Point* case applied the first approach and held that the delay LD clause did not apply where work had not been completed. The relevant clause that the court considered was as follows:

*"Article 5.3 If CONTRACTOR fails to deliver work within the time specified and the delay has not been introduced by the Employer (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."*

when PTT accepts completed work from *Triple Point*". Therefore, the clause had no application in a situation where the contractor never hands over completed work to the employer.

<sup>1</sup> *Triple Point Technology v PTT* [2021] UKSC 29

<sup>2</sup> See *British Glanzstoff Manufacturing v General Accident, Fire and Life Assurance Co* 1913 SC (House of Lords) 1 and *Gibbs v Tomlinson* (1992) 35 Con LR 86

<sup>3</sup> See *Greenore Port Ltd v Technical & General Guarantee Company Ltd* [2006] EWHC 3119 (TCC), *Shaw v MFP Foundations and Pilings Ltd* [2010] EWHC 1839 (TCC) and *Bluewater Energy Services BV v Mercon Steel Structures BV* [2014] EWHC 2132 (TCC)

<sup>4</sup> See *Hall v Van Der Heiden (No 2)* [2010] EWHC 586 (TCC)



delay LD clause in the agreement is set out below:

*"22(2) If the Developer fails to hand over vacant possession of the Premises within the Extended Period, the Developer shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of 12% of the Purchase Price from the date of the expiry of the Extended Period up to the day of delivery of vacant possession of the Premises."*

The court followed the Privy Council decision in *Loh Wai Lian*,<sup>6</sup> which held that where a delay LD clause provides for a formula to compute the agreed LD which defined not only its *terminus a quo* (opening date) but also its *terminus ad quem* (closing date), the LD is a single sum which cannot be ascertained until the closing date occurs. The court in the case of *Lim Yee Khei* held that since there had been no completion or delivery of vacant possession (i.e. the "closing date" had not occurred), no cause of action for LD could arise.

On the other hand, the High Court case of *Kerajaan Malaysia*<sup>7</sup> seems to have taken a different view. In this case, the plaintiff had hired the defendant to build an army camp. The defendant eventually stopped work due to its own financial difficulties. The plaintiff then issued a certificate of non-completion and terminated the contract. The relevant delay LD clause considered in the case is as follows:

*"Section 16.2 Extension Period  
(b) Without prejudice to the Government's right to terminate in the event of the Company's default, unless an extension is granted, the Company shall pay to the Government liquidated and ascertained damages to be calculated from day to day at a rate to be determined per day in accordance with the following formula until the actual Completion Date: ..."*

This decision caused concerns in the construction industry as it was seen as challenging the conventional understanding of contract law and application of delay LD clauses.

However, players in the construction industry, particularly the employers, can now breathe a sigh of relief as the UKSC has overturned the CoA's decision, branding it as "*radical re-interpretation of case law*". The UKSC stated that where parties have agreed on a LD clause to provide a remedy that is predictable and certain for a particular event (usually a delay in completion), it does not follow that the parties would forgo this certainty in circumstances where the contract is terminated before work is completed. The UKSC, in contrast with the decision in the CoA, stated that the phrase "*up to the date PTT accepts work*" should be interpreted to mean "*up to the date (if any) PTT accepts such work*" and held that the delay LD clause will apply to any period of delay in completing

the work up to, but not beyond, the date of termination of the contract. In effect, the UKSC restored the orthodox approach described earlier.

### Current position in Malaysia

In Malaysia, the orthodox approach seems to be generally accepted. However, cases have not been entirely consistent in deciding whether or not delay LD can be claimed where the contract has been terminated and the delayed works are not completed.

In the High Court case of *Lim Yee Khei*,<sup>5</sup> the plaintiff entered into an agreement with the defendant, a building developer, to purchase a service suite. The defendant delayed in giving vacant possession and the plaintiff of its own accord had then set off the amount of delay LD payable against the progressive payments of the purchase price. The defendant subsequently terminated the agreement due to the plaintiff's failure to settle outstanding sums of the progressive payments. The

<sup>5</sup> *Lim Yee Khei v Berjaya Times Square Sdn Bhd* [2002] MLJU 365

<sup>6</sup> *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1

<sup>7</sup> *Kerajaan Malaysia v KCSB Konsortium Sdn Bhd* [2019] 10 MLJ 429

Although the delay LD clauses in *Lim Yee Khei* and *Kerajaan Malaysia* were worded similarly and mentioned a closing date (i.e. “the delivery of vacant possession” and “the actual Completion Date”, respectively) which had not yet occurred, the court in *Kerajaan Malaysia* proceeded to calculate and impose delay LD from the date of the service of the certificate of non-completion up to the date of termination.

In light of the decision in *Triple Point*, it is likely that Malaysian courts may increasingly reinforce the orthodox approach, as reflected in *Kerajaan Malaysia*. Nonetheless, it would still be sensible to contractually provide for the adoption of the orthodox approach to avoid any uncertainty.

## Standard forms of contract

What, then do delay LD clauses of standard forms of contract often used in Malaysia say on this matter? We set out below these clauses in three of these standard forms:

### International Federation of Consulting Engineers (FIDIC) Red Book 1999

“8.7 If the Contractor fails to comply with Sub-Clause 8.2 [Time for Completion], the Contractor shall subject to Sub-Clause 2.5 [Employer’s Claims] pay delay damages to the Employer for this default. These delay damages shall be the sum stated in the Appendix to Tender, which shall be paid for every day which shall elapse between the relevant Time for Completion and the date stated in the Taking-Over Certificate...”

### Malaysian Institute of Architects (Pertubuhan Arkitek Malaysia) PAM Contract 2018 (Without Quantities)

“22.1 If the Contractor fails to complete the Works by the Completion Date and the Architect is of the opinion that the same ought reasonably so to have been completed, the Architect shall issue a Certificate of Non-Completion. Upon the issuance of the Certificate of Non-Completion, the Contractor shall pay or allow to the Employer a sum calculated at the rate stated in the Appendix as Liquidated Damages for the period from the Completion Date to the date of Practical Completion...”

### Malaysian Public Works Department PWD Form 203A (Rev. 1/2010)

“40.2 Without prejudice to the Government’s right to terminate this Contract, when the S.O issues the Certificate of Non-Completion, the Government shall be entitled to recover from the Contractor Liquidated and Ascertained Damages calculated at the rate stated in Appendix 1 from the period of issuance of the Certificate of Non-Completion to the date of issuance of Certificate of Practical Completion or the date of termination of this Contract...”

It can be seen that the delay LD clauses in the FIDIC Red Book 1999 and PAM Contract 2018 (Without Quantities)<sup>8</sup> are worded similarly to the delay LD clause in the *Triple Point* case in that they provide that the delay LD is to be calculated for the period ending on the date of completion of the works (i.e. “date stated in the Taking-Over Certificate” and “date of Practical Completion”, respectively). If the CoA decision had prevailed in the *Triple Point* case, delay LD are unlikely to be payable by the contractor under these forms of contract if the contract was terminated prior to completion.<sup>9</sup>

On the other hand, the wording of the delay LD clause in the PWD Form 203A (Rev 1/2010) is different from those in the FIDIC Red Book 1999 and PAM Contract 2018 (Without Quantities). It provides for the opening date (i.e. the issuance of the Certificate of Non-Completion) and interestingly two alternative closing dates, the date of issuance of Certificate of Practical Completion or the date of termination of the Contract. This makes clear that the parties intend that delay LD will be payable in the event of termination of the contract.

Notwithstanding the *Triple Point* decision, parties, and particularly, the employer, should still carefully consider the delay LD clauses of any standard forms of contract that they are proposing to adopt. If the relevant delay LD clause is expressed in a way similar to that discussed in *Lim Yee Khei* or that in the FIDIC Red Book 1999 or PAM Contract 2018 (Without Quantities), careful drafting of appropriate amendments to clearly adopt the orthodox approach would be a good idea. **LH-AG**

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<sup>8</sup> The PAM Contract 2018 (With Quantities) has the same delay LD clause as the PAM Contract 2018 (Without Quantities).

<sup>9</sup> This issue appears to have been addressed in the FIDIC Red Book 2017 where cl 15.4 states that “After termination of the Contract under Sub-Clause 15.2 [Termination for Contractor’s Default], the Employer shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to payment by the Contractor of... (c) Delay Damages, if the Works or Section have not been taken over under Sub-Clause 10.1 [Taking Over the Works and Sections] and if the date of termination under Sub-Clause 15.2 [Termination for Contractor’s Default] occurs after the date corresponding to the Time for Completion of the Works or Section (as the case may be). Such Delay Damages shall be paid for every day that has elapsed between these two dates.”