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21 JULY 2021

Victory for Common Sense Approach to Liquidated Damages

Triple Point Technology Inc v PTT Public Company Ltd [2021] UKSC 29

As employers, can you recover liquidated ascertained damages (**LAD**) if you terminate a contractor for its delays? For two years,¹ employers were told that they could not. They were faced with an unenviable choice: terminate the contract and forgo LAD, or impose LAD but risk waiting for an indefinite period for the completion of works — not both. With the recent decision of the UK Supreme Court (**UKSC**), employers can now breathe a huge sigh of relief: common sense has ultimately prevailed.

The central issue in *Triple Point* was whether LAD was recoverable for works which had not been completed by the contractor before the contract was terminated. The LAD clause in question stipulated that the contractor was liable for each day of delay "... from the due date for delivery **up to the date [the employer] accepts such work**". [*Emphasis added.*]

The English Court of Appeal (**CoA**) held that the LAD clause applied only to works that were completed and accepted by the employer, but not to delays up to termination.² This decision was controversial. Contractors in delay were incentivised to not complete works to avoid paying LAD. Employers were left agonising over whether to terminate the contract or wait indefinitely to recover LAD (i.e. after the contractor completed works, if they ever did).³

In overturning the CoA's decision, the UKSC reinstated the orthodox and common sense approach in the interpretation of LAD clauses, clarifying that LAD would be payable for periods of delay up to termination even where works are not completed.

¹ Since the CoA's decision in *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230 was handed down on 5 March 2019.

² The CoA held that any other losses suffered by the employer for the incomplete works would be recoverable as general damages under common law.

³ See, for example, *Media City Development Sdn Bhd v China State Construction Engineering (M) Sdn Bhd* [2020] MLJU 1163 at [39]. The adjudicator had applied the CoA's decision in *Triple Point* in arriving at his decision.



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Importantly, the UKSC held that the CoA's decision is "inconsistent with commercial reality and the accepted function of liquidated damages".⁴ LAD clauses are designed to: (i) provide a predictable and certain remedy for delays in the completion of works; and (ii) avoid the intractable task of having to quantifying the employer's financial losses.⁵

The UKSC also observed that it was not necessary for parties to expressly provide for the effect of the LAD clause after termination. Parties should be taken to know that LAD would cease to accrue upon termination.

The UKSC's decision is significant for providing clarity and guidance on the operation of LAD clauses where a contract is terminated prior to the completion of works. Employers who are dealing with slow contractors can now enjoy the best of both worlds — terminate the contract and impose LAD up to termination. Further, consistent with the Malaysia Federal Court's decision in **Cubic Electronics**,⁶ employers need not undertake the intractable and time-consuming task to quantify and prove the actual losses suffered.

It remains to be seen whether the UKSC judgment will influence Malaysian courts' treatment of LAD clauses where a contract is terminated prior to the completion of works. For abundance of caution, commercial parties should specify clearly: (i) LAD remains payable in the event of an early termination prior to works being completed; and (ii) the LAD clause would apply up to the termination of contract.

The full grounds of judgment can be accessed [here](#).

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Published by the Energy, Infrastructure & Projects Practice

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⁴ *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29 at [35].

⁵ *Ibid.*

⁶ *Cubic Electronics v Mars Telecommunications* [2018] MLJ 1935 (FC)