

TMT Article

Liquidated Damages in Tech Contracts; An analysis of the UKSC decision in Triple Point Technology, Inc v PTT Public Company Ltd [2021] UKSC 29

By Judith Kagere



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PRE- PACKED: liquidated damages in tech contracts; an analysis of the UKSC decision in Triple Point Technology, Inc v PTT Public Company Ltd [2021] UKSC 29

This decision was an appeal concerning a software contract which provides for the implementation and provision of a software-based business system. The appeal raised issues on provision of liquidated damages and post contract remedies under the software design and build contract.

In this case, the software contract termed (the “CTRM” contract) dated 8th February, 2013 was executed between PPT Public Company, a Thai company, and Triple Point Technology, Inc (“Triple Point”) for the design, installation by data transmission, maintenance and licencing of software to assist PPT to carry on its business in commodity trading. The CTRM Contract was negotiated over 6-7 months in 2012 and 2013.

Triple Point had to customise its proprietary software for commodity trading and risk management to the needs of the customer. The contract was remunerated by reference to milestones set by the contract, which specific work had to be done and steps completed. Milestones handle scheduling and provide agreed timeline for completion of vital work in development of code. In addition, which is not uncommon for many tech contracts, they agreed to maintenance, upgrade, replacement, online support and staff training obligations within the terms of the contract. As regards the class of licence, they agreed to a perpetual licence, which is for life. The terms of the Perpetual Licence Agreement were based on Triple Point's standard form licence agreement and contained warranties as to the quality of software and annexed to the contract. Because software as a licensed product is often developed through continuous negotiations between the developer and the purchaser, the minutes from the meetings of those negotiations often form part of the main contract as the product created is a result of these concessions. The functionality specifications were also incorporated into the terms of reference.

For the CTRM contract, the functionality provisions of the contract formed part of the terms of the contract- which is the purpose and range of functions that the tech is designed to perform. It was obvious from the working of the contract that functionality was material and defects would cause massive financial harm to PPT.

The parties agreed to substantial limitations on the remedies available in the event of delay. Liquidated damages were made available for delay and other damages for defects that are able to be remedied by repair.

The foremost issue on appeal to the Supreme Court was the availability of damages or whether PPT is entitled under the CTRM contract to liquidated damages for delay in respect of work which had not been completed before the contract was terminated. The second and third issue arising out of the contract was whether it imposes a limit or cap on the amount of damages that could be

claimed by Triple Point for breach of contract.

At performance of the contract, the completion of the Phase 1 business blue prints was significantly delayed and work did not commence on the preparation of the Phase 2 scope of work at all. In December 2013 and March 2014, the parties met in Singapore to seek to resolve the same. The parties agreed that PPT would accept the work performed in respect of project milestones 1 and 2 of Phase 1 subject to recording certain areas as to be completed. They then agreed to a revised Phase 1 Project Plan. Subsequently, Triple Point agreed that if the payment were to be made in respect of the first payment milestone then it would not suspend its works on the project. However, the next month, they claimed payment for other invoices it had previously submitted. PPT refused to make those payments on grounds that they were not payable under the terms of the CTRM contract.

Triple Point then instituted proceedings in the Technology and Construction Court, which is a sub division of the Queen's Bench Division and the UK's speciality court handling principally technology and construction disputes. Matters are heard by High Court Judges who are designated to sit in this court. Their claim was for alleged failures to make payment for software licence fees. PPT denied the claim and counter claimed for damages for breach of contract on termination in respect of wasted costs for hardware purchased prior to termination, liquidated damages under the contract up to the date of termination, and termination loss for the costs of procuring a replacement system plus interest pursuant to the statute. At the Technology and Construction Court, it was found that the delay in performance of the CTRM contract as due to Triple Point's breach of contract for failure to exercise reasonable skill, care and diligence in the performance of its services, through negligently failing to plan, programme, manage the project or delays, failing to provide sufficient number of suitably qualified staff, conduct adequate business analysis and production of business blue print for the design, development and implementation of the software.

At Court of Appeal, it was held that PPT was entitled only to liquidated damages in respect of works that had been completed by reference to the agreed stages in the main contract and project plan. More importantly they stated that the exception to the limitation on liability for breach of contract for "negligence" did not apply to cases where Triple Point was liable for breach of the contractual obligation to exercise reasonable skill and care and only applied to cases of "free standing torts or deliberate wrong doing" and that in those circumstances, that did not happen.

On an analysis of a set of case law on the trigger for liquidated damages upon delay, non- completion, termination and procurement of a new employer or vendor, it was analysed by the Court of Appeal that the question of operation of the liquidated damages clause depends on the wording of the clause itself. The Supreme Court also substantiated on the difference between liquidated damages and general damages, and that in case the circumstance for which

specific provision was made in the liquidated damages clause do not take place, then it shall be treated as general damages. Parties agree a liquidated damages clause so as to provide some remedy that is predictable and certain for a particular event. Notwithstanding this, a liquidated damages clause is not one that survives termination of a contract, and the parties may look at general damages for breach of contract under contractual law, with general damages remaining a preserve of court. The event for accrual of liquidated damages has to be well substantiated by the contract for example whether the liquidated damages are for delay in completion or for failure to complete at all.

In the instance case, the contract provided for liquidated damages if Triple Point did not discharge its obligations within the time fixed by the contract irrespective of whether the purchase accepted any works which were completed late. Furthermore, the liquidated damages remain within the cap when they result from the breach of a contractual obligation, this is because defect free software, deliverables and functionality compliance were strictly contractual. On the issue of termination, the court held that where at the time of termination delay for which liquidated damages are payable has already occurred, there is no reason why termination of the contract would deprive the employer of its right to recover such damages, unless the contract clearly provides for this. The fact that, if the employer were deprived of that right, only one assessment of damages for delay would be required does not seem to be a good reason. Losses caused by breaches occurring before the contract is abandoned or terminated are not part of the employer's total losses flowing from the abandonment or termination and s can be quantified separately.

It was stated that in addition to the ordinary effect of termination on the parties' rights and obligations, there are cogent commercial reasons why parties who include a liquidated damages clause in their contract would be unlikely to intend the employer's right to receive such damages for delay by the contractor to be conditional upon the contractor actually completing the work, as it is envisaged that at this point the relationship is irretrievable and the liquidated damages would justify the loss incurred at that point.

If the parties to the contract had from the beginning observed their relationship and considered to take up the benefits of certainty, simplicity and efficiency that are the advantages of contracting for liquidated damages, then at the event of termination they should be able to evoke those benefits. The shortcoming that is sought to be avoided is the uncertainty about what sum is recoverable in case delay occurs or the financial exposure for the other party liable to incur the liquidated damages.

Counsel for Triple Pint was asked whether at the time of hearing, they could give an example of a standard form of contract which provides that liquidated damages for delay will be payable only if the contractor actually completes the work. They produced the example of 2017 FIDIC Conditions of Contract for Plant & Design Build (the Yellow Book), and Lord Arden concluded that it is

ordinarily to be expected that, unless the clause clearly provides otherwise, a liquidated damages clause will apply to any period of delay in completing the work up to, but not beyond, the date of termination of the contract.

Importantly, a distinction was made between a penalty and liquidate damages. For this tech project, Triple Point had completed stage 1 and stage 2 of Phase 1 although this was 149 days late. They did not complete any of the further seven stages of phase 1 or any of those in phase 2 at all. Delay was construed to mean any time when the contractor is under obligation to deliver work with which it fails to comply. Accordingly, if the contractor ceases to be under an obligation to deliver work because the contractor is discharged from that obligation by the termination of the contract, no further liability to pay the sum payable for each day of delay in the performance of that obligation will arise. However, termination of the contract does not affect the liability of Triple Point to pay liquidated damages for each day of delay in the performance of its obligation to deliver work under the contract which had already occurred before the contract was terminated. The purpose of agreeing in advance on a sum payable as liquidated damages for each day of delay caused by the contractor would be defeated if the stipulated sum was payable only if and when the contractor chose to complete the contract.

PPT had made the argument that reasonable parties would be unlikely in these circumstances to intend that liquidated damages should be payable unless and until a defined stage of the work is completed, although the Lord Justices were not convinced by the argument. What the judges agreed is that where the contract is terminated after the due date for completion of work but before relevant work is completed, it is difficult to determine if the contract had not been completed.

The exception to capping the contractor's total liability was negligence within the meaning of the contract. The crux of the issue was whether negligence refers to a breach of a contractual duty of care or to a breach of duty in tort which does not give rise to a concurrent liability. In this case, liability resulting from breach of a contractual duty of care falls within the exception for liability resulting from negligence. The cap on liability refers to the total liability of the contractor under the CTRM contract. It does not apply to any other liability which the contractor might have independently from a tort. Therefore, the only liability arising is that from the contract. The extent of departure from the ordinary remedy of damages for loss resulting from breach of that obligation which applying the liability cap would involve is illustrated by the potential financial impact of such a conclusion in the present case.

In a conclusion on the three issues in the Appeal, on issue 1, the appeal was allowed on the availability of liquidated damages issue; on the negligence issue, the appeal was allowed as the exclusion from the cap should be given its ordinary meaning and not a strained meaning by the argument that the exclusion of damages for negligent breach of contract from the cap would emasculate the cap. The important obligations about meeting the specifications for functionality and other absolute obligations in the CTRM contract mean that

liability for negligent breach of contract was not the core obligation of Triple Point under the CTRM contract. Within this contract, the reference to negligence was made as breach of contractual care and not as an independent tort of negligence.

Liquidated damages are an exclusive remedy. Where one party breaches a contract, the other often has a right to damages; which is money to compensate for injuries. However, in some tech contracts, the parties may know in advance that the damages may not be easily computed, or take in to consideration some of the detriments suffered or foregone, so they specify the amount the breaching party will have to pay in the liquidated damages clause.

There are certain losses that the parties feel would only be justified by the payment in liquidated damages. This may happen for software that is specially ordered for development and delays prove detrimental to the customer. In turn, they also are meant to prevent wasting time in adjudicating various issues in a court case which would prove expensive for the parties in terms of time and money.

Importantly, they are different from early termination fees; early termination fees arise where a party decides to opt out in exchange for a fee. This termination is not arrived at by the contractor as a damages calculation but a figure conceded to by the parties for early termination. Liquidated damages however are damages for breach of contract. There are two vital principles for paying out of liquidated damages. Firstly, that the true rationale of the clause was understood and contemplated by the parties at negotiation. This means, the damages were uncertain to prove so the parties opted to have a liquidated damages clause to cover this uncertainty. This clause should in short, be a genuine estimate of the anticipated losses. What matters is that at the time of contracting this figure is agreed to by the parties and is a reasonable estimate. Liquidated damages may also be contracted into licence fees, this means that they are payable for each business day between the due date and later date a vendor delivers software. Liquidated damages are an exclusive remedy for any delay that may occur and still they do not preclude a party from other remedies for other injuries. During negotiation for the design and build of software, a liquidated damages clause may need to be considered in case the parties have a genuine concern as to deliverables and completion dates. As long as the parties can genuinely make a reasonable estimate and still go forward with performing the contract, then it may offer a remedy against lengthened litigation. In drafting, it would be important to carefully word the clause so that it does not rule out additional damages for any other injuries arising after execution of the contract.

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