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## Supreme Court Clarifies the Position Under English Law on Recovery of Liquidated Damages in the Event of Termination

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Liquidated damages for delay and termination rights are standard and familiar components of construction contracts. However, very few contracts address how liquidated damages operate in the event of termination. The English courts have historically not offered much assistance on this question, issuing several inconsistent judgments on the interplay of these important provisions.

However, in a long-awaited judgment, in *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29, the Supreme Court has clarified how these provisions operate together in English law in this scenario, reverting to the traditional, or “orthodox”, view that liquidated damages (“LDs”) are payable up to the date of termination of a contract where the contractor was in delay before termination. After termination, however, the employer will need to prove general damages for its termination loss.

The Supreme Court’s decision restores the generally accepted understanding under English law of LDs clauses and provides a much-desired certainty over the consequences of termination where a contractor is in delay and the contract does not otherwise address the position. In this regard, the case serves as an important reminder that parties should, at all times, seek to draft their contract in a way that clearly sets out its operation and reflects the parties’ intentions as to the application of LDs in a termination scenario.

### BACKGROUND

The underlying dispute concerned delay to the design and implementation of software by Triple Point (the contractor), ultimately resulting in PTT (the employer) terminating the contract and claiming LDs for delay. The contract provided that Triple Point was liable for LDs for each day of delay “from the due date for delivery up to the date PTT accepts such work”.

At first instance, the Technology and Construction Court held that PTT was entitled to LDs up to the date of termination. This was reversed by



the Court of Appeal, who held that, on a proper construction of the contract, PTT was entitled to LDs for the two elements of work that were completed (albeit late) before termination, but it had to claim and prove general damages for the delay to the remainder of the works. In reaching its decision, the Court of Appeal departed from the traditional approach to LDs on termination. It relied on a 100-year old authority to conclude that clauses which refer to liability for LDs “up to acceptance or completion”, do not apply where the work is never “accepted or completed” because of termination.

The Court of Appeal’s judgment created significant uncertainty over an employer’s entitlement to LDs in circumstances where it lawfully terminates a construction contract when a contractor is in delay, and the works are not yet completed.

However, PTT appealed the decision and the Supreme Court provided welcome clarity on this important issue under English law. As most standard construction contracts (including the FIDIC 4<sup>th</sup> Edition (1987) Red Book) contain LDs provisions similar to those in *Triple Point*, the Supreme Court’s judgment is of significant interest to all participants in the construction industry.

### SUPREME COURT’S DECISION

The Supreme Court overturned the Court of Appeal’s decision that the LDs clause only applies where the work had been accepted or completed, so that when the work was never accepted or completed because of termination, the LDs clause fell away. The Supreme Court found such approach to be “*inconsistent with commercial reality and the accepted function of liquidated damages*”.

Lady Arden, delivering the main judgment, held that:

1. Parties generally agree LDs provisions to “*provide a remedy that is predictable and certain*”, so that the employer does not have to go through the difficult and time-consuming process of quantifying its loss and the contractor understands its exposure;
2. Parties must be taken to know the general legal principle that accrued rights do not expire on termination; and
3. Parties must also be taken to know that the law already provides for recovery of general damages resulting from termination, so the LDs clauses do not need to cover this point.

Therefore, as a matter of contractual interpretation, the LDs clause in *Triple Point*’s contract applies in all circumstances where the work is not delivered on time – including where the contract is terminated prior to the work having been completed.

### IMPLICATIONS

While the Supreme Court was only concerned with the interpretation of the specific LDs provision in *Triple Point*’s contract, given the prevalence of similar clauses the decision is of importance to most parties entering into construction contracts under English law.

The decision is also of significance because it recognised the commercial reality and expectations of the parties in this case and avoided an interpretation that would go against the parties’ likely intentions and render the clause of little value.

Employers and contractors now know that LDs provisions in their contracts, if similar to *Triple Point*’s contract, will continue to be interpreted in the way they had intended and expected, with LDs due up to the date of termination irrespective of whether the work was complete at that time. This much-needed clarity and predictability will no doubt be welcomed.

Nonetheless, the judgment serves as an important reminder that parties should, at all times, seek to draft their contract in a way that clearly sets out its operation and reflects the parties’ intentions. Drafters should therefore consider expressly



stipulating in their contracts the agreed position in respect of the application of LDs on termination. Some standard form construction contracts already address this issue, such as the 2017 edition of the FIDIC Red Book and the October 2020 Amendments to the NEC4 contract.

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