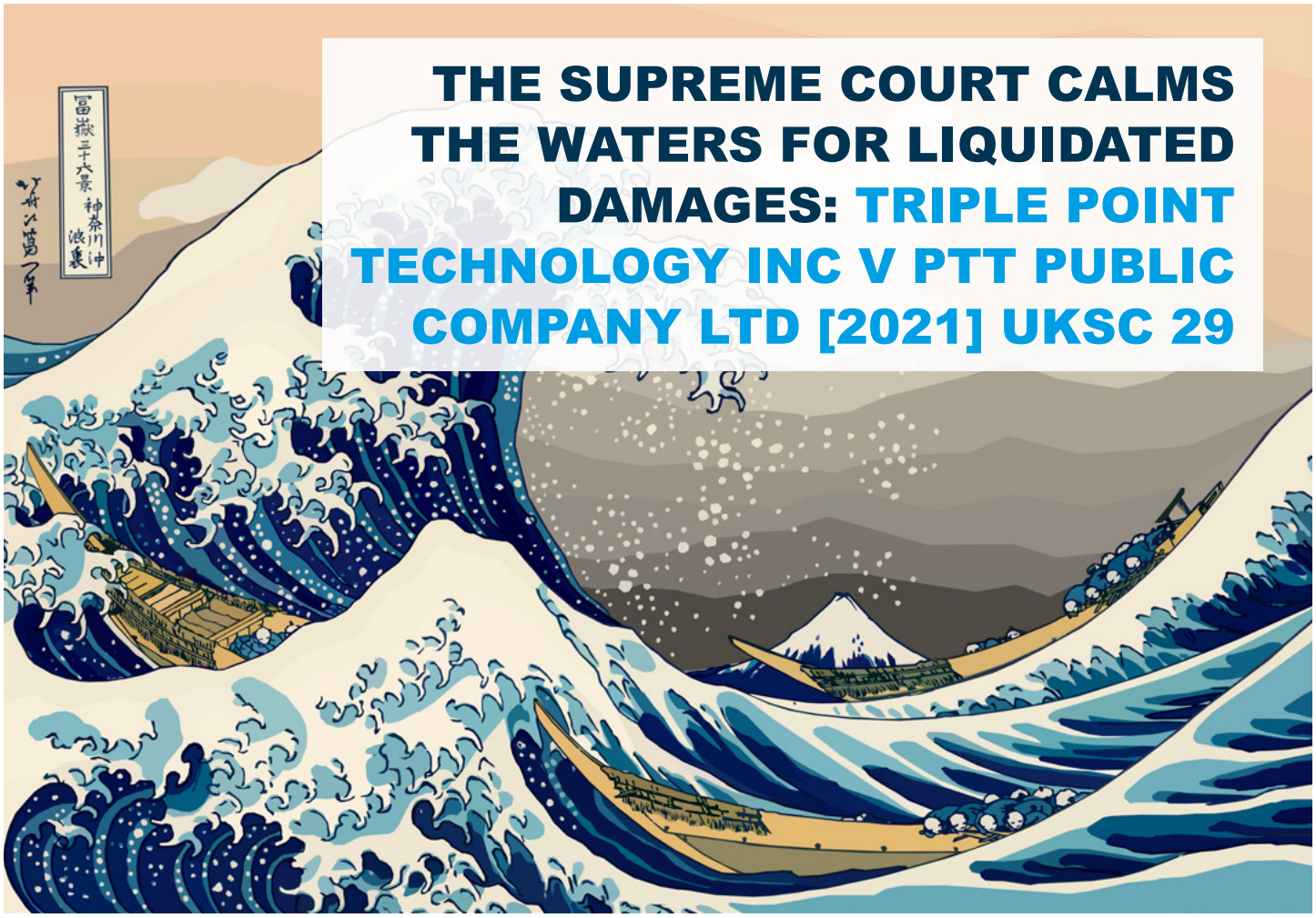

THE SUPREME COURT CALMS THE WATERS FOR LIQUIDATED DAMAGES: TRIPLE POINT TECHNOLOGY INC V PTT PUBLIC COMPANY LTD [2021] UKSC 29

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A recent Supreme Court decision handed down on 16 July 2021 has brought welcome clarity to liquidated damages clauses and related damages caps.

Executive Summary

The commercial utility of Liquidated Damages clauses had been thrown into doubt after the Court of Appeal decision in Triple Point Technology v PTT Public Company Ltd [2019] EWCA Civ 230. The effect of that decision was that parties are only entitled to Liquidated Damages in relation to delays for works that had already been accepted/completed, and not up to the date of termination of a contract if further works had not been accepted/completed at the point of termination.

The importance of Liquidated Damages clauses cannot be overstated given their use in a variety of cross border contracts, particularly in construction and IT contracts with English law as the governing law clause. A key example of this is the decision that many large businesses make when outsourcing their back office or IT functions to third party companies in foreign jurisdictions.

The generally accepted view had been that Liquidated Damages clauses were there to help contracting employers who wished to be compensated for half-completed projects, where unacceptable delays had led to the contractual relationship breaking down and termination being triggered.

The particular clauses under consideration in this case arose from an IT contract for the development of software. It is probably fair to comment that in IT contracts standardised terms have yet to take on the substantially settled status afforded to terms in standard form construction contracts, which have been litigated and refined over many years.

Rather than force an employer to prove, often by way of a detailed and granular analysis, the level of damages caused by a breach, such clauses allow the parties to negotiate, at the point of contracting, the sum that should be paid in certain specified circumstances, without the need to quantify the actual damages (which may exceed the sum agreed in the clause). As these clauses often sit alongside limitation of liability clauses, it is possible that the sum payable is also capped by agreement thereby balancing up the commercial bargain struck between the parties.

The more recent Supreme Court decision handed down earlier this year has reintroduced some clarity as to the accepted commercial purpose, namely to compensate an adversely impacted party for the delays to completing works on time, which brings the underlying contractual relationship to an end and enables pre-agreed compensation to be paid.

In many cases the work that has not been done by the contractor has to be paid to someone else. Therefore the paying party can end up paying twice or delaying payment until work has been done. The cut and thrust of such disputes inevitably brings with it the risk of counter-claims. It is therefore

important for the terms of such clauses to be as clear as possible and to, with a sufficient degree of precision, what should be paid in aggregate bearing in mind all the other terms of the agreement.

Background facts in the case

The parties had agreed a software contract on 8 February 2013 (referred to as the "CTRM contract") as well as a Perpetual License Agreement ("PLA"). The contracts were bespoke to the project.

The intention was to design software suitable for commodity trading which would assist PTT's business model.

The Supreme Court's approach to the issues

Issue 1

Are liquidated damages payable under article 5.3 of the Main Part where Triple Point completes the work and PTT never accepts it?

Court of Appeal was wrong in its approach to suggesting that a party can delay and avoid liquidated damages under the clause upon termination. As the Judgment said:

"Reading the clause in that way meets commercial common sense and prevents the unlikely elimination of accrued rights. The Court of Appeal was aware of the importance of accrued rights because after the sentence last quoted the judgment of Sir Rupert Jackson begins: "Although accrued rights must be protected, ...". However the rest of that sentence and the next sentence go on to hold that it may be that the parties intended that general damages should take the place of liquidated damages: "… it may sometimes be artificial and inconsistent with the parties' agreement to categorise the employer's losses as £x per week up to a specified date and then general damages thereafter. It may be more logical and more consonant with the parties' bargain to assess the employer's total losses flowing from the abandonment or termination, applying the ordinary rules for assessing damages for breach of contract." If that were so, it is hard to believe that the parties would have gone to the trouble of providing for liquidated damages in the first place. Moreover, under this approach, accrued rights are not protected. They are lost."

Unlike the Court of Appeal, the Supreme Court held that the words "up to the date PTT accepts such work" as meaning "up to the date (if any) PTT accepts such work".

Issue 2

Are damages for Triple Point's negligent breach of the CTRM Contract within the liability-limitation exception in the final sentence of article 12.3?

The sentence in issue provided as follows:

"….4. This limitation of liability shall not apply to CONTRACTOR'S liability resulting from fraud, negligence, gross negligence or wilful misconduct of CONTRACTOR or any of its officers, employees or agents."

The Supreme Court found that the Liquidated Damages are within the cap carve out set out in clause 12.3 if they result from contractual breaches involving skill & care thereby meaning that damages fall outside the cap.

The Court of Appeal had considered that the word "negligence" was a reference to an independent tort rather than to a contractual skill & care claim. However, the decision of the Supreme Court is that this is not the case in the context of this contract. As the Judgment said:

"In my judgment, the Court of Appeal went down the wrong route in concluding that the word "negligence" in the cap carve-out referred to an independent tort. The matters referred to in the final sentence are all characteristics of conduct: fraud, wilful misconduct, gross negligence and negligence. These can apply to breaches of the CTRM Contract. Considering the sentence as a whole it is clear that it includes an act which is a breach of contract and which possesses one of those characteristics. Thus, if there is a breach of contract to exercise skill and care by reason of Triple Point's negligence, that will not be subject to the cap in article 12.3".

Issue 3

Are liquidated damages subject to the cap in article 12.3?

The Supreme Court found that there were individual "mini caps" in each sentence and the Appeal on this issue was dismissed.

Comments

Whilst there are many projects that evolve without the need for litigation, the revenues that litigation teams at law firms are posting for dispute related work in the last few years suggests that there is still a considerable degree of ambiguity in the drafting of contracts. The need for clarity with respect to allocation of risks still causes clients difficulties when considering how to compensate each party, even where contracts have been drafted by experienced IT contract lawyers.

This case underlines that it may often be prudent for commercial lawyers to bring in litigators to review boiler plate clauses to seek to understand the traps that are being set for either party when seeking compensation or resisting compensation being paid. The underlying assumption that litigators are only useful when things go wrong should perhaps be re-thought and include consideration of allocating the risks of commercial relationships breaking down.

A final thought is that this dispute illustrates the grave difficulties that can flow from a "carve out" approach to drafting commercial contracts and the lack of attention given by some parties as to where the risk of breach lies. The ambiguity that may arise can cause clients to incur millions in legal expenses. So why do commercial parties do this? Why not redraft these clauses to say what "can happen" rather than what "cannot happen"?