The drafting and operation of liquidated damages clauses, and liability caps (Triple Point v PTT [2021])

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Commercial analysis: Triple Point concerned a liquidated damages clause in a software design and implementation contract, which would be triggered by a failure to complete the work on time. The key issue for the Supreme Court was whether the clause would entitle the employer to liquidated damages if they terminated the contract, for breach, before the works reached completion. The Supreme Court, overturning the Court of Appeal, held that, unless the clause clearly provided otherwise, the employer could claim damages for wrongful delays occurring up to the termination date. The termination of the contract would not affect those accrued rights. The case also considered the drafting and operation of a liability cap in respect of 'negligence', and to what that would extend. In reaching those conclusions, the Supreme Court considered the modern approach to exclusion clauses. Written by Seb Oram, barrister at 3PB Barristers.

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

What are the practical implications of this case?

Triple Point is significant for those who draft commercial contracts (particularly construction and technology contracts) in which parties include provisions to quantify damages in advance, or to cap their liabilities. It is also significant for commercial litigators, since it explains when and how such clauses will be enforceable in the event of termination. A number of practical points can be drawn from it.

First, while the meaning of a liquidated damages clause will always ultimately depend on its wording, it is a legitimate approach to construction to consider the purpose of such a clause, which the Court of Appeal had not done (at [6], [35], [74]–[76], [92]–[93]). They avoid intricate and costly disputes for the quantification of damages, by establishing in advance the losses that the parties accept. They also limit the contractor's exposure to liability, and give the employer certainty as to the losses that it will be entitled to recover. The parties would ordinarily wish those benefits to apply to a damages claim, whether or not the contract had been terminated.

Secondly, the decision reinforces—in the context of contractual interpretation—the well-established principles that termination operates only prospectively, and that rights already accrued will survive termination. The parties could be taken to know that general law, and did not therefore need to expressly state that liquidated damages would accrue up to, but not beyond, termination. Similarly, the clause should not be interpreted, in the absence of clear words, as removing an accrued right to liquidated damages up to the date of termination (at [35]–[37], [40], [79]).

Thirdly, the additional reasoning of Lords Leggatt and Burrows provides a useful summary of the modern approach to enforcing exclusion clauses. That approach recognises the parties' entitlement to allocate risks as they see fit, and that the task of the court is to interpret the words they have used, fairly, applying the ordinary methods of contractual interpretation. As part of that process, the court starts from the assumption that in the absence of clear wording the parties did not intend the contract to derogate from the normal rights and obligations established by the common law (themselves reflecting judicial or statutory consensus as to the obligations that a reasonable businessman would realise that he was accepting in a contract of this particular kind): see at [107]–[110]. The clarity of language required to displace that assumption may depend on the importance of the particular

common law right, and the extent to which the various possible meanings of the contract involve a departure from it.

What was the background?

Triple Point agreed to design, install and maintain computer software to assist PTT to carry on its business in commodity trading. It would be remunerated by reference to contractual milestones, and the work had to be completed in phases.

Article 5.3 entitled PTT to claim liquidated damages if Triple Point delayed the works beyond the contractual completion date. Those damages would be calculated '*up to the date PTT accepts such work*'. Article 12 separately provided a cap on Triple Point's liabilities, limiting damages to the fees paid to Triple Point for the relevant work. Critically, however, that cap did not apply to '*Contractor's liability resulting from… negligence*'. For that, damages were unlimited.

By the time that PTT gave notice of termination under the contract, Triple Point had completed stages 1 and 2 of Phase I, 149 days late. None of the remaining five stages of Phase I, and none of Phase II, had been completed. The trial judge found that those delays resulted from Triple Point's contractual failures to exercise reasonable care, including failing carefully to plan, programme and manage the project or delays; and failing to follow standard practice for the design, development and implementation of software.

The Supreme Court considered (so far as relevant): (i) whether PTT was entitled to liquidated damages only for the 149 days relating to the 2 stages of Phase I that had been completed, or for all of the works (including the incomplete works) in delay at the date of termination; and (ii) what was meant by 'negligence' in the exclusion from the liability cap.

What did the court decide?

The scope of the liquidated damages clause

The Court of Appeal had been wrong to interpret the words '*up to the date PTT accepts such work*' to mean that liquidated damages were only available for works that did reach completion. By concluding that the clause did not apply, and leaving the parties to claim general damages at common law, it had overlooked the commercial purpose of such a clause. There was an alternative meaning of those words, which was simply to provide one end date for the calculation of damages.

Generally speaking, as Lord Leggatt observed, '*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*' (at [86]).

On its proper construction, the parties intended liquidated damages to be available in any case of delay caused by the contractor to the completion date. The loss would be quantified up to either the date of termination of the contract by the employer, or the date on which the employer accepted the works. The first of those options did not have to be expressly stated, since it followed from the general law (at [35],[48]) or because a contractor could not be said to be causing delay during a period for which it had no right to carry out the works (and so its liability stopped at termination: [91]–[92]). That interpretation was also consistent with PTT having an accrued right to damages from delays occurring up to termination, which were not lost on termination (at [36]–[37], [79]).

The meaning of 'negligence' in the liability cap

Giving the lead judgment, Lady Arden reasoned that 'negligence' has an accepted meaning in English law, covering both tortious and contractual failures to exercise reasonable skill and care ([52]). The narrower meaning given to it by the Court of Appeal (which was supported by the minority judgments of Lords Sales and Hodge), which limited it to liability arising independently in tort alone, would not have occurred to the parties and was illusory.

Of wider interest is the additional justification of Lords Leggatt and Burrows. The narrower definition of negligence, for which Triple Point contended, would extend the damages cap to the ordinary, implied obligation to supply services with reasonable care. By thereby significantly limiting the damages available for breaches of those duties, the extent of that departure from the usual legal remedies engaged the interpretative principle summarised in the third point above. Their Lordships observed that that principle was subsuming outmoded canons of construction such as the contra proferentem principle, or the Canada Steamship test.

Those drafting commercial contracts will consequently need to bear in mind that 'negligence' in an exclusion clause, will take its meaning from the surrounding context and may include both a breach of a contractual provision to exercise skill and care and the tort of failing to use due care. When drafting exclusion clauses it is therefore important to consider the potential scope of any references to 'negligence', particularly in a contract whose only or main subject matter is the provision of services. For such a contract, the primary obligation will often be to exercise reasonable care and skill in relation to those services, and an exclusion clause extending to negligence may well significantly reduce the enforceability of that primary obligation.

Death or personal injury caused by negligence are commonly carved out from any limitation of liability, to comply with section 2(1) of the Unfair Contract Terms Act 1977. Suppliers will often seek to exclude or cap all other losses that result from negligence. Where customers reject this and push for a narrower limitation, suppliers should be aware that any carve out for negligence may also capture a contractual duty of skill and care, meaning that loss suffered as a result of a breach will not be capped. Alternative drafting techniques might include expressly excluding from a financial cap liability for 'deliberate default' or 'gross negligence' (the latter usually goes beyond mere lack of reasonable care, and requires '*serious disregard of or indifference to an obvious risk*': see, eg *Toucan Energy Holdings Ltd v Wirsol Energy Ltd* [2021] EWHC 895 (Comm), at [289]–[292]), expressly defining the conduct intended to be covered, or simply using a financial liability cap to clarify risk.

Case details:

- Court: Supreme Court
- Judge: Lady Arden, Lord Leggatt, Lord Sales, Lord Hodge and Lord Burrows
- Date of judgment: 16 July 2021

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