

The Implications of Triple Point Technology v. PTT (2019)

Marion Smith QC
39 Essex Chambers

The Case

Triple Point Technology, Inc. v. PTT Public
Company Ltd [2019] EWCA Civ 230, [2019]
1 WLR 3549

Agenda

- The Scenario
- First instance
- The clause
- Appeal
- Implications
- Other

The (Apparent) Timetable

Stages 1 and 2 31 October 2013

Stages 3 and 4 20 January 2014

Completion of Stages 1 and 2 on 19 March
2014

Stages 5, 6 and 7 30 April 2014

Stages 8 and 9 11 June 2014

PTT terminated the contract on 15 February
2015.

First Instance

LDs \$3.45 million under Article 5.3

- Stages 1 and 2, 13 October 2013 to date of completion (19 March 2014): \$154,662.
- All other elements of the work from specified completion dates to date contract terminated (15 February 2015): \$3,304,616.40.

Article 5.3

*“If [TP] fails to deliver work within the time specified and the delay has not been introduced by PTT, [TP] shall be liable to pay the penalty at the rate of 0.1% ...of undelivered work per day of delay from the due date for delivery **up to the date PTT accepts such work**, provided, however, that if undelivered work has to be used in combination with or as an essential component for the work already accepted by PTT, the penalty shall be calculated in full on the cost of the combination.”*

Argument on Appeal

- Is Article 5.3 engaged?
- Applies if work delayed **BUT** subsequently completed and accepted
- Does not apply in respect of work which is never accepted

Key Words

*“liable to pay the **penalty** at the rate of 0.1%
...of undelivered work per day of delay **from**
the due date for delivery **up to the date PTT**
accepts such work ...”*

The decision of the Highest Court

British Glanzstoff Manufacturing Co. Ltd v General Accident, Fire and Life Assurance Co. Ltd 1913 SC (HL)

Three Possible Solutions

- LD clause does not apply at all
- LD clause only applies up until the point of termination
- LD clause applies until the second contractor achieves completion.

The Answer

*“..the question of whether the liquidated damages clause (a) ceases to apply or (b) continues to apply up to termination/abandonment, or even conceivably beyond that date, **must depend upon the wording of the clause itself.***

There is no invariable rule that liquidated damages must be used as a formula for compensating the employer for part of its

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loss.”

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The Application

- Article 5.3 no application where TPP never hands over completed work
- “*up to the date PTT accepts such work*” = *‘up to the date when PTT accepts completed work from Triple Point’*
- Recover LDs of £154,662

Key Words

“liable to pay ... at the rate of 0.1% ... of undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work ...”

Implications

- Read the contract
- Consider amending the standard form clause
- Consider termination carefully where the CCD overrun
- Keep your records

Amendments

“If the Contractor fails to comply with Sub-Clause 8.2 [*Time for Completion*] the Employer shall be entitled ... to payment of Delay Damages by the Contractor for this default...such payment of Delay Damages shall be payable even if the Contractor’s employment under this Contract is terminated or this Contract is terminated for any reason whatsoever.”

Other

- Not a penalty
- Order of precedence clause
- No implied term
- Cap fits

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