

LIQUIDATED DAMAGES

(What are the implications and potential workarounds for issues such as the failure to issue JCT notices or arguments over outstanding EOT applications in liquidated damages claims?)

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17 October 2023

Topics / Agenda

- **Why?**
- **What can go wrong?**
 - Amount
 - Drafting
 - Administration

Question 1

**Why do you agree a
liquidated damages clause?**

Triple Point Technology v. PTT Public Company Ltd [2021] UKSC 29

Lady Arden [35]

“Parties agree a liquidated damages clause so as to provide a remedy that is predictable and certain for a particular event ...The employer does not then have to quantify its loss, which may be difficult and time-consuming for it to do.”

Triple Point Technology v. PTT Public Company Ltd

Lord Leggatt [74]

“... establishing what financial loss delay has caused the employer would often be an intractable task capable of giving rise to costly disputes. Fixing in advance the damages payable for such delay avoids such difficulty and cost.”

Triple Point Technology v. PTT Public Company Ltd

Lord Leggatt [74]

“... such a clause limits the contractor’s exposure to liability of an otherwise unknown and open-ended kind, while at the same time giving the employer certainty about the amount that it will be entitled to recover as compensation. Each party is therefore better able to manage the risk of delay in the completion of the project.”

Question 2

What does “BAFO” mean in a JCT Design and Build Contract (2016)?

Schedule 10

New Manufacturing Facility, Ellesmere Port Peel/Powell		
LADs/ Proposal		
<u>Schedule of Accepted Sectional Milestones & Proposed LADs applicable</u>		
Proposed CSA (BAFO)	£	25,710,050.28

Schedule 10

Ref	Description	Sectional Milestone (dd/mm/yy)	LADs as Per Tender Schedule 10		BGCL LADs Proposal ref BAFO Ltr 13.9.17	
			% of CSA/day	£/wk	% of CSA/day	£/wk
1	High Bay Ground Floor Slab	23/01/2018	0.075%	£134,977.76	0.075%	£134,977.76
2	All other Production Areas Ground Floor Slabs.	25/05/2018	0.075%	£134,977.76	0.075%	£134,977.76
3	All other slabs (offices, mezzanines) and building closed.	25/05/2018	0.075%	£134,977.76	0.038%	£67,488.88

Question 3

Do you include a “waiver” clause?

Buckingham Group Contracting Limited v. Peel L&P Investments and Property Limited [2022]

“GENUINE PRE-ESTIMATE OF LOSS The Parties agree that the maximum LADs to be paid, deducted and/or withheld at any one time [] per week (pro rate for any part of a week) and that having given careful consideration to this matter, all LADs payable by the Contractor are considered by the Parties to be a genuine pre-estimate of the losses which the Employer will incur in relation to the Contractor’s failure to achieve Practical Completion of the Works or any Section or any Milestone Date by the relevant Completion Date; arrived at without any inequality of bargaining position as between the Parties as a true bargain between the Parties; fair, given the nature and circumstances of the agreement; neither excessive, extravagant, unconscionable or oppressive in all the circumstances; and as such these monies are payable as liquidated damages such that the Contractor waives absolutely any entitlement to challenge the enforceability in whole or in part of the liquidated damages provision. The Parties’ joint intention in agreeing a scheme of liquidated damages in such circumstances is to substantially reduce and, to the fullest extent possible in law, eliminate, the risk of a dispute and potential litigation in relation to such circumstances.

Each Party confirms that:

- a) it has taken specific legal advice on the effect of this Liquidated Damages Schedule; and*
- b) based on such advice, it does not enter into the agreement in anticipation that, or with any expectation that this Schedule or any part of it will be unenforceable for any reason”.*

Buckingham Group Contracting Ltd v. Peel L&P Investments and Property Ltd. [2022]

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Buckingham Group Contracting Limited v. Peel L&P Investments and Property Limited [2022]

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Buckingham Group Contracting Limited v. Peel L&P Investments and Property Limited [2022]

arrived at without any inequality of bargaining position as between the Parties as a true bargain between the Parties;

Buckingham Group Contracting Limited v. Peel L&P Investments and Property Limited [2022]

*fair, given the nature and circumstances of the
agreement;*

Buckingham Group Contracting Limited v. Peel L&P Investments and Property Limited [2022]

*neither excessive, extravagant, unconscionable
or oppressive in all the circumstances;*

Buckingham Group Contracting Limited v. Peel L&P Investments and Property Limited [2022]

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Octoesse LLP v Trak Special Projects Limited [2016] EWHC 3180 (TCC)

*"If the Contractor fails to complete the Works or a Section by the relevant Completion Date, the Architect/Contract Administrator **shall** issue a certificate to that effect. If an extension of time is made after the issue of such a certificate, the extension **shall cancel** that certificate and the Architect/ Contract Administrator **shall where necessary** issue a further certificate."*

Grove Developments Ltd v. S&T (UK) Limited.

[2018] EWCA Civ 2448

2.29.1 Provided:

2.29.1.1 the Employer has issued a **Non-Completion Notice** for the Works or a Section; and

2.29.1.2 the Employer has **notified** the Contractor before the due date for the final payment under clause 4.12.5 that he **may require payment of, or may withhold or deduct, liquidated damages**, the Employer may, not later than the day before the final date for payment of the amount payable under clause 4.12, **give notice to the Contractor in the terms set out in clause 2.29.2.2.**

29.2 **A notice** from the Employer under clause 2.29.1 shall state that for the period between the Completion Date and the date of practical completion of the Works or that Section:

2.29.2.1 he **requires the Contractor to pay liquidated damages** at the rate stated in the Contract Particulars, or lesser rate stated in the notice, in which event the Employer may recover the same as a debt; and/or

Grove Developments Ltd v. S&T (UK) Limited.

[2018] EWCA Civ 2448

2.29.2.2 that **he will withhold or deduct liquidated damages** at the rate stated in the Contract Particulars, or at such lesser stated rate, from sums due to the Contractor.

2.29. 3 If the Employer fixes a later Completion Date for the Works or a Section, the Employer shall pay or repay to the Contractor any amounts recovered, allowed or paid under clause 2.29 for the period up to that later Completion Date.

2.29.4 If the Employer in relation to the Works or a Section has notified the Contractor in accordance with clause 2.29.1.2 that he may require payment of, or may withhold or deduct, liquidated damages, then, unless the Employer states otherwise in writing, clause 2.29.1.2 shall remain satisfied in relation to the Works or Section, notwithstanding the cancellation of the relevant Non-Completion Notice and issue of any further Non-Completion Notice.

Grove Developments Ltd v. S&T (UK) Limited.

[2018] EWCA Civ 2448

Notice 1: 13 October 2016

Notice 2 (by email): sent 18 April 2017 at
5:00:49 pm arrived 5:03:12

Notice 3 (by email): sent 18 April 2017 at
5:00:57pm arrived 5:03:19.

Grove Developments Ltd v. S&T (UK) Limited.

[2018] EWCA Civ 2448

Jackson LJ [121]

“The procedure in clause 2.29 provides no obvious benefit to anyone, if the employer warns the contractor of what he may do just seven or eight seconds before he actually does it. At one point I was minded to allow S&T's appeal on the third issue. On reflection, however, I find it impossible to identify any specific period of time which should elapse between serving notice 2 and serving notice 3. To say that there must be a 'reasonable' lapse of time is unworkable and does not satisfy the requirements for an implied term: ...”

Conclusion

