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TRIPLE POINT TECHNOLOGY INC –V- PTT PUBLIC COMPANY LIMITED

- A recent judgment of the Court of Appeal provides guidance as to the effect of termination on liquidated damages provisions in relation to delay, and effects a move away from the previously accepted orthodox position.
- As a result changes to the liquidated damages provisions of the JCT (and other standard forms) should be considered for new contracts.
- The guidance is also important to parties who are considering whether to terminate an existing contract.

What's it about?

- The case related to a software contract entered into between PTT and the claimant contractor (**Triple Point**). The contract provided for payment against certain milestones but (inconsistently) set out fixed dates for payment in an order form attached to an appendix. Article 5.3 related to liquidated damages and stated:

  > *"If CONTRACTOR fails to deliver work within the time specified and the delay has not been introduced by PTT, CONTRACTOR shall be liable to pay the penalty at the rate of 0.1% (zero point one percent) of undelivered work per day of delay <u>from the due date for delivery up to the date PTT accepts such work</u>…"* [Emphasis added].

- The work was delayed but Triple Point sought payment according to the fixed dates, even though the relevant milestones had not been achieved. PTT refused to pay on that basis. Triple Point suspended work for non-payment and left the site. PTT maintained that Triple Point had wrongfully suspended work and sought to terminate the contract for Triple Point's default.
- At first instance in the TCC, Triple Point's claim for unpaid invoices was dismissed and PTT was awarded circa $4.5 million on its counterclaim (circa $3.5 million in respect of liquidated damages).
- On appeal, Triple Point argued that Article 5.3 was not engaged and only applied when work was delayed, but subsequently completed and then accepted; it did not apply to work which PTT never accepted. This was considered by Sir Rupert Jackson to be a "*formidable argument which raises questions of general principle concerning the operation of liquidated damages clauses in termination or abandonment cases".*
- The Court of Appeal upheld Triple Point's appeal. Liquidated damages did not accrue in respect of milestones which were incomplete at the time of termination. The Court of Appeal considered itself to be bound by a 1913 decision which appears not to have been cited in recent cases. As a result, the fact that Article 5.3 focused specifically on delay between the contractual completion date and the date when Triple Point actually achieved completion meant it had no application in a situation where the contractor never hands over completed work to the employer.
- The consequence of this was that whilst PTT was entitled (subject to a cap on liability) to recover circa $150,000 in liquidated damages in respect of Triple Point's delay in completing earlier sections of work, PTT was not entitled to recover liquidated damages in respect of any other delays as Triple Point did not complete any other sections of work. In actual fact, the effect of the cap on liability was that PTT could not recover the liquidated damages as the whole of the cap had been used up by the general damages awarded as a result of the termination and breaches of contract.

Why does it matter?

- Whilst the precise wording of the clause in question will be key, based on Court of Appeal's rationale for its decision it appears likely that liquidated damages provisions which refer to damages being payable until completion by the contractor or under the completion mechanism in the contract will be considered to fall away upon termination of the contract. In those circumstances the employer will be left to prove a claim for general damages for his losses arising from delays both before and after termination. These claims are likely to be costlier and much more time consuming to pursue.

- This may also prove to be a double edged sword for a contractor, if the employer's actual losses in respect of the period prior to termination exceed the amount of liquidated damages which would have been payable in respect of the relevant period.

- The case also highlights the importance of precedence clauses in a contract – the Court found that payments were to be made by reference to the milestones, not the fixed dates, as the contract terms were stated to take precedence. As such Triple Point was not entitled to payment or to suspend work for non payment.

- Finally the case considered the impact of caps on liability. A cap on the total liability of the contractor was held to be just that, capping damages for defects, delay and other breaches. As a result the liquidated damages which were due were not actually recoverable as the capped liability had already been exhausted.

Now what?

- Parties to new contracts should consider whether they want liquidated damages to remain payable in respect of any delay which has occurred prior to termination – this was previously seen as the orthodox interpretation of standard liquidated damages provisions.

- If this is the case, checks are needed to ascertain whether any amendments are required to the proposed contract to achieve this. In our opinion, amendments are needed to the liquidated damages provisions in most of the standard forms to state this expressly. The AG precedents have been amended to provide for liquidated damages to be payable until completion by the contractor or termination. The provisions relating to payments on termination should also be checked for consistency.

- Parties who are considering whether to terminate a construction contract should consider the impact of termination upon the liquidated damages provisions carefully before doing so.

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