

# If you are Late and Terminated, the Liquidated Damages Stop

On 16 July 2021 the Supreme Court handed down their decision for Triple Point Technology Inc –v– PTT Public Company Limited, a much appreciated judgment for the construction industry

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The judgment unanimously overturned the Court of Appeal decision regarding the issue of liquidated damages, effectively restoring the 'orthodox' understanding of how contracts operate with regards to liquidated and ascertained damages ('LADs'), that is: that liquidated damages are payable for any period in delay in completion of the works up to the date of termination of a contract, and not beyond the termination date unless otherwise specifically laid out within the contract.

## Brief Facts on the Triple Point Case

On 08 February 2013 PTT entered into a Contract to provide software services to Triple Point. The Contract provided that PTT was to be paid via instalments upon completion of milestones. The Contract included LAD clauses where PTT failed to hit its milestones. The LADs were to be calculated at a daily rate "*from the due date for delivery up to the date that Triple Point 'accepts such work'*" (Article 5 of the contract).

In May 2014 PTT suspended its services to Triple Point after a dispute had arisen over payments due to it. By 23 March 2015 only two milestones had been achieved and Triple Point terminated the Contract.

PTT initiated proceedings against Triple Point claiming sums due to it. Triple Point then countered this with a claim for LADs which, had been unpaid prior to the termination of the contract and for costs accrued because of termination.

The main issue surrounding the issues of the LADs was whether the LADs clause was applicable where the Contract was terminated before the works were completed.

## Judgements of the TCC and the Court of Appeal

The Technology and Construction Court held that PTT should be awarded LADs which were a consequence of delay (under Article 5 of the Contract) which had accumulated up to the point of termination. However, the Court of Appeal overturned this decision.

In its reasoning, the Court of Appeal outlined three potential common law approaches to LADs clauses which have emerged where a contractor fails to complete contracted works:

1. The LADs clause does not apply at all;
2. LADs apply only up to the date of termination (the 'orthodox' approach);
3. The LADs clause applies until the contractor taking over the uncompleted works completes the works.

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The first approach was adopted in *Glanzstoff* in 1913, the contract in question had similar wording to the wording of Article 5 of the PTT contract. On the basis of this similarity the Court of Appeal held that the LADs clause did not apply in PTT's case as the works had not been accepted before terminating the contract. The Court of Appeal decision left it open as to whether a LADs clause is applicable will be dependent on the language of individual contractual clauses.

## Supreme Court

Whilst the Supreme Court agreed with the overarching principle that the application of a LADs clause will be dependent on the specific drafting of the clause in question (as is always the case in contracts), the Supreme Court disapproved the approach of the Court of Appeal, labelling the adoption of the *Glaznstoff* approach as not only “*inconsistent with commercial reality*”, but also as failing to provide certainty in the law regarding the issue of liquidated damages.

Lady Arden highlighted that LADs clauses are used to provide predictable and certain remedies in particular events, in this instance delay in completion of the works. Up to this point it has been understood that the accrual of LADs ends upon termination of a contract. The Supreme Court moved to rectify the uncertainty provoked by the Court of Appeal by returning to this “orthodox” method of construction for LADs clauses, that being: that such clauses WILL apply up to the date of termination, unless otherwise EXPRESSLY agreed by the parties in writing.

It is now a point of law that accrual of LADs comes to an end upon termination a contract: after this, the aggrieved party must seek damages for breach of contract under the common law or tort law.

This article was written by Emma Payne, Intern at Quigg Golden.

If you have any queries on the issues raised in this article, please contact us on [Belfast@QuiggGolden.com](mailto:Belfast@QuiggGolden.com).

## Quigg Golden Commentary

The Court of Appeal decision meant that many drafters of contracts looking at delay felt obligated to draft express provisions for the termination of a contract prior to the completion of the works in LADs clauses.

This Supreme Court decision removes this obligation and provides certainty to contracting parties regarding the enforceability of LADs clauses, specifically where completion of the works has been delayed.

If you are unhappy with any liquidation damage clauses in your contract you should seek to amend these, prior to completion of the works.

Hopefully this has put to bed the issues that we have been keeping an eye upon, that is the uncertainty as to the application of LADs upon termination. As always, for anyone seeking advice on contract drafting, termination or indeed claims for LADS, Quigg Golden will be on hand to assist.

