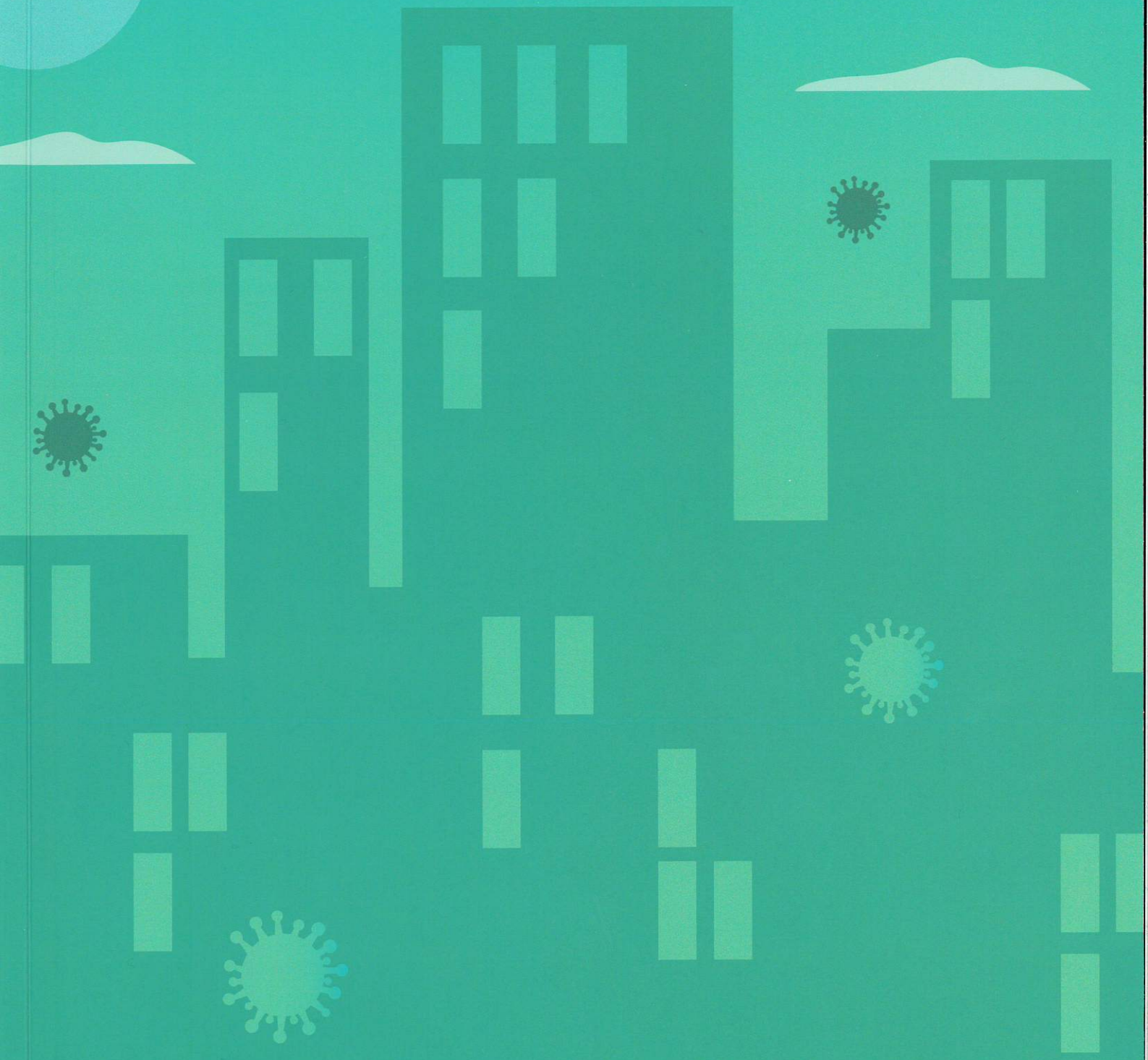
Chartered Institution of Civil Engineering Surveyors

CONSTRUCTION LAW REVIEW



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Parties should ensure a liquidated damages clause clearly sets out how and when liquidated damages should apply.

The clause was found to focus specifically on delay between contractual completion and the date when Triple Point actually achieved completion.[9] The phrase 'up to the date PTT accepts such work' was held to mean up to the date when PTT accepts completed work from Triple Point.[10] The clause did not bite in the situation where Triple Point did not in fact hand over completed works,[11] with the consequence that PTT was only entitled to recover liquidated damages for delays to Triple Point's completed works. This left PTT unable to recover significant sums under the contract.

A similar question arose in the recent case in *PBS Energo A.S v Bester Generacion UK Ltd* (2020) EWHC 223 (TCC) which concerned a contract for the design, construction and installation of a biomass plant. The court acknowledged that the application of the liquidated damages clause on termination would turn on the wording of the clause, and that the Triple Point clause provided a *"fairly clear marker"* that actual completion was key to the entitlement to liquidated damages.[12]

The liquidated damages clause in PBS Energo differed because it focused on planned, not actual, completion. An accrued right to liquidated damages arose from the time at which the works should have been completed.[13]

The decision in Triple Point (which is currently on appeal) will likely have an impact on how adjudicators, courts and tribunals apply liquidated damages clauses.

Practical considerations for drafters

Some practical considerations for drafters:

- As always, parties should take care drafting a liquidated damages clause. The clause should be clear, concise, and reflect the parties' intentions and relevant governing law.
- Employers and contractors should continue to be mindful of the 'legitimate interest' test in Makdessi and closely consider the test to ensure the drafting and application of a liquidated damages clause does not offend the rule on penalties. The parties may wish to expressly acknowledge this in the liquidated damages clause (like the clause mentioned above in De Havilland).
- A party should exercise greater caution when negotiating a liquidated damages clause with a counterparty who is not at arm's-length, of comparable bargaining power and/or represented by appropriate counsel, as these are relevant factors in determining whether a clause may be penal. Indeed, it may be prudent to prescribe the parties' agreement on what will occur if the provision is found to be penal.
- Parties should ensure a liquidated damages clause clearly sets out how and when liquidated damages should apply, including in the event a contract is terminated.
- It is common for parties to agree caps on liquidated damages, whether by a fixed period of time or up to a fixed amount.
- As always, the parties should also ensure that the contract contains an adequate mechanism addressing extensions of time to avoid the impact of the prevention principle.

Conclusion

Liquidated damages clauses are an important and commonly used financial parameter in construction contracts. They provide commercial protections for both contractor and employer and stand as part of the overall allocation of risk and responsibility. Parties should therefore give careful and proper consideration to drafting and negotiating liquidated damages clauses.

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[9] (2019) EWCA Civ 230, paragraph 112
[10] (2019) EWCA Civ 230, paragraph 112
[11] (2019) EWCA Civ 230, paragraph 108-112
[12] (2020) EWHC 223 (TCC), paragraph 443
[13] (2020) EWHC 223 (TCC), paragraphs 447 to 448

Getting paid under your construction contract

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CASH is king – if you are involved in the commercial management of any construction project you will surely have heard this phrase. You will also know that obtaining prompt payment and managing cashflow can be easier said than done. The three main complaints in my experience are late payment, disputed reduced payment, and no payment at all. These are not new issues; payment issues have been a problem for decades and they remain the most common reason why construction companies become insolvent.

Despite the many ways of dealing with payment issues, it remains that parties to construction contracts seem to ignore, forget or are still not familiar with the options available.

The options available when dealing with payment issues

The options

So, what are the options?

- Continue with the works and resolve the issue later
- Suspension/termination
- Dispute resolution

Continue with the works and resolve the issue later

This seems to be the norm. When I ask clients why they are proceeding with the works and allowing payment disputes to fester or escalate, the common answers seem to be something along the lines of 'because we have a good working relationship, they will pay eventually' or something similar to a quote I read not long ago in *Construction News*:

You should also know when not to accept the excuse that you will be paid when the party that you are contracted with is paid.

> *"We never get paid what we asked for – that's just the way of our world."*

Other more concerning reasons include references to pay when paid clauses.

Whether it is late payment or a dispute over the amount due, the decision to continue the works, without properly addressing the matter, needs to be a carefully considered commercial decision, measured against your alternative options and in consideration of the implications to your business.

As a minimum, if the issue is late payment, consider your right to apply interest in accordance with the terms of your contract or, where such provisions do not exist, the *Late Payment of Commercial Debts (Interest) Act* provides for simple interest to be payable on outstanding debts at a penal rate of 8% above the Bank of England base rate. Parties continuously seem to think this is not an option – forgetting how much that figure can be. You wouldn't for example accept the bank not paying you interest

It might even be enough that the giving of the notice of your intent to 'down tools' is sufficient in resolving the matter without suspension actually occurring.

due on your savings so why should this situation be any different.

You should also know when not to accept the excuse that you will be paid when the party that you are contracted with is paid. UK legislation, Section 113 of the *Housing Grants Construction and Regeneration Act* 1996, prohibits pay when paid clauses except in the case of insolvency of a third party. This will apply so long as the contract is a 'construction contract' as defined by the construction act.

Suspension/termination

You might rely on a contract term allowing you to suspend (stop work) for non-payment of a notified sum or, so long as the contract again fits the definition of a construction contract in accordance with the construction act, then you will have a statutory right to suspend regardless of whether there is a contractual term in existence or not in relation to suspension for non-payment.

Suspending the works will not automatically result in a payment being made. However, where the employer is keen for progress to be maintained and completion to be achieved, it gives the contractor considerable leverage to resolve the payment issue. It might even be enough that the giving of the notice of your intent to 'down tools' is sufficient in resolving the matter without suspension actually occurring.

If suspension occurs and is prolonged without resolve you might then have the option to terminate. But proceed with caution here. There will be many contractual and/or procedural points that you need to consider and correctly implement if you plan to suspend the works, and even more so if you are considering termination (you will need to

Review carefully the payment procedure at the outset so it is clear when interim and final payments become due, when are you required to issue a payment application, what can be claimed for, how should the amount due be assessed and when the employer should issue notice of the certified amount.

be sure of liability, adhere to notice requirements and so on). You should carefully check the provisions of your contract and/or legislation before proceeding. Given the serious implications if you wrongfully suspend/terminate I recommend you seek legal advice if you find yourself in this situation.

Dispute resolution

Your construction contract will likely contain multiple dispute resolution procedures, and these might vary from internal dispute resolution boards to mediation, adjudication, arbitration or litigation. Know your contract and know which procedure you can rely on and when. It is not uncommon that your contract will specify that, for example, mediation or adjudication should be attempted prior to referring any dispute to the tribunal.

Where your construction contract does not detail any process for resolving payment disputes then you can rely on your statutory right under the construction act to refer your dispute to adjudication. Adjudication is typically a 28-day procedure designed to protect cash-flow during construction.

Before you commence adjudication, you should ensure you have correctly established the right to refer the dispute, be sure that the dispute has crystallised, know you are following the right procedure to appoint the adjudicator, understand the timings that should be adhered to and you should have carefully assessed that adjudication is the most suitable procedure to resolve the particular dispute.

The Construction Industry Council Low Value Disputes Model Adjudication Procedure (CIC LVD MAP) has been recently introduced, it is useful to know that you may be able to refer your dispute under this model where the total amount in dispute is £50,000 or less. If this option is not explicitly stated in your contract, check or seek advice before commencing the procedure.

Conclusion

In attempts to avoid payment disputes it is advisable that the parties to a construction contract consider the options to minimise the risk in relation to payment prior to executing the agreement or commencing works. Review carefully the payment procedure at the outset so it is clear when interim and final payments become due, when are you required to issue a payment application, what can be claimed for, how should the amount due be assessed and when the employer should issue notice of the certified amount. Pay close attention to other provisions relating to payment such as retention, withholding payments for defective work, delays, conditions precedent to payment, suspension of work, and termination of the contracts – these too will affect when and how much you may be paid under your contract.

Where there are changes to the works it is the contractor's responsibility to provide the employer with the relevant information to assess and value the changes. Failure to provide any substantiation in relation to entitlement and or quantification will inevitably lead to a delay in obtaining the value claimed.

While the measures described in this article aim to provide workable solutions in resolving payment disputes, they are not without risk of aggravating the parties if not managed properly. Consequently, I advise exercising caution and seeking legal advice before assuming any of the possible remedies available.

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