Trinity Term
[2021] UKSC 29
On appeal from: [2019] EWCA Civ 230

JUDGMENT

Triple Point Technology, Inc (Respondent) *v* PTT Public Company Ltd (Appellant)

before

Lord Hodge, Deputy President
Lady Arden
Lord Sales
Lord Leggatt
Lord Burrows

JUDGMENT GIVEN ON

16 July 2021

Heard on 12 November 2020

Appellant
James Howells QC
Nicholas Maciolek

(Instructed by Watson
Farley & Williams LLP)

Respondent
Paul Darling QC
Andrew Stafford QC
Nathaniel Barber
(Instructed by Kobre &
Kim (UK) LLP (London))

LADY ARDEN: (with whom Lord Leggatt and Lord Burrows agree)

Outline of the software contract in issue, the issues on this appeal and my determination of them

1. This is an appeal concerning a software contract which provides for the implementation and provision of a software-based business system. The appeal raises general issues about a provision for liquidated damages and specific issues about the limitation of remedies under this contract.

2. The software contract ("the CTRM Contract"), dated 8 February 2013, was made between the appellant, PTT Public Company Ltd ("PTT") and Triple Point Technology, Inc ("Triple Point") for the design, installation (by data transmission), maintenance and licencing of software to assist PTT to carry on its business in commodity trading. Triple Point had to customise its proprietary software for commodity trading and risk management to the needs of PTT, and it was remunerated by reference to "milestones" set by the contract at which specified work had been done and steps completed. Triple Point also agreed to enter into maintenance, upgrade, replacement, online support and staff training obligations. It further agreed to enter into a perpetual licence. The terms of the Perpetual License Agreement ("PLA"), which formed part of the CTRM Contract, which was based on Triple Point's standard form licence agreement and contained various warranties as to the quality of the software, were annexed to the main part of the CTRM Contract ("the Main Part"). There were provisions for checking that the software provided conformed to specification, ie achieved the agreed "functionality" or the purposes and range of functions that it was designed to perform: it is obvious that this was an important part of the CTRM Contract and that software defects could cause enormous financial and other harm to PTT.

3. The CTRM Contract was not, therefore, simply a standard-form contract but was tailored to the requirements of this particular project. The governing law was English law. The provisions of the Main Part provided that, in the event of inconsistency between the PLA or other annexed parts, and the Main Part, the terms of the Main Part were to prevail (article 29).

4. The parties agreed substantial limitations on the remedies available in the event of delay and so on. Liquidated damages were available for delay (article 5.3 of the Main Part). There was a non-financial remedy for certain other breaches of contract in that in specified circumstances Triple Point had an opportunity to cure

the defect. If it failed to do so, damages were payable but were limited to the fees paid for the relevant work (article 12.3 of the Main Part).

5. The principal issue ("the availability of liquidated damages issue") on this appeal is whether PTT is entitled under the CTRM Contract to liquidated damages for delay in respect of work which had not been completed before the contract was terminated. The second and third issues arise from article 12.3 of the Main Part which imposes a limit or "cap" on the amount of damages which PTT could claim for Triple Point's breach of contract. Thus the second issue ("the cap carve-out for negligence issue") is whether an exception from the cap in article 12.3 for negligence removes from the cap losses caused by Triple Point's negligent breach of contract or only losses for the commission of some independent tort. The third issue ("capping of liquidated damages issue") is whether liquidated damages fell within the cap on Triple Point's liability imposed by article 12.3.

6. In my judgment, for the reasons explained in this judgment, the Court of Appeal fell into error on Issue 1 in its approach to the liquidated damages clause, which failed to take account in the process of interpretation of the legal incidents and function of such clauses, and on Issue 2 in relation to the interpretation of the cap carve-out for negligence. However, on Issue 3, I conclude that the Court of Appeal was right to hold that (subject to the cap carve-out for negligence) liquidated damages fall within the cap.

The facts in greater detail

7. By the CTRM Contract, PTT, a Thai company, contracted with Triple Point for the provision of a software system which would facilitate its trading in certain commodities and manage their purchase, including their delivery and so on. Triple Point had standard terms, but it agreed to supplement these by customised terms, which were to have priority over its standard terms.

8. The CTRM Contract was negotiated over a period of some six to seven months in 2012 and 2013 and the functional specifications for the software system to be supplied by Triple Point were ultimately recorded in the Terms of Reference and clarifications incorporated as annexes to the CTRM Contract. At the time the parties entered into the CTRM Contract, they had agreed the Contract Price for the Phase 1 Services, including business consultancy, design, configuration and implementation services, software licenses and year one software maintenance services, to be $6,920,000. The CTRM Contract was subsequently varied by the addition of two further order forms, with which this appeal is not directly concerned.

Relevant terms of the CTRM Contract (the software contract)

9. We are told that the CTRM Contract followed a structure used for software contracts which involve the implementation and provision of software-based business systems. There was no supply of hardware involved and no physical construction work. What Triple Point agreed to do was to design, implement, support and maintain an IT system which was to be built based upon configurable packages of Triple Point proprietary software marketed for use in businesses focussed upon trading in petrochemicals and other commodities markets.

10. In article 1.2 of the Main Part, "Services" were defined in wide terms to include almost anything done by Triple Point under the CTRM Contract:

> "all activities rendered by CONTRACTOR to PTT in connection with the Project."

11. Article 5 of the Main Part provided for Triple Point to perform the Services in accordance with the Project Plan (which set out the timetable for performance) and to pay damages for delay:

> "ARTICLE 5. SCHEDULE OF SERVICES
>
> 1. The Services to be performed by the CONTRACTOR shall be in conformance with the Schedule for the Services ('Project Plan') as proposed by the CONTRACTOR and accepted by PTT.
>
> 2. The CONTRACTOR shall use its best effort and professional abilities to complete Phase 1 of the Project within 460 calendar days after the Effective Date. If however such date is not attainable due to a delay out of the control of the CONTRACTOR, the CONTRACTOR shall continue to perform the Services for the time necessary to complete the project. This extension will require written approval from PTT. (Para numbers added)
>
> 3. 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 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." (Para numbers added)

12. Article 12 of the Main Part provided for Triple Point to use reasonable care and skill, and limits on its liability (by way of a "cap") and restrictions on PTT's remedies:

"ARTICLE 12. LIABILITY AND RESPONSIBILITY

12.1 CONTRACTOR shall exercise all reasonable skill, care and diligence and efficiency in the performance of the Services under the Contract and carry out all his responsibilities in accordance with recognized international professional standards. [...]

12.3 CONTRACTOR shall be liable to PTT for any damage suffered by PTT as a consequence of CONTRACTOR's breach of contract, including software defects or inability to perform 'Fully Complies' or 'Partially Complies' functionalities as illustrated in Section 24 of Part III Project and Services. The total liability of CONTRACTOR to PTT under the Contract shall be limited to the Contract Price <u>received by CONTRACTOR with respect to the services or deliverables involved under this Contract. Except for the specific remedies expressly identified as such in this Contract, PTT's exclusive remedy for any claim arising out of this Contract will be for CONTRACTOR, upon written notice, to use best endeavor to cure the breach at its expense, or failing that, to return the fees paid to CONTRACTOR for the Services or Deliverables related to the breach</u>. This limitation of liability shall not apply to CONTRACTOR's liability resulting from fraud, negligence, gross negligence or wilful misconduct of CONTRACTOR or any of its officers, employees or agents."

13. Article 13 of the Main Part provided:

"ARTICLE 13. INDEMNITY

13.1 Each party shall indemnify, protect, defend and hold harmless the other party, its affiliates and their respective directors, officers, agents and employees from and against all losses, damages, liabilities and claims, including legal expenses, arising out of or relating to the performance or obligation of CONTRACTOR under this Contract, provided that such losses, damages, liabilities and claims shall occur as a consequence of the errors, omissions, negligence or wilful misconduct of the indemnifying party, its personnel or agents on the CONTRACTOR's part."

14. Article 18 of the Main Part provided:

"18.1 Payment shall be made by milestone as indicated in the below table. The CONTRACTOR shall submit invoice to PTT (1 original and 2 copies) along with sign off document of each milestone in section 23, DELIVERABLES of *Part III Project and Services.*"

	Milestone	Percentage of Payment of Total Contract Value
Phase 1	Project Preparation and Review Business Process	15%
Phase 2	Business Blueprint	
Phase 3	Implementation and Configuration	30%
Phase 4	Functional/Technical Test	
Phase 5	Core Team Training	45%
Phase 6	UAT/End User Training	
Phase 7	Final Preparation	
Phase 8	Go-Live and Post Implementation Support	10%
Phase 9	First Month End Closing	
	Total	100%

15. Articles 28 and 29 of the Main Part provided:

> "ARTICLE 28. MODIFICATION TO CONTRACT
>
> This Contract consists of the Contract document and the Exhibits thereto.
>
> Exhibit 1 Letter of Intent Number 4110000917 and Terms of Reference (TOR) For Commodity Trading & Risk Management (CTRM) System, Rev June 13, 2012
>
> Exhibit 2 Technical Document (Clarification)
>
> Exhibit 3 Triple Point Software Product Perpetual License Agreement, Software Maintenance Services and Order Form 2012 (dated January 31, 2013)
>
> Exhibit 4 Performance Security
>
> The Contract constitutes the entire agreement between PTT and CONTRACTOR and shall not be altered, amended or modified except in writing which shall bear the authorized signatures of both parties.
>
> ARTICLE 29. ORDER OF PRECEDENCE
>
> In the event of a conflict in the provisions of this Contract, the following shall prevail in the order set forth below:
>
> 29.1 This Contract
>
> 29.2 Exhibit 1 and 2
>
> 29.3 Exhibit 3

> CONTRACTOR shall immediately refer to PTT for clarification of any such inconsistency."

16. Articles 23 and 24 of the Terms of Reference (part of Exhibit 1 to the CTRM Contract) made provision for "deliverables" and "functionalities". Deliverables, which were itemised in article 23, were essentially the documentation to be delivered by Triple Point at the end of each specified step in the development and installation of the CTRM system verifying that that particular step had been completed. Functionalities were dealt with in article 24. PTT had in its invitation for bids specified a number of functionalities which it needed, and it stipulated that bidders should in their bids state whether the functionality of their system complied wholly or partly with its requirements. By article 24 of the Terms of Reference, the parties in effect incorporated into their agreement the 567 functionalities of the system identified in the bidding process which PTT wanted. Article 24 left the agreed level of compliance with the required functionalities blank but it appears that PTT agreed to the level of functionalities which Triple Point had specified in its bid. Triple Point's bid contained over 600 functionalities. At all events, it is clear from article 12.3 that the parties had agreed on some functionalities.

17. The relevant provisions of the PLA forming part of the CTRM Contract were as follows:

(a) Clause 7 of the PLA was headed: "Warranties, Liabilities and Indemnification". Paragraph 7.1 of the PLA provided:

> "Triple Point represents and warrants to Licensee that the Maintenance Services and Consulting Services, if applicable, will be provided with its best efforts and professional abilities. Triple Point represents and warrants to Licensee that Licensee's use of the Licensed Software as contemplated by this Agreement does not infringe any US patent, trademark, trade secret, copyright or similar right of any third party. If the Licensed Software is held, or believed by Triple Point, to so infringe or misappropriate, Triple Point shall have the option, at its expense, to (x) modify the Licensed Software to be non-infringing or (y) obtain for Licensee a license to continue using the Licensed Software, and if (x) or (y) are commercially impractical, then Triple Point may terminate the Software License and refund the Software License Fee paid by Licensee, pro rated over a five year term from the Effective Date."

(b) Paragraph 7.2 provided:

"If any third party claim of intellectual property infringement is brought against Licensee arising from Licensee's use of the Licensed Software licensed under this Agreement in accordance with the terms hereof, Triple Point will indemnify, defend and hold harmless at its own expense, Licensee from and against any and all costs, damages, expenses, liability, suits, claims and proceedings (including reasonable attorneys' and professional fees) incurred by Licensee as a result of any such suit or action. Licensee shall provide Triple Point with as soon as possible written notice of the suit or action for which indemnity is claimed giving Triple Point sole control of the defence thereof and any related settlement negotiations; and providing all assistance, information and authority reasonably required to defend or settle the suit or action."

(c) Paragraph 7.3 provided:

"Triple Point represents and warrants that the Licensed Software will substantially conform to the documentation in all material respects and Triple Point's sole obligation hereunder shall be to repair any defect in the Licensed Software or replace the Licensed Software that causes it to fail to so conform provided that written notice of such defect is received by Triple Point during the Maintenance Term. Except with respect to the warranty set forth in this section, the Licensed Software, Documentation, Maintenance and Consulting Services are provided 'as is' and without warranty of any kind, express or implied, including any implied warranties of merchantability or fitness for a particular purpose. Triple Point does not warrant that the Licensed Software will be free of defects, will operate uninterrupted or error free or will satisfy the operational requirements of Licensee."

(d) Paragraph 7.4 provided:

"Without limiting the foregoing, Licensee agrees that the aggregate liability of Triple Point for damages from any cause of action whatsoever, regardless of the form of action, shall not exceed the fees paid to Triple Point under the CTRM Contract and except such damages caused by fraud, gross negligence and wilful misconduct."

(e) Paragraph 7.5 provided:

> "In no event shall either party be liable for lost profits or indirect, incidental, consequential, special or punitive damages of any nature whatsoever."

(f) Paragraph 10.9 of the PLA provides that that Agreement and the CTRM Contract should constitute the entire agreement and understanding between the parties. The proviso in paragraph 10.9 stated:

> "Provided, however, that Triple Point agrees that this Agreement shall not supersede and shall be an Annex to the CTRM Contract. In addition, Triple Point agrees that if there is any conflict between the CTRM Contract and this Agreement, the CTRM Contract shall prevail and be enforceable."

Performance of the Contract

18. The completion of the Phase 1 business blueprints was significantly delayed. Work did not commence on the preparation of the Phase 2 scope of works at all. In December 2013 and March 2014, the parties met in Singapore to seek to resolve disagreements as to the functional scope of the Project and as to significant aspects of the functionality. At a meeting on 19 March 2014 the parties agreed that PTT would accept the work performed in respect of Project milestones 1 and 2 of Phase 1 (the first payment Milestone) subject to recording certain areas as to be completed. The parties thereafter also agreed a Revised Phase 1 Project Plan. On 31 March 2014 Triple Point agreed that if the payment was made in respect of the first payment Milestone in the sum of US$1,038,000 by 28 April 2014 it would not suspend its works on the Project. In May 2014 Triple Point demanded payment in respect of other invoices it had previously submitted. PTT refused to make those payments on the grounds that they were not payable under the terms of the CTRM Contract. From May 2014 Triple Point refused to continue performance of the CTRM Contract without payment of the additional sums it had demanded. Triple Point did not complete the works in respect of any other part of Phase 1 or any part of Phase 2 prior to termination. On 23 March 2015, PTT gave notice stating it was terminating the CTRM Contract under articles 15.1 and 15.7 of the Main Part.

These proceedings from commencement to date

19. Triple Point commenced proceedings in the Technology and Construction Court in London on 12 February 2015. Triple Point claimed in respect of alleged

failures to make payments for software licence fees. In its Defence and Counterclaim dated 21 May 2015, PTT denied all of Triple Point's claims and counterclaimed damages for breach of contract on termination of the parties' contract in respect of its wasted costs in respect of hardware purchased prior to termination, liquidated damages under the terms of the contract up to the date of termination and, as termination loss, the costs of procuring a replacement system plus interest pursuant to statute. In its Reply and Defence to Counterclaim dated 9 July 2015, Triple Point denied that it was liable as alleged. It also relied on the cap in article 12.3 of the Main Part as limiting the damages claimed by PTT. Triple Point contended that any sums found to be due to PTT should be set off against the Performance Security, being the security for payment required to be provided by Triple Point under the terms of the CTRM Contract.

20. In due course the matter came on for trial before Jefford J between 28 November to 14 December 2016 and on 31 January 2017. She gave judgment on 23 August 2017. She found that the delay in performance of the CTRM Contract was caused by Triple Point's breach of article 12.1 of the Main Part to exercise reasonable skill, care and diligence in the performance of its services, through negligently: failing carefully to plan, programme and manage the Project or delays in the Project; failing to provide sufficient numbers of suitably qualified staff; failing to conduct adequate business analysis and production of business blueprints required under the terms of the CTRM Contract; and, failing to follow internationally recognised and applied methodologies for the design, development and implementation of software.

21. The judge dismissed Triple Point's claims and decided that PTT was, prima facie, entitled to damages for breach of contract by Triple Point and on termination of the CTRM Contract and/or repudiation of that contract in the sums of: US$3,459,278.40 in respect of liquidated damages for delays prior to termination; US$630,000 damages in respect of wasted costs of hardware purchases prior to termination; and, US$10,574,756.78 in respect of termination loss for the costs of procuring a replacement system from a new contractor.

22. The judge held that Triple Point's liability for damages in respect of wasted costs and termination loss was capped at US$1,038,000 by article 12.3 of the Main Part, being the amount paid by PTT under the contract prior to termination. The judge rejected arguments, including arguments as to the quantum of liquidated damages, from which Triple Point did not appeal. The judge decided that PTT's entitlement to liquidated damages was not subject to the cap.

23. Triple Point appealed to the Court of Appeal and PTT cross appealed. The Court of Appeal (Lewison and Floyd LLJ and Sir Rupert Jackson) held that PTT was entitled only to liquidated damages in respect of works that had been completed

by reference to the agreed stages contained in article 18 of the Main Part and the Project Plan and that the appellant's entitlement to receive liquidated damages under article 5 of the Main Part was, together with all entitlements to general damages on termination, subject to the cap in article 12.3 of the Main Part. The Court of Appeal held that the exception to the limitation on liability for breach of contract in article 12.3 for "negligence" did not apply to cases where Triple Point was liable for breach of the contractual obligation to exercise reasonable skill and care and only applied to cases of "freestanding torts or deliberate wrongdoing", and that in those circumstances it did not apply (para 119 of the Court of Appeal's judgment [2019] 1 WLR 3549).

Issue 1: Are liquidated damages payable under article 5.3 of the Main Part where Triple Point never completes the work and PTT never accepts it?

24. The issue here is whether PTT is entitled (subject to any operation of the cap) to liquidated damages for work which Triple Point never completed, and which was therefore never accepted by PTT. This point was raised only orally in the Court of Appeal with Triple Point submitting that it was not liable to pay any liquidated damages for delay under article 5.3 because the work in question was never completed or accepted by PTT. So we have no skeleton arguments for this point in the Court of Appeal and we cannot tell precisely how it was put. However, it is clear that initially Triple Point did not propose to argue the point by reference to an analysis of the authorities which were ultimately cited by the Court of Appeal in its judgment.

25. However, it appears from the judgment of Sir Rupert Jackson, with whom Lewison and Floyd LJJ agreed, that the Court of Appeal regarded the point as raising questions of principle although the application of the principle would be affected by the terms of the contract in question. In the course of his judgment, Sir Rupert Jackson examined or referred to some ten authorities. He considered that the first case, *British Glanzstoff Manufacturing Co Ltd v General Accident, Fire and Life Assurance Corpn Ltd* [1913] AC 143, established a point of principle though the principle in question was never to my mind clearly articulated. This case loomed large in the reasoning of the Court of Appeal although its significance had not previously been appreciated. The essential facts are very simple.

26. Glanzstoff employed Brown to build a new factory. The contractual completion date was 31 January 1910 (which it was agreed should be extended to February 1910), but Brown ceased work before that date. On 16 September 1909, Glanzstoff engaged Henshaw to complete the contract and he completed the works on 28 March 1910. The issue was whether Glanzstoff could claim liquidated damages for delay from Brown under clause 24 of the contract between Brown and Glanzstoff for the period from February 1910 to 28 March 1910. Brown had

provided a guarantee to secure the performance of his contractual obligations and Glanzstoff hoped to recover the liquidated damages under the guarantee. Clause 24 provided:

> "If the contractor fail to complete the works by the date named in clause 23 … and the architect shall certify in writing that the works could reasonably have been completed by the said date, … the contractor shall pay or allow to the employer the sum of £250 sterling per week for the first four weeks, and £500 per week for all subsequent weeks as liquidated and ascertained damages for every week beyond the said date or extended time, as the case may be, during which the works shall remain unfinished …"

27. The Outer House and Inner House of the Court of Session dismissed Glanzstoff's claim as did the House of Lords. As Sir Rupert Jackson explains, the judgment of the House of Lords is more fully reported in the Reports of the Sessions Cases: 1913 SC (HL) 1. Viscount Haldane LC gave the leading judgment. He characterised clause 26 as "an enclave in the contract by itself providing for a special remedy": p 2. He held that that clause did not apply for two reasons:

> "In my opinion it does not apply, and I think it does not apply for two reasons: first of all, that it is altogether inapt to the provisions made by clause 26, which contain a complete code of themselves; and secondly, *because upon its construction I read it as meaning that if the contractors have actually completed the works, but have been late in completing the works, then, and in that case only, the clause applies.* Under the circumstances in which this appeal comes before us the contractors have not completed the works; on the contrary, they have been ousted from the works by the employers under their powers given them by clause 26. I am therefore of the same opinion as the learned Judges in the Court of Session, who were unanimous in holding that clause 24 has no application to the present case …" (p 3, Emphasis added)

28. Sir Rupert Jackson focused on the passage which I have italicised in the preceding paragraph. He examined some ten other cases on the operation of liquidated damages clauses. The conclusions of this examination are set out in para 106 of his judgment which placed the cases which had been examined into three categories:

> "106. Let me now stand back from the authorities and review where we have got to. In cases where the contractor fails to complete and a second contractor steps in, three different approaches have emerged to clauses providing liquidated damages for delay:
>
> (i) The clause does not apply: the *Glanzstoff* case [1913] AC 143; the *Chanthall* case 1976 SC 73; the *Gibbs* case 35 Con LR 86.
>
> (ii) The clause only applies up to termination of the first contract: the *Greenore* case [2006] EWHC 3119 (TCC); the *Shaw* case [2010] EWHC 1839 (TCC); the *LW Infrastructure* case [2012] BLR 13; the *Bluewater* case 155 Con LR 85.
>
> (iii) The clause continues to apply until the second contractor achieves completion: the *Hall* case [2010] EWHC 586 (TCC); the *Crestdream* case (2013) HCCT 32/2013; the *GPP* case [2018] EWHC 2866 (Comm)."

29. Sir Rupert Jackson rejected the argument that the principle in *Glanzstoff* could be confined to cases where the contract was terminated before the contractual completion date (para 108). As to category (ii), he held:

> "110. The textbooks generally treat category (ii) as the orthodox analysis, but that approach is not free from difficulty. If a construction contract is abandoned or terminated, the employer is in new territory for which the liquidated damages clause may not have made provision. Although accrued rights must be protected, it may sometimes be artificial and inconsistent with the parties' agreement to categorise the employer's losses as £x per week up to a specified date and then general damages thereafter. It may be more logical and more consonant with the parties' bargain to assess the employer's total losses flowing from the abandonment or termination, applying the ordinary rules for assessing damages for breach of contract. In my view, the question 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 loss."

30. Sir Rupert Jackson saw much force in the reasoning of the House of Lords and took the view that the wording of the liquidated damages clause could be so close to the wording in *Glanzstoff* that the House of Lords decision is binding. I find this observation difficult to follow as the clauses in question in *Glanzstoff* were not said to be some market-accepted wording or clauses from some standard form recognised in the industry where the interpretations of the courts in reported cases may in practice be treated as binding in later cases involving the same wording. With those exceptions, in general the decision of one case as to the meaning and effect of a clause cannot be binding as to the meaning and effect of even a similar clause in another case.

31. Sir Rupert Jackson went on to hold that if the liquidated damages clause did not make specific provision for a particular circumstance, the employer was in new territory for which the liquidated damages clause may have made no provision. It was possible that the parties intended the situation after the contractor ceased to act to be dealt with as general damages. The question whether the liquidated damages clause should apply would have to depend on the wording of the clause. In this case, however, the Court of Appeal considered that the words "up to the date PTT accepts such work" meant that article 5.3 had no application in a situation where the contractor never completed the works, and, by definition, the employer never accepted them. As Sir Rupert Jackson put it:

> "112. Let me now turn to article 5.3 in the present case. This clause, like clause 24 in the *Glanzstoff* case, seems to be focused specifically on delay between the contractual completion date and the date when Triple Point actually achieves completion. The phrase in article 5.3 'up to the date PTT accepts such work' means 'up to the date when PTT accepts completed work from Triple Point'. In my view article 5.3 in this case, like clause 24 in the *Glanzstoff* case, has no application in a situation where the contractor never hands over completed work to the employer."

32. Mr James Howells QC, for PTT, contends that Sir Rupert Jackson erred in law in this passage. By contrast, Mr Darling QC and Mr Stafford QC, for Triple Point, seek to uphold the decision of the Court of Appeal. They argue that, although the judgment of Sir Rupert Jackson included an analysis of a number of previous decisions on liquidated damages, this analysis had little bearing on the decision reached by the Court of Appeal. The decision identified several different outcomes from previous cases and then identified the outcome based on the wording in the

CTRM Contract. Moreover, on their submission, the decision made business sense. On Triple Point's case, there is logical force, and high authority, in support of the Court of Appeal's approach in the cases cited by Sir Rupert Jackson and see also per Coulson LJ in *Construction Law: Recent Highlights and Greatest Hits*, October 2019, The Society of Construction Law Paper No 220, p 4.

33. In my judgment, the passages that I have quoted from Sir Rupert Jackson's judgment are equivocal as to whether the point is being treated as one of interpretation or as one of principle. The approach seems to have been a mixture of the two. The point may have ultimately been presented to the Court of Appeal as one of principle rather than one of interpretation of article 5.3. If the question was one of interpretation, para 106 must refer to three possible outcomes rather than categories.

34. The more important question is: what was the conclusion which the Court of Appeal drew from Sir Rupert Jackson's analysis of the authorities? The Court of Appeal were alive to the fact that they were departing from the generally understood position as to the meaning of liquidated damages clauses (see para 110, set out above). In my judgment, the Court of Appeal concluded that *Glanzstoff* showed that there were circumstances in which a liquidated damages clause would not necessarily apply even if the contractor had been guilty of delay and had not completed the work on time. It followed in the Court of Appeal's view that it should not be assumed that the liquidated damages clause had any operation beyond the precise event for which it expressly provided: the only event for which article 5.3 provided was that in which the employer accepted the delayed work. The event described in the liquidated damages clause was to be determined from the words used. PTT did not, therefore, in the judgment of the Court of Appeal, have an entitlement to liquidated damages in the present case where the contractor did not complete the work.

35. The difficulty about this approach is that it is inconsistent with commercial reality and the accepted function of liquidated damages. Parties agree a liquidated damages clause so as to provide a remedy that is predictable and certain for a particular event (here, as often, that event is a delay in completion). The employer does not then have to quantify its loss, which may be difficult and time-consuming for it to do. Parties must be taken to know the general law, namely that the accrual of liquidated damages comes to an end on termination of the contract (see *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 844 and 849). After that event, the parties' contract is at an end and the parties must seek damages for breach of contract under the general law. That is well-understood: see per Recorder Michael Harvey QC in *Gibbs v Tomlinson* (1992) 35 Con LR 86, p 116. Parties do not have to provide specifically for the effect of the termination of their contract. They can take that consequence as read. I do not, therefore, agree with Sir Rupert Jackson when he holds in the second sentence of para 110 of his judgment that "If a

construction contract is abandoned or terminated, the employer is in new territory for which the liquidated damages clause may not have made provision." The territory is well-trodden, and the liquidated damages clause does not need to provide for it.

36. Of course, the parties may out of prudence provide for liquidated damages to terminate on completion and acceptance of the works so as to remove any question of their being payable thereafter. But if they do, it is in my judgment unrealistic to interpret the clause as meaning that if that event does not occur the contractor is free from all liability for liquidated damages, and that the employer's accrued right to liquidated damages simply disappears. It is much more probable that they will have intended the provision for liquidated damages to cease on completion and acceptance of the works to stand in addition to and not in substitution for the right to liquidated damages down to termination.

37. Reading the clause in that way meets commercial common sense and prevents the unlikely elimination of accrued rights. The Court of Appeal was aware of the importance of accrued rights because after the sentence last quoted the judgment of Sir Rupert Jackson begins: "Although accrued rights must be protected, ...". However the rest of that sentence and the next sentence go on to hold that it may be that the parties intended that general damages should take the place of liquidated damages: "… it may sometimes be artificial and inconsistent with the parties' agreement to categorise the employer's losses as £x per week up to a specified date and then general damages thereafter. It may be more logical and more consonant with the parties' bargain to assess the employer's total losses flowing from the abandonment or termination, applying the ordinary rules for assessing damages for breach of contract." If that were so, it is hard to believe that the parties would have gone to the trouble of providing for liquidated damages in the first place. Moreover, under this approach, accrued rights are not protected. They are lost.

38. The Court of Appeal did not ask whether there was any commercial reason for holding that the parties intended that the liquidated damages clause should provide for damages only in the one case, which is where delay occurs, but Triple Point subsequently produces work which PTT is content to accept as complying with the contract. Why should the parties want liquidated damages in that event but not in any other event where the work had not been delivered on schedule? If their purpose was to achieve a certain and quick resolution of the employer's claim for loss for the potential benefit of both parties, in the event of delay, then it would not be achieved by limiting article 5.3 to the situation where the work is ultimately done and accepted. Put another way, it must follow on the Court of Appeal's approach that some positive wording is needed if the employer is to be protected against other causes of delay. In my judgment, additional wording is not needed. It would be sufficient to interpret the words "up to the date PTT accepts such work" as meaning "up to the date (if any) PTT accepts such work".

39. The detailed analysis of the later authorities by the Court of Appeal therefore proceeded from the wrong hypothesis and nothing would in my judgment be gained by this Court analysing those authorities again. They all turn on their particular circumstances.

40. Mr Howells impressed on us that a liquidated damages clause gave rise to an accrued right to liquidated damages on the part of the employer and that the courts have held that this right should not be taken away without clear words. I have dealt with accruals above: the parties are unlikely to intend that the right to liquidated damages once it had accrued is simply extinguished.

41. Mr Darling submits that the issue in this case is not whether the right to liquidated damages was extinguished but whether any such right existed in the first place. But a sufficient answer to Mr Darling's point is that there is nothing to suggest that the aim of the parties in this case was that the entitlement to liquidated damages should be limited to the situation where Triple Point was late in completing its work, but depends on whether it finished the work and PTT accepted it. By contrast it was perfectly natural that the parties should seek to put an end date on the accrual of liquidated damages to prevent a party who had accepted the performance of work from continuing to demand liquidated damages.

42. Nor do I consider that the little-known case of *Glanzstoff* should have led the Court of Appeal to their radical re-interpretation of the case law on liquidated damages clauses. In my judgment, *Glanzstoff* is a decision on the interpretation of a particular contract. The decision is, as one would expect, that the liquidated damages clause in Brown's contract could not be relied on to make him liable for the delay in completion due to the employment of a substitute contractor. An alternative explanation for the decision is that the contract with Brown had terminated before the contractual completion date so that in accordance with general principle the only remedy for loss after the date of termination was for (unliquidated) damages for breach of contract, but I agree with Sir Rupert Jackson that this is not the basis of the decision (although in my judgment it is also clear that (as stated in the Appeal Cases report) all the House of Lords did was to affirm the decision of the Inner House: 1912 SC 591). When the court is required to interpret a similar clause today, it will have to decide the issue in the same way as any other question of interpretation and not by treating *Glanzstoff* as having created some special rule applying to liquidated damages clauses.

43. Although the Court of Appeal treated the *Glanzstoff* case as a case of significance, it is not. The first edition of *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland*, W M Gloag, (1914), p 798, a leading work, treated the *Glanzstoff* case as one on the meaning of the particular clause,

rather than as establishing any point of principle. In my judgment, it turns on its particular facts and establishes no new proposition of law whatever.

44. Sir Rupert Jackson included *Chanthall Investments Ltd v F G Minter Ltd* 1976 SC 73 with *Glanzstoff* in the first of the three categories of clause which he sets out at para 106 of his judgment. *Glanzstoff* had indeed been cited in that case. The material point in this decision of the Inner House of the Court of Session was that the Inner House applied *Glanzstoff* in support of its acceptance of the contractor's contention that, although he was late in performing the work he had agreed to undertake under the contract, he was not liable under the liquidated damages clause, clause 22, for delays caused by others. Clause 22 provided as follows:

> "22. If the Contractor fails to complete the Works by the Date for Completion …, then the Contractor shall pay or allow to the Employer a sum calculated at the rate stated in the said appendix as Liquidated and Ascertained Damages for the period during which the Works shall so remain or have remained incomplete, and the Employer may deduct such sum from any monies due or to become due to the Contractor under this Contract."

45. Lord Justice-Clerk Wheatley, with whom the other members of the Inner House of the Court of Session agreed, treated *Glanzstoff* as a case where it was held that references to completion in the relevant clause were to completion under and in conformity with the same contract. Lord Wheatley considered that this was the view taken by Viscount Haldane LC in *Glanzstoff* when he held that the liquidated damages clause in that case applied where the original contractor had completed the works but had been late in doing so. Viscount Haldane was not dealing with the situation where there had been a delay in completion, but where the delay had been caused by other factors. Again the approach is one of interpreting the liquidated damages clause in very different circumstances from those in the present case.

46. Recorder Michael Harvey QC approached the *Glanzstoff* case in a similar way in *Gibbs v Tomlinson* (above, para 35). This is the other case to which Sir Rupert Jackson referred in his first category, along with *Glanzstoff*.

47. *Glanzstoff* is rarely discussed in leading works on the law of contract in England and Wales. It is an illustration of how a liquidated damages clause can be interpreted. Lewison on *The Interpretation of Contracts*, 7th ed (2020), para 17.50 helpfully sums up the overall position on the categorisation of cases made in para 106 of the judgment of Sir Rupert Jackson as follows:

> "Ultimately the question turns on the wording of the particular clause. One question that will arise is whether the purpose of the clause is limited to liquidating damages for delay in completion, or whether it also liquidates damage for failure to complete at all."

48. In the instant case, article 5.3 of the Main Part on its true construction provided for liquidated damages if Triple Point did not discharge its obligations within the time fixed by the contract irrespective of whether PTT accepted any works which were completed late. The function of the words on which the Court of Appeal relied was to provide an end date for liquidated damages on acceptance of the works by PTT to ensure that in that event there was no further claim for liquidated damages in respect of the relevant delay. But it did not follow that there were to be no liquidated damages if there was no such acceptance. To reach that conclusion would be to render the liquidated damages clause of little value in a commercial contract. To use an idiomatic phrase, the interpretation accepted by the Court of Appeal in effect threw out the baby with the bathwater.

49. I conclude with my views on some interesting but in the end not very convincing auxiliary arguments made in this Court. I do not see much force in the argument advanced by Triple Point that this Court's interpretation would hand all control to the employer if there were delay in completing the works since only PTT had the ability to terminate the CTRM Contract under article 15. That would have been obvious to Triple Point when the CTRM Contract was made: it was part of their bargain. Mr Darling also submits that there are circumstances in which an employer may prefer general damages to those available under a liquidated damages clause, but he did not point to any specific matter in this regard. Mr Darling further argues that there was no contractual mechanism for recovering overpaid liquidated damages. This was so whichever interpretation was adopted. Mr Darling's point may be said to be an argument for preferring a restrictive interpretation of the liquidated damages clause. However, the absence of this mechanism would also seem to indicate that the parties never thought about the issue, which means that they cannot have attached much significance to it.

Issue 2: Are damages for Triple Point's negligent breach of the CTRM Contract within the liability-limitation exception in the final sentence of article 12.3?

50. On this appeal, the parties provided the Court at its request with a full copy of the CTRM Contract (507 pages) rather than simply the extracts of some 74 pages originally included in the electronic bundle. No doubt the decision to provide only a limited number of pages was done for reasons of economy but speaking for myself, I found it helpful to see the entire contract. I do not know whether this was an

advantage which the Court of Appeal also had. Contrary to the conclusions of the judge and the Court of Appeal, I take the view that the liquidated damages are within the cap carve-out in the fourth sentence of article 12.3 if they result from breaches by Triple Point of its contractual obligation of skill and care so that liability for them is uncapped. My reasons are contained in the paragraphs immediately following.

(1) Structure of article 12.3

51. Article 12.3 consists of four sentences. The first constitutes a statement that Triple Point is liable to PTT for any damage in consequence of any breach of contract, including software defects or inability to meet the functionality criteria. The second sentence is the cap, namely the global limit for all breaches of contract, fixed at the contract price received by Triple Point. The third sentence deals with the form of remedies. Apart from specific remedies PTT's exclusive remedy was for the contractor to use his best endeavours to cure the defect and failing that to return the attributable part of the fees paid. The fourth and final sentence contained a carve-out from the limitation of liability, and I call it the "cap carve-out". It provided that the contractor's liability resulting from the fraud, negligence, gross negligence or wilful misconduct of the contractor was not limited. I will set out article 12.3 again, this time numbering each of the sentences for convenience:

> "ARTICLE 12.3
>
> 1. CONTRACTOR shall be liable to PTT for any damage suffered by PTT as a consequence of CONTRACTOR's *breach of contract*, including software defects or inability to perform 'Fully Complies' or 'Partially Complies' functionalities as illustrated in Section 24 of Part III Project and Services.
>
> 2. The total liability of CONTRACTOR to PTT *under the Contract* shall be limited to the Contract Price received by CONTRACTOR with respect to the services or deliverables involved under this Contract.
>
> 3. Except for the specific remedies expressly identified as such in this Contract, PTT's exclusive remedy for *any claim arising out of this Contract* will be for CONTRACTOR, upon receipt of written notice, to use best endeavor to cure the breach at its expense, or failing that, to return the fees paid to

> CONTRACTOR for the Services or Deliverables related to the breach.
>
> 4. *This limitation of liability* shall not apply to CONTRACTOR's liability resulting from fraud, negligence, gross negligence or wilful misconduct of CONTRACTOR or any of its officers, employees or agents." (Numbering and italics added)

(2) The concept of "negligence" denoted by article 12.3

52. The first point to make is that the word "negligence" has an accepted meaning in English law, which was the governing law of the CTRM Contract. It covers both the separate tort of failing to use due care and also breach of a contractual provision to exercise skill and care. Unless, therefore, some strained meaning can be given to the word "negligence" in the context of the final sentence of article 12.3 the effect of that clause is that liability for negligence does not exclude the breach of a contractual duty of care. As I shall explain in the next paragraph, the courts below took the view that the contractual duty of care was not included in the reference to negligence in the final sentence of article 12.3.

(3) The CTRM Contract is not just for services to be provided carefully: it is also for defect-free software and deliverables and functionality compliance

53. The judge considered that there would be little point in imposing a cap on liability for breach of the contractual duty of skill and care in a contract which was wholly or substantially for services, which had to be provided with skill and care, only to remove the cap in the final sentence. The Court of Appeal agreed. The argument that impressed the courts below was therefore that, since the centrepiece of the contract was services, there was little point in having a cap and then carving out, by the cap carve-out, the bulk if not the entirety of the claims. Put another way, if the cap carve-out included breaches of the contractual duty of care, the cap was emasculated. Therefore, it is said, the word "negligence" could not mean "negligence" in the ordinary sense of that word. It had to exclude breaches of a contractual duty of care and be limited to breaches of a duty of care which arose entirely independently of those breaches, ie independent torts.

54. The difficulty with that argument, however, as Mr Howells points out, was that the contract was not solely about the provision of services. It included important obligations on Triple Point's part for the provision of defect-free software and the "Deliverables". It was clear from the opening sentence of article 12.3 that there were

certain matters which Triple Point agreed to do or provide as an absolute covenant, not merely one of skill and care. Those matters also included the agreed level of functionality. Thus, in the first sentence of article 12.3, there was an obligation to provide software which met the specifications as to functionality. An example is the ability to create trade templates. PTT had specified in the invitation to bid that the system must have this functionality and that bidders had to state the level of compliance of their systems. Accordingly in its bid, Triple Point stated that its system had the desired functionality and fully complied with the bid specification. It added a note explaining that the CTRM system allowed users to create trade templates with frequently used trade data. As Mr Howells pointed out, apart from software defects and functionality compliance (article 12.3), the CTRM Contract and the documents annexed to it or incorporated into it contain the following further obligations which were obligations of result on the part of Triple Point and not obligations of skill and care:

(a) Warranties as to use of intellectual property/non-infringement of third-party intellectual property rights, and conformity to documentation (PLA paragraphs 7.1 and 7.3).

(b) Obligations as to time for completion (article 5).

(c) Obligations as to use and protection of confidential information (article 6).

(d) Obligations as to appointment, replacement and control of personnel (article 10).

(e) Obligations as to sub-contracting or assignment of rights to payment (article 10.8).

(f) Obligations as to remuneration and prohibition on gratuities and commission (article 17).

(g) Obligations as to maintenance of records of expenses and audit (article 18.9).

(h) Obligations to pay all taxes and duties (article 19).

(i) Obligation to ensure any sub-contract is assignable and assigned to PTT on termination (articles 15.4.2 and 20).

(j) Obligations arising in respect of the Software Warranty (article 22, Perpetual License Agreement paragraph 7).

(k) Obligations as to title (article 25).

(l) Obligations of the respondent and its staff to abide by the rules and regulations of the Kingdom of Thailand (article 27.4).

55. As I see it the CTRM Contract drew a distinction between those Services in respect of which Triple Point owed a contractual duty of care, and those matters which it would be a breach of contract not to provide (ie a distinction between contractual obligations of reasonable care and skill and strict contractual obligations). Defect-free software and deliverables fell into the second category as did functionality compliance. This distinction can be seen in the opening sentence of article 12.3 of the Main Part, and in addition, in the case of the deliverables, in article 23 of Part III Project & Services, which specifies by a table with columns the Milestones by reference to which Triple Point is to submit Deliverables to PTT. Two of those columns are for "Milestone and Activity" and "Deliverables" respectively. For example, the former includes an item of which the activity is stated to be "Prepare functional specification that describes the solution requirements, the architecture, and the detailed design for all the features" and the Deliverable as "Functional Specification" (item 3.2). Satisfaction of the specification for the new system and functional criteria would obviously be matters of considerable importance in a contract of this kind. The first sentence of article 12.3 makes it clear that there was a strict (or an absolute) obligation to supply software which was not defective and which met the agreed level of functionality.

(4) It is incoherent and inappropriate to interpret the cap carve-out by reference to unrealistic examples of independent torts

56. What the Court of Appeal and the judge held is that the word "negligence" must mean some independent tort and excludes breach of a contractual duty of skill and care. But no-one has yet thought of a realistic example of such a tort. Unless there is an obvious example of an independent tort, it is unlikely in my judgment that the parties considered that the word "negligence" should apply, and on Triple Point's case apply only, to an independent tort. As I have explained, the Services were to be provided by data transmission. There would be no question of attending at the premises of PTT or of injury being done to wiring or hardware or to members

of PTT's staff through the actions of Triple Point. Neither the example given by Sir Rupert Jackson in his judgment in the Court of Appeal nor that given by Mr Stafford on the hearing of this appeal was apt for that reason. The example given by Sir Rupert Jackson was that of damage to the wiring at PTT's premises causing personal injury to staff members of PTT (Judgment, para 119). In argument, Mr Stafford gave the example of the extracontractual service of repairing a computer done voluntarily at the request of a staff member at PTT's premises. These are simply not realistic examples, and no-one has been able to think of a better one.

57. Moreover, and more importantly, these are examples of acts that were outside article 12.3 altogether. Article 12.3 only dealt with liability under the CTRM Contract: see the words italicised in article 12.3 as set out in para 51 above. That was the limitation on damages. The limitation placed on damages was on damages under the CTRM Contract. So, any exclusion from that limitation also had to be damages under the Contract and that would exclude an independent tort. At one point in his argument, Mr Stafford was compelled to accept that the provision in the final sentence of article 12.3 was simply there for the avoidance of doubt (Transcript, p 86).

58. Furthermore, article 13 provides a further indication against the limitation of the cap carve-out to independent torts. It was surmised by Triple Point that in their negotiations the parties to the CTRM Contract would have started with the position as set out in clause 7 of the PLA. The provenance of this document is a standard form contract which Triple Point requires persons who wish to buy its software to sign, and it contains a cap carve-out which does not use the word "negligence". Insofar as the suggestion is that that word must have been put into article 12.3 without any intention to produce a different result, there is absolutely no evidence to support that suggestion and it would only be admissible evidence if it was the objective of both parties. In my judgment, quite the contrary is plain without the need for any evidence. The word "negligence" clearly appears in article 12.3. In addition, it also appears in article 13 which provides an obligation of indemnity for loss caused by the actions of either party. The fact that the word was introduced not just once but twice in the main part of the CTRM Contract is inconsistent with any suggestion that its appearance in article 12.3 was of no import or a mistake. In the light of article 13, the inherent probability is that it was introduced deliberately.

59. This point also receives a measure of support from the fact that article 29 provides that in the event of any conflict the provisions in the Main Part should prevail over any provision in the PLA and from the further fact that article 29 at least in one respect enhances the protection given to PTT over that provided to users under the PLA. If the article 29 provision had not been there, PTT would have been subject to the other provisions of paragraph 7 of the PLA which exclude all liability for breach of warranty. As the provisions of article 12.3 take priority, PTT has the possibility of obtaining damages of any kind up to the amount of the price received

by Triple Point. This demonstrates an intention to enhance PTT's position as regards the damages remedy in the Main Part from that which it enjoyed under the PLA.

60. Article 29 only operates where there is a conflict. Consequential loss of profits is a matter which would be of concern to commercial parties to a software contract. While the point has not been argued, there must be an argument that this is not within article 12.3 in any event because of the provisions of clause 7.5 of the PLA.

61. Another argument advanced by Mr Stafford was that the objective of the parties was to have a meaningful cap. But this argument works both ways. The exclusion of negligence from the cap also made it a meaningful cap because otherwise article 12.3 arguably provided a wholly inadequate damages remedy to PTT.

62. Mr Howells argues that the term "negligence" was an inappropriate one in any event because the contracts were not being performed within the English jurisdiction. This, he submits, is another argument for saying that the parties were unlikely to have intended that the cap carve-out should refer to an independent tort and that has some force. It should however be borne in mind, as the contract is governed by English law, that the court would endeavour to apply the English concept of negligence to whatever wrong was claimed to have occurred under any foreign law.

63. In my judgment, the Court of Appeal went down the wrong route in concluding that the word "negligence" in the cap carve-out referred to an independent tort. The matters referred to in the final sentence are all characteristics of conduct: fraud, wilful misconduct, gross negligence and negligence. These can apply to breaches of the CTRM Contract. Considering the sentence as a whole it is clear that it includes an act which is a breach of contract and which possesses one of those characteristics. Thus, if there is a breach of contract to exercise skill and care by reason of Triple Point's negligence, that will not be subject to the cap in article 12.3. It is simply the provision of Deliverables and other obligations of result under the CTRM Contract which fall within the cap. As I have explained, in a software contract, where the provision of software may result in damages of a considerable amount without any fault on the part of the designer and installer of the software, it is understandable that claims for damages for breach of the requirement that software be defect-free should in those circumstances be subject to the cap.

(5) The exclusion of warranties in the PLA was deliberately not followed in article 12.3

64. As an alternative, it is said that the formula for excluding matters from the limitation of liability was taken from the PLA and the word "negligence" was merely added in, and so it was suggested that it is unlikely to add very much more. But that is to misunderstand the nature of the PLA. As I have explained, the provenance of this document was a standard form agreement for licensing the software for which Triple Point had copyright protection. It was therefore an agreement with persons who might contract for nothing more than the licensing of that copyrighted software (just as a person might download open-source software on the internet for free).

65. The notion that article 12.3 of the Main Part should be interpreted in line with paragraph 7.4 of the PLA has no traction when the very different provenance of those two provisions is considered. When the PLA was made a part of the CTRM Contract, which was for the provision of the design and installation of software including the copyrighted material, the formula used in article 12.3 cannot simply be assimilated to that in paragraph 7.4 of the PLA. It is likely to have been independently negotiated in a format appropriate for the CTRM Contract. There is no basis for the suggestion that the same terms as to liability should be included in a customised contract as were included in a standard form contract. In a customised contract the customer has the ability to negotiate a better deal than a person who is simply offered a standard form contract. Moreover, the principal concern of a person taking a licence from Triple Point would be the warranties as to merchantability and quality of the software (and so on) being licenced. In that context, negligence as an independent tort is not a relevant consideration.

66. Mr Howells made a point about the creation of perverse incentives. He submits that the cap was framed around the contract price received by Triple Point. This framing had the effect of incentivising Triple Point to delay the performance of its obligations and the more liquidated damages PTT became entitled to the less the amount available to pay damages for other breaches. That, submits Mr Howells, might have been a reason why PTT would have been concerned to exclude negligence from the limitation of liability.

67. I would not give weight to that submission as there is no evidence about the aims of both parties in framing the cap carve-out as they did. It is clear that Triple Point wanted to have a limitation of liability and one can well understand that the design and installation of software can give rise to claims by the client for compensation for loss and damage: for example, the new software may be said to be incompatible with other software of the client. This could no doubt happen without any lack of skill and care, but it may be entirely different if a defect occurs through

lack of skill and care. Be that as it may, there was no evidence about the parties' aim in agreeing to the cap carve-out.

Conclusion on Issue 2

68. In my judgment the cap carve-out in the final sentence of article 12.3 for all the reasons given above should be given its natural and ordinary meaning of removing from the cap all damages for negligence on Triple Point's part, including damages for negligent breach of contract. That means that in my judgment the judge and the Court of Appeal were wrong to treat damages for breach of the contractual duty of skill and care as subject to the cap in article 12.3 of the Main Part of the CTRM Contract.

Issue 3: The capping of liquidated damages issue - Are liquidated damages subject to the cap in article 12.3?

69. The issue here is helpfully explained in the following passage from the judgment of Sir Rupert Jackson, who also sets out the Court of Appeal's answer to it, which differed from that of the judge (judgment, paras 272 to 275):

> "123. The final question is whether liquidated damages for delay fall outside the article 12.3 cap as the judge has held. On this issue Mr Howells supports the judge's reasoning and Mr Stafford attacks it.
>
> 124. Mr Stafford submits that sentence 3 is a separate provision from sentence 2. He bases this argument on the reference to 'the services or deliverables related to the breach' at the end of sentence 3. He submits that sentence 3 is making provision for specific breaches of contract, each of which will have a lower damages cap than the total liability cap imposed by sentence 2. Therefore, says Mr Stafford, the exception in sentence 3 for 'specific remedies expressly identified as such in this contract' has no application to the general cap imposed by sentence 2.
>
> 125. Mr Howells rejects that analysis. He points out that under article 18 the contract price was payable by reference to milestones, not by reference to services or deliverables. He submits that sentences 2 and 3 must be read together. Sentence 3 amplifies sentence 2 and provides further details. Therefore,

the exception in sentence 3 applies also to the cap imposed by sentence 2.

126. Both counsel accept that there are difficulties with the second and third sentences of article 12.3, whichever interpretation is correct. I have come to the conclusion that the appellant's construction is preferable. Sentence 3 is dealing with specific remedies for individual breaches. Each breach is subject to its own individual mini-cap. I agree that precise calculation of an individual mini-cap will not be easy because of the way in which the contract price is structured, but it will be possible to make a reasonable assessment. For obvious reasons, sentence 3 cannot apply to delays. Unlike defects, delays cannot usually be 'cured' by the contractor. Furthermore, delays cannot be valued in the same way as defects. So there is a formula elsewhere, namely in clause 5.3, for valuing delays. Accordingly sentence 3 of article 12.3 contains a specific exclusion for delay breaches. Sentence 2 is talking about something different from sentence 3, namely the cap on the contactor's total liability for all breaches.

127. In my view, the way in which the contract works is this:

> (i) Article 5.3 provides a formula for quantifying damages for delay.
>
> (ii) Sentence 3 of article 12.3 deals with breaches of contract not involving delay. Hence sentence 3 necessarily includes the words 'Except for the specific remedies expressly identified as such in this contract'. It is common ground that this phrase refers to liquidated damages under article 5.3. Sentence 3 of article 12.3 imposes a cap on the recoverable damages for each individual breach of contract.
>
> (iii) Sentence 2 of article 12.3 imposes an overall cap on the contractor's *total* liability. That cap on total liability means what it says. It encompasses damages for defects, damages for delay and damages for any other breaches …"

70. Mr Howells seeks to persuade the Court that the judge was right and that liquidated damages are outside the cap. In particular, he submits that the liquidated damages for delay cannot be correlated with any portion of the Contract Price as required by the second sentence.

71. In my judgment, the reasoning of the Court of Appeal is correct. I agree with the Court of Appeal that a reasonable assessment can be made of the relevant part of the price. I do not accept that the exception for special remedies in the third sentence extends to the second sentence dealing with the global cap. On my interpretation, the second and third sentences of article 12.3 serve separate functions and are in logical order. First there is a limitation on liability and, second, there is a limitation on the form of remedy. The limitation on the form of remedy contains an exception for special remedies under the contract, of which the liquidated damages clause would be one. But that does not mean to say that the same exception should be written into the limitation on liability. Accordingly, I would reject PTT's appeal on this point.

Conclusion on the three issues on this appeal

72. I would allow this appeal in part. For the reasons given above, I conclude on Issue 1 (the availability of liquidated damages issue), that the Court of Appeal fell into error in being guided by the decision of the House of Lords in *Glanzstoff* because of the similarity in wording. This decision was not binding on them in that respect. I would accordingly allow the appeal on Issue 1. On Issue 2 (the scope of negligence issue), I would also allow the appeal. The exclusion from the cap should be given its ordinary meaning and not a strained meaning. A strained meaning is not justified in fact by the argument that the exclusion of damages for negligent breach of contract from the cap would then emasculate the cap. The important obligations about meeting the specifications for functionality and other absolute obligations in the CTRM Contract meant that liability for negligent breach of contract was not the core obligation of Triple Point under the CTRM Contract. Had the position been otherwise, that would have supported reading the reference to negligence in the cap carve-out as limited to the independent tort of negligence. On Issue 3 (the capping of liquidated damages), I would dismiss the appeal. The Court of Appeal were right to say that the cap embraced liquidated damages so that they counted towards the maximum damages recoverable under the cap.

LORD LEGGATT: (with whom Lord Burrows agrees)

73. I agree with Lady Arden that the appeal should be allowed for the reasons she gives but wish to add reasons of my own for reaching this conclusion.

Liquidated damages

74. A liquidated damages clause is a clause in a contract which stipulates what amount of money will be payable as damages for loss caused by a breach of the contract irrespective of what loss may actually be suffered if a breach of the relevant kind (typically, delay in performance of the contract) occurs. Liquidated damages clauses are a standard feature of major construction and engineering contracts and commonly provide for damages to be payable at a specified rate for each week or day of delay in the completion of work by the contractor after the contractual completion date has passed. Such a clause serves two useful purposes. First, 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. Second, 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.

The approach of the Court of Appeal

75. In his judgment in the Court of Appeal (with which Lewison and Floyd LJJ agreed), Sir Rupert Jackson reviewed a series of cases in which courts have decided whether liquidated damages were payable in circumstances where the contract was terminated before the work had been completed: see [2019] EWCA Civ 230; [2019] 1 WLR 3549, paras 76-111. He divided the cases (at para 106) into three groups, according to whether the court concluded that:

(a) the clause in question did not apply to any period of delay in completion of the work;

(b) the clause applied to any period of delay up to the date of termination of the contract; or

(c) the clause continued to apply even after the termination of the contract until the work was completed by another contractor.

76. Sir Rupert Jackson concluded that the category into which a particular clause falls must depend upon the wording of the clause itself (para 110). That must clearly be correct. He also expressed views, however, about the inherent likelihood that parties to a construction contract (or, as in this case, software engineering contract) would intend a liquidated damages clause to operate in one or another of the three

possible ways he had identified. He said he had doubts about the cases in category (iii) as, if those cases were correct, the result would be that the employer and the second contractor could control the period for which liquidated damages will run (para 108). As regards category (i), Sir Rupert Jackson said that he saw much force in the reasoning of the House of Lords in the Scottish case of *British Glanzstoff Manufacturing Co Ltd v General Accident, Fire and Life Assurance Corpn Ltd* [1913] AC 143; 1913 SC (HL) 1 (para 109). He also said that the "*Glanzstoff* principle" cannot be confined to cases where - as happened in *Glanzstoff* itself - the contract was terminated before the due date for completion of the work (para 107). He drew an analogy with the clause in *Glanzstoff* when he came to interpret the liquidated damages clause at issue in the present case (para 112).

77. I agree with Lady Arden that *Glanzstoff* is not authority for any legal principle (in either Scottish or English law). As Viscount Haldane LC said in giving the principal speech in that case: "What we have to determine is a matter of pure construction." What the House of Lords decided, affirming the decision of the Court of Session, was that, on the correct interpretation of the contract in question, the liquidated damages clause did not apply to delay in completing the works which occurred after the employer had exercised its contractual right to take possession of the works and engage another contractor to complete them. The damages recoverable in that situation were governed by another clause in the contract which, in the words of Viscount Haldane, "constitutes an enclave in the contract by itself providing for a special remedy": see 1913 SC (HL) 1 at p 2. As already mentioned, on the facts of *Glanzstoff*, the contract had been terminated before the date for completion of the work had arrived. No liquidated damages were therefore payable for the simple reason that no default by the contractor which gave rise to a liability to pay liquidated damages ever occurred. It is true that Viscount Haldane said of the liquidated damages clause in *Glanzstoff* (at p 3) that:

> "upon its construction I read it as meaning that if the contractors have actually completed the works, but have been late in completing the works, then, and in that case only, the clause applies." (Emphasis added)

However, the House of Lords was not contemplating a situation in which the contractors, having failed to complete the works by the due date, were then ousted from the contract by the employer before they had completed the works. No reason was given for supposing that, in such a situation, the contractors would not have been liable to pay liquidated damages for the delay which had already occurred before the contract was terminated, and I cannot think that Viscount Haldane (whose speech was given ex tempore at the conclusion of the appellant's argument) had such a situation in mind. In any event, in the absence of any reasoning to support such a conclusion, no weight should in my view be attached to his remark.

78. Sir Rupert Jackson acknowledged that a conclusion that a liquidated damages clause applies up to the termination of the contract - his category (ii) - is generally treated as the "orthodox analysis" but he suggested that this approach "is not free from difficulty" (para 110). That is because:

> "If a construction contract is abandoned or terminated, the employer is in new territory for which the liquidated damages clause may not have made provision. Although accrued rights must be protected, it may sometimes be artificial and inconsistent with the parties' agreement to categorise the employer's losses as £x per week up to a specified date and then general damages thereafter. It may be more logical and more consonant with the parties' bargain to assess the employer's total losses flowing from the abandonment or termination, applying the ordinary rules for assessing damages for breach of contract."

79. I confess to having difficulty with this reasoning. I agree that, if a construction contract is abandoned or terminated, the employer is thereafter in new territory for which the liquidated damages clause may not have made provision. However, as Sir Rupert Jackson acknowledged in saying that "accrued rights must be protected", the effect in law of termination of a contract on the parties' rights and obligations is prospective only. In other words, subject to contrary agreement, the parties are discharged from their obligations under the contract which would otherwise arise after termination but not those which have arisen before: see eg Burrows, *A Restatement of the English Law of Contract*, 2nd ed (2020), section 19(4). In principle, therefore, where at the time of termination delay for which liquidated damages are payable has already occurred, there is no reason - in law or in justice - why termination of the contract should deprive the employer of its right to recover such damages, unless the contract clearly provides for this. The fact that, if the employer were deprived of that right, only one assessment of damages for delay would be required instead of two does not seem to me a good reason. Moreover, the last sentence of the passage quoted above appears to overlook the fact that losses caused by breaches occurring before the contract is abandoned or terminated are not part of the employer's total losses flowing from the abandonment or termination. There is therefore nothing illogical in quantifying the damages for them separately. Whether it is inconsistent with the parties' agreement to do so begs the question of what they have agreed.

80. In addition to the ordinary effect of termination on the parties' rights and obligations, I agree with Lady Arden that there are cogent commercial reasons why parties who include a liquidated damages clause in their contract would be unlikely to intend the employer's right to receive such damages for delay by the contractor to be conditional upon the contractor actually completing the work. In the first place,

if the parties wish to obtain the benefits of a liquidated damages clause mentioned at the start of this judgment, I can see no reason why, in the event that the contract is terminated before the work is completed, they would wish to forgo those benefits of certainty, simplicity and efficiency in quantifying the damages in relation to delay which has already occurred. Indeed, making the right to liquidated damages for delay by the contractor conditional upon the contractor completing the work would itself introduce considerable uncertainty at the time of contracting about what sum would be recoverable if delay occurs and would thus deprive the parties of the advantage of being able to know their financial exposure from this risk in advance.

81. Secondly and still more importantly, a clause which had this effect would give a contractor who badly overruns the time specified for completion an incentive not to complete the work in order to avoid paying liquidated damages for the delay which its breach of contract has caused. It makes no sense to create such an incentive. As Lord Skerrington said in *Cameron-Head v Cameron & Co* 1919 SC 627, p 636 - a case in which it was argued, relying on *Glanzstoff*, that a sum payable per day by purchasers of timber "until [the work of clearing the timber] was done" could not be recovered unless and until the work had been completed:

> "It was suggested that the purchasers had it in their power to reduce this stipulation to a mere nullity, because they had only to be bold enough to throw up the contract and say that they would not fulfil it in order to relieve themselves of it. … The purpose which the parties had in view would be defeated, if the penalty could not be exacted immediately but was to be payable only if and when the purchasers thought fit to complete their contract."

See also Davie M and Dowers N, "The Court of Appeal's Look North for a Solution Goes South: Liquidated Damages and Termination in *Triple Point Technology v PTT*", (2019) 23(3) Edin LR 395, 400. While this point assumes that the right to be paid liquidated damages is beneficial to the employer, if the parties have agreed a low rate which favours the contractor, the same point applies in reverse.

82. I recognise that judges whose experience of entering into contracts of the kind under consideration is entirely vicarious need to be cautious in expressing views that a particular type of arrangement would not make commercial sense, especially if the arrangement is in fact commonly adopted. I therefore thought it would be a useful cross-check to ask counsel for Triple Point if, after the hearing, they could give an example of a standard form of contract which provides that liquidated damages for delay will be payable only if the contractor actually completes the work. The example they produced was the 2017 FIDIC Conditions of Contract for Plant & Design Build (the Yellow Book). However, clause 15.4(c) of these conditions

provides that, where the contract is terminated for the contractor's default, liquidated damages are payable for every day that has elapsed between the due date for completion of the works and the date of termination; see also Inns D & Touhey K, "Liquidated damages for delay after termination: until completion do us part?" (2019) 35(4) Const LJ 221 at 232. In other words, this is an example of the "orthodox" approach. The fact that no standard clause could be found which falls into Sir Rupert Jackson's category (i) reinforces my view that such a clause is not one which parties to a commercial contract would think it sensible to choose.

83. What of a clause in category (iii) which continues to apply even after the termination of the contract until the work is completed by another contractor? In *Hall v Van der Heiden* [2010] EWHC 586 (TCC), para 76, Coulson J rejected the suggestion that the defendant's liability to pay liquidated damages came to an end when his employment under the contract was terminated. Coulson J said:

> "Any such term would reward the defendant for his own default. Take the example of a contractor who has wholly failed to comply with the contract, is in considerable delay, and is facing a notice of termination. The defendant's case would mean that such a contractor was only liable to pay liquidated damages for delay before the decision was taken to terminate, thereby penalising the employer for trying to get the works completed by another contractor, and rewarding the contractor for sitting on his hands and failing to carry out the works in accordance with the programme."

84. As Sir Rupert Jackson pointed out, this decision has been criticised: [2019] EWCA Civ 230; [2019] 1 WLR 3549, para 100, citing as an example *Hudson's Building and Engineering Contracts*, 13th ed (2015), p 733, fn 156 (now 14th ed (2020), para 6-023, fn 161). One criticism that has been made is that the reasoning reveals a misapprehension that, in the absence of a claim under the liquidated damages clause, the claimant would have had had no claim for damages for delay: see McKendrick E, "Liquidated Damages, Delay and the Termination of Contracts", (2019) 8 JBL 577 at 587. However, I see no reason to think that Coulson J made such an elementary error. I am sure that what he had in mind was the difficulty of proving and quantifying loss caused by delay and the fact that a right to damages at the agreed rate of £700 per week in *Hall* was - as is often the position - patently far more advantageous to the employer than a claim for damages at common law (under which the only damages recoverable in *Hall* would have been a much smaller sum in storage costs). As I understand it, the point that Coulson J was making was that cutting off liquidated damages at the date of termination rewards the contractor for the fact that its default has led to the contract being terminated before the work has been completed by relieving it of further liability to pay damages at the agreed rate.

85. While this is a relevant consideration, a clause under which liquidated damages cease to run at the date of termination cannot be said to reward the contractor for its default to an extent comparable to a clause which makes recovery of any liquidated damages for delay, including past delay, conditional upon whether the contractor chooses to complete the work. Any such factor also has to be set against the point made by Sir Rupert Jackson that, after the contract has been terminated, the time taken to complete the work is entirely outside the control of the original contractor. As Professor McKendrick has observed, it is possible that the risk which this poses for the contractor could be mitigated by making clear in the clause itself that the liability to pay liquidated damages will only arise post-termination if the employer and any replacement contractor complete the works in a timely, efficient and cost-effective manner: see 8 JBL 577, 593. But without some protection of this kind, it seems unlikely that a contractor would put itself at the mercy of the employer by agreeing that liquidated damages should continue to run after the termination of the contract.

86. I conclude that it is ordinarily to be expected that, unless the clause clearly provides otherwise, a liquidated damages clause will apply to any period of delay in completing the work up to, but not beyond, the date of termination of the contract.

The liquidated damages clause in this case

87. The relevant clause of the CTRM Contract is the third paragraph of article 5 (referred to for convenience as "article 5.3"), which states:

> "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)

It is common ground on this appeal that, although the sum payable is referred to as "the penalty", the clause is not a penalty clause but a clause providing for the payment of liquidated damages.

88. Much money potentially turns on the meaning of this clause. The relevant facts are that Triple Point completed Stages 1 and 2 of Phase 1 of the project 149 days late but did not complete any of the further seven Stages of Phase 1 nor any of the nine Stages of Phase 2 by the due dates or at all before the CTRM Contract was terminated. If (as the judge held and PTT contends) liquidated damages are payable

for the delay up to the date of termination in delivering all the uncompleted work (a total period of 3,220 days), the sum recoverable is US$3,459,278.40. If on the other hand (as the Court of Appeal held and Triple Point contends) liquidated damages are payable only for the delay of 149 days in completing the work which Triple Point actually did complete, then the liquidated damages which Triple Point is liable to pay are only US$154,662.

89. The meaning and effect of article 5.3 is in my view reasonably straightforward. Where the two conditions specified in the opening words are met - that is, (1) the Contractor fails to deliver work within the time specified, and (2) the delay has not been introduced by PTT, then liquidated damages are payable for each day of delay from the due date for delivery of any item of work up to the date when PTT accepts the work.

90. It could not reasonably have been intended that, if PTT unjustifiably refuses to accept completed work, liquidated damages should continue to accrue until PTT chooses to accept the work, and it is not suggested that the clause has that effect. It seems to me that, on the wording of the clause, the way in which such a consequence is avoided is that any delay in accepting work after it has been completed would be delay "introduced by PTT". Hence Triple Point would not be liable to pay the specified sum in respect of any such period.

91. PTT has not sought to argue that article 5.3 continued to apply after the contract was terminated. (Nor in fact did PTT claim any unliquidated damages in relation to the further time taken for another contractor to complete the work after that date.) In light of the considerations discussed above, the term "delay" would in my view reasonably be understood to refer to delay by the Contractor - that is to say, any period of time when the Contractor is under an obligation to deliver work with which it has failed to comply. Accordingly, if the Contractor ceases to be under an obligation to deliver work because the Contractor is discharged from that obligation by the termination of the contract, no further liability to pay the sum payable for each day of delay in the performance of that obligation will arise. However, termination of the contract will not affect the liability of Triple Point to pay liquidated damages for each day of delay in the performance of its obligation to deliver work under the contract which had already occurred before the contract was terminated.

92. The interpretation of article 5.3 contended for by Triple Point and accepted by the Court of Appeal is that, if Triple Point never completes the work because for example, as happened in this case, PTT terminates the contract lawfully because of Triple Point's repudiatory breach, then there never is a date when PTT accepts the work and in these circumstances the liability to pay liquidated damages has no application. This interpretation seems to me to have the double disadvantage of

being inconsistent with both the language and the commercial purpose of the clause. It is inconsistent with the language because the clause specifies the conditions which must be met in order for liability to pay liquidated damages to arise, and acceptance of the work by PTT is not one of them. The clause does not say that the Contractor shall be liable to pay the agreed sum for each day of delay provided that PTT accepts the work, or anything of that kind. It simply makes the Contractor liable to pay that sum for each day of delay up to the date PTT accepts the work. This carries no implication that the Contractor will not have a liability to pay liquidated damages for delay unless such a date arrives. To the contrary, the clause clearly signifies that, provided the two stated conditions are met, the liability to pay the agreed sum for each day of delay will run from the due date of delivery and will go on running until the work is accepted. That is the effect of the clause, no more and no less. If the contract is terminated, the liability to pay liquidated damages stops running, not because the end date specified in the clause has been reached, but because Triple Point ceases to be under an obligation to deliver work with which it is failing to comply.

93. The interpretation for which Triple Point contends is also inconsistent with the purpose of the clause for the reasons given at paras 80-81 above. In short, the purpose of agreeing in advance on a sum payable as liquidated damages for each day of delay caused by the contractor would be defeated if the stipulated sum was payable only if and when the contractor chose to complete the contract.

94. It was submitted by Mr Paul Darling QC, who argued this issue for Triple Point, that it may not be possible before work has been completed to determine what, if any, part of a period of delay in completing the work has been caused by PTT and is therefore not delay for which Triple Point is liable to pay liquidated damages. The suggestion was that reasonable parties would be unlikely in these circumstances to intend that liquidated damages should be payable unless and until a defined stage of the work has been completed. I am not persuaded by this argument. I accept that, if the contract is terminated after the due date for completion of work but before the relevant work has been completed, it may be impossible to know with any certainty when, if the contract had not been terminated, the work would have been completed and what part, if any, of the overall period of delay would have been caused by the employer. But that is not the relevant question. The relevant question is what part of the delay which has occurred between the due date for completion and the date of termination has in fact been caused by the employer. That does not depend on what would have happened thereafter. In any case, to the extent that there may be difficulties in proving to what extent delay has been caused by the employer, those difficulties would equally exist if the quantum of damages was at large and are not a reason to infer that, where a period of delay not caused by the employer has been established, the parties would not want the damages to be quantified on the basis of an agreed daily rate and would instead want them to be unliquidated.

95. Accordingly, I would reject Triple Point's contention that it is not liable under article 5.3 to pay liquidated damages for the periods of delay which occurred between the due dates for delivery of work and the termination of the contract (none of which on the judge's findings were introduced by PTT). It follows that - subject to the issues about the correct interpretation of article 12.3 of the CTRM Contract to which I am about to turn - PTT is entitled to recover liquidated damages under article 5.3 in the amount of US$3,459,278.40 assessed by the judge.

The meaning of article 12.3

96. Article 12.3 (with the four sentences separated and numbered for convenience) provides as follows:

> "1. CONTRACTOR shall be liable to PTT for any damage suffered by PTT as a consequence of CONTRACTOR's breach of contract, including software defects or inability to perform 'Fully Complies' or 'Partially Complies' functionalities as illustrated in Section 24 of Part III Project and Services.
>
> 2. The total liability of CONTRACTOR to PTT under the Contract shall be limited to the Contract Price received by CONTRACTOR with respect to the services or deliverables involved under this Contract.
>
> 3. Except for the specific remedies expressly identified as such in this Contract, PTT's exclusive remedy for any claim arising out of this Contract will be for CONTRACTOR, upon receipt of written notice, to use best endeavor to cure the breach at its expense, or failing that, to return the fees paid to CONTRACTOR for the Services or Deliverables related to the breach.
>
> 4. This limitation of liability shall not apply to CONTRACTOR's liability resulting from fraud, negligence, gross negligence or wilful misconduct of CONTRACTOR or any of its officers, employees or agents."

97. The first point to make about this clause is that, as is clear from the first sentence onwards, the clause is concerned only with the liability of the Contractor for any damage suffered by PTT as a consequence of the Contractor's breach of contract. It does not apply to any extra-contractual liability which the Contractor

might incur under the law of tort. Although the words "arising out of this Contract" in sentence 3 might in some contexts (such as an arbitration clause) be construed more widely to include other claims arising out of the parties' relationship, it is apparent from the later part of sentence 3 that it is concerned only with remedies for breach of contract. Like the rest of the clause, therefore, sentence 3 is dealing only with liability under the law of contract and not with liability in tort.

The relationship of sentences 2 and 3

98. It is common ground that sentences 2 and 3 of article 12.3 need to be read together in that they together constitute the "limitation of liability" referred to in sentence 4. PTT seeks to take this interrelationship a stage further, however, by arguing that the exception for "the specific remedies expressly identified as such in this Contract" at the start of sentence 3 also qualifies sentence 2. I agree with Lady Arden that this argument can be disposed of shortly, as there is simply no justification for rewriting the contract in such a way. The exception for specific remedies is needed in order to preserve, in particular, the remedy of liquidated damages for delay in the delivery of work provided by article 5.3. The remedy of returning the fees paid to the Contractor is not apposite to such a breach, as it is only once work has been delivered that fees are payable for it. By contrast, it makes perfectly good sense for the parties, if they choose to do so, to agree separately to impose a cap on the Contractor's total liability under the contract which includes any liability to pay liquidated damages. It is clear from the wording of the clause that this is indeed what the parties have done - subject to the exception in sentence 4.

The meaning of "negligence" in sentence 4

99. The principal dispute in relation to article 12.3 is whether the word "negligence" in sentence 4 refers to breach of a contractual duty of care (as PTT contends) or to breach of a duty of care in tort which does not give rise to a concurrent liability for breach of contract (as the judge and the Court of Appeal held).

100. The starting point must be that, as the judge observed, any breach of an obligation to exercise reasonable care and skill would, in common legal language, be called "negligence", whether the source of the obligation is a term of the contract or the law of tort: see [2017] EWHC 2178 (TCC), para 258. On a straightforward reading of article 12.3, therefore, liability resulting from breach of a contractual duty of care falls within the exception for "liability resulting from … negligence" established by sentence 4. Hence such liability is not subject to the limitation on the liability of Triple Point to PTT.

101. A further, compelling reason for giving the word "negligence" in article 12.3 its straightforward and ordinary legal meaning is that, as already noted, article 12.3 only deals with liability for breach of the CTRM Contract and does not deal with liability in tort at all. It therefore makes no sense to interpret the word "negligence" in sentence 4 as referring to a basis of liability which is not part of the subject matter of the clause. The cap imposed in sentence 2 applies to the total liability of the Contractor under the CTRM Contract. It does not apply to any other liability which the Contractor might have independently of the CTRM Contract under the law of tort. The same applies to sentence 3 which, as already noted, deals with remedies for breaches of the CTRM Contract. Hence the only limitation of liability resulting from the Contractor's negligence which sentence 4 can disapply is liability resulting from breach of a contractual duty of care. Liability in tort does not enter the equation.

102. That is also consistent with the rest of sentence 4. The terms "gross negligence" and "wilful misconduct" are not, at least in common law systems, separate torts. It seems clear that those terms must be intended to describe, or at the very least to include, conduct which amounts to a breach of the contract. The same is true of "fraud". Although that term could be used to refer to claims in tort such as claims in the tort of deceit, it is apt also to refer to fraud which would entitle the innocent party to rescind the contract or fraud in the performance of the contract. It is anomalous to treat the term "negligence" as excluding negligent conduct which amounts to a breach of the contract when there is no similar restriction on the scope of the other terms in the list.

103. By contrast, the interpretation of the word "negligence" for which Triple Point contends is inconsistent not merely with the ordinary legal meaning of the word but with any meaning which the word can reasonably bear. I would certainly accept that the word "negligence" could in some contexts mean the tort of negligence - though, as stated, this is not a reasonable interpretation of the word in the context of a clause which does not apply to liability in tort at all. That is not, however, the meaning of the word for which Triple Point contends. If "negligence" in article 12.3 meant the tort of negligence, this might not be good enough for Triple Point and could produce illogical results. The reason is that, at any rate in English law, someone who provides services to another person generally owes that person a duty of care in tort whether or not the relationship between them is contractual and even if such a duty of care is also owed under the contract: see *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9; [2012] QB 44. In the present case a claim in tort would not have been governed by English law. Pursuant to article 4(1) of Regulation (EC) 864/2007 (Rome II), the applicable law would be that of the country where the damage occurred, which was probably Thailand where PTT carries on its business. However, if the applicable law were similar in this respect to English law, negligence in the performance of the "Services" (defined in article 1.2 of the CTRM Contract to mean "all activities rendered by [Triple Point] to PTT in connection with the Project")

would give rise to a concurrent liability in tort as well as under the contract. If the intention were to cap Triple Point's liability to PTT resulting from negligence in the performance of the contract, it would potentially defeat that intention to create an exception from the cap for liability for negligence in tort which arises concurrently with liability for breach of a contractual duty of care.

104. To avoid that result, Triple Point contends that the term "negligence" in sentence 4 of article 12.3 does not include want of care which gives rise to liability in tort if it also gives rise to liability for breach of the contract. I take the Court of Appeal to have accepted this contention in holding that "negligence" in sentence 4 of article 12.3 means "the freestanding tort of negligence": see [2019] EWCA Civ 230; [2019] 1 WLR 3549, para 119. The word "freestanding" was presumably intended to signify that the term "negligence" is confined to a negligent act or omission which is a breach of a duty of care owed in tort but is not also a breach of a duty of care arising under the contract.

105. The problem with this approach, however, is that it seeks to build into the word "negligence" a convoluted meaning which the word cannot reasonably bear. No reasonable person would understand the word "negligence" to mean negligence which is neither a breach of a contractual duty of care nor of a concurrent duty of care in tort. Still less is that a possible meaning when, as discussed above, the context in which the word is used is a clause dealing only with liability for breach of the contract and not with liability in tort at all - let alone with liability in tort which arises altogether outside the scope of the contract.

Clear words needed to restrict valuable rights

106. Even if the interpretation for which Triple Point contends were considered to be a possible meaning of the word, a further reason for giving the word "negligence" its straightforward and ordinary legal meaning is that clear words are necessary before the court will hold that a contract has taken away valuable rights or remedies which one of the parties to it would have had at common law (or pursuant to statute).

107. The approach of the courts to the interpretation of exclusion clauses (including clauses limiting liability) in commercial contracts has changed markedly in the last 50 years. Two forces have been at work. One has been the impact of the Unfair Contract Terms Act 1977, which provided a direct means of controlling unreasonable exclusion clauses and removed the need for courts to resort to artificial rules of interpretation to get around them: see Lord Denning's swansong in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 296-301; and *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8; [2002] 1 AC 251, paras 57-60 (Lord Hoffmann). This change of attitude was heralded by the

decision of the House of Lords in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827. The second force has been the development of the modern approach in English law to contractual interpretation, with its emphasis on context and objective meaning and deprecation of special "rules" of interpretation - encapsulated by Lord Hoffmann's announcement in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912 that "almost all the old intellectual baggage of 'legal' interpretation has been discarded".

108. The modern view is accordingly to recognise that commercial parties are free to make their own bargains and allocate risks as they think fit, and that the task of the court is to interpret the words used fairly applying the ordinary methods of contractual interpretation. It also remains necessary, however, to recognise that a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law (and often now codified in statute). These comprise duties imposed by the law of tort and also norms of commerce which have come to be recognised as ordinary incidents of particular types of contract or relationship and which often take the form of terms implied in the contract by law. Although its strength will vary according to the circumstances of the case, the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from these normal rights and obligations.

109. The first and still perhaps the leading statement of this principle is that in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689 ("*Gilbert-Ash*"). The question was whether the parties to a building contract had agreed to exclude the contractor's common law and statutory right to set off claims for breach of warranty against the price. The right allegedly excluded was thus one which would diminish the value of the claim otherwise maintainable against the contractor. Lord Diplock said (at 717H):

> "It is, of course, open to parties to a contract for sale of goods or for work and labour or for both to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law … But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption."

In *Photo Production* [1980] AC 827, 850-851, Lord Diplock returned to this principle and explained its rationale more fully:

> "Since the presumption is that the parties by entering into the contract intended to accept the implied obligations exclusion clauses are to be construed strictly and the degree of strictness appropriate to be applied to their construction may properly depend upon the extent to which they involve departure from the implied obligations. Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear. But this does not entitle the court to reject the exclusion clause, however unreasonable the court itself may think it is, if the words are clear and fairly susceptible of one meaning only." (Emphasis added)

110. Many further authoritative statements of this principle are quoted in Lewison, *The Interpretation of Contracts*, 7th ed (2020), chapter 12, section 20: see eg *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] AC 199, 208C (Lord Jauncey of Tullichettle); *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574, 585 (Lord Goff of Chieveley); *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6; [2003] 1 All ER (Comm) 349, para 11 (Lord Bingham of Cornhill); *Bahamas Oil Refining Co International Ltd v Owners of the Cape Bari Tankschiffahrts GMBH & Co KG* [2016] UKPC 20; [2017] 1 All ER (Comm) 189, para 31 (Lord Clarke). Notable statements of the principle are also contained in several judgments of Moore-Bick LJ in the Court of Appeal. In *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75; [2010] QB 27, para 23, he said:

> "The court is unlikely to be satisfied that a party to a contract has abandoned valuable rights arising by operation of law unless the terms of the contract make it sufficiently clear that that was intended. The more valuable the right, the clearer the language will need to be."

See also *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ 429; [2008] 2 Lloyd's Rep 216, para 20; and *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691; [2011] 1 All ER (Comm) 1077, paras 27-29. In *Seadrill* at para 29, Moore-Bick LJ described the principle as "essentially one of common

sense; parties do not normally give up valuable rights without making it clear that they intend to do so".

111. To the extent that the process has not been completed already, old and outmoded formulas such as the three-limb test in *Canada Steamship Lines Ltd v The King* [1952] AC 192, 208, and the "contra proferentem" rule are steadily losing their last vestiges of independent authority and being subsumed within the wider *Gilbert-Ash* principle. As Andrew Burrows QC, sitting as a Deputy High Court Judge, said in *Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2019] EWHC 347 (Comm); [2019] 1 CLC 207, para 34(iii):

> "Applying the modern approach, the force of what was the *contra proferentem* rule is embraced by recognising that a party is unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words. And as Moore-Bick LJ put it in the *Stocznia* case, at para 23, 'The more valuable the right, the clearer the language will need to be'. So, for example, clear words will generally be needed before a court will conclude that the agreement excludes a party's liability for its own negligence."

See also Peel E, "Whither Contract Proferentem?" in Burrows and Peel (eds), *Contract Terms* (2007), chapter 4; and Foxton D, "The Status of the Special Rules of Construction of Exemption Clauses in Commercial Contracts" (2021) JBL 205.

112. In *Seadrill* and in *JP Morgan Chase Bank* the obligation allegedly excluded by a clause in the contract was in each case an aspect of the obligation implied by law - originally at common law and now by section 13 of the Supply of Goods and Services Act 1982 - in a contract to supply services that the supplier will carry out the service with reasonable care and skill. In each case, applying the *Gilbert-Ash* principle, it was held that clear wording would be needed to exclude this obligation and that there was no such clear wording. Affirming the decision of the deputy judge in *Federal Republic of Nigeria v JP Morgan Chase Bank NA* [2019] EWCA Civ 1641; [2019] 2 CLC 559, para 40, Rose LJ (with whom Baker LJ and Sir Bernard Rix agreed) said that the duty to exercise reasonable care and skill in the services provided (in that case by a bank to its customer) can "properly be described as one of the incidents which the law ordinarily attaches to the relationship" and is "a duty which is inherent in that relationship". Those descriptions well express the doctrine that many types of contract are regarded as having certain ordinary incidents, derived from the nature of the relationship they create, which inform the interpretation of the contract and which clear words are required to displace.

113. In the present case it was likewise an obligation implied by law in the CTRM Contract, in so far as it involved the supply of services, that Triple Point should carry out those services with reasonable care and skill. The parties have not sought to exclude that obligation from arising. Indeed, they have positively reinforced it by article 12.1. The extent of the departure from the ordinary remedy of damages for loss resulting from breach of that obligation which applying the liability cap would involve is illustrated by the potential financial impact of such a conclusion in the present case. On the judge's findings, negligence of Triple Point in the performance of the Services gave rise prima facie to a liability to pay damages to PTT in a sum of US$14,664,035.18. This amount comprises the cost of procuring an alternative system quantified at US$10,574,756.78, wasted costs of US$630,000 and the liquidated damages for delay of US$3,459,278.40 referred to at para 95 above. If, however, the limitation of liability contained in article 12.3 applies to negligence in the performance of the Services, the total liability of Triple Point is limited to the sum of US$1,038,000. Hence declining to interpret the term "negligence" in sentence 4 as bearing its ordinary legal meaning would involve a substantial departure from the obligations implied by law in a contract of the present kind.

Triple Point's argument

114. The argument which persuaded the Court of Appeal that the word "negligence" in sentence 4 of article 12.3 should not be given its straightforward meaning of a failure to exercise reasonable care and skill in the performance of the Services was that, on that basis, sentence 4 "would take away almost the entire protection afforded by the cap" and "deprive the … cap of any practical effect": see [2019] EWCA Civ 230; [2019] 1 WLR 3549, paras 117 and 121.

115. In my view, there are at least four flaws in this argument. First, as already indicated, the alternative meaning for which Triple Point contends - that the word "negligence" in sentence 4 of article 12.3 refers to negligence altogether outside the scope of the contract - is, in my view, not merely contrary to the ordinary legal meaning of the word "negligence" but is not a meaning which the term can reasonably bear.

116. Second, as Lady Arden has shown, the argument in any case exaggerates the effect of giving the term "negligence" its ordinary legal meaning. As well as agreeing to supply services, Triple Point also agreed to provide what are referred to in article 12.3 as "Deliverables" consisting in software which complied with contractual specifications. This aspect of the contract imported obligations which were strict and not just duties of care. While it is true, therefore, that giving the term "negligence" in sentence 4 its ordinary legal meaning creates a significant exception to the limitation of liability in article 12.3, it is going too far to say that it takes away "almost the entire protection" afforded by the cap or that it deprives the cap "of any

practical effect". The clause still has the practical effect of limiting the liability of Triple Point for breach of any of the numerous obligations of result referred to by Lady Arden at para 54 of her judgment.

117. Third, Triple Point's argument would have more to commend it if, conversely, restricting the "negligence" referred to in sentence 4 to negligence outside the scope of the contract left the term with some meaningful content. However, as Lady Arden has also shown, it empties the term of any meaningful content. Several attempts have been made to come up with an example of a liability in tort outside the scope of the contract that reasonable parties could credibly have been seeking to preserve. None of the examples suggested seems to me to describe a scenario which might realistically have been a source of concern that would explain the decision to exclude liability for "negligence" from the cap. Moreover, even if any of the examples suggested is considered realistic, the exception would anyway have no content or practical effect as the cap does not apply to liability other than liability under the contract.

118. Like Lady Arden, I do not consider that Triple Point gets any assistance from comparing sentence 4 of article 12.3 with clause 7.4 of Triple Point's standard Licence Agreement, which formed part of the CTRM Contract. Clause 7.4 of the Licence Agreement limits "the aggregate liability of Triple Point for damages from any cause of action whatsoever" to the fees paid to Triple Point under the agreement, except for "such damages caused by fraud, gross negligence and wilful misconduct." Far from assisting Triple Point, the fact that the exception in this standard term does not refer to "negligence" serves to show that the term "negligence" has been deliberately added in article 12.3 which is a bespoke clause (and is the relevant clause in this case because it is contained in the main contract which covered the implementation of the software system which Triple Point agreed to supply). It is not to be supposed that reasonable parties would have gone to the trouble of altering the wording of a standard clause in a way that was utterly pointless.

119. Of more help to Triple Point, in my view, is the argument that the addition of "negligence" in article 12.3, if the term is given its ordinary legal meaning, makes the expression "gross negligence" redundant. I agree that it does have this result and that it would have been neater and better drafting simply to have deleted the word "gross". But arguments of this sort based on verbal surplusage in a commercial contract do not count for much. As Staughton LJ said in *Total Transport Corpn v Arcadia Petroleum Ltd* [1998] 1 Lloyd's Rep 351, 357:

> "It is well-established that the presumption against surplusage is of little value in the interpretation of commercial contracts."

Many authorities confirming that proposition are collected in Lewison, *The Interpretation of Contracts*, 7th ed (2020), chapter 7, section 3.

120. Fourth, the argument advanced by Triple Point, even if it otherwise had merit, fails to take account of the principle discussed above that clear words are needed to exclude or limit an obligation implied by law as an ordinary incident of a contract.

121. I therefore consider that no adequate reason has been shown for construing the contractor's "liability resulting from … negligence" which is expressly excepted from the cap on liability by sentence 4 of article 12.3 to mean liability resulting from negligence outside the contract which would in any case not be subject to the cap. On the contrary, the only reasonable meaning of these words is that the cap does not apply to liability resulting from negligence in the performance of the Services under the contract. It follows that the cap does not apply to the damages claimed by PTT in this case.

Conclusion

122. For these reasons in addition to those given by Lady Arden, I agree that the appeal should be allowed, with the result that PTT is entitled to recover the damages assessed by the judge in the total sum of US$14,664,035.18 without any limitation of liability.

LORD SALES: (part dissenting) (with whom Lord Hodge agrees)

123. I agree with the judgment of Lady Arden on the first and third issues in the appeal. I also agree with Lord Leggatt's reasoning on the first issue. I gratefully adopt Lady Arden's account of the facts and will use her terminology in this judgment.

124. The second issue relates to the interpretation of the word "negligence" in the fourth sentence of article 12.3 of the Main Part of the CTRM Contract between PTT and Triple Point. On that issue I have come to a different conclusion.

125. I agree with the judge (paras 261-262) and Sir Rupert Jackson and the other members of the Court of Appeal (paras 117-121) that the word "negligence", as used in that sentence, does not refer to negligence in the performance of Triple Point's obligations under the CTRM Contract. I think it is telling that four experienced judges have all come to this view with little hesitation. Sir Rupert Jackson, who has

great experience in dealing with contracts of this type, thought that the judge's conclusion was obviously correct.

126. The CTRM Contract was pulled together from a number of sources. Aspects of it are not well drafted. In particular, the fourth sentence of article 12.3 is not well expressed, whatever interpretation one gives to the word "negligence". This is a one-off provision and the question of law to which it gives rise has no wider significance than this case.

127. In my opinion, to understand article 12 four features of the CTRM Contract are of particular importance. First, the provisions of the Main Part are expressed to prevail where there is any conflict with other documentation pertaining to and forming part of the CTRM Contract: article 29 of the Main Part and clause 10.9 of the PLA. The Main Part is the primary source of the parties' rights and obligations. Secondly, the term "Services" is defined in article 1.2 of the Main Part in very wide terms: "all activities rendered by CONTRACTOR [ie Triple Point] to PTT in connection with the Project". As Lady Arden points out, this includes almost anything done by Triple Point under the CTRM Contract. Thirdly, article 12 appears in the section of the Main Part entitled "Performance Security and Liability", comprising articles 11 to 13. It is this section which defines the basic obligations of the parties in a manner which governs all aspects of the CTRM Contract. Fourthly, it is common ground that the CTRM Contract and the services provided under it were produced by customising Triple Point's standard software products and contractual terms: hence the use of the PLA, in modified form, as part of the CTRM Contract.

128. In the "Performance Security and Liability" section of the Main Part, article 11 imposes an obligation on Triple Point to furnish a performance security as a guarantee for the proper fulfilment of its obligations. Article 12 is headed "Liability and Responsibility" and deals with the obligations of Triple Point which are fundamental to performance of the CTRM Contract. Article 13 is headed "Indemnity" and sets out the obligation of each party (but with particular reference to Triple Point) to hold the other harmless in respect of liabilities the other may incur as a result of steps taken in implementation of the CTRM Contract.

129. Article 12 provides:

> "12.1 CONTRACTOR shall exercise all reasonable skill, care and diligence and efficiency in the performance of the Services under the Contract and carry out all his responsibilities in accordance with recognized international professional standards. The CONTRACTOR, his employees and sub-

> contractors, while in Thailand and/or other countries where the Services are being carried out, shall respect the law and customs of the respective countries. The CONTRACTOR shall replace employees and sub-contractors who commit serious violation of the laws of such countries with others of equal competence satisfactory to PTT at the expense of the CONTRACTOR.
>
> 12.2 CONTRACTOR's personnel, representatives, successors and permitted assignees shall not have the benefit, whether directly or indirectly, of any royalty on or of any gratuity of commission in respect of any patented or protected articles or process used on or for the purpose of the Contract unless it is mutually agreed in writing that CONTRACTOR shall have such benefit.
>
> 12.3 CONTRACTOR shall be liable to PTT for any damage suffered by PTT as a consequence of CONTRACTOR's breach of contract, including software defects or inability to perform 'Fully Complies' or 'Partially Complies' functionalities as illustrated in section 24 of Part III Project and Services. The total liability of CONTRACTOR to PTT under the Contract shall be limited to the Contract Price received by CONTRACTOR with respect to the services or deliverables involved under this Contract. Except for the specific remedies expressly identified as such in this Contract, PTT's exclusive remedy for any claim arising out of this Contract will be for CONTRACTOR, upon receipt of written notice, to use best endeavor to cure the breach at its expense, or failing that, to return the fees paid to CONTRACTOR for the Services or Deliverables related to the breach. This limitation of liability shall not apply to CONTRACTOR's liability resulting from fraud, negligence, gross negligence or wilful misconduct of CONTRACTOR or any of its officers, employees or agents."

130. The core obligation of Triple Point under the CTRM Contract is to exercise reasonable skill and care: article 12.1. The limitation of liability provisions set out in the second and third sentences of article 12.3, which form part of the same article, have to be read in that context. In my view, on a fair and straightforward reading of those sentences, they are intended to create a limitation of liability for Triple Point in respect of any breach of that core obligation, including to the extent that it may be reflected in a co-extensive duty of care in tort as contemplated in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145. The fourth sentence of article 12.3 naturally falls to be interpreted with that in mind.

131. Mr Howells QC for PTT makes a textual point which, taken out of context, would have force. He emphasises that the limitation of liability in both the second and third sentences of article 12.3 refers to the liability of Triple Point "under" or "arising out of" the CTRM Contract; therefore, he says, the fourth sentence should be taken to be referring to (and only to) liability of Triple Point for breach of the CTRM Contract and any co-extensive *Henderson v Merrett* duty of care, and not other forms of liability it may incur. It would be unnecessary to refer to other forms of liability, since the limitation of liability in the second and third sentences of article 12.3 does not apply to them. Alternatively, the fourth sentence should be taken to include reference to breaches of the CTRM Contract with particular qualities as set out there, even if it also includes reference to other forms of legal liability as well, making it clear for the avoidance of doubt as regards those other forms of liability that the limitation of liability in the provision does not apply to them. On either basis, Mr Howells submits, the fourth sentence of article 12.3 should be interpreted to mean that breaches of the CTRM Contract which have the quality of "negligence" do not fall within the scope of the limitation of liability in that article.

132. The immediate objection to this which the judge and the Court of Appeal regarded as insuperable is that this interpretation would have the practical effect of undoing what the parties obviously intended the limitation of liability provision should achieve, namely to limit Triple Point's liability for breach of its core obligation under the Contract to exercise reasonable skill and care in carrying out its tasks. By virtue of the definition of "Services" in article 1.2 of the Main Part and the priority given to the Main Part by virtue of article 29 of the Main Part and clause 10.9 of the PLA (in the modified form in which it is incorporated in the CTRM Contract), that is the standard of obligation which governs practically all of what Triple Point is required to do under the CTRM Contract. Breach of such an obligation may be described as "negligence", as a matter of ordinary legal parlance. Mr Howells does not suggest otherwise. Therefore, on the interpretation proposed by PTT, article 12.3 would grant a limitation of liability for Triple Point in respect of any simple failure by it (which did not have any added element of fraud, gross negligence or wilful misconduct) to comply with its core obligation under the CTRM Contract, while taking that away in the following sentence. If the word "negligence" in the fourth sentence is construed as applying to breaches by Triple Point of its obligation to exercise reasonable skill and care in carrying out its tasks, it would effectively nullify the limitation of liability in the second and third sentences. That limitation of liability would then only apply in relation to non-negligent breaches of any strict obligations in the CTRM Contract, but there are very few and, with the exception of the warranties as to the use of intellectual property rights in the PLA (clauses 7.1 and 7.3), are ancillary or peripheral to the main performance obligations under the Contract. Although Lady Arden regards the obligations of Triple Point regarding provision of defect-free software and "Deliverables" under the CTRM Contract as strict (para 54), I do not think that is right. They are part of the "Services" (as defined) under the CTRM Contract and

accordingly, by virtue of article 12.1, are the subject of a performance obligation of reasonable skill and care.

133. In my view, it makes no sense to interpret article 12.3 as giving with one hand and taking away with the other in this way. To the extent that the fourth sentence might be regarded as being in conflict with the second and third sentences, an interpretation should be adopted which gives effect to what was clearly the main purpose of article 12.3, which was to confer on Triple Point the protection of a limitation of liability in respect of ordinary breaches of its core performance obligation. That purpose is promoted, rather than defeated, by the interpretation given to the fourth sentence by the courts below.

134. That interpretation is reinforced by the wider contractual context and by three textual features of the fourth sentence.

135. The services to be provided by Triple Point under the CTRM Contract involved combining and modifying existing software products which it already offered to customer licensees. Those were to be the building blocks for the system it agreed to supply to PTT. The contractual starting point for the drafters of the CTRM Contract was to take Triple Point's standard terms in relation to its existing products and then to incorporate them in the CTRM Contract, subject to certain adaptations.

136. Clause 7.4 of Triple Point's standard terms, as modified in the PLA for the purpose of being appended to and incorporated in the CTRM Contract, provided as follows:

> "… Licensee agrees that the aggregate liability of Triple Point for damages from any cause of action whatsoever, regardless of the form of action, shall not exceed the fees paid to Triple Point under the CTRM Contract and except such damages caused by fraud, gross negligence and wilful misconduct."

Thus, the starting point for the drafters was a limitation of liability provision which applied in relation to all forms of liability, whether under contract, in tort or otherwise, subject to disapplication in the case of damages caused by fraud, gross negligence or wilful misconduct (whether arising under contract or in tort or otherwise).

137. The drafters recognised that provisions in Triple Point's standard terms might conflict with what was written in the bespoke terms set out in the Main Part of the

CTRM Contract. So, in clause 10.9 of the PLA as appended to and incorporated in the CTRM Contract, they included the following statement:

> "… Triple Point agrees that this agreement shall not supersede and shall be an annex to the CTRM Contract. In addition, Triple Point agrees that if there is any conflict between the CTRM Contract and this agreement, the CTRM Contract shall prevail and be enforceable."

In this way, the drafters demonstrated their concern to manage any potential dissonance between article 12.3 of the Main Part and clause 7.4 of the PLA standard terms. The inference is that the fourth sentence of article 12.3 was derived from the exception proviso in clause 7.4 and was intended to be interpreted in line with that proviso, so far as possible. Where conflict could not be avoided, the terms of the Main Part would prevail.

138. The standard term clause 7.4 of the PLA was concerned with all forms of liability, so the terms "fraud", "gross negligence" and "wilful misconduct" were intended to apply to breaches of contract and tort. There is every reason to infer that the same is true where the parties used the same terms in article 12.3 of the Main Part, having regard to the drafting history and since that would minimise the scope for conflict between the provisions. If the list in the fourth sentence of article 12.3 referred only to breaches of contract, arguments could arise whether that involved a conflict with clause 7.4 having the effect that it was displaced; but the intention was that the scope for such arguments to arise should be kept to a minimum. Further, since the drafters were concerned to manage possible conflicting impressions which might be created by the different contractual documents, it is a reasonable inference that they intended the fourth sentence of article 12.3 to fulfil to some degree the function of avoiding doubt.

139. Therefore, when the drafters wrote "this limitation shall not apply [etc]" in the fourth sentence of article 12.3 they intended the list as a whole to cover liability arising both in contract and in tort, and to say that the limitation cap on liability did not apply to fraud, gross negligence or wilful misconduct within either of those categories of liability, as was the case with clause 7.4. I use English law categories for ease of exposition and because they are the most obvious frame of reference for the drafters of the CTRM Contract as a contract governed by English law; but the terms in the list are applicable in relation to all and any type of non-contractual liability which might arise, including under the law of the various jurisdictions which might be implicated in the provision of the services under the CTRM Contract, such as Thailand, Singapore and the United Arab Emirates. Against this background, the suggestion that the restriction on the limitation of liability in article

12.3 is limited to liability under the CTRM Contract (the first alternative in para 131 above) is not persuasive.

140. Three textual features of the fourth sentence of article 12.3 also support this view. First, since the list of cases of exception set out in that provision has been expanded to include "negligence" alongside "gross negligence", the provision would be incoherent and nonsensical if it applied only to breaches of contract. The "gross negligence" category would be redundant. Therefore, the drafters must have intended that there should be scope for these terms to apply distinctly in relation to different types of liability. The only way for the fourth sentence of article 12.3 to be given an interpretation which avoids such redundancy is by reading the list as a whole as applicable to both liability in contract and liability in tort, while at the same time treating the specific term "negligence" as limited to liability in tort in order to reflect the purpose of the second and third sentences of article 12.3 as explained above. This has the result that "negligence" can be read as referring to liability in tort alone, and since "gross negligence" covers both forms of liability it is not a redundant term since it applies to breaches of contract involving gross, but not ordinary, negligence.

141. Secondly, in the context set out above, it is significant that, by contrast with the second and third sentences of article 12.3, the fourth sentence is expressed in general terms and not by reference to liability "under the Contract".

142. The commercial sense of the restriction in the context of clause 7.4 of the PLA is readily understood. The limitation of liability was to cover Triple Point in respect of its ordinary conduct in seeking to meet its contractual obligations, where it was found not to have met the contractual standard of reasonable skill and care. But it would not apply if Triple Point did something out of the ordinary and involving a degree of culpability which was not to be expected as an ordinary incident of commercial relations under the contract, ie amounting to fraud, gross negligence or wilful misconduct.

143. In my view, that same objective was intended to be carried into the fourth sentence of article 12.3. So what was the point of adding "negligence" to the list of forms of conduct to which the limitation of liability was not to apply? For the reasons I have given, the list as a whole is intended to refer to liability in contract and liability in tort. However, in the case of "negligence", to avoid incompatibility with the fundamental object of the second and third sentences of article 12.3 and to avoid incoherence and textual redundancy in the fourth sentence, that specific term can only sensibly refer to liability in tort. It therefore must be taken to refer to the freestanding tort of negligence which, like the other terms in the list, is something apart from an ordinary incident of commercial relations under the contract. I agree with Sir Rupert Jackson's explanation at para 119:

> "… The word 'negligence' must be read in context. The phrase 'fraud, negligence, gross negligence, or wilful misconduct' is describing unusual or extreme conduct, such that Triple Point should forfeit the protection of the cap. It is talking about breaches of contract which are also freestanding torts or deliberate wrongdoing. In my view, 'negligence' in this context means the freestanding tort of negligence. For example, if Triple Point's engineers carelessly left electrical wiring exposed which caused personal injury, that would be both a breach of contract and the freestanding tort of negligence. If the engineers did so deliberately, that would be both a breach of contract and wilful misconduct. In those two examples Triple Point would be liable for the full consequences of the engineers' negligent conduct, alternatively their wilful misconduct, without the article 12.3 cap limiting the financial liability."

144. Mr Howells criticised Sir Rupert's example, pointing out that the services to be rendered under the CTRM Contract did not include supply of hardware. But Sir Rupert's basic point is correct. It is recognised that in cases involving the supply of services under a contract it is possible for the contractors to do something alongside the work they are carrying out under the contract, but outside the terms of the contract, which gives rise to an assumption of responsibility in the tort of negligence and hence to freestanding liability in negligence: see eg *Holt v Payne Skillington* (1995) 77 BLR 51, 72-73 (Hirst LJ) and *Robinson v PE Jones (Contractors) Ltd* [2011] EWCA Civ 9; [2012] QB 44, paras 77-80 (Jackson LJ). I do not think it is difficult to think of situations where this could be the case in relation to work carried out by Triple Point under the CTRM Contract. For example, freestanding liability in negligence could arise if one of Triple Point's agents, while delivering training on the new system to a PTT employee under the CTRM Contract, was given remote access to the employee's computer; the employee asked him to fix an unrelated problem with the computer alongside delivering the training; and he did so, but in a negligent way which caused damage to the computer or to PTT's other operational systems. Given the vulnerability of computer systems to be infected by software content delivered remotely, which was to be the manner in which Triple Point's agents were to be interacting with PTT's systems, there could be many scenarios in which there might be a risk of tortious action by agents of Triple Point. As Sir Rupert appreciated, the important point is that there is a category of case to which the term "negligence" can coherently and sensibly refer which does not do violence to the intended effect of the second and third sentences of article 12.3. If anything, his example, focusing as it did on a problem in the delivery of hardware, understated the size and significance of this category of case.

145. Therefore, while the list of excepted conduct in the fourth sentence of article 12.3, taken as a whole, refers to liability in contract and liability in tort, the word "negligence" is intended to refer only to freestanding liability in tort. In my view, that is the only coherent interpretation which can be given to the fourth sentence. Certainly, in the context of this poorly drafted provision, I think it can be said to be the interpretation which is the least incoherent and which best reflects the intended effect of article 12.3 as a whole.

146. Thirdly, in English law, which governs the CTRM Contract, "negligence" is a term which is capable of bearing a narrow, technical meaning as referring to the tort of negligence. The drafters' choice of that word in article 12.3, rather than referring more generally to a failure to exercise "reasonable skill and care" (ie using the language already employed in the same provision in article 12.1), tends to indicate that they deliberately intended to draw a distinction between the two concepts and that the word "negligence" should bear that narrower, technical meaning.

147. For these reasons, I would have dismissed PTT's appeal in relation to the second issue.