



16 July 2021

## PRESS SUMMARY

**Triple Point Technology, Inc (Respondent) v PTT Public Company Ltd (Appellant)**  
[2021] UKSC 29  
*On appeal from [2019] EWCA Civ 230*

**JUSTICES:** Lord Hodge (Deputy President), Lady Arden, Lord Sales, Lord Leggatt, Lord Burrows

### BACKGROUND TO THE APPEAL

The central issue (Issue 1) on this appeal concerns the approach to interpreting liquidated damages clauses. The liquidated damages clause here was in a familiar form, providing for liquidated damages to be paid for each day of delay by the contractor “from the due date for delivery up to the date [the employer] accepts such work.” The issue was whether liquidated damages were payable under this clause in respect of work which had not been completed before the contract was terminated. Issue 2 involves the interpretation of an exception to a cap on the contractor’s liability for damages when the liability results from negligence. The question is whether “negligence” in the exception means the tort of negligence or whether it includes breach of the contractual duty of skill and care. Issue 3 is whether liquidated damages are subject to a cap in the contract on the amount of recoverable damages.

On 8 February 2013, the Appellant, PTT Public Company Ltd (“**PTT**”), entered into a contract (the “**CTRM Contract**”) with the Respondent, Triple Point Technology, Inc (“**Triple Point**”). The contract was subject to English law. By the contract, Triple Point was to design, install (by data transmission), maintain and license a customised software system for PTT to assist in its commodities trading business. The project had two phases. Phase 1 involved replacing PTT’s existing software system and Phase 2 involved developing the Triple Point system for new types of trade. Triple Point was to be paid by reference to “milestones” with particular work to be completed by each milestone. Triple Point entered into a perpetual licence agreement with PTT, annexed to the main part of the CTRM Contract. Also annexed to the main part was a document entitled Terms of Reference for the CTRM System, which contained a list of agreed “functionality” criteria. These allowed for checking that the software provided conformed to specification and fulfilled the specified functions.

Triple Point achieved completion of the first two stages of Phase 1 on 19 March 2014, 149 days late. PTT paid Triple Point’s invoice for that work. PTT terminated the CTRM Contract on 23 March 2015. Triple Point commenced proceedings in the Technology and Construction Court to recover outstanding sums on unpaid invoices. PTT counterclaimed for damages and liquidated damages for delay under article 5.3. Article 12.3 placed a cap on the amount of damages that could be recovered and contained an exception from that cap for “negligence”. Jefford J dismissed Triple Point’s claim, holding that PTT was entitled to damages of US\$4,497,278.40, under the heads of: liquidated damages for delay (uncapped), the costs of procuring an alternative system and wasted costs (both subject to the article 12.3 cap). Triple Point appealed and PTT cross-appealed against the finding that any of the damages were capped. The Court of Appeal (Lewison and Floyd LJ and Sir Rupert Jackson) set aside the judge’s award of liquidated damages, holding that PTT was only entitled to liquidated damages for work which had been completed prior to termination of the contract, that all damages were subject to the cap and that the exception for “negligence” applied only to freestanding torts and not to breaches of the contractual obligation to exercise care. PTT appeals to the Supreme Court on all three issues.

## JUDGMENT

The Supreme Court unanimously allows the appeal on Issue 1 and dismisses it on Issue 3. On Issue 2, the majority, Lady Arden, Lord Leggatt and Lord Burrows, allows the appeal with Lord Sales and Lord Hodge dissenting. The leading judgment is given by Lady Arden. Lord Leggatt gives a concurring judgment. Lord Sales, with whom Lord Hodge agrees, gives a dissenting judgment on Issue 2.

## REASONS FOR THE JUDGMENT

On Issue 1, Lady Arden notes that the Court of Appeal departed from the generally understood position that, subject to the precise wording of the clause, liquidated damages would accrue until the contract was terminated. At that point the contractor becomes liable to pay damages for breach of contract. The Court of Appeal held that in some cases it might be inconsistent with the parties' agreement to categorise the employer's losses as subject to the liquidated damages clause until contractual termination and thereafter as damages. This approach was inconsistent with commercial reality and the accepted function of liquidated damages [35]. The parties' aim was that the employer should not have to quantify its loss which it may be difficult for it to do [35]. The parties should be taken to know that liquidated damages would cease to accrue on termination; they did not have to provide for that expressly [35]. Reading the clause in that way reduced the risk that the contractor was not liable for liquidated damages for delay and the extinction of accrued rights to liquidated damages. Under the CTRM Contract, liquidated damages were payable where Triple Point never completed the work. *Glanzstoff* turned on the interpretation of the particular clause in that case [42].

On Issue 2, in English law "negligence" covers both the separate tort of failing to use due care and a breach of the contractual provision to exercise care [52]. The Court of Appeal was wrong to hold that, if it covered damages for breach of the contractual provision to exercise care, the exception to the cap for "negligence" removed the core liability made subject to the cap. The CTRM Contract was not only for services. It drew a distinction between the services in respect of which Triple Point owed a contractual duty of care, and other matters that Triple Point was under an absolute obligation to provide, such as providing software which met the functionality specifications [54-55]. There was no realistic example of an independent tort, especially as liability for "negligence" had to be one which arose out of the CTRM Contract [56] [57]. On Issue 3, liquidated damages are subject to the cap in the contract on recoverable damages. The Court of Appeal's reasoning was correct [71].

Lord Leggatt agrees with Lady Arden and gives additional reasons. In particular, on Issue 1, he points out that, contrary to the Court of Appeal, it is not illogical to quantify damages accrued before and after termination separately [79]. On Issue 2, he holds that to restrict "negligence" to independent torts gives the word "negligence" a convoluted meaning that it cannot reasonably bear [105]. Lord Leggatt discusses whether clear words are needed to restrict valuable rights. He holds that in contractual interpretation the court should proceed on the basis that in the absence of clear words the parties did not intend to derogate from the normal rights and obligations that a contract would give [108].

Lord Sales, with whom Lord Hodge agrees, dissenting on Issue 3 holds that "negligence" as used in the clause in question does not refer to negligence in the performance of Triple Point's contractual obligations [125]. Effect should be given to what was clearly the main purpose of the clause, which was to confer on Triple Point a limitation of liability in respect of ordinary breaches of its core performance obligation: to exercise reasonable care and skill in carrying out its contractual tasks [130, 133]. It makes commercial sense that the limitation of liability applied to any breach by Triple Point of its core obligation, but not to acts by Triple Point alongside that work but outside the ordinary scope of commercial relations which give rise to an assumption of responsibility and freestanding liability in the tort of negligence [142-145]. The limitation of liability would otherwise be effectively nullified [132].

*References in square brackets are to paragraphs in the judgment*

**NOTE** This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.html>