Neutral Citation Number: [2019] EWCA Civ 230

Case No: A1/2017/2912

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT,
Queen's Bench Division
Technology and Construction Court
Mrs Justice Jefford
HT-2015-000056

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 March 2019

Before:

LORD JUSTICE LEWISON
LORD JUSTICE FLOYD
and
SIR RUPERT JACKSON

- -

Between:

Triple Point Technology, Inc.	**Claimant/ Appellant**
- and -	
PTT Public Company Ltd	**Respondent**

- -
- -

Mr Andrew Stafford QC & Mr Nathaniel Barber (instructed by **Kobre & Kim (UK) LLP**) for the **Appellant**
Mr James Howells QC (instructed by **Watson Farley & Williams LLP**) for the **Respondent**

Hearing dates: Wednesday 16th and Thursday 17th January 2019

- -

Approved Judgment

Sir Rupert Jackson:

1. This judgment is in eight parts, namely:

Part	Paragraphs
Part 1 – Introduction	Paragraphs 2 - 7
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Part 3 – The present proceedings	Paragraphs 38 – 44
Part 4 – The appeal to the Court of Appeal	Paragraphs 45 – 49
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Part 1 – Introduction

2. This is an appeal by the supplier of a software system against a judgment of the Technology and Construction Court, dismissing its claim for payment and ordering it to pay substantial damages on the counterclaim. The main issue of principle which arises is how to apply a clause imposing liquidated damages for delay in circumstances where the contractor or supplier never achieves completion. The other issues concern the interpretation of particular wording in the contract before the court.

3. Triple Point Technology, Inc. is claimant in the action and appellant in this court. I shall refer to it as "Triple Point".

4. The defendant in the action and respondent in this court is PTT Public Company Limited. I shall refer to it as "PTT".

5. In this judgment "CTRM" is an abbreviation for "Commodities Trading, Risk Management and Vessel Chartering System". "TCC" is an abbreviation for Technology and Construction Court.

6. All sums of money mentioned in this judgment are in US dollars.

7. After these introductory remarks, I must now turn to the facts.

Part 2 – The facts

8. Triple Point is a company based in Delaware which designs, develops and implements software for use in commodities trading. This software is based on Triple Point's proprietary platforms known as "Commodity XL" ("CXL") and "Softmar Vessel Chartering and Vessel Operations" ("VO").

9. PTT is a company which, amongst many other activities, undertakes commodities trading. PTT is based in Thailand. The principal commodities which it trades are oil, refined products and petrochemicals.

10. In 2012, PTT decided to acquire a new CTRM system. PTT intended there to be two phases to the project: Phase 1 would replace the existing system and Phase 2 would involve the development of the system to accommodate new types of trade. PTT set out its requirements in a document dated 13 June 2012 entitled "Terms of Reference (TOR) for Commodity Trading and Risk Management (CTRM) System". I shall refer to this as the "TOR".

11. Paragraph 22 of Part III of the TOR made it clear that all bids should include the costs of the software, as well as the costs of the installation and implementation. Paragraph 23 set out a series of milestones for the project, beginning with project preparation and ending with one month of standby support after going live.

12. PTT sought tenders for the provision of software and related services, as set out in the TOR. On 7 September 2012 Triple Point submitted its bid to undertake the project.

13. There then followed discussions between the parties, during which Triple Point clarified its bid. These discussions resulted in two documents. The first document was entitled "Technical Document (Clarification)". I shall refer to this as "the clarification document". It comprised a series of written questions and answers, which distilled what PTT had asked and what Triple Point had responded in the period November 2012 to January 2013.

14. The second document was entitled "Technical and Commercial Clarifications basis the meeting on 14th December 2012 with PTT". This document contained many technical details. Paragraph (3) stated that the total price for Phase I was $6.92 million. That comprised $2.6 million for CTRM software; $4.04 million for implementation (including training, testing, initial support and maintenance); $280,000 for travel and related expenses. I shall refer to this as "the technical document".

15. On 28 December 2012, PTT sent a letter of intent addressed to Triple Point. This stated PTT's intention to replace the CTRM system for $6.92 million. The "description" box in the letter of intent stated:

"Payment shall be made by milestone

1 AU [Absolute Unit] @ 6,920,000.00

Reference is made to PTT's Terms of Reference."

Triple Point countersigned the letter of intent on 10 January 2013.

16. During January 2013 the parties negotiated and agreed the terms of their contract for the provision of the CTRM system to PTT. The contract was entitled "Contract for Commodity Trading and Risk Management System" and is generally referred to as the "CTRM contract". Triple Point signed the CTRM contract on 31 January 2013. PTT signed it on 8 February 2013. The CTRM contract included the following provisions:

"**ARTICLE 1. DEFINITIONS**

1.1 "Project" means the Implementation of Commodity Trading & Risk Management Software in accordance with the scope as described in this Terms of Reference.

1.2 "Services" means all activities rendered by CONTRACTOR to PTT in connection with the Project.

…

1.6 "Contract Price" means the total price for the Scope of Services performed under the Contract.

…

ARTICLE 3. SCOPE OF SERVICES

Services to be performed by CONTRACTOR shall be as described in this Terms of Reference.

…

ARTICLE 5. SCHEDULE OF SERVICES

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.

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.

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.

…

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. 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 of 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 endeavour 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.

…

ARTICLE 14. EFFECTIVE DATE

The Contract shall become effective as from January 10th, 2013.

ARTICLE 15. DURATION AND TERMINATION

15.1 The Contract shall come into force on its Effective Date by virtue of Article 14 and shall terminate as hereinafter indicated in this Article 15.

15.2 The Contract shall normally terminate upon the expiration of CONTRACTOR's responsibilities, liabilities and warranty period.

15.3 In addition to the regular termination as described in this Article 15, PTT is entitled to the following:

> 15.3.1 Terminate the Contract if PTT is of the opinion that CONTRACTOR has not exercised the professional skills and care which can be expected from CONTRACTOR as provided herein. In such case, PTT will notify CONTRACTOR in writing specifying the reason(s) of termination. Should CONTRACTOR fail to satisfy PTT within 30 (thirty) calendar days from the date of receiving the said written notice, PTT is entitled to terminate such Contract; or
>
> 15.3.2 PTT may at any time and at its absolute discretion to terminate the Contract. Such termination shall become effective immediately after delivery of written notice to the CONTRACTOR or on such later date as specified in such notice, such date being the effective date of termination for the purposes of this Article 15.3.

…

15.7 PTT shall be entitled by written notice to CONTRACTOR to terminate all or any part of Services without prejudices to any other rights and remedies under the Contract when CONTRACTOR is deemed to be in breach of the Contract under the following circumstances:

> 15.7.1 Failure by CONTRACTOR to comply with any fundamental condition of this Contract except where such non-compliance arises from Force Majeure circumstances envisaged in Article 16 or from some other circumstances accepted by PTT as justification for the said non-compliance

provided that PRR shall give CONTRACTOR a minimum of 15 (fifteen) Working Days following receipt of termination notice in writing to remedy the said failure and provided that CONTRACTOR upon receipt of such notice commences with all due diligence to correct the said failure then no breach of Contract shall be deemed to have occurred.

…

ARTICLE 18 INVOICING AND PAYMENT

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 & Services*.

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

…

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 13th, 2012

Exhibit 2 Technical Document (Clarification)

Exhibit 3 Triple Point Software Product Perpetual License Agreement, Software Maintenance Services and Order Form 2012 (dated January 31st, 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."

17. The three paragraphs of Article 5 are not numbered. For convenience, however, I will refer to them as Article 5.1, Article 5.2 and Article 5.3.

18. I shall refer to the four sentences in Article 12.3 as "sentence 1", "sentence 2", "sentence 3" and "sentence 4". I shall refer to the cap imposed by sentence 2 and sentence 3 as the "the Article 12.3 cap" or "the cap".

19. Article 27 of the CTRM contract provided that the contract was subject to English law. It also provided that any dispute would be submitted to the High Court in London.

20. Exhibit 1 to the contract was the letter of intent, which in turn referred back to the TOR. Exhibit 2 was the clarification document. Exhibit 3 was a licence agreement with an attached order form, both dated 8 February 2013. For convenience during the litigation, everyone has referred to the order form attached to the licence agreement as "order form A". I shall do likewise.

21. The licence agreement included the following provisions:

"1.15 "Order Form" means that certain Order Form attached hereto and each subsequently executed Order Form, each of which is incorporated herein by reference.

> …
>
> 5.1 Licensee shall pay the Software Licence Fee and the Maintenance Fee (for the Initial Maintenance Term) as set forth on the relevant Order Form. Subsequent Maintenance Fees, if applicable pursuant to Section 3.4 above, are payable in advance on the commencement of each Renewal Maintenance Term. Consulting fees are payable within 30 calendar days after Licensee has received the invoice, verified and approved the Consulting Services, unless otherwise provided on the Statement of Work.
>
> …
>
> 7.4 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 WILLFUL MISCONDUCT.
>
> …
>
> 10.9 Entire Agreement. This Agreement (with any executed and delivered Order Forms) AND THE CTRM CONTRACT constitute the entire agreement and understanding between the parties hereto with respect to the subject matter hereof AND THEREOF. The Entire Agreement supersedes any and all OTHER prior agreements and understandings, oral or written, relating to the subject matter hereof. This Entire Agreement may only be amended by a writing signed by both parties and shall inure to the benefit of and be binding upon each party's successors and permitted assigns. 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 ENFORC[E]ABLE."

22. Order form A set out the price of the software and the services which PTT was ordering as follows:

Installation, configuration and training	$4,320,000
Software licence fees	$2,600,000

That made a total of $6.92 million.

23. In relation to the software licence fees, order form A included the following payment provision:

> "**Payments**
>
> Due on Project Start Date (no later than 31st January 2013) $390,000
>
> Due on Implementation Configuration and Testing (15th Dec 2013) $780,000
>
> Due on Core team and end user training (20th February 2014) $1,170,000
>
> Due on Go Live: No later than 20th MAY 2014 $260,000
>
> **Total of payments due** $2,600,000"

24. The contract as originally executed related to Phase 1 of the project.

25. After the parties had signed off the contract, Triple Point duly commenced performance. The system which Triple Point provided was based on three separate software packages. These were CXL, VO and a credit risk module ("CR").

26. On 30th April 2013, PTT sent two further order forms to Triple Point. During the litigation everyone referred to these as "order form B" and "order form C". I shall do likewise, although no-one used those descriptions during the course of the project.

27. Order form C related to Phase 2 of the project. It stated that the licence fee for Phase 2 was $1,050,000. In relation to payment, order form C stated:

> "**Payments**
>
> Due 30th April 2013 $157,500
>
> Due 30th September 2013 $315,000
>
> Due 15th December 2013 $420,000
>
> Due 15th January 2014 $157,500
>
> **$1,050,000**"

28. Order form B added further users to both Phase 1 and Phase 2. It stated that the additional licence fee was $450,000 and that the annual maintenance fee for the first year was $330,000. That made a total of $780,000. In relation to payment, order form B stated:

> "**Payments**
>
> Due on 15th January 2014 $780,000

Due each 15th January thereafter until 15th January 2019 $330,000"

29. Both order forms B and C contained the following note in a box on the first page:

"Order Form is subject to the terms and conditions set forth in CTRM contract, dated 8 February, 2013"

30. The dates which the parties agreed for the completion of each stage of the project and the proportion of the contract price which the parties agreed to be referable to each stage, were as follows:

Phase 1		
Stages 1 and 2	31st October 2013	15%
Stages 3 and 4	20th January 2014	30%
Stages 5, 6 and 7	30th April 2014	45%
Stages 8 and 9	11 June 2014	10%

Phase 2		
Stages 1 and 2	11th July 2013	15%
Stages 3 and 4	23rd September 2013	30%
Stages 5, 6 and 7	30th December 2013	45%
Stages 8 and 9	12th February 2014	10%

31. Unfortunately, work proceeded slowly. Triple Point failed properly to resource the project. It failed properly to integrate the three software packages, namely CXL, VO and CR. The system which Triple Point installed did not have the functionality specified in the TOR.

32. Triple Point achieved completion of Stages 1 and 2 of Phase 1 on 19 March 2014. That was 149 days late. Triple Point submitted an invoice for $1,038,000 in respect of this work. PTT duly paid that sum.

33. Triple Point then asked PTT to pay further invoices in respect of other work which was not yet completed. In making this demand, Triple Point was relying upon the calendar dates for payment stated in order forms A, B and C.

34. PTT refused to make any further payments. It placed reliance on Article 18 of the CTRM contract, which stated that payment would be made by milestones. PTT pointed out that Triple Point had not achieved any of the milestones, apart from the completion of Phase 1, stages 1 and 2. Triple Point did not dispute this. By email dated 23rd April 2014 Triple Point appeared to concede that it had not done any implementation work on Phase 2.

35. Even so, Triple Point maintained that further payments were due on its invoices. Triple Point was not willing to continue working without receiving further payment. On 27 May 2014, it suspended work and left the site.

36. PTT maintained that Triple Point had wrongfully suspended work. PTT terminated, or purported to terminate, the CTRM contract pursuant to Article 15.3 and/or Article 15.7 on 15 February 2015.

37. Triple Point was undismayed. In order to recover the outstanding sums claimed in its invoices, Triple Point commenced the present proceedings.

Part 3 – The present proceedings

38. By a claim form issued in the TCC on the 25th February 2015, Triple Point claimed against PTT all the outstanding sums shown as due on unpaid invoices. Triple Point attached the three order forms to the claim form as annexes A, B and C. Thus it was that the pleader of the claim form determined the names by which those three order forms should be known throughout the litigation.

39. PTT responded with a vigorous defence and counterclaim. PTT denied that any further payments were due to Triple Point. PTT claimed damages for delay and damages due upon termination of the contract.

40. The action came on for trial before Mrs Justice Jefford on 28th November 2016 and continued until 15th December. The judge heard the factual evidence of four witnesses employed by Triple Point and six witnesses employed by PTT. She also heard the evidence of two expert witnesses, one for each party. The trial was then adjourned for preparation of closing submissions. Counsel made their closing speeches on 31st January 2017.

41. The judge handed down her reserved judgment on 23rd August 2017. She dismissed Triple Point's claim. She awarded $4,497,278.40 to PTT on the counterclaim.

42. I would summarise the judge's findings and reasoning as follows:

    i) There was a single contract between the parties with a single payment regime.

ii) There was an inconsistency between Article 18 of the CTRM contract (which required payment by milestones) and the payment dates stated in order forms A, B and C. Article 18 prevailed.

iii) Accordingly, Triple Point was not entitled to receive any further payments under the contract.

iv) During 2013 and 2014 Triple Point failed properly to perform their duties under the contract. They failed to provide the required resources. They did not effectively integrate the three software packages CXL, VO and CR. Although not expressly stated in the TOR, it was implicit that Triple Point would integrate the software packages.

v) The delay and ultimate failure of the contract was not caused by PTT's lack of cooperation. It was caused by Triple Point's negligent failure to plan, programme or manage the project; its failure to provide sufficient numbers of suitably qualified staff; its negligent failure to conduct adequate business analysis and production of business blueprints required under the terms of the CTRM contract; and/or its negligent failure to follow appropriate or internationally recognised and applied methodologies for the design, development and implementation of the software. See paragraphs 5 and 198 of the judgment.

vi) Triple Point was not entitled to suspend work in May 2014. By doing so, Triple Point was in repudiatory breach of contract.

vii) PTT terminated the CTRM contract pursuant to Article 15.3.1 or 15.7.1. Alternatively, the contract was terminated at common law.

viii) PTT is entitled to recover (a) the costs of procuring an alternative system and (b) wasted costs, but subject to a cap of $1,038,000 pursuant to Article 12.3.

ix) PTT is also entitled to recover liquidated damages for delay pursuant to Article 5.3, totalling $3,459,278.40. These damages are not subject to a cap under Article 12.3.

43. In relation to subparagraph (v) above, the judge was not making a finding of the tort of negligence. She was finding Triple Point to be in breach of its contractual duty under Article 12.1 to "exercise all reasonable skill, care and diligence and efficiency in the performance of the services".

44. Triple Point was aggrieved by the judge's decision. Accordingly, it appealed to the Court of Appeal.

Part 4 – The appeal to the Court of Appeal

45. By a notice of appeal filed on 25th October 2017, Triple Point appealed against the judge's decision on five grounds. I would summarise those grounds as follows:

i) The judge ought to have held that payment was due for the software licences and related services on the dates stated in order forms A, B and C.

ii) Alternatively, if Triple Point is entitled to payment of only 15% (as contended by PTT and as held by the judge), then Triple Point should recover 15% of the sums set out in order forms B and C. So far Triple Point has only received 15% of the sums shown in order form A.

iii) It was an implied term that Triple Point could suspend work, if it did not receive payment in accordance with the order forms. Therefore, Triple Point's suspension of work in May 2014 was not a breach of contract.

iv) Liquidated damages for delay under Article 5 are irrecoverable.

v) Any liquidated damages recoverable are subject to the Article 12.3 cap.

46. On 22nd February 2018, I considered this case on the papers. I took the view that the issues were not straightforward and that the appeal had a real prospect of success. Accordingly, I granted permission to appeal.

47. On 12th March 2018, PTT served a respondent's notice and notice of cross-appeal. PTT challenged the judge's decision that the Article 12.3 cap applied to any of the damages claimed by PTT. PTT sought to uphold the rest of the judge's decision on additional grounds.

48. The appeal was heard on 16th and 17th January 2019. Mr Andrew Stafford QC and Mr Nathaniel Barber appeared for Triple Point. Mr James Howells QC appeared for PTT. I am grateful to all counsel for their assistance.

49. The first three grounds of appeal are closely linked. I shall therefore deal with them collectively, before turning to the other grounds of appeal and cross-appeal.

Part 5 – Grounds of Appeal I – III: Payment Arrangements and Right to Suspend for Non-Payment

50. Triple Point's case is that either there were two contracts or there was a single contract with two separate payment regimes. Either way, payments fell due on the dates stated in order forms A, B and C.

51. At trial, Triple Point placed emphasis on its argument that there were two contracts. Mr Stafford submitted that the CTRM contract was the contract for the development of software and implementation of the new system; order forms A, B and C gave rise to a separate contract requiring payment for software on specified calendar dates. The judge accepted that Mr Stafford's argument had some attraction, but she rejected it for the reasons set out in paragraphs 67 to 77 of her judgment.

52. On this issue, in my view the judge was plainly right. See paragraphs 22-23 of Part III of the TOR, paragraph (3) of the technical document, the "description" box in the letter of intent, clause 10.9 of the licence agreement and Article 28 of the CTRM contract. Indeed, on appeal Mr Stafford put little, if any, reliance on the proposition that there were two separate contracts. Order form A was part of Exhibit 3 to the CTRM contract. Article 28 of the CTRM contract expressly incorporated order form A into the contract. Admittedly order forms B and C came almost three months after the CTRM contract was signed off. But those two order forms had stamped on the front page the words:

> "Order Form is subject to the terms and conditions set forth in CTRM contract, dated 8 February, 2013."

53. Assuming that there was a single contract, Mr Stafford submitted that the payment provisions in order forms A, B and C formed a separate payment regime. This took precedence over the provision in Article 18 of the CTRM contract for payment by milestones.

54. Relying on the judgment of the Master of the Rolls in *Re Strand Music Hall Co Limited ex parte European and American Finance Co. Limited* (1865) 35 Beav. 153, Mr Stafford submitted that the court should construe the contract in such a way as to give effect to every provision, if that was possible. In the present case, it is possible to give effect to both Article 18 (which provides for payment by milestones) and the order forms (which provide for payment on calendar dates). The order forms set out the dates on which PTT must pay for the software and the licences. Article 18 sets out the dates on which PTT must pay for implementation, including customisation of the software.

55. This is an ingenious argument, but I do not think that it is correct. The basic software packages (CXL, VO and CR) were of no value to PTT. What PTT was purchasing was customised software for use in its business. The provisions in the contractual documents, which I have set out in Part 2 above, made it plain that the CTRM contract governed both the provision and the customisation of the software. The natural reading of Article 18 is that it governs payment for everything.

56. The basic principles for the interpretation of contracts have been restated by the Supreme Court on several occasions in recent years. The most recent distillation is in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173 at [10] to [14]. I bear those principles in mind, but will not extend this judgment by setting them out.

57. Article 29 of the CTRM contract sets out the order of precedence. Precedence clauses are of particular importance in substantial construction or IT contracts. Many people draft different sections of the contract and specification. The final contract is an amalgam of all these efforts. Sometimes, although not in this case, the contracts are so vast that no human being could possibly be expected to read them from beginning to end. The traditional rule that you construe a contract as a whole must now be understood in this context. Conflicts between different parts of the contract documents are almost inevitable in such cases. Precedence clauses tell the reader how such conflicts should be resolved.

58. In the present case Article 29 states that the CTRM contract comes at the top of the order of precedence. The licence agreement and order form A come at the bottom of the order of precedence. Order forms B and C likewise take their place at the bottom level: see clause 1.15 of the licence agreement.

59. The dates in the order forms may well be the dates on which some individuals expected or hoped that milestones would be achieved. But the provision in Article 18 for payment by reference to milestones takes precedence over the calendar dates stated in the three order forms.

60. I therefore conclude that the judge was right on this issue. Triple Point was entitled to receive payment when it reached the various milestones, as set out in Article 18. Triple Point was not entitled to any earlier payments on the calendar dates set out in the order forms.

61. The second ground of appeal is a fall-back position. Triple Point says that if payment was governed by the milestones, then on 19th March 2014 PTT should have paid 15% of the sums due on order forms A, B and C. PTT only paid 15% of the order form A sums. Therefore, PTT must now pay 15% of the sums shown on order forms B and C.

62. That argument does not work. On 19th March 2014, Triple Point achieved milestones 1 and 2 of Phase 1. It did not achieve milestones 1 and 2 of Phase 2. Therefore, Triple Point was not entitled to receive any payments referable to Phase 2.

63. In those circumstances, the third ground of appeal becomes irrelevant. In March 2014, Triple Point received all the payments to which it was entitled. No further payments fell due before 27th May 2014. The question whether Triple Point had an entitlement to suspend work for non-payment does not arise. I can therefore deal with the third ground of appeal quite shortly.

64. Triple Point contends that in order to make the CTRM contract commercially workable, a term must be implied that Triple Point could suspend work in the event of non-payment. Mr Stafford relies on the judgment of Lord Neuberger in *Marks and Spencer PLC v BNP Parabis Securities Services Trust Co. (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742 at [21]. He submits that without the suggested implied term the contract would lack practical coherence.

65. I do not agree. If PTT failed to make payments on the due dates, Triple Point would have all the usual remedies for non-payment. These would include suing for the money due, applying for summary judgment, treating non-payment as a repudiation and so forth. There was no need for the contract to incorporate a provision that Triple Point could suspend work for non-payment, even though from one party's point of view such a term would have been nice to have. I reject the suggestion in paragraph 28.2 of the appellant's skeleton argument that without such an implied term the contract would be "wholly one-sided". Furthermore, even if the contract were to favour one party strongly, that is no reason for the court to redress the balance by implying terms.

66. The contract expressly provided for the suspension of work in certain specified circumstances. Article 15.6 enabled PTT to suspend work on ten days' notice. Article 16.1 provided for the suspension of work in the event of *force majeure*. These terms show that the parties addressed their minds to the circumstances in which work could be suspended. Those circumstances did not include non-payment.

67. Accordingly, I do not think it is legitimate to imply the term for which Triple Point contends. I reject the third ground of appeal.

Part 6 – Ground of Appeal IV: Entitlement to Liquidated Damages for Delay

68. Article 5.3 of the CTRM contract required Triple Point to pay damages for delay at the rate of 0.1% of undelivered work per day. The judge held that, although Article 5.3

used the word "penalty", it was not in fact a penalty clause. It was a lawful provision for liquidated damages. See the judgment at [265] to [266].

69. Mr Stafford challenges that conclusion. He relies upon *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67; [2016] AC 1172, in particular the judgment of Lord Neuberger PSC at [32]. Mr Stafford submits that Article 5.3 imposes a detriment on Triple Point "out of all proportion to any legitimate interest of the innocent party".

70. Mr Howells resists this argument. He points out that the sums generated by the contractual formula are modest, when compared with the financial consequences of delay in installing the software.

71. On this issue, I agree with Mr Howells. The relevant figures are set out in paragraph 264 of the judgment. The losses flowing from late delivery of the software and its impact on PTT's business could well be much greater than that. Although the contractual formula is not perfect, it is a genuine pre-estimate of the losses likely to flow from delay.

72. In relation to the penalty issue, Mr Stafford advances a separate argument to the effect that Article 12.3 permits double recovery. He submits that the losses for which Article 12.3 provides compensation are all recoverable as general damages for delay caused by breach of Article 12.1. This is a hopeless argument. A liquidated damages clause (if valid) operates in substitution for a general assessment of the claimant's losses caused by delay. It does not enable the wronged party to recover compensation for the same losses twice over.

73. I therefore reject this ground of appeal. The judge was correct in her conclusion that Article 5.3 should not be struck down as a penalty.

74. The judge awarded $3,459,278.40 as liquidated damages for delay pursuant to Article 5.3, made up as follows:

    i) Delay on Stages 1 and 2 of Phase 1 from 13th October 2013 to 19th March 2014, the date of completion: $154,662.

    ii) Delay on all other elements of the work from the specified completion dates to 15th February 2015, the date when the contract was terminated: $3,304,616.40.

    iii) Total: $3,459,278.40.

75. Triple Point contends that Article 5.3 was not engaged. That Article only applies when work was delayed, but subsequently completed and then accepted; it does not apply in respect of work which the employer never accepted.

76. This is a formidable argument which raises questions of general principle concerning the operation of liquidated damages clauses in termination or abandonment cases. Counsel cited no authorities on this important issue to the judge, or indeed to us until we asked for them. Counsel produced some of the relevant authorities on day 2 of the appeal and others after the conclusion of the hearing. I must review those authorities before grappling with the issue arising in this case.

77. The nineteenth century cases cited, although fascinating, turn upon their own facts and contractual provisions. They do not require review in this judgment.

78. In *British Glanzstoff Manufacturing Co. Ltd v General Accident, Fire and Life Assurance Co. Ltd* 1912 SC 591 (Court of Session) and 1913 SC (HL) 1, Glanzstoff employed a contractor, Brown, to construct a new factory. The contractual completion date was 31st January 1910. Clause 24 of the contract provided:

> "24. If the contractor fail to complete the works by the date named in clause 23, or within any extended time allowed by the architect under these presents, and the architect shall certify in writing that the works could reasonably have been completed by the said date, or within the said extended time, 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, except as provided by clause 23, and such damages may be deducted by the employer from any moneys due to the contractor."

79. Clause 26 provided that if the contractor ceased working, the employer could engage another contractor to complete the works. The employer could then recover the additional costs incurred from the original contractor.

80. General Accident, Fire and Life Assurance Corporation ("GA") provided a bond guaranteeing Brown's performance of the construction contract. GA undertook to compensate Glanzstoff for all loss and damage suffered in the event of Brown's default.

81. Brown become bankrupt on 20th August 1909 and ceased work. Brown's receivers continued to work on site until mid-September, but then stopped. On 16th September 1909, pursuant to clause 26 of the contract, Glanzstoff engaged another contractor, Henshaw, to complete the works. The completion date specified in the new contract was 31st December 1909, but Henshaw overran. They completed on 28th March 1910.

82. Glanzstoff brought an action against GA to recover their losses. They accepted that Brown would have been entitled to a two-week extension of time, i.e. until 14th February. Glanzstoff claimed liquidated damages for six weeks' delay in respect of the period 14th February to 28th March 1910.

83. The Lord Ordinary dismissed the claim for liquidated damages for delay. The First Division for the Court of Session upheld that decision, essentially on the basis that Glanzstoff's remedy under clause 26 was an alternative to its remedy under clause 24.

84. In the course of their judgments two members of the Court of Session observed that clause 24 only applied to a case where the original contractor completed the works: see the Lord President at 598 and Lord Mackenzie at 599.

85. Glanzstoff appealed to the House of Lords. There was a stellar line up of counsel. The Lord Advocate of Scotland, leading Alfred Hudson KC (author of Hudson's Building

Contracts) appeared for the appellant. Richard Atkin KC (the future Lord Atkin) appeared for the respondent.

86. In those days courts moved swiftly. The House of Lords gave its decision on 28th October 1912. That was just ten months after the first instance decision and eight months after the Court of Session decision. The House of Lords dismissed the appeal.

87. Lord Haldane LC gave the leading judgment. He characterised clause 26 as "an enclave in the contract by itself providing for a special remedy". He held that clause did not apply in the instant case for two reasons:

> "…first of all, that 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…"

88. The Earl of Halsbury and Lord Atkinson agreed with the Lord Chancellor's speech.

89. Lord Shaw delivered a separate speech to similar effect. At the end of the first paragraph he said:

> "… Clause 24, in my judgment, gives no foundation for such a hypothetical claim. It only applies to the failure by Brown himself to complete this contract timeously, but it does not apply to a state of matters in which, under section 26 of the contract, a different remedy has been adopted under what is really a separate code."

90. The Scottish courts revisited these issues in *Chanthall Investments Ltd v F.G. Minter Ltd* 1976 SC 73. Chanthall employed Minter to construct an office block in Glasgow, on what the law report describes as "the RIBA Schedule of Conditions of Building Contract 1963 edition (revised 1967)". I think that this must be a reference to the JCT standard form building contract which replaced the former RIBA Conditions of Contract in 1963. Clause 22 provided:

> "22. If the Contractor fails to complete the Works by the Date for Completion stated in the appendix to these Conditions or within any extended time fixed under clause 23 or 33(1)(c) of these Conditions and the Architect certified in writing that in his opinion the same ought reasonably so to have been completed, 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."

The rate of liquidated damages specified in the appendix was £1,000 per week.

91. Minter's performance was far from satisfactory and the architect declined to issue a certificate of practical completion. It is not clear from the report whether, (a) Minter walked off site before finishing the job or (b) Minter pressed on to what they thought was practical completion but the architect would not accept the finished product. In any event, Chanthall employed a second contractor under a "remedial contract" to bring the building to a proper state of completion. Chanthall brought a claim for damages, quantified as follows: (a) remedial works £737,000; (b) additional costs of completion caused by delay £584,177; (c) anticipated additional costs £55,000; (d) loss of income from the building £902,158; (e) consequential expenses £634,434.

92. Minter contended that Chanthall's claims for damages for delay was limited to £1,000 per week by clause 22. The Lord Ordinary repelled this plea in the defence. Relying upon *Glanzstoff*, he held that clause 22 only applied in a case where the contractor had actually completed the works, albeit late.

93. Minter appealed against that decision. As usual, there was a stellar cast of counsel. James Mackay QC appeared for Chanthall and Charles Jauncey QC appeared for Minter, both future law lords. The Inner House of the Court of Session dismissed the appeal.

94. Lord Wheatley, the Lord Justice-Clerk, gave the leading judgment with which Lord Kissen and Lord Leechman agreed. At 79 he said:

> "… The pursuers' case is not that the Contract was completed late in time but is that it was not completed at all conform to Contract, and was late in completion as well. They argued that Clause 22 only applies when there is delay in completion and nothing else. It does not supersede or exclude the right to obtain common law damages for delay occasioned by a breach of contract.
>
> That in my view finds support in what Lord Chancellor Haldane said when the aforementioned case went to the House of Lords 1913 S.C. (H.L.) I (at p.3), namely "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".
>
> In my opinion the pursuers are right in their submission and the first defenders' argument fails. It was for them to show that Clause 22 applies, and in particular how it applies to the damages in question, and this they have failed to do. In that situation the common law rule of damages will operate in respect of the pursuers' claim based on delay, as it will in respect of their other heads of claim…"

95. In *Gibbs v Tomlinson* (1992) 35 Con LR 86 the plaintiff engaged the defendant to carry out extension works to his house on the JCT Minor Building Works Contract. Clause 2.3 provided that the contractor should pay liquidated damages of £250 per week "for every week or part of the week between the aforesaid completion date and the date of partial completion". Following repudiation of the contract Mr Recorder Michael Harvey QC, relying upon *Glanzstoff,* held that clause 2.3 did not apply: see 116.

96. There then followed a number of cases in which *Glanzstoff* was not cited. In *Greenore Port Ltd v Technical & General Guarantee Company Ltd* [2006] EWHC 3119 (TCC) the claimant employed SAR to renovate its port. The contract incorporated the Conditions of Contract published by the Institution of Engineers of Ireland. Clause 47 of those conditions required the contractor to pay liquidated damages for delay. SAR became insolvent before works were complete. The claimant made a claim on the performance bond issued by the defendant. I held that the claimant was entitled to liquidated damages for delay up to the date of termination and general damages thereafter: see [220]-[221].

97. In *Shaw v MFP Foundations and Pilings Ltd* [2010] EWHC 1839 (TCC) the claimants employed the defendant to carry out housebuilding works on the JCT Minor Works Building Contract. The contract specified nil as the rate of liquidated damages for delay. The contractual completion date (after appropriate extensions of time) was Christmas 2007. The contractor was dilatory. He also committed a repudiatory breach by refusing to replace defective work. The claimants accepted the repudiation on 8th February 2008. The dispute went to arbitration and afterwards to the TCC on applications under sections 68 and 69 of the Arbitration Act 1996.

98. Edwards-Stuart J decided a number of issues, which are not material for present purposes. In relation to damages for delay, he said this at [41]:

> "So far as liquidated damages are concerned, in respect of any period of culpable delay up to the date when the contract is terminated the employer is entitled to recover liquidated damages at the contractual rate (or nothing, if that is what the contract provides). However, after the date of termination the parties are no longer required to perform their primary obligations under the contract and so the contractor's obligation to complete by the completion date no longer remains and the provision for liquidated damages therefore becomes irrelevant. In its place arises an obligation to pay damages for the employer's losses resulting from the breach of contract, including damages for any loss resulting from any further delay caused by the need to have the works completed by a different contractor. Accordingly, whilst the arbitrator was correct to conclude that the liquidated damages provision prevailed up to the date of termination, he was wrong to conclude (if he did) that Mr and Mrs Shaw were not entitled to damages for any delay occurring thereafter."

99. In *Hall v Van Der Heiden (No 2)* [2010] EWHC 586 (TCC) the claimant employed the defendant on the JCT Minor Works Building Contract to carry out refurbishment works to their flat for £143,054.00. Clause 2.9 required the contractor to pay liquidated

damages for delay at the rate of £700 per week. The contractual completion, as extended, was 3rd November 2007. The defendant fell behind. On 17th January 2008 he left site maintaining that he had achieved practical completion but had not been properly paid. In reality the claimants had paid all sums that were properly due. The defendant had not achieved practical completion, because many items of work were defective or incomplete. The claimants engaged another contractor who achieved practical completion on 17th May 2008.

100. In the subsequent litigation, only one party was represented and, so far as I can see, none of the relevant authorities were cited. Coulson J (as he then was) awarded liquidated damages at the rate £700 per week for the entire period, 3rd November 2007 to 17th May 2008. The editors of *Hudson's Building and Engineering Contracts* (13th edition, 2015) described that decision as "questionable": see footnote 156 on page 733. There are similar comments in other textbooks. Despite that, *Hall* has been followed by the High Court of Hong Kong in *Crestdream v Potter Interior Design* (2013) HCCT 32/2013 and, very recently, by Mr Richard Salter QC sitting as a deputy High Court judge in *GPP Big Field LLP v Solar EPC Solutions SL* [2018] EWHC 2866 (Comm).

101. *Bluewater Energy Services BV v Mercon Steel Structures BV* [2014] EWHC 2132 (TCC) is a complex case, which does not lend itself to pithy summary. Suffice it to say that Ramsey J held that liquidated damages for delay ran up to the date of termination, but not beyond. The judge held at [526] that termination of the contract did not affect accrued rights.

102. The House of Lords' decision in *Glanzstoff* came under scrutiny in Singapore in *LW Infrastructure PTE Ltd v Lim Chan San Contractors PTE Ltd* [2011] SGHC 163; [2012] BLR 13. In that case LW employed LCS as sub-contractor. The extended completion date for the sub-contract work was 31st October 2002. LCS was dilatory and failed to meet that date. On 12th May 2003, LW terminated the sub-contract and engaged others to complete the sub-contract works.

103. LW claimed liquidated damages for delay between 31st October 2002 and 12th May 2003. The arbitrator, relying on *Glanzstoff*, rejected that claim. He held that since LCS never completed the works, the clause specifying liquidated damages for delay did not apply.

104. LW appealed to the High Court. Unfortunately, counsel did not put before the High Court the full decision of the House of Lords in *Glanzstoff*. Instead, all that counsel produced was the two-line summary at [1913] AC 144 ("The House affirmed the decision of the First Division of the Court of Session upon the grounds stated by that court."). Prakash J distinguished *Glanzstoff* on the basis that Brown's contract was terminated before the contractual completion date. Therefore, on the termination date there was no accrued liability for delay. Such a liability could not be imposed upon the contractor as a result of events which occurred after termination of its contract.

105. Unfortunately, Prakash J did not have sight of the speeches in the House of Lords. I do not know what she would have made of the passages which I have quoted in paragraphs 87-89 above and on which Mr Stafford relies.

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: *Glanzstoff*; *Chanthall*; *Gibbs.*

   ii) The clause only applies up to termination of the first contract: *Greenore*; *Shaw*; LW *Infrastructure*; *Bluewater.*

   iii) The clause continues to apply until the second contractor achieves completion: *Hall*; *Crestdream*; *GPP.*

107. I do not think that the *Glanzstoff* principle can be confined to cases where the first contract was terminated before the contractual completion date. It is clear from the reasoning of the Court of Session and the House of Lords that the decision would have been the same if Brown had become bankrupt after the contractual completion date, but before actual completion.

108. Much will turn on the precise wording of the liquidated damages clause in question. I have no intention of going through the earlier authorities and pronouncing on which one was right or wrong, having regard to the wording of the clause in that particular case. I have my doubts about the cases in category (iii). If they are correct, it means that the employer and the second contractor can control the period for which liquidated damages will run.

109. I see much force in the House of Lords' reasoning in *Glanzstoff*. In some cases, the wording of the liquidated damages clause may be so close to the wording in *Glanzstoff* that the House of Lords' decision is binding. That is a decision of our highest court, which has never been disapproved. Unfortunately, *Glanzstoff* appears not to have been cited in most of the post 1992 decisions. My own decision in *Greenore* may possibly have been different if *Glanzstoff* had been cited. I now have no recollection of the case beyond what appears in the judgment.

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.

111. In considering this issue, I have looked at several US authorities and articles. An article in the Montana Law Review for 1942 by B. Johnson, *Damages: liquidated damages for delay in an abandoned construction contract*, neatly articulates the conflicting

policy considerations. So far as I can see, the American cases go in both directions. The US material is of no real assistance in resolving the present problem.

112. Let me now turn to Article 5.3 in the present case. This clause, like clause 24 in *Glanzstoff*, 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 *Glanzstoff*, has no application in a situation where the contractor never hands over completed work to the employer.

113. The consequence of this analysis is that PTT is entitled to recover liquidated damages of $154,662 in respect of Triple Point's delay of 149 days in completing stages 1 and 2 of Phase 1. PTT is not entitled to recover liquidated damages for any of the other delays. That is because Triple Point did not complete any other sections of the work. The fact that PTT cannot recover liquidated damages in respect of any other sections of the work does not mean that it is left without a remedy for non-completion. Such damages are at large, rather than fixed in advance. PTT is entitled to recover damages for breach of Articles 5 and 12 of the CTRM contract, assessed on ordinary principles.

114. The question remains, however, whether PTT's entitlement to damages is subject to the Article 12.3 cap. Indeed, that question arises whether PTT's claim is formulated as liquidated damages for delay or as 'ordinary' damages for breach of contract. I must now turn, therefore, to consider the operation of the Article 12.3 cap.

Part 7 – Ground of Appeal VI and Respondent's Cross-Appeal: The Operation of the Cap

115. We now move into territory where both parties are attacking the judge's decision. PTT says that the judge erred in applying the Article 12.3 cap to any part of the damages claimed. Triple Point says that the judge erred in failing to apply the Article 12.3 cap to all of the damages claimed, including liquidated damages for delay. Despite the judge's careful and thorough consideration of the issues, no one is here to fight her corner. We must be astute not to let that go by default.

116. The structure of Article 12 is as follows. The first and most important sentence of Article 12.1 requires the contractor to exercise all reasonable skill, care and diligence in performing its services under the CTRM contract and to comply with recognised international professional standards. I shall refer to this as the contractual duty of skill and care. Article 12.2 is concerned with protecting IP rights. Turning to Article 12.3, <u>sentence 1</u> states that Triple Point shall be liable to PTT for any breaches of contract. This is self-evident, since the contract is subject to English law. <u>Sentence 2</u> imposes a cap on the contractor's total liability under the contract. The cap is the total amount that has been paid to the contractor for the services or deliverables involved under the contract. <u>Sentence 3</u> imposes a separate cap in respect of individual breaches of contract, except where the contract provides "specific remedies". In respect of each such breach PTT must give the contractor a chance to remedy the breach. If the contractor fails to remedy it, then the contractor must repay to PTT the fees which PTT has paid for the services or deliverables which are the subject of that breach. <u>Sentence 4</u> then provides an exception to the cap which has been imposed by sentences 2 and 3.

The exception is "liability resulting from fraud, negligence, gross negligence, or wilful misconduct of contractor or any of its officers, employees or agents".

117. Let me deal first with the cross-appeal. The judge held that "negligence" in sentence 4 of Article 12.3 means the tort of negligence. It does not mean or include breach of the contractual duty of skill and care. If "negligence" had that broader meaning, sentence 4 would take away almost the entire protection afforded by the cap.

118. Mr Howells says that the judge fell into error. Her interpretation of the word "negligence" deprives it of any practical effect. All negligent acts or omissions which Triple Point might commit would be breaches of the contractual duty of skill and care.

119. I do not accept that submission. 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.

120. In my view, the judge's interpretation of the word "negligence" in sentence 4 of Article 12.3 is obviously correct. It fits with the language used and makes commercial sense. Also, this interpretation of sentence 4 is consistent with clause 7.4 of the licence agreement. In that clause, the exceptions to the cap are expressly limited to freestanding torts or deliberate wrongdoing.

121. The interpretation of sentence 4 of Article 12.3 urged upon the court by Mr Howells does not fit with the language used or make commercial sense. It would deprive the Article 12.3 cap of any practical effect.

122. I would therefore dismiss the cross-appeal.

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 <u>total</u> liability. That cap on total liability means what it says. It encompasses damages for defects, damages for delay and damages for any other breaches.

I readily accept that it would be more logical and easier to understand if sentence 3 had preceded sentence 2. But the draughtsmen of this particular contract were not trying to make life easy for the reader. In my view, this interpretation gives an intelligible meaning to all the provisions of Article 12.3. This reading of the clause should be preferred to the rival interpretation which has been canvassed.

128. In the result, therefore, I would dismiss PTT's cross-appeal and allow Triple Point's appeal in relation to the operation of the cap. Since the cap has been wholly used up by the award of general damages, this prevents PTT from recovering the liquidated damages of $154,662 assessed in Part 6 above.

Part 8 – Conclusion

129. For the reasons set out above, I would reject the first three grounds of appeal and uphold the judge's decision to dismiss all Triple Point's claims.

130. In relation to the counterclaim, I would allow Triple Point's appeal and set aside the judge's award of liquidated damages for delay. I would dismiss PTT's cross-appeal.

Lord Justice Floyd:

131. I agree.

Lord Justice Lewison:

132. I also agree.