

Construction Law Update

Gosschalks Solicitors

Thursday 21st November 2019



Triple Point Technology v PTT [2019]

Court of Appeal

Liquidated Damages:
Is there life after death?



What are liquidated damages?

- Payable for a failure to complete by completion date
- Amount of damages fixed in advance
- Typically, a weekly rate
- Employer doesn't have to prove a loss
- May overcompensate or undercompensate
- Must be a genuine pre-estimate of likely loss
- Can be “zero”
- EOT mechanism

Planned completion
date



1 March 2020

Extension of time



1 April 2020

Actual completion
date



1 May 2020



Liquidated damages x 5 weeks @ £10k a week = £50k

Works **not** completed – what LADs due?

Planned completion

date



1 March 2020

Termination

date



1 May 2020

Third party completion

date



1 August 2020



A



B



C

Triple Point Technology v PTT [2019]

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TPT

v



PTT

The LADs clause

“If the Contractor fails to deliver work within the time specified and the delay has not been introduced by PTT, the Contractor shall be liable to pay the penalty at the rate of 0.1%....of undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work.....”

Key facts

- Chronic underperformance
- First section – 149 days late
- Rest of works never completed
- TPT stopped working
- PTT terminated contract

DECISION = CATEGORY B = \$3,304,616.40
LADs UP TO DATE OF TERMINATION

Court of Appeal decision

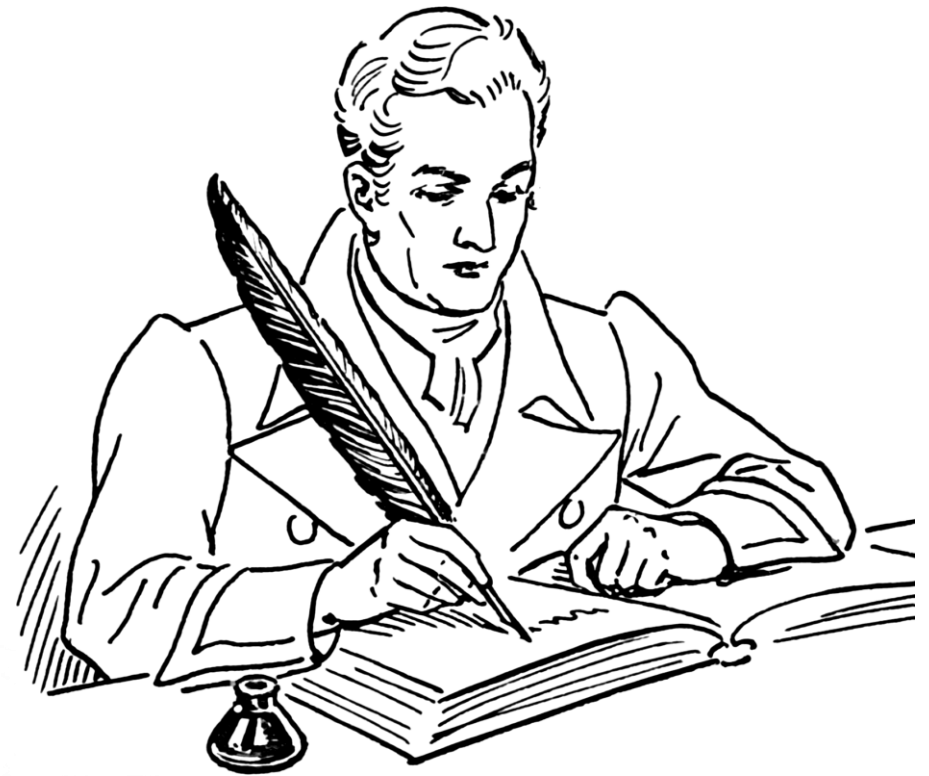
- (a) No LADs (b) up to date of termination (c) up to date of completion by another contractor
- Doubtful category c) cases
- Category b) can also be problematic
- Look at the contract clause
- PTT clause had a focus on the date of acceptance of works by PTT
- *“up to the date PTT accepted completed works from TPT”*

**DECISION: CATEGORY (A) CASE: NO LADS
FOR UNCOMPLETED WORK
GENERAL DAMAGES PAYABLE**



Liquidated Damages Drafting Tips

- Ensure the contract has the desired effect
- Eliminate uncertainty currently present in most standard forms
- Consider impact on liquidated damages before termination
- Beware of any clauses capping overall liability
- Liability to repay accrued damages?



Mears v Costplan Services [2019]

Court of Appeal

Practically complete or
too small for comfort?



Mears v Costplan Services [2019]

Court of Appeal

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Key facts

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- Agreement for Lease
- Mears agreed to enter into a 21 year lease on practical completion
- Rent= £1,660,667
- If certificate of practical completion not issued by 11th September 2018 AFL could be terminated
- Issue of certificate in the sole discretion of certifier
- Contractor not allowed to make material variations to room sizes
- A reduction of more than 3%= material
- 56 rooms were more than 3% smaller
- Impossible to rectify
- Certifier willing to certify practical completion achieved

Court of Appeal analysis

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- PC is easier to recognise than define
- No hard and fast rules
- Latent defects cannot prevent PC
- Existence of patent defects will not necessarily prevent PC
- To do so must be more than 'trifling'
- Whether or not 'trifling' is a matter of fact & degree
- Can be measured against whether Employer can take possession and use works
- BUT just because can be used does not automatically achieve PC
- Existence of irremediable defect does not necessarily prevent PC



Court of Appeal decision

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- Parties had chosen not to agree parameters for certifier (the 3% rule **not** linked to definition of PC)
 - PC therefore a matter for certifier's discretion
 - Certifier considered that problem was trifling
 - Cannot interfere with that conclusion
 - Fact that irremediable is irrelevant
-
- **DECISION: PC HAD BEEN ACHIEVED**



Practical Completion Drafting tips

- Clearly define practical completion
- Can practical completion be achieved?
- Pass down any relevant requirements
- Termination clauses

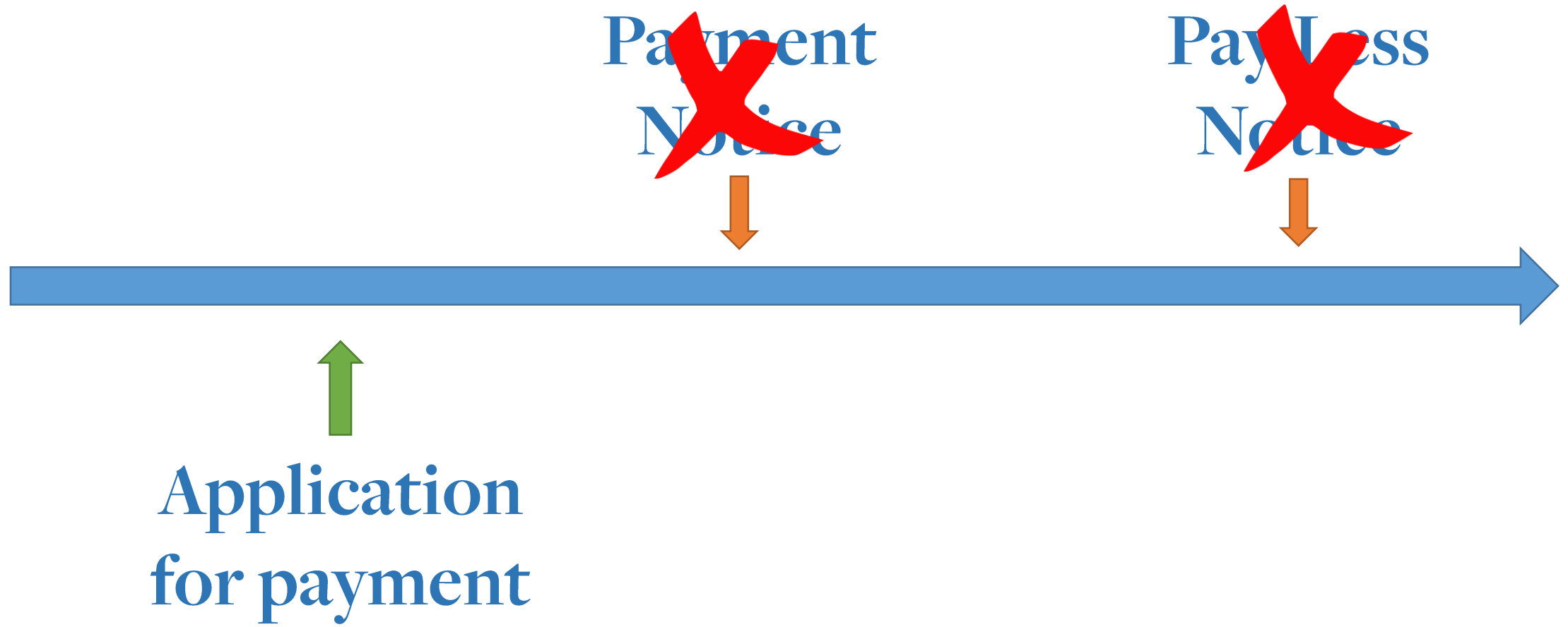


M Davenport Builders v Greer [2019]

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Payment Cycle: Reminder



ISG Construction Ltd v Seevic College [2014]

- Employer: Seevic College
- Contractor: ISG Construction Ltd
- Interim application for £1,097,696
- No Payment Notice or Pay Less Notice served
- Court said the works were worth only £315,450
- However,
 - Seevic had to pay full £1,097,696; and
 - it couldn't have the true value assessed

MJ Harding Contractors v Paice [2015]

- Employer: Paice
- Contractor: MJ Harding Contractors
- Contract Terminated – Final Account Assessment
- No Payment Notice or Pay Less Notice served
- Smash and Grab adjudication successful
- But, as this related to the final account, the true value could be assessed at adjudication.

S&T(UK) Ltd v Grove Developments [2018]

- Employer: Grove Developments Ltd
- Contractor: S&T (UK) Ltd
- Virtually last interim application - £14m
- Pay Less Notice served - £0
- An employer who had failed to serve a payment notice or a pay less notice was nevertheless entitled to adjudicate to determine the true value of an interim application.

S&T(UK) Ltd v Grove Developments[2018]

- However, the Court of Appeal said:

“...the employer must make payment in accordance with clause 4.9 of the contract (or, as I would say, in accordance with section 111 of the Amended Act) before it can commence a ‘true value’ adjudication...”

M Davenport Builders Ltd v Greer [2019]

- Employer: Greer
- Contractor: M Davenport Builders Ltd
- Application for Payment: £106,160.84
- No Payment or Pay Less Notice
- Successful smash and grab adjudication but payment not made
- Second adjudication started. True value assessed – no sums owing

M Davenport Builders Ltd v Greer [2019]

- Greer wanted to rely on second adjudication by way of set off
- “...an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure... to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication...”

M Davenport Builders Ltd v Greer [2019]

- *“The decision of the Court of Appeal implies that it is not an essential prerequisite to relying upon a later true value adjudication decision that the earlier immediate obligation should be discharged before launching the later true value adjudication. Paice did not pay its immediate obligation under the third adjudication before launching the fourth, and they were not precluded from proceeding with or relying upon the fourth adjudication for that reason. This suggests that the critical time will be the time when the Court is deciding whether to enforce the immediate obligation.”*

M Davenport Builders Ltd v Greer [2019]

A spanner in the works?

- a) Court of Appeal v High Court
- b) 2018 v 2019
- c) Commence on interim v Rely on final accounts?
- d) Section 108 issue resolved?



Drafting tips

- Does your contract contain achievable deadlines?
- Importance of following contract provisions
- Can you serve notices by email/post/hand?
- Designated administrator



Questions?

Networking



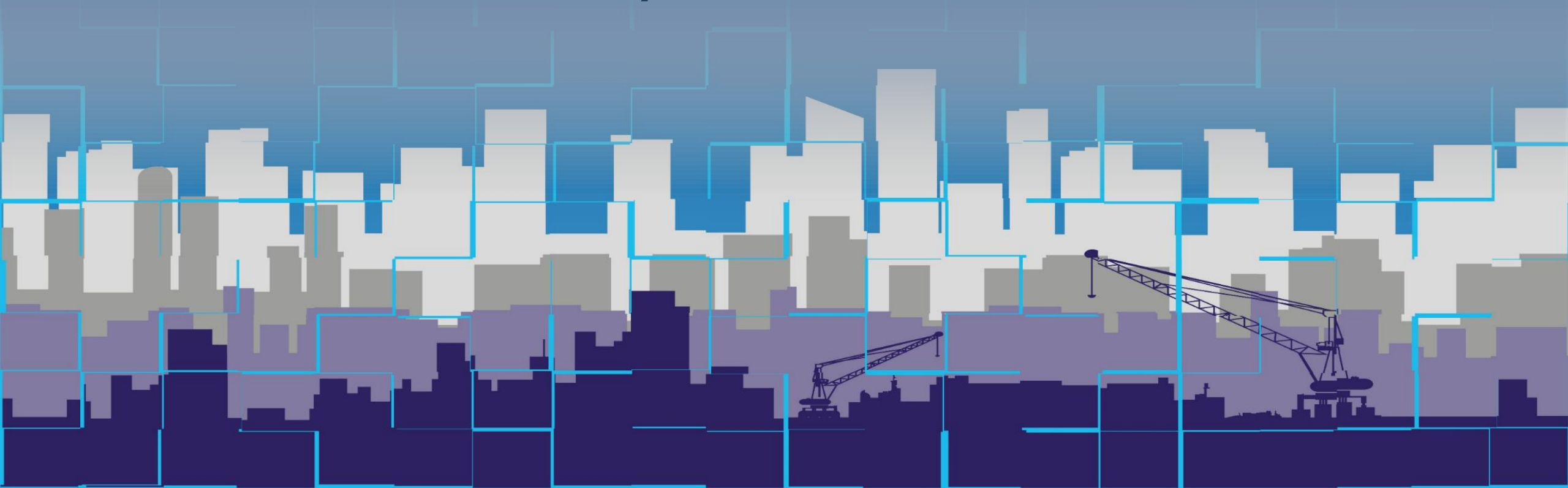


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NEXT EVENT

thinkBIM Digital Manufacturing

Wednesday 4th December 2019





**CONSTRUCTING
EXCELLENCE**
IN YORKSHIRE & HUMBER

Awards 2020

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Closing for entries: mid April (date t.b.c.)
Ceremony Date: Thursday 9 July 2020
New Dock Hall | Royal Armouries | Leeds