LIQUIDATED DAMAGES AND LONDON BUSES

CASES ABOUT LIQUIDATED DAMAGES ARE, IT TRANSPIRES, LIKE LONDON BUSES: YOU WAIT AGES FOR ONE TO TURN UP AND THEN TWO COME ALONG TOGETHER.

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In the summer of 2021, barely two weeks after the Supreme Court decision in *Triple Point* restored good sense to the law concerning the recoverability of liquidated damages after termination,[1] O'Farrell J handed down a judgment which dealt with two of the other classic debates in the law relating to liquidated damages. Her decision in *Eco World – Ballymore Embassy Gardens v Dobler* deals first with the law concerning the application of the penalty doctrine to the liquidated damages clause where partial possession has been taken, and secondly, with the debate about whether such a clause operates to limit the contractor's liability for losses resulting from delay even where it has found to be void and inoperable.[2]

Background – Eco World - Ballymore v Dobler

The dispute arose out of a contract by which the Claimant developer engaged the Defendant contractor to design, supply and install façade and glazing works for a building forming part of a development in Nine Elms, London.

The contract was on the JCT 2011 Construction Management Trade Contract form, subject to a number of bespoke amendments. It included a liquidated damages clause by which the Contractor was to pay liquidated damages at a rate of £25,000 per week up to an aggregate maximum of 7% of the final contract sum. It also included a clause by which the Employer was empowered to take over part of the Works prior to practical completion. However, it did not contain a mechanism to reduce the level of liquidated damages that would be paid in those circumstances.

The dispute came before the Court in Part 8 proceedings in which, somewhat unusually, it was the Employer that was seeking to argue that the liquidated damages clause was unenforceable as a penalty, whereas the Contractor was seeking to uphold it.

The parties had previously fought a series of adjudications which had led them to adopt what might otherwise have appeared to be those counterintuitive positions, both parties having *"performed a volte-face"*, as the Judge observed, each arguing the case put forward by the other in the adjudication.[3]

1 *Triple Point Technology Inc v PTT Public Co Ltd* [2021] A.C. 1148.

2 *Eco World – Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd* [2021] EWHC 2207 (TCC); 197 Con. L.R. 108.

3 *Eco World*, para. [48].

Issue 1 – Partial possession and the penalty doctrine

The Claimant's argument was that where an Employer under a construction contract exercises a contractual right to take early partial possession, but the liquidated damages provisions do not contain a mechanism for reducing the sums to be paid to reflect such early possession, the liquidated provisions are void and/or unenforceable. In advancing that argument it relied on some old favourites in terms of authorities – *Bramall & Ogden v Sheffield City Council* and *Taylor Woodrow v Barnes & Elliott* – as well as on supportive passages in both *Keating* and *Hudson*.[4]

O'Farrell J rejected that argument. Having conducted a careful review of the authorities, she pointed out that they did not reject as automatically fatal the concept of one rate of liquidated damages applying even where there was sectional completion or partial possession.

The Judge acknowledged that one of Lord Dunedin's well-known propositions in *Dunlop Pneumatic Tyre Co* was that there was a presumption that a provision was penal where a single sum was made payable on the occurrence of several different events, some of which might occasion serious and others but trifling damage.[5] However, she held that applying the test for a penalty identified by the Supreme Court in *Cavendish Square*, the liquidated damages provision was not unconscionable or extravagant so as to amount to a penalty.[6]

Four points were of particular importance in arriving at that conclusion. First, the liquidated damages clause had been negotiated by the parties' external lawyers. Secondly, the Employer had a *"legitimate interest"* (in the language of *Cavendish Square*) in enforcing the Contractor's obligation to complete the whole of the works by the completion date, notwithstanding the fact that it had taken partial possession. Thirdly, the quantification of damages that the Employer would suffer would be difficult, a difficulty avoided by the agreement of a global liquidated damages rate in advance. Fourthly, the level of liquidated damages at £25,000 per week and subject to a maximum of 7% of the contract sum was not at an unreasonable or disproportionate level in any event.

4 *Bramall & Ogden Ltd v Sheffield City Council* (1986) 29 B.L.R. 73; *Taylor Woodrow Holdings Ltd Barnes & Elliott Ltd* [2004] EWHC 3319 (TCC).

5 *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] A.C. 79.

6 *Makdessi v Cavendish Square Holdings BV* [2016] A.C. 1172.

Issue 2 – A cap on the Contractor's liability in general damages

Having rejected the Employer's case it was strictly unnecessary for the Court to go on to consider the Contractor's alternative argument to the effect that even if the liquidated damages clause was found to be void and unenforceable, it nevertheless operated as a cap on the general damages which the Employer could recover where it was seeking to prove the actual loss it had suffered as a result of the failure to complete on time.

As readers will be aware, this is another classic debate in the law relating to liquidated damages on which there is no modern English authority. Whilst both *Keating*[7] and *Hudson*[8] have long suggested that it would be inequitable for the Contractor to lose the benefit of the cap that it had negotiated and agreed in circumstances in which the clause is found to be penal, *McGregor on Damages* has always taken the opposite view.[9]

Whilst recognising that each case would fall to be determined on the basis of the proper construction of the relevant provisions, O'Farrell J concluded that it was the clear intention of the parties that the liquidated damages clause was to serve two purposes: first, to provide for automatic liability in a liquated sum, but secondly to limit the Contractor's overall liability for late completion. Accordingly, she concluded that if the liquidated damages clause had been void or unenforceable, the Contractor's liability for delay in general damages would still have been capped at the agreed rate and percentage.

Discussion

There is no doubting the importance of the decision in *Eco World*. The two issues which it considers are ones that practitioners will recognise as arising frequently, both in international arbitration and in adjudication.

O'Farrell J's decision on the first issue is likely to make it much harder for parties (usually Contractors) to succeed with *Bramall & Ogden* type arguments. Winning a penalty argument is always difficult but a failure to account for sectional completion or partial possession was one area in which those sorts of arguments could gain some traction. This decision changes the landscape. Indeed, O'Farrell J's approach has already been followed and applied in another case in the TCC in which a Contractor's attempt to rely on the reasoning in *Bramall & Ogden* to establish that a liquidated damages provision was penal.[10]

More generally, the decision shows that the Supreme Court's 2016 decision in *Cavendish Square* which recast the law on the penalty doctrine is having an impact on the outcome of disputes. There is certainly a case to be made that the decision would have been different under the old law with its overriding focus on whether the liquidated damages constituted a genuine pre-estimate of loss. A conclusion that the Employer nevertheless had a legitimate interest in enforcing the Contractor's primary obligation to complete the whole of the works was central to the Court's reasoning.

In that sense, the judgment can be read as exemplifying the gradual but decisive shift which has taken place in judicial attitudes towards liquidated damages clauses over the longue durée of the modern law of contract. What was once a palpable suspicion of liquidated damages clauses has given way to an approach that is entirely comfortable with, even supportive of, provisions of that sort.

It might be said that O'Farrell J's conclusions on the second issue will prove less significant, particularly as she was at pains to base her reasoning on the particular wording before her and given the difficulty of establishing that a clause is penal in the first place. However, it is suggested that the points made by the Court in reaching the decision here are of much more general application and could be made in most cases in which the issue arises. Given the longstanding disagreement between the textbooks, it is useful to have a modern authority which comes down firmly on one side.

Of the two judgments handed down weeks apart in the summer of 2021, the decision in *Triple Point* received far more attention. In one sense, that was unsurprising: it was a decision of the Supreme Court overturning a Court of Appeal decision which had been widely criticised by commentators and was giving rise to practical difficulties for parties wishing to terminate projects in substantial delay. However, it may well be that it is the decision in *Eco World* that ends up proving more significant and being more often relied on. *Triple Point* merely identified the correct approach as that which had been stated as such in *Keating* since its earliest editions. By contrast, *Eco World* provides answers to two of the other classic debates in the law on liquidated damages provisions.

7 *Keating on Construction Contracts* (11th ed.), para. 10-029.

8 *Hudson on Building and Engineering Contracts* (14th ed.), para 6-050.

9 *McGregor on Damages* (21st ed.), para 16-029.

10 *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2972 (TCC), paras. [92]-[98] (Eyre J).