



Construction – Case Law Update 2019

13th December 2019

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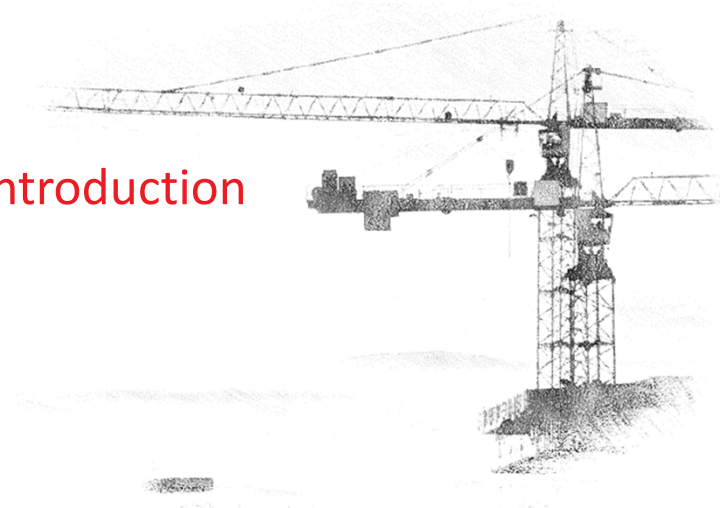
A grayscale, high-contrast image of a construction crane, likely a tower crane, positioned on a construction site. The crane is the central focus, with its long jib extending horizontally. The background shows some structural elements of a building under construction.

Construction – Case Law Update 2019

The law as stated during this webinar is
up to date as of **9th December 2019**


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Introduction


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Construction Case law Update

Liquidated Damages after Termination: Triple Point Technology v PTT

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Overview

- The Issue
 - In the event of termination, how do liquidated damages (“LDs”) provisions operate in respect of unfinished works?
- British Glanzstoff principle (1913)
 - Clause 24
 - Clause 26 - A “separate code”
- Other relevant case authorities (2006 to 2018)
 - Various conflicting approaches
- Triple Point approach (2019)
 - Clarity given
 - A question of true construction
- Key take away messages

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British Glanzstoff Manufacturing Co Ltd v General Accident, Fire and Life Assurance Corpn Ltd [1913] AC 143 [HL]

- Building Contract
 - British Glanzstoff ("**Glanzstoff**") engaged William Brown & Sons as contractor ("**Browns**")
- Guarantee from General Accident
 - "do hereby guarantee ...the due fulfilment...of the said building contract...and to pay and satisfy....all losses....as they may sustain....through the failure of **the said contractor** to carry out the building contract".
- Clause 24 of Building Contract:
 - If works not complete by completion date at clause 23..."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 ...**" ["**LDs**"]

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British Glanzstoff continued....

- **Clause 26**
 - Termination - If Brown's fails to rectify a default within 14 days of default notice, Glanzstoff can take possession of the site and works and "...may engage any other person to complete the works...Upon the completion of the works the architect shall certify the amount of the expenses properly incurred..." due to contractor default.
- **Relevant facts**
 - Brown's declared bankrupt 20 August **1909**
 - Glanzstoff terminated against Brown and engaged Henshaw & Sons ("**Henshaw's**") as replacement contractor
 - Brown's contractual completion Date 31 January **1910**
 - Henshaw's contractual completion date 31 December 1909 (but no LDs)
 - Works completed by Henshaw's 28 March 1910
 - Final account – 2 wks eot to 14 Feb 1910 and 6 weeks LDs (to 28 March)
 - Glanzstoff claimed against Brown's under the General Accident Guarantee

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British Glanzstoff - Decision

- House of Lords (Scotland)
 - Clause 24 does not apply when Clause 26 is utilised:
 - Clause 26 is a separate code, providing a special remedy where the contractor is replaced (i.e. calculation of sums due/owed once works actually completed by others).
 - As a matter of construction, Clause 24 applies only where the works are completed late by the **original** contractor.
 - Affirmed the decision of the Court of Session in favour of General Accident – no entitlement to LDs.

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Other relevant case authorities

- **Greenore Port Ltd v Technical & General Guarantee Co Ltd [2006]** EWHC 3119 (TCC)
 - Contractor became insolvent before works complete. Employer entitled to recover *LDs up to termination and general damages after*.
- **Bluewater Energy Services BV v Mercon Steel Structures BV [2014]** EWHC 2132 (TCC)
 - M argued LDs fell away because works completed by others (not M). Court upheld a “two-stage” LDs mechanism: (1) LDs applicable (as accrued rights) for the interim milestones missed before termination; (2) Final assessment done at actual completion.
- **Hall v Van Der Heiden [2010]** EWHC 586 (TCC) - Coulson J (as then was)
 - LDs applied until second contractor completed. Any other result “*would reward the defendant for his own default*”. No relevant cases cited.
- **GPP Big Field v Solar EPC Solutions [2018]** EWHC 2866 (Comm) WLUK 80
 - *LDs continued post termination* until works completed by the replacement Contractor. Citing Coulson J in the **Hall** case.

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Triple Point Technology v PTT [2019] EWCA Civ 230

- Triple Point (“TP”) designs and develops software for commodities trading. PTT trades commodities. Contract for software.
- Two Phases: (1) replace PTT’s current trading software; (2) develop new software to inc. new types of trading.
 - **Article 5.3** – “If 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 a penalty of 0.1% of undelivered work per day of delay “...**up to the date PTT accepts such work**”.
 - Phase 1 late by 149 days – LDs \$154,622.
 - TP invoiced for Phase 2 payment even though Phase 2 had not started.
 - PTT refused to pay; TP suspended; PTT terminated.
 - **Proceedings:** TP sued for unpaid invoices; PTT counterclaimed damages.
 - **First instance:** TP claim dismissed, PTT awarded circa \$4.5m (1) costs of replacement contractor and wasted costs - capped under article 12.3 at \$1,038,000; (2) LDs for delay under art 5.3 and **not capped** under art 12.3 of circa \$3.459,278.40 (inc the circa \$154k of Phase 1).

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Triple Point continued.....

- **Court of Appeal Reasoning**
 - Potential conflicting strands of authority dealing with LDs clauses where projects completed by others.
 - **Sir Rupert Jackson** - The case authorities show that three different categories have emerged in relation to LDs in circumstances where termination occurs and works are completed by another contractor:
 1. LDs do not apply and only general damages are recoverable (Glanzstoff) - “much force” where the LDs clause is very close to the wording in Glanzstoff (rarely cited since 1992);
 2. LDs only apply up to termination under the first contract (*Bluewater*) and general damages thereafter- Orthodox textbook approach but “*not free from difficulty*” (e.g. accrued rights);
 3. LDs continue to apply until the replacement contractor completes the works (*GPP Big Field*) - “*doubts about the cases*” in this category.

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Triple Point continued.....

- **Court Of Appeal Decision**

- Upheld the first instance decision to dismiss TP's claims (e.g. unpaid invoices).
- **Article 12.3 cap** - PTT said that the judge had erred in applying it to any part of the claim for damages. TP said Judge erred in failing to apply it to all damages, **inc LDs**.
- **Set aside the award of LDs for Phase 2 (over \$3m):**
 - Article 5.3 was not applicable to delay after termination as the Phase 2 works had been completed by others (not TP).
- **Dismiss PTT's cross-appeal:**
 - The 12.3 imposed an overall cap on TP's total liability (including damages for defects, delay and any other breaches). The cap prevented PTT from recovering the LDs for Phase 1 (\$154,662).
 - TP had not forfeited the protection of the cap by "*fraud, negligence, gross negligence, or wilful misconduct*". There had been no deliberate wrongdoing.

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LDs clauses in some Standard Form contracts

- **JCT 2011** [JCT 2016 – Same, but, clauses 2.28 and 2.29]
 - Clause 2.31 – Certificate of Non-Completion - "**If the Contractor fails to complete** the Works...by the relevant Completion date.."
 - Clause 2.32 - "*A notice...shall state that for the period between the Completion Date and the date of practical completion...[the Employer] requires the Contractor to **pay liquidated damages**...*"
- **NEC (ECC) 3** [NEC (ECC) 4 – Same, save that "Client" changed to "Employer"]
 - X7.1 – "*The Contractor pays delay damages at the rate stated in the Contract Data from the Completion Date for each day until the earlier of [1] Completion and [2] The date on which the **Client** takes over the Works*"
- **FIDIC Red Book (2017)** [Same in FIDIC Silver and Yellow Books]
 - Clause 8.8 - "**If the Contractor fails to comply** with Sub-Clause 8.2 [Time for Completion], the Employer shall be entitled...to payment of Delay Damages...every day between the relevant Time for Completion and the relevant Date of Completion of the Works...."

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Key Take Away Messages

- *Triple Point* gives clarity to previously conflicting approaches.
- Applicable to any commercial agreement where performance is to take place over time and to a schedule - not only construction contracts.
- Each case will depend on the drafting and interpretation of the LDs clause [consider also any interaction with other clauses].
 - Whether an LDs clause is caught by *Glanzstoff* is a question of construction - does the clause contemplate only the original contractor completing the works, late?
- Employers who are considering terminating a contract where work is delayed and incomplete should, consider the implications of *Triple Point* and take legal advice before terminating a contractor's employment under a contract.

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Adjudication Update

The ability to adjudicate

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Adjudication Update: the ability to adjudicate

1. **M Davenport Builders Limited v Greer & Anor [2019] EWHC 318 (TCC)**

- Smash and grab adjudications
- Ability by the paying party to launch a 'true valuation' dispute

2. **Bresco Electrical Services Limited (In Liquidation) v Michael J Lonsdale (Electrical) Limited [2019] EWCA Civ 27**

- Previous case law deals with adjudication brought against insolvent companies
- Can an insolvent party commence an adjudication?

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(1) M Davenport Builders Limited v Greer & Anor - Background

Background

- Mr and Mrs Greer contracted with Davenport Builders to carry out constructions works at a building in Stockport
- Basic contract comprising the employers' acceptance of the builder's quotation
- Scheme applied in respect of payment dates and adjudication
- Contractor issued final payment application but employers served no payment or pay less notice
- Contractor issued a payee's notice in default. Employers did not pay.

Adjudication 1

- Contractor stated 'smash and grab' adjudication proceedings
- Contractor obtained award saying entitled to amount in payee notice in default plus interest
- Employer still did not pay. Instead commenced own adjudication

Adjudication 2

- True valuation of what was due to the contractor
- Adjudicator held that no further sum was due to the contractor

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(1) M Davenport Builders Limited v Greer & Anor - Background

Enforcement: issues to be decided

- Contractor applied to court to enforce decision in adjudication 1
- Employers argued that the decision in adjudication 1 was correct but could rely on decision in adjudication 2 as a set-off or counterclaim.
- How was **Grove v S&T** to be applied?

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(1) M Davenport Builders Limited v Greer & Anor - Decision

Enforcement: TCC's findings

- Court of Appeal decision was upheld:
"as it happens I agree with the reasoning and the outcome ... it was provided after full argument and was expressly intended to provide authoritative guidance on an issue that Coulson J had decided in the contractor's favour."
- A defendant who has not discharged his immediate obligation by paying an amount found payable in a first adjudication, could not rely on a second true value adjudication decision in order to set-off or counterclaim against it
- Made clear that the employer can only dispute the valuation of an application when he has paid the "sum ordered to be paid by the earlier adjudication"
- Where perceived risk of insolvency the employer should be scrupulous to protect itself by serving timeous payment notices or pay less notices
- Final payment vs interim payment
- "That does not mean that the Court will always restrain the commencement of progress of a true valuation adjudication commenced before the employer has discharged his immediate obligation" ???

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(2) Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd

Background

- Bresco provided electrical services to Lonsdale
- Bresco ceased provision of services after 6 months and entered insolvent liquidation
- 3 years later Bresco referred the dispute to adjudication claiming £220,000 for wrongful repudiation
- Lonsdale challenged adjudicator's jurisdiction and applied for injunction on the grounds:
 - Adjudicator did not have jurisdiction to deal with company in insolvent liquidation – Insolvency Rules took over and Bresco's only right was to claim net balance out of mutual dealings and set-off; and
 - Adjudicator's decision in favour of Bresco would not be enforced
- Lonsdale granted injunction
- Bresco appealed to set aside injunction

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(2) Bresco v Lonsdale – CoA decision

Court of Appeal decision:

- Bresco appeal dismissed – injunction granted
- Court disagreed with Lonsdale's first ground for not enforcing judgment – an **adjudicator could technically have the necessary jurisdiction to consider a claim advanced by a party in liquidation**
- There is an incompatibility between adjudication and insolvency:
 - Adjudication – a means to improve cash-flow quickly and cheaply
 - Insolvency Regime – a liquidator will take a detailed account and carry out careful calculation of net balance
- Adjudicator's decision in favour of a company in liquidation would not usually be enforced
- Referring a claim where responding party has a cross-claim would be "an exercise in futility"

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(2) Bresco v Lonsdale – Comment

Significance:

- Theoretically possible for company in liquidation to bring adjudication
- This reinforces the view that adjudication and the Insolvency Regime are incompatible
- BUT enforcement of any decision in favour of company in liquidation would require "exceptional circumstances"
 - **Meadowside Building Developments Ltd (in liquidation) v 12-18 Hill Street Management Co Ltd [2019] EWHC 2651 (TCC)**

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Good faith

Developments in 2019

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Recognising good faith at common law

- Recognised if contract contains an **express term**
- Traditionally - does not recognise an obligation of good faith as implicit in all contracts
- Lord Justice Moore-Bick in MSC Mediterranean **Shipping v Cottonex Anstalt**:

"There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement."

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Implied duty of good faith in England and Wales

- Development of case law on implied duties of good faith:
 - **Yam Seng Pte Ltd v International Trade Corporation Ltd [2013]**
- Seminal case in challenging orthodox view
- Implied duty of good faith in relational contracts?
 - E.g. joint venture agreements, franchise agreements and long term distribution agreements
- Still subject to general rules on implied terms
- **Further developed in Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd [2013].**

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Bates v Post Office Limited

- **Fraser J considered the characteristics that may be indicative of a 'relational contract':**
 1. No express terms that are inconsistent with the implied duty of good faith.
 2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.
 3. The parties must intend that their respective roles be performed with integrity and with fidelity to their bargain.
 4. The parties will be committed to collaborating with one another in the performance of the contract.
 5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.
 6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.
 7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.
 8. There may be a degree of significant investment commitment by either or both parties in the venture.
 9. Exclusivity of the relationship may also be present.

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Bates v Post Office Limited - continued

- Mr Justice Fraser:

"I find that these were relational contracts. I find that this means the contracts included an implied obligation of good faith. This [implied duty of good faith] means that both the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. Transparency, co-operation, and trust and confidence are, in my judgment, implicit within the implied obligation of good faith."

- "An implied duty of good faith does not mean solely that the parties must be honest."

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UTB LLC v Sheffield United Ltd

- Mr Justice Fancourt:

- *"It is self-evidently not all long-term contracts that involve an enduring but undefined, cooperative relationship between the parties that will, as a matter of law, involve an obligation of good faith".*
- *"The question, therefore, is whether a reasonable person reading the ISA at the time that it was made, with knowledge of the circumstances in which it is entered into...and the other agreements made as part of the same transaction, would consider that it was obvious that UTB had to act in good faith in all its dealings with SUL, and vice versa, or whether such an obligation is necessary to give coherent business effect to the ISA."*
- *"In these circumstances, I cannot accept that a mutual obligation of good faith is obviously what the parties meant to prescribe, or that such an obligation is necessary to give business efficacy to the ISA."*

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New Balance Athletics v Liverpool Football Club and Athletic Grounds

- Adopts position in Bates
- Clarifies test for breach of implied duty of good faith
- Provides additional guidance on this test

"However, if New Balance **honestly believed** that it could meet the distribution obligation but its **grounds for so believing were unreasonable** then **I do not consider** that it would be **acting in breach of the implied duty of good faith**. Its **conduct would be innocent**, albeit **careless or unwise**. I do not consider that reasonable and honest people would regard such conduct as lacking fidelity to the parties' bargain or "**commercially unacceptable**" though they would no doubt regard it as **imprudent**".

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Good faith – where next?

- Brexit
- NEC: "spirit of mutual trust and co-operation"
- Drafting tips

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