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Are There LADs After Death?

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Introduction

In *Triple Point Technology v PTT Public Company* [2019] EWCA Civ 230, the Court of Appeal considered whether a liquidated damages provision applied where the contractor failed to complete the work. The decision also dealt with disputed payment provisions, the existence (or otherwise) of an implied right to suspend for lack of payment and the perhaps unsurprising challenge (as it is often made) that the liquidated damages clause was an unenforceable penalty.

The case offers not only some salutary reminders that English law applies contracts strictly, but it also gives food for thought as regards the availability of liquidated damages where the employer has terminated the contract prior to (delayed) completion.

The Court of Appeal has distanced itself from what was previously thought the orthodox approach in such situations, after counsel unearthed (apparently at Sir Rupert Jackson's prompting during the hearing) an over 100 years old House of Lords' decision that appears to have largely been forgotten. Not any more!

The Facts and the Contract

Triple Point, a software company, had contracted with PTT, the Thai state-owned oil and gas company, to install proprietary software for PTT's commodities trading business. Triple Point had a proprietary system which it was to supply for PTT in phases – replacing of PTT's old software with Triple Point's system, followed by expansion and adaptation of Triple Point's proprietary suite, to meet PTT's specific needs.

The contract was concluded after PTT had put the project out to tender. In June 2012, PTT issued 'Terms of Reference'. This was an 'employer's specification'-type document which described the technical features that PTT required. In September 2012, Triple Point submitted its bid. That bid was then discussed in meetings with PTT. From November 2012, Triple Point issued two 'Technical Documents', recording Triple Point's responses to questions PTT had asked in bid discussion meetings. These documents were intended to be 'bid clarifications'. In December 2012, the parties signed a letter of intent. In late January 2013, Triple Point sent PTT a 'License Agreement' and 'Order Forms A, B and C' for phases of the Triple P. In February 2013, the contract was signed.

The final contract had a number of exhibits, which either consisted of or referred to all the documents the parties had exchanged in the preceding months – so the Terms of Reference, Technical Documents, Letter of Intent, License Agreement and Order Forms. Perhaps unsurprisingly, these documents were not always consistent with each other, or the conditions of the contract. One particular inconsistency related to payment dates. Article 18 of the final contract provided for payment of a percentage of the contract price against performance milestones. Order Forms A, B and C, exhibited to the contract, provided for certain other payments to be made on calendar dates, without reference to the completion of any particular works. The contract also contained a 'precedence clause', stating that the main conditions, including Article 18, took precedence over the exhibits in the event of any conflict.

The Dispute

The project proceeded very slowly. As the courts ultimately found, Triple Point did not allocate adequate resources to the project. The software that was eventually installed did not meet PTT's technical requirements as set out in the Terms of Reference. In March 2014, Triple Point had completed just two milestones of the first stage of the work – and had done so 149 days late. PTT paid Triple Point's invoice for that milestone, but declined to pay further invoices that Triple Point had issued based on the calendar dates for payment in the Order Forms A, B and C. PTT relied on the fact that the work in question had not been completed, and that Article 18 therefore did not require payment. PTT's refusal brought matters to a head. In response, Triple Point purported to suspend the work for non-payment, and then demobilised. PTT then terminated the contract, relying on Triple Point's wrongful suspension. Undeterred, Triple Point issued proceedings to recover the unpaid invoices which, it maintained, had become due on the relevant calendar dates in the Order Forms. PTT denied that anything further was due to Triple Point, and counterclaimed, including for liquidated damages for delay.

The Judgment at First Instance and the Decision of the Court of Appeal

Triple Point lost at first instance. As regards Triple Point's invoices, Jefford J held that Article 18 of the contract and the Order Forms A, B and C were inconsistent, but that the main conditions of contract took precedence. The judge at first instance also found that Triple Point had been negligent in carrying out the work, and that Triple Point's negligence caused the delay, rather than any lack of cooperation by PTT. She held that Triple Point's suspension of the work was a repudiatory breach of the contract at common law. That suspension also entitled PTT to terminate under the contractual termination provision. The judge awarded PTT damages of just under $4.5 million in total, both in respect of the cost of procuring an alternative functioning and complete software system and as liquidated damages for delay. Triple Point appealed.

On 5 March 2019, Sir Rupert Jackson handed down the judgment of the Court of Appeal. The judgment deals with the correct interpretation of the contractual payment clauses and whether a term entitling the contractor to suspend the work due to non-payment ought to be applied. While the Court of Appeal's decision on those two issues is confined to the application of established principles, it provides a useful reminder of the fact that contractual wording in an agreement of this nature will be given effect, even if the result appears to favour one party over the other. We will briefly look at the decision on the payment dispute before turning to the issue of liquidated damages.

No Separate Payment Regime to Give Effect to all Contractual Documents

On appeal, Triple Point sought to get around the 'precedence' clause in the contract by arguing that notwithstanding the requirement for milestone payments in Article 18, the calendar dates for payment set out in Order Forms A, B and C still had to have some contractual force. This was because (as is often said) every provision in a contract ought to be given at least some effect, if at all possible. On Triple Point's argument, construing the contract as a whole, the Order Forms created a separate payment regime for certain specific items that were to be supplied by Triple Point under the contract, namely the software itself and the licensing fee.

The total contract price was $6.92 million. Order Form A stated that this figure consisted of (i) $4.32 million for "*Installation, configuration and training*", and (ii) $2.6 million for "*Software license fees*." The Order Form then set out four payments, all due by reference to calendar dates, which came to a total of $2.6 million. Article 18 of the contract, on the other hand, stated that "*Payment shall be made by milestone*," showing percentages payable against a total of nine milestones, each described as "*Percentage of Payment of Total Contract Value*." Triple Point's argument was that one could avoid any inconsistency between the two payment provisions by

concluding that Order Form A was only concerned with payment for the software, of $2.6 million (because the payments due on the calendar dates added up to that figure), while Article 18 had to be concerned with only the remaining $4.32 million, which was payable for installation and customisation of the software – something for which performance milestones would make a lot more sense.

Sir Rupert described this argument as 'ingenious'. Unfortunately for Triple Point, when a judge uses that expression, it usually means that the argument in question is too clever for its own good. He was not persuaded that Triple Point's interpretation of the contract had to be given effect in order to achieve a harmonious construction of the contract. He noted:

> *"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."*

With that in mind, the correct interpretation was to uphold Article 18, which came first in the pecking order. The milestone payment regime applied to all sums due under the contract, because Article 18 contained no reference to part only of Triple Point's scope of work. This decision is a useful reminder that English law will not strive overmuch to resolve even clear contradictions in contractual documents, where the parties have accepted a precedence clause.

No Implied Right to Suspend for Non-Payment

As Triple Point had received all the payments due to it under the contract, Triple Point could not have had any right to suspend performance due to non-payment. The Court of Appeal nevertheless dealt with Triple Point's argument that there could have been such a right as a matter of principle, based on an implied term. Triple Point had suggested that a right to suspend performance due to non-payment had to be implied to give the contract 'commercial or practical coherence'. Sir Rupert disagreed. He found that even without such an implied term, Triple Point still had a range of remedies available to it in the event that PTT failed to pay, such as bringing a claim in debt and obtaining summary judgment or treating non-payment as a repudiatory breach (if the outstanding amount is sufficient for the purpose).

The Court of Appeal was not moved by Triple Point's complaint that without an implied right to suspend, the contract was entirely one-sided: even if that were the case, a term would not be implied to make bargain fairer. It was also material that the parties had evidently thought about the circumstances in which Triple Point was to have a right to suspend performance: under the contract, PTT had been given a right to suspend for convenience by giving ten days' notice, and work was also to be suspended if a *force majeure* event occurred. As the express terms of the contract showed that the parties had turned their minds to the issue of suspension, the fact that they had not included non-payment as a ground for suspension left no room for the implication of a term.

PTT's Liquidated Damages Were Not a Penalty

Triple Point argued on appeal that the amounts it had been ordered to pay due to the delay were an unenforceable penalty. The judge at first instance had awarded PTT liquidated damages for delay of $3.46 million, pursuant to Article 5.3 of the contract which provided:

> *"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 5.3 thus used the term 'penalty', which is anything but an ideal approach to drafting such a provision. Under English law, a 'penalty' imposed on a party that breaches the contract will be unenforceable. However, the language used by the parties in the contract is not conclusive. A court or arbitral tribunal will always look at the substance of the provision, to determine whether it really falls foul of the rule against penalties, no matter what label the parties have attached to the relevant payment.

The Supreme Court has restated the law on penalties in *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67. The key question is whether the clause in issue imposes a detriment on the party in breach that is *"… out of all proportion to any legitimate interest of the innocent party …*". Both at first instance and on appeal, Triple Point said that Clause 5.3 did have precisely that effect and was therefore unenforceable. The judge found this argument "*hopeless*". Jefford J's judgment contains a breakdown of how PTT had calculated the amount of the liquidated damages claimed based on the contractual formula, but no discussion of how PTT had worked out the contractual formula in the first place. While it is not clear what evidence (if any) the judge heard as to how PTT had estimated its likely losses, and how it had set the contractual formula by reference to any such estimate, the judgment suggests that Jefford J saw no need for any detailed enquiry.

Triple Point's penalty argument did not fare much better in the Court of Appeal. Sir Rupert found that:

> *"… 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."*

Considering that PTT's commodities trading business is likely to be profitable, and that any interruption in that business due to the unavailability of the required software platform could lead to substantial losses, this conclusion is not surprising. It is worth noting, however, that neither the judge nor the Court of Appeal felt it necessary to refer to any evidence of what PTT's (actual) likely losses might have been, or as to how the formula was worked out at the time of contracting. The liquidated damages provision was, it seems, waved through. This illustrates the general willingness of English law to uphold such provisions, where they are agreed between sophisticated commercial parties for projects where the employer faces a real risk of considerable losses if completion is delayed.

Are Liquidated Damages Payable Following Termination or Abandonment?

Triple Point had one final argument to deploy. This was that the liquidated damages clause did not apply in the first place because the work had never been completed 'late'. Instead, PTT had terminated the contract. Sir Rupert noted that this was a "*formidable*" argument (on the judicial scale, this is much better than 'ingenious'), which raised a point of principle. He also commented that, during the hearing, the Court of Appeal had asked counsel to provide all relevant authorities – something both sides had omitted to do as part of their initial submissions. This could suggest that Triple Point had not had much faith in this argument, and that PTT did not think it merited a detailed response. However, Sir Rupert evidently took a different view.

The authorities that counsel then supplied go back to the decision of the House of Lords in *British Glanzstoff Manufacturing v General Accident, Fire and Life Assurance* 1913 SC (an appeal from the Court of Session), a case that seems to have been overlooked in recent times. The contractor in *Glanzstoff* had been required to complete a new factory that would produce artificial silk by 31 January 1910. The contract included a liquidated damages provision (Clause 24) in the following terms:

> *"If the contractor fails 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 …"*

The contract also contained a further provision (Clause 26) stating that if the contractor stopped working, the employer was entitled to employ someone else to complete the factory, with the original contractor being liable for the additional costs that the employer might incur by having someone else take over.

The contractor went bankrupt and stopped work. On 16 September 1909, the employer engaged a new contractor, who duly completed the work on 28 March 1910, so later than the original contractor's completion date of 31 December 1910. The employer accepted that the original contractor would have been entitled to an extension of time until 14 February 1910. On that basis, the employer brought an action against General Accident, Fire and Life Assurance, who had guaranteed the original contractor's performance. The employer claimed both for the additional cost of having the work completed by the new contractor and also for liquidated damages for the period from 14 February 1910 (the original contractor's extended completion date) to 28 March 1910 (the date on which the new contractor completed the works).

In the House of Lords, Alfred Hudson SC, for the employer, faced Richard Atkin SC, for the guarantor. It would be an understatement to say that both went on to have successful careers. On this occasion, their Lordships sided with the future Lord Atkin. The House of Lords found that the liquidated damages clause (Clause 24), and the provision entitling the employer to complete the works at the contractor's (additional) cost if the contractor failed to complete the work (Clause 26), were different remedies applicable in different circumstances. The liquidated damages clause was interpreted as only applying when the contractor completed the work late:

> *"… 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 opinion … that clause 24 has no application to the present case …"*

Clause 26 was described as a contractual enclave, or a separate code to liquidated damages under Clause 24. The House of Lords also found that, as a matter of construction, Clause 24 only applied when the contractor had actually completed the works, albeit late.

In *Triple Point*, Sir Rupert expressed the view that the House of Lords' reasoning was not confined to cases where the contract was terminated before the original completion date (as had actually happened in *Glanzstoff*), but that the result would have been the same if the employer had terminated the contract after the completion date, when the original contractor was in delay. If that is so, then one might think that the employer loses accrued rights – to be paid liquidated damages for delay that has actually happened due to the fault of the contractor – as a consequence of exercising the right to terminate. This may seem odd, as termination, including

for repudiatory breach, does not ordinarily affect sums that have already become due and payable between parties prior to termination.

Two Different Lines of Authorities

The decision in *Glanzstoff* appears to have been largely forgotten in recent years. It was not cited in about half a dozen decisions in the Technology and Construction Court from around 2010 onwards, all concerning claims for liquidated damages where the employer had terminated. These decisions went down two different paths.

The approach taken by the first line of authorities is best illustrated by *Shaw v MFP Foundations and Pilings Ltd* [2010] EWHC 1839. The employer accepted the contractor's repudiatory breach in refusing to repair defective work, thereby terminating the contract. The employer then claimed liquidated damages for delay, in circumstances where the works remained incomplete. Edwards Stuart J found that the employer could recover liquidated damages up to the date of termination, but not beyond:

> *"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 …"*

This was perhaps the most widely accepted view before *Triple Point* brought their Lordships' speeches in *Glanzstoff* back into the spotlight. Sir Rupert identified a further four cases following the approach in *Shaw* (liquidated damages up to termination only), including one of his own decisions (*Greenore Port v Technical & General Guarantee Company* [2006] EWHC 3119). It will be noted that on this view, the employer can claim general damages (based on loss that would have to be proven) for any further delay suffered as a result of procuring completion by a replacement contractor.

The second strand of authorities goes further in the employer's favour. In those cases, the Court decided that the contractor's liability to pay liquidated damages did not end on termination, but continued until such time as the works were actually completed, regardless of who would complete the works. The fullest explanation of the reasoning supporting that school of thought is found in the judgment of Coulson J in *Hall v Van Den Heiden* (No 2) [2010] EWHC 586 (TCC):

> *"I reject the suggestion that the defendant's liability to pay liquidated damages somehow came to an end when his employment under the contract was terminated. There is no such provision in the contract. Any such term would reward the defendant for his own default. Take the example of a contractor who has wholly failed to comply with the contract, is in considerable delay, and is facing a notice of termination. The defendant's case would mean that such a contractor was only liable to pay liquidated damages for delay before the decision was taken to terminate, thereby penalising the employer for trying to get the works completed by another contractor, and rewarding the contractor for sitting on his hands and failing to carry out the works in accordance with the program. If the defendant was right, the contractor would be better off not coming back on site to carry out the works because, if he refused to do so, the contract would then be terminated and his liability to pay liquidated damages would automatically come to an end. That would not be a common-sense interpretation of this (or any) construction contract."*

The Court of Appeal followed *Glanzstoff*

Sir Rupert acknowledged that, at its heart, the question was one of construction of the relevant liquidated damages clause – was it meant to apply up to termination, or even beyond? However, he also noted that:

> *"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."*

Turning to Article 5.3, Sir Rupert decided that the provision did not apply as PTT had terminated the contract. He felt that the wording of the clause was similar to that in *Glanzstoff*. Recall that Article 5.3 stated that PTT's liquidated damages were levied (emphasis added):

> *"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 …"*

This meant that PTT's liquidated damages were to be calculated for the period expiring on the date of PTT accepting such work from Triple Point, but not another contractor. PTT's entitlement to liquidated damages was therefore limited to the 149 days of delay for the works in the first stage, which PTT did accept before then terminating the contract, calculated in accordance with the contractual formula – giving PTT about $150,000 of the $3.5 million that the judge had awarded.

Article 5.3 can certainly be interpreted in this manner. It does, however, require reading the provision as not giving rise to any accrued rights to claim liquidated damages until the 'date of acceptance'. In other words, 'acceptance' by PTT of Triple Point's late works would need to be a condition precedent for the accrual of any entitlement to liquidated damages – even though the clause also says that Triple Point is liable to pay liquidated damages at the agreed rate "… *of undelivered work per day of delay* ...".

The fact that PTT could not recover liquidated damages did not, of course, mean that PTT had no claim for any losses following the delay. PTT's losses would fall to be assessed by reference to the ordinary principles of damages for breach of contract. An employer's actual loss might turn out to be greater than the liquidated damages provided for. After all, the amount of liquidated damages is often subject to a limit, sometimes expressed as a percentage of the contract price. Contractors negotiate these limits, and employers tend not to be able to impose whatever amount of ascertained damages that they wish to have.

Liquidated damages are of course fixed in advance. The employer does not have to prove any actual loss suffered in the event that delay occurs and can bank on receiving the agreed sums, subject only to the rule against penalties. If the clause does not apply in the event of early termination or abandonment, then damages are at large. That cuts both ways. The employer would have to prove its actual loss. The contractor on the other hand ought not be able to rely on any limit of the amount of liquidated damages in defending a claim for general damages. If the liquidated damages clause is of no application, then any such limit contained within that provision should equally be inapplicable. In *Triple Point*, PTT's claim for general damages was, however, caught by a limitation clause set out in another part of the contract, limiting Triple Point's maximum liability to PTT (for

any breach of contract, including delay and losses suffered following early termination). Absent that provision, PTT should have been able to claim for the actual loss caused by any disruption to its commodities trading business.

Conclusion

While the effect of any liquidated damages clause will always depend on the contractual wording, the Court of Appeal's decision in *Triple Point* does break with the orthodox view that liquidated damages are payable in respect of any delay until termination of the contract. Sir Rupert was also critical of the other approach that had previously found support in the authorities, that the employer's entitlement to claim ascertained amounts continues after termination until the works have actually been completed. He voiced the concern that this would allow the employer and the replacement contractor to control the period of delay, thus making the original contractor liable for something over which they had no influence. Instead, the liquidated damages clause in *Triple Point* was found not to apply at all as a result of the termination. Article 5.3 in the contract between Triple Point and PTT did refer to 'acceptance' of the delayed work as marking the end of the period in respect of which liquidated damages were payable. It is therefore possible to read the clause as never giving rise to any liability absent such 'acceptance' from the original contractor.

The Court of Appeal arguably went somewhat further, describing the decision of the House of Lords in *Glanzstoff* as laying down a principle, and as potentially 'binding' where the wording of the liquidated damage clause in issue is close to that which was before their Lordships in *Glanzstoff*. This raises a potential issue. The clause in Glanzstoff did not refer to 'acceptance', or any handing over of the work, by the original contractor. Clause 24 said that (emphasis added):

> *"… 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 <u>for every week beyond the said date or extended time, as the case may be, during which the works shall remain unfinished</u> …"*

The works of course "… *remain unfinished* …" if the employer terminates under Clause 26 and has someone else complete the work. The clause also refers to an obligation by the contractor to "*pay*" liquidated damages for every week beyond the contractual completion date. One could therefore argue that this provision gives rise to a debt which accrues on a weekly basis, while there are 'unfinished' works. Termination, of course, does not affect accrued liabilities. Indeed, some liquidated damages clauses specifically say that the liability to pay accrues on a daily basis, irrespective of whether the employer demands the liquidated damages. If such provisions say nothing about the period over which liquidated damages apply as having to be calculated by reference to the date of acceptance or completion, then it would seem rather difficult to apply the so-called *Glanzstoff* principle. Instead, the orthodox result might follow, with liquidated damages being payable until termination.

For the sake of argument, assume that after a period of delay has occurred, the employer commences proceedings to recover liquidated damages calculated at that point in time. It would be odd if the contractor could defeat that claim on the basis that the employer had to wait for as long as it took the contractor to finish the work, and that the employer might, in future, decide to terminate.

In *Triple Point*, Sir Rupert, however, said that in his view, whether the *Glanzstoff* principle applied had to be judged by reference to the wording of the liquidated damages clause ("*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*."). Arguably, the clause in *Glanzstoff* could quite happily be construed as entitling the employer to claim

liquidated damages until the works have been 'finished'. It is this aspect of the Court of Appeal's decision that might fuel argument in the future.

It may be that their Lordships' reasoning in *Glanzstoff* did not rely so much on the wording of Clause 24, but rather on the fact that Clause 26 giving the employer an additional remedy (the so-called "*contractual enclave*") that was inconsistent with the application of liquidated damages. The contract therefore required the employer to choose between having the work completed by another contractor and claiming the extra cost or sticking with the original contractor and claiming liquidated damages. Their Lordships also noted a number of particular features of Clause 26, which entitled the employer to use the (ousted) contractor's plant and tools, and involved the architect still supervising the work:

> *"… clause 26 … is this carefully guarded power which is given … to the employer to enter and to complete the work either himself or through another contractor under the guidance of the architect, who is made the judge between the two parties, and whose duty it is to see that the employer does not put a larger burden upon the original contractors than could properly have been the case. The employer is bound by the opinion of the architect, who at the completion of the works carried out, after this taking possession and ousting of the original contractors, is to certify the amount of expense properly incurred. If by chance there has been an advantage in that the work has been more cheaply done than it would have been done under the original contract, then the original contractors, notwithstanding they have been in default, are to get the benefit. The reason is plain. This is a very exceptional remedy under which they are ousted from the contract. But if, on the other hand, the architect certifies that additional expenses have been incurred, then those are to be recovered."*

The employer's choice was therefore between completion of the work by the original contractor plus liquidated damages, or completion through the Clause 26 mechanism, which does not reflect the position following termination at common law (for instance, the contractor would not be entitled to any benefit if the employer managed to complete the work more cheaply). Clause 26 also requires the application of the contractual certification mechanism, through the architect, to works carried out by the replacement contractor. One might, therefore, ask whether exercising the 'exceptional' remedy Clause 26 was really the same as terminating the contract.