

Recent court judgments on project planning costs and liquidated damages



On 28 January 2021, in striking down planning permission for a strategic housing development, the Court awarded costs against An Bord Pleanála and the developer. The challenge was brought by Dublin City Council (DCC) against An Bord Pleanála on the basis that the grant of planning permission in the Dublin docklands area was in breach of building height restrictions.

Developer jointly liable for costs with the Planning Board in planning case

The Planning Board had granted permission to increase the height of one tower from 11 to 13 storeys, and another tower from seven to 11 storeys. The developer was participating as a notice party only. In deciding to overturn the

grant of planning the High Court awarded costs against both An Bord Pleanála and the developer. The High Court's decision to overturn the permission is currently under appeal. It is understood that the award of costs against the developer is also under appeal.

This award is a significant departure from usual practice where the costs of a

successful challenger would typically be awarded against the losing party only (in this case the Planning Board), unless the conduct by the developer had unnecessarily prolonged a case.

The Court awarded DCC its costs on the basis of the usual rule and the Planning Board consented to an order for costs being made against it. The Court accepted that the decision was made by the Board and as such it was the Board who had committed the legal error. However, the Court held that the developer had tried to defend the Board's decision, and in doing so brought itself into the frame to pay DCC's costs. In particular, the Court stated that "a significant burden of defending the action, similar to the burden on [the Board], was taken on by [the developer]". On that basis, the Court held that it was appropriate to award costs against the developer so that the Board and the developer were made jointly and severally liable for DCC's costs.

Until now, it has been rare for a costs order to be made against the developer in challenges to planning permissions. In this case, the Court's decision appears to be based only on the fact that the developer took on the burden of defending the action, rather than that the developer unnecessarily prolonging the case (although the court did not ultimately make a finding on this point).

The Court did accept that a developer might not be liable for costs where it "makes only a brief intervention in a case where the vast bulk of representing the losing point of view is taken up by someone else". Ultimately, this decision increases the risk that a developer who defends a permission could have costs awarded against it, even if the developer runs that defence efficiently. Developers should take careful account of this risk.

Liquidated damages: applicability in the context of termination

Commonly found in construction/works contracts, liquidated damages (LDs) allow an employer and contractor to agree a set rate of damages to be paid to the employer by the contractor where the works have not been completed by the contractual completion date. These rates will normally be calculated and agreed on a daily or weekly basis as an estimate of the potential contractual liability for delay.

For many years, the courts have grappled over issues arising where the works have not been completed by the completion date, but the employer has terminated the contract, meaning that the contractor is not afforded the opportunity to complete the works. The courts have, over the years, deployed three approaches in dealing with this issue:

- the original approach taken by the (UK) courts was one in which LDs were not applicable at all in a scenario where works are late, incomplete and the contract is terminated. Instead, a general damages claim may be available;
- more recently (2010), opinion began to shift toward LDs being applicable for any period of culpable delay up until the date of termination, from which point on general damages would then apply. The logic behind

this shift in approach was that contractors should pay damages for any loss resulting from any further delay caused by the need to have the works completed by an alternative contractor; and

- also in 2010, the (UK) courts allowed for LDs to continue to apply post termination until the works are completed by replacement contractors. This approach, however, was criticised on the basis that once the contract was terminated, the contractor loses control over the time for completion particularly where a replacement contractor has been engaged to finish out the work.

A recent UK Court of Appeal decision in the Triple Point case has created some uncertainty in relation to the applicability of liquidated damages following termination. The key issue in Triple Point focused on the termination of the employment of the first contractor, a supplier of software systems, after the contractual completion date but before the contractor had completed the agreed works where a second contractor was subsequently engaged. The court in Triple Point reviewed the three previous approaches discussed above and departed from the more recent approach reverting to the position that the employer had no right to claim liquidated damages for any portions of work that had not been completed by the first contractor and could instead claim actual

losses from delays in the completion of the works as unliquidated damages.

The Triple Point case does need to be considered in drafting and agreeing LD clauses in construction/works contracts, particularly when using standard form contracts. Commentators agree that it would not be a huge leap to extend Triple Point's application to standard form construction/work contracts and have pointed to two main issues arising in removing the ability to use the liquidated damages mechanism:

- employers would now only be able to claim unliquidated damages for culpable delays by the contractor, meaning that they would also have to establish the actual losses suffered; and
- contractors may be at risk for a much greater sum in a termination scenario through unliquidated damages as opposed to what may have been agreed for under a contract.

In light of the decision in Triple Point, future proof/appropriate LDs drafting should be included in construction/work contracts so as to ensure that the outcome is satisfactory to both parties. In order to protect LDs, employers should look to include bespoke amendments to enable employers to levy LDs after the point of termination.

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