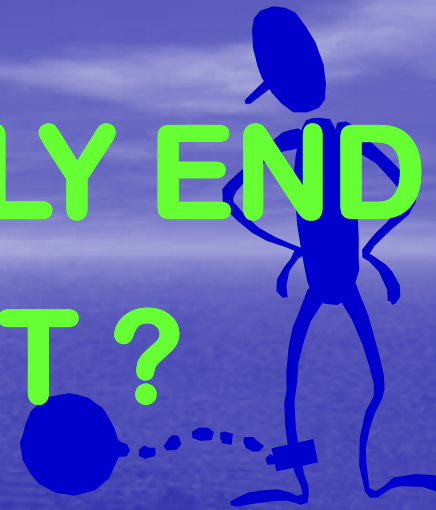


HOW TO LEGALLY END A CONTRACT ?



presented by

MONICA NEO

Advocate & Solicitor
Commissioner for Oaths

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Termination under express provision of the contract

- Standard form contracts invariably provide for the termination of the contract - see for eg:
 - SIA clause 32 (by employer) & clause 33 (by contractor)
 - PSSCOC clause 31 (by employer only)
 - REDAS D&B clause 30 (by employer) & clause 31 (by contractor)

Termination under express provision of the contract

General approach of the Courts

- **Strict construction of the termination clause & need for strict compliance with the procedural requirements under the clause**
 - ***Central Provident Fund Board v Ho Bock Kee* [1980-1981] SLR 180, [1981] 2 MLJ 162, CA**

CPF Board v Ho Bock Kee

The facts

- Respondent was engaged to erect a building for the appellant at Robinson Road
- Respondent’s employment was subsequently terminated by the appellant pursuant to the termination provision under the contract

CPF Board v Ho Bock Kee

Relevant provisions under the Contract

Clause 34(a) Default - If the contractor shall make default in any of the following namely:

...

then, if any such default shall continue for seven days after a notice sent by registered post to the contractor from the superintending officer specifying the same, the superintending officer may without prejudice to any other rights herein contained thereupon by notice sent by registered post determine this contract; provided that notice hereunder shall not be given unreasonably or vexatiously and such notice shall be void if the Board is at the time of the notice in breach of this contract.

CPF Board v Ho Bock Kee

Relevant provisions under the Contract

Clause 1A. (d) Notwithstanding any provision to the contrary in these conditions contained, it is hereby agreed that the right to take action and/or initiate proceedings on behalf of the Board under cll 31, 32, 34, 35 or 40 hereof is expressly reserved to the chairman, Central Provident Fund Board.

CPF Board v Ho Bock Kee

Respondent's arguments

- The determination was not justified because, *inter alia*, the procedure for determination required by the contract was not followed in that: (1) the notices of default & termination were issued by the SO and not the Chairman of the Board, and (2) they were not sent by registered post

CPF Board v Ho Bock Kee

Questions of law referred to the Court

- Is the notice of default invalid on account of its being given by the SO instead of the Chairman of the Board?
- Is the notice of default invalid on account of its not having been sent by registered post?
- Is the notice of termination invalid on account of there being no valid notice of default?

CPF Board v Ho Bock Kee

Questions of law referred to the Court

- Is the notice of termination invalid on account of its not having been sent by registered post?

Held:

- The giving of the notice of default was the taking of action on behalf of the Board and, on a true construction of cl 1A(d), was reserved to the chairman alone

CPF Board v Ho Bock Kee

Held :

- The requirement of registered post was no doubt intended for the purpose of avoiding subsidiary disputes between the parties as to whether the notice was given or received as the receipt of the required notices could be corroborated from an independent and official source – i.e. the postal office

CPF Board v Ho Bock Kee

Held :

- The provision of this method of service was, however, also for the protection of the contractor in that he was duly warned that the determination procedure had been operated and had to take immediate steps to rectify the specified defaults within the time limit prescribed in the clause
- Accordingly, all questions were answered by the Court in the affirmative

AL Stainless Industries Pte Ltd v Wei Sin Construction Pte Ltd [2001] SGHC 243

The parties

- Wei Sin – main contractor of 2 HDB’s project at Jurong West
- AL – sub-contractor for the supply, delivery and installation of metal work

AL v Wei Sin

The facts

- In course of the sub-contract, AL submitted progress claims for payment
- Wei Sin was often late in payment and also did not pay the entire sums claimed - As a result, AL was chasing for payments to be made
- In the meantime, Wei Sin alleged that that there was delay in AL's works and also defects

AL v Wei Sin

The facts

- Eventually, AL’s solicitors (B T Tan & Company) sent a fax dated 4 Sept 1999 to Wei Sin to allege that Wei Sin was in breach of contract and to require that arrears in payment be paid in full by 9 Sept 1999, failing which AL would terminate the sub-contract

AL v Wei Sin

The facts

- In response, Harry Elias Partnership (HEP), who were the then solicitors of Wei Sin, replied on 10 Sept 1999 to deny any breach by Wei Sin
- They alleged severe delay and numerous defects in AL’s work and purported to terminate under the terms of the sub-contract

AL v Wei Sin

The facts

- B T Tan & Co then replied also on 10 Sept 1999 to, in turn, purportedly terminate the sub-contract

Court's findings

- The purported termination notice by HEP (Wei Sin) was not valid as it failed to give AL 3 days prior written notice as required under the sub-contract

AL v Wei Sin

7. TERMINATION OF CONTRACT

This Sub-contract shall be terminated in the event the Sub-Contractor default in the followings:

- (a) fails to proceed with the sub-contract works with due diligence and expedition after being required in writing to do so by the Main Contractor, or
- (b) refuses or neglects to remove defective materials or make good defective work after being directed in writing to do so by the Main Contractor, or
- (c) fails to perform his obligations in accordance with the sub-contractor (*sic*) after being required in writing to do so by the Main Contractor
- (d) commits an act of bankruptcy or goes into liquidation.

For items (a) to (c), the Sub-Contractor will be given three (3) days to comply. Upon such determination, the rights and liabilities of the Main Contractor shall be the same as if the Sub-Contractor have repudiated this contract. The Main Contractor reserve the right to recover all loss and cost from the Sub-Contractor.’

Termination under express provision of the contract

Common problem

- Need for party exercising the right of termination to prove the validity of the ground for the termination
- The wrongful exercise of the right to terminate will amount to repudiation
- Difficulty in practice always lie in proving the ground for termination - e.g. ground based on contractor’s failure to proceed with due diligence & expedition

SG Industrial Pte Ltd v Eros Electrical Engineering & Construction Pte Ltd [1998] SGHC 299

The parties

- SG Industrial – main contractor for a HDB Project at Bukit Panjang
- Eros – m&e sub-contractor

SG Industrial v Eros

Termination provision under the sub- contract

Clause 33 of the sub-contract provided that SG might terminate the sub-contract if Eros should make the following defaults :

- (a) if without reasonable cause it wholly suspends the sub-contract works before completion;
- (b) if it fails to proceed regularly and diligently with the sub-contract works
- (c) if it refuses or persistently neglects to work according to [SG’s] instructions.

SG Industrial v Eros

The facts

- SG purported to terminate the sub-contract by serving, through its solicitors, a notice of termination under clauses 33 (b) and (c)
- Eros argued that the termination was wrongful

SG Industrial v Eros

Held :

- The failure on the part of Eros to progress based on the construction programmes was not necessarily a breach of its obligation to proceed regularly and diligently
- Eros’ apparent breaches appear to have been largely induced by SG’s own breaches – namely: shortening of programme, SG’s own failure to keep to the programmes, SG’s delay in making progress payments, non-availability of work areas

SG Industrial v Eros

Held :

- The flurry of instructions by SG was necessitated largely by its attempt to catch up for delays for which Eros was not responsible, and to do so within a telescoped time-frame

SG Industrial v Eros

Held :

- Eros’ failure or delay in carrying out SG’s instructions in the circumstances, could not amount to breaches of the contract, let alone repudiatory breaches, as the reasonableness of SG’s purported exercise of the power to give instructions in the circumstances is open to serious doubt in the first place
- SG’s termination was therefore wrongful

But see *Jurong Engineering Ltd v Paccan Building
Technology Pte Ltd* [1998] SGHC 299 [1999] 3
SLR 667, CA

The parties

- JE - main contractor for the construction of the main office, substation and guard house for the Senoko Gasworks
- Paccan - subcontractor for the building works

Jurong Engineering v Paccan

The facts

- JE purported to terminate Paccan’s sub-contract pursuant to the termination provision under the sub-contract on the ground that Paccan has failed to proceed with the works with reasonable diligence
- Paccan argued that the termination was wrongful

Jurong Engineering v Paccan

Held :

- Paccan had failed to carry out the subcontract works with reasonable diligence based on the subcontract programme
- Paccan was from the start, in delay, with insufficient manpower
- There were delay and continued lack of satisfactory progress in the subcontract works

Jurong Engineering v Paccan

Held :

- The progress of the subcontract works consistently lagged behind and did not keep pace with the subcontract programme
- Notwithstanding JE’s taking over large sections of the works under the terms of the sub-contract, the delay and defaults persisted and yet, Paccan decreased the manpower further

Jurong Engineering v Paccan

Held :

- Paccan also refused to carry out instructions for variation works and its project manager was instructed not to attend consultants’ meetings
- Paccan would often submit non-compliant alternative materials instead of those specified or compliant alternative materials - Invariably, they were rejected and this resulted in further delay

Jurong Engineering v Paccan

Held :

- JE was therefore entitled to determine the subcontract and employ other subcontractors to complete the outstanding subcontract works, rectify any defective subcontract works and recover the additional costs from Paccan

Determination under General Law

Generally, there are 3 situations where an innocent party can determine a contract at common law

- Where the defaulting party has repudiated the contract
- Where there is a fundamental breach
- Where there is a breach of a fundamental term

Determination under General Law

Repudiation

A party repudiates the contract when he intimates by words or conduct that he does not intend to honour his obligations under the contract when they fall due

Determination under General Law

Fundamental breach of contract

A fundamental breach of contract has been described as “something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates” and which went “to the root of the contract”

Determination under General Law

Breach of a fundamental term

A fundamental term is one “which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract”

Determination under General Law

- Terms have been used interchangeably although they meant different things
- Key test – “no longer intended to be bound by the contract” - breach goes to the root of the contract
- A question of mixed fact and law

Determination under General Law

- Need for innocent party to accept the repudiation before he can be discharged from the contract – *c.f.* affirmation
- *San International Pte Ltd (fka San Ho Huat Construction Pte Ltd) v Keppel Engineering Pte Ltd* [1998] 3 SLR 871

Determination under General Law

Slow progress or delay in the works

- Mere delay does not amount to repudiation
- Must be of such a magnitude and character as to show that the contractor is either unable to proceed or has no intention of proceeding with the works
- Party purporting to terminate on this ground must not itself be in breach

*Shia Kian Eng (trading as Forest Contractors) v
Nakano Singapore (Pte) Ltd* [2001] SGHC 68

The parties

- Nakano – main contractor for a development known as the Woodsvale Executive Condo
- Forest – sub-contractor for various trades including plastering works

Forest v Nakano

The facts

- Nakano terminated Forest’s plastering sub-contract on ground of Forest’s alleged slow progress
- One of the issues before the court was whether Nakano was justified to terminate Forest

Court’s findings

- Nakano’s termination was wrongful

Lim Chin San Contractors Pte Ltd v Sanchoon Builders Pte Ltd [2005] SGHC 227

The parties

- Sanchoon – main contractor for a project which involved the construction of the Police Coast Guard Sub-Base at Loyang Way / Loyang Crescent
- LCS – subcontractor for certain bored piling and marine works connected with the project

LCS v Sanchoon

The facts

- Sanchoon terminated LCS’s sub-contract on the grounds of LCS’s alleged refusal to carry out certain works and alleged failure to proceed with the works diligently

Court’s findings

- Sanchoon’s termination was wrongful

Compact Metal Industries Ltd v Enersave Power Builders Pte Ltd and Others [2008] SGHC 201

The parties

- EP – nominated sub-contractor for LTA’s project at Kallang / Paya Lebar Expressway
- Compact – sub-subcontractor for the external cladding works

Compact v EP

The facts

- EP terminated Compact’s sub-contract on the ground of Compact’s delay in the sub-contract works and deployment of insufficient manpower

Court’s findings

- EP’s termination was wrongful

Determination under General Law

Delay in payment

- Depends on magnitude
- Mere delay in or failure to make payment does not amount to repudiation
- *c.f.* persistent failures & work properly carried out
- *c.f.* allegations of under-certifications

Brani Readymixed Pte Ltd v Yee Hong Pte Ltd
[1995] 1 SLR 205

The parties

- **Yee Hong – main contractor engaged by PSA to build a service complex at Brani Terminal, Pulau Brani**
- **Brani – supplier of ready-mixed concrete**

Brani v Yee Hong

The facts

- Brani alleged that Yee Hong had repudiated the contract in failing to provide the casting schedule and to make payment
- Accordingly, Brani accepted Yee Hong’s repudiatory breach by terminating the contract

Brani v Yee Hong

Court's findings

- Yee Hong's failure to provide the casting schedule did not amount to a repudiation of the contract
- While mere failure or delay in making payment *per se* would not amount to a repudiation, Yee Hong here was not merely stalling for time to make payment – it did not intend to pay Brani at all and perform the contract

Brani v Yee Hong

Court's findings

- Brani was therefore entitled to accept Yee Hong's repudiatory breach

*Comfort Resources Pte Ltd v Alliance Concrete
Singapore Pte Ltd and Another Suit [2008] SGHC
122*

The parties

- Alliance – supplier of ready-mixed concrete
- Comfort – sand supplier

Comfort Resources v Alliance Concrete

The facts

- Each party commenced its own action
- In the action commenced by Comfort, Comfort sued Alliance for sand sold and delivered and for loss of profits for sand Alliance under-ordered

Comfort Resources v Alliance Concrete

The facts

- In another action, Alliance sued Comfort for losses incurred by Alliance as a result of Comfort’s failure to supply the contracted quantities of sand
- Alliance alleged that Comfort had, by its letter dated 14 Sept 2006 stating it would not make further deliveries of sand, repudiated the contract, which repudiation Alliance purportedly accepted by its solicitors’ letter dated 15 Sept 2006

Comfort Resources v Alliance Concrete

Court's findings

- Notwithstanding Comfort's repeated reminders for payment, Alliance had blithely ignored them
- Comfort's threat of stopping deliveries and its reasons therefore was made crystal to Alliance
- Alliance was therefore given more than adequate notice of the consequences should Comfort's demand not be met

Comfort Resources v Alliance Concrete

Court's findings

- More importantly, Comfort had put Alliance on notice that timely payment of its invoices was made the essence of the contract notwithstanding that the contract was silent on the point
- Comfort was therefore entitled to treat Alliance's continued refusal to pay Comfort's overdue invoices as conduct that evinced an intention not to be bound by the contract, and Comfort was entitled to accept Alliance's repudiation

Comfort Resources v Alliance Concrete

Court's findings

- Alliance was also in fundamental breach in that it had persistently under-ordered
- Had Comfort not stopped deliveries and terminated the contract, Alliance would have persisted in its under-orders for the balance of the contract period

Comfort Resources v Alliance Concrete

Court's findings

- The obvious effect of Alliance's action (under-order) would be to deprive Comfort of the whole benefit it would have received under the contract in that Comfort's profit margin would be substantially reduced due both to the quantities ordered and to the (lower) price charged as contract prices for sand are always lower than spot prices

But see *Chan Hong Seng Engineering Engineering & Construction Pte Ltd v Vatten International Pte Ltd* [2002] SGHC 124

The parties

- Vatten – painting sub-contractor for construction of Seletar Sewage Treatment Works
- CHS – sub-subcontractor for almost the whole of the painting works

CHS v Vatten

The facts

- Vatten terminated the subcontract on the basis that CHS had already repudiated it by stopping work

CHS's arguments

- It did not stop work

CHS v Vatten

CHS's arguments

- Even if it was found that it had in fact stopped work altogether, it was entitled to rely on Vatten's persistent underpayment to excuse it from further performance of the subcontract
- It had had to stop work because it was unable to make corresponding payments to the paint supplier and to its own workers

CHS v Vatten

CHS's arguments

- Alternatively, the work stoppage did not constitute a repudiatory breach because it had already substantially completed the works

Court's findings

- CHS had stopped works
- CHS has not proved persistent underpayment by Vatten

CHS v Vatten

Court's findings

- CHS also did not produce any evidence of its inability to pay its workers
- In any case, difficulty in settling one's suppliers' and workers' bills would not justify breaching the subcontract by stopping work unless that difficulty was caused by a pre-existing breach in its payment obligations by Vatten

CHS v Vatten

Court's findings

- Since the assertion of persistent underpayment was not established, any difficulty that CHS experienced with payments to its workers and suppliers could not be laid at Vatten's door
- CHS has not therefore justified its work stoppage

CHS v Vatten

Court's findings

- If the contractor stops work and indicates that he is not prepared to continue with the work although there is still work to be done, he would be in breach of contract even if the outstanding work remaining incomplete is only a small percentage of the total work under the contract, since someone has to do that work

Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd [2004] SGHC 107

The parties

- AL – main contractor for a construction project
- JM – sub-contractor for the structural works of the project

Jia Min v Ann Lee

The facts

- AL terminated JM’s sub-contract on the ground that JM had ceased all works at the site

JM’s arguments

- It had not stopped work
- Even if it had stopped work, it was caused by AL’s failure to effect timeous payments
- AL’s deduction of costs of the materials incurred in Oct from Nov progress claim was premature

Jia Min v Ann Lee

Court's findings

- JM had stopped work on the site – as such, AL was entitled to terminate the sub-contract after JM stopped work
- AL was entitled to set-off and deduct the cost of materials from any progress claim
- There was no factual basis for JM's contention that AL's non-payment of Nov claim caused JM to stop its work - JM's progress had not been satisfactory even before the alleged non-payment

Determination under General Law

Defects in the works

- Mere existence of defects does not amount to repudiation
- But see *Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd* [1995] 1 MLJ 214

Kokomewah

The facts

- Defendant had appointed the plaintiff to construct a chicken farm project in Labuan
- Notices to speed up the work and to remove and rectify various defective works were given by defendant to plaintiff
- Defendant subsequently terminated the contract
- Plaintiff alleged wrongful termination and claimed damages

Kokomewah

Held:

- In deciding whether the termination was wrongful, the most important consideration was whether there was delay and other breaches as claimed by the defendant and whether in all the relevant surrounding circumstances including the extent of such breaches, if any, the defendant was justified in determining the contract

Kokomewah

Held:

- It was clear that some of the works were defective in that the plaintiff had not taken the necessary care to ensure that they were of the required standard or quality and in accordance with specifications
- It was also clear that there had been stoppages of work and delays in the performance of the contract
- In the result, the determination of the contract by the defendant was justified

Determination under General Law

Other circumstances

- Where one party insists on carrying out his obligations in his own ways that is substantially inconsistent with his obligations under the contract
 - *Ceramic Brickworks (S) Pte Ltd v Asia-Tech Construction & Engineering Pte Ltd* [1996] 1 SLR 200

Ceramic Brickworks v Asia-Tech

The parties

- **Asia-Tech – building contractor for a condominium project**
- **Ceramic Brickworks – supplier of bricks to Asia-Tech for the project**

Ceramic Brickworks v Asia-Tech

The facts

- Prior to contract, plaintiff delivered some sample bricks
- Contract of supply described the goods to be supplied as being ‘common bricks, SISIR standards, SS103:1974, as per sample’

Ceramic Brickworks v Asia-Tech

The facts

- When the first consignment of bricks was delivered, defendant rejected them on the ground that they were substantially different from the samples delivered earlier
- Plaintiff responded by delivering a further quotation for the same quantity of bricks, with description ‘common bricks, SISIR standards, SS103:1974’ and quoted a higher price

Ceramic Brickworks v Asia-Tech

The facts

- Defendant was notified that if it wanted bricks of the same quality as the sample delivered, it would have to pay the higher price
- In consequence, defendant refused to make any further orders from the plaintiff and purchased the bricks it required from the market, at a price higher than that contracted with the plaintiff

Ceramic Brickworks v Asia-Tech

Issues before the Court

- Whether the plaintiff was in repudiatory breach of the contract ?

Held :

- Plaintiff had repudiated the contract by supplying and insisting on supplying inferior quality bricks which did not conform with the samples and by delivering the fresh quotation

Ceramic Brickworks v Asia-Tech

Held :

- Plaintiff was trying to renege from the contract because, after the conclusion of the contract and when the time for supply came, it was unhappy with the price as the contractual quality bricks could have been sold for a much higher price in the then prevailing market
- Defendant was justified in purchasing bricks from other sources

Ceramic Brickworks v Asia-Tech

Held:

- Plaintiff was therefore ordered to pay defendant the amount equivalent to the increased price paid by the defendant, less the price for the first consignment of the bricks

Determination under General Law

Other circumstances

- Taking away or omissions of works to give to other contractors
 - *Carr v J.A. Berriman Pty Ltd* (1953) ALJR 273
- Failure to give possession of site – c.f. case of sub-contractors
 - *Teknikal dan Kejuruteraan Pte Ltd v Resources Development Corp (Pte) Ltd* [1996] 3 SLR 145, CA

Determination under General Law

Other circumstances

- Wrong interpretation of contract provisions
 - *GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2007]
SLR 918
- Fluctuations / increase in materials price ?

Other Ways of Ending a Contract

- Case of misrepresentation
- Economic duress
- Occurrence of a frustrating event that makes it physically impossible to perform the contract
- Doctrine of “*force majeure*”

Misrepresentation

- Arises where one makes a statement which is false and untrue, and that statement has induced the other party to enter into the contract with that party
- If proven, the other party may rescind (terminate) the contract

Fu Hai Construction Pte Ltd v Econ Corporation Ltd [2002] SGHC 201

The parties

- Econ – main contractor for HDB project for the Punggol East contract
- Fu Hai – main sub-contractor

Fu Hai v Econ

The facts

- Econ terminated Fu Hai’s sub-contract on the ground that Fu Hai had failed to carry out the sub-contract works regularly and diligently despite numerous reminders

Fu Hai’s arguments

- Econ has breached its representations as regards, amongst others, the man-year entitlements and soil condition

Fu Hai v Econ

Fu Hai Arguments

- These affected Fu Hai’s performance and progress of its sub-contract works
- Econ’s termination was therefore wrongful
- Alternatively, the sub-contract should be rescinded by reason of the misrepresentation

Fu Hai v Econ

Court’s findings re misrepresentation as to man year entitlement

- Fu Hai had itself to blame for not getting any man year entitlement as it failed to submit its application Form in the first place
- It does not lie in Fu Hai’s mouths to complain that Econ did not give Fu Hai 250 man year entitlements when Econ’s offer of 50 workers first was not even taken up by Fu Hai

Fu Hai v Econ

Court’s findings re misrepresentation as to man year entitlement

- It was therefore irrelevant whether Econ initially promised Fu Hai 180 or 250 foreign workers
- The question of breach of this representation did not even arise

Fu Hai v Econ

Court’s findings re misrepresentation as to soil condition

- It was not disputed that the nature of the soil excavated comprised of rubbish
- Econ must have known or ought to have known, the nature of the material it excavated - yet it kept the information away from Fu Hai

Fu Hai v Econ

Court's findings re misrepresentation as to soil condition

- While the non-disclosure of the soil condition does not generally amount to a misrepresentation, a duty was imposed on the facts of the present case on Econ to disclose the information as Fu Hai had actually inquired from Econ whether there were any adverse factors it should know about and was assured there were none

Fu Hai v Econ

Conclusion

- The sub-contract was rescinded

Economic Duress

- Arises where one illegitimately pressurised to enter into the contract
- It was not clear precisely what is meant by “illegitimate” but a sufficiently coercive threat to break a contract may amount to economic duress
- No decided case but may be difficult to arise in construction context

Frustration & Impossibility

- “radical change” or emergence of a fundamentally different situation
- Must be actual physical impossibility of performing contract – not merely more expensive or onerous
- Increased cost due to unforeseen delay or unanticipated and wholly abnormal rise or fall in price does not constitute frustrating event
- Limitations – (a) express provision, (b) foreseeability of frustrating event, (c) self-induced frustration

Davis Contractors v Fareham (1956) AC

696

The facts

- Contractors entered into a contract to build 78 houses for a fixed price within a period of 8 months
- Owing to unexpected circumstances, and without fault of either party, adequate supplies of labour and/or material were not available

Davis Contractors v Fareham (1956) AC 696

The facts

- Although work never actually stopped, the shortage of labour and/or material caused such delay that the contract took 22 months to complete
- As a result, contractor claimed to be entitled to a *quantum meruit* claim for the additional cost of 17,000 pounds

Davis Contractors v Fareham (1956) AC 696

Held by English House of Lords

- Contract had not been frustrated
- The fact that, without the fault of either party, there had been an unexpected turn of events, which rendered the contract more onerous than had been contemplated was not a ground for relieving the contractors of the obligation which they had undertaken

Davis Contractors v Fareham (1956) AC 696

Held by English House of Lords

- While the job proved to be more onerous, it never became a job of a different kind from that contemplated in the contract
- The contractor therefore had to bear the loss themselves

Davis Contractors v Fareham (1956) AC 696

Held by English House of Lords

- This was notwithstanding that it might in one sense be said that the basis of the contract (i.e. adequate supply of labour and/or material) had gone
- Disappointed expectations did not necessary lead to frustrated contracts

MTU Asia Pte Ltd v Brightside-Who Hup [1987]

SLR 391

The facts

- BWH agreed to buy from MTU (the supply contract) certain equipment for its sub-contract works in a project
- However, it subsequently asked MTU to suspend all manufacture/delivery of the equipment

MTU Asia Pte Ltd v Brightside-Who Hup [1987]

SLR 391

The facts

- MTU informed that it would not agree to an indefinite suspension of the supply contract and required BWH to reply as to when it could accept delivery of the equipment
- However, BWH failed to reply
- Accordingly, MTU commenced proceedings for damages for breach of contract against BWH

MTU Asia Pte Ltd v Brightside-Who Hup [1987]

SLR 391

BWH's arguments

- It was prevented from accepting the equipment purchased from MTU and that the supply contract was frustrated because the main contract (and hence its sub-contract) was terminated and the termination was beyond its control

MTU Asia Pte Ltd v Brightside-Who Hup [1987]

SLR 391

Held:

- The main contract was not frustrated but merely breached
- The determination of the main contract led to the determination of the subcontract by its own terms
- It followed that the subcontract could not have been frustrated
- That being the case, there was no basis for arguing that the supply contract was frustrated.

Doctrine of “*Force Majeure*”

- Expression of French origin – means “greater force” or “irresistible compulsion or coercion”
- No precise meaning in English law
- However, it has been construed to cover acts of God, war and strikes, embargoes, refusals to grant licences, abnormal weather conditions

Doctrine of “*Force Majeure*”

- It does not give rise to any special legal doctrine or consequences under English law and is available only where contract expressly provides for it – see for eg SIA clause 23(1)(a), PSSCOC clause 14.2 – but only extension of time not ground for termination

Doctrine of “*Force Majeure*”

- Needs to show that event : (a) made performance impossible, (b) was unforeseeable, & (c) was unavoidable in occurrence and effects
- Parties cannot invoke *force majeure* clause if they are relying on their own acts or omissions

RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and anor appeal [2007] SGCA 39

The parties

- Sato Kogyo – contractor engaged by LTA to construct a MRT station
- RDC – supplier of ready-mixed concrete

RDC v Sato Kogyo

The facts

- On at least 42 occasions, RDC failed to supply concrete ordered by Sato Kogyo on grounds of (a) shortages of raw material, *i.e.* aggregates and cement, and (b) plant breakdowns
- In the result, Sato Kogyo had to purchase concrete from alternative suppliers at higher rates and it deducted the cost differentials incurred from the outstanding amounts due to RDC

RDC v Sato Kogyo

The facts

- RDC maintained it was not liable for the cost differentials incurred by Sato Kogyo as the shortage of raw materials constituted a “*force majeure*” event under the contract
- As a result of Sato-Kogyo’s non-payment, RDC eventually suspended its supply of concrete
- Sato Kogyo, in turn, terminated RDC’s contract

RDC v Sato Kogyo

The issues

- One of the issues before the court was whether the *force majeure* clauses exempted RDC from liability for the non- or short supply of concrete during the period prior to RDC’s suspension

Trial judge’s findings

- The *force majeure* clause exempted RDC from non-supply of concrete due to shortage of raw materials

RDC v Sato Kogyo

CA's decisions

- RDC could not invoke the *force majeure* clauses because it had not pleaded *force majeure* in its defence
- In any case, the *force majeure* clauses would not have exempted RDC from liability for the non- or short supply as RDC could not prove that the shortage of raw materials was beyond its control – evidence shows that RDC was able to supply concrete to other contractors

RDC v Sato Kogyo

CA's decisions

- RDC was therefore liable to Sato Kogyo for the cost differentials

SCAL seminar on “How to Legally End a Contract?” (18 Nov 2008) presented by MONICA K. C. NEO,
Advocate & Solicitor, Commissioner for Oaths

THE END

Speaker's profile (Monica K. C. Neo)

Nationality and resident status: Singaporean
Advocate & Solicitor, Supreme Court of Singapore
Commissioner for Oaths
6 Battery Road #33-01 Singapore 049909
Email: mneo@tsmp.com.sg
Tel : 62169035

Academic and Professional Qualifications

LLB Hons - University of London (Aug 1990)
Barrister at Law, Lincoln's Inn (Nov 1991)
Member of the Civil Practice Committee, Law Society of Singapore (2002)
Member, Singapore International Arbitration Centre (May 2003 - todate)
Fellow Member, Singapore Institute of Arbitrators (Oct 2004 - todate)
Member, Chartered Institute of Arbitrators (Nov 2004 - todate)
Legal Adviser, Institutions of Engineers Singapore (2006 - 2007)
Panel of Arbitrators under the Law Society Arbitration Scheme (August 2007 - todate)
Member, Society of Construction Law (2007 - todate)

Major Publications (author or co-author):

“The Singapore Court Forms”
“The Singapore Standard Form of Building Contract – An Annotation”
“Construction Defects: Your Rights and Remedies” title of the Sweet & Maxwell’s Law
for Layman Series
Singapore Civil Procedure 2003 (White Book)
Real Estate Developers’ Association of Singapore’s (REDAS) Design and Build
Standard form contract
Chapter on “Construction Contracts” in Law Relating to Specific Contracts in Singapore