

# Construction Law Focus

CHAN TAN & PARTNERS

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NO. 1 COLOMBO COURT #09-26/27 SINGAPORE 179742

## Government Contract - delay in completion - whether employer entitled to deduct liquidated damages

*Engineering Construction Pte Ltd v. Attorney General & Anor* [1993] 1 SLR 390

In this case the plaintiffs, Engineering Construction Pte Ltd ("EC"), entered into a contract with the Government of Singapore, for reconstruction road works. Liquidated & ascertained damages ("LAD") were to be payable for delay beyond the completion date at the rate of \$3,000 per day. The second defendant, Mott MacDonald (Singapore) Pte Ltd ("MM") were appointed the superintending officer ("SO") under the contract. The government wrote 2 letters to EC. One was for extending the date of completion for 5 days ("the extension of time letter"). The other was to inform EC that as a result of the works being uncompleted by the extended date, EC would have to pay the government LAD at \$3000 per day for the period of delay ("the LAD letter"). EC sought a declaration against both the defendants that the second defendant as SO was not entitled to deduct liquidated damages from amounts due to the plaintiffs under the said contract. The court observed that 2 conditions must be satisfied before the plaintiffs are liable to pay LAD, namely:

- (a) the plaintiffs had failed to complete the works by the contracted completion date or within any extended time under cl 32, and
- (b) the SO had certified in writing under cl 31(a) that in his opinion the works ought reasonably to have been completed.

It was argued that the 2 letters from the government were sufficient to satisfy the 2 conditions. It was also submitted on the defendants' behalf that by reason of cl 1(d), the right under cl 32(a) to make a fair and reasonable extension of time and the right under cl 31(a) to certify in writing that in his opinion the works ought reasonably to have been completed within the extended time is reserved to the director.

The Court found that to make a fair and reasonable extension of time for completion of the works under cl.32(a) and to certify that the works ought

reasonably to have been completed within the extended time and to deduct LAD under cl.31(a) are actions which but for cl.1(d) are to be taken by the SO on behalf of the government and by reason of cl.1(d) the right to take such actions is reserved to the director. In the Court's view, the extension of time letter satisfied the requirements of the first condition by determining the extension of time within which the works were to be completed. The LAD letter, however, did not satisfy the requirements of the second condition that the director must certify that in his opinion the works ought reasonably to have been completed within the extended time. The Court found that the second letter was not an expression in written form of any certifying process. There was nowhere in the letter the substance of what the director was required to certify. The Court therefore held that LAD was not payable and gave the Plaintiffs the declaration sought.

## EDITORIAL COMMENT

This is a rare decision on a form of contract used by the government. The certificate in writing under cl 31(a) that the works ought reasonably to have been completed within the extended time is identical to a similar requirement under the RIBA-JCT forms of contract. This decision illustrates the principle that a valid certificate that the works ought reasonably to have been completed is a condition precedent to the employer's right to deduct liquidated damages from any amount due to the contractor. In *A Bell & Son (Paddington) Ltd v CBF Residential Care and Housing Association* (1989) 46 BLR 102 it was also held that a similar architect's certificate under clause 24 of JCT 80 was a condition precedent to the right to deduct liquidated damages against payment due to the contractor under interim certificates. This case followed a line of cases that include *Brightside Kilpatrick Engineering Services v Mitchell Construction* [1975] 2 Lloyd's Rep. 493 and *Ramac Construction Co Ltd v J.E. Lesser (Properties) Ltd* [1975] 2 Lloyd's Rep. 430. The decision in *Engineering Construction Pte Ltd v. Attorney General & Anor* is therefore a useful local affirmation of a well accepted principle enunciated in U.K. cases. It should be noted that a Delay

Certificate under cl 24 of the SIA standard form is expressly required as a condition precedent to the deduction of liquidated damages by the employer.

**Contract - implied term - installation of escalators - whether escalators had become fixtures - passing of property - whether the suppliers of escalators can unfix escalators and retake possession of them**

*People's Park Chinatown Devt Pte Ltd (in liquidation) v Schindler Lifts (S) Pte Ltd* [1993] 1 SLR 591

The appellants were the developers of a project. The respondents were sub-contractors in the installation of lifts and escalators in the project. Ten escalators were delivered by the respondents which were hoisted into position in specially constructed spaces where they rested on their own weight. The design of the building and the escalators was such that there was no necessity for the escalators to be affixed by bolts, screws or otherwise. The escalators had not been tested or commissioned as the power supply had not been connected. A winding-up order was afterwards made against the appellants. The respondents sought a declaration that the ten escalators belonged to them.

The issues raised can be summarised as follows:

1. Whether the escalators were fixtures so that property in them passed to the appellants when they were installed.
2. If the escalators were fixtures, whether in the circumstances there was a contractual provision under which the property in the escalators was not to pass except upon payment or whether a contractual right was conferred on the respondents to remove the escalators.

The only provision that dealt with the passing of property was cl. 14 of the main contract which however confined itself to 'unfixed' materials and goods. The Court of Appeal in allowing the appeal held as follows:

1. The escalators when hoisted into place were intended to be a permanent feature of the building. The fact that the escalators had not as yet been commissioned cannot alter the fact that the escalators had been so affixed.
2. In so far as the main contract was concerned, there was no privity between the appellants and the respondents. In any event, cl.14 in the main contract dealt only

with the passing of title in respect of 'unfixed' goods and materials. It did not make provision for the passing of title in respect of 'fixed' materials and goods because the law relating to passing of title in respect of fixtures is well settled.

3. Quite apart from the question whether there was any contract between the parties after the sub-contract had been entered into, there was nothing in the letters to indicate what the intention of the parties might have been as to the passing of property. That being so, there was no basis on which to imply a term in the letters that the respondents were conferred the right to enter upon the site, unfix the escalators and retake possession of them.

**EDITORIAL COMMENT**

This case is a good illustration of what can occur when the employer is wound up. In such circumstances, when the supplier is not paid, it will be important to know whether he can retake possession of the equipment or material he supplied. This case turned primarily on the fact that there was no direct contract between the employer (the wound-up company) and the supplier; apart from this, the court also found no express provision relating to the passing of property nor could it find any basis to imply a term allowing the supplier to enter the site. A passage (part of which is reproduced below) in *Hudson's Building and Engineering Contracts* (10th ed) at p 655 was approved:

" But once the builder has affixed materials, the property in them passes from him, and at least as against him they become the absolute property of his employer .. The builder has no right to detach them from the soil or building .."