IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 244

OS 527/1992

Between

Engineering Construction Pte Ltd

… *Plaintiff*

And

Attorney General
Another

… *Defendant*

GROUNDS OF DECISION

Building and Construction Law — Termination — Consequences; Civil Procedure — Pleadings

Version No 1: 11 Sep 2026 (01:05 hrs)

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Engineering Construction Pte Ltd v Attorney General and Another

[1992] SGHC 244

OS 527/1992
Lim Teong Qwee JC
17 September 1992

1 Cur Adv Vult

2 ***Introduction***

3 By a contract in writing (`contract`) entered into between the government of Singapore and the abovenamed Engineering Construction Pte Ltd (`EC`) on 2 March 1990, EC undertook to execute the reconstruction of Jalan Ahmad Ibrahim Culvert and Jurong Lake Tidegate (`the works`) for the sum of $12,070,282.08. The date of possession was 19 March 1990 and the date of completion was 18 December 1991. Liquidated and ascertained damages (`LAD`) were payable for delay beyond the completion date at the rate of $3,000 per day. The works were not completed and on 25 April 1992 the contract was terminated. Under the contract, the superintending officer (`SO`) was the abovenamed Mott MacDonald (Singapore) Pte Ltd (`MM`). More accurately, in the space for `official designation of officer appointed to be the "superintending officer" under this contract` appears `Consulting Engineers, Mott Hay & Anderson Asia Pte [now MM]`.

4 By this originating summons issued on 9 June 1992, EC claimed against the Attorney General (`A-G`) a declaration that the government`s purported notice of termination of the contract was null and void, and consequential reliefs. This was not disputed by the A-G and I made a consent order in terms of the declaration sought and consequential reliefs. EC also claimed against both the A-G and MM:

> *a declaration that the second defendants as superintending officer under the said contract are not entitled by cl 31 of the said contract or otherwise to deduct from amounts due to the plaintiffs under the said contract liquidated damages*

5 and consequential reliefs. This was opposed by both defendants.

6 I heard counsel on 17 August 1992 and reserved judgment. I then referred counsel to **Token Construction Co Ltd v Charlton Estates Ltd** [1973] 1 Build LR 50 and counsel asked for further argument. I heard counsel on 27 August 1992 and again reserved judgment. The A-G then asked for a further hearing to apply for leave for a second affidavit to be received and I heard the application on 4 September 1992 and granted it. I also allowed a second affidavit on behalf of MM and EC to be received. I again reserved judgment.

7 At the first hearing, the case for the A-G was first that the claim (for the disputed declaration) had not been `pleaded` and secondly, that on the merits the government was entitled to claim and deduct LAD and accordingly EC was not entitled to the declaration claimed and consequential reliefs. At the second hearing, the A-G submitted the alternative argument on the merits that the Director, Environmental Engineering, Ministry of the Environment (`the director`) had made a fair and reasonable extension of time for completion of the works by five days and had further certified that the works ought reasonably

to have been completed by the extended time so that as the works had not been completed within the extended time, the government was entitled to deduct LAD from any amount due to EC under the contract. Reference was made to two letters, both dated 4 January 1992, signed by the director. In the second affidavit which I granted leave to be received, the A-G has put in two further certificates, both dated 2 September 1992, issued by the SO.

8 **The pleading point**

9 These proceedings were begun by originating summons and it is not disputed that they are appropriate to be so begun under O 5 r 4(2). Mr Soh submits that O 18 r 7 (which is expressed to apply to pleadings) also applies to an originating summons as if the summons and affidavit filed in support are pleadings in the action. It is not disputed that EC`s affidavit in support of the summons contains no material directly bearing upon the declaration sought other than referring to the contract. Mr Soh submits that the material facts have not been pleaded as required under O 18 r 7 and accordingly the relief prayed for cannot be granted. He refers to **Re Carter** [1893] 41 WR 140 In **Re Carter** [1893] 41 WR 140 the trustees applied by originating summons for determination of the question whether the tenant for life was entitled to enjoy in specie the income of unconverted estate held on trust for sale. Kekewich J, who heard the originating summons, said at p 141:

> *The tenant for life is entitled to enjoy the income in specie of the real estate until sale, but with regard to the leaseholds they are governed by the rule of law to which I have just referred.*

10 The rule of law referred to is of course the rule as regards equitable apportionment.

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11 Counsel for the remaindermen thereupon asked for a declaration that the tenant for life was entitled to 4%pa on the capital value of the leaseholds as at the date of death of the testator. Kekewich J, later at p 141, said:

> *That would be raising a question which the trustees do not ask. All the court has to do on this summons is to answer questions raised by the trustees. It is open to the remaindermen to raise this question hereafter.*

12 That is undoubtedly right on the facts but it does not support the proposition that Mr Soh urges upon me. It may also be helpful to refer to O 20 r 7 and O 28 r 8(1) which would be unnecessary if the summons or affidavit were a pleading. See also **Lewis v Packer** [1960] 1 WLR 452[1960] 1 All ER 72

13 Order 7 r 3 provides:

> (1) Every originating summons must include ... a concise statement of the relief ... claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief ... .

14 What is required is that the summons itself must state:

> (1) the relief; and
>
> (2) sufficient particulars to identify the cause of action.

15 In this summons, the relief claimed has been stated. I have set out above the terms of the relief claimed. This is endorsed on the summons. There is no other statement contained in the summons that sets out any particulars except to identify `the said contract` as the contract between EC and the government.

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16 Under the contract, there would be amounts due to EC in respect of works executed by it. Such amounts are payable from time to time as progress payments. If the SO under the contract is at all entitled to deduct LAD from amounts payable to EC, it is entitled to do so only in accordance with the terms of the contract. Clause 31 of the contract is referred to in the relief claimed and it provides:

> (a) If the contractor [EC] fails to complete the works by the date set out on p 1 hereof [18 December 1991] or within any extended time under cl 32 hereof and the superintending officer certifies in writing that in his opinion the same ought reasonably so to have been completed the contractor shall pay or allow to government a sum calculated at the rate stated on p 1 hereof as liquidated and ascertained damages for the period ... during which the said works shall remain or have remained uncompleted. The superintending officer shall be at liberty to deduct any such amount so payable to the government by the contractor or any part thereof from the security deposit referred to in cl 37 hereof and from all moneys then due or thereafter to become due or payable to the contractor under this contract ... .

17 Apart from this clause and cl 14 which provides a general right for the SO to make deductions, there are no other provisions entitling him to deduct LAD.

18 EC must pay LAD (1) if it fails to complete the works by 18 December 1991 which is the date set out on p 1 of the contract or within any extended time under cl 32, and (2) if the SO certifies in writing that in his opinion the works ought reasonably so to have been completed. Both these conditions must be satisfied before EC is liable for LAD. Until EC is liable for LAD, the SO is not entitled to make any deduction for LAD. See **Token Construction Co Ltd v Charlton Estates Ltd** [1973] 1 Build LR 50 Accordingly, I am satisfied that the summons contains sufficient particulars to identify the cause of action in

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respect of which EC claims the relief. It is for the SO or the government to prove that the two conditions have been satisfied.

19 **The claim**

20 The first point taken by Mr Soh is that the government is entitled to deduct LAD. As I have said in relation to the pleading point, the right of the SO (and of the government) to deduct LAD only arises upon the two conditions being satisfied. On the evidence and it is not disputed, the contract was terminated on 25 April 1992 before completion of the works and so it would appear that the first condition may have been satisfied. It may still be necessary to consider cl 32 of the contract. Clause 32 provides:

> (a) If, in the opinion of the [SO], the works be delayed by [here follow a list of causes], then in such case the [SO] shall make a fair and reasonable extension of time for completion of the works ... .

21 In the first affidavit filed on behalf of MM, it is disclosed that on 11 December 1991, EC submitted a written request to the SO for an extension of 327 days for completion of the works and that the SO was able to recommend an extension of only five days. However, the SO must `make a fair and reasonable extension of time` and this must be communicated to EC. There is no evidence that at the date of commencement of these proceedings the SO has done so, leaving aside for the time being the first of the two letters dated 4 January 1992 from the government which I shall consider later. Accordingly, it cannot be said that EC has failed to complete the works within the extended time because there has been a request for extension of time and time has not been extended in accordance with cl 32.

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22 The second condition calls for a certificate in writing from the SO that the works ought reasonably to have been completed within the extended time. Again leaving aside for the time being the second letter dated 4 January 1992 from the government which I shall also consider later, the condition has not been satisfied. I accordingly hold that the first point taken by Mr Soh fails.

23 On 4 January 1992, the government wrote to EC two letters and it is necessary to set out the full terms of these letters.

24 First letter

> *In accordance with cl 1(d) and cl 32(a) of the conditions of contract, I wish to inform you that the contract date for completion has been extended to 23 December 1991 on the following grounds:*

25 Inclement weather for the period March 1990 to November 1991 (five days).

> *Yours faithfully*
>
> *Signed*
>
> *Anselm Gonsalves*
>
> *for Director*
>
> *Environmental Engineering Division*
>
> *Ministry of the Environment*

26 Second letter

> You have failed to complete the works by 23 December 1991 (the extended date for completion).
>
> (2) In accordance with cl 31 of the conditions of contract, you shall pay the government liquidated and ascertained damages at $3,000 per day for the period during which the said works shall remain or have remained incomplete.

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> *Yours faithfully*
>
> *Signed*
>
> *Anselm Gonsalves*
>
> *for Director*
>
> *Environmental Engineering Division*
>
> *Ministry of the Environment*

27 I shall refer to the first letter as the extension of time letter and the second as the LAD letter.

28 Mr Soh submits, and this is the second point taken by him, that these two letters satisfy the conditions to entitle the SO to deduct LAD from amounts due to EC under the contract. It will be observed immediately that under cl 32 it is the SO who shall make a fair and reasonable extension of time if in the opinion of the SO the works are delayed by one of the specified causes and under cl 31 it is the SO who is to certify in writing that in his opinion the works ought reasonably to have been completed within the extended time. Finally, it is the SO who shall be at liberty to make the deduction. However, the matter does not end there.

29 Clause 1(d) provides:

> *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 government under cll 31, 32, 34, 35 or 40 hereof is expressly reserved to the Permanent Secretary/Director Environmental Engineering Ministry of the Environment.*

30 Mr Soh`s submission is 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 and to deduct LAD is reserved to the

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director. He refers to **Central Provident Fund Board v Ho Bock Kee** [1981] 2 MLJ 162 In that case, the arbitrator stated a special case for the decision of the court. The first question for the determination of the court was whether a notice dated 25 October 1974 was invalid on account of its having been given by the superintending officer. It appears that the contract before the court in that case was in the same form as the contract in this case and Mr Soh informs me that many government contracts are still in the same form. The notice of 25 October 1974 was a notice addressed to the contractor and the material parts are as follows:

> *I hereby give you notice pursuant to the provisions of cl 34(a) of the conditions of contract ... that in my opinion you are failing to proceed with reasonable diligence with the works ... and that you are accordingly in default ... . I also hereby give you notice that in the event that such default shall continue for seven days after the date of this notice, I reserve the right ... to determine the said contract ... .*
>
> *Dated this 25 October 1974*
>
> *Sd: (illegible)*
>
> *Superintending Officer*

31 Wee Chong Jin CJ (delivering the judgment of the court) said at pp 163-164:

> *Clause 1A(d) of the conditions of contract expressly reserved to the Chairman, Central Provident Fund Board the `right to take action ... on behalf of the board under cll 31, 32, 34, 35 or 40` notwithstanding any provision to the contrary in the conditions of contract. Clause 34(a) gives the power to give a seven-day default notice to the superintending officer (Mr Seah). It seems to us plain that if Mr Seah sends a seven-day notice under cl 34(a) he is exercising the power given to him by that clause and in so doing he is exercising the right to take action under cl 1A(d). Mr Butcher on behalf of the appellants, contends that as cl 1A(d) relates only to actions taken and proceedings initiated `on behalf of the board` it ought to be construed only to reserve to the chairman those functions which are ascribed to the board itself by cll 31, 32, 34, 35 and 40 as distinct from those functions where the superintending officer is acting in his independent*

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> *capacity as `architect` in charge of the project, such as the first notification under*
>
> *cl 34(a) which depends for its responsible exercise upon a detailed acquaintance with events on site during the ordinary progression of work.*

32 We are unable to accept such a strained construction on the meaning of cl 1A(d) and in our opinion the giving of the first notice under cl 34(a) is the taking of action on behalf of the board and on the true construction of cl 1A(d) is reserved to the chairman alone. Accordingly, the answer to the first question should have been in the affirmative.

33 It is argued that if the right to take action or initiate proceedings on behalf of the government includes the right to give the seven-day notice under cl 34(a), then it also includes the right to give the extension of time letter and the LAD letter. The extension of time letter and the LAD letter, both dated 4 January 1992, have been properly given under the contract as they were signed by the director to whom the right is reserved under cl 1(d). Mr Soh submits that these two letters satisfy the conditions and accordingly the government is entitled to deduct LAD.

34 The notice in the ***Central Provident Fund Board*** case4 was the seven-day notice to the contractor from the superintending officer given under cl 34(a). The rest of that notice merely reserves certain other rights. Clause 34(a) provides:

> *Default - If the contractor shall make default in any of the following respects, namely:*
>
> (i) …
>
> (ii) fails to proceed with the works with reasonable diligence;
>
> (iii) …

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> *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 ... thereupon by notice sent by registered post determine the employment of the contractor; ... .*

35 Clause 1A(d) reserves to the chairman the right to take action and/or initiate proceedings on behalf of the board under cll 31, 32, 34, 35 and 40.

36 The Court of Appeal expressly rejected the contention that cl 1A(d) ought to be construed only to reserve to the chairman those functions which are ascribed to the board itself as distinct from those where the superintending officer is acting in his independent capacity as architect in charge of the project such as the first notification under cl 34(a). I respectfully agree. Under cl 34 the SO has the right (1) to give notice to the contractor to remove defective work or improper materials, and (2) to give notice to determine the employment of the contractor, apart from the right to give the seven-day notice. In the exercise of these rights the SO acts as the agent of the board. In giving the seven-day notice the SO is exercising the right to take action on behalf of the board. Clause 1A(d) reserves to the chairman the right to take action on behalf of the board. It must follow that the right to give the seven-day notice is reserved to the chairman and it is really unarguable that

37 cl 1A(d) is to be construed to reserve to the chairman only those functions ascribed to the board.

38 Mr Jeyaretnam submits that cl 1(d) does not alter the effect of cl 31(a) as regards the SO giving a certificate as to his opinion. He seeks to distinguish **Central Provident Fund Board v Ho Bock Kee** [1981] 2 MLJ 162 on the grounds (1) that it concerned the seven-day notice under cl 34(a), (2) that giving the seven-day notice is taking action on behalf of the government, but (3) that

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the exercise of the SO`s certifying function is not. The thrust of his argument is that in the exercise of his function in certifying as to his opinion the SO is called upon to act subjectively quite unlike the action he takes in giving the seven-day notice under cl 34(a) or deducting LAD under cl 31(a) once the conditions have been satisfied.

39 There are 40 clauses in the contract in the printed form and in addition there are another 58 clauses in the additional conditions. The great majority of these clauses refer expressly to the SO. Clause 99 (cl 42 has been cancelled) has this definition:

> *`Consulting engineers`, or `superintending officer` or `SO` shall mean Mott Hay & Anderson Asia Pte or its representative who have been appointed by the Government of the Republic of Singapore as consulting engineers for the contract, who are responsible for the design of the works, specification for the materials, articles and equipment, advice during the construction period, and the supervision and administration of the contract.*

40 The SO has many functions under the contract. Those under cl 34 have been noted. Throughout he acts as the agent of the government by whom he is appointed with responsibility expressly for the supervision and administration of the contract. The SO is not a party to the contract. The parties are the government as employer and EC as contractor. In the exercise of many of his functions the SO has to form an opinion or make a decision which will determine the amount the contractor is entitled to be paid or the quality of the completed works which the employer has contracted for. In all these matters the parties enter into the contract on the understanding that the SO is the agent of the government but nevertheless will act fairly. Examples of such functions can be found under cl 38 relating to the issue by the SO of certificates for payment. Others are to be found in cll 31(a) and 32(a).

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41 There can be no doubt that if in cl 31(a) and immediately before `shall make a fair and reasonable extension of time` in cl 32(a) `director` or any other officer of the government had been substituted for `superintending officer` the provisions would have been enforceable in accordance with their terms as altered. The fact that if there had been no alteration, then in giving the certificate under cl 31(a) the SO would have been required to form an opinion and in cl 32(a) he would have had to make a fair and reasonable extension of time could make no difference. In **Central Provident Fund Board v Ho Bock Kee** [1981] 2 MLJ 162 this point was not taken but from the report of the judgment it appears that the point was taken that the particular function in that case, the giving of the seven-day notice, depended for its responsible exercise upon a detailed acquaintance with events on site during the ordinary progression of works. The court rejected this. I am unable to see that there is any distinction between the two. The question is whether cl 1(d) has the same effect as making the alterations in cll 31(a) and 32(a). In my opinion cl 1(d) clearly has and Mr Jeyaretnam`s submission on this point fails. 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.

42 I now return to the extension of time letter and the LAD letter written by the director. Mr Soh`s point is that they satisfy the two conditions for deducting LAD. The extension of time letter informs EC (1) that the contract date for completion has been extended to 23 December 1991, (2) that the letter is written in accordance with cll 1(d) and 32(a), and (3) that the ground for the extension is inclement weather. By reason of cl 1(d) it is the director who has to make a

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fair and reasonable extension of time under cl 32(a) and inclement weather is one of the causes of delay specified. In my judgment the extension of time letter satisfies the requirements of the first condition by determining the extended time within which the works are to be completed.

43 The LAD letter informs EC (1) that it has failed to complete the works within the extended time, (2) that EC shall pay LAD at the agreed rate, and (3) that the obligation to pay is in accordance with cl 31. The obligation to pay in accordance with cl 31(a) only arises when, notwithstanding EC`s failure to complete the works within the extended time, the director has certified in writing that in his opinion the works ought reasonably to have been completed within that time. The question is whether the director has so certified by writing this letter.

44 In **Token Construction Co Ltd v Charlton Estates Ltd** [1973] 1 Build LR 50 Edmund Davies LJ said at pp 52-53:

> *That clause required him to `certify` in writing. While no set form of certificate is provided, unlike that under cl 21(a) and (b), it must clearly appear that the document relied upon is the physical expression of a certifying process. One should, therefore, have some regard to the factors of `form`, `substance` and `intent` of which Mr Justice Devlin spoke in the admittedly different circumstances of* ***Minster Trust Ltd v Traps Tractors Ltd****. Or, to adopt a passage in* ***Hudson*** *(10th Ed) p 479, the document should be `the expression in a definite form of the exercise of the ... opinion ... of the ... architect ... in relation to some matter provided for by the terms of the contract`. And, as Mr Garland accepted, it must be free from ambiguity.*

45 What the architect is called upon by cl 16 to certify is his `opinion` that `the works ought reasonably to have been completed` by the original date specified `or within any extended time fixed under cl 2(c) of these conditions`. Now, the contract vested in the architect no ***general*** power to extend the time for completion. On being so requested by the contractors, cl 2(e) empowers him

to `make a fair and reasonable extension of the time for completion of the works if in the opinion of the architect the completion of the works has been or will be delayed` in one or more of the eight ways therein listed.

46 Accordingly, before cl 16 can be relied upon by this employer, it must first appear that, following upon a request for extension of time by the contractor, the architect formed the opinion that, in the relevant circumstances indicated by cl 2(e), it was `fair and reasonable` to grant that request. The next stage is that he must `make` the extension, and this, of course, means that he must specify its duration, for unless this is done it would be impossible to find a date from which the liquidated and ascertained damages referred to in cl 16 could be calculated. He need not `make` it in writing, but what he must do is to `advise the surveyor of any such extension`, for the reason stated in the terminal words of cl 2(e). What must further appear is that the architect has formed the `opinion` already referred to. Finally, as I have already said, he must certify in writing that such is his opinion.

47 Edmund Davies LJ was considering provisions in a building contract not unlike those before me and I find this passage in his judgment particularly helpful.

48 I am unable to say that the LAD letter or any part of it is an expression in written form of any certifying process. I am equally unable to see anywhere in the LAD letter the substance of what the director is required to certify. I have considered the statement that EC has failed to complete within the extended time and taken into account the fact that this is a letter written by the director who is the one to give the certificate but there is no hint of any certifying process or of any opinion that is certified or what that opinion is. I have considered the reference to cl 31 but all that it does is to leave it to be inferred that the

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conditions have been satisfied, to put it at its highest, without saying what in fact has been done to satisfy the condition as regards the certificate or what the substance of that certificate might be. Unlike the making of a fair and reasonable extension of time under cl 32(a) the opinion under cl 31(a) has to be certified in writing. In my judgment the LAD letter does 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.

49 I come now to the two certificates issued by the SO dated 2 September 1992. The contract was terminated on 25 April 1992 and, as admitted by the A-G, wrongfully so terminated by the government. These proceedings were commenced on 9 June 1992 and I first heard counsel on 17 August 1992, referred **Token Construction Co Ltd v Charlton Estates Ltd** [1973] 1 Build LR 50 to them and heard them again on 27 August 1992 and reserved judgment. Just under a week later the SO issued these two certificates. The first purports to be a certificate under cl 32(a) the material part of which says `In my opinion you are entitled to an extension of five days up to 23 December 1991 by reason of inclement weather ... `. The second purports to be a certificate under cl 31(a) the material part of which says `In my opinion, the works ought reasonably to have been completed by 23 December 1991 ... `. For the reasons I have given above, it is not competent for the SO to take the action evidenced by these two certificates and in my judgment they do not cure the defect in the LAD letter. Although I have given leave for an affidavit exhibiting these two certificates to be received and I have considered them only so far as is necessary, I decline to express any view as to whether it would be open to the director to issue a certificate under cl 31(a) at this point of time as there is no evidence that he has done so and I have not had the advantage of hearing counsel on this.

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50 Finally, I come to the reliefs claimed. The declaration asked for is to the effect that the SO is not entitled to deduct LAD by cl 31 or otherwise. The case for the A-G is that by reason of cl 1(d), the right to take such action under cl 31 is reserved to the director. Ms Khong adopts Mr Soh`s submissions on this. Mr Jeyaretnam`s case appears to be the same or at least while he concedes that the right to take such action is reserved to the director, he submits that the conditions precedent have not been satisfied. The right of the SO to take action under cl 14 is not affected by cl 1(d). The right to deduct LAD can only arise when LAD has become payable under the first part of cl 31(a). I have held that LAD is not payable and accordingly there will be a declaration. These proceedings have been argued throughout on the basis that the damages referred to in the declaration sought are damages which are referred to in the contract as liquidated and ascertained damages. To correct the error I will amend the originating summons by adding `and ascertained` after `liquidated` in line 4 of para 5 of the reliefs claimed and I grant the declaration in terms of the amended para 5. Paragraph 6 seeks an order for payment of what appears to be the amount of a progress payment under the contract but there is no evidence of any certificate in respect of this having been issued and there will accordingly be no order. I will hear counsel on costs.

51 **Outcome:**

Lim Teong Qwee JC

Philip Jeyaretnam (Helen Yeo & Partners) for the plaintiffs
Soh Tze Bian (State Counsel) for the Attorney General

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Khong Swee Lin (Chan Cher Boon & Leong) for the second defendants

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