IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1999] SGCA 3

CA 92/1998

Between

JDC Corporation
Another

… *Appellant*

And

Lightweight Concrete Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Arbitration — Agreement; Civil Procedure — Stay of proceedings; Contract — Contractual terms

Version No 1: 20 Nov 2026 (00:35 hrs)

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JDC Corporation and Another v Lightweight Concrete Pte Ltd

[1999] SGCA 3

CA 92/1998
Karthigesu JA; L P Thean JA
12 January 1999

Judgment:

LP THEAN JA

(delivering the grounds of judgment of the court): This was an appeal against the decision of a judge in chambers discharging an order of the assistant registrar staying the proceedings pursuant to s 7 of the Arbitration Act (Cap 10). We allowed the appeal and now give our reasons.

2. ***The facts***

The appellants were the main contractors for the construction of an administration and operation building for the new container terminal at Pasir Panjang (`the project`) of the Port of Singapore Authority (`PSA`). The respondents were the nominated sub-contractors for the supply and installation of external wall cladding and glazing for the project under a contract (`the sub-contract`) entered into by the parties on or about 17 May 1996.

3.The sub-contract comprised of several documents which were to be read in conjunction with one another. The relevant documents for our purposes were: (i) the PSA`s standard form of conditions of sub-contract (`the conditions`); (ii) the preliminaries and conditions of sub-contract (`the preliminaries`) which contained an extract of some of the conditions in the main contract between PSA and the appellants; and (iii) the particular specifications of the project (`the specifications`).

4.Disputes arose between the parties in relation to the performance of the sub-contract. In a letter to the respondents dated 29 December 1997, the appellants alleged that certain works under the sub-contract were not `substantially completed`, and that the deadline for their completion was the end of May 1997 which they, the respondents, had failed to meet. The appellants made an interim claim for a total sum of $2,426,230 for their loss and damage under cl 19 of the conditions and this amount comprised of the following: (a). a sum of $464,130 representing the acceleration cost; and

(b). a sum of $1,962,100 representing additional preliminaries and staff overheads.

In addition, they also claimed liquidated and ascertained damages in respect of which they had yet to ascertain the exact amount. In their letter they indicated that they proposed to recover the amount from the respondents under cl 12 of the conditions.

5.Clause 12 of the conditions gave to the appellants a right to deduct from and set off against moneys due to the respondents any sums which the respondents were liable to pay to the appellants under the sub-contract. It provides as follows:

Version No 1: 20 Nov 2026 (00:35 hrs)

> 12 Contractor`s right to deduction or set-off
>
> *The Contractor shall notwithstanding anything in this Sub-contract contained be entitled to deduct from or set off against any money due from him to the Sub-Contractor (including any retention money) any sum or sums which the Sub-Contractor is liable to pay to the Contractor under this Sub-Contract.*

6.On the same day of 29 December 1997, the superintending officer of the project issued an interim payment certificate No 19 (`Certificate No 19`) certifying that the sum of $335,000 (excluding GST of $10,050) was due to the respondents from the appellants. Another sum of $84,000 (excluding GST of $2,520) was similarly certified to be due to the respondents on 19 January 1998 under the interim payment certificate No 20 (`Certificate No 20`). Under cl 23 of the conditions, the appellants were required to notify and pay to the respondents the amount certified within seven days of receiving payment from PSA. The appellants, however, did not make any payment of either sum to the respondents under the respective certificates.

7.The respondents in their letter dated 19 January 1998 to the appellants rejected the appellants` allegations set out in the letter of 29 December 1997, saying that the allegations were `fundamentally flawed and would not be sustained in an arbitration`. This was ignored by the appellants and on 26 January 1998 they indicated to the respondents that they would under cll 12 and 19 of the conditions deduct from and set off against the sums of $345,050 and $86,520 the amount claimed by them for the loss and damage sustained.

8.Subsequently, the respondents commenced these proceedings against the appellants to recover the two sums together with interest. The appellants applied for a stay of further proceedings pursuant to s 7 of the Arbitration Act (Cap 10)

Version No 1: 20 Nov 2026 (00:35 hrs)

(`the Act`) and the stay was granted by the assistant registrar. On appeal, the learned judge allowed it and set aside the order for a stay.

9. ***Appeal***

The sole issue before us was whether the appellants were entitled to stay the proceedings pursuant to s 7 of the Act. The sub-contract by cl 30 of the condition provided for arbitration of any dispute between the parties. It is useful here to set out, in so far as material, the provisions of this clause which are as follows:

> *30 Arbitration*
>
> *Provided always that in case of any dispute or difference except a dispute or difference as to rates of wages or conditions of employment of workmen employed by the Sub-Contractor in and for the purpose of this Contract including workmen employed by the authorised Sub-Contractors engaged directly by the Sub-Contractor shall arise between the Sub-Contractor, either during the progress or after completion of the Works or after the determination, abandonment or breach of this Sub-Contract as to the construction of this Sub-Contract, or as to any matter or thing arising thereunder, or as to the withholding by the Contractor of any certificate to which the Sub-Contractor may claim to be entitled, then either party shall give to the other notices in writing of such dispute or differences and such dispute or differences shall be referred to the arbitration and final decision of a person nominated and appointed by agreement between the Contractor and Sub-Contractor or, in event of his death or unwillingness or inability to act, or, if the Contractor or Sub-Contractor fail to agree, of an arbitrator nominated by the Superintending Officer, and the award of such arbitrator shall be final and binding on the parties. Such reference, except on the question of certificates, shall not be commenced until after the completion or alleged completion of the works, unless with the written consent of the Superintending Officer or the Contractor and in any case of the Sub-Contractor:-*
>
> *...*

10.It was in reliance on this clause that the appellants applied to court for a stay under s 7 of the Act, and that section provides as follows:

Version No 1: 20 Nov 2026 (00:35 hrs)

> (1) If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings against any other party to the arbitration agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings.
>
> (2) The court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Clearly, on the basis of cl 30 of the conditions the appellants were entitled to a stay under s 7. The question then was whether there was any sufficient reason why the matter should not be referred to arbitration in accordance with cl 30 of the conditions. The burden of showing that there was a sufficient reason for not referring the matter in dispute to arbitration fell on the party opposing the application for a stay, and in this case the respondents.

11.The contention of the respondents was that there was no genuine dispute between the parties which should be referred to arbitration. First, by virtue of cl 23 of the conditions, they were entitled to the two sums certified to be due to them under Certificate Nos 19 and 20. The appellants` right to set off against these sums damages alleged to be due was without legal justification, as under the terms of the sub-contract, the parties had committed themselves to liquidated damages at the rate of $2,000 per day as the remedy for delay. It was a settled principle that where there was a clause providing for liquidated damages, that would operate as a limitation of the party`s liability and there would be no separate inquiry into actual damage suffered: see Keating on Building Contracts (6th Ed, 1995) at p 240. However, from the appellants` letter dated 29 December 1997, it was clear that the appellants were not merely preserving their right to

Version No 1: 20 Nov 2026 (00:35 hrs)

set off liquidated damages but were also exercising a right to claim and set off damages for actual loss and damage, including acceleration costs and additional overheads. Clause 12 of the conditions did not entitle the appellants to set off any actual damages, and the respondents` claim to the two sums was indisputable, and accordingly, there was no dispute or difference to be referred to arbitration.

12.The learned judge appeared to have accepted this contention of the respondents. She said, at [para] 18-21:

> 18 … this is not a case in which the right to set off is in dispute. Rather, the facts of the case are such that the defendants` right to set off is without any legal justification. The basis of the defendants` set off is set out in their letter of 29 December 1997 and is a claim for actual and potential losses arising from alleged delay by the plaintiff. In this letter, they laid out claims including acceleration costs, addition preliminaries and staff overheads as well as reserved the right to pass on any claim for liquidated and ascertained damages.
>
> 19 However, under the terms of the Sub-Contract, the parties have committed themselves to liquidated damages as being the remedy for delay …
>
> 20 Further, in the form of warranty to be given by the nominated sub-contractor, the contract provisions provided ` ***for payment of liquidated damages for delay in completion at the rate of Singapore Dollars Two Thousand (S$2,000) per day*** `.
>
> 21 The defendants` set-off under cl 12 is not a claim for liquidated damages for delay but a claim for actual losses. However, there is already a clause in the sub-contract agreeing that a fixed sum of $2,000 per day be paid as damages for delay in completion.

The learned judge then referred to the case of **Temloc v Errill Properties** [1987] 39 BLR 30 and continued at [para] 22:

> *Here, the parties have agreed that $2,000 per day is what is recoverable in the event of delay on the part of the sub-contractor.*

Version No 1: 20 Nov 2026 (00:35 hrs)

> *This should be the amount which the defendants are allowed to set-off against the payments demanded by the plaintiff under Interim Certificates 19 and 20. However, they are claiming actual damages as well as preserving their right to liquidated damages. This is inconsistent with the sub-contract. The defendants have no right to set off their actual losses from the sums due and payable to the plaintiff under the interim certificates.*

13.We had some difficulty in accepting this conclusion. On examination of the various documents comprised in the sub-contract, we did not find the position to be that straightforward. Clause 5.1 of the specifications provides:

> 5 Liquidated and ascertained damages
>
> 5.1 It is to be clearly and definitely understood by the Nominated Sub-contractor that time is the essence of this contract and that the periods specified for the completion of the works must be strictly adhered to. Failure to complete the work within the periods specified will render the Nominated Sub-contractor liable to pay to the main contractor liquidated and ascertained damages at the rate which the Authority will otherwise impose on the main contractor under the main contract for the various phases. For the convenience of the nominated sub-contractor, an extract from the main contract providing such rates has been enclosed in this tender document and can be found on p PS/25 in the section on the `Preliminaries and Conditions of the Sub-Contract`.

The appendix to the preliminaries includes the following extract from the main contract between PSA and the appellants:

> 31(a) Liquidated and ascertained damages
>
> Singapore Dollars Two Thousand (S$2,000.00) per day

14.The appellants` claim was made under cl 19 of the conditions and it was submitted that the proviso to that clause provided that the respondents were liable to the appellants for `any damage or loss suffered or incurred` caused by

Version No 1: 20 Nov 2026 (00:35 hrs)

or due to the respondents` failure to complete the sub-contract works within the agreed period or periods. Clause 19 provides:

> 19 Completion of the sub-contract works
>
> The sub-contractor within seven (7) days of the receipt by him of a written notice from the contractor so to do shall with all reasonable dispatch proceed to execute and complete the Sub-Contract works or the respective sections thereof within the period or periods as specified in the Articles of Agreement for Sub-Contract.
>
> Provided that the Sub-Contractor shall pay to the Contractor any damage or loss suffered or incurred by the Contractor and caused by or due to the failure of the Sub-Contractor to complete within the said period or respective periods of which damage or loss as aforesaid the Contractor shall at the earliest opportunity give reasonable notice to the Sub-Contractor that the same is being or has been suffered or incurred; but so nevertheless that if such failure to complete as aforesaid:
>
> (a) shall be caused by or due to any of the matters specified in cl 10(a) or (b) hereof or by any act or omission of the Contractor, his Sub-Contractors or their respective servants or agents; or
>
> (b) shall be within any of the cases in which the Contractor could obtain an extension of the period or periods for completion under the Main Contract;
>
> then the Contractor shall grant a fair and reasonable extension of the said period or periods for completion of the Sub-Contract works or the respective sections thereof (as the case may require) and such extended period or periods shall be the period or periods for completion of the same respectively and this clause shall be read and construed accordingly.

15.There appeared to be some tension between cl 5.1 of the specifications and cl 19 of the conditions. Without seeking to delve too deeply into these provisions, it seemed to us that they raised the issue of whether the liquidated damages of $2,000 per day were the sole remedy for the delay under the sub-contract. It should be noted that the meaning and effect of any clause for payment of liquidated damages depends on its express terms and turns on the true construction of the clause. Therefore, whether liquidated damages of

Version No 1: 20 Nov 2026 (00:35 hrs)

$2,000 per day were an exhaustive remedy for the appellants in the event of a delay by the respondents would depend on the true construction of the terms of the sub-contract, in particular cl 5.1 of the specifications and cl 19 of the conditions. In this connection, we bore in mind cl 30 of the conditions which explicitly provided that any dispute as to, inter alia, the `construction of the terms of the sub-contract, or as to any matter or thing arising thereunder` was to be referred to arbitration. Accordingly, the appropriate forum for the resolution of this issue was an arbitral tribunal.

16.The respondents` second contention was that the appellants` set-off under cl 12 could not be sustained contractually. The appellants` claim for the loss and damage for the alleged delay was made under cl 19 of the conditions. However, cl 19 contained a proviso that if the respondents` failure to complete within the agreed period or periods fell within either of the cases stated there, ie [para] (a) or (b) thereof, for which the appellants could obtain an extension of time under the main contract with PSA, the appellants were obliged to grant a `fair and reasonable extension` of the agreed period or periods for completion, and cl 19 was to be construed accordingly. In this case, the appellants had allegedly made variations to the original scope of works under the sub-contract, but the respondents were not granted any extensions of time.

17.In our opinion, while we accept that there were provisions in cl 19 which would entitle the respondents to an extension of time, whether in the circumstances they were so entitled was a matter which could not, and should not, be summarily determined by us. A full hearing before the proper forum would be necessary for the determination of, inter alia, the following: whether the respondents were entitled to an extension of time and whether the appellants were themselves in breach of contract in failing to grant to the respondents an extension of time, as well as what would amount to a `fair and reasonable

Version No 1: 20 Nov 2026 (00:35 hrs)

extension` of time: see **Kwan Im Tong Chinese Temple & Anor v Fong Choon Hung Construction Pte Ltd** [1998] 2 SLR 137 .

18.Further, the appellants argued that on the evidence the revised completion date for the respondents` sub-contract works was the end of May 1997. At [para] 8 of the grounds of decision, the learned judge said:

> *On or about 26 January 1998, the defendants set-off the sum of $86,520 due and payable to the plaintiff under interim Certificate No 20.*

The appellants alleged that as at that date the sub-contract works were still incomplete. Applying the rate of liquidated damages at S$2,000 per day for the period from 1 June 1997 to 26 January 1998 (and continuing), the amount of liquidated damages as at 26 January 1998 alone would stand at S$480,000, which would extinguish the respondents` total claim of S$431,570 under the Certificates Nos 19 and 20. Again, we do not express any view on this claim of the appellants. Suffice it here to say that such claim and set-off would have to be determined by way of arbitration.

19.In our judgment, this was not a case where it could properly be said that the respondents` claim was `undisputed or indisputable`. The appellants had made out a prima facie case of disputes between the parties, and these disputes fell within the ambit of the arbitration agreement. Accordingly, there was no sufficient reason for not granting a stay of the proceedings pursuant to s 7 of the Act.

20.The respondents sought to argue that the delay in referring the matter to arbitration would cause them considerable hardship in an industry where cash flow is vital. In reply, we need only refer to the following passage of the judgment of Saville J in **Hayter v Nelson** [1990] 2 Lloyd`s Rep 265 at p 268:

Version No 1: 20 Nov 2026 (00:35 hrs)

> *[I]t must not be forgotten that by their arbitration clause the parties have made an agreement that in place of the courts, their disputes should be resolved by a private tribunal. Even assuming that this tribunal is likely to be slower or otherwise less efficient than the courts, that bargain remains - and I know of no general principle of English law to suggest that because a bargain afterwards appears to provide a less satisfactory outcome to one party than would have been the case had it not been made or had it been made differently, that bargain can be simply put on one side and ignored.*

Karthigesu JA
L P Thean JA

Christopher Chuah and Michael Chia (Drew & Napier) for the appellants
David Morris and Lean Min Tze (Arthur Loke & Partners) for the respondents

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Version No 1: 20 Nov 2026 (00:35 hrs)