IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 161

Suit 271/1993

Between

Assoland Construction Pte Ltd

… *Plaintiff*

And

Malayan Credit Properties Pte Ltd

… *Defendant*

GROUNDS OF DECISION

Building and Construction Law — Building and construction contracts; Civil Procedure — Summary judgment

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

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Assoland Construction Pte Ltd v Malayan Credit Properties Pte Ltd

[1993] SGHC 161

Suit 271/1993
Goh Phai Cheng JC
12 July 1993

1 ***The background***

2 The plaintiffs are building contractors. The defendants are the owners of a building. On 14 November 1990 the parties executed a formal agreement whereby the plaintiffs undertook the works for the construction and completion of a 12-storey building with a basement at Ardmore Park. The agreement was in the form of the 1987 revised version of the standard form of contract of the Singapore Institute of Architects. Forming part of and attached to the agreement are, inter alia, the conditions of contract (`conditions of contract`) and an appendix. In this judgment, unless the context otherwise requires, a reference to a cl by number is a reference to a cl by the same number in the conditions of contract.

3 Under the contract, the scheduled completion date for the works was 19 September 1991. The works were not completed by that date.

4 On the following dates the plaintiffs submitted to the architect of the project (`the architect`) claims for extensions of time to complete the works pursuant to cl 23(1):

5 Date No of days sought Revised completion date 15 October 1991 174.5 days 11 March 1992 19 September 1991 343.8 days 27 August 1992 27 March 1992 450 days 13 December 1992

6 In addition to the above claims for extensions of time, the plaintiffs notified the architect in writing, pursuant to cl 23(2), of the events, directions or instructions which the plaintiffs relied on for their claim to be entitled to extensions of time under cl 23(1). A curious feature in the present case is that the architect failed to comply with cl 23(2) which requires him to inform the plaintiffs of his decision within one month of the plaintiffs` notification of the particular event, instruction or direction which formed the basis of the extension of time. All of sudden on 4 November 1992, the architect issued a `delay certificate` pursuant to cl 24(1) stating, inter alia, that the time for the completion of the works was extended for a total of 218 days and accordingly the latest date for the completion of the works was 24 April 1992. I shall revert to the `delay certificate` later.

7 On 20 July 1992 the architect wrote to the developers stating, inter alia, that:

> (a) the date of completion was extended to 31 January 1992 and the `delay certificate` will be issued thereafter; and
>
> (b) the date of practical completion will be 1 July 1992.

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8 On 31 July 1992 the architect issued a certificate of completion certifying that the works were practically completed on 1 July 1992.

9 Monthly interim payment certificates (`interim certificates`) were issued by the architect under cl 31(1) for payment to the plaintiffs of the sums stated in those certificates and the plaintiffs were entitled to be paid those sums by the defendants within 14 days of the receipt of the interim certificates.

10 The architect had issued interim certificates Nos 23 and 24 on the following dates for the following amounts:

11 Date Interim certificate Amount 15 July 1992 No 23 $309,160 11 August 1992 No 24 $170,860

12 Total

13 $480,020

14 Those interim certificates were not paid by the defendants within the period named in the contract for honouring interim certificates.

15 Subsequently, the architect also issued two other interim certificates, namely:

> (a) interim certificate No 23R dated 15 July 1992 consisting of one page, the contents of which are essentially the same as that of the first page of interim certificate No 23; and
>
> (b) interim certificate No 24R dated 11 August 1992 also consisting of one page, the contents of which are also essentially the same as that of the first page of interim certificate No 24.

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16 No payment was made to the plaintiffs under interim certificate Nos 23R and 24R.

17 On 16 October 1992, the representatives of the plaintiffs and the defendants together with the architect met with a view to resolving the settlement of the outstanding sums owing by the defendants to the plaintiffs under the contract. An agreement was reached by the parties that:

> (a) the architect`s interim certificate Nos 23R and 24R would be withdrawn;
>
> (b) the architect would issue a new interim certificate No 23A dated 16 October 1992 to the defendants for the amount of $480,020;
>
> (c) the plaintiffs would forward a letter agreeing to the withdrawal of interim certificate Nos 23R and 24R and thus there will be no interest due for late payment of the sums stated in those certificates; and
>
> (d) the defendants would release payment within two weeks from the date of new interim certificate No 23A.

18 An interim certificate No 23A dated 16 October 1992 for the amount of $480,020 was duly issued by the architect.

19 On 20 October 1992 the plaintiffs wrote to the defendants stating that they will not claim `any interest in respect of interim certificate No 23A providing (sic) payment for the certificate which amounts to $480,020 is received by us before 30 October 1992`. The plaintiffs further confirmed that interim certificate Nos 23R and 24R should be withdrawn and that they will not claim any interest in respect of the sums stated in those two certificates.

20 On 4 November 1992 the plaintiffs received a cheque for $280,000 from the defendants being payment for interim certificate No 23A. On the same day,

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the plaintiffs wrote to the defendants stating that the payment of the said sum did not constitute a discharge for interim certificate No 23A and informing them that unless the difference was paid within seven days thereof action will be taken against the defendants.

21 On 4 November 1992 the architect also issued a `delay certificate` under cl 24(1) and it states:

> *Pursuant to cl 24(1) of the conditions of contract, I hereby certify that the contract completion date (as revised in my revision certificate dated ...) was 19 September 1991; that pursuant to cl 23 of the conditions I have further extended the time for completion for a total of two hundred and eighteen (218) days; that no grounds exist for any further extension of time to the [plaintiffs]; that accordingly the latest date for completion of the works pursuant to cl 22(1) of the conditions is 24 April 1992 and that the [plaintiffs] is and has been in default in not having completed the works by this latest date now certified by me.*

22 In this action the plaintiffs claimed (a) the sum of $200,020 which was due and owing to them being the balance of the said sum of $480,020; (b) interest on the sum of $200,020; and (c) costs.

23 The plaintiffs applied for summary judgment. The defendants applied for a stay of proceedings pursuant to s 7 of the Arbitration Act (Cap 10) on the ground that the conditions of contract contained an agreement to arbitrate the matters in respect of which the action was brought. The two applications were heard by the assistant registrar on 29 March 1993 and he decided that the defendants should be given unconditional leave to defend and that these proceedings should be stayed pending arbitration.

24 Against this order the plaintiffs appealed. The parties agreed that the outcome of the appeal on the stay of proceedings should be determined by the

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outcome of the appeal on the plaintiffs` application for summary judgment. I heard the plaintiffs` appeals on 18 May 1993 and decided on 22 May 1993 to allow the appeals; and accordingly gave the plaintiffs judgment for the balance of their claim of $200,020 together with interest at 8% pa from 9 February 1993 to the date of judgment with no stay of the proceedings.

25 The defendants have appealed against my decision. I now give my reasons.

26 **The issues**

27 (a) The plaintiffs` cause of action

28 Before the assistant registrar, the defendants contended that the plaintiffs had not properly pleaded their cause of action because in their statement of claim the plaintiffs appeared to have relied on interim certificate Nos 23 and 24 for their claim and not interim certificate Nos 23R and 24R or interim certificate No 23A. It was further contended on behalf of the defendants that the affidavit affirmed and filed by Hwang Ming Kao, the project manager of the plaintiffs, on 18 February 1993 in support of the plaintiffs` application for summary judgment did not specify which interim certificate or certificates the plaintiffs were relying on and that by a letter dated 5 November 1992, the plaintiffs had informed the defendants, inter alia, that the agreement of 16 October 1992 was null and void since the defendants failed to keep their promise to pay the sum of $480,020 by 30 October 1992. Furthermore, the plaintiffs had in their letter dated 13 January 1993 to the architect referred to the long outstanding payment of $200,020 under interim certificate No 23A. Therefore, the plaintiffs have not

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even properly identified their cause of action and they are not entitled to summary judgment.

29 The plaintiffs` response was that they were claiming payments under interim certificate Nos 23 and 24 and if the court found that those certificates have been subsumed under certificate No 23A by virtue of the settlement reached on 16 October 1992, such settlement being extraneous to the terms of the contract, the plaintiffs could still claim the sum of $200,020 that is still due and owing to them. The plaintiffs did not claim the interest due to them for the late payment of the sums certified under certificate Nos 23 and 24 when they filed their statement of claim for the present action.

30 In my judgment, the plaintiff`s cause of action is based on the contract made between the parties. From the facts pleaded in the statement of claim, it is clear that the plaintiffs are relying on interim certificate Nos 23 and 24 or alternatively interim certificate No 23A for their claim of $200,020 which is the balance of $480,020 being the aggregate amount certified in certificate Nos 23 and 24 or the amount certified in certificate No 23A. Furthermore, the plaintiffs have pleaded that interim certificate Nos 23R and 24R have no legal validity for the reasons given in para 4 of their statement of claim. It is clear that they are not relying on certificate Nos 23R and 24R and the plaintiffs did not plead that the agreement of 16 October 1992 was null and void. Clause 31(1) of the conditions of contract clearly states that the plaintiffs are entitled to payment of the sum named in the certificate within the period set out in the appendix to the contract. In the present case, certificate Nos 23 and 24 clearly state that the plaintiffs were entitled to be paid the sum of $309,160 and $170,860 on 15 July 1992 and 11 August 1992 respectively. At the meeting of 16 October 1992, the defendants agreed to pay those sums and the plaintiffs agreed to waive their

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entitlement to interest on the late payment of the sums certified in those two certificates. Certificate 23A was issued subsequently by the architect to reflect what was agreed at the meeting of 16 October 1992.

31 In other words, there is no dispute between the parties that the plaintiffs are entitled to payment of the sum of $480,020. In my judgment, the first issue raised by the defendants is a sham defence.

32 In ***Lojan Properties Pte Ltd v Tropican Contractors Pte Ltd*** , at p 72, Karthigesu J delivering the judgment of the Court of Appeal gave the following description of the unique features of the standard form of contract of the Singapore Institute of architects:

> *The conditions of contract as its very name suggests is a revised version of the former Singapore Institute of Architects conditions of contract and differs in many essential respects from it and from the RIBA and JCT forms of contract on which the former Singapore Institute of Architects conditions of contract was modelled.* ***The unique features of the conditions of contract are that the contractor is assured of regular periodic payments during the period the contract works are in progress based on a retrospective revaluation of all work carried out under the contract (see cl 31(1) and (2)) and subject to the exceptions mentioned in cl 31(11) the contractor is put in a position to enforce payment if payment is not made on the due date by action in the courts.****On the other hand the employer`s rights are equally protected in that he is entitled legitimately to deduct his legitimate claims against the contractor during the progress of the works provided that the claims themselves and the amounts due are certified by the architect. See cl 31(11) and cl 1(7) for defective works, cl 24(2) for liquidated damages and cl 30(4) for payment to nominated sub-contractors. Further the arbitration cl (cl 37) envisages that the courts and not an arbitrator may be seized of a dispute thus negativing a stay in the event an action is brought in the courts to recover payment under an interim certificate of payment. Both the courts and the arbitrator are given power to order repayment of moneys overpaid by either party to the other whether the overpayment was under a mistake of fact or of law (see cl 37(7)).* ***The financial machinery under***

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> ***the conditions of contract is regulated by the certificates of the architect, the effectiveness of which until determined otherwise by a court or an arbitrator is preserved by cl 37(3)(g). Most important of all the conditions of contract read as a whole and cll 31(11), 1(7), 24(2) and 30(4) make it particularly clear that the common law defence of set-off or counterclaim are no longer available to the employer in a claim for payment of an interim certificate of payment.*** *(Emphasis added.)*

33 Clause 31(11) states:

> *No certificate of the architect under this Contract shall be final and binding in any dispute between the Employer and the Contractor, save only that, in the absence of fraud improper pressure or interference by either party, full effect by way of Summary Judgment or Interim Award or otherwise shall, in the absence of express provision, be given to all decisions and certificates of the architect ... whether for payment or otherwise, until final judgment or award, as the case may be, and until such final judgment or award such decision or certificates shall (save as aforesaid and subject to sub cl (4) of this Condition) be binding on the Employer and the Contractor in relation to any matter which, under the terms of the Contract he has as a fact ruled, in his certificates or otherwise ...*

34 The intention of cl 31(11) of the conditions of contract has been admirably stated by LP Thean J in ***Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd,*** at p 220, 2nd col, between letters C and E as follows:

> *... It is intended that [referring to cl 31(11)] the contractor be paid the amounts expressed to be payable in the interim certificates, and if no payment is made by the employer it is intended to enable the contractor in the absence of fraud, improper pressure or interference or in the absence of express provisions, to obtain quick summary judgment for the amounts certified as due. In so far as any sum claimed by the employer is concerned, only the amounts expressly deductible under the contract may be set off against the amount due under the interim certificate. I therefore come to the conclusion that subject to any deduction or set-off as provided expressly in the contract, the amounts certified in the interim certificates are due and payable to the plaintiffs.*

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35 LP Thean J`s statement of the intention of cl 31(11) was approved by the Court of Appeal at p 73, 1st col, between letters D and G.

36 (b) Defence of set-off

37 Next, it was contended on behalf of the defendants that they have a defence of set-off under cl 24(2) against the plaintiffs` claim of $200,020 and therefore the plaintiffs` application for summary judgment must fail. Since the architect issued a `delay certificate` on 4 November 1992 stating, inter alia, that the latest date for completion of the works was 24 April 1992 and the architects issued a certificate of practical completion stating that the works were completed on 1 July 1992, the plaintiffs were liable under the conditions of contract to pay liquidated damages of $3,000 per day for late completion, and the liquidated damages amounted to $204,000, which exceeds the plaintiffs` claim of $200,020.

38 Clause 24(2) states: ***Upon receipt of a delay certificate the employer shall be entitled to recover from the contractor liquidated damages*** calculated at the rate stated in the appendix to the conditions from the date of default certified by the architect for the period during which the works shall remain incomplete, and may but shall not be bound to deduct such liquidated damages, whether in whole or in part from any moneys due under the contract at any time up to and including the final certificate. (Emphasis added.)

39 It is clear that under the above condition, the defendants are entitled to recover from the plaintiffs liquidated damages for delay in completing the works only upon receipt of the delay certificate issued under cl 24(1) by the architect and may then deduct such liquidated damages from any moneys due under the

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contract to the plaintiffs. The defendants` right to deduct liquidated damages from moneys due to the plaintiff arises only after the issue of the `delay certificate` on 4 November 1992.

40 The question which then arises is whether the defendants are entitled to deduct liquidated damages from the moneys due to the plaintiff after the architect issued the `delay certificate` on 4 November 1992. I think not. By the agreement made between the parties on 16 October 1992, it was agreed that the plaintiffs would be paid the sum of $480,020 within two weeks of the release of interim certificate No 23A. On 16 October 1992 the parties knew that the architect had on 31 July 1992 issued a certificate stating that the works were practically completed on 1 July 1992. The plaintiffs would be liable to pay liquidated damages under the terms of the contract if no extension of time was granted by the architect for the completion of the works. On that date the architect had not granted any extensions of time. Yet the defendants agreed to pay the amount of $480,020 due to the plaintiffs in consideration of the plaintiffs agreeing to waive the contractual interest due to the plaintiffs for the late payment of the sum then owed by the defendants and there was therefore an implied undertaking by the defendants not to invoke their right under cl 24(2) in respect of the sum of $480,020 that was then due to the plaintiffs.

41 (c) Was the extension of time valid?

42 It was also contended on behalf of the plaintiffs that the `delay certificate` issued by the architect on 4 November 1992 was not valid in that the extension of time granted by the architect for the completion of the works did not comply with cl 23 and that the defendants were therefore not entitled to deduct any liquidated damages from the sum of $480,020 due to the plaintiffs.

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43 Clause 23 deals with the grant of extension of time by the architect for the completion of the works. Clause 23(1) sets out the grounds for the grant of extension of time for the completion of the works. Clause 23(2) sets out the procedural requirement for the grant of extension of time and it reads:

> *It shall be a condition precedent to an extension of time by the architect under any provision of this Contract including the present clause (unless the architect has already informed the Contractor of his willingness to grant extension of time) that the Contractor shall within 28 days notify the architect in writing of any event or direction or instruction which he consider entitles him to an extension of time, together with a short statement of the reasons why delay to completion will result.* ***Upon receipt of such notification the architect shall inform the Contractor in writing within 1 month of its receipt whether or not he considers the event or instruction or direction in principle entitles the Contractor to an extension of time.*** *(Emphasis added.)*

44 The grant of an extension of time is conditional upon the plaintiffs notifying the architect within 28 days of the occurrence of a particular event which the plaintiffs rely upon as the basis for an extension of time unless the architect has already informed the plaintiffs of his willingness to grant extension of time. Upon receipt of such notification, the architect must inform the plaintiffs of his decision in writing within one month of his receipt of such notification. When the architect informs the plaintiff of his willingness to grant an extension of time, he is required by cl 23(3) to notify the plaintiffs the length of the period of extension beyond the contract completion date `as soon as any delaying factor in respect of which an extension of time is permitted by the Contract has ceased to operate and it is possible to decide the length of the period of extension beyond the contract completion date (or any previous extension thereof) in respect of such matter`. Where two or more such factors are operating concurrently the architect need not so notify the plaintiff until the last of such matters has ceased to operate.

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45 In the present case, there were requests for extension of time made by the plaintiffs for variations or additional works ordered by the architect. In my judgment, the architect`s failure to comply with the procedural requirements in cl 23(2) would mean that the purported exercise of the power conferred upon him by cl 23 on 4 November 1992 was invalid as it was not exercised within the period fixed by cl 23(2). As such, there is no date from which liquidated damages could be computed and no liquidated damages is therefore recoverable in the present case. I find assistance from ***Hudson`s Building and Engineering Contracts*** (10th Ed, 1970) at pp 644-645 where the author states:

> *In the first place, the contract may contemplate that the power should be exercised at once upon the occurrence of the event causing delay. This construction may be appropriate to non-continuing causes of delays, such as the ordering of extras. Secondly, the contract may contemplate that the power should be exercised when the full effect upon the contract programme is known. This is appropriate to continuing causes of delay, such as strikes, withholding of the site, and so on, or to cases, like some extras, where precise estimation is difficult or impossible. Or, thirdly, the contract may contemplate exercise of the power at any time before issue of the final certificate. Since the case of* ***ABC Ltd v Waltham Holy Cross UDC*** *(1952) a decision on the then current RIBA form of contract, which distinguished* ***Miller v LCC*** *(1934) on somewhat slender grounds, it is suggested that this latter interpretation will normally prevail in the absence of clear language to the contrary, particularly as the ambit of most modern extension of time clauses usually comprehends delays due to causes of many different kinds.*

46 In ***MacMahon Construction Pte Ltd v Crestwood Estates*** , at p 167, Burt J said:

> *An `extended time`, should it exist, must be the product of the proper exercise of a power appropriate to the circumstances to be found in the contract and by a `proper exercise` I mean that if, upon the proper construction of the power to extend, it should appear that the power must be exercised within a period of time either fixed or reasonable, then a purported exercise outside that time is ineffective and there then being no date from which liquidated damages can run, the building owner loses the benefit*

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> *of that provision: see Hudson, op cit, (6th Ed) p 359, and* ***Miller v London County Council*** *[1934] All ER Rep 657, at p 661, per du Parcq J.*

47 In ***Anderson v Tuapeka County Council*** , at p 13 Williams J said:

> *... If no date is specified within which the works are to be completed, how is it possible for the contractor to complete the works by a specified date? or how can he have broken a contract to complete on a specified date if he did not know beforehand what the date was on which he was under an obligation to complete? ...*

48 A similar opinion was expressed by Roper J in ***Fernbrook Trading Co Ltd v Taggart*** at p 568 :

> *I think it must be implicit in the normal extension clause that the contractor is to be informed of his new completion date as soon as is reasonably practicable. If the sole cause is the ordering of extra work then in the normal course the extension should be given at the time of ordering so that the contractor has a target for which to aim.*

49 (d) Can the defendants rely on estoppel to claim liquidated damages?

50 It was contended on behalf of the defendants that the plaintiffs were estopped from alleging that the architect should have acted sooner on the requests for extensions of time because written requests for extensions of time were submitted by the plaintiffs between 15 May 1991 and 5 October 1992 and there were discussions between the parties and the architect on those applications for extensions of time at the meeting held on 16 September 1992. In support of his contention, counsel for the defendants referred me to ***Hughes v Metropolitan Railway Co*** . In my view the ***Hughes*** case6 has no application as the respondent company in that case was seeking equitable relief against forfeiture of a lease. The defendants in the present case are seeking to claim liquidated damages from the plaintiffs. They are seeking to use estoppel not as

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a shield, but as a sword. In ***Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd*** , at p 122, Lord Denning MR said:

> *The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has been overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited to a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or law - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.*

51 I do not think the principle enunciated in the ***Amalgamated Property*** case7 applies to the present case where the defendants are seeking to claim liquidated damages from the plaintiffs for late completion. It would be unfair to make the plaintiffs pay liquidated damages when there is non-compliance on the terms of the contract made between the parties in so far as the grant of extension of time is concerned.

52 **Conclusion**

53 As for my refusal to grant a stay of these proceedings for the recovery of the sum of $200,020 from the defendants, the arbitration cl (cl 37) read with cl 31(11) in the contract envisages that the courts and not an arbitrator may be seized of a dispute over any payment due to the plaintiffs under an interim

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certificate thus negativing a stay in the event an action is brought in this court to recover payment under an interim certificate of payment.

54 Accordingly, for the reasons given above, I entered judgment for the plaintiffs for the sum of $200,020 with interest at 8% pa from the date of the writ to date of judgment and refused to grant a stay of these proceedings.

55 Appeal allowed.

Goh Phai Cheng JC

Lim Chung Wei (Boey Ng & Wan) for the plaintiffs
Woo Bih Li (Bih Li & Lee) for the defendants

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