IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 178

Suit 146/1998

Between

Lightweight Concrete Pte Ltd

… Plaintiff

And

JDC Corporation
Santarli Construction Pte Ltd

… Defendant

GROUNDS OF DECISION

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

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Lightweight Concrete Pte Ltd v JDC Corporation and Another

[1998] SGHC 178

Suit 146/1998
Lai Siu Chiu J
23 May 1998

Judgment:

GROUNDS OF DECISION

The background

1. This was an appeal by the plaintiff against the decision of the court below that further proceedings be stayed. At the conclusion of the hearing, I allowed the plaintiff's appeal with costs against which decision the defendants have appealed (Civil Appeal No. 92 of 1998).

The facts

2. The defendants are the main contractor for the construction of a new administration and operations building at Pasir Panjang ("the Project") for the Port of Singapore Authority ("the PSA").

3. On or about 17 May 1996, the plaintiff entered into a Nominated Sub-Contract ("the Sub-Contract") with the defendants for the supply and

installation of external wall cladding and glazing for the Project. The Sub-Contract incorporates the PSA's Standard Form of Conditions of Sub-Contract ("Sub-Contract Conditions").

4. Clause 30 of the Sub-Contract Conditions provides as follows:

ARBITRATION

Provided always that in case 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 Contractor and 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 difference and such dispute or difference 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 and 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:- Provided that…The arbitrator shall have power to review and revise any certificate, opinion, decision, requisition or notice and to

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

determine all matters in dispute which shall be submitted to him, and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision requisition or notice had been given…"

5. By letter dated 29 December 1997, the defendants informed the plaintiff that they (the defendants) were lodging claims under cl 19 of the Sub-Contract for *"losses incurred to-date and possible claims"* and would be recovering an *"interim total"* thereunder of $2,426,230 from payments due to the plaintiff in reliance on cl 12 of the Sub-Contract.

6. Clause 12 of the Conditions confers on the Contractor a right of deduction and 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."

7. On or about 12 January 1998, the defendants set-off the sum of $345,050 due and payable to the plaintiff under Interim Certificate No. 19.

8. 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.

9. The plaintiff commenced this suit to recover the sums payable under Interim Certificates Nos. 19 and 20.

10. The defendants applied for and were granted a stay of proceedings.

The issue

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

11. The only issue for determination is whether, pursuant to Section 7 of the Arbitration Act Cap. 10 ("the Act"), there is sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration clause contained in the Sub-Contract.

The decision

12. There is no doubt that a Court has the powers to stay the proceedings either under its own inherent jurisdiction or pursuant to section 7 of the Act which states:

"(1) If any party to an 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."

13. The approach adopted towards arbitration agreements is that stated in **Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd** [1993] 1 SLR 876 (at p 879)

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

"Where the claim is undisputed or indisputable the Courts and not the arbitrators have the jurisdiction to decide upon the claim even though the arbitration agreement stipulates for disputes to be referred to arbitration.

Where the arbitration agreement provides for disputes to be decided by arbitrators, the Court should adopt a holistic and common sense approach to see if there is a dispute. If the Defendant makes out a prima facie case of disputes the Court should not embark on an examination of the validity of the disputes as though it were an application for summary judgment"....

(per Selvam J)

14. The main issue is whether the claim is one which is undisputed. In **Ellis Mechanical Services v Wates Construction** [1978] 1 LR 33, Lord Denning commented :

"There is a point on the contract which I might mention upon this. There is a general arbitration clause. Any dispute or difference arising on the matter is to go to arbitration. It seems to me that if a case comes before the Court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the Court is able, on an application of this kind, to give summary judgment for such sum as appears to be indisputably due, and to refer the balance to arbitration."

Bridge L J in the same case commented:

"To my mind the test to be applied in such a case is perfectly clear. The question to be asked is: is it established beyond reasonable doubt by the evidence before the Court that at least $x is presently due from the defendant to the plaintiff? If

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

it is, then judgment should be given for the plaintiff for that sum, whatever x may be, and in a case where, as here, there is an arbitration clause, the remainder in dispute should go to arbitration."

15. In my opinion, the defendants should not be given the opportunity to escape summary liability when it is clearly justified in the circumstances. Here, the delay involved in having the action stayed would cause hardship to the plaintiff. As Lawton L J in **Ellis Mechanical Services Ltd v Wates Construction Ltd** said:

"One of the perils of commercial life for sub-contractors in the building trade is that there may develop between the main contractor and the building owner a serious dispute which leads to one or other of them repudiating the main contract. When that happens the lifeblood of the building trade, namely money, stops. It seems to me that the administration of justice in our courts should do all it can to restore that lifeblood as quickly as possible.

The courts are aware of what happens in these building disputes; cases go either to arbitration or before an official referee; they drag on and on and on; the cash flow is held up. In the majority of cases because one party or the other cannot wait any longer for the money, there is some kind of compromise, very often not based on the justice of the case but on the financial situation of one of the parties. That sort of result is to be avoided if possible. In my judgment it can be avoided if the courts make a robust approach, to the jurisdiction under O 14."

16. Selvam J in **Hua Khian Ceramics Tiles Supplies Pte Ltd v Torie Construction Pte Ltd** [1992] 1 SLR 884 recognised that in the present day context, it is often in summary judgment applications that the defendant would raise the defence of set-off. He said, quoting the passage by Lawton L J above,

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

"In order to make a robust approach it is the duty of the court to closely examine points of set-off raised by a defendant and to ensure that the true purpose is not to cause delay to the plaintiff."

17. In this case, the plaintiff is making a claim for the sums due to the company under Interim Certificates 19 and 20. There is no doubt that the plaintiff is entitled to these payments under cl 23 of the Sub-Contract. By cl 23 of the Sub-Contract, the plaintiff is entitled to payment of the amount certified in the certificates of payment issued by the Superintending Officer of the PSA within 7 days of receipt of the progress payment by the defendants. Indeed the PSA itself questioned the defendants by letter dated 21 January 1998 (see p 73 of exhibit GST-3 of the first defendants' affidavit filed 11 February 1998) why the plaintiff had not been paid on certificate no 19. The defendants do not deny that these payments are due but are resisting the claim on the basis of their right to set-off under cl 12. Before me, counsel for the defendants cited the decision of the House of Lords in **Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd** [1974] AC 689 where it was held that on a true construction of the contract, there were no provisions which ousted the right of set off in respect of unliquidated cross claims and that, accordingly, since the sum deducted was related to a "bona fide contra account … or claim" within the meaning of cl 1(2) the appellants were entitled to deduct that sum, pending the determination of the cross claims, from the amount certified as payable to the respondents. Counsel relied on this in support of his contention that a party to a contract is entitled to defend a claim or dispute liability on the basis of his right to set off unless the contract expressly stipulates that this right of set off is excluded or ousted.

18. I am in agreement with the above proposition. However, 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

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

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, additional 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. Under cl 5(1) of the Main Contract:

"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."

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.

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

"Where there is such a clause and the contractor has failed to complete to time, he is prima facie liable to a claim for the liquidated damages either by way of action or by

deduction (if there is an express power) or by a set-off. There can be no inquiry into the actual loss suffered. "

Keating on Building Contracts (6 ed. p 240)

"Liquidated damages are said to be genuine pre-estimates of the loss which is likely to flow from any breach of contract and will, if the breach is proved, be upheld and enforced by the courts as the quantum of damages to be paid by the defaulting party. In many situations this operates as an exhaustive remedy for the breach contemplated and hence to limit the extent of the defendant's liability."

Law and Practice of Construction Contract Claims (2 ed. p 141)

22. The English Court of Appeal in **Temloc v Errill Properties** [1987] 39 BLR 30 held that since the parties had inserted "$nil" as the rate of liquidated damages in a contract, that will be the rate which the employer is entitled to recover in the event of a delay to the works. 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. 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.

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

23. As such, the plaintiff's claim to the sums due under Interim Certificates 19 and 20 is indisputable. In **Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd** [1989] 1 LR 473, Parker L J said this (at p 483):

"The purpose of O 14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived the plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the plaintiff is also entitled to judgment, But O 14 proceedings should not in my view be allowed to become a means for obtaining, in effect, an immediate trial of an action, which will be the case if the court lends itself to determining on O 14 applications points of law which may take hours or even days and the citation of many authorities before the Court is in a position to arrive at a final decision.

In cases where there is an arbitration clause it is in my judgment the more necessary that full scale argument should not be permitted. The parties have agreed on their chosen tribunal and a defendant is entitled prima facie to have the dispute decided by that tribunal in the first instance, to be free from the intervention of the Courts until it has been so decided and thereafter, if it is in his favour, to hold it unless the plaintiff obtains leave to appeal and successfully appeals."

24. In my opinion, this is a case which can be disposed of easily and expeditiously. The defendants' right to set -off is clearly without legal basis as they purport to set off their actual losses when they have been contractually bound to a fixed sum of damages for the plaintiff's delay. It seems that the defendants' purpose in raising this defence was to cause delay to the plaintiff.

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

The defendants are clearly in a dominant position. In staying the proceedings and allowing the matter to be arbitrated, the plaintiff would be kept out of his moneys indefinitely. As Lawton L J pointed out in **Ellis Mechanical Services**, contractors are in a situation where cash flow is vital. To do justice, it is important that one should try to maintain this cash flow. Keeping the plaintiff out of his money to which he is legally entitled seems to me to be unjust. Further, the defendants cannot justify the set-off on any legal basis. As such, I could see no reason to stay the proceedings in order to have the matter arbitrated.

25. The plaintiff had in the circumstances, proved that a stay need not be granted as its claim is indisputable. Accordingly, I allowed its appeal with costs (fixed at $1,000) here and below.

Lai Siu Chiu

Judge

Lai Siu Chiu J

Paul Fitzgerald (Arthur Loke & Partners) for the plaintiff
Rebecca Yeo (Drew & Napier) for the defendants

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