IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 311

Suit 636/1999, RA 334/1999, RA 335/1999

Between

JSD Construction Pte Ltd

… Plaintiff

And

Progen Pte Ltd

… Defendant

GROUNDS OF DECISION

Version No 1: 29 Oct 2026 (23:45 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

JSD Construction Pte Ltd v Progen Pte Ltd

[1999] SGHC 311

Suit 636/1999, RA 334/1999, RA 335/1999
Lai Kew Chai J
29 November 1999

1 **JUDGMENT:**

2 **GROUNDS OF JUDGMENT**

3 1 By a writ of summons issued on 29 April 1999 the plaintiffs (hereafter "the main contractors") sued the defendants (hereafter "the employers") for the sum of $1,694,975.59, alternatively damages, interest and costs for work done and materials supplied under a building contract in writing dated 1 August 1996 (hereafter "the contract") whereby the main contractors agreed to carry out and did carry out for the employers works in a 4-storey single user occupier factory with office and ancillary at the Woodland Loop, Singapore.

4 2 After appearance was filed, the main contractors on 14 May 1999 applied for an order that judgment be entered against the employers for $1,342,072.21, interest and costs. The claim was reduced because subsequent to the commencement of these proceedings the Architect revised Certificate Nos. 12 and the Penultimate Certificate.

5 3 On 10 June 1999 the employers applied for an order that all further proceedings in this action be stayed pursuant to s 7 of the Arbitration Act, Cap. 10 on the ground that the main contractors had by the contract agreed to refer to arbitration the matters in respect of which this action was brought.

6 4 On 2 August 1999 both summonses-in-chambers came up for hearing before the Assistant Registrar of the Supreme Court, Ms Wan Wai Yee, for hearing. At the conclusion of the hearing of both applications, the learned Assistant Registrar dismissed with costs the application to stay the action and ordered that judgment be entered against the employers for the sum claimed, together with interest at 6% p.a. on the judgment sum and costs to the plaintiffs fixed at $3,800.

7 5 Having failed to resist the application for summary judgment and having failed to obtain a stay of the proceedings the employers appealed to the High Court by Registrar's Appeal Nos. 335 of 1999 and 334 of 1999 respectively. They came up for hearings before me on 19 August, 9 September and 1 October 1999. At the conclusion of the hearings, both appeals were dismissed with costs. In respect of both the appeals, I ordered that the employers pay the costs fixed at $5,000. I further ordered that the main contractors be at liberty to enter final judgment against the employers for the sum of $1,342,072.21 together with costs below fixed at $3,800 and interest thereon at 6% per annum as follows: (a) for Certificate No. 10, interest to run from 3 December 1997; (b) for Certificate No. 11, interest to run from the expiry of 14 days from the date of the certificate i.e. from 26 February 1998; (c) for Certificate No. 12(Revised), interest to run from the expiry of 14 days from the date of the certificate i.e. from 12 June 1999; and (d) for the Penultimate Certificate(Revised), interest to run from the expiry of 14 days from the date of the certificate i.e. from 12 June 1999.

Version No 1: 29 Oct 2026 (23:45 hrs)

8 The Background

9 6 The plaintiffs tendered for and were engaged by the employers as the main contractors to build the Progen Building in Woodlands. The architect for the works were ID Architects and Law Property Management (hereafter "LPM") were engaged as the project manager. By letter dated 1 August 1996 the employers awarded the contract based on the sum of $20,572,572.96. The total figure for "Preliminaries" was $650,000 and the P.C. and provisional sum was stated to be $5,430,707.76. The main contractors signed the contract documents which were prepared by the employers' Project Quantity Surveyor. The contract documents were signed by the main contractors after 4 October 1996.

10 7 In disputing their liability to pay the main contractors' claims, the employers in the first place relied on clause 4 (hereafter "clause 4") of the Additions and Amendments to the Conditions of Contract which provides that the main contractors to submit to the employers a Performance Bond. Clause 4 provides as follows:-

> "The successful tenderer will be required upon acceptance of his tender to submit immediately as stated in the Tender Document to these Conditions to the Employer with a Performance Bond in the form annexed hereto, duly executed by a bank to be approved by the Employer, in an amount equal to ten (10) [sic] of the Contract Sum … Notwithstanding any other provision in the Contract to the contrary, the Employer shall be under no obligation whatsoever to make any payment of any kind to the Contractor nor shall the Contractor have any right whatsoever to receive any payment form [sic] the Employer until such time as the said Performance Bond has been furnished to the Employer…"

11 8 The specimen Performance Bond was annexed to the contract documents. A relevant paragraph for present purposes states that the performance bond "shall continue to be in force for the period of the subsistence

Version No 1: 29 Oct 2026 (23:45 hrs)

in the contract and shall expire only if and when all shrinkages, other faults and damages have been rectified and made good by the Contractor in accordance with the provisions of the contract".

12 9 The employers also contended that their disputes with the main contractors must as agreed be referred to arbitration. The arbitral clause is Clause 37 of the SIA Articles and Conditions of Building Contract and it provides as follows:

> "Any dispute between the Employer and Contractor as to any matter arising under or out of or in connection with the Contract or under or out of or in connection with the carrying out of the Works and whether in contract or tort, or as to any direction or instruction or certificate of the Architect … shall be referred to arbitration…".

13 10 After the award of the contract, the employers changed their minds. They decided to carry out the major portion of the nominated subcontract works, namely the M & E works, either by themselves or through their own contractors. It was not disputed that the employers had excluded the major portion of the nominated subcontract works from the main contractors. The P.C. Sum for the M & E works was substantial and it totalled $3,056,000. As it was excluded from the contract, there were therefore no subcontract between the main contractors and the nominated subcontractors. In consequence, the main contractors did not have the benefit of similar performance bonds from the subcontractors to back up their performance bond in favour of the employers to the extent originally contemplated. It was noted that on 13 August 1996 the Architects wrote to the main contractors to ask for the performance bond.

14 11 On 4 October 1996 the main contractors submitted to the employers a breakdown of the preliminaries. It was significant that no figure was attributed

Version No 1: 29 Oct 2026 (23:45 hrs)

to the item "B security deposit". The main contractors relied, inter alia, on this fact to show that the employers did not require the performance bond.

15 12 The furnishing of the performance bond by the main contractors was referred to in the minutes of Site Meetings Nos. 1,2,3 and 4 which were held on 6 September, 27 September, 18 October and 1 November 1996 respectively. It was noted in the first site meeting that the issue of the performance bond was a matter for the main contractors. The item appeared like a standard item which was repeated and recorded. In the minutes of the 3rd site meeting paragraph 6.6 stated as follows: "Performance Bond and Insurance Policies to Architect/QS/Owner 18/10/96 JSD (meaning the main contractors) confirmed submitted." These notes, which were prepared by the employers' own consultants or agents, were wrong. In fact, no performance bond had been furnished to the employers. But the insurance policies were issued and furnished by the main contractors. Yet these notes, which were repeated in the other site meetings by references merely to the paragraph number, were never picked up by anyone of those who attended the site meetings as erroneous.

16 13 The building progressed apace. The Architect certified Practical Completion with effect from 19 September 1997. The Certificate of Statutory Completion was issued on 15 June 1998, some ten months prior to the commencement of these proceedings. By that certificate, the Director-General of Public Works certified that the works had been duly completed and that "occupation thereof (was) permitted" under the Building Control Act. In the ordinary way and contractually physical possession would be handed to the employers immediately upon the issue of the certificate. It was.

17 14 At all material times, no performance bond was furnished by the main contractors to the employers. But the main contractors carried out their works

Version No 1: 29 Oct 2026 (23:45 hrs)

and supplied the materials up to statutory completion, as recited earlier. The employers made 9 full payments and 1 part payment pursuant to payment certificates issued by the Architect. No performance bond was ever required by the employers before they made payments on the certificates. The particulars are as follows:

Interim Cert No.	Date Issued	Amount Certified Payable	Amount Paid	Date Paid
1	18/10/96	Certified and Paid in full		23/11/96
2	22/11/96	Certified and Paid in full		03/01/97
3	16/01/97	Certified and Paid in full		03/02/97
4	17/02/97	Certified and Paid in full		12/03/97
5	20/03/97	Certified and Paid in full		29/04/97
6	05/05/97	Certified and Paid in full		24/05/97
7	26/05/97	Certified and Paid in full		07/07/97
8	10/07/97	Certified and Paid in full		12/08/97
				22/08/97
9	11/08/97	Certified and Paid in full		16/10/97
				02/12/97
10	18/09/97	$1,078,042.07	$250,000.00	02/12/97
11	12/01/98	$ 154,185.36	-	-
12	30/04/98	$ 333,171.53	-	-
Penultimate	12/08/98	$ 379,576.63	-	-

18 15 Following the main contractors' demands for payments of the outstanding certificates, the employers wrote and insisted on the issue of the performance bond even though one year had lapsed.

Version No 1: 29 Oct 2026 (23:45 hrs)

19 16 The employers also alleged that there were many defects, which they listed out in extenso. However, the employers had and continue to have the security of the retention sums for any defects and the issues of defects could be arbitrated, as the main contractors conceded.

20 17 Under the terms of cl. 31(11) of the contract, set-off and counterclaims were not applicable to the claims of defects asserted by the employers in this case: *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] 3 MLJ 216 and *Lojan Properties Pe Ltd v Topicon Contractors Pte Ltd* [1991] 2 MLJ 20. However, it was noted that cl. 31(11) itself provides that it would apply only "in the absence of express provision".

21 18 Counsel for the main contractors relied on the doctrine of waiver and submitted that the employers had by their conduct waived the requirement for the performance bond and/or alternatively waived the enforcement of clause 4. He relied on *W.J. Alan & Co Ltd v. El Nasr Export And Import Co (C.A.)* [1972] 2 QB 189, 213 where Lord Denning MR stated:

> "The principle of waiver is simply this: If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so: see *Plasticmoda Societa per Azioni v. Davidsons (Manchester) Ltd.* [1952] 1 Lloyd's Rep. 527, 539. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist upon them: *Tool Metal Manufacturing Co. Ltd. V. Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761. But there are cases where no withdrawal is possible. It may be too late to withdraw: or it cannot be done without injustice to the other party. In that event he is bound

Version No 1: 29 Oct 2026 (23:45 hrs)

> by his waiver. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made."

22 19 In my judgment the employers had waived their rights to call for the performance bond. They had paid against 9 interim certificates. Relying on their conduct, the main contractors had completed the works up to the statutory practical completion. Interim Certificates 10 and 11 both evidenced the works done during the period when most certainly no performance bond was called for by LPM, the employers' consultants and agents. On 10 February 1998 LPM wrote to the plaintiffs stating that one Mr Lee Eng of the employers insisted that he wanted a copy of the bond. On 20 February 1998 the main contractors replied that the bond was no longer required and waived. In the meantime, the main contractors continued with their works, leading to the issue of the Certificate of Statutory Compliance on 15 June 1998. Those works and materials supplied formed the basis of Interim Certificate No. 12 and the Penultimate Certificate. The employers moved in. The employers must accept responsibility for failing to insist on sighting the performance bond duly signed by an acceptable financial institution. If, as they did, they left the matter in the hands of their consultants, they must accept the consequences of the omissions of their consultants. To have required the main contractors to issue the performance bond would have been unjust and unfair to the main contractors. On the other hand, there was no injustice or unfairness against the employers. If they have any claims for defects, they were perfectly at liberty to refer to arbitration. After all, they had been in possession of the buildings since June 1998.

23 20 The main contractors had also contended that the employers had agreed to dispense with the performance bond. I was not persuaded that there was such an agreement. Such conduct as I have described could not, in my view,

Version No 1: 29 Oct 2026 (23:45 hrs)

have constituted agreement on the part of the employers but they were such as to have precluded them in equity form asserting a contrary position.

24 Lai Kew Chai

25 Judge

26

Lai Kew Chai J

Stephen Soh [Bernard, Rada & Partners] for the defendants/appellants
Giam Chin Toon/Peter Chow [Wee Swee Teow & Co] for the plaintiffs/respondents

Version No 1: 29 Oct 2026 (23:45 hrs)