LW Infrastructure Pte Ltd *v* Lim Chin San Contractors Pte Ltd [2011] SGHC 163

Case Number : Originating Summons No 759 of 2010

Decision Date : 05 July 2011

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Tan Liam Beng and Soh Chun York (Drew & Napier LLC) for the plaintiff; Alvin Yeo SC, Sean La'Brooy, Napolean Koh and Pamela Tan (WongPartnership LLP) for the defendant.

Parties : LW Infrastructure Pte Ltd — Lim Chin San Contractors Pte Ltd

Arbitration

Building and Construction Law

5 July 2011 Judgment reserved.

Judith Prakash J:

Introduction

1 This case (Originating Summons No 759 of 2010 ("OS 759")) is one of two cross-appeals on several questions of law which arise out of an arbitral award. The other is Originating Summons No 769 of 2010 ("OS 769").

The factual background

2 The factual background is set out in detail in my judgment in OS 769. For present purposes, it is enough to say that LW Infrastructure Pte Ltd ("LW") was the main contractor and Lim Chin San Contractors Pte Ltd ("LCS") was the sub-contractor in respect of a building project involving the design and construction of an industrial building at 31 Toh Guan Road East, Singapore ("the Project"). The developer of the Project and LW's employer under the main construction contract was Topmost Industries Pte Ltd ("the Employer").

3 LCS was appointed pursuant to a letter of award issued by LW on 14 May 2001. The formal sub-contract document was executed on 30 November 2001. LCS was required to complete the sub-contract works by 2 August 2002. The sub-contract provided that the works would be practically completed upon receipt of a Temporary Occupation Permit ("TOP") from the relevant authorities.

4 On 12 May 2003, LW terminated the sub-contract pursuant to cl 27.1.2 which allowed it to do so upon failure by the sub-contractor to proceed regularly and diligently with the performance of its obligations. New sub-contractors were engaged and the TOP was eventually granted on 1 August 2003.

5 On 22 June 2004, LW served a notice of arbitration on LCS. Mr Johnny Tan Cheng Hye ("the Arbitrator") accepted appointment as the arbitrator on 9 November 2007. He issued his award on 29 June 2010 ("the Award"). Subsequently, both parties brought appeals on questions of law arising out

of the Award.

Questions of law raised in this appeal

6 OS 759 was filed by LW, the main contractor, in an appeal on the following questions of law:

(a) whether the contractual right of LW to claim for liquidated damages against LCS under the provisions of the sub-contract for delay to the completion of the works by LCS, which accrued prior to termination of the sub-contract, had been extinguished or rendered inapplicable following termination of the sub-contract ("the first question of law");

(b) whether the contractual right of LW to claim for liquidated damages against LCS under the provisions of the sub-contract for delay to the completion of the works by LCS, which accrued prior to termination of the sub-contract, had been extinguished or rendered inapplicable following completion of the works by others after termination of the sub-contract ("the second question of law"); and

(c) whether, in a claim for liquidated damages incurred or suffered by LW prior to the termination of the sub-contract for delay in completion by LCS, LW was required to prove the extent of damages incurred or suffered and attributable to LCS's breach of contract arising out of their delay in completing the works ("the third question of law").

The first question of law

7 During the Arbitration, LW put its claim for damages for delay in the completion of the sub-contract works as being recoverable on the basis of three alternative grounds:

(a) as liquidated damages from 31 October 2002 to 28 July 2003 at the rate of $5,000 per day;

(b) as liquidated damages from 31 October 2002 to 12 May 2003 at the rate of $5,000 per day, and general damages between 13 May 2003 and 28 July 2003 calculated at the same rate; or

(c) as general damages between 31 October 2002 and 28 July 2003 calculated at the rate of $5,000 per day.

8 All three bases of claim were rejected by the Arbitrator. The total amount claimed by LW on each of the three alternative grounds was the same ($1,360,000) because the general damages were also calculated at $5,000 per day. This was the rate of liquidated damages which was imposed on LW by the Employer for delay in the main contract works. In relation to the claim for general damages, the Arbitrator held that LW had failed to prove the extent of its loss which was attributable to LCS because:

(a) the main contract works included both the sub-contract works and M&E works, and LW had failed to prove the extent of the delay in the main contract works which was attributable to

the delay in the sub-contract works; and

(b) part of the delay after termination of the sub-contract was due to the conduct of LW itself, and LW had failed to prove the extent of delay after termination which was due to LCS's delay.

9 In its appeal, LW chose to focus solely on the period between 31 October 2002 and 12 May 2003, *ie* the period between the date on which the sub-contract ought to have been completed (as extended by an agreed extension of time) and the date on which the sub-contract was terminated by LW. Essentially, LW's position is that its termination of the sub-contract on 12 May 2003 did not *ipso facto* have the effect of preventing the making of any claims for liquidated damages which are based on the period *before* termination.

The Arbitrator's findings

10 The liquidated damages clause in the sub-contract is as follows:

> 24 Damages for non-completion
>
> 24 .1 If the Contractor fails to complete the construction of the Works by the Completion Date the Employer shall issue a notice in writing to the Contractor to that effect.
>
> 24 .2 .1 Subject to the issue of a notice under clause 24.1 the Contractor shall, as the Employer may require in writing not later than the date when the Final Account and Final Statement become conclusive..., pay or allow to the Employer the whole or part of a sum calculated at the rate [of $5,000 per day] as liquidated and ascertained damages for the period between the Completion Date and the date of Practical Completion and the Employer may deduct the same from any monies due or to become due to the Contractor under this Contract (including any balance stated as due to the Contractor in the Final Account and Final Statement) or the Employer may recover the same from the Contractor as a debt.
>
> 2 If, under clause 25.3.3, the Employer fixes a later Completion Date, the Employer shall pay or repay to the Contractor any amounts recovered allowed or paid under clause 24.2.1 for the period up to such later Completion Date.

11 The Arbitrator began his analysis by asking the question, "Does Clause 24.2.1 survive after the termination of the Sub-Contract?" He agreed with LCS that all future obligations cease upon termination:

> 85 I agree with [LCS] that when a contract is terminated, all future obligations under the contract cease with the termination. [LCS] relied on *Re Sanpete Builders*... where the learned judge quoted *Keatings* [*sic*] *on Building Contracts* (4th Edn):
>
> > "If the contract is brought to an end by determination or otherwise, then prima facie all future obligations cease and no claim can be made for liquidated damages accruing after determination. But there may be some special clause which has the effect of keeping the provision for payment of liquidated damages alive although the work has been taken out of the hands of the contractor."

86 The learned judge then went on to say:

> "In *British Glanzstoff*... the House of Lords held that a clause on liquidated damages applied only where the contractors had completed the contract and did not apply where the control of the contract had passed out of their hands."

12 The Arbitrator then went on to decide that the liquidated damages clause "does not apply and any claim for damages by [LW] would be by way of general damages":

> 87 A party to a contract cannot be made responsible for not fulfilling obligations which he has been denied the opportunity on account of the termination of the contract unless there are specific provisions in the contract that expressly has the effect of keeping that provision alive after the termination. In this Sub-Contract there is no such provision. Further, *as decided by the House of Lords, liquidated damages apply only where the contractor had completed the contract and not when their employment had been terminated and control of the contract passed out of their hands*.
>
> 88 In the present case, [LCS] had not completed the contract. The completion of the Sub-Contract was taken out of their hands. Hence, Clause 24.2.1 does not apply and any claim for damages by [LW] would be by way of general damages.
>
> [emphasis added]

LW's arguments

13 LW accepts that the Arbitrator correctly decided that all future obligations under the sub-contract ceased upon termination so that no claim for liquidated damages which accrue after termination may be made. This concession was rightly made: Stephen Furst QC & Sir Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 2006, 8th Ed) ("*Keating*") at para 9-028. Its disagreement with the Arbitrator stems from his decision, based on *British Glanzstoff Manufacturing Company, Limited v General Accident, Fire and Life Assurance Corporation, Limited* [1913] AC 143 ("*British Glanzstoff*"), that a liquidated damages clause only "applies" where the sub-contractor against which the liquidated damages claim was brought had in fact completed the works. In other words, he decided that because the liquidated damages clause did not "apply" in such a situation, no *claim* for liquidated damages could be brought regardless of whether it was brought in relation to the period before or after termination of the sub-contract.

14 LW submits that *British Glanzstoff* does not support the Arbitrator's decision. The report of the judgment of the House of Lords is somewhat brief and merely states the following (at 144):

> The First Division of the Court of Session... held, upon the construction of clauses 24 and 26 of the contract, that the clause as to liquidated damages applied only where the contractors had themselves completed the contract and did not apply where the control of the contract had passed out of their hands.
>
> ...
>
> The House affirmed the decision of the First Division of the Court of Session upon the grounds stated by that Court.

The Arbitrator was content to take these paragraphs at face value and decided that, *as a matter of*

law, *all* claims of liquidated damages cannot be sustained where the contractor has not in fact completed the works. However, an examination of the decision of the lower court, as reported at *The British Glanzstoff Manufacturing Company, Limited v The General Accident, Fire, and Life Assurance Corporation, Limited* [1912] SC 591, does not support the Arbitrator's decision because, on the facts, it was a case where the termination of the contract occurred before the date of completion (at 592-593):

> ... By article 23 of the said articles of agreement it was provided that possession of the site should be given to the contractors on or before the 1st of May 1909, and that they should begin the works immediately thereafter *and complete* the same *by the 31st day of January 1910*. Possession was duly given to the contractors on said 1st day of May 1909. By article 24 thereof it was provided that if the contractors failed to complete the works by 31st January 1909, or within any extended period allowed by the architect thereunder, the contractors should be bound to pay to the employer the sum of £250 sterling per week for the first four weeks, and £500 sterling per week for all subsequent weeks during which the works remained unfinished. ... The [contractors] entered upon the construction of the said works and *carried them on until the 20th day of August 1909, when a receiving order was granted ... against them*. No further work was done by the [contractors]. In consequence of the ... failure to complete the contract it was necessary for the [employer] to obtain the services of other contractors, and on *16th September 1909* they entered into articles of agreement with Messrs Joshua Henshaw & Sons ... who duly completed the construction of the said works. ...
>
> [emphasis added]

In other words, the facts of *British Glanzstoff* were such that the termination of the contract (on 16 September 1909) had occurred before the agreed date of completion (on 31 January 1910). Therefore, by definition, there could not have been any claim to liquidated damages as of the date of termination because the completion date had not yet arrived. This was explained by Lord MacKenzie in the lower court (at 600):

> … I am unable to see how the [employer] can charge [the contractors] under a liquidated damages clause, because they failed to complete the works by 31st January 1910, when on [the contractors'] bankruptcy the [employer] made a contract with Henshaw & Sons to complete by 31st December 1909.

The decision was but a different iteration of the well-established principle that no liquidated damages accrue once a contract has been terminated, in the absence of express contractual provision to the contrary. LW submits that the House of Lords did not intend that termination or the fact that the control of the contract had passed out of the hands of the contractor should constitute a new defence to a claim of liquidated damages. I agree.

15 LW's interpretation is supported by the well-established principle that the termination of a contract does not affect rights which have accrued before termination: *Bank of Boston Connecticut v European Grain and Shipping Ltd* [1989] 1 AC 1056 at 1098H-1099D; *Hurst v Bryk and others* [2002] 1 AC 185 at 199D-E. This was explained in H G Beale QC (gen ed), *Chitty on Contracts vol 1* (Sweet & Maxwell, 2008, 30th Ed) ("*Chitty*") at paras 24-048 and 24-051 in the following way:

> ... [I]n principle, only those primary obligations falling due after the date of discharge will come to an end; *those which have accrued due at the time may still be enforceable as such*. Thus, while both parties are discharged from further performance of their primary obligations under the contract, "*rights are not divested or discharged which have been unconditionally acquired*". The

party in breach can therefore enforce against the innocent party such rights as it has "unconditionally acquired" by the date of termination.

[emphasis added]

This principle was reiterated in Nicholas Dennys QC, Mark Raeside QC & Robert Clay, *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 2010, 12th Ed) ("*Hudson*") at para 6-039:

In the absence of special provision, it is submitted that any liquidated damages accrued due prior to the date of rescission, forfeiture or determination will be recoverable, but in respect of any later delay the Employer will be required to prove their damage (if any) in the normal way... Again, it has been seen that the Full Court of Victoria [in *SMK Cabinets*, see *infra* at [22]], consistently with this, has held that, in a case of prevention by the ordering of extras where there is no applicable extension of time clause, *liquidated damages already accrued due up to the date of the order for the variations will be recoverable*, but only general damages for delay thereafter. *This accords with the general principle, following rescission of a contract at common law, that previously accrued rights, including rights of payment up to that time if such exist, will be enforced*.

[emphasis added]

In the present case, there is no express provision which stipulates that a right to liquidated damages for the period between the agreed (or extended) completion date and termination will be extinguished upon termination.

16 The Arbitrator also relied on *Re Sanpete Builders (S) Pte Ltd* [1989] 1 SLR(R) 5 ("*Re Sanpete Builders*"). LW submits that the case does not support the Arbitrator's interpretation of the law. I agree. Chao Hick Tin JC (as he then was) was not concerned with the validity of a claim for liquidated damages accruing *prior* to the termination of the contract. This is clear from the following passage in the judgment (at [23]):

As on the date of termination of the sub-contract, no liquidated damages have accrued to Sanpete because the date for completion has yet to arrive. There is nothing in the sub-contract which preserves the right to liquidated damages after termination.

[emphasis added]

1 7 *Re Sanpete Builders* was a case where the termination of the sub-contract by the contractor occurred before the completion date (as extended by the architect). The original completion date was 25 July 1986, but this was extended by six months by the architect to 25 January 1987. The sub-contract was terminated on 4 October 1986. Chao JC made it quite clear that he was only dealing with the situation where termination occurred before the extended completion date (at [21]):

In view of the fact that the subcontract was terminated by Sanpete on 4 October 1986, it seems clear to me that the liquidated damages clause can have no application *as the clause talks about if the contractor fails to complete the said works by the date. That is a condition precedent which must be satisfied before liquidated damages may be imposed*. A contractor has until the last hour of the day fixed for completion in which to finish the works: see *Startup v MacDonald* (1843) 6 Man & G 593 ...

[emphasis added]

Thus, Chao JC rejected the claim of liquidated damages despite the fact that it was estimated by the architect that, as of 8 July 1986 (*ie*, before the extended completion date), the works were behind schedule by 163 days.

18 In summary, the cases cited by the Arbitrator, *ie*, *British Glanzstoff* and *Re Sanpete Builders*, do not support his conclusion. It is well-established that the effect of termination on liquidated damages is only that no claim to liquidated damages can be brought in respect of the period after termination. In the absence of express provision to the contrary, termination of the contract does not affect a claim to liquidated damages in respect of the period before termination.

Whether cl 24 survived termination

19 LCS argues that cl 24 (the liquidated damages clause) did not survive the termination of the sub-contract, relying on *British Glanzstoff* and *Re Sanpete Builders*, and that therefore no *claim* to liquidated damages for the period *before* termination could be brought. It is not disputed that cl 24 did not survive termination in the absence of express provision to the contrary; rather, what is disputed is whether or not this should necessarily mean that liquidated damages for the period before that cannot be *claimed*. For the reasons outlined in the previous section, the two cases do not assist LCS.

20 LCS also relies on *Engineering Construction Pte Ltd v Attorney-General* [1994] 1 SLR(R) 125 ("*Engineering Construction*"). LCS initially argued that Lim Teong Qwee JC held (at [31]) that the employer was not entitled to deduct or recover liquidated damages in respect of any period during which the contractor was in delay before termination. However, this in itself does not assist LCS because, as LW points out, the *ratio* of the case was that the condition precedent to the right to liquidated damages had not been fulfilled. In its further submissions, LCS accepts that the facts in *Engineering Construction* were different but relies instead on observations made by the judge (at [30]). Because these observations relate to the issue of the point in time at which the right to liquidated damages accrues under the contract, I will leave this point aside for the time being.

Whether time had been set at large

21 LCS argues that the Arbitrator was correct to hold that LW was not entitled to liquidated damages for the period between the agreed completion date (as extended) and the date of termination, because time had been set at large by reason of acts of prevention on LW's part (although this was not the justification which was articulated by the Arbitrator). As I have dismissed LCS's argument in OS 769 that time was set at large, it is unnecessary to deal with this argument any further.

22 For the avoidance of doubt, even if I was wrong to have held that time had not been set at large, a claim of liquidated damages would still be available to LW to the extent that it was made in relation to the period before the acts of prevention had been committed: see *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391 ("*SMK Cabinets*").

Whether LW's right to liquidated damages had accrued

23 I have held that liquidated damages which have accrued before termination of a contract may still be claimed or deducted after termination. The question which then arises is whether or not LW's right to liquidated damages had accrued as of the date of termination on 12 May 2003. This is the crux of this appeal. LCS argues that LW's right to claim liquidated damages *had not yet accrued* and therefore did not survive the termination. It advances several grounds for this proposition.

Validity of notice

24 First, LCS argues that LW had failed to provide a valid notice pursuant to cl 24, the relevant portion of which is as follows:

> 24 .1 If the Contractor fails to complete the construction of the Works by the Completion Date the Employer shall issue a notice in writing to the Contractor *to that effect*.
>
> 24 .2 .1 Subject to the issue of a notice under clause 24.1 the Contractor shall... pay or allow to the Employer the whole or part of a sum calculated at the rate [of $5,000 per day] as liquidated and ascertained damages ...
>
> [emphasis added]

25 LW argues that it had in fact provided a valid notice by means of a letter to LCS dated 2 January 2003, two months after the agreed completion date of 4 November 2002:

> I am enclosing a copy of letter dated 2 January from the [Employer], giving notification on the failure to proceed regularly and diligently with the performance of the contractual obligation, in particular, to complete the project on or before the *contractual extended completion date of 30 October 2002*.
>
> We hereby notify you along similar basis expressed in the above-mentioned letter for your failure to proceed regularly and diligently with your obligations under the Contract dated 14 May 2001, *in particular, to complete the project (ie your works) by the contractual completion time*. In this regard, may we also refer you to Clause 27.1.2 of the Conditions of Contract.
>
> Without prejudice to our rights whatsoever, you are hereby required to remedy your said failure, in particular, to complete the project (ie your works) within 14 days hereof. In this regard, you are required to forthwith give us the latest construction programme to achieve completion of your works within 14 days from the date hereof.
>
> We reserve our rights to take any action deemed necessary by us for the failure on your part to regularly and diligently perform your obligations under the Contract.
>
> [emphasis added]

26 LCS argues that this letter did not constitute a valid notice because it did not *specifically* refer to LW's right to liquidated damages. In my opinion, such a reference is not a requirement of cl 24.1 which *prima facie* merely requires that the notice should state that the sub-contractor failed to complete the works by the completion date.

27 In any event, this argument does not constitute an argument of law. While it is true that s 49(1) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") merely specifies that *appeals* must be brought on questions of law arising out of arbitral awards, by necessary implication the arguments raised in opposition to such appeals must *also* be arguments of law, although they need not themselves necessarily arise out of the award due to the operation of O 69 r 6(6):

> Where the respondent contends that the relevant part or parts of the award should be upheld on grounds not or not fully expressed in the award, such grounds should be included in the Respondent's Case.

LCS's argument that there was no valid notice pursuant to cl 24 contains two distinct elements: (a) that there was an erroneous *interpretation* of the notice requirement in cl 24; and/or (b) that there was an erroneous *application* of this requirement to the letter. The first element is indeed a question of law, but it is one which does not "arise out of" the Award for the simple reason that the Arbitrator decided that LW's claim of liquidated damages failed at the preliminary stage because cl 24 did not "apply" where the sub-contract had been terminated; he did not go on to consider whether all the prerequisites to the right to liquidated damages had been satisfied. The second element is a pure question of fact which is not open to appeal under s 49.

Interpretation of cl 24

28 Secondly, LCS argues that cl 24 provides that the *right* to liquidated damages *only arises* upon *actual* completion of the works. LCS notes that cl 24.2.2 provides that in the event that LW grants an extension of time under cl 25 and fixes a later completion date, LW is not entitled to claim liquidated damages for the extended period. This is certainly correct, but it does not even begin to answer the broader question of whether liquidated damages can be claimed for the period *beyond* the extended completion date up to the time of termination.

29 Additionally, LCS notes that cl 24.2.1 specifies that liquidated damages are calculated "for the period between the Completion Date and the date of Practical Completion". The Arbitrator held that the completion date was extended to 4 November 2002. It is not disputed that practical completion eventually occurred when the TOP was obtained on 1 August 2003. LCS notes that in *Re Sanpete Builders*, Chao JC stated (at [23]):

> *As on the date of termination of the sub-contract, no liquidated damages have accrued to Sanpete because the date for completion has yet to arrive*. There is nothing in the sub-contract which preserves the right to liquidated damages after termination.
>
> [emphasis added]

LCS submits that, similarly, at the time of termination on 12 May 2003, the date of practical completion had yet to arrive because the TOP had not been obtained, and that therefore no right to liquidated damages had accrued. It is undoubtedly true that the date of practical completion had not yet arrived, but this does not assist LCS in any way. Its reliance on *Re Sanpete Builders* is misplaced because Chao JC was but reiterating the well-established principle that the right to liquidated damages only arises once the date of completion has passed. The date of completion referred to by Chao JC in that paragraph was the date of *agreed* completion (and not the date on which the works were actually completed).

30 More pertinently, LCS's argument should be rejected because it conflates, on the one hand, the conditions for the existence of a right to liquidated damages, and, on the other hand, the total quantum of damages which may be recovered pursuant to that contractual right. As LW points out, if it was the parties' intention that the right to liquidated damages would only accrue once the actual date of practical completion had passed, they could have easily provided for this in the clause. However, cl 24 does not in terms provide for any condition precedent apart from the requirement to issue a notice. It is not inconceivable that the parties would have intended that liquidated damages could be claimed or deducted in respect of a shorter period if practical completion was not yet achieved when the sub-contract was terminated.

31 This interpretation of cl 24 is supported by the fact that it is well-established that the function of a liquidated damages clause is to allow the employer to claim or deduct liquidated damages

immediately the agreed completion date has been overrun. This was explained in *Hudson* (at para 6-029):

> ... [T]he most important practical function of liquidated damages clauses is to confer a power to deduct the damages *immediately* from monies due to the Contractor *on interim certificate once the completion date or extended date has passed* ...
>
> [emphasis added]

Hudson goes on to explain the importance of this principle (at para 6-040):

> ... [A]s in many forms of contract liquidated damages *become due immediately on the date when completion should have occurred, and provision is made for a right of immediate deduction of liquidated damages from monies due after that date* (for example, on interim certificate); financial rights or obligations may well have accrued by the time of determination or rescission, and it would, to say the least, be highly inconvenient to reopen the whole state of accounts between the parties, as would be the case if the liquidated damages provision was held to have been invalidated retrospectively upon forfeiture.

Uncertainty as to date of contractual completion

32 LCS's most promising argument is based on the inherent uncertainty as to the exact completion date according to which the *total* amount of liquidated damages will *eventually* be calculated. This argument is advanced primarily on the basis of certain *obiter* observations in *Engineering Construction*. The facts of the case were as follows. The plaintiff agreed to complete certain construction works for the government by 18 December 1991. Cl 31(a) provided that the government would be entitled to liquidated damages for any delay in completion, and cl 32(a) provided for the certifying engineer to have the power to grant and certify extensions of time. On 30 April 1992 (*ie*, after the agreed completion date), the government wrongfully terminated the agreement. The plaintiff accepted this termination as a repudiatory breach. At that time, the works were not yet completed. Subsequently, on 29 September 1992, the certifying engineer issued a certificate stating that the works ought reasonably to have been completed by 28 December 1991 and another certificate stating the amount of liquidated damages which was due to the government. The plaintiff successfully sought a declaration that the government was not entitled to the liquidated damages.

33 The *ratio* of the decision was that the certifying engineer lost the power to issue the certificates (which were a condition precedent to the right to liquidated damages) once the contract was terminated. Lim JC nonetheless went on to express his views on the other issues that were argued before him, citing the decision of the lower court in *British Glanzstoff* with approval. The observations relied upon by LCS (at para [30] of the judgment) can be summarised as follows:

(a) So long as the contract remains in force, events for which an extension of time may be granted may occur. Therefore, the total length of extensions of time cannot be determined until the works are actually completed;

(b) Under cl 31 of the contract, liquidated damages are payable in respect of the period the works remain uncompleted. This period cannot be finally determined until the works are in fact completed;

(c) This period also cannot be determined if the works can no longer be completed by the contractor by reason of the contract having come to an end (citing *British Glanzstoff*);

(d) If there is already delay to completion when the contract is terminated, that period of delay may in fact be shorter upon completion (if the contract had not been terminated) than at the time of termination. Say the date for completion is 30 June. The works are not completed and will require another 15 days. The contractor proceeds with the works, and on 5 July extras are ordered by the employer and the engineer allows an extension of 25 days (*ie*, to 25 July). The contractor completes the original works as well as the extras on 30 July. What was potentially a 15-day period of delay has been reduced to one of only 5 days; and

(e) The first extension of time certificate issued by the engineer cannot be final until the works are actually completed, and since further performance has been taken out of the contractor's hands altogether, the extension of time clause can no longer operate.

34 LCS relies on these observations to establish that liquidated damages can only be calculated and imposed after the works are completed by the original contractor and after the project consultants take into account all events that happened prior to the completion of the works. This is because the completion date in a construction contract is liable to change and there may be events which occur after termination which in fact reduce the *effective* delay *before* termination *for which a contractor is liable*.

35 In my view, however, the observations in *Engineering Construction* do not provide any assistance to LCS. Statements (a), (b), (d) and (e) are undoubtedly true but do not address the issue of whether a right to liquidated damages has already arisen. As noted above, the right to liquidated damages on LW's part arose as soon as actual completion of the works was not achieved by the agreed completion date. What is uncertain is merely the total amount of liquidated damages to which LW is entitled.

36 The observation in (d) that, *ex post facto*, the total period of delay may turn out to be shorter than the expected period of delay viewed at the agreed completion date, is indeed correct. But this does not assist LCS because the right to liquidated damages may be characterised in the following manner: a right to liquidated damages arises the moment the works have not been completed by the agreed completion date, and the total quantum of a claim to liquidated damages consequent on this right will increase with every day (or week, *etc*, as the case may be) that actual completion is not achieved. However, the total quantum of liquidated damages that may be claimed is subject to alteration by subsequent events such as extensions of time which will, by extending the agreed completion date, reduce the effective period of delay for which the contractor is liable. In other words, the *maximum* quantum of liquidated damages that can be claimed increases as time passes, but the actual quantum of liquidated damages which are eventually claimed or deducted, over the entire period, may be less than that.

37 This characterisation is supported by the terms of the sub-contract. LW points out that the sub-contract stipulates that the parties should deal with issues of extension of time *as and when* the relevant events occur: there is no requirement to do so only after practical completion is achieved, and in fact such an approach is prohibited. Cl 25.2.1 requires LCS to give notice of an event which will or is likely to cause delay to the progress of the works *once this becomes reasonably apparent*. Cl 25.2.3 also requires notice to be given *whenever there is a subsequent material change* in the circumstances. In turn, cl 25.3 requires LW to grant the necessary extension of time and fix a new

completion date (where applicable) within 12 weeks of LCS's notice.

38 LW also points out that the sub-contract provisions stipulate that liquidated damages accrue *upon* the occurrence of a delay in the completion of the sub-contract works. LW is entitled to deduct any liquidated damages from payments *other than* the balance stated as due to LCS in the final account and final statement – cl 24.2.1. Also, LW has to *repay* to LCS any liquidated damages *previously* paid to LW *upon the fixing of a later completion date* – cl 24.2.2. It is clear that cll 24.2.1 and 24.2.2 directly contradict LCS's submission that LW's right to liquidated damages cannot accrue before actual completion.

39 This characterisation is additionally supported by two cases. In *JF Finnegan Ltd v Community Housing Association Ltd* (1995) 77 BLR 22, the English Court of Appeal dealt with the construction and interpretation of a liquidated damages clause in a JCT contract which is *in pari materia* with cl 24 of the sub-contract. Peter Gibson LJ held that liquidated damages accrue once there is delay to the completion of the construction works, regardless of the fact that the agreed completion date may be subsequently revised. The relevant passage from the judgment is as follows (at 34H-I):

> Until another completion date is fixed, the employer is entitled to claim [liquidated damages] *for the whole of the period of the overrun*, *repaying under clause 24.2.2 the excess when a later completion date is fixed by the architect* under clause 25.3.3. ...
>
> [emphasis added]

40 In *SMK Cabinets*, it was held by the Full Supreme Court of Victoria that an employer may not claim liquidated damages in respect of delay arising after it had ordered certain variation works after the due date for completion had passed. However, the employer's right to claim liquidated damages in respect of delay occurring before its order of variation remained intact. Brooking J explained the position quite clearly:

> The first matter concerns the date of the prevention... The obligation is to complete by a certain date... ; the subsequent ordering of extras cannot have prevented the contractor's performance of that obligation. Such is the argument. But... *the consequences to the contractor of [its] failure depend on the number of days during which the failure continues: the provision is for graduated sums, the obligation being to pay a larger sum for every day by which completion is delayed. The promise is to pay alternative sums, depending on the date by which the work is finished: $35 if it is not finished before 22 July, $70 if it is not finished before 23 July, $105 if it is not finished before 24 July, and so on* ...
>
> ... [T]he ordering of variations after the due date which must substantially delay completion will, unless the contract provides otherwise, and in the absence of an applicable extension of time clause, disable the proprietor from recovering or retaining liquidated damages which might otherwise have accrued after the giving of the order, *the employer's right in respect of amounts that have already accrued by way of liquidated damages not being affected* ...
>
> [emphasis added]

41 LCS submits that it would be perverse if, in the situation where the sub-contract has been terminated, events after termination which could decrease the total number of days by which completion is delayed should be ignored. LW's argument does not, however, lead to this outcome: it acknowledges that events after termination may affect the quantum of a claim for liquidated damages for the period before termination. Rather, LW's contention is that the possibility of post-termination

events which may result in extensions of time should not *ipso facto* negate the existence of the right to recover liquidated damages. For the reasons outlined above, this is correct.

42 The only statement in *Engineering Construction* which addresses the issue directly is statement (c), which is made in reliance on *British Glanzstoff*. I have dealt with this point above and found that *British Glanzstoff* was decided in very different circumstances. The correct interpretation of *Engineering Construction* is that Lim JC did not mean that post-termination events should affect the *existence* of a right to liquidated damages: he merely observed, correctly, that such events could affect the *quantum* of the *total* claim of liquidated damages.

Standard industry practice

43 LCS's final argument relies on the provisions contained in two standard forms widely used in Singapore, *ie*, the *Public Sector Standard Conditions of Contract for Construction Works* (Building and Construction Authority, 2008, 6th Ed) ("*PSSCOC*") and the *Singapore Institute of Architects Articles and Conditions of Building Contract: Lump Sum Contract* (Singapore Institute of Architects, 2008, 8th Ed) ("*SIA Contract*"), to support its proposition that further delay arising between termination and actual completion has to be taken into account before the *right* to liquidated damages arises. It is doubtful whether the terms of other contracts, even if they are contained in standard forms widely used in Singapore, are at all relevant to the interpretation of cl 24 which is clear and not ambiguous. Even if the terms of such standard forms were materially similar to cl 24 and cl 24 was ambiguous, the ultimate objective is to ascertain the parties' objective intentions as expressed in the contract which they have entered into and not some other contract. As the Court of Appeal stressed in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [132(d)], the principle of objectively ascertaining the shared contractual intentions of the parties remains paramount and that therefore any extrinsic evidence must go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. In the present case, there was no evidence that the parties had regard to the *PSSCOC* or *SIA Contract* when entering into the sub-contract. Indeed, as will be explained later, it is apparent that the chosen allocation of rights and obligations in the sub-contract is significantly different from that in the *PSSCOC* and *SIA Contract*. Nevertheless, for the sake of completeness LCS's arguments will be considered.

44 LCS argues that standard industry practice dictates that the final statement and final account are issued only after practical completion is achieved. Therefore, the parties must have intended that LCS be given an opportunity to make representations to LW as to the state of accounts between themselves before the final statement and final account is issued. Although it is undoubtedly true that the final statement and final account are, as a matter of practice, issued only after practical completion is achieved, this is neither here nor there. It is also not uncommon that interim statements and interim certificates are issued and that the amounts stated in those documents are immediately payable upon their issue (subject only to adjustment in subsequent statements and/or certificates). This was explained in Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 2004, 3rd Ed) ("*Chow Kok Fong*") (at p 338):

> Interim certificates are certifications of payments made in accordance with a timetable in the contract... These certifications are never intended to be a precise determination of the value of the works... A more accurate view of the amount certified in an interim certificate is to treat them as estimates of the value of the work done up to the date shown in the certificate. Thus, while the employer or owner is obliged to pay what is certified, the amounts certified are not binding on the parties in the sense that they are subject to adjustment on completion ...

45 This provisional quality of interim certificates was also explained in *Keating* at para 5-009 and

Hudson at para 4-074 to 4-075. Clause 24.2, which envisages that a right to liquidated damages may accrue before practical completion and the issue of the final statement and final account, encapsulates this industry practice.

46 Apart from its argument based on the final statement and final account, LCS relies on specific clauses contained in the *PSSCOC* and *SIA Contract*. Cl 31.3 of the *PSSCOC* is as follows:

> If the employment of the Contractor has been terminated for default pursuant to Clause 31.1 and completion of the Works or any phase or part by the Employer or by other contractors or persons appointed by the Employer to complete the Works, phase or part has been delayed beyond the Time for Completion, the following provisions shall have effect:
>
> (a) *The Employer shall be entitled to the same liquidated damages for delay as those which would have been payable if the Contractor had completed the Works* or phase or part on the actual completion date of the Employer or the other contractors or persons appointed by the Employer.
>
> (b) For the purpose of giving effect to the above, the Superintending Officer shall, upon the completion of the Works or phase or part issue a certificate. Such certificate shall state the date upon which the Contractor should have completed the Works or phase or part and shall also state the full period of delay for which the Contractor is responsible and shall compute the total damages due to the Employer therefor. *The certificate shall give credit for events occurring after the termination of the Contractor's employment which would have entitled the Contractor to an extension of time had he duly executed and completed the Works or phase or part and duly complied with Clause 14. In assessing the period of delay, the Superintending Officer shall also reduce the period of delay to the extent that there has been any failure by the Employer or by any other contractors or persons engaged by the Employer to use due diligence and expedition in arranging for or completing the remaining parts of the Works or phase or part*.
>
> (c) Upon the issue of a certificate under Clause 31.3(b), the amount of damages certified by such certificate shall be immediately recoverable by the Employer from the Contractor.
>
> [emphasis added]

And cl 32(8)(g) of the *SIA Contract* is as follows:

> In the event of the termination of the employment of the Contractor...
>
> (g) *In the event that final completion of the Works by the other contractors or persons engaged by the Employer has been delayed beyond the Contract Completion Date* (as revised or extended or notionally extended...) the following provisions shall have effect:-
>
> (i) *The Employer shall be entitled to the same liquidated damages for delay as those which would have applied under the terms of the Contract if the Contractor had himself completed the Works on the actual completion date of the other contractors or persons engaged by the Employer*.
>
> (ii) ... [T]he Architect shall, upon the completion of the Works issue a certificate known as a "Termination Delay Certificate". Such certificate shall state the date upon which the Contractor should have completed the Works... but... shall state the full period of delay

for which the Contractor is responsible and shall compute the total damages due to the Employer therefore. *The Certificate shall give credit for matters following the termination which would in any event have entitled the Contractor to an extension of time had he completed the Works himself and applied for such extension, and in assessing the period and date of delay to be certified in the Termination Delay Certificate the Architect shall also reduce the period of delay to be certified to the extent that there has been any failure by the Employer or by the other contractors or persons engaged by the Employer to use diligence and due expedition in arranging for or completing the remaining parts of the Works*.

(iii) Upon the issue of the Termination Delay Certificate the damages certified in that Certificate shall be immediately payable by the Contractor to the Employer.

[emphasis added]

47 LCS argues that clauses such as cl 31.3 of the *PSSCOC* and cl 32(8)(g) of the *SIA Contract* were introduced because it was recognised that liquidated damages are assessed for the period up to actual completion: these clauses empowered the contract administrator (a) to assess events *after* termination that could change the overall situation and (b) to give the terminated contractor credit for events that happen after termination. LCS points out that cl 25 (the extension of time clause) also contemplates that the completion date is liable to further changes. However, this argument does not assist LCS. In advancing this argument, LCS has again conflated, on the one hand, the conditions for the existence of a right to liquidated damages, and, on the other hand, the total quantum of liquidated damages to which the contractor is entitled. The uncertainty as to the total quantum of liquidated damages available to an employer or contractor does not negate the existence of the right to liquidated damages.

48 In any event, LW notes that the liquidated damages provisions in the *PSSCOC* and *SIA Contract* survive termination unlike cl 24 of the sub-contract because there is express contractual provision to this effect: see, respectively, cl 31.3(a) of the *PSSCOC* and cl 32(8)(g)(i) of the *SIA Contract*. Therefore, credit was given to the original contractor for matters following termination which would have entitled the original contractor to an extension of time had it completed the works itself. The provision of such credit was not because of the termination *per se*, but because of the continued application of the liquidated damages provisions to the original contractor after termination. By contrast, in the present case the sub-contract did not provide for the same liquidated damages to be applied to the original sub-contractor after termination. Thus, these clauses cannot possibly be relevant to the interpretation of cl 24 given the significantly different allocation of rights and obligations in the event of delay to the completion of the works and subsequent termination of the contract.

Conclusion

49 I hold that the answer to the first question of law is "No". Thus, I allow LW's appeal on the first question of law.

50 I would note one last point before turning to the appeal on the second question of law. Both parties argued their respective cases before the Arbitrator and this court on the basis that the termination was that *of the sub-contract*. The first issue referred to the Arbitrator by LW was:

Whether the *termination of the Sub-Contract* by [LW] on 12 May 2003 was valid.

[emphasis added]

And, on appeal, the first question of law posed was as follows:

> Whether the contractual right of [LW] to claim for liquidated damages against [LCS] under the provisions of the Sub-Contract for delay to the completion of the Sub-Contract Works by [LCS], which accrued prior to *termination of the Sub-Contract*, is extinguished or rendered inapplicable following *termination of the Sub-Contract*.
>
> [emphasis added]

51 There is, however, a clear conceptual distinction between termination *of the contract* and termination *of one's employment* under the contract. This distinction was explained in *Chow Kok Fong* (at p 598):

> The activation of the termination proceedings usually operates to alter the employer's obligations for payments. These changes may occur at two levels. Firstly, where the termination provision provides for the contract to be terminated as opposed to the determination of the contractor's employment, it would seem that the effect is that *all the arrangements under the contract comes to an end*. In these circumstances, an architect or engineer becomes *functus officio* and he can no longer certify payments or administer the contract: *Engineering Construction Pte Ltd v Attorney General (No. 2)* (1994). For this reason, *the wording used in the provisions of contracts like the JCT and the SIA standard forms distinguish carefully between the determination of a contractor's employment and the termination of a contract*.
>
> [emphasis added]

This conceptual distinction was also explained in *Chitty vol 2* (at para 37-242):

> *[Determination] refers to termination of the employment of the contractor under the contract, as opposed to bringing the contract itself to an end*... Both parties remain bound by terms of the contract which are to apply upon determination coming into effect... *The consequences of determination for default are broadly equivalent to the effect of acceptance of repudiatory breach of contract as terminating the contract. In the case of determination, however, the contract makes express provision for the consequences*...
>
> [emphasis added]

52 In the present case, the notice of termination by LW on 12 May 2003 was, on closer examination, a notice of termination of LCS's employment under the sub-contract:

> As you have failed to proceed regularly and diligently with the performance of your contractual obligations, we hereby give you notice to determine the contract under Clause 27 of the Conditions of Contract. We therefore require you to leave site immediately.

Cl 27 refers to a termination of employment and not a termination of the sub-contract:

> 27 .1Without prejudice to any other rights or remedies which the Employer may possess, if the Contractor shall make default in any one or more of the following respects, that is to say:
>
> 1 ...

2 if he fails to proceed regularly and diligently with the performance of his obligations under this Contract; ...

Then the Employer may give to him a notice... specifying the default. If the Contractor either shall continue such default..., then the Employer may within 10 days after such continuance or repetition... forthwith *determine the employment of the Contractor under this Contract*...

[emphasis added]

53 In truth, therefore, the mere termination of LCS's employment under the sub-contract on 12 May 2003 would not *ipso facto* have affected the existence of the liquidated damages clause, although the claim of liquidated damages for the period *after* termination of LCS's employment would still be barred, applying the reasoning in *British Glanzstoff*, in the absence of express provision to the contrary. Thus, the net result would have been the same. As the parties did not identify and raise this issue before the Arbitrator, I have decided this appeal on the basis that the termination on 12 May 2003 was that of the sub-contract.

The second question of law

54 LW argues that the Arbitrator erred when he decided that a claim for liquidated damages which had accrued before termination would fail if the sub-contract had been terminated and control over the Project had passed out of LCS's hands. The relevant passage in the Award is as follows:

87 A party to a contract cannot be made responsible for not fulfilling obligations which he has been denied the opportunity on account of the termination of the contract unless there are specific provisions in the contract that expressly has the effect of keeping that provision alive after the termination. In this Sub-Contract there is no such provision. *Further, as decided by the House of Lords* [in *British Glanzstoff*]*, liquidated damages apply only where the contractor had completed the contract and not when their employment had been terminated and control of the contract passed out of their hands*.

[emphasis added]

55 In LW's appeal on the first question of law, I have concluded that a claim to liquidated damages may still be brought even where the sub-contract has been terminated, provided that the liquidated damages claimed relate only to the period between the agreed completion date and the termination date (in the absence of express contractual stipulation to the contrary). Therefore, events which occur after termination, such as the appointment of other sub-contractors to complete the works, should not affect the ability of a contractor to mount such a claim (again, in the absence of express contractual stipulation to the contrary), although the total quantum of such a claim may be subject to subsequent certificates. Thus, I allow LW's appeal on the second question of law.

The third question of law

56 LW argues that the Arbitrator erred when he decided that, in its claim for *liquidated* damages, it was required to prove the extent of loss suffered which was attributable to LCS's breach of contract in the latter's delay in completion of the works. After the Award was made, LW requested on 2 July 2010 an additional award pursuant to s 43(4) of the Act; according to LW, the omitted claim was for liquidated damages between 5 November 2002 and 12 May 2003. Five days later, the Arbitrator rejected this request on the ground that he had already dealt with LW's claims for general and liquidated damages for the entire period, *ie*, from 31 October 2002 to 28 July 2003. In so doing, he

allegedly implied that cl 24 did in fact "apply" to the claim for liquidated damages but that the claim had failed because LW had failed to prove the loss which was attributable to LCS's breach.

57 The Arbitrator repeated his finding that cl 24 did not survive termination, and that therefore he rejected the post-termination claim of liquidated damages. He then stated that, in relation to "pre-termination damages (*liquidated or otherwise*)", he had rejected this claim due to LW's failure to prove the loss attributable to LCS's breach. Although this latter wording was somewhat imprecise, it is clear that the Arbitrator did not change his mind on the issue and implications of whether cl 24 survived termination. This reflected his error on the first and second questions of law. In any event, if the letter had purported to decide the substance of LW's claim then it would have no legal effect because the Arbitrator would be *functus officio* once the Award was issued on 29 June 2010: s 44(1). Thus, I dismiss the appeal on the third question of law.

Remedies

58 As I have allowed LW's appeals on the first and second questions of law, the question of remedies has to be considered. In its originating summons, LW prayed for the Award "to be varied, set aside or be remitted to the arbitral tribunal for reconsideration". During the course of argument, it became clear that LW's preferred remedy was a variation of the Award so that its claim for $945,000 as liquidated damages between 5 November 2002 and 12 May 2003 is allowed. The court's remedial jurisdiction in an appeal on a question of law arising out of an award is provided by s 49(8) of the Act, which is as follows:

> On an appeal under this section, the Court may by order —
>
> (a) confirm the award;
>
> (b) vary the award;
>
> (c) remit the award to the arbitral tribunal, in whole or in part, for reconsideration in the light of the Court's determination; or
>
> (d) set aside the award in whole or in part.

59 The difficulty with LW's preferred remedy is that such a variation requires a finding that LW *was entitled* to all the liquidated damages claimed for that particular period; this is a finding which necessarily requires that *all* the prerequisites of such a claim have *in fact* been satisfied. Because the Arbitrator rejected LW's claim of liquidated damages on the preliminary point of law that no such claim could be brought after termination of the sub-contract, he did not proceed to determine whether the other prerequisites were met. Although it is undisputed that the sub-contract works were not completed by the extended completion date of 4 November 2002, the Arbitrator did not deal with the issue of whether the required notice was given by LW pursuant to cl 24.1. In *Fence Gate Limited v NEL Construction Limited* (2001) 82 Con LR 41, Judge Thornton QC observed at [93]:

> It follows that *the power to vary ought ordinarily only to be used where the necessary fact-finding has already been completed by the arbitrator and the necessary answer is self-evident*. Where a further role is to be performed by the arbitrator, particularly if there *is insufficient information in the award to enable the court to decide on the appropriate variation to make to the award in the light of its findings on the questions of law* that have led to the appeal succeeding, the appropriate remedy would normally be to remit the award for his reconsideration...

[emphasis added]

A similar approach was adopted in *Marc Rich & Co AG v Beogradska Plovidba (The "Avala")* [1994] 2 Lloyd's Rep 363 at 365 by Tuckey J, who stated:

> ... I am not persuaded that but for the concession the arbitrator would or should necessarily have decided the point in favour of [the] charterers... [E]ven if I had concluded that the award did raise a question of law *I would not have felt able to determine the issues between the parties on the facts presently found by the arbitrator*.
>
> [emphasis added]

60 Although I am of the opinion that the required notice under cl 24.1 was satisfied by LW's letter of 2 January 2003, this was a matter which was to be decided by arbitration pursuant to the parties' intentions as encapsulated in Art 5 of the sub-contract. It would not be appropriate for the requested variation to be ordered in the absence of sufficient findings by the Arbitrator to support it.

Conclusion

61 For the above reasons, I allow LW's appeal on the first and second questions of law. Accordingly, I remit the Award to the Arbitrator, pursuant to s 49(8)(c), for reconsideration on the issue of whether LW was entitled to liquidated damages between 5 November 2002 and 12 May 2003, in light of my finding that a claim to liquidated damages for that period, being the period after the extended contractual completion date but before termination of the sub-contract, is not excluded by termination or the fact that control over the works had passed out of LCS's hands.

62 The appeal on the third question of law is dismissed because it is not brought against a question of law arising out of an award.

63 As LW has been successful in its appeal on two of the three questions of law, I award costs for this appeal to LW. As for the costs of the Arbitration, I remit this issue, pursuant to s 49(8)(c), to the Arbitrator for reconsideration in the light of my decision on the first and second questions of law and of the decision which he eventually reaches on LW's claim for liquidated damages for the specified period.