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# High Court rules on getting deposits back post contract termination

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### Introduction

Recently, in *Strong Force (M) Sdn Bhd v Khoo Soon Lee Realty Sdn Bhd*,<sup>(1)</sup> the High Court decided on a novel point – whether a contractor can seek deposits paid for the purchase of condominiums as provided in the relevant contract, following termination of the contract. Other relevant issues that were decided in this case were the:

- implications of a late delivery of site possession;
- need for a revised work programme; and
- assessment of extension of time (EOT) applications.

### Facts

By a letter of award (LOA) dated 20 March 2017, the defendant had appointed the plaintiff to construct a "post-tensioning slab system" (the works) for phase one of the construction of a shopping, cinema and car park complex in Klang, Selangor Darul Ehsan.

There was a delay in site possession and the plaintiff had applied for three EOT applications, but these were rejected by the defendant in a letter dated 17 August 2020 in which the defendant had also invoked clause 37 of the LOA (the termination clause). Subsequently, in a letter dated 21 August 2020, the defendant terminated the LOA. By this point the plaintiff had performed 90% of the work but had not been paid for payment certificates No. 21 to 23 and 26 to 28.

In the legal proceedings, the plaintiff sought an injunction to restrain the defendant from making a demand on the performance bond and a sum of 1,343,777.60 ringgits (approximately £228,629) with interest. Meanwhile, the defendant counterclaimed, declaring that:

- the plaintiff had breached the LOA;
- the plaintiff ought to pay the defendant an amount of 6,325,522.11 ringgits (approximately £1,076,201) as liquidated damages (LD); and
- the Court ought to assess general damages.

### Issues before Court

Among the issues before the Court were the following:

- With regard to the delay of the plaintiff's works:
  - When was possession of the site given by the defendant?
  - When did the plaintiff's works commence?
  - Whose obligation was it provide the revised work programme?
  - Was the delay was caused by others?
- Should the defendant have allowed plaintiff's three EOT applications?
- Could the defendant counterclaim from the plaintiff for LD?
- Had the defendant breached the LOA by way of the termination?
- Could the plaintiff claim from the defendant the return of deposits for two condominiums which had been paid pursuant to clause 39 of the LOA (the deposits).

### Decision

#### Issue one

The Court found that the site possession was given in either May 2018 (as the plaintiff claimed) or June 2018 (as the defendant claimed) as opposed to the contractual commencement date of 15 July 2017. Hence, the original commencement date, as provided in clause 4 of the LOA, could not apply. Thus the Court found that a commercially sensible construction of clause 4 meant that, upon the actual delivery of site, or within a reasonable time after the actual delivery of site, the defendant should give the revised work programme to the plaintiff. This was not done. As such, there was no extended completion date within the meaning of clause 4. Thus, the Court found that time was up.

With regard to the other cases of delay, the Court found, upon reviewing the minutes, that there had been delays by Yit You Construction Sdn Bhd and Semon Bina Sdn Bhd (jointly referred to as the main builders) who were subsequently terminated and new contractors were appointed to replace them. The Court found that, without the completion of these works, the plaintiff's works could not commence. Hence, the termination of these contractors and the appointment of the replacement contractors are relevant pursuant to section 8(2) of the Evidence Act 1950.

The Court also accepted the frequent tower crane breakdowns as one of the reasons for the delay but did not accept the defendant's statement that these were due to the plaintiff. This was because the tower cranes were not erected at the site nor were they operated and maintained at site by the plaintiff. They were only used to hoist materials.

#### **Issue two**

The Court found that in view that the delays (ie, late delivery of site possession, delays by the main builders and the tower crane breakdowns) the defendant ought to have allowed the three EOT applications.

The Court further found that the defendant's excuse that there were no documents in support of the three EOT applications had been contrived by the defendant to unlawfully defeat the original action in this case. This was because the defendant's representatives had actual knowledge of the three delays. As such, the Court found that the plaintiff did not need to submit supporting documents to the defendant.

#### **Issue three**

Given that the plaintiff was not culpable for the delays, there was no breach of clause 7 of the LOA (LAD clause) or any other clause in the LOA which would entitle the defendant to counterclaim LAD from the plaintiff.

Even if clause 7 had been breached, the defendant would not be entitled to counterclaim the LAD due to clause 56(1) and (3) of the Contracts Act 1950 (the CA). By virtue of clause 56(1) of the CA, the LA was voidable at the defendant's option, but this was not done within reasonable time. Instead, the defendant by its conducts had affirmed the LOA.

#### **Issue four**

The defendant's termination of the LOA was premised on the defendant's letter dated 17 August 2020, which referred to clause 37 of the LOA. Paragraphs (a) to (g) of clause 37 provided the grounds for terminating the plaintiff's appointment under the LOA. There were no defaults by the plaintiff that fell within the meaning of clause 37 and, accordingly, there was no valid ground to issue the letter dated 17 August 2020 and the termination was in breach of the LOA.

#### **Issue five**

The Court held that the plaintiff's payment of the deposits was part of the "consideration" for the LOA as understood in section 2(d) of the CA. This was because the deposits were at the behest of the defendant in order for the defendant to enter into the LOA with the plaintiff. If the plaintiff had not provided the deposits, the defendant would not have appointed the plaintiff pursuant to the LOA.

Following the defendant's termination of the LOA and the defendant's failure to counterclaim any LAD, the Court found that it was just for the defendant to return the deposits to the plaintiff.

#### **Comment**

The decision in this case sheds light on the legal implications of a late delivery of site possession and the inaction of a developer or main contractor to provide a revised work programme or a fresh completion date in lieu of a late delivery of site possession. The importance of meeting minutes as well as the sequence in construction works has also shown to be of importance in deciding the cause of delays.

However, notwithstanding the Court's findings that supporting documents are not necessary when the relevant representatives have actual knowledge of the delays raised in the EOT applications, parties should still submit supporting documents to support their EOT applications.

The novel point decided by the Court regarding the deposits is also important as there are more and more construction contracts which would involve a sale for part of the property built in the shopping, cinema and car park complex. In connection with this decision, would there be a difference if there was a supplementary agreement to contra properties as a form of partial payment? The answer could perhaps be "yes" if it can be established that this is a "consideration" to continue works.

All in all, members of the construction industry should always actively manage their construction projects and contracts. Inaction of a party during a construction project may be costly as it was in this case.

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#### **Endnotes**

(1) [2023] 10 MLJ 894.