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Timelines In Construction Contracts: Cemented Or Malleable?

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As a developing country, construction is one of the fastest growing industries in Malaysia, with an estimated 7.9% annual growth year-on-year from 2010 to 2016[1]. This rising demand for projects corresponds in parallel with a steady increase of disputes in the construction sector. Commonly resolved via arbitration, these disputes are typically complex and document heavy.

According to Asian International Arbitration Centre (AIAC) data, over 75% of disputes recorded in 2018 were construction disputes[2]. Many of these disputes centre around the issues arising from breach of contract, commonly involving a delay in completion of the project. These cases are especially prominent in the COVID-19 pandemic era, as numerous construction sites had halted works for months during the initial months of the MCO[3].

In construction contracts, any late completion entitles the employer/purchaser to claim liquidated ascertained damages (LAD), which are damages calculated on a per-day basis from the pre-agreed completion date to the date of actual completion.

Due to the straightforward drafting of LAD clauses and Section 56(1) of the Contracts Act 1950 (CA), it is a common misconception that the defaulting party would always be liable if there is a delay beyond the completion date. There are instances where time may be set "at large" and the timelines envisaged under the contract are no longer material.

This alert will discuss the application of the "prevention principle" in construction contracts in Malaysia.

[1]https://www.medac.gov.my/admin/files/med/image/portal/gppv/08.%20Industry%20Outlook%20Hartanah.pdf
[2] https://themalaysianreserve.com/2018/04/25/construction-sector-sees-a-higher-number-of-dispute-cases/
[3] https://www.theedgemarkets.com/article/claims-late-delivery-homes-likely-spike

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The Position In Malaysia

Section 56(1) of the CA states that "*When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do so any such thing at or before the specified time, the contract, or so much of it has not been performed, becomes voidable at the option of the promise, if the intention of the parties was that time should be of the essence of the contract*.

Even in the absence of "time is of the essence" clauses, the courts have implied that time is of the essence in construction contracts. In *Kerajaan Malaysia (Jabatan Kerja Raya) v Global Globe (M) Sdn Bhd*, the Federal Court held that "*When a time for completion is specified, and unless expressed otherwise, it is deemed to be of the essence of the contract".*

Reading this in conjunction with the Section 56(1), it could be said that the Courts have usually placed a high burden on contractors to complete works on time. However, is this always the case?

The Prevention Principle

The prevention principle is a common law doctrine which is borne out of common sense and fair play. In short, where the delay in completion is caused wholly or partly by the employer, it would be wrong to insist that the contractor be held strictly to the completion date.

A useful summary of the way in this doctrine has been applied can be found in the United Kingdom Court of Appeal's case of *Trollope & Colls Ltd v Northwest Metropolitan Regional Hospital Board.* There are two key takeaways his judgment, which are*:*

> *"i) It is well settled that in building contracts—and in other contracts too—when there is a stipulation for work to be done in a limited time, if one party by his conduct—it may be quite legitimate conduct, such as ordering extra work—renders it impossible or*

impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time.

ii) [In this case], The time becomes at large. The work must be done within a reasonable time—that is, as a rule, the stipulated time plus a reasonable extension for the delay caused by his conduct."

This judgment was recently upheld in *Multiplex Ltd v Honeywell Ltd (No.2)*, where the United Kingdom High Court further expanded the position by stating the following:

"i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date;

ii) Acts of prevention by an employer do not set time at large, if the contract provides for an extension of time in respect of those events;

iii) In so far as the extension of time clause is ambiguous, it should be construed in favour of the contractor".

Hence, it can be seen that the prevention principle has been developed to allow an implied extension of time thereby protecting contractors from unreasonably shortened timelines, particularly in cases where the delay was caused by the employer.

The next question is, how has this doctrine been applied in Malaysian courts?

The Malaysian Approach

The application of this principle can be seen in *Yuk Tung Construction Sdn Bhd v Daya Cmt Sdn Bhd and another appeal*.

a) Brief Facts

This case concerned a dispute between a developer, Yuk Tung Construction Sdn Bhd (YTC) and their subcontractor, Daya Cmt Sdn Bhd (Daya) in relation to the development of 3 blocks of 28 storey buildings of apartment units (the Project). The completion date was set on 14.11.2014 before it was extended to 27.12.2014.

The Project did not proceed as planned and Daya was issued a Default Notice on the 3.12.2015. On the 22.12.2015, YTC terminated the contract on the ground that Daya failed to proceed with the works regularly and diligently. This resulted in Daya filing a claim at the High Court which was followed by a counterclaim by YTC.

b) High Court

Daya's primary contention was that YTC had committed multiple acts of prevention which set time of completion at large, in which case Daya made the case that they should only be required to complete the Project within a reasonable time. Expectedly, YTC argued that their termination was lawful, so they counterclaimed for damages being the additional costs in engaging another subcontractor to complete the Project.

YTC argued that Daya had failed to avail itself to the extension of time (EOT) provisions under the contract as they had failed to give notice after the occurrence of the delaying event and had waited for the filing of the suit before making an EOT application.

Daya attempted to mount the prevention principle argument by applying the case of *Gaymark Investments Pty Limited v Walter Construction Group,* where the Supreme Court of the Northern Territory of Australia ruled that the prevention

principle applied even in cases where the contractor did not explicitly make an EOT application.

Ultimately, the High Court ruled in favour of YTC and stated that Daya is not entitled to any further extension of time, YTC's termination was valid and that YTC was entitled to impose LAD as a result of Daya's delay. Following the case of *Peak Construction (Liverpool) v McKinney Foundations*, the High Court ruled that the prevention principle did not apply in this case as all of the events of delay alleged by Daya were covered under the Extension of Time (EOT) clause under the contract.

Out of the 32 events of delay alleged, the Court found that Daya had only made 11 EOT applications. Therefore, Daya did not apply for an EOT in respect of the remaining 21 events of delay and did not give the required notice in accordance with the EOT clause when the instructions were given or at any time during the progress of the Project.

c) Court of Appeal

In its appeal, Daya attempted to argue that there was no condition precedent compelling Daya to give notice or to make an application for an extension of time. Daya argued that the Supervising Officer (SO) was duty bound to make a decision whether Daya was entitled to an extension of time even in the absence of a notice of delay from the contractor. Nevertheless, the Court of Appeal upheld the decision of the High Court by deciding that the EOT clause under the contract was very clear in their mandatory drafting to give notice upon the delay becoming reasonably apparent.

Additionally, the Court of Appeal rejected the application of *Gaymark* by implying that there would be serious issues if "*contractors could be gaining some advantage by ignoring the notice requirements"*. The Court was on the view that if the case was ruled in favour of Daya, it would "*open up the floodgates"* and "*render the notice requirement redundant and illusory*". The Court ultimately wholly rejected the application of the prevention principle in this case.

Conclusion

In *Yuk Tung Construction*, the courts may have ruled more favourably in Daya's favour if they had adequately complied with the notice provisions in the EOT clause of the contract. The current position of the prevention principle seems to be in line with the three-tier test established in *Multiplex,* where the prevention principle is applied widely to events that employers are entitled to instruct, but also excludes any events which fall within the scope of the extension of time clause. It is therefore key for contractors to remember to keep a close eye on their respective EOT clauses to ensure the best compliance possible before issuing a claim.

Authored by Calan Eskandar, a pupil with the firm's Dispute Resolution practice.

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