

**LATEST
DEVELOPMENT IN
CONSTRUCTION
LAW**

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ROADMAP

01 Variations - a gentleman's word is his bond?

02 Contract Documents - incorporate future documents?

03 Contract Clause that does not allow oral modifications

04 Bond Call - must prove actual loss?

05 LD - Can it be claimed if no actual loss is suffered?

06 LD - Does it still run after termination?



1. Variations



Vim Engineering Ltd v Deluge Fire Protection (SEA) Pte Ltd

[2021] SGHC 63

Facts:

- Subcontractor claimed approx. \$700K for variation works.
- Alternatively, it claimed a fair and reasonable sum, on a *quantum meruit* basis.

Vim Engineering Ltd v Deluge Fire Protection (SEA) Pte Ltd

[2021] SGHC 63

Facts:

- Variation Clause provided:
- “any variation work such as [additions] or [omissions] or [modifications], shall be on a back-to-back basis with the Main Contract. Such variation shall be carried out with **written [instructions] from [Deluge’s] Project Manager** – [Vim] shall be entitled to ninety percent (90%)... or shall allow a discount of 10% (Profit and Attendance) for [Deluge], on any approved variation claim for additional work orders”

Vim Engineering Ltd v Deluge Fire Protection (SEA) Pte Ltd

[2021] SGHC 63

High Court:

- There were no written instructions
- Vim had received Drawings from Employer. But they were not considered as “written instructions from Deluge’s project manager”

Vim Engineering Ltd v Deluge Fire Protection (SEA) Pte Ltd

[2 0 2 1] S G H C 6 3

High Court:

- Vim asserted that it acted on verbal instructions.
- **Court:** But that does not amount to waiver/ estoppel. It simply means contractual requirement for written instructions has not been complied with.
- Vim argued “a gentleman’s word is his bond”
- **Court:** Yes, and Deluge was simply honouring what parties had agreed in the subcontract

Moral of the Story

1. If the contract requires variation instructions to be in writing, insist on it
2. It can be by email, WhatsApp etc.
3. At the very least, record it in writing and say that it shall be “deemed your written instructions”.



2. Contract Documents



GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd [2020] SGHC 167

Facts:

- Plaintiff claimed that the Defendant (subcontractor) breached the Glass Specifications
- Defendant argued:
 - (1) Plaintiff never gave Defendant a copy of the main contract, in which Glass Specifications may be found
 - (2) Glass Specifications were issued only after the date of the Subcontract

GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd [2020] SGHC 167

Facts:

- Subcontract clause incorporating Glass Specifications:
- “The Sub-Contractor shall be deemed to have full knowledge of the provisions of the Main Contract other than the details of the Main Contractor’s pricing and shall **observe and comply with all provisions of the Main Contract relating, affecting or applicable to the Sub-Contract works** as if all the same were severally set out herein. A copy of which may be inspected at the Main Contractor’s office.”

GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd [2020] SGHC 167

Facts:

- “The following documents shall form part of this contract:…
(b) All main contract documents, drawings and specifications containing, relating and/or concerning the sub-contract works scope shall mutatis mutandis be applicable to the subcontractor.”

GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd [2020] SGHC 167

High Court:

- A person is bound by all the terms of a contract that it signs, even if he did not read or understand those terms – unless there is fraud or misrepresentation.
- It was always within the Defendant's power to exercise its right to inspect the main contract at the Plaintiff's office.

GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd [2020] SGHC 167

High Court:

- It is possible to incorporate into a contract a document that comes into existence only after the contract has been formed. E.g. parties may agree on essential terms, and leave details to be subject to ongoing discussions.
- Contract clause shows parties' intention to incorporate the Glass Specifications into the subcontract, whenever they may come into existence.

MORAL OF THE STORY

- Ensure we have the entire set of the contract documents
- Especially for back-to-back contracts, ask for copy of the main contract documents/specifications
- List the documents, especially their version and date.



3. Are Oral Modifications to Contract Clauses allowed?

Charles Lim Teng Siang v Hong Choon Hau [2021] SGCA 43

Facts:

- Sale and Purchase Agreement for sale of shares.
- Completion Date for the sale passed, and the transaction was never completed.
- More than 3.5 years later, the Plaintiff sued the Defendant for breach of the SPA
- Defendant argued that the SPA had been orally rescinded by mutual agreement, via a telephone call

Charles Lim Teng Siang v Hong Choon Hau [2021] SGCA 43

Facts:

- Plaintiff relied on Clause 8.1 in the SPA. Argued that even if there had been an oral rescission of the SPA, it was invalid under Clause 8.1.
- Clause 8.1:

“Variation of Terms

No variation, supplement, deletion or replacement of or from this Agreement or any of its terms shall be effective **unless made in writing** and signed by or on behalf of each Party.”

Charles Lim Teng Siang v Hong Choon Hau [2021] SGCA 43

Court of Appeal:

- Some good reasons for NOM clauses: (a) prevent modification by informal means; (b) ensure certainty of terms; (c) restrict employee's authority to agree to any variation
- In England, NOM Clauses are given full effect. Any subsequent oral modification is invalid. Must comply with formalities - to be in writing.

Charles Lim Teng Siang v Hong Choon Hau [2021] SGCA 43

Court of Appeal

- But parties can depart from NOM Clause by oral agreement **IF** they expressly or impliedly intended to depart from it. Whether they had addressed their mind to the NOM Clause at the time of the oral modification.
- Stronger evidence of oral modification is required if there is an NOM Clause



MORAL OF THE
STORY

- NOM Clauses are still useful
- Can control conduct of employees
- But NOM Clause are not
indefeatable



4. Bond Call

AXA Insurance Pte Ltd v Chiu Teng Construction Pte Ltd [2021] SGCA 62

Facts:

- Chiu Teng made a 1st call on the bond in 2018.
- The High Court held that the call was defective. The bond was an “indemnity” bond. Since there was no evidence of actual loss, the call on the bond was defective.
- In 2020, Chiu Teng made a 2nd call on the bond.

AXA Insurance Pte Ltd v Chiu Teng Construction Pte Ltd [2021] SGCA 62

Facts:

- In the 2nd call, Chiu Teng itemised the losses that it suffered in a letter, and enclosed the supporting evidence.
- AXA refused to make payment.
- AXA argued that Chiu Teng had to prove its losses – by a court judgment or an arbitration award

AXA Insurance Pte Ltd v Chiu Teng Construction Pte Ltd [2021] SGCA 62

High Court:

- High Court agreed with AXA that the losses had to be proven by Chiu Teng. This was to be by way of a court judgment, arbitration award, or an independent assessment.
- Chiu Teng did not have those evidence.
- But High Court also then held that it could make the assessment.
- And based on Chiu Teng's documents attached to the letter calling on the bond, the High Court agreed the call was valid.

AXA Insurance Pte Ltd v Chiu Teng Construction Pte Ltd [2021] SGCA 62


Court of Appeal:

- It was not necessary for there to be a court judgment or arbitration award or some independent assessment before bond may be called.
- No such requirement on the wording of the bond.
- Chiu Teng's documents had established a *prima facie* case. That was sufficient for a call on the bond.

MORAL OF THE STORY

Indemnity Bonds:

- *"In the event of the Sub-Contractor failing to fulfil any of the terms and conditions of the said contract, we shall indemnify [CTC] against all losses, damages, costs, expenses or otherwise sustained by [CTC] thereby up to the sum of Singapore Dollars XXX (the 'Guaranteed Sum') upon receiving your written notice of claim for payment made pursuant to Clause 4 hereof."*
- To call on the bond, evidence of loss needs to be presented. A mere demand is insufficient.



5. Can LD be
claimed when no
actual loss is
suffered?

Comfort Management Pte Ltd v OGSP Engineering Pte Ltd

[2020] SGHC 165

Facts:

- Contract provided that the Plaintiff may recover from the Contractor liquidated damages agreed at \$500 per calendar day “during the period which the Contract Works remain incomplete”.
- Contractor argued: Plaintiff is not entitled to LD because the contract is a back-to-back contract, and the Plaintiff’s employer did not impose any LD on the Plaintiff.

Comfort Management Pte Ltd v OGSP Engineering Pte Ltd


[2020] SGHC 165

High Court:

- Contractor is liable for LD. Argument is wrong for 2 reasons:
- (1) Back-to-back is not a term of art. It just allows for incorporation of terms into the contract from the Plaintiff's contract. But the 2 contracts remain distinct.
- (2) LD only depends on wording of the clause, not on proof of loss. Whether Plaintiff's employer imposed LD on Plaintiff is legally irrelevant. There could be many reasons for non-imposition of LD, none of which has to do with Contractor's liability under its own contract.

MORAL OF THE STORY

- Application of LD is based on wording of contract clause, not proof of loss
- No loss need to be suffered before LD can be imposed
- Means also that actual loss may be more or less. Irrelevant to applicability of LD
- Best to agree to a reasonable and tolerable LD amount.



6. Does LD continue to run after termination?



Triple Point Technology v PTT

[2 0 2 1] U K S C 2 9

Facts:

- Contract provided that the contractor would be paid by achieved milestones.
- Liquidated damages would be charged for late completion of works.
- Only the first 3 milestones were completed, 149 days late.
- Contractor demanded payment for work not yet completed, and suspended its work when those demands were not met.
- Employer terminated the contract as a result.

Triple Point Technology v PTT

[2021] UKSC 29

Facts:

- Contractor claimed for the payment in court.
- Employer counter-claimed for liquidated damages for delay, both for work completed before termination, and for work which was never completed.
- Contractor argued that since the contract had been terminated, the liquidated damages clause cannot apply at all.

Triple Point Technology v PTT

[2021] UKSC 29

UK Court of Appeal:

There are 3 alternative approaches in determining the application of liquidated damages clauses:

- (i) LD does not apply when the contractor fails to complete the works;
- (ii) LD only applies up to the termination of the contract;
- (iii) LD continues to apply until the replacement contractor achieves completion

Triple Point Technology v PTT

[2021] UKSC 29

Singapore High Court:

...

- (i) LD does not apply when the contractor fails to complete the works;
- (ii) LD only applies up to the termination of the contract;**
- (iii) LD continues to apply until the replacement contractor achieves completion

LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd [2011] 4 SLR 477

Triple Point Technology v PTT

[2021] UKSC 29

UK Court of Appeal:

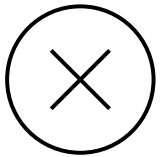
- (i) LD does not apply when the contractor fails to complete the works;
- (ii) LD only applies up to the termination of the contract;
- (iii) LD continues to apply until the replacement contractor achieves completion

Because LD clause stated that payment should be “up to the date PTT accepts such works”; therefore, LD clauses does not apply if works are not handed over.

Triple Point Technology v PTT

[2021] UKSC 29

UK Supreme Court:



(i) LD does not apply when the contractor fails to complete the works;



(ii) LD only applies up to the termination of the contract;

(iii) LD continues to apply until the replacement contractor achieves completion

MORAL OF THE STORY

- LD only applies up to termination of contract
- Consider this before termination
- After termination, general damages applies - loss must be proven

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THANK YOU