IN THE COURT OF APPEAL OF MALAYSIA

Coram: David Wong, JCA; Iskandar Hashim, JCA; Hasnah Hashim, JCA

Kerajaan Malaysia v Global Globe (M) Sdn Bhd

Citation: [2018] MYCA 297 **Suit Number:** Rayuan Sivil No. W-01(C)(A)-190-05/2016

Date of Judgment: 03 September 2018

Contracts & commercial – Contract – Provision for extension of time to complete the contract – Construction of the contractual clause that provides for extension of time – Refusal to grant a third extension of time – Termination of contract – Whether the Certificate of Non-Completion validly issued – Whether termination of the contract valid

JUDGMENT

[1] This is an appeal by the Appellant (the Defendant in the High Court) against the decision of the High Court dated 22.4.2016 made after a full trial, which allowed the Plaintiff's claim against the Defendant and a nominal sum of RM50,000.00 for loss of reputation as a result of being blacklisted with costs of RM100,000.00.

[2] We heard this appeal on 29.1.2018 and on 21.2.2018 and reserved our decision. After perusing the Records of Appeal, the written submissions filed by the respective learned Counsel and upon hearing learned Counsel, we adjourned the matter for our consideration and decision.

[3] We now give our decision and the reasons for the same.

[4] For ease of reference in this judgment the parties will be referred to as they were in the High Court.

Background Facts

[5] The relevant background facts of the case have been set out in detail by the learned trial judge and are as follows. By a process of tender the Plaintiff was awarded by the Defendant to carry out works for a project described as "*Pembinaan Bangunan Tambahan Ibu Pejabat Polis Kontijen (IPK) Johor*" ("the Project"). The contract sum for the Project is the sum of RM103,556,694.84. The

Plaintiff was awarded the contract to carry out and complete the works within 88 weeks commencing from 28.12.2010 ("the Contract Period"). The scheduled date of completion for the project was on 3.9.2012 (See: paragraph 5 Statement of Claim).

[6] The parties entered into a contract and the terms and conditions of the contract is in accordance with JKR 203A (Rev. 2007) Standard Form of Contract ("the Contract"). However, the Plaintiff could not complete within the contract period and had requested a total of three (3) extension of time (EOT). The Defendant granted two (2) EOTs but rejected the third (3rd) EOT applied by the Plaintiff. On 10.2.2014 the Defendant terminated the contract.

[7] The Plaintiff challenged the termination as being unlawful. The Plaintiff contended that the Defendant's own decisions prevented the Plaintiff from completing the works as scheduled.

Decision of the High Court

[8] The High Court, after a full trial and having analysed the evidence sustained the claim of the Plaintiff. In the Grounds of Judgment, the learned Judge gave her reasons why she found the Plaintiff's case proved on a balance of probabilities. Her Ladyship set out her reasons which essentially can be summarised as follows:

(i) the 3rd EOT was never considered by the Defendant and such non consideration or failure to consider the 3rd EOT renders the Defendant in breach of clause 43.1;

(ii) even if the Court were to accept that the Defendant was entitled to not consider the 3rd EOT the Defendant was still in breach of clause 43.1 when it did not inform the Plaintiff of its decision;

(iii) when the Defendant failed to consider the 3rd EOT time was no longer of the essence of the contract. Time was at large and the Plaintiff was entitled to complete the project within reasonable time;

(iv) the Certificate of Non-Completion (CNC) issued on 17.7.2013 was prematurely issued; and

(v) until and unless the application of extension is decided the Defendant cannot issue the CNC or impose LAD.

The 3rd EOT

[9] The learned High Court Judge was of the opinion that the events leading to the application of the 3rd EOT are relevant to determine whether the Plaintiff has valid grounds for the application for extension. Her Ladyship considered the pleadings and the evidence before her and concluded that the Defendant's decision was erroneous and unacceptable under the terms of Clause 43.1 of the contract. The High Court Judge opined that it is implicit that Clause 43.1 imposes a corresponding obligation on the Defendant to examine the notification of delay together with the supporting documents once it received the said notification. The purpose according to Her Ladyship is to form an opinion:

i. whether the completion of the works is likely to be delayed or has been delayed beyond the relevant date for completion; and/or

ii. whether the extension of time should be granted.

[10] The Plaintiff must provide a cogent and valid reason with supporting documents when applying for extension of time and the Defendant is expected to formulate and reach an opinion on whether the application should be granted. Under Clause 43.1 the Defendant is obliged to consider the application. Her Ladyship concluded that by not considering EOT 3 time of completion is now at large and when that happens the Defendant is not at liberty to terminate the contract on the grounds of non-completion by the extended date and to impose LAD.

[11] The High Court Judge concluded that by not considering the application for the 3rd EOT before the expiry of the extended completion date of 18.7.2013, the time of completion will be at large. The Defendant is not at liberty to terminate the contract on the ground of non-completion by the extended date and any decision to terminate made under such circumstances would be invalid. Her Ladyship relied on the case of **Lion Engineering Sdn. Bhd. v Pauchan Development Sdn. Bhd.** [1997] 4 AMR 3315 where an extension of time was considered and the High Court Judge in that case stated that the failure of the architect to comply with the procedural requirements in Clause 22 of the PAM contract rendered the exercise of the power conferred upon the architect invalid as it was not exercised within the reasonable time frame as allowed under that clause.

[12] The learned High Court Judge was also of the considered view that the failure to consider and inform the Plaintiff as required under Clause 43.2 amounts to a breach by the Defendant and renders the decision to terminate invalid.

[13] The grounds relied upon by the Plaintiff for the 3rd EOT were considered by the High Court and are as follows:

i. delay in the approval of the super-structural and sub structural plans and instructions on various level of work including invert levels of drainage, that is delay in approving the design drawings; and

ii. delay in site possession.

[14] Her Ladyship considered the evidence before her and made the following findings:

i. The Plaintiff may rely on the same grounds relied on the 2nd EOT.

ii. The first ground relates to the change to the Integrated Building System (IBS) and related approvals. The Plaintiff proposed the IBS in June 2011. The Court found that is neither material nor relevant that it was the Plaintiff who submitted the proposal for change. The Plaintiff had submitted all the required documents including the drawings to the Defendant for approval. Upon submission, the Defendant not only approved the change to the IBS but also approved the drawings before the construction of Block A commenced. The approval of the Defendant vide

letter dated 5.8.2011 and 25.12.2012 are sufficient for the Plaintiff to proceed with the works. The IBS change is a material change and therefore the Plaintiff had relied on prime and cogent reasons for the extension of time sought.

iii. From the time IBS was proposed in June 2011 and until it was approved in May 2012, a period of one year had lapsed. The Defendant did not give due consideration of this when considering the application for the 3rd EOT.

iv. The Plaintiff has valid and reasonable grounds for the application for extension of time. The issuance of CNC, imposition of the LAD and its decision to terminate are all invalid.

v. There was a delay in the handing over of the project site. The Defendant is in breach and the termination invalid and unenforceable.

The Plaintiff's submission

[15] It is the Plaintiff's pleaded case that the CNC and the termination are invalid and unlawful because the Defendant did not assess nor respond to the application for the 3rd EOT. The Defendant is duty bound to assess the application and is not at liberty to terminate the contract as the final date had yet to be crystallised.

Our Decision

[16] In our view, the central issue in this appeal relates to the following questions:

(i) whether on a true construction of Clause 43 of the contract, the Defendant had considered the grounds relied on by the Plaintiff in the application for the 3rd EOT;

(ii) whether the Defendant had validly issued the CNC pursuant to clause 40 of the same contract; and

(iii) whether the termination of the contract by the Defendant is valid.

Whether on a true construction of Clause 43 of the contract the Defendant had considered the grounds relied on in the application for the 3rd EOT

[17] In holding that termination of the contract is invalid the learned judge took the approach that the failure of the Defendant to consider and inform the Plaintiff as required under Clause 43.2 of the Contract amounts to a breach by the Defendant and renders the decision to terminate invalid.

[18] It would be useful to examine the background of the case in particular the terms of the contract, the minutes of the site meetings as well as the correspondences between the parties to appreciate the reasons taken by the Defendant to terminate the contract.

[19] According to the terms and conditions of the Contract, the Project's completion period is 88 weeks commencing from 28.12.2010. The Project was closely monitored by the Superintending

Officer (S.O.) and regular monthly site meetings were held to discuss progress as well as problems faced by the Plaintiff. The monthly site meetings were attended by representatives of the Plaintiff as well as the Defendant.

The Monthly Site Meetings

[20] In most construction projects site meetings are regularly held in order to monitor the progress of the works. It provides a forum for both the contractor and the employer to raise any problem or issue they may have with regards to the construction works which may delay or hamper the due progress and/or completion of the project according to the agreed schedule.

[21] In this instant appeal the 1st site meeting was held on 22.2.2011 chaired by the Pengarah Kerja Raya JKR Johor. The representatives of the Plaintiff and the Defendant attended the meeting. The Plaintiff alleged in paragraph 6 of the SOC that the Defendant failed to give to the Plaintiff possession of the site of the Project as agreed. It is the Plaintiff's pleaded case that they were not given possession of the site of the whole project on the date as stipulated in the contract:

> *"6. lanya juga di peruntukkan dibawah Kontrak tersebut bahawa pemilikan keseluruhan tapak tidak diberikan kepada Plaintiff sepanjang jangka masa Kontrak, maklumat-maklumat selanjutnya berkenaan akan dibutirkan dibawah ini."*

[22] The Defendant denied that it failed to give full possession of the project site. Paragraph 2 of the Statement of Defence (SOD) states:

> *"2. Perenggan 6 Pernyataan Tuntutan adalah dinafikan. Mengikut Fasal 38.2 Kontrak tersebut dan Pernyataan Awal yang terkandung di dalam Bahagian A Kerja-Kerja Awalan, Defendan tidak perlu menyerahkan milikan kosong keseluruhan tapak projek kepada Plaintif."*

[23] At that 1st site meeting the Plaintiff, however, did not raise any issue or problem it faced with regards to the failure of the Defendant to give possession of the site. This fact is confirmed through the minutes of the meeting of the 1st site meeting. In fact, at the subsequent monthly site meetings the Plaintiff did not raise the issue of delay in possession of site at all.

Extension of Time (EOT)

[24] EOT is a common feature in a construction contract. The date for completion of construction works is generally spelt out in the contract particulars. If for some reasons the works are not completed within the agreed stipulated time then the contractor may request for an extension of completion date, and if extension is granted the date of completion will be rescheduled. When there is a probability, or a possibility that there is likely to be, a delay that could merit an extension of time, the contractor will apply by way of a written notice to the contract administrator or the S.O. identifying the cause of the delay and request for an extension of time according to the terms of the contract.

[25] The purpose of submitting an application for EOT is to reduce or avoid the imposition of

liquidated ascertained damages (LAD) that could arise during the extended period. An EOT would inevitably relieve the contractor for damages for delay in the from of LAD and reprogramming of the schedule of the works. For the employer it will establish a new completion date and prevents the time for completion to be at large, which at the end of the day may prove to be costly.

[26] If a contractor seeks to rely on late instructions as entitlement for extension of time and at the same relevant time the contractor is also delayed by events for which it is responsible, the contract administrator/ S.O. will need to satisfy himself that the delay caused by the late instruction was the dominant cause of the delay in order to award an extension time. If the contract administrator/ S.O. is satisfied that the delay was caused by good reasons then an extension of time may be granted and the completion date will be adjusted accordingly.

The 1st EOT

[27] On **16.12.2011** the Plaintiff applied for the 1st EOT. The reasons given for the 1st EOT were as follows:

"1.0 Kelewatan Penerimaan Kelulusan Kebenaran Mula Kerja Awal

2.0 Perubahan lokasi dan Rekabentuk Stesen Suis Utama (SSU)

3.0 Kerja-kerja Pengalihan Utiliti di dalam Tapak

4.0 Perubahan Rekabentuk disebabkan oleh keperluan "Fire Escape" dari pihak Bomba & TNB

a) Tangga di Bangunan Trafik dan Siasatan Jenayah

b) Dewan Serbaguna di Bangunan Menara Block A

5.0 Perubahan Rekabentuk disebabkan oleh Keperluan 'Kitchen Specilaist Equipment' di kafeteria

6.0 Tabunan hujan melebihi Kebiasaan."

[28] The application for the 1st EOT was for an extension of 172 days until **22.2.2013**. The Defendant was satisfied that there were justified reasons for extension and granted the extension rerquested. A certificate of delay and extension of time was issued and the date of completion of the project was rescheduled.

The 2nd EOT

[29] Subsequently, due to its inability to complete the project on the date extended by the 1st EOT the Plaintiff on **16.10.2012** applied for the 2nd EOT of **420 days**. The extension period was **from 22.2.2012 until 18.4.2014**. However, on **3.12.2012** the Plaintiff submitted an amended application of the 2nd EOT requesting an extension of **221 days** commencing **from 22.2.2013 until 30.9.2013**.

[30] The main reason for the extension was due to the delay of the approval of the change to the IBS System. Through its letter letter dated **17.12.2012** the Plaintiff gave the following reasons for the delay:

> *"a) Kelewatan WBLFL dan struktur bangunan Blok A tidak dapat dilakukan atas sebab kerja mengeringkan tapak dari takungan air di atas factor hujan dan pemasangan komponen 'precast' yang tidak dilakukan pada waktu malam diatas sebab hujan pada waktu bekerja*
>
> *b) Penutupan Kilang Pre cast di Bukit Kulai dan Perpindahan Kilang ke Cyberjaya Sepang, Selangor*
>
> *c) Kelewatan mendapat pengesahan Lubang Ducting untuk peralatan lapang sasar di Lapang Sasar*
>
> *d) Kelewatan Memperoleh Kelulusan Bagi Menguna Sistem IBS*
>
> *e) Kelewatan mendapat Pemilikan Penuh Tapak Bina Padang Kawad dan Padang Bola".*

[31] Similar with the 1st EOT application, the grounds for the 2nd EOT was the delay of approval of the IBS system as well as the delay of the possession of site, in particular "...*Kelewatan mendapat Pemilikan Penuh Tapak Bina Padang Kawad dan Padang Bola*".

[32] The 2nd EOT of 146 days was granted. By the said extension the completion date of the project was rescheduled to **18.7.2013**, a delay of slightly more than a year. Unfortunately, despite the 2nd EOT the Plaintiff's progress of work was not according to the schedule and the Plaintiff was unable to complete the works as targeted.

The 3rd EOT

[33] A week before the expiry of the 2nd extended completion date the Plaintiff submitted the 3rd EOT application and applied for a further extension of 271 days. This is the application for an extension of time which is the subject of dispute between the parties.

[34] The Plaintiff contended that the delay was one which was beyond their control. The reasons for the delay as set out by the Plaintiff through its letter dated 8.7.2013 are as follows:

> *" 2.1 Kelambatan kelulusan Pelan Superstruktur*
>
> *2.2 Kelambatan perincian Struktur di Aras Bawah*
>
> *2.3 Kelambatan perincan Aras Satu*
>
> *2.4 Kelambatan perincan Aras Dua*
>
> *2.5 Kelambatan perincan Aras Tiga*

2.6 Kelambatan perincan Aras Tiga (Lapang Sasar dan tempat letak kereta)

2.7 Kelewatan perincan Aras Empat

2.8 Kelewatan percanggahan Rekabentuk dan Situasi tapak pada Jambatan Penghubung diantara Blok A dan Blok B

2.9 Kelewatan percanggahan rekabentuk dan situasi tapak berkenaan Invert level sistem pengaliran di dalam kawasan Black Maria

2.10 Kelewatan percanggahan cerun dan longkang di kawasan belakang Blok E (Kafeteria)

2.11 Kelambatan memberimilikan sebahagian tapakbina"

[35] It is the Plaintiff's pleaded case that the Defendant failed to consider the 3rd EOT and that the failure to consider the 3rd EOT renders the Defendant's decision to terminate the Contract invalid. The Plaintiff argued that the it was incumbent on the Defendant to respond to the application for the 3rd EOT. The fact that the grounds for the 3rd EOT are similar with the 2nd EOT is not a valid reason for not responding to the said application.

[36] The Defendant in its defence explained that the Plaintiff knew that the application for the 3rd EOT will not be considered as the reasons for the extension are the same as the reasons given in support of the 2nd EOT. Despite the delays the Plaintiff was still allowed to continue with the works on site. In fact technical and site meetings were held on a regular basis attended by the Plaintiff and representatives of the Defendant to discuss the issues causing the delay and to resolve the delay.

[37] The learned High Court Judge having examined the relevant clause, Clause 43.1, was of the view that it is implicit that the said clause imposes a corresponding obligation on the Defendant once the Plaintiff notified the Defendant of the delay and requested for an extension of time of the completion date. That corresponding obligation is to examine the application for extension of time together with its supporting documents upon receipt of the said application. The Defendant is obliged to form an opinion on the following issues:

i. whether the completion of the Works is likely to be delayed or has been delayed beyond the relevant date for completion;

ii. whether the extension of time should be granted.

[38] In her judgment Her Ladyship concluded that the Defendant is under obligation to consider the application for extension of time and the failure to consider the application renders the termination of the contract invalid. The learned Judge in paragraph 70 of her grounds explained her reasons as follows:

"[70] Therefore, in answer to the questions posed in respect of EOT 2, this Court finds that EOT 3 was never considered by the defendant; that such non-consideration or failure by the

defendant to consider EOT 3 renders the defendant in breach of clause 43.1. Even if the Court were to accept that the defendant was entitled not to consider EOT 3 to the extent of rejecting or not granting the extension sought, the defendant was still in breach of clause 43.1 when it did not inform the plaintiff of its decision. It is also the Court's finding that when the defendant failed to consider EOT 3, time was no longer of the essence of the contract. Time was at large and the plaintiff was entitled to complete the project within reasonable time."

[39] With respect we do not agree with the learned Judge for the following reasons. Under the Contract the parties have corresponding obligations. However, these corresponding obligations are as defined by the terms of the Contract. When a time for completion is specified, and unless expressed otherwise, it is deemed to be of the essence of the contract. The contractor must endeavor to complete the Project within the stipulated completion date.

[40] The Plaintiff's obligation under the Contract is to diligently carry out and complete the works in accordance to the terms of the Contract. Therefore, the failure to meet the date gives the employer the right to treat the contract as being at an end. As the contractor the Plaintiff has the contractual obligation to diligently proceed with the works, to use its best endeavor to prevent or mitigate any delay in the progress of the works, and to prevent the completion of the works from being delayed beyond the completion date.

[41] In Hudsons' Buildings and Engineering Contracts (Atkins Chambers); 12th edition at page 919 delay in a construction project is described as follows:

"Delay analysis is the forensic investigation into what caused delay to completion of the works. Primarily the investigation is concerned with what has caused critical (as opposed to non-critical) delay. Critical delay is delay which delays the completion date. It is any delay to any activity which is on the critical path of the project, that is to say, the sequence of activities through a project network from start to finish, the sum of whose duration determines the overall project duration. Non-critical delay is any other delay which affects progress but does not delay overall completion. There may be any number of delays suffered on a project but many will not cause any critical delay, that is to say, delay which results in a delay to overall completion. Usually, it is only those events which cause critical delay to any activity on the critical path and hence cause critical delay to the project as a whole which are relevant to any assessment of the Contrcator's entitilement to an extension of time."

[42] In the instant appeal the completion date of the Project was rescheduled twice therefore the delay can be described as being a critical delay. Prior to the application the 3rd EOT, the Defendant had considered and granted two extensions of time and the completion date was rescheduled twice. The Plaintiff argued that the delay in approving the IBS and the possession of site had greatly hampered the progress of the works according to schedule and ultimately delayed the progress of the project.

[43] The learned High Court Judge stated in paragraph 51 of her grounds of judgment that the pleaded defence of the Defendant that it was not in breach when it did not consider the 3rd EOT and

justified for not doing so, are not sustainable from a proper reading of Clause 43.1. The failure to discharge that obligation according to her Ladyship amounts to a breach of that clause by the Defendant.

[44] The learned High Court Judge arrived at that conclusion based on the Statement of Defence of the Defendant wherein it was stated that the 3rd EOT was not considered at all by the Defendant. The Defendant had pleaded in paragraph 24 as follows:

> *"(a) Plaintiff sememangnya mempunyai pengetahuan bahawa permohonan EOT No. 3 tidak akan dipertimbangkan kerana alasan yang dikemukakan untuk permohonan EOT No. 3 adalah ulangan alasan-alasan EOT No. 2 saperti yang dinyatakan dalam perenggan 21 Pernyataan Tuntutan dan alasan-alasan ini telah di tolak. Tambahan pula, Plaintif boleh meneruskan kerja-kerja tanpa perlu menunggu sebarang jawapan daripada Defendan.*
>
> *(b) Melalui beberapa siri mesyuarat dan perbincangan di peringkat mesyarat teknikal, mesyuarat pemantauan bersama pelanggan (Kementerian Dalam Negeri) dan mesyuarat bersama pengurusan tertinggi Defendan yang turut dihadir oleh Plaintif, Plaintif telah dimaklumkan bahawa permohonan mencapai kemajuan kerja di tapak sekurang-kurangnya 4% sebulan seperti yang dijanjikan oleh Plaintif sendiri. Walau bagiamanapun, Plaintif gagal mencapai kemajuan kerja yang telah dijanjikan."*

[45] At the technical meeting held on 26.6.2013, before the 3rd EOT application by the Plaintiff, the progress of the project was as follows:

> *"i. Kemajuan sebenar: 55%*
>
> *ii. Kemajuan mengikut jadual: 99%*
>
> *iii. Lewat: 44%".*

[See: page 2906-2911 Common Core Bundle Volume 2].

[46] It is undisputed that even after the 3rd EOT application was submitted, the Plaintiff was closely monitored by the Defendant and the Plaintiff continued with the works with the objective to complete the project.

[47] Clause 43 stipulates as follows:

> *"43.0* ***DELAY AND EXTENSION TIME***
>
> *43.1 Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice to the officer named in Appendix as to the causes of delay and relevant information with supporting documents enabling the said officer to form an opinion as to the cause and calculation of the length of delay. If in the opinion of the said officer named in Appendix the completion of the Works is likely to be delayed or has been*

delayed beyond the Date for Completion stated in Appendix or beyond any extended Date for Completion previously fixed under this Clause due to any or more of the following events:

(a) force majeure as provided under clause 57;

(b) exceptionally inclement weather;

(c) suspension of Works under clause 50;

(d) directions given by the S.O., consequential upon disputes with neighbouring owners provided the same is not due to any act, negligence or default of the Contractor or any sub-contractor; nominated or otherwise;

(e) S.O.'s instructions issued under clause 5 hereof, PROVIDED THAT such instructions are not issued due to any act, negligence, default or breach of this Contract by the Contractor or any sub-contractor, nominated or otherwise;

(f) the Contractor not having received in due time instructions in regard to the nomination of sub-contractors and/or suppliers provided in this Contract, necessary instructions, drawings or levels for the execution of the Works from the S.O. due to any negligence or default of the S.O. PROVIDED THAT the Contractor shall have specifically applied in writing on a date which having regard to the Date for Completion stated in Appendix or to any extension of time then fixed under this clause, was neither unreasonably distant from nor unreasonably close to the date on which it was necessary for him to receive the same;

(g) delay in giving possession of the Site as provided under clause 38.4 hereof other than claim in effecting insurance and Performance Bond;

(h) delay on the part of artists, tradesmen or others engaged by the Government in executing work not forming part of this Contract;

(i) the Contractor's inability for reason beyond his control and which he could not reasonably have foreseen at the date of closing of tender of this Contract to secure such goods, materials and/or services as are essential to the proper carrying out of the Works; or

(j) delay on the part of the Nominated Sub-contractors and/or Nominated Suppliers to perform their works, due to reasons as stated above in sub-clauses (a) to (i),

then the officer named in Appendix may if he is of the opinion that the extension of time should be granted, so soon as he is able to estimate the length of the delay beyond the date or time aforesaid issue a Certificate of Delay and Extension of Time giving a fair reasonable extension of time for completion of the Works.

***PROVIDED THAT** all such delays are not due to any act, negligence, default or breach of contract by the Nominated Sub-contractor and/or Nominated Supplier and/or the Contractor, or*

any of the servants or agents of such Nominated Sub-contractor or Nominated Supplier or the Contractor.

***PROVIDED ALWAYS** that the Contractor has taken all reasonable steps to avoid or reduce such delay and shall do all that may reasonably be required to the satisfaction of the S.O. to proceed with the Works.*

***PROVIDED FURTHER** that the Contractor shall not be entitled to any extension of time where the instructions or acts of the S.O. are necessitated by or intended to remedy any default of or breach of contract by the Contractor."*

[48] The officer named in the Appendix is the Pengarah Kerja Raya Negeri Johor ("the officer"). Clause 43.1 makes it mandatory upon the Plaintiff, if it wishes to extend the completion date of contract, to submit a written notice to the Defendant as to the causes of delay and the relevant information with supporting documents. This will enable the officer to form an opinion as to the cause of the delay in the completion of the Project and also the calculation of the length of delay. In order to form an opinion, the officer must of course consider all the relevant factors that had attributed to the delay and decide whether the extension of time applied is justified or not.

[49] If the officer is of the opinion that the extension of time should be granted, as soon as he is able to estimate the length of the delay beyond the date or time, a certificate of extension of time giving a fair reasonable extension of time for completion of the works will be granted. The contractor is expected to take all reasonable steps required to the satisfaction of the officer and proceed with the works with the ultimate objective to complete the works on or before the new completion date.

[50] Clause 43 of the Contract does not expressly provide that the officer must give a response in writing notifying that the application for extension of time is being considered. As we have alluded, once the application is submitted the officer will either grant or refuse the application. It is also not expressly provided under the said clause that if the application is rejected the officer must notify the contractor of the rejection in writing.

[51] In interpreting an agreement or contract, the general rule is that words ought to be given their ordinary and natural meaning and that the intention of the parties must be considered. The meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. (See: *Chitty on Contracts*, 29th edition, paragraph 12-043).

[52] Mohd. Azmi FCJ in the judgment of the Federal Court in **City Investment Sdn Bhd v Koperasi Serbaguna CUEPACS Tanggungan Bhd** [1985] CLJ Rep 17, held at page 82a-c:

"The general principle of construction of contract applies to all contracts whether they are building contracts or not and in each case the meaning of any clause in a particular contract has to be ascertained by looking at the contract as a whole and giving effect so far as possible to every part of it..."

[53] The principles of Lord Hoffmann in the landmark case of **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896, 912-913 were summarised in **Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd** [2010] 1 CLJ 269 where Gopal Sri Ram FCJ, who delivered the leading judgment of the court stated:

> *"Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix which forms the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract."*

[54] Guided by the above established principle, we had therefore carefully examined the documents that were placed before us to ascertain if the learned High Court Judge had arrived at her decision correctly on the basis of the relevant law and evidence before her. The terms of the Contract between the Plaintiff and the Defendant must be considered in totality taking into consideration the factual matrix of the case and both oral and documentary evidence. There were series of technical and site meetings attended by both representatives of the Plaintiff and the Defendant to resolve the issue of delay by the Plaintiff. The outcome of all the meetings are detailed in the respective minutes of meetings.

[55] With regards to the 3rd EOT application, the Defendant's witness (DW4) who was the Superintending Officer of the project, explained in his answer to Q/A 14 of his Witness Statement that:

> *"A: Keputusan rasmi tidak disampaikan tetapi Plaintif telah maklum akan keputusan ini yang telah disampaikan kepadanya secara lisan dalam perbincangan-perbincangan teknikal dan taklimat kemajuan projek bersama pengursan tertinggi Jabatan Kerja Raya dan di peringkat Kementerian Kerja Raya. Tambahan pula tarikh permohonan penyiapan projek kerap berubah."*

[56] During cross examination, he reiterated that the Plaintiff was told of the status of the 3rd EOT application:

> *"...even though it was not responded officially by letters but it has (sic) mentioned to the Plaintiff in many meetings up to the Ministerial level because the Plaintiff keep on changing their completion date..."*

[57] Even if assuming the 3rd application for the EOT was not considered it does not necessarily mean that the termination of the contract was invalid. Before any extension is granted the Defendant must be satisfied that the Plaintiff had made progress in carrying out the works and can successfully complete the Project.

[58] It is not expressly provided under the contract and specifically under Clause 43.1 that the

Defendant is obliged to inform the Plaintiff that the application for the 3rd EOT was considered, or that the application would be granted or rejected. Under the Contract if no extension of time is granted the Defendant can, pursuant to Clause 51 give notice to the the Plaintiff to remedy and to terminate if the Plaintiff failed to remedy the default. The Plaintiff knew that the delay caused by the delay in the approval of the IBS cannot be a basis for any extension of time. This was communicated to the Plaintiff vide a letter dated 20.6.2011 (See: pages 225-226 Common Core Bundle of Document):

> *" 3. Dukacita turut dimaklumkan bahawa sehingga kini pihak tuan masih belum mengemukakan Surat Niat untuk permohonan pertukaran struktur system IBS kepada pejabat ini walupun perkara tersebut telah dimaklumkan semasa Mesyuarat Pra-Pembinaan yang telah diadakan di JKR Johor pada 4hb Januari 2011 dan yang terbaru pada Mesyuarat Pembentangan Sistem IBS oleh Global Prefab Sdn. Bhd. di pejabat Tapak pada 17hb Jun 2011.*
>
> *4.* ***Oleh yang demikian, adalah diingatkan bahawa kelewatan untuk mendapatkan kelulusan pertukaran struktur IBS tidak wajar di jadikan sebagai asas untuk permohonan lanjutan masa akan datang."***
>
> *[the emphasis is ours]*

[59] In the case of **Hawl-Mac Construction Ltd v Campbell River (District)** (1985), 10 CLR 177 (BCSC) relied upon by her Ladyship the contractor encountered a delay caused by the owner's engineer and, as a result, the contractor requested a time extension. While an extension was eventually granted, it was not granted until after the original completion date, and, even with the extension, the contractor was unable to complete the works.

[60] We cannot agree with respect, that the failure to inform the Plaintiff by the Defendant of the rejection of the 3rd EOT pursuant to Clause 43 render the termination of the Contract invalid. The terms of the Contract are explicit that the Defendant is not contractually required to give any notification in writing. To do so would amount to rewriting the agreed terms of the Contract. In the event the Plaintiff fails to proceed diligently and execute the works in accordance with the terms of the contract it is mandatory upon the Defendant to give a written notice specifying the default and requiring the Plaintiff to remedy such default (See: Clause 51.1). This was duly done by the Defendant and when the Plaintiff failed to complete the works the Contract was terminated in accordance with the terms of the Contract.

Delay in Possession of Site

[61] It was contended by the Plaintiff that one of the reasons for the slow progress in the completion of the works was due to the delay of possession of site by the Defendant to the Plaintiff. Clause 38.3 of the contract provides as follows:

> *" The "date of completion" of the works as referred to under clause 39 hereof shall be calculated from the "Date of Possession". PROVIDED ALWAYS that the possession of the Site*

may be given in section or in parts and any other restrictions upon possession of the Site shall be stated in the Appendix to these Conditions or in the Contract Documents."

[62] If there is any delay of the possession of site the Defendant may issue an instruction and the date of completion would then be revised (See: Clause 38.4). In the event that the possession of the site is delayed beyond 90 days the Defendant shall issue a written notice to the Plaintiff of the causes of delay. Upon the receipt of the said notice, the Plaintiff may inform the Defendant in writing of its decision within fourteen (14) days of receipt of such notice either to agree to proceed with the works when the site is made available or to terminate the Contract (See: Clause 38.5).

[63] We have perused the Records of Appeal before us and we find that there was no evidence that there was a delay in the possession of site and the Plaintiff had taken steps pursuant to Clause 38 due to the delay in the possession of site. At the 7th Site meeting held on 3.1.2012, the Defendant notified the Plaintiff that the "*...pejabat sediada PDRM di kawasan tapak cadangan padang bolasepak tidak boleh dirobohkan bagi tujuan pembinaan sehingga Blok A siap dibina."*

[64] This was followed by the 9th Site Meeting held on 26.4.2012 where the issue of moving the "*Pejabat PDRM di Blok Menara Pentadbiran*" was rasied. According to the minutes of meeting:

"5.3.1 Mesyuarat mengambil maklum bahawa mengikut perancangan asal, pihak kontraktor perlu menyiapkan pembinaan Blok A lebih awal iaitu selewat-lewatnya pada Disember 2012 bagi membolehkan pihak 'end user' mengosongkan bangunan sedia dan berpindah ke bangunan baru.

...

5.3.3 Walaubagaimanapun, dari perkembangan semasa pihak kontraktor utama memaklumkan bahawa ***Blok A tidak dapat disiapkan saperti yang dirancang dan hanya boleh disiapkan pada bulan Februari 2013...****"*

[the emphasis is ours]

[65] Block A was only completed on 23.11.2012 but the issue of delay was addressed by the 2nd EOT that was subsequently granted. If the delay of possession was critical to the Plaintiff's progress of works, then the Plaintiff should have invoked Clause 38 at the earliest possible time. This the Plaintiff failed to do so.

The IBS

[66] One of the main complaints of the Plaintiff is the delay in approving the IBS component. With regards to the IBS, the problem of approval was only raised at the 3rd site meeting where it was highlighted by the representative of JKR that the Plaintiff had proposed to change the IBS component thus there would be adjustment to the contract sum. This is reflected in the minutes of meeting of the 3rd site meeting held on 28.6.2011:

"7.0 <u>Pertukaran Struktur Sistem IBS</u>

7.1 Pn. Shahrom memaklumkan sekiranya kontraktor bercadang untuk menukar komponen IBS maka pelarasan harga kontrak akan berlaku. Jika terdapat pertambahan kos maka ianya adalah di bawah tanggungan kontraktor dan sekiranya terdapat pengurangan kos maka potongan harga akan dilaksanakan.

Tindakan: Global Globe S/B, JB Bergabung, Juru Ukur Bahan".

[67] The change to IBS system could only be approved subject to the approval of the Head of Design Team (HODT). By a letter dated 15.6.2011 JKR had notified the Plaintiff that as the contractor of the Project must appoint an Independent Checker (IC) as well as obtain the necessary approval from the Cawangan Akitek JKR. The cost of the IC must be borne by the Plaintiff.

[68] As early as in June 2011 the Defendant reminded the Plaintiff by a letter dated 20.6.2011 that the delay in appointing the IC and obtaining the necessary approval from Cawangan Akitek JKR to change to the IBS system should not be a basis for extension of time.

[69] The Defendant reminded the Plaintiff to appoint the IC as required under the Need Statement and to submit all the structural designs to the IC for verification and certification before works can commence on the site (See: letter dated 20.7.2011 from Ketua Penolong Pengarah Kanan, Bahagian Struktur (Unit Keselamatan) Cawangan Kejuruteraan Awam, JKR; Common Bundle of Document). By a letter dated 5.8.2011 the Defendant informed the Plaintiff that it had no objection to the change in the IBS as proposed by the Plaintiff as long as it did not involve any change to the architect's scope and complies with the IBS score. The Defendant had also informed the Plaintiff that "*Status kelulusan Sistem IBS bagi displin strucktur secara dasar telah di persetujui semasa Mesyuarat Semakan Rekabentuk IBS yang telah diadakan pada 8.8.2011. Manakala kelulusan pertukaran system IBS oleh pihak arkitek adalah berdasarkan surat dari Cawangan Arkitek...*"

[70] The Defendant then informed the Plaintiff that the method statement was submitted to the Consultant Engineer, OMK Jurutera Perunding Sdn. Bhd. on 19.4.2012 for approval. On 25.11.2011 the Defendant wrote to the Plaintiff reminding them to submit the report by the IC:

"2. Seperti tuan sedia maklum melalui surat di atas, pejabat ini telah bersetuju dengan calon penyemak bebas yang dikemukakan oleh tuan. Walau bagiamana pun, sehingga kini pihak kami masih belum menerima sebarang laporan penyemak bebas daripada pihak tuan seperti yang telah dipersetujui semasa Mesyuarat semakan Rekabentuk IBS yang telah diadakan pada 8/8/2011 dipejabat ini."

[71] Therefore, based on the documentary evidence it is evident that the delay in approving the IBS system was due to the Plaintiff's own conduct when they proposed the change of the IBS component after the Contract was awarded. There was delay with regards to the appointment of the IC and the submission of the relevant documents by the Plaintiff to the consultant engineer for approval.

[72] The Plaintiff's case hinges on the fact that the delay was due to the Defendant's inaction of approving the IBS and of giving possession. Upon perusal of the evidence we find no evidence of

such inaction by the Defendant. Instead there were clear attempts by the Defendant throughout the contract period to assist the Plaintiff to achieve its targeted completion date. Despite all these the Plaintiff failed to complete the project as originally scheduled and also by the extended dates. To say that the 3rd EOT application was not considered is not quite correct as the application was discussed and considered at the "*Mesyuarat Projek Sakit*" and "*Mesyuarat Jawatankuasa Kelambatan Lanjutan Masa"* (See: pg 3151-3153 Rekod Rayuan Jld 2(13) Bahagian C).

[73] Upon our perusal of the evidence that the Defendant had at all material time assisted the Plaintiff to achieve its targeted completion dates. Contrary to the learned High Court Judge's findings we are of the view that even if the 3rd EOT application was not considered it does not prejudiced the Defendant's right in any way whatsoever in electing to terminate the Contract

The Certificate of Non-Completion (CNC)

[74] The next issue that we have considered pertained to whether the Defendant had validly issued the CNC pursuant to clause 40 of the Contract. The general rule is that as a contractor the Plaintiff is bound by the terms of the Contract to complete the work by the original date for completion as stipulated in the contract. If the Plaintiff fails to do so under the terms of the Contract the Plaintiff will be liable for liquidated damages.

[75] As a prerequisite to claiming liquidated and ascertained damages the Defendant must issue a Certificate of Non-Completion (CNC) to the Plaintiff. The CNC gives formal written notice to the Plaintiff that they have failed to complete the works by the completion date that was last agreed. The Defendant may then deduct LAD from the Plaintiff. Generally, contractors may challenge claims for LAD if the procedures and the notice periods set out in the contract have not been followed.

[76] When LAD is imposed and subsequently deducted the correct contractual procedures must be adhered to. In the case of **Octoesse LLP v Trak Special Projects Ltd.** [2016], Justice Jefford held that Octoesse was not entitled to deduct liquidated damages as they had agreed to an extension of time after a certificate of non-completion had been issued. As Octoesse had not issued a further certificate of non-completion, they were not entitled to deduct liquidated damages.

[77] Clause 40 of the Contract reads as follows:

> *"40.1 If the Contractor fails to complete the Works by the Date for Completion or within any extended time granted pursuant to clause 43, the S.O. shall issue a Certificate of Non-Completion to the Contractor. Prior to the issuance of the Certificate of Non-Completion, the S.O. shall issue a notice to the Contractor informing the Contractor the intention of the Government to impose Liquidated and Ascertained Damages to the Contractor fails to complete the Works by the Date for Completion or within any extended time granted.*
>
> *40.2 Upon the issuance of the Certificate of Non-Completion, the Government shall be entitled to recover from the Contractor Liquidated and Ascertained Damages calculated at the rate stated in Appendix from the period of the issuance of the Certificate of Non-Completion to the*

date of issuance of Certificate of Practical Completion or the date of termination of this Contract. The S.O. may deduct such damages from any money due or to become due to the Contractor failing which such damages shall be recovered from the Performance Bond or as a debt due from the Contractor. The S.O. shall inform the Contractor in writing of such deduction."

[78] With respect we do not agree with the learned High Court Judge that the CNC issued by the Defendant is invalid given that the date of completion had yet to pass at the time of issuance for the following reasons. The Plaintif was granted two EOT and therefore was contractually bound to complete the Project on or before the expiration of the 2nd extended date. Since the Plaintiff failed to complete by the second rescheduled completion date the Defendant must issue the CNC pursuant to Clause 40 of the Contract. The issuance of the CNC serves as a notice to the Plaintiff that LAD will be imposed due to the failure to complete the Project according to schedule.

[79] The Defendant issued the CNC on **17.7.2013**. The progress of the Project as at May 2013 was as follows:

LAPORAN KEMAJUAN KERJA (Sehingga 30 Mei 13)

<table>
<tr><td colspan="7">Kemajuan kerja Semasa Mesyuarat Bersama KPKR Pada 9 Mei 2013 (Sebenar)/86% (Jadual): 52.4%</td></tr>
<tr><td colspan="2">Minggu</td><td>1</td><td>2</td><td>3</td><td>4</td><td rowspan="2">Jumlah</td></tr>
<tr><td colspan="2">Tarikh</td><td>10 - 16/5/13</td><td>17 - 23/5/13</td><td>24 - 30/5/13</td><td>31/5 - 6/6/13</td></tr>
<tr><td rowspan="2">Pencapaian Kemajuan Kerja Mingguan</td><td>Rancang</td><td>1.60%</td><td>1.00%</td><td>1.00%</td><td>1.00%</td><td>4.60%</td></tr>
<tr><td>Sebenar</td><td>0.30%</td><td>0.30%</td><td>0.30%</td><td>**</td><td>0.90%</td></tr>
<tr><td rowspan="3">Pencapaian Kemajuan Kerja Mingguan (Kumulatif)</td><td>Rancang - Siap Semasa (LM No. 2) 18 Julai 13 (CPM)</td><td>89.00%</td><td>92.00%</td><td>94.00%</td><td>95.00%</td><td></td></tr>
<tr><td>Rancang - (Recovery Plan) Siap 31 Dis 13 - Dalam Tempoh LAD</td><td>54.00%</td><td>55.00%</td><td>56.00%</td><td>57.00%</td><td></td></tr>
<tr><td>Sebenar</td><td>52.70%</td><td>53.00%</td><td>53.30%</td><td>**</td><td></td></tr>
</table>

Nota: ** belum berkaitan (belum tiba masa)

[80] The Table shows that the progress of the works was only at 53.3% as at 30.5.2013 when it should be almost 100%. The CNC was issued a day before the scheduled completion date, i.e 18.7.2013. If CNC is not issued then the Defendant will not be able to deduct LAD. The Defendant possessed the contractual right to issue the CNC if the Plaintiff fails to complete the works by the date for completion or by the extended time granted. Thus, the issuance of the CNC a day before the expiry of the 2nd extended date of completion is in accordance with the contractual terms.

[81] This is not a small Project involving a miniscule sum. The contract sum is a staggering RM103,556,694.84. Therefore, any delay would have far reaching consequences. The delay in the completion of the Project means an increase in the costs not only to the Plaintiff but also to the Defendant. Accordingly, based on the facts and evidence we find that the Defendant had correctly exercised its rights under the Contract to issue the CNC and need not wait to issue the CNC after the expiry of the extended completion date. The learned Judge erred when she said that the CNC issued before the expiry of the extended completion date was invalid.

Whether the termination of the contract by the Defendant is valid

[82] The Contract was terminated due to the poor progress and failure to complete the Project despite being given two extensions of time. It was communicated to the Plaintiff that the delay in the approval of the IBS must not be the basis for any extension of time. This was because it was the Plaintiff that had proposed the change after the Contract was awarded to them. Therefore, since the Plaintiff failed to complete the Project within the extended time granted, it was within the Defendant's legal rights to terminate the Contract.

Conclusion

[83] Had the learned High Court Judge considered the evidence in their proper perspective she could not have come to the conclusion that the termination by the Defendant was invalid.

[84] In conclusion after having heard the parties at length and upon careful perusal of the records of appeals, we are of the considered opinion that this is a case in which appellate intervention is warranted. For the foregoing reasons, we unanimously allow the appeal with costs. The decision of the learned judge is therefore set aside. We ordered costs of RM50,000.00 here and below subject to the payment of allocator.

HASNAH BINTI DATO' MOHAMMED HASHIM
Judge
Court of Appeal, Malaysia
Putrajaya

Date: 03/09/2018

COUNSEL

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JUDGMENTS REFERRED TO:

Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd [2010] 1 CLJ 269

City Investment Sdn Bhd v Koperasi Serbaguna CUEPACS Tanggungan Bhd [1985] CLJ Rep 17

Hawl-Mac Construction Ltd v Campbell River (District) (1985), 10 CLR 177 (BCSC)

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912-913

Lion Engineering Sdn. Bhd. v Pauchan Development Sdn. Bhd. [1997] 4 AMR 3315

Octoesse LLP v Trak Special Projects Ltd. [2016]