Lim Chin San Contractors Pte Ltd *v* LW Infrastructure Pte Ltd [2011] SGHC 162

Case Number	: Originating Summons No 769 of 2010
Decision Date	: 05 July 2011
Tribunal/Court	: High Court
Coram	: Judith Prakash J
Counsel Name(s)	: Alvin Yeo SC, Sean La'Brooy, Napolean Koh and Pamela Tan (WongPartnership LLP) for the plaintiff; Tan Liam Beng and Soh Chun York (Drew & Napier LLC) for the defendant.
Parties	: Lim Chin San Contractors Pte Ltd — LW Infrastructure Pte Ltd

Arbitration

Building and Construction Law

5 July 2011 Judgment reserved.

Judith Prakash J:

Introduction

1 This case (Originating Summons 769 of 2010 ("OS 769")) is one of two cross-appeals on several questions of law which arise out of an arbitral award. The other is Originating Summons 759 of 2010 ("OS 759"). Two of the issues raised in the appeals are of considerable importance in the construction industry, and, so far as I am aware, have not yet been expressly decided.

The factual background

2 Topmost Industries Pte Ltd ("the Employer") engaged AC Consortium Pte Ltd as the architect ("the Architect") and E S Tang Consultants as the quantity surveyor ("the Quantity Surveyor") in respect of a proposed project. On 15 January 2001, Lim Chin San Contractors Pte Ltd ("LCS") was invited by the Architect, on the Employer's behalf, to tender for the main contract for the design and construction of an industrial building known as "LW Technocentre" at 31 Toh Guan Road East, Singapore 608608 ("the Project"). During the final tender interview on 5 April 2001, LCS was informed that LW Infrastructure Pte Ltd ("LW") would be interposed as the main contractor and that it would instead be the design and build sub-contractor.

3 On 8 May 2001, the Employer issued a letter of award to LW, appointing it as the main contractor of the Project for a lump sum price of $13,027,052.56. LW accepted the offer on 12 May 2001. In turn, LW issued a letter of award to LCS on 14 May 2001, appointing it as the design and build sub-contractor of the Project at a lump sum price of $9,451,780.80 (excluding Mechanical and Electrical Works ("M&E Works")). On the same day, LW engaged Leun Wah Electric Co (Pte) Ltd ("Leun Wah") as the sub-contractor for the M&E Works. Leun Wah in turn engaged LCS to carry out those works.

4 In relation to the main sub-contract works, LCS accepted the offer from LW on 18 May 2001 and the formal sub-contract document was subsequently executed on 30 November 2001. LCS was

required to complete the sub-contract works within 15 months from the commencement date of the sub-contract. As this was 2 May 2001, LCS was required to complete the works by 2 August 2002. Clause 16.1 provided that the works would be deemed to have been practically completed upon receipt of a Temporary Occupation Permit ("TOP") from the relevant authorities.

5 On 22 May 2002, both parties agreed that an extension of time of some three months would be given to LCS. The precise duration of the agreed extension was disputed before Mr Johnny Tan Cheng Hye ("the Arbitrator"): *ie* whether the completion date was extended to 31 October 2002, or to 2 November 2002. The Arbitrator held that the completion date was extended to 31 October 2002 and that this agreed extension was only for the delay caused by late and short payments by LW before 22 May 2002. He also found that LCS was entitled to four additional days of extension of time pursuant to cl 25 due to exceptionally adverse weather. This finding extended the completion date to 4 November 2002.

6 Clause 27.1.2 of the sub-contract provides that failure by the sub-contractor "to proceed regularly and diligently with the performance of [the sub-contractor's] obligations" is a ground for termination of the sub-contract. On 2 January 2003, LW sent a notice to LCS notifying it of its failure to proceed regularly and diligently with its obligations, and in particular its obligation to complete the project by the contractual completion date. LCS had assured LW on numerous occasions that the TOP would be obtained by various target dates: 31 December 2002, 7 February 2003, 15 April 2003, and 10 May 2003. Due to the fact that the TOP had not yet been obtained despite these repeated assurances, LW was concerned with LCS's ability to complete the sub-contract works. The final straw was when LW complained on 6 May 2003 that, despite a payment of $200,000 to LCS, many sections of the works were still incomplete. This complaint was met with silence until 12 May 2003 when a terse reply was sent:

> I am sorry, my telephone and internet was temporarily disconnected due to non-payment and was only connected on 9th May 2003.
>
> We are unable to continue to apply for TOP and are not capable to take delivery of FSB certificates.

LW immediately terminated the sub-contract pursuant to cl 27.1.2. After termination, various sub-contractors were engaged by LW to complete the Project. The TOP was eventually granted on 1 August 2003.

7 On 22 June 2004, LW served a notice of arbitration on LCS. The Arbitrator accepted appointment on 9 November 2007 and issued his award on 29 June 2010 ("the Award"). For completeness, it is noted that a supplementary award was issued on 15 July 2010 to correct typographical errors.

Leave to appeal

8 Appeals on questions of law arising out of an arbitral award pursuant to s 49 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") may only be brought with the leave of the court or with the agreement of all the parties to the proceedings: s 49(3). Initially, the parties applied for leave to appeal and their respective applications came on for hearing before me on 29 October 2010. During the hearing, both parties accepted that Art 5.5 of the sub-contract stipulated that either party may appeal to the High Court on questions of law. Art 5.5 is as follows:

> The parties hereby agree and consent pursuant to sections 28 and 29 of the Arbitration Act

(Cap 10, 1985 Ed), that either party

may appeal to the High Court on any question of law arising out of an award made in an arbitration under this Arbitration Agreement and

may apply to the High Court to determine any question of law arising in the course of the reference

and the parties agree that the High Court shall have jurisdiction to determine any question of law

As this satisfied the requirement in s 49(3)(a), I granted leave to both parties to amend their respective originating summons to include the necessary prayers for the appeal proper.

9 Two issues arise from Art 5.5. First, in *Poseidon Schiffahrt GmbH v Nomadic Navigation Co Ltd ("The Trade Nomad")* [1998] 1 Lloyd's Rep 57, Colman J had to determine the issue of whether parties to an arbitration agreement entered into *before* the occurrence of a dispute or the making of an award could, by that agreement, dispense with the need to obtain leave to appeal as a condition precedent to mounting an appeal pursuant to s 1(3) of the Arbitration Act 1979. It was argued that the phrase "parties to the reference" in s 1(3)(a), which is similar to the phrase "parties to the proceedings" in our s 49(3)(a), envisages that there already has been a reference to arbitration at the time when consent was given. Colman J rejected this argument because there was no policy reason why the requirement of consent would be satisfied only if it was given after the dispute was referred to arbitration.

10 Secondly, on its face Art 5.5 states that the parties agreed and consented "pursuant to sections 28 and 29 of the Arbitration Act (Cap 10, 1985 Ed)" that appeals on questions of law arising out of arbitral awards may be brought. The appeal in this matter and that in OS 759 are brought pursuant to s 49 of the present Act. This precise issue was dealt with by Clarke J in *Taylor Woodrow Civil Engineering Ltd v Hutchinson IDH Development Ltd* (1998) 75 Con LR 1. Clarke J held that the more sensible inference would be that the parties must have intended that either party would have a right to appeal to the court on a question of law arising out of an award regardless of whether the arbitration was governed by the Arbitration Act 1979. Thus, he held that there was a right of appeal where the arbitration was governed by the Arbitration Act 1996. This sensible approach was followed in *Fence Gate Limited v NEL Construction Limited* (2001) 82 Con LR 41.

Questions of law raised in this appeal

11 OS 759 was filed a day before OS 769. I am dealing with OS 769 first, however, because the decision in this appeal will affect the resolution of the issues raised in OS 759.

12 OS 769 was filed by LCS, the sub-contractor, in an appeal in the following questions of law:

(a) where there were acts of prevention which caused delay in the progress of the works and which were not extendable [*sic*] under the sub-contract, whether it was necessary for LCS to have been prevented from completing the works by a prescribed date in order for time to be set at large ("the first question of law");

(b) where there were acts of prevention which caused delay in the progress of the works and which were not extendable [*sic*] under the sub-contract, whether LW was entitled to exercise its contractual right of termination under cl 27.1 of the sub-contract or if LW was

so entitled, whether it could only do so by reference to a reasonable time for completion of the works ("the second question of law"); and

(c) where there were acts of prevention which caused delay in the progress of the works and which were not extendable [*sic*] under the sub-contract, whether LW was entitled to exercise its contractual right under cl 27.4 of the sub-contract to claim for costs incurred in engaging other contractors to carry out the works under the sub-contract ("the third question of law").

The first question of law

The Arbitrator's findings

13 The Arbitrator considered several distinct incidents which were relied upon by LCS to support its claim to an extension of time. As LCS has only raised two of these incidents before me to support its appeal, it will be unnecessary to deal with the others. First, it points out that the Arbitrator found that there was late and under-allocation of Man-Year Entitlements ("MYEs"). In order to deal with the dependency of contractors on workers from non-traditional source countries, the Ministry of Manpower ("the Ministry") created a system of MYEs, in which each MYE would entitle an employer or contractor to bring in one worker from non-traditional source countries on a work permit for one year, while two MYEs could be used to obtain a two-year work permit, and so on. LW received the permit for piling and pile caps on 12 June 2001, and the permit for building works on 5 July 2001. However, it only submitted the application for MYEs to the Ministry on 27 July 2001. On 31 August 2001, the Ministry granted 157 MYEs to LW. Of this amount, only 75 were allocated to LCS; this fell short of the 83 which the Arbitrator held that LCS was entitled to have. Additionally, he found that LW should have applied for the MYEs earlier.

14 Secondly, LCS points out that the Arbitrator found that there were late payments by LW. Clause 30.3.2 stipulated the procedure for interim payments. In LCS's applications for interim payment, it was required to enclose a certificate from the Architect which stated the amount due to it from LW. This procedure was not followed and LW treated the applications as being invalid. After several complaints by LCS regarding what they considered to be late payments, cl 30.3.2 was amended on 14 March 2002 to state that a certificate from the Architect was not required and that LW would accept certificates from the Quantity Surveyor instead. The Arbitrator held that because the agreed three-month extension of time was granted for late and short payments before 22 May 2002, he would only consider the late payments after that date. Between 10 June 2002 and 28 February 2003, the Quantity Surveyor issued nine interim payment certificates, only two of which were honoured by LW within the 14-day period stipulated in cl 30.3.3. The Arbitrator therefore found that there were late payments by LW.

15 The Arbitrator found that there was delay to the progress of the works due to these incidents, *ie*, late and under-allocation of MYEs, and late interim payments. However, he found that LCS had failed to prove that these incidents had caused a delay in the *completion* of the sub-contract works for the following reasons:

(a) in relation to the late allocation of MYEs, the analysis by LCS's expert was incomplete, and LCS only utilised the MYEs in November 2001 although it was informed of the allocation in mid-September;

(b) in relation to the under-allocation of MYEs, the analysis by LCS's expert was incomplete; and

(c) in relation to the late payments, LCS's expert was unable to produce evidence that this had caused delay in completion, and the managing director of LCS had stated that it had no financial or cash-flow difficulties and that the complaints of late payments were only raised to put pressure on LW to pay because he was concerned that the latter was a $2 company.

16 Earlier in the Award, the Arbitrator had stated that it was well-established that a contractor would only be entitled to an extension of time if an employer's risk event had caused a delay in completion. As he found that LCS had failed to prove delay in completion due to the incidents it relied upon, apart from exceptionally adverse weather, he held that only a four-day extension would be granted for that incident. The Arbitrator then dealt with the issue of whether time was set at large in the following manner:

> 355 I now move to the issue whether time is set at large... Generally, when a contractor is prevented from completing the Works by a prescribed date by the employer's or his agent's acts of prevention and the contract does not provide for extension of the contract period or where it does so provide but the extension is improperly withheld, then the contractual date for completion will cease to apply and time is said to be set at large and the contractor is required to complete the works by a reasonable time.
>
> 356 [LCS] submitted that in this case, time is set at large because their progress of works was delayed by the late and/or under allocation of MYE and late... payments. [LCS] submitted that these acts of prevention are not Relevant Events under Clause 25.4 of the Sub-Contract [the extension of time clause]. In any event, they say that no extension of time was granted by [LW]. However, I have found earlier that both of these events although they did cause delay to the progress of the works, there is no evidence adduced by [LCS] that they delayed the ... completion of the Sub-Contract. A delay to progress of works does not automatically result in a delay to completion. That has to be proven, which [LCS] failed to do.
>
> 357 Accordingly, time for the completion of the Sub-Contract works was not set at large.

17 LCS argues that the Arbitrator erred in reaching this conclusion despite finding that there was a delay in the progress of the works which did not permit an extension of time under the sub-contract. According to it, in order for time to be set at large it is not necessary for there to be a delay in the *completion* of the works which is attributable to the contractor. A mere delay in the *progress* of the works will be sufficient.

The effect of time being set at large

18 In *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd and another* [2009] 1 SLR(R) 385 ("*Sonny Yap*"), I described the effect of time being set at large in the following terms (at [34]):

> [A] contractor's obligation to complete the works under a construction contract within a prescribed period of time is premised on the requirement that he is not delayed by reason of any "acts of prevention" committed by either the employer or his agent. As Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 3rd Ed, 2004) states at p 401:
>
> > An act of prevention operates to prevent, impede or otherwise make it more difficult for a contractor to complete the works by the date stipulated in the contract.

> ... *[T]he legal consequence of [time being set at large] is that the date for completion originally stipulated in the contract ceases to be the operating date for the completion of the works. Additionally, the employer's right to claim or deduct liquidated damages is lost since there is no longer a valid date for completion from which such damages can be calculated*...
>
> [emphasis added]

19 LW points out that LCS accepts that the time *for completion* is what is set at large. However, this in itself does not assist LW because LCS's contention is rather narrower: that although the *effect* is that time for completion is set at large, this effect may be *triggered* by a mere delay in progress.

The rationale of the principle of time being set at large

20 LCS submits that the rationale for the principle of time being set at large is two-fold. First, the contractual completion date is provided on the basis that the contractor will not do anything to impede the *progress* of the works by the sub-contractor. It relies on my explanation in *Sonny Yap* of time being set at large (at [18], *supra*). Secondly, LCS submits that it would be unfair if it was liable to pay liquidated damages even though there were acts of prevention by LW because LW would be taking advantage of its own wrong in having committed such acts. LCS cites Lord Esher MR in *Dodd v Churton* [1897] 1 QB 562 at 566:

> *The principle is ... that, when one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default* ... [I]f the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided for by the contract. *The reason for that rule is that otherwise a most unreasonable burden would be imposed on the contractor*.
>
> [emphasis added]

21 LCS argues that there will be a most unreasonable burden placed on it in the event that liquidated damages are imposed for delays which are not entirely due to its fault. It asserts that there would be no real prejudice to LW if time was set at large because LW would still have a remedy by way of general damages for LCS's breach of the sub-contract. In essence, LCS argues that the principle of time being set at large is based on the idea that a man should not be allowed to take advantage of his own wrong; thus, this principle should apply equally to a breach by the contractor which delays the *progress* of the works because there would also be a breach of contract. While LCS accepts that an express contractual provision may provide otherwise, it notes that such a provision is absent in this case. Therefore, it says, LW's breach should set time at large.

22 However, LCS's reliance on *Dodd v Churton* in fact undermines its appeal. It is clear from the paragraph cited by LCS that Lord Esher MR stated that there would be a "most unreasonable burden" where there was undoubtedly a delay in completion. In the sentence immediately preceding the last sentence cited by LCS, Lord Esher MR contemplated a situation where extra work ordered by the owner "has necessarily increased the time requisite for finishing the work". The two other judges (Lopes and Chitty LJJ) also based their decision on the fact that there was a delay in the completion of the works. Lopes LJ put the point quite clearly (at 567-568):

> ... It is a well-ascertained rule of law that, where the *failure of a contractor to complete the work by the specified day* has been brought about by the act of the other party to the contract,

he is exonerated from the performance of the contract by that date, which has been thus rendered impossible. That rule appears to me to be applicable to the present case. It has often been laid down that, where there is a provision that a contractor shall pay penalties *for delay* as in the present case, no penalty can be recovered *where delay has been occasioned by the act of the person* endeavouring to enforce the penalties ...

[emphasis added]

23 Chitty LJ expressed the same opinion (at 568):

The law on the subject is well settled. ... This principle is applicable not to building contracts only, but to all contracts. If a man agrees to do something by a particular day or in default to pay a sum of money as liquidated damages, the other party to the contract *must not do anything to prevent him from doing the thing contracted for within the specified time*. Of course a man may make such a contract as was alleged in *Jones* v. *St John's College*... [However,] it would require very clear language to shew that a man had undertaken a responsibility which very few men would undertake with their eyes open ...

[emphasis added]

24 All the leading cases have expressly reiterated the requirement that the delay must result in delayed completion of the works. In *Holme and another v Guppy and another* (1838) 150 ER 1195; 3 M&W 387 at 389, Parke B (delivering the judgment of the Court of Exchequer) stated:

It is clear, from the terms of the agreement, that the plaintiffs undertake that they will complete the work in a given four months and a half; and the particular time is extremely material, because they probably would not have entered into the contract unless they had had those four months and a half, within which they could work a greater number of hours a day. Then it appears that they were disabled from by the act of the defendants from the performance of that contract; and there are clear authorities, that if the party be prevented, by the refusal of the other contracting party, *from completing the contract within the time limited*, he is not liable in law for the default (1 Roll. Abr. 543; Com. Dig. Condition, L. (6)) ...

[emphasis added]

25 A fuller quote from Lord Esher MR's judgment in *Dodd v Churton* makes this point clear (at 566):

The principle is laid down in Comyns' Digest, Condition L(6.), that, *where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default*; and, accordingly, a well recognised rule has been established in cases of this kind, beginning with *Holme v Guppy*, to the effect that, if the building owner has ordered extra work beyond that specified by the original contract which *has necessarily increased the time requisite for finishing the work*, he is thereby disentitled to claim the penalties for non-completion provided by the contract. The reason for that rule is that otherwise a most unreasonable burden would be imposed upon the Contractor ...

[emphasis added]

26 In *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114 at 121 ("*Peak v McKinney*"), which is a case cited by LCS in support of its appeal, Salmon LJ states quite clearly that time will be set at large only where there is a delay in completion:

If the *failure to complete on time* is due to the fault of both the employer and the contractor, in my view, the clause does not bite. I cannot see how, in the ordinary course, the employer can insist on compliance with a condition if it is partly his own fault that it cannot be fulfilled: ... *Holme v Guppy*. I consider that unless the contract expresses a contrary intention, the employer, in the circumstances postulated, is left to his ordinary remedy; that is to say, to recover such damages as he can prove flow from the contractors' breach. No doubt if the extension of time clause provided for a postponement of the completion date on account of delay caused by some breach or fault on the part of the employer, the position would be different. This would mean that the parties had intended that the employer could recover liquidated damages notwithstanding that he was *partly to blame for the failure to achieve the completion date*. In such a case the architect would extend the date for completion, and the contractor would then be liable to pay liquidated damages for delay as from the extended completion date. ... If the employer wishes to recover liquidated damages for *failure by the contractors to complete on time* in spite of the fact that some of the delay is due to the employers' own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such fault or breach on the part of the employer.

[emphasis added]

27 In *Percy Bilton Ltd v Greater London Council* [1982] 1 WLR 794 at 801C-E, Lord Fraser of Tullybelton (with whom the four other Law Lords agreed) provided a clear exposition of the applicable principles:

The true position is, I think, correctly stated in the following propositions ... :

1. *The general rule* is that the main contractor is bound to complete the work by the date for completion stated in the contract. If he fails to do so, he will be liable for liquidated damages to the employer.

2. That is subject to the exception that the employer is not entitled to liquidated damages if by his acts or omissions he has prevented the main contractor from *completing his work by [the] completion date*: see for example *Holme* v. *Guppy* (1838) 3 M. & W. 387...

3. These general rules may be amended by the express terms of the contract.

...

[emphasis added]

28 Lord Fraser made it quite clear, therefore, that if no delay in completion is proven, the general rule applies and time is not set at large. The reason for the consistent affirmation of the requirement that there must be a failure to complete by the specified date is evident. While the principle of time being set at large originated in the idea that liquidated damages for delay *in completion* should not be imposed where the person claiming those damages contributed to that delay, there is no reason to extend that principle to situations where there is a mere delay in the progress of the works which cannot, by definition, give rise to a claim to or deduction of liquidated damages. In claiming or deducting liquidated damages, the employer would not be taking advantage of his own wrong because his conduct was not proven to have caused completion of the works to be delayed.

29 As a matter of principle, the unanimous weight of academic commentary leans heavily in favour of the proposition that a delay in completion of the works must be shown. In Stephen Furst QC & Sir

Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 2006, 8th Ed) ("*Keating*"), the following statement was made (at para 9-018):

> If the employer prevents *the completion* of the works in any way ... the general rule is that he *loses the right to claim liquidated damages for non-completion* to time, for he "cannot insist on *a condition* if it is his own fault that *the condition* has not been fulfilled"
>
> [emphasis added]

A similar statement was made in Nicholas Dennys QC, Mark Raeside QC & Robert Clay, *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 2010, 12th Ed) ("*Hudson*") (at para 6-009):

> ... [A]n obligation to complete within a reasonable time... arises... where a contractual completion date has been specified, but has ceased to be applicable and there is no, or no applicable or enforceable, extension of time mechanism. This can happen where... the Employer has in one way or another prevented *completion* within the contract time ...
>
> [emphasis added]

30 The requirement that there must be a delay to completion of the works was also reiterated in Keith Pickavance*, Delay and Disruption in Construction Contracts* (Sweet & Maxwell, 2010, 4th Ed) ("*Pickavance*") at para 6-120:

> In summary, therefore, where there is a contractually binding date for completion but, for reasons within [the contractor's] control [the sub-contractor] is *prevented from completing* by the contract completion date, [the contractor] can no longer insist upon completion by the due date and must then complete within a reasonable period as a result of the effect of what is known as the "prevention principle". Although there appears to be no US case law on the point, this equitable remedy is familiar to most common law countries, and it is a remedy that is encapsulated in art.7.1.2 of the *Unidroit Principles of International Commercial Contracts* (2004) and in some civil law codes.
>
> [emphasis added]

3 1 *Sonny Yap* was a case in which the conduct of the employer was the main cause of the inability of the contractor to *complete* the works by the stipulated date. Also, Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 3rd Ed, 2004) ("*Chow Kok Fong*") at p 401 provides no support for LCS's contention because it is clear that, read in context, it states that only a delay in completion of the works will suffice to set time at large:

> ... [T]he contractor's *obligation to complete the works* under a construction contract within a prescribed period of time *is premised on the requirement that he is not delayed* by reason of any "act of prevention" committed by either the employer or his agents. An act of prevention operates to prevent, impede or otherwise make it more difficult for a contractor *to complete* the works by the date stipulated in the contract ...
>
> [emphasis added]

32 Furthermore, the distinction between, on the one hand, a delay in progress which does not constitute an act of prevention and therefore does not set time at large, and, on the other hand, a

delay in completion which does constitute an act of prevention, is well-established. *Pickavance* puts the point in the following way (at paras 6-001 to 6-002):

> ... A delay, or a likelihood of delay to progress is not the same as a delay, or a likelihood of delay to completion. It is unfortunate that the words are easily connected and, in using them in the same clauses of contracts, the draftsmen have caused much confusion. A delay to progress is an adverse shift in the intended timing of the start and/or finish of a discrete activity; it can occur at any time. ... On the other hand, a delay to the completion date occurs only when the completion date has passed and can only be caused by a delay to the progress of an activity which is on the critical path to completion.
>
> ... For example: if an event that causes 50 days' delay to progress in an activity impacts upon an activity that has 15 days' total float, it will demonstrate that the event will absorb the 15 days of float and, after the float has been taken up, the event will be likely to cause only 35 days' delay to the completion date (not withstanding that it caused 50 days' delay to progress.

33 A similar explanation was provided in *Hudson* (at para 6-068):

> ... [E]vents which may give rise to ... interference with progress... fall into two broad categories: those which amount to a breach of contract by the Employer and those events which are authorised by the contract, but nonetheless affect progress. ... The consequence of the event may be delay to a single activity or to a number of the activities which are dependent for their progress on the activity which has been delayed. Whether the activity will cause delay to the completion date for the whole of the work contracted for will depend on the relationship between the activity delayed and subsequent activities which cannot be carried out or completed until the activity has been completed... [S]uch a delay involves the activity being critical, i.e. on the critical path for the project. This expression itself may be ambiguous because there are activities which are physically linked in the sense that one must complete before the other can start (sometimes referred to as construction links), and activities which are linked in the Contractor's programme because that represents the sequence which reflects the way in which the Contractor intends to use their resources (resource links). The former (construction) links cannot be "broken" as they are part of the inherent logic of any programme. The latter (resource) links can be changed, but may involve some additional expense for the Contractor. ...

34 Apart from *Sonny Yap*, LCS cites several other cases in support of its appeal. *Peak v McKinney* has already been considered. Although the New Zealand case of *Fernbrook Trading Co Ltd v Taggart* [1979] 1 NZLR 556 does not expressly state whether the delay was one which affected completion, it is likely that the delay was in fact one which affected completion, because it concerned a delay of 23 weeks in making progress payments and a failure to issue progress payment certificates in five separate months. Furthermore, all the cases cited in the judgment concerned a delayed completion date.

35 LCS also cites two local cases: *Kwang In Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* [1997] 1 SLR(R) 907 at [18] ("*Kwang In Tong*") and *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 3 SLR(R) 518 at [18]. In the first case, the judge appeared to accept that there was a delay in the completion of the works. The second case is unclear as to whether there was delay in the completion of the works. The passage cited from the judgment merely reiterates that time will be set at large where there is "any prevention by the employer of the contractor's performance of the contract". In light of the overwhelming weight of authority and academic opinion, the judge must have meant a prevention of completion on time.

36 In essence, an employer's conduct will set time at large only if a threshold is met: it must cause a delay in the completion of the works. Because the Arbitrator found that LW's breaches of contract had not been proved to meet this threshold, LCS's remedy lies in damages for disruption of its progress (in which case it will have to prove its loss to obtain more than nominal damages). Given the availability of a remedy in damages, LCS's contention that LW would be taking advantage of its own wrong appears to be misconceived.

37 LCS's final argument is that if there is a question as to which party should bear the risk of time being set at large as a consequence of acts of prevention, the obvious answer should be LW. First, it was LW which committed the acts of prevention. Secondly, LW could have, from the outset, prevented time from being set at large by expressly providing for an extension of time in the event that such acts of prevention caused delay. LCS relies on the following passage in *Peak v McKinney* (at 121):

> ... If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employers' own fault or breach of contract, then the extension of time clauses should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer ...

It also relies on *dicta* in *Kwang In Tong* (at [18]):

> ... Such a result (time set at large) can be prevented by providing in the contract for extensions of time in the event of the employer's acts or omissions affecting the progress of the works, and by the actual grant of extensions of time.

38 I reject this argument because it presupposes that time will in fact be set at large even if there is only a delay in progress. I have held that this is not the case. A contractor should not be held legally responsible for failure to protect itself from an eventuality which may never occur. In any event, the question of the allocation of risk is almost invariably a question of contractual interpretation and is not one which is left to the court's discretion. The courts have adopted a common-sense approach and have *presumed* that the parties have intended that liquidated damages should not be available if the person claiming it has contributed to the delay in completion of the works. For this reason, it is well-settled that if a contract clearly provides that the date of completion will not be set at large even if the completion date of the works is delayed, this bargain will be upheld by the courts: *Jones and another v The President and Scholars of St John's College, Oxford* (1870-71) LR 6 QB 115; *Dodd v Churton* at 568. This may occur, for instance, where the contract clearly obliges the contractor to complete the works within the stipulated time even if extras are ordered and no extension of time is granted.

LW's alternative arguments

39 LW also advances three other arguments to resist LCS's appeal on the first question of law. As I have concluded that LCS's appeal on the first question of law should fail, it is strictly unnecessary to deal with these arguments. One of the arguments raised involves an important point of principle, however, and may therefore merit further discussion.

40 LW argues that LCS is precluded from bringing the appeal on the first question of law because the latter had pleaded in the Arbitration that there was delay in completion but had failed to prove this. Furthermore, during the Arbitration LCS had agreed with LW that "Issue 10" – whether time for completion was set at large – would only need to be decided by the Arbitrator if "Issue 9" – whether there was delay in *completion* – was answered in the affirmative. During the hearing on 8 February

2011, this argument was refined by LW's counsel. He argued that because the issue was pleaded and put to the Arbitrator in that particular way, the Arbitrator had not made an error of law which was amenable to an appeal on a question of law arising out of an arbitral award.

41 LCS argues that there was no such agreement between the parties as to the issues to be submitted to the Arbitrator. This contention is unsustainable in light of the evidence: first, a letter on 3 July 2009 from the Arbitrator to the parties set out a list of issues, including Issues 9 and 10, "to be determined" in the arbitration, and second, this list was drawn up "by agreement of solicitors for the parties". A subsequent exchange of emails between the parties did not show that there was any objection to the list of issues or to the assertion that it was agreed upon by both parties.

42 It is true that the Arbitrator was only asked to decide (a) whether there was delay in the completion of the works (Issue 9), and (b) if so, whether time was set at large (Issue 10). However, it is clear that, in arriving at the conclusion on Issue 10 that time was not set at large, the Arbitrator held that the proof of delay to progress of the works was in itself insufficient to set time at large without further proof of a knock-on delay in completion. In essence, LW's contention is that a question of law which is open to appeal under s 49 of the Act is limited to the precise issues which are pleaded before the arbitrator and nothing more, even if the question of law arises out of a finding which was a necessary step along the path to the arbitrator's ultimate conclusion on the pleaded issues. LW provided no authority for this contention. The leading case of *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR(R) 494 ("*Northern Elevator*"), in which the Court of Appeal dealt with the scope of the equivalent provision under the now-repealed Arbitration Act (Cap 10, 1985 Rev Ed), does not contemplate such a limited scope for the operation of what is now s 49:

> 17 Section 28 of the Act confers upon the High Court a power to grant leave to appeal against an arbitration award if there is a "question of law", arising from the award, to be determined. As a preliminary point, it is essential to delineate between a "question of law" and an "error of law", for the former confers jurisdiction on a court to grant leave to appeal against an arbitration award while the latter, in itself, does not.
>
> 18 An opportunity arose for comment in *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [1993] 2 SLR(R) 208. In that case, G P Selvam JC (as he then was) stated at [7]:
>
> > … *A question of law means a point of law in controversy which has to be resolved after opposing views and arguments have been considered. It is a matter of substance the determination of which will decide the rights between the parties*. … If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law there lies no appeal against that error for there is no question of law which calls for an opinion of the court. …
>
> 19 To our mind, a "question of law" must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to resolve. When an arbitrator does not apply a principle of law correctly, that failure is a mere "error of law" (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.
>
> [original emphasis removed; emphasis added in italics]

This definition of a "question of law" has been cited with approval in England: *Benaim (UK) Ltd v Davies Middleton & Davies Ltd* [2005] EWHC 1370 at [107]; *The Coal Authority v F W Davidson, W E Davidson* [2008] EWHC 2180 at [6].

4 3 *Northern Elevator* distinguishes between, on the one hand, an erroneous identification of the correct legal principles (or, in other words, an identification of the wrong legal principles), and, on the other hand, the erroneous application of the correct legal principles: only the former will qualify as a proper "question of law" within s 49(1). There is nothing in *Northern Elevator* which obliges the court further to limit the meaning of "question of law" to the precise issues which were pleaded before the arbitrator. In reaching a conclusion on a pleaded issue, an arbitrator may make several findings along the way, whether of fact or of law (as properly understood). If he makes a finding of law which is necessary to enable him to reach the ultimate conclusion on the precise issue which was pleaded, there seems to be no reason why that finding should not fall within the meaning of a "question of law" in s 49(1).

Conclusion

44 I reject LCS's argument that time may be set at large if there is no delay in the completion date but merely a delay in progress. Thus, the answer to the first question of law is "Yes".

The second question of law

45 According to s 49(1) of the Act, a party to arbitration proceedings may appeal "on a question of law arising out of an award made in the proceedings." In light of the fact that both parties had contractually agreed in Art 5.5 of the sub-contract that appeals to the court on questions of law may be brought, the second and third questions of law raise the interesting issue of whether the mere fact that the parties have agreed that appeals on questions of law may be brought has the effect of precluding the need to characterise the questions to ensure that they are questions of law arising out of the award. In this particular case, Art 5.5 does not contemplate this result because it simply refers to appeals "on any question of law arising out of an award", without more. As a matter of common-sense, this clause does not purport to preclude the necessity of characterisation; indeed, such characterisation would be even more essential because Art 5.5 confines the scope of the parties' agreement to appeals on "any question of law arising out of an award".

46 In any event, there is nothing in the wording of s 49(1) which indicates that the parties may alter by agreement the nature of questions which may be referred to the court on appeal. This approach is reinforced by the wording of s 49(2) which is as follows:

> Notwithstanding subsection (1), the parties may *agree to exclude* the jurisdiction of the Court under this section and an agreement to dispense with reasons for the arbitral tribunal's award shall be treated as an agreement to exclude the jurisdiction of the Court under this section.
>
> [emphasis added]

In light of that, I am of the opinion that, if there was any purported agreement between the parties to increase the scope of the court's jurisdiction on appeals pursuant to s 49, it is still necessary to characterise the questions referred to the court to ensure that they truly constitute questions of law arising out of the arbitral award. I note that this approach was also taken by Blair J in *Guangzhou Dockyards Co Ltd v ENE Aegiali I* [2011] 1 Lloyd's Rep 30 where the arbitration clause stated that either party may appeal "on *any issue* arising out of any award" and one party attempted to appeal on what it admitted to be questions of fact.

47 Thus, it is necessary to characterise the second question of law. It is as follows: given that time has been set at large, whether LW could exercise its contractual right to terminate under cl 27.1 and, if so, whether it could only do so by reference to a reasonable time for completion of the works.

LW submits that because the appeal on this question of law is premised on time having been set at large, it should be dismissed if LCS's appeal on the first question of law fails. I agree. As I have dismissed LCS's appeal on the first question of law, I also dismiss its appeal on this question of law.

48 Even if I was wrong to have dismissed LCS's appeal on the first question of law, I hold that the appeal on the second question of law should be dismissed because s 49(1) requires that the question of law must be one "arising out of an award made in the proceedings". The Arbitrator held that time was *not* set at large; therefore, this question of law could not have arisen out of the Award.

49 *Northern Elevator* draws a distinction between, on the one hand, an erroneous identification of legal principles (*eg*, the interpretation of cl 27.1 or the identification of the common law principles of termination) which is open to appeal under s 49(1), and, on the other hand, an erroneous application of the correct legal principles to the facts which is not amenable to appeal. A question of contractual interpretation is in principle a question of law which the court has jurisdiction to determine: see, *eg*, *Pioneer Shipping Ltd and others v BTP Tioxide Ltd* [1982] AC 724 at 736A-G ("*The Nema*"), *Permasteelisa Pacific Holdings Ltd v Hyundai Engineering & Construction Co Ltd* [2005] 2 SLR(R) 270 at [10], *Holland Leedon Pte Ltd (in liquidation) v Metalform Asia Pte Ltd* [2011] 1 SLR 517 at [11]. This approach is consistent with the legislative intent which underpins s 49 of the Act. In 1997, the Attorney-General set up a committee to review the arbitration legislation in Singapore. In 2000, it published its final report, *Review of Arbitration Laws*, *LRRD No 3/2001* ("the Report") as well as the draft Arbitration Bill 2001. Section 2.38.1 of the Report states:

> Retaining a limited degree of review by the court is consistent with the parties' desire *to have the matter decided in accordance with the law as properly understood and as applied in Singapore*. The right of appeal against awards on questions of law is thus retained in this Bill.
>
> [emphasis added]

50 It would be odd if questions of contractual interpretation, *ie*, of the meaning of particular contractual terms, are not questions of law which are amenable to appeal pursuant to s 49. Given that the obligations of contracting parties are generally governed by the terms of the contract, whether express or implied, party autonomy would be unduly infringed if the mere fact that an arbitrator had identified the correct principles of contractual interpretation (at a more general level) would prevent an appeal pursuant to s 49 if he had nonetheless failed to *apply* them correctly to ascertain the *more specific* obligations arising out of the contract. These more specific obligations, *eg*, whether a particular event qualifies for extension of time under an extension of time clause, will invariably be viewed as being far more practically important by contracting parties.

51 In the present appeal, the Arbitrator did not have the opportunity of deciding the effect of time being set at large on LW's right to terminate the sub-contract, whether pursuant to cl 27.1 or relying on its common law remedies, for the simple reason that he found that time was *not* set at large. I would not be in a position to decide this appeal without having the benefit of the Arbitrator's findings to determine whether the hypothetical error raises a question which is amenable to appeal under s 49(1), *ie*, whether or not the second question, *if* answered by the Arbitrator, would have raised an issue of contractual interpretation or merely one of the application of the law (as correctly determined) to the facts.

The third question of law

52 This question of law is as follows: given that time has been set at large, whether LW was entitled under cl 27.4 to claim the costs incurred in engaging other sub-contractors to carry out the

sub-contract works. I hold that this appeal should be dismissed for the same reasons as the appeal on the second question of law.

Conclusion

53 For the reasons given above, this appeal fails and must be dismissed with costs.