

# AVOIDING & RESOLVING DISPUTES IN CONSTRUCTION CONTRACTS

CLAIMS OF THE CONTRACTOR AND  
CLAIMS OF THE EMPLOYER

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# 1.1 GENERAL

- Construction Law
  1. Corpus of case law
  2. Often reflected in standard forms
    - PWD 203 (Rev. 10/83)
    - PAM 1998, PAM 2006
    - FIDIC 1999 (“Silverbook”)

## 1.2 IN BRIEF

- Employer undertakes to:
  1. Pay the contract sum and
  2. Provide the site
- The Contractor undertakes to:
  1. Build and complete
  2. To the drawings and specifications, and
  3. To complete within a fixed duration

# 1.3 Damages at Law

- In Section 74 of Contracts Act 1950:
  - A party in breach of a contract will have to compensate:
    - The losses which naturally arise; and
    - Losses which the parties knew would be likely to arise
    - This is a reflection of case *Hadley v Baxendale* (1854)
    - Note that this is different from LAD for delay

## 2.1 OBLIGATION TO COMPLETE

- All inclusive lump sum contract – if BQ contract, as per actual quantities, BUT
- What is included in the contract?
  - Temporary Works – how the contractor gets it done is entirely up to the contractor
    1. *Thorn v London County Council*
    2. *Tharsis Sulphur v McElroy*
  - Permanent Works – generally, if an item is not in the Bill, contractor is deemed to have included –

# 2.1 OBLIGATION TO COMPLETE

due to all inclusive price principle

- *Williams v Fitzmaurice* – eventhough no description of floor boards, contractor for house deemed to have included
- for permanent works, whether contractor obliged to carry out item of works depends on intention based on contract

But contrast this against

- *Adcock's Trustee v Bridge Rural District Council (1911)*:
  - Bricks approved by Engineer
  - Ground wetter than expected
  - Held that contractor not required to replace bricks

# 2.1 OBLIGATION TO COMPLETE

## What is included

1. Case 1 – 1,000 cu m rocks in 40,000 cu m excavation (under FIDIC remeasurable)
  - 10 boreholes
  - Provision that rates for exc'n include for all else necessary to achieve, i.e. deemed to be included
  - Contractor entitled to claim for unforeseeable physical conditions

# 2.1 OBLIGATION TO COMPLETE

## What is included

### 2. Case 2 – steel support to hall

- Lump sum contract - amounts for individual items of breakdown
- Breakdown includes provisional sums, abt RM 3 million for contingencies
- Drawing indicated - “to specialist’s details” for one PC sum item
- Drawing indicated - “to specialist’s details” for steel truss support above ceiling



# 2.1 OBLIGATION TO COMPLETE

## What is included

- In 2<sup>nd</sup> case:
  1. Substantial works by NSCs
  2. “to specialist’s details” for other NSCs’ works
  3. Deemed to be included clause cannot cover situation

## 2.1 OBLIGATION TO COMPLETE

### What is included

- Case of requirement for contractor to compact imported fill from borrow pit provided by Employer to 1.8 tonne/m<sup>3</sup>
- It is always advisable to summarize what is included and what is excluded especially if there is a convoluted negotiation process

## 2.1 OBLIGATION TO COMPLETE

- Standard forms of contracts
  1. PWD 203 and PAM 1998 say very little about temporary works – but the specs may require submission of temp works design
  2. FIDIC 1999 makes it clear that approvals do not relieve contractor of responsibility

## 2.1 OBLIGATION TO COMPLETE

- If power conferred on RE/Architect to approve
- Needless disapproval would entitle contractor to claim EOT
- Excessive requirement shop drawings or method statements with refusal to allow temporary works may entitle contractor to EOT

## 2.1 OBLIGATION TO COMPLETE

- Contractor liable for losses/damage before completion – hence insurance requirement
- Contractor to pay cost of completion in event cannot complete
- Right to claim for costs if unforeseen ground conditions – only FIDIC
- Hence provision for security:
  - Performance Bond
  - Retention

## 2.1 OBLIGATION TO COMPLETE

- Popular misconception amongst REs -
- If there is a specification for a particular type of work, then contractor must do it:
  - Drawing shows dry pitching, MOM includes wet pitching
  - Contract includes cement rendered wall, spec has section for painting to walls

## 2.1.2 LIABILITY FOR DEFECTS

- Contractor to complete to employer's intention – if only minor defects or even minor o/standing works - considered practically complete
- Patent defects – upon rectif'n after expiry of DLP – issuance of CMGD - entitlement to last payment
- Latent defects – under PWD Form – if detected before final payment, may set off, but not for PAM

## 2.1.3 EMPLOYER'S REMEDIES IN THE EVENT OF NON-COMPLIANCE

- Refuse to pay for non-compliant work
- More directly – engage a 3<sup>rd</sup> party & backcharge, after giving contractor notice – PWD, PAM, FIDIC



## 2.2 OBLIGATION TO COMPLETE ON TIME

- Time not “of the essence” in construction contracts
  - Time of the essence : may terminate for slight delay
  - Unfair to contractor who has expended a lot of money to have contract rescinded for minor delay
  - Land belongs to employer and works attached to land becomes his property

## 2.2 OBLIGATION TO COMPLETE ON TIME – REMEDIES OF EMPLOYER

- PAM & PWD
  - “without reasonable cause wholly suspends...”
  - “fails to proceed regularly or diligently”
- FIDIC
  - “abandons.. .. plainly demonstrates the intention not to continue performance of his obligations ..”

## 2.1.3 Consequences of delays by a contractor

- contractor delays beyond the date for completion
  - *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 – party seeking to recover LAD must prove loss
  - In construction contracts would include:
    - Purchasers' LADs
    - Costs of consultants
    - Financing costs

## 2.1.3 Consequences of delays by a contractor

- Delay before completion date and contract is terminated
  1. The delay caused before termination – no LAD, damages will be “at law”
  2. The delay to engage a replacement contractor – recoverable, provided reasonable
  3. Acceleration cost, probably recoverable:
    - New contract – shorter duration as against acceleration, cheaper
    - Acceleration cost lower compared to LAD

## 2.2 OBLIGATION TO COMPLETE ON TIME – REMEDIES OF EMPLOYER

- Right at law to terminate if can demonstrate contractor is unlikely to complete by due date, but delay will probably need to be very serious
- The contractor is obliged to leave the site – status of contractor in respect to land is only that of a licensee

### **3. THE EMPLOYER'S OBLIGATIONS AND CLAIMS OF THE CONTRACTOR**

- To pay the contractor for works (including variations) done
- To allow the contractor to carry out his works without hindrance

# 3.1 Employer's Obligation to Pay – at law

- delay by employer in discharging its payment obligation - no automatic right to terminate
  - “the non-delivery or the non-payment amounts to an abandonment of the contract or a refusal to perform it on the part of the party making the default” – *Freeth v Burr*
  - “So a clear indication or refusal or inability to pay future instalments .. .. repeated failure to pay on time.. .. inference of an intention to pay late habitually so as to derive financial advantage”

# 3.1 Employer's Obligation to Pay

- Delaying or withholding of payments common ploy amongst main contractors
- In the event of rescission, contractor can claim:
  1. outstanding payments
  2. financing charges for late payments (claimable in any case if incurred)
  3. loss of profit
  4. costs of demobilization
  5. claims from suppliers and sub-contractors



# 3.1 Employer's Obligation to Pay

- PAM - clause 26.1(a) termination:
  1. non-payment within the duration for honouring certificate **and**
  2. after serving a notice to pay within 14 days
- PWD does allow for termination due to defaults in payment

# 3.1 Employer's Obligation to Pay

- FIDIC - clause 16.2, contractor may terminate:
  1. Due to delay in certification
  2. Delay in payment of 42 days after payment due
- FIDIC also allows termination if employer fails to provide proof of financing arrangements

# 3.1 Employer's Obligation not to Hinder Progress

- Delays can be caused by employer due to:
  1. Land problems
  2. Late information, e.g. drawings, details
  3. Variations, especially ordered late
  4. Late appointment of nom. S/Cs
  5. Delay by employer's direct contractors or workmen

# 3.1 Employer's Obligation not to Hinder Progress

- Contractor is interested in two respects
  1. Have time for completion extended – i.e. avoid LAD
  2. Claim for costs incurred as a result of delays

# 3.2.1 Delays and extensions of time

- EOT can arise due to:
  1. Delays without defaults by employer –if contract is silent, contractor bears risk-
    - Weather (PAM, PWD, FIDIC)
    - Unforeseeable shortages – PAM (materials only), FIDIC (materials & labour)
    - Governmental actions (FIDIC only)
    - Strikes & lockouts – PAM even if affect plant & materials used, PWD trades affecting works only

## 3.2.2 Delays and costs

- Costs arising out of delays
  - PAM and PWD specifically recognize right to claim costs incurred following delays
  - FIDIC recognizes general right to claim costs, this involves costs involved in variations and others
  - PAM attempts to exclude common law right to claim but PWD is silent, i.e. right is preserved

## 3.2.2 Delays and costs

- How and what to claim
  1. Notification, notification, and notification
  2. Whether cost incurred as a result of delay?
    - Overheads and expenses, if concurrent delay – only costs in carrying out delayed works claimable
    - Materials & other costs escalation, financing charges – includes late release of moiety

### **3.3 Contractor's claim for variations to the contract works**

- Method of determining varied rates
  1. If identical to item in BQ, then apply rate
  2. If of similar nature but executed in diff. conditions – to be adjusted
  3. PAM and PWD – dayworks + 15%, FIDIC – cost + reasonable profit
  4. If varied works substantially affect contract sum, then to be taken into account in rates