

# Singapore Decision Supports Rights of Contractors in Recovering Liquidated Damages

3 September 2020

A recent decision of the Singapore High Court in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd & Ors* [2020] SGHC 165 has confirmed that a contractor need not demonstrate actual loss to exercise a contractual right to recover liquidated damages.<sup>1</sup>

**Background.** The plaintiff, *Comfort Management Pte Ltd* (“Comfort”), was a sub-contractor on a construction project in Jurong, Singapore (the “Project”). In October 2013, it entered into a sub-sub-contract with the first defendant, *OGSP Engineering Pte Ltd* (“OGSP”), under which OGSP would carry out works relating to the air conditioning ducting system and mechanical ventilation system (the “Works”).<sup>2</sup> The sub-sub-contract was expressed to be “back-to-back” with Comfort’s own sub-contract with the employer.

Approximately a year after commencing the Works, OGSP demobilised its team and left the site. Comfort commenced proceedings against OGSP, making a number of claims, including a claim for liquidated damages for delay in completion of the Works. However, despite the delay under the OGSP contract, Comfort was not facing any delay claim from the employer under its sub-contract. In its defence, OGSP therefore argued that Comfort had not suffered any loss, and so should not be entitled to claim the liquidated damages.

**The Judgment.** Vinodh Coomaraswamy J rejected OGSP’s defence.

The Court first rejected OGSP’s argument that, since OGSP’s sub-sub-contract was “back-to-back” with Comfort’s sub-contract, no liability could arise for OGSP unless Comfort had a matching liability under its sub-contract. The Court noted that<sup>3</sup> the term “back-to-back” is “not a term of art, even though it is a term found with some regularity

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<sup>1</sup> [2020] SGHC 165, at [63].

<sup>2</sup> [2020] SGHC 165, at [1].

<sup>3</sup> [2020] SGHC 165, at [62].

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in sub-contracts in the construction industry”, but that the two contracts remained distinct, “with two distinct sets of rights and obligations”.<sup>4</sup>

Vinodh Coomaraswamy J then continued that OGSP’s argument failed properly to understand the role of a liquidated damages clause in a construction contracts. He stated that “*an enforceable liquidated damages clause does not cease to yield damages simply because the party seeking to rely upon the clause has, in fact, suffered no loss*”.<sup>5</sup> Instead, “[Comfort’s] *right to recover liquidated damages in accordance with the clause accrues when the contract is made and does not depend on proof of loss when the contract is breached. Therefore, whether [the employer] in fact imposed liquidated damages on [Comfort] is a legally irrelevant consideration and does not affect [Comfort’s] right to recover liquidated damages from [OGSP] under the [sub-sub-contract]*”.<sup>6</sup>

**Comment.** This judgment confirms that, under Singaporean law, where a party has the benefit of a liquidated damages clause, it will be entitled to recover the stipulated liquidated damages irrespective of whether it has suffered any actual loss. The judgment is in line with those of other common law jurisdictions, including England and Wales.<sup>7</sup>

In doing so, the judgment also highlights a key difference between common law jurisdictions, where priority is generally placed on the parties’ agreed contractual bargain above all else, and many civil law jurisdictions, where courts may have the power to revisit the parties’ bargain and rewrite the contractual regime to soften the impact of certain clauses.

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<sup>4</sup> [2020] SGHC 165, at [62].

<sup>5</sup> [2020] SGHC 165, at [63].

<sup>6</sup> [2020] SGHC 165, at [63].

<sup>7</sup> See, for example, *Jobson v Johnson* [1989] 1 WLR 1026.



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