

Liquidated Ascertained Damages : Can a Main Contractor impose LAD on a Nominated Subcontractor when the Employer did not impose any LAD?

PANTAS ALAM SDN BHD V HAU WAH LETRIK SDN BHD [PA-22NCvC-18-01/2022]

31st May 2023

ISSUES

Often in a chain of construction contracts, when there is delay to the nominated subcontractor's works, the delay may translate to a delay in the overall Project affecting the contract between the main contractor and the employer.

In such circumstances, the employer may impose liquidated ascertained damages ("LAD") on the main contractor who would in turn impose LAD on the nominated subcontractor.

However, if the employer does not impose any LAD on the main contractor, can the main contractor still impose / claim for LAD against the subcontractor? How would the Courts treat such claims considering that the main contractor did not suffer any LAD claims / imposition from the employer?

These questions were answered in the recent decision of the Penang High Court in Pantas Alam Sdn Bhd v Hau Wah Letrik Sdn Bhd [PA-22NCvC-18-01/2022].

BRIEF FACTS

The brief facts of the case are as follows:-

- (a) Asia Green Construction Sdn Bhd ("Employer") appointed the Plaintiff as the Main Contractor in the project known as "Cadangan Mendirikan Satu (01) Blok Rumah Pangsa Kos Rendah 34 Tingkat (349 Unit) termasuk 9 Tingkat Podium Tempat letak Kenderaan dan kemudahan Masyarakat (Hakmilik Strata) diatas Lot 12807, Jalan Merbah, Mukim 12, D.B.D. Pulau Pinang" ("Project");
- (b) Upon the M&E Consultant's Letter of Instructions dated 28.07.2015 ("Letter of Instruction"), the Plaintiff vide its Letter of Award dated 28.07.2015 ("Letter of Award") appointed the Defendant as the Nominated Subcontractor for electrical works;
- (c) The Letter of Award stipulates that the award to the Defendant is made on a back-to-back basis with the main contract between the Plaintiff and the Employer ("Main Contract");



- (d) The Letter of Award also provides that the Employer is responsible to make direct payment to the Defendant for the Defendant's work done and that LAD amounting to RM16,000.00 per day shall be imposed on the Defendant should the delay in completing the nominated subcontract works is due to the Defendant's fault;
- (e) The initial completion date under the Letter of Award was 14.09.2016, but it was subsequently extended to 31.03.2017;
- (f) Disputes arose as to whether the Defendant had completed its scope of works within time and whether the Plaintiff is entitled to LAD.

PROCEEDINGS BEFORE THE COURT

Arising from the disputes between the parties, the Plaintiff commenced a High Court suit to claim for LAD amounting to RM1,312,000.00. The Plaintiff applied for Summary Judgment but the application was dismissed by the Learned Judge and the matter proceeded to full trial.

At trial, the 3 broad issues to be determined are as follow:-

- “6.1 *whether the Defendant had completed all its job scope under the contract by the 31st March 2017;*
- 6.2 *whether there was a delay by the Defendant in completing their job scope; and*
- 6.3 *is the Plaintiff entitled to claim LAD against the Defendant.”*

The principal dispute between the parties is whether the Defendant have to obtain TNB's approval as part of its scope of work. It is not in dispute that the Defendant had completed the physical work within time but TNB's approval was only given after the time for completion.

After examining the evidence lead at trial, the Learned Judge found that “*it is not within the scope of the Defendant's work to obtain any letter of non-objection from TNB*” and that any delay (if any) in obtaining the approval was not due to the Defendant's fault.

Consequently, the Learned Judge finds that the “*Plaintiff has failed to establish a breach of contract by the Defendant entitling them to the LAD as sought*”.

BACK-TO-BACK CONTRACT : EMPLOYER DID NOT IMPOSE ANY LAD ON THE MAIN CONTRACTOR

Further from the above, the Defendant also contended that the Plaintiff's claim should be dismissed on the basis that the Employer had paid the Defendant in full and did not impose any LAD against the Plaintiff:-



- “53. Finally, the Defendant has raised an interesting point which I find is with merits and this pertains to the fact that quite apart from the admitted fact that the employer had paid the Defendant in full for its services rendered, is the fact that the employer has also never launched any claim against the Plaintiff for LAD under the main contract. This was expressly pleaded in paragraph 12 of the Defence as follows...
54. In this regard, it is not disputed that in the Plaintiff’s main contract with the employer, there was provided under clause 8 therein a similar LAD clause for RM16,000.00 per day. There is no dispute that this was never triggered and the employer had never made any claim against the Plaintiff for LAD. Hence, one of the reasons I did not grant summary judgment previously was because I was troubled with the fact of whether the Plaintiff could claim LAD against the Defendant when they were not subject to it by the employer. It would be akin to unjust enrichment of sorts and would in my view be inequitable to allow the Plaintiff to claim LAD against the Defendant for an alleged delay when they themselves were not subject to any claim from the ultimate employer for LAD. The reasonable assumption from these two facts, i.e., that the Defendant was paid in full as well as there being no claim for LAD against the Plaintiff is that the completion of the said project was never delayed.”

In response, the Plaintiff contended that their liability to the Employer is a separate matter and irrelevant to their claim against the Defendant. However, this did not find favour with the Learned Judge as the Letter of Award is back-to-back with the Main Contract:-

- “57. On this issue, the Plaintiff contends that the fact that whether or not they are liable to the employer was the subject matter of a separate contract and irrelevant whereas their claim against the Defendant was premised purely and squarely on the terms of the subcontract. In my view, **I do not find favour with this contention of the Plaintiff as the terms of the agreement between the Plaintiff and the Defendant were back-to-back with that of the Plaintiff and the employer.**”

[Emphasis added]

On this issue, the Learned Judge found that the Plaintiff’s claim should also be dismissed on the ground that the Plaintiff themselves did not suffer any imposition of LAD from the Employer as it would be highly inequitable to allow the Plaintiff’s claim in the circumstances:-

- “58. Hence, quite apart from my reasons above that the Plaintiff’s claim ought to be dismissed on the ground that there were no delay or that any delay was not the fault of the Defendant, **this was an additional ground upon which I would dismiss the Plaintiff’s claim herein.** In my view, **it would be highly inequitable to allow the Plaintiff’s claim for LAD against the Defendant when they themselves were not liable for LAD to the employer.**”

[Emphasis added]

MOVING FORWARD

Following the decision, it is important to note that:-

- (a) In a back-to-back nominated subcontract, it would be inequitable to allow the main contractor to impose LAD on the nominated subcontractor when the main contractor did not suffer any LAD losses imposed by the employer.
- (b) In the event the main contractor suffers any losses arising from the nominated subcontractor's delay (other than LAD by the employer), the main contractor should consider leading evidence of such losses at trial.

If you have any questions or comments on this article, please contact:-

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