Extension of Time : Time is of the Essence Despite Absence of an Express EOT Clause?

SAVELITE ENGINEERING SDN BHD V ASKEY MEDIA TECHNOLOGY SDN BHD [2025] CLJU 1808

30th September 2025

ISSUES

When a construction contract is silent on extensions of time, does this mean that time is no longer of the essence, or can the courts still imply an EOT clause to give effect to the parties' intentions?

Can a contractor rely on equitable estoppel to shield itself from LAD? For example, if the employer has issued a Certificate of Practical Completion, continued to certify and pay progress claims despite delays, or left an EOT application undecided, can the contractor argue that the employer is estopped from later imposing LAD? Or will the contractor's own conduct — such as repeatedly applying for EOTs and not disputing the CNC — defeat such an argument?

And where a contract stipulates liquidated ascertained damages (LAD), is the employer still required to prove actual loss, or does the LAD clause set both the measure and the ceiling for recovery? If the employer's actual loss exceeds the LAD stipulated in the contract, can those additional sums still be claimed, or is recovery capped at the LAD alone?

These questions were examined by the Court of Appeal in the recent case of **Savelite Engineering Sdn Bhd v Askey Media Technology Sdn Bhd** [2025] CLJU 1808.

BRIEF FACTS

The brief facts of the case are as follows:-

(a) **Askey Media Technology Sdn Bhd** ("**Plaintiff**") appointed **Savelite Engineering Sdn Bhd** ("**Defendant**"), to build a two-storey office and single-storey factory in Bayan Lepas Industrial Area, Penang.

(b) The contract sum was RM8,600,000.00, with a completion period of 24 weeks, ending on 04.09.2016.

(c) In the Contract between them, there were several contractual provisions that relates to time and liquidated ascertained damages ("**LAD**"):-

(i) Clause 4 of the Letter of Award ("**LA**") fixed the completion date at **04.09.2016** and provided for LAD at RM3,300.00 per day;

(ii) Clauses 1.0, 1.2 and 6 of Appendix A to the Form of Agreement, repeated the 24-week period, stipulated the completion date, and set out the LAD rate;

(iii) Clause 14 of the Scope of Works ("**SW**") provided that time would be strictly enforced and no EOT would be granted unless the SO gave special consideration in unforeseen circumstances;

(iv) Clauses 30 and 31 of the General Conditions of Contract ("**GCC**") empowered the Superintending Officer ("**SO**") to certify non-completion and deduct LAD, and also to grant extension of time ("**EOT**") in certain circumstances (e.g. force majeure, exceptionally inclement weather, strikes, or instructions by the SO).

(d) Meanwhile, the Plaintiff had entered into tenancy agreements with **Ceva Logistics**, committing to deliver vacant possession of the factory by **13.03.2017**.

(e) The Defendant failed to complete the works on time. A Certificate of Non-Completion ("**CNC**") was issued by the SO on **05.09.2016**.

(f) The Defendant's first EOT application was rejected. A second EOT application was made on 17.07.2017, but no decision was issued by the SO. Subsequently, the Defendant made a third and fourth EOT application, both of which were submitted after the Plaintiff had commenced the present suit.

(g) **Practical completion** was only achieved on **15.09.2017**, resulting in a delay of 376 days.

(h) The SO subsequently granted an EOT of 143 days and imposed LAD for the remaining 233 days, amounting to RM768,900.00.

(i) The Plaintiff initiated a suit in the High Court, claiming for:-

(i) LAD of RM1,240,800 for 376 days of delay (or alternatively RM768,900 after taking into account the SO's grant of 143 days EOT);

(ii) RM1,136,180 for loss of profit from delayed tenancy, and

(iii) RM523,096.50 as compensation paid to the tenant.

(j) The Defendant defended the claim on the following grounds:-

(i) The Plaintiff was **estopped** from claiming LAD on the basis that:-

a) a Certificate of Practical Completion ("**CPC**") had been issued,
b) the Plaintiff had accepted and paid progress claims despite the delay, and
c) the SO had not decided Savelite's 2nd EOT application.

(ii) The Plaintiff's conducts caused the delay ("**Prevention Principle**").

(k) The Defendant also filed a counterclaim of RM721,807.00 for unpaid work, but later withdrew it after recovering the amount via CIPAA adjudication.

(l) The High Court awarded LAD of RM768,900.00 and 5% interest but dismissed the additional claims for loss of profit and tenant indemnity.

(m) Both parties appealed. The Defendant against the LAD award, and the Plaintiff to reinstate its dismissed claims (loss of profits and compensation to tenant). These appeals were heard together.

ISSUES BEFORE THE COURT OF APPEAL

The following, amongst others, were the issues canvassed before the Court of Appeal:-

(a) Whether time was of the essence of the Contract, and in this regard, whether there is a rule of law that if an agreement is silent on EOT, time shall not be of the essence;

(b) Whether the doctrine of equitable estoppel applied in this case; and

(c) Whether the Plaintiff is entitled to LAD, having regard to the effect of sections 56, 74(1) and 75 of the Contracts Act 1950 ("**CA 1950**").

WAS TIME THE ESSENCE OF THE CONTRACT?

The Court of Appeal affirmed that a commercial agreement should be interpreted in a manner which makes business common sense.

Applying this approach, the Court of Appeal held that time was of the essence. The presence of contractual provisions on time and LAD (see paragraph (c) of Brief Facts above) supported the interpretation that time for the Defendant's performance of the Contract was not at large. These clauses would have been rendered nugatory if time was not the essence of the Contract.

> *"[25] Applying the Business Common Sense Construction (Commercial Contract), we have no hesitation to affirm the High Court's Decision that time was indeed the essence of the Contract. Our reasons are as follows:*
>
> *(1) the following provisions of the Contract clearly support the interpretation that time for the Defendant's performance of the Contract was not at large-*
> *(a) clause 4 LA;*
> *(b) clauses 1.0, 1.2 and 6 Appendix A;*
> *(c) clause 14 SW; and*
> *(d) clauses 30 and 31 GCC*
> ***[Contractual Provisions (Time of the Essence of the Contract)]**; and*
>
> *(2) if we have accepted the submission by the Defendant's learned counsel that time was not the essence of the Contract, this would have rendered nugatory all the Contractual Provisions (Time of the Essence of the Contract)."*

Whilst the Court of Appeal recognised that the Contract expressly gave the SO discretion to grant extension of time, the Court stressed that there is no rule of law stipulating that the absence of an express EOT clause ("**Express EOT Contractual Provision**") means that time is not of the essence.

The Court of Appeal further explained that even in the absence of such a clause, an EOT contractual provision may be implied if both the *"officious bystander"* and business efficacy test are satisfied.

> *"[27] With regard to the contention by the Defendant's learned counsel that the absence of a provision in the Contract to grant an EOT for the Defendant to complete the construction of the Factory beyond the Completion Date (**Express EOT Contractual Provision**), in itself, meant that time was not of the essence of the Contract, we are not able to accede to such submission. Our reasons are as follows…*
>
> *(2) whether time is of the essence of an agreement is a question of interpretation of the agreement so as to ascertain the true intention of the parties. There is no rule of law that the absence of an Express EOT Contractual Provision, in itself, means that time is not of the essence of the agreement…*

(3) *even if there is no Express EOT Contractual Provision, the court may imply an EOT contractual provision if two concurrent tests for the implication of an implied EOT contractual provision are fulfilled. We refer to the following judgment of the High Court in Era Kemuncak Jaya (M) Sdn Bhd v Tenaga Switchgear Sdn Bhd [2022] 1 MLRH 208, at [56] -*

"[56] I am of the view that the Defendant has an implied contractual right to grant an EOT to the Plaintiff under the Agreement (Defendant's Implied Right). This decision is premised on the following reasons:

(1) according to the judgment of Peh Swee Chin FCJ in the Federal Court case of Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151, at 169-170, the court can imply a contractual term if the following two tests (2 Tests) are fulfilled cumulatively –

(a) if an "officious bystander" is asked regarding the Defendant's Implied Right, what would be the answer of the officious bystander (Officious Bystander Test)?; and

(b) is it necessary to give business efficacy to the Agreement for the court to imply the Defendant's Implied Right in the Agreement (Business Efficacy Test)?

The 2 Tests have been affirmed by the Federal Court in a judgment delivered by Zulkefli Ahmad Makinudin PCA in See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank Bhd & another appeal [2019] 1 MLJ 25, at [74]-[76]; and

(2) the cumulative application of the 2 Tests is as follows-

(a) the Officious Bystander Test is fulfilled because if an officious bystander is asked whether the Defendant has an implied contractual right grant an EOT for the Plaintiff to complete the works in the

Project, the officious bystander would have unhesitatingly answered "of course"; and

(b) the Business Efficacy Test is satisfied as it is necessary to give business efficacy to the Agreement for the Defendant's Implied Right to be implied by the court in the Agreement "

(emphasis added)."

APPLICATION OF EQUITABLE ESTOPPEL PRINCIPLE

The Court reaffirmed that equitable estoppel has a wide application, including in construction disputes, but emphasised that it must be grounded in the conduct of the parties. Under section 8(2) of the Evidence Act 1950, a party's conduct in the proceedings is relevant to whether estoppel should apply.

> *"[30] A party's conduct is relevant under s. 8(2) of the Evidence Act 1950 (**EA**). Reproduced below is s. 8(2) EA:*
>
> ***"The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto."*** *(emphasis added)."*

The Court of Appeal also held that the Defendant was estopped from denying that time was of the essence, given its own conduct: it never disputed the CNC, submitted multiple EOT applications (including after proceedings had begun), and never sought to invalidate the SO's decisions.

> *"[31] The Defendant was estopped from denying that time was not of the essence of the Contract due to the Defendant's own conduct [relevant under s. 8(2) EA] as follows:*
>
> *(1) the Defendant did not dispute at all the accuracy of the CNC. Nor did the Defendant make any objection regarding the issuance of the CNC by the SO;*

(2) the Defendant made four EOT applications to the SO to extend time for the Defendant to complete the construction of the Factory. In fact, the Defendant's 3rd EOT Application and Defendant's 4th EOT Application were made after the filing of This Suit against the Defendant; and the Counterclaim only prayed for Payment (Defendant's Works) and did not apply for declarations to invalidate -

(a) the CNC;
(b) the SO's Rejection (Defendant's 1st EOT Application); and/or
(c) the SO's 2 Letters (13.1.2020) which granted the SO's EOT (Defendant's Delay) and the imposition of the LAD.

In any event, the Counterclaim was subsequently withdrawn by the Defendant."

However, the Court declined to invoke estoppel against the Plaintiff. The Court found that the main reason for Defendant's delay was due to the Defendant's own default, and it was neither just nor equitable to allow the Defendant to rely on estoppel to avoid liability for LAD.

LAD : EFFECT OF SECTIONS 56, 74(1) AND 75 OF THE CONTRACTS ACT 1950

The Court of Appeal confirmed that where a contract stipulates LAD, **s. 75 of the CA 1950** is the governing provision, displacing **s. 56(3)** (late performance accepted with notice to claim compensation) and **s. 74(1)** (general damages for breach). This is because the contract already provides a specific remedy through LAD.

"[38] Sections 56(3) and 74(1) CA do not apply in this case due to the following reasons:

*(1) clause 4 LA, clause 6 Appendix A and clause 30 GCC have provided for LAD to be paid by the Defendant to the Plaintiff (**Express LAD Contractual Provisions**). The Express LAD Contractual Provisions attract the application of s. 75 CA (When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach);*

(2) in accordance with the maxim of statutory interpretation, generalia specialibus non derogant, s. 75 CA is a specific provision and should be applied in preference to the general provisions of ss. 56(3) and 74(1) CA…"

Under **s. 75 CA 1950**, as interpreted by the Federal Court in **Cubic Electronics v Mars Telecommunications**, the Court of Appeal emphasised three guiding principles. The employer must show a **legitimate interest** in timely completion, the LAD must be **proportionate and not extravagant**, and recovery is **capped at the amount stipulated** in the contract.

> *"[39] With regard to the application of s. 75 CA, Richard Malanjum CJ (Sabah & Sarawak) (as he then was) in the Federal Court case of Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd [2019] 2 CLJ 723, at [74], had delivered the following judgment:*
>
> > *"[74] **In summary and for convenience, the principles that may be distilled from hereinabove are these**:*
> >
> > *…*
> >
> > *(iv) **In determining what amounts to "reasonable compensation" under s. 75 [CA], the concepts of "legitimate interest" and "proportionality" as enunciated in Cavendish (supra) are relevant.***
> >
> > *(v) **A sum payable on breach of contract will be held to be unreasonable compensation if it is extravagant and unconscionable in amount in comparison with the highest conceivable loss which could possibly flow from the breach. In the absence of proper justification, there should not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party**."*

Applying these principles, the Court of Appeal found the LAD of **RM768,900.00**, about **8.95%** of the RM8,600,000.00 contract price, to be reasonable. The Plaintiff had entered into tenancy agreements with **Ceva Logistics**, committing to deliver vacant possession of the factory by 13.03.2017. As the delay prevented timely handover, the Plaintiff risked loss of rental income and had to compensate the tenant. These tenancy obligations demonstrated a legitimate commercial interest in timely completion, justifying the LAD. However, the Court held that recovery was limited to the LAD under s. 75, and the employer could not claim further damages for loss of profit or indemnity.

> *"[40] Based on s. 75 CA (as interpreted in **Cubic Electronics**), we are of the following view…*
>
> > *(5) the Defendant had failed to discharge the evidential burden to satisfy the court that the High Court's Award (LAD) did not constitute reasonable compensation. This decision is supported by the following evidence and reasons…*

(c) in view of the Plaintiff's Legitimate Interest and the proportionality of the High Court's Award (LAD) of the Price, the High Court's Award (LAD) constituted reasonable compensation for the Plaintiff in this case. This is because the High Court's Award (LAD) was neither extravagant nor unconscionable in comparison with the actual total loss suffered by the Plaintiff in this case as a result of the Defendant's Breach (Contract), ie., the Plaintiff's Loss of Profit (Tenancy) and Plaintiff's Indemnity (Tenant); and

(6) once s. 75 CA applied in this case, the Plaintiff could only claim for a maximum sum in the form of the High Court's Award (LAD), namely, an amount "not exceeding the amount so named" in the Express LAD Contractual Provisions. In other words, the Plaintiff could only claim for the High Court's Award (LAD) and not-

(a) the Plaintiff's Loss of Profit (Tenancy); and
(b) the Plaintiff's Indemnity (Tenant).

We are not persuaded that in the light of the Express LAD Contractual Provisions and s. 75 CA, the Plaintiff had a right to be indemnified by the Defendant with regard to the Plaintiff's Loss of Profit (Tenancy) and Plaintiff's Indemnity (Tenant). Hence, we are constrained to dismiss the Plaintiff's Appeal."

DECISION OF THE COURT OF APPEAL

In the upshot, the Court of Appeal dismissed both appeals. The Defendant's appeal against the LAD failed, as the Court confirmed that time was of the essence, estoppel could not assist the Defendant, and the LAD clause was enforceable under s. 75 of the Contracts Act.

The Plaintiff's appeal also failed. While the LAD was upheld as reasonable compensation, the Court made clear that no further damages for loss of profit or indemnity could be recovered beyond the agreed LAD.

The only variation was to the award of interest; it was ordered to run from **26.01.2017** (after the 143-day EOT) rather than from the original completion date. No order for costs was made in the Court of Appeal.

KEY TAKEAWAYS

Following this decision, the following points should be noted:-

(a) **Time can still be of the essence even without an express EOT clause**. Courts will adopt a business common sense interpretation, and may imply an EOT provision if both the officious bystander and business efficacy tests are satisfied.

(b) **Contractor conduct matters**. A contractor may be estopped from denying that time is of the essence if its own actions are inconsistent with that position, such as applying for EOTs (including after the suit was filed) and not seeking declaration to invalidate the CNC or the SO's decisions

(c) **LAD is the ceiling for recovery**. Where a contract specifies LAD, it will be enforced if reasonable, and the employer need not prove actual damages. However, no further claims (e.g. profit or indemnity) can be added on top of the agreed LAD.

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

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