

# Due Diligence and Time of the Essence in Construction Contracts - Can they be implied?

## Overview

The Singapore Court of Appeal recently found – applying strikingly different reasoning to the Court at First Instance - that there is no implied term of due diligence and expedition in a construction contract nor, unless the contract expressly provides otherwise, an implied term that time is of the essence (CAA Technologies Pte Ltd v Newcon Builders Pte Ltd [2017] SGCA 53).

Proceeding with due diligence and expedition on the one hand refers to an obligation to maintain particular rates of progress. Time of the essence, on the other, refers to a time obligation representing a condition such that, if breached, the innocent party will be entitled to terminate the contract.

Notably this was the first time the Singapore Courts had considered the question of implied terms to proceed with due diligence and expedition.

## Facts

- Newcon engaged CAA as subcontractor to supply precast concrete slabs for the construction of a medical technology hub in Jurong, Singapore.
- The contract was by way of a Letter of Intend (LOI) which included a construction programme schedule and contemplated the parties signing a Letter of Award (LOA).
- Newcon duly sent an LOA (which also included a construction programme schedule) for CAA's signature. The LOA was however never signed.
- CAA failed to comply not only with the LOI and LOA construction programme schedules, but also with a revised schedule that Newcon issued granting it an extension of time.
- Newcon accordingly terminated the contract
- CAA then commenced proceedings claiming damages for wrongful termination. Newcon counterclaimed damages for breach of contract.

## First Instance

In brief overview, at first instance the High Court implied two terms into the contract, both of which were found to have been breached by CAA. First, an implied obligation (in fact, not law) to proceed with the works with due diligence and expedition. Second, an implied term that time was of the essence.

Further, CAA was also found to have breached an express obligation requiring it to *"follow the site progress ... including any revisions to construction programme schedule..."* (Clause 2 of the LOI).

It was found that both the implied terms and express term represented conditions of the contract, such that CAA's breaches of those terms represented a repudiatory breach entitling Newcon to terminate either under the common law, or under the contract (the latter by reason of the implied term making time of the essence).

## Court of Appeal

The Court of Appeal upheld Newcon's entitlement to terminate the contract, but on completely different grounds.

As regards the breach of the express obligation at Clause 2 of the LOI, the Court of Appeal held that it was not a condition of the contract. In other words, that time was not of the essence.

Chong J observed that the *"normal rule"* is that time is not of the essence in construction contracts, unless it is expressly so provided. It was held that in the context of the fairly long 15-month contract duration, it was not likely the parties intended that any failure to meet any interim timeline would give Newcon the right to terminate.

Nevertheless, the Court concluded that CAA's breach of the express obligation at Clause 2 of the LOI alone justified termination, as it deprived Newcon of substantially the whole benefit of the contract.

Turning to the Court's findings on the implied term to proceed with due diligence and expedition, on the facts, and following the approach of the English Courts in *Leander Construction Ltd v Mulalley and Company Ltd* [2011] EWHC 3449 (TCC), the Court of Appeal concluded that the term should not have been implied into the contract.

Chong J observed that due diligence clauses are commonly found in standard form construction contracts in Singapore, which parties have recourse to. It was reasoned that if parties ultimately agree a contract without a due diligence clause, it may well indicate that they elected *not* to include such a clause.

On the facts, the Court also considered it significant that the LOA prepared by Newcon contained a due diligence clause, which suggested that at least Newcon had contemplated including an express term as to due diligence but decided not to include it in the LOI.

Accordingly, it was found that there was no true gap in the contract which the parties had failed to contemplate and which would justify the implication of a due diligence obligation.

The Court also held that it would usually not be necessary to imply due diligence terms into construction contracts, as they already provide for a certain completion date. On the facts, the Court of Appeal noted that CAA's scheduled deadlines had contractual force and there was no necessity to imply a term of due diligence in these circumstances.

Finally, the Court noted that the High Court had justified the implication of the due diligence and time of the essence terms "*in order to*" give Newcon the right to terminate, but only "*if CAA were guilty of persistent breach of its obligation of due diligence and expedition which evinces either an inability to perform its contractual obligations or an intention no longer to be bound by the contract*".

This, Chong J observed, was no different to allowing Newcon to terminate in circumstances where CAA's breaches deprived it of substantially the whole benefit of the contract, which in itself would have justified the termination under common law. Hence, there was no need to imply the terms and, in any event, terms cannot be implied in fact *in order* to give a party a specific remedy which the parties did not expressly provide for.

## **Conclusion**

This significant Court of Appeal judgment confirms in no uncertain terms that the High Court's implication of terms into a construction contract to proceed with due diligence and expedition, and that time is of the essence, was an anomaly, and that the Singapore Courts will be very slow to do so.

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