

Extensions of time in construction contracts

Jo O'Dea

In an extension of time claim, blame for the delay was a relevant consideration when assessing what was “fair and reasonable”.

In *CAJ v CAI* [2021] 5 GCA 102, the Singapore Court of Appeal considered the issue of extensions of time in construction contracts. If the extension of time (EOT) clause is invoked, what should the Court consider when deciding if the extension was reasonable?

CAJ v CAI

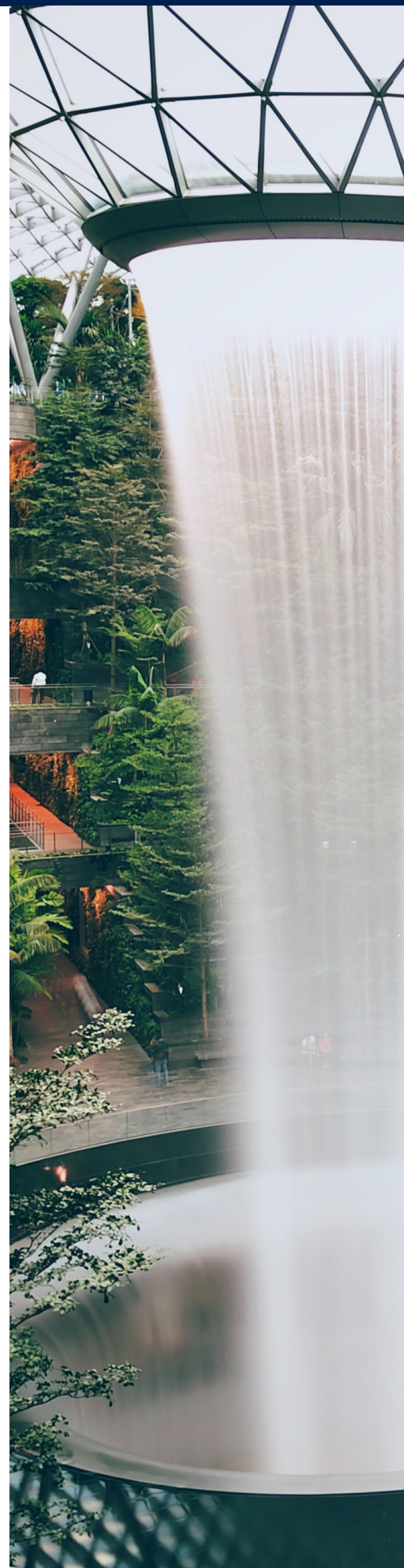
In this case, the contractor was engaged to build a silicon plant for the owner. The contractor went over the scheduled completion date with “fixes” and there was a dispute between the parties about the cause of these delays. The owner commenced an arbitration claiming damages caused by the delays. The contractor claimed that the delays had been caused by the owner’s instructions – a not uncommon situation in any construction project.

The relevant construction contract had an EOT clause that allowed the contractor an extension of time if it was “reasonable and fair”. Part of the problem was that the contractor did not claim the EOT clause was relevant until closing submissions in the arbitration. The owner objected to the late introduction of this defence but the arbitral tribunal allowed it and considered the EOT defence. The owner successfully appealed to the Singapore Court of Appeal about the arbitral tribunal’s consideration of the late EOT submissions on the basis that this was a

- i. breach of the arbitral tribunal’s authority; and
- ii. a breach of natural justice.

In deciding this issue, the Court of Appeal looked at the arbitral tribunal’s ability to determine a very late, unspecific defence submission and concluded that this was not within the tribunal’s power because it breached the principles of natural justice. The Court held that the owner did not have a fair and reasonable opportunity to respond to the EOT defence or to present its case in response (based on the evidence that had already been submitted in the arbitral proceedings). So, when the arbitral tribunal allowed and ruled on the EOT defence in the Award, the owner was denied the right to be heard.

It is interesting to note that once the Court held the arbitral tribunal had been in breach of its duty to comply with natural justice, the Court then turned to look into the substance of the claim despite the parties’ agreement to use arbitration for dispute resolution. The rationale for this was that the court is empowered





to make consequential or ancillary orders to give effect to the setting aside of the arbitral tribunal's decision. The Court wasn't using "general or residual powers" in contravention of Art 5 Model Law. Rather, it used a power that flows from its express jurisdiction under Art 34(2)(a)(iii) Model Law to set aside an award, or part of it. The Court stated that if it did not look into this issue, the actual award would be "completely hamstrung" and left in limbo. The owner would then be left with the "wholly unattractive and uncommercial proposition of having to re-commence fresh arbitration proceedings, assuming that is even possible given the effluxion of time".

The Court then considered what it needed to look at in relation to the EOT clauses. It determined that blame was not a basis for determining who was more or less at fault for the delay. More important was a factual assessment of the factors causing the delay. Once this is done, then any blame can be looked at to assess what a "fair and reasonable" EOT would be. To do this, the Court looked at the responsibility of each party for the delay. In this case, the Court considered that it had to perform a fact-based assessment to determine what was "fair".

It is important to note that this was a decision by a Singaporean Court and different jurisdictions may take a different approach when considering how to interpret EOT clauses in construction contracts. As with any contract, it will depend on the terms of the clause included in the relevant contract(s).

CONCLUSION

An overriding theme in all EOT dispute cases seems to be that whenever there is a delay event, "real-time" documenting of the cause and effect of the delay will help determine whether the contractor is entitled to an EOT and if so, the extent of the EOT and any time-related costs. If the Court has to make a determination about cause of the delay and what is "fair", this type of documentation will be more useful than any retrospective delay analysis based largely on assumptions.

An independent review of the available contemporaneous evidence may stop or reduce the escalation of any dispute. And if there is a formal claim, don't forget to give proper notice in terms of the contract referencing the clause(s) relied on as grounds for the EOT.

ABOUT THE AUTHORS



Jo O'Dea is a qualified lawyer, with a wide range of experience having worked as a member of NZDRC's Knowledge Management team providing technical support to the Building Disputes Tribunal. She has also worked as a contracts specialist for UNICEF, and as a solicitor in New Zealand and the United States.

