FEATURE ARTICLE

DIAMOND GLASS SLICES DAMAGES IN AIRPORT CONTRACT

In ***Diamond Glass Enterprises Pte Ltd v Zhong Kai Construction Co Pte Ltd and another*** [2022] SGHC (A) 44 a sub-subcontractor on the Singaporean Changi Airport construction project won a partial appeal in a judgment which ensured Singaporean law was aligned with English law. Zhong Kai (a subcontractor) could not accrue liquidated damages post-termination of the contract.

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Background in Singapore

Both Diamond Glass (**DG**) and Zhong Kai (**ZK**) were Singapore-incorporated companies. DG was a supplier of tools and glassworks for equipment buildings and associated works to ZK on the Changi Airport project.

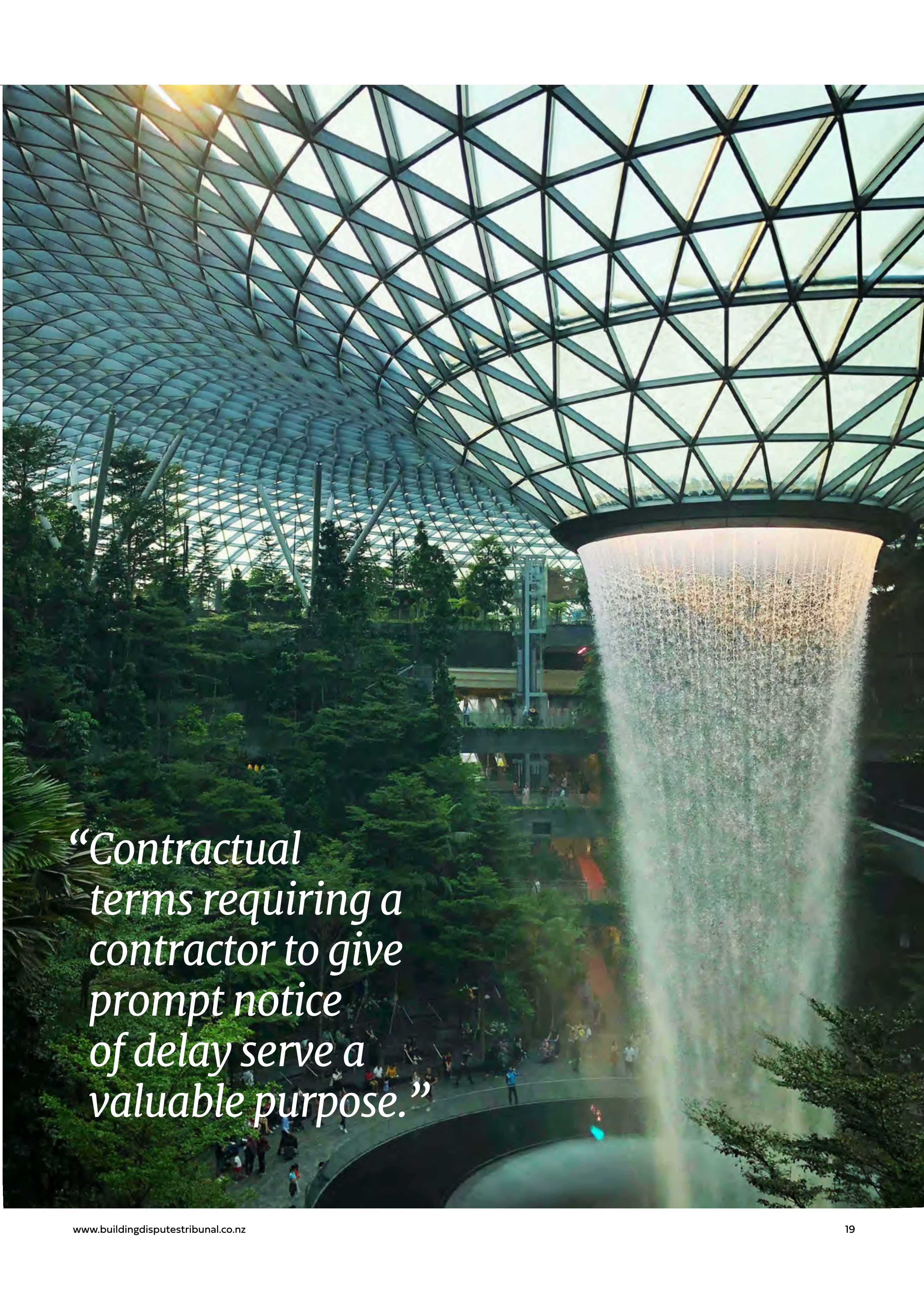
This project was let to a third-party main contractor. DG failed to complete its contracted works on time (it abandoned the works) and ZK replaced DG with a further contractor which finished the works on 30 September 2018. ZK accepted DG's repudiation of the contract (for alleged lack of payment). According to DG the delays were caused by ZK and others further up the contractual chain.[1] In the end, DG's reasons for the delay were irrelevant.

DG failed to apply in writing for an extension of time as a condition precedent to obtaining such an extension.[2] It was required to do this within 30 days from when ZK allegedly caused the delay.[3] This failure proved problematic.

1 *Diamond Glass Enterprises Pte Limited v Zhong Kai Construction Co Pte Ltd and another* [2022] SGHC (A) 44 at [14].

2 At [83], referring to clause 4 of the subcontract.

3 At [84].



"Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose."

Notice conditions to be strictly construed and implemented.

→ This case from Singapore confirms contracts requiring notices of extension of time create a condition precedent. Notices should be issued promptly if they are to be relied upon.

A lower court decision granted $501,800 in liquidated damages to ZK. On appeal, Justice Quentin Loh delivered the judgment for the unanimous three judge bench and reduced the liquidated damages against DG in favour of ZK by $165,000 **(Judgment)**. This was on the basis the contract was held to terminate on 1 July 2018,[4] and 92 days' worth of damages were retracted.

Initial uncertainty in England

Were liquidated damages correctly ascertained in the Judgment? The Singaporean position that a principal contractor may rely on the contract's liquidated damages provisions even when the contract is terminated had been left somewhat uncertain by an appellate decision of the English Court of Appeal. The confusion was created by the decisions *Triple Point Technology Inc v PTT Public Co* [2019] EWCA Civ 230 (*Triple Point* (CA)) as overturned in the UK Supreme Court in *Triple Point Technology Inc v PTT Public Company Ltd* [2021] UKSC 29 (*Triple Point* (SC)). Even *Triple Point* (SC) did not explicitly affirm the correctness of the Singaporean position.

In both *Triple Point* (CA) and (SC) the main question was how to apply a clause imposing liquidated damages for delay in circumstances where the contractor or supplier never achieved completion. The other issues concerned the interpretation of particular wording in the contract before the two Courts.[5]

In *Triple Point* (CA) three different approaches emerged in answer to the question of whether an employer (here, ZK) can rely on a clause imposing liquidated damages for delay in circumstances where the contractor (here, DG) never achieved completion due to termination:[6]

1. the clause does not apply;
2. the clause only applies up to termination of the contract;[7] and
3. the clause continues to apply until the replacement contractor completes the works.

In considering these approaches, Sir Rupert Cross noted:[8]

> *The textbooks generally treat category (ii) as the orthodox analysis, but that approach is not free from difficulty.*
> *… In my view, the question whether the liquidated damages clause (a) ceases to apply or (b) continues to apply up to termination/abandonment, or even conceivably beyond that date, must depend upon the wording of the clause itself. There is no invariable rule that liquidated damages must be used as a formula for compensating the employer for part of its loss.*

4 At [63].
5 *Triple Point* (CA) at [1].
6 *Triple Point* (CA) at [106].
7 That is, in the manner of *LW Infrastructure Pte Ltd v Lim Chan San Contractors Pte Ltd* [2011] SGHC 163, to be addressed below.
8 *Triple Point* (CA) at [110].

In Singapore, in *LW Infrastructure*, the Court adopted the orthodox analysis in holding that the liquidated damages clause only applies up to termination of the contract. At [58] of the Judgment, *LW Infrastructure* was preferred:[9]

> *18 … It is well-established that the effect of termination on liquidated damages is only that no claim to liquidated damages can be brought in respect of the period after termination. In the absence of express provision to the contrary, termination of the contract does not affect a claim to liquidated damages in respect of the period before termination.*

Conversely to *Triple Point* (CA), in *Triple Point* (SC) Lady Ardern held for the Court:[10]

> *35 … Parties must be taken to know the general law, namely that the accrual of liquidated damages comes to an end on termination of the contract (see Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, 844 and 849). After that event, the parties' contract is at an end and the parties must seek damages for breach of contract under the general law. That is well-understood…*

Decision in Singapore

In Singapore liability for accrued damages stops after the date of termination of the contract. Primary obligations under the contract come to an end on termination, and the subcontractor cannot be held liable for delays after that date. In the absence of special provisions in the contract to the contrary, in the judgment this saved 92 days' worth of damages until the sub-contract could be completed.

The Court rejected DG's attempt to further reduce damages by blaming ZK for delays DG had itself caused.

In oral submissions DG attempted to rely on *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] NTSC 143 to suggest that, notwithstanding its own failure to seek an extension of time under clause

9 *LW Infrastructure Pte Ltd* at [58].
10 Reiterated by Lord Leggatt in *Triple Point* (SC) at [86].

4 of the contract, ZK was still liable for the cost of delays because of its conduct. *Gaymark* is authority for the proposition that when a principal is responsible for project delays, despite a subcontractor's failure to properly apply for an extension of time which left time at large, the principal is prevented from claiming liquidated damages,[11] subject to the terms of the contract. This submission was roundly rejected.[12] The Singaporean approach endorsed the approach in *Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EHWC 477 (TCC):[13]

> *88 However, the court in the UK case of Multiplex Constructions (UK) … considered Gaymark and cast significant doubt on its correctness (see Law and Practice of Construction Contracts at paras 9.188 and 9.195; Keating at para 8-034). Indeed, the court in Multiplex stated as follows (at [103]):*
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> *… Whatever may be the law of the Northern Territory of Australia, I have considerable doubt that Gaymark represents the law of England. Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent. If Gaymark is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option the contractor could set time at large.…*

Justice Loh agreed with *LW Infrastructure Pte Ltd* and *Triple Point* (SC), which DG relied on.[14]

Conclusion

The sending of timely notices for extension of time is vital. Failure to do so might inhibit access to relief in construction contracts bound by Singaporean law. The rejection of *Gaymark* in the Judgment was the first time for this to happen in Singapore and is a welcome clarification: the notice condition must be strictly construed and implemented.

The Judgment provides clarification for the Singaporean position and effectively aligns it with English law.

11 At [87]; *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* [1999] NTSC 143 at [69].
12 At [87]–[89].
13 *Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EHWC 477 (TCC) at [88].
14 At [57].

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