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SINK OR SWIM? WHO OWNS THE FLOAT IN A CONSTRUCTION PROJECT IN SINGAPORE?

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Derek **LOH**
MA (Cantab); *Advocate and Solicitor (Singapore)*;
Partner, TSMP Law Corporation.

Natalie **WONG**
LLB (Hons) (Durham University); *Advocate and Solicitor (Singapore)*;
Associate, TSMP Law Corporation.

I. Prologue

1 The recent High Court decision in *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd*[1] ("*Crescendas Bionics*") made reference to a term that is of some rarity in Singapore's law reports – float. The issue of float and its ownership is something that the body of construction law has attempted to navigate (infrequently) but has more often than not found itself circumventing. The *Crescendas Bionics* case casts light on one of the more enigmatic and intriguing topics in construction contracts: "Who owns the float in a construction contract?"

2 Before diving into the question proper, it is helpful to remind ourselves about the nature of float. Simply put, float is the period of time during which, if an activity is delayed, it will not have the effect of delaying the completion of the works, or a succeeding activity.[2]

3 Likewise when speaking of "ownership", it is not so much possession but rather the right to use or consume. So a party who "owns" the float is entitled to delay, or cause delay to, an activity without the other party being entitled to claim relief,

1 [2019] SGHC 4.
2 Julian Bailey, *Construction Law* vol II (Informa Law, 1st Ed, 2011) at para 11.75.

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and compensation, for that delay if it does not exceed the float time. Put more provocatively, a party who owns the float can delay the progress of the works with impunity provided it keeps the delay within the available float.

4 Compounding the situation are the entities that can own the float. An ordinary and rational person would have come to the conclusion that ownership of float would be binary – either by the contractor or the employer. Unfortunately, even the concept of ownership is complicated. Float can be owned not only by the employer or the contractor, but also by the project. In the case of ownership by the project, this is a surrogate to say that no party owns the float and the float is available to be owned, used, and consumed on a first come, first served basis. In other words, a project float would be owned not by either party, but by the greater cause, *ie*, the project. The person who first causes the delay and seeks to avail himself of the project-owned float will be entitled to use the float to the extent of the period of that first delay.

5 Given the complexities involved in its ownership, the importunate question is how one can determine, or what can aid in ascertaining, ownership of float.

II. The antediluvian position

6 It is indisputable that unless the contract expressly provides otherwise, a contractor is entitled to plan and perform the works as he pleases, provided that he finishes it by the time fixed in the contract.[3]

7 When considered in the context of a simple contract to complete construction works by a specified contractually agreed time, the starting proposition that a contractor can complete the works in any order he wishes, and with full use of the time

3 *Greater London Council v Cleveland Bridge and Engineering Co* (1986) 34 BLR 50.

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specified under the contract, it is hardly contestable that float (if it arises) is owned by the contractor.

8 Just as humankind has evolved beyond wattle and daub, construction projects and their administration have become considerably more sophisticated, and today practically all projects of note or of value will involve contracts that require some sort of programme for the construction works (coupled with the ability to revise the programme) and an obligation to proceed with due diligence and expedition. With the advent of the obligation to furnish and work to a programme, a contractor's right to work to his convenience and plan was undermined. This in turn changed the dynamics in relation to any buffers or float in the contractor's plan for the construction works he was to undertake.

III. The default position?

9 The root of the conundrum with float and its ownership is that the default position on ownership is unclear. One would have thought that like the law relating to extension of time and completion dates, or variations to the works, customary ownership of float would be delineated or underpinned by a clear legal proposition. That, unfortunately, is not the case.

10 The English position appears inclined in favour of a project-owned float as a default. The Society of Construction Law Delay and Disruption Protocol, published by the Society of Construction Law (UK) in 2002 ("SCL Protocol"), holds as one of its core principles the following: "Unless there is *express provision to the contrary in the contract*, where there is remaining float in the programme at the time of an Employer Risk Event, an extension of time should only be granted to the extent that the Employer Delay is predicted to reduce to below zero the total float on the activity paths affected by the Employer Delay" [emphasis added]. Essentially, the position under the SCL Protocol is that float is owned by the project and may be used at will by the employer or contractor, subject to chronological precedence.

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11 Contrast this to the position taken by the Singapore High Court in the *Crescendas Bionics* case where Tan Siong Thye J approved the decision in *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd*[4] ("*Lian Soon Construction*"), namely that the start point of any analysis on float is that the contractor should be entitled to use of the float in preference over the employer. These two cases involved quite different conditions of contracts but came to similar outcomes – the float belongs to the contractor. Beyond this nod in favour of the contractor, both cases do not engage in substantial reasoning or rationale as to the premise of float ownership.

IV. The contract

12 This brings us back to the original question – in the context of modern construction contracts, who owns the float? All of us are familiar with the old aphorism, "What does the contract *say*?" Indeed, most standard form contract conditions attempt to address a plethora of issues with one glaring exception – in the case of float, practically all contracts do not appear to have even considered the issue, let alone address it.

13 That said, the wording used in some standard form contracts is somewhat clearer in its indication of float ownership. The Fédération Internationale Des Ingénieurs-Conseils ("FIDIC") Red Book is explicit that a contractor will be entitled to an extension of time where his works will be delayed, *whether beyond the contract completion date or not*. Therefore, so long as the contractor will face a delay in the progress of his works for which he is not responsible, the contractor becomes entitled to an extension of time regardless. While just shy of being specific, this distinct premise for a time extension strongly suggests that the contractor owns the float under the FIDIC Red Book.[5]

4 [1999] 3 SLR(R) 518.

5 Julian Bailey, "The Society of Construction Law Delay and Disruption Protocol: a retrospective analysis" (2015) 31 Const LJ 69, cited in Andrew (*cont'd on the next page*)

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14 In the context of Singapore and in terms of the contractor owning the float, the Real Estate Developers Association of Singapore ("REDAS") Design and Build Conditions of Contract is the standard form that perhaps comes closest to the FIDIC Red Book, although it would be somewhat optimistic to suggest that the REDAS standard form is as perspicuous as the FIDIC Red Book. Clause 16.1 of the REDAS standard form states that the contractor may apply for an extension of time if he is or will be *delayed* before or after the date of completion.

15 The wording of the REDAS standard form is less obvious but could arguably be read to say that the contractor is entitled to an extension of time regardless of the delaying event affecting the completion date. On this premise, it is possible to contend that the contractor owns the float under the REDAS standard form.

16 In contradistinction, the Joint Contracts Tribunal ("JCT") standard form permits an extension of time only where the effect of the delaying event causes the construction works to be completed *after* the contract completion date. To that extent, one may fairly conclude that the project owns the float.[6]

17 Similarly, the Singapore Institute of Architects' Articles and Conditions of Building Contract ("SIA standard form") also makes express that the contractor is only entitled to an extension of time for delay *in completion*, *ie*, a delay to the completion date. The consequence then is that under the SIA standard form (as with the JCT standard form) the project owns the float.

18 Then there are the contracts which befuddle, namely the Public Sector Standard Conditions of Contract for Construction Works ("PSSCOC"). Clause 14.3(3) of the PSSCOC standard form

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Burr, *Delay and Disruption in Construction Contracts* (Informa Law, 5th Ed, 2016) Appendix 3 at p 1113.

6 Julian Bailey, "The Society of Construction Law Delay and Disruption Protocol: a retrospective analysis" (2015) 31 Const LJ 69, cited in Andrew Burr, *Delay and Disruption in Construction Contracts* (Informa Law, 5th Ed, 2016) Appendix 3 at p 1113.

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allows the superintending officer to take into account any events which will delay completion of the works in granting any extensions of time to the contractor. This suggests that the float is owned by the project.

19 Clause 14.3(3) then goes on to state that the superintending officer can also take into account any concurrent delaying events. This reference to concurrent delaying events (not found in the other Singapore standard forms) would suggest that the contractor does not own the float.

V. What about the programme?

20 It is axiomatic to say that float derives its existence from the programme for the works. If so, does the answer to float ownership lie in the nature and effect of programmes? There is certainly credence in the suggestion that a significant factor to consider in determining ownership of float is the effect of the construction programme and how the parties treat the programme under the terms of the contract.

21 The typical construction programme is prepared by the contractor and submitted to the employer or certifier. It sets out the stages, phases, segments and schedule of the major construction works for the project. It is against the chart or timetable contained in a programme that contractors and employers are able to measure or determine the actual physical progress of the works from or against that which was planned, and to consider any action or adjustment to resourcing to address or ameliorate difficulties. More importantly, it is on the basis of such a programme that the contractor has priced its bid for the works, having factored both the optimum time and the costs to undertake the works.

22 On this foundation rests the primary contention that the contractor owns the float. Throughout the tender process, and up until the execution of the contract, the contractor would have priced for the project to be carried out within a certain timeframe, including buffers in time for each type or phase of

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works to allow for the likelihood (if not reality) that the contractor will invariably encounter events of delays during the progress of the works. These buffers, essentially the float, will naturally form a part of the construction programme of the project (whether expressly indicated or otherwise).

23 That said, to assert that the contractor owns the float as it is the contractor who draws up the programme is by no means beyond contestation. The difficulty to any such contention is rooted in the contractual effect of the programme – does the programme form part of the contract and do the obligations, particularly the timetable or schedule, in the programme bind the parties?

24 If parties agree that the programme is an integral part of the contract that binds them both, then the float ought to belong to the contractor. After all the schedule and planning of the works (and all the time allotted to each aspect) is an intrinsic part of the agreement between the parties to which the parties are required to adhere.

25 On the other hand, where the employer is not contractually obliged to approve (or accept) the contractor's programme, the employer is essentially not bound by the contractor's suggested or planned sequence of works, nor is the employer bound by the timetable for the respective phases of works within which confines the contractor purports to be able to complete the relevant works. In this instance, arguably the float belongs to the project and becomes available for use by either party on a first come, first served basis. After all, if the programme does not form part of the contract, one cannot expect the parties to be bound by the pricing, sequencing, and methodology of the contractor, and by extension the contractor's in-built float.

26 It seems reasonably apparent that:

(a) Where the construction programme is expressly required to be agreed upon by parties, the float is to be used for the benefit of the contractor.

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(b) Conversely, where the construction programme submitted by the contractor, including the float incorporated into the programme, is not subject to approval and has no contractual effect, then it should follow that the project owns the float and the float is to be consumed on a first come, first serve basis.

27 The difficulty arises where a contract provides for a contractor's programme to be subject to approval or acceptance by the employer or the certifier but then proceeds to negate the contractual effect of any such acceptance or approval of the programme. Unfortunately, this is precisely the case in a couple of the most commonly used standard forms of contracts in Singapore. Both provide that notwithstanding that the contractor's programme is subject to acceptance (by the contract administrator or otherwise), the employer is not bound by or to the contractor's programme.

28 First, there is the PSSCOC which says the acceptance of the programme by the contract administrator (the superintending officer) does not relieve the contractor of any of his obligations to execute and complete the works in accordance with the contract and by the completion date.[7] Therefore, while the programme is subject to acceptance (and agreement), it is no more than a guide and has no contractual effect.

29 The REDAS standard form is even more explicit as to the extent to which the employer is not bound by a contractor's programme and that the programme has little effect. Clause 2.9.3 expressly reads "Acceptance by the Employer's Representative of any programme or revised programme in accordance with this clause shall not in any way imply that the programme so accepted is feasible, suitable or appropriate and the Employer's rights under the Contract as to time shall not be impaired in any manner whatsoever by such acceptance".

7 Public Sector Standard Conditions of Contract for Construction Works (7th Ed, July 2014) cl 9.3.

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30 The fact that a programme is subject to approval by but is not binding on the employer opens another argument: if the employer accepts but is not bound by the programme, should the float then be owned by the project and available for use by the employer given that the employer plainly disavows the very existence of the float despite being aware of it? There is certainly merit to contend that in these circumstances the employer ought not to have any right to use the float.

31 For completeness, it bears mention that the contractual effect of the contractor's construction programme is much clearer in the SIA standard form. Clause 4.2 of the SIA standard form provides, "Approval of the programme by the Architect shall signify his agreement with the proposed order or sequence of working in the programme …" Under the SIA standard form, once the architect (*ie*, certifier) agrees to the programme of the contractor, the parties are bound by it and are expected to comport with it, and the float is owned by the contractor.

VI. Main contractors *versus* subcontractors

32 As between a main contractor and its subcontractor, the question of float ownership can also arise. The float spoken of here is still the float that has been built into the master programme of the main contractor that is submitted to the employer. There is some case law that says a subcontractor's delay that erodes the float built into the master programme by a main contractor does not give rise to any entitlement to damages by the main contractor against the subcontractor. In *Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd*,[8] the court took the position that if the subcontractor's delay is absorbed by and does not exceed the float, the main contractor should not be able to recover from the subcontractor damages for the subcontractor's delay. This is because if the float is not exceeded, the main contractor does not suffer a critical delay to his works and, moreover, does not become liable to pay

8 (1999) 66 Con LR 119.

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liquidated damages to the employer. Accordingly, there is no loss incurred by the main contractor that can be visited on the subcontractor.

33 In that sense, it is interesting to appreciate the notion that a main contractor may own the float against the employer but does not quite own it against its subcontractor (unless the subcontract specifies otherwise). While an employer's delaying events may not be allowed to eat into the float of the main contractor, a subcontractor's theoretically can.

VII. Making sense of it all

34 It would seem that the principle of a project-owned float as a default is the least objectionable to many. However, providing joint or project ownership of the float (as the SCL Protocol does) as a default presents its own logical challenges. What amounts to "an express provision to the contrary"? We have yet to come across a widely used standard form contract or even the bespoke portions of a construction contract (be it the letter of award/acceptance, the particular conditions, the special conditions, the preliminaries, the articles of agreement *et al*) with a specifically drafted provision that expressly and explicitly addresses the issue of float ownership. There would be very few practitioners of construction law that have encountered that unicorn contract containing the magic words "The float in the project shall belong to …".

35 As mentioned earlier, Singapore judicial precedent appears to run contrary to the precept that the default is for the project to own the float.[9] The point is perhaps most succinctly encapsulated by the statement of Warren Khoo J in *Lian Soon Construction* when he said "the contractor is entitled to have the time initially allowed him by the contract to complete the works initially comprised in the contract, and any 'float time' which he

9 *Crescendas Bionics v Jurong Primewide Pte Ltd* [2019] SGHC 4; *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 3 SLR(R) 518.

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has within that over-all time is his for him to use".[10] However, as there is no clear statement in either *Lian Soon Construction* or *Crescendas Bionics* as to the premise or grounds for the contractor's ownership of float, it simply cannot be definitively said that the Singapore courts have determined as legal principle that float is owned by a contractor as a matter of default. There is every chance that both Tan J and Khoo J had arrived at their respective decisions based on their perception or interpretation of the wording in the relevant contracts and no more.

36 There is no definitive resolution to the quandary presently. Perhaps the answer lies somewhere in between these two seemingly contrasting and rather sweeping viewpoints. We believe that float ownership will depend primarily on the intent of the contract in question. The first port of call in ascertaining float ownership is to look at the manner in which delay is treated, characterised and addressed in the extension of time provision. If the wording of the contract clearly grants the contractor an extension of time for an event of delay regardless of its impact on the completion date, then the float ought to belong to the contractor.

37 If the extension of time provision is unclear, then one should look at how the contract treats the programme for the works submitted by the contractor. If the programme has contractual effect and obliges both the contractor and the employer to comply with the dates or timetable set out in the programme, then arguably the float is owned by the contractor only. After all, if nothing else, the employer has the benefit of the contractor's best price based on this agreed contractual programme and it seems fair that the contractor retains the time buffers or float he has built (and priced) into his programme to cushion against any delays caused by the contractor himself.

38 On the other hand, if the programme does not have any contractual effect, our view is that the float must be owned by

10 *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 3 SLR(R) 518 at [31].

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the project and either party to the contract can avail itself of the float on a "first come, first served" basis in chronological order of delay – the issue of concurrent delay, tempting a discussion as it may be, does not arise here. Where the project owns the float, the identity of the true party at fault in a concurrent delay, or a truly concurrent delay in itself, ought not to affect the absolute amount of time absorbed by the float.

VIII. Conclusion

39 The question of ownership (and use) of float remains rather vexing and there is no silver bullet or magic potion to resolve it.

40 While the concept of project-owned float as a default is, being neutral, seemingly the most attractive stance to adopt (not least because it is the most academically convenient), one must avoid being seduced by superficiality or appearances. Such a precept simply ignores the effect of contractual intent and risk apportionment that the parties may have agreed on. Moreover, there is judicial precedent that inclines to float being owned by the contractor as a default. It is our view that the better default position is that articulated by the Singapore courts – the contractor owns the float.

41 Ultimately, float ownership must turn on how the contract perceives and addresses delay as well as the contractual effect of a construction programme.

42 That is unless of course one encounters that special unicorn ...

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