

CONSTRUCTION & PROJECTS

Damages for Defective Construction – Court Determines When to Award Cost of Cure

Introduction

In construction claims, the question of damages is often one of the key areas of dispute, given the importance of liquidity in the industry and the potential impact that a substantial amount of claims can have on the solvency of a company. Issues such as the justification and basis of claims, quantum of damages, and validity of liquidated damages clauses frequently take centre stage.

In a claim for breach of contract for defective construction, a party may seek the "cost of cure" as the basis for damages, meaning the cost required to rectify the alleged defects. In *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd and another appeal* [2025] SGHC(A) 4, the Singapore High Court (Appellate Division) ("**Court**") considered whether a party is entitled to the "cost of cure" as damages even if it does not intend to rectify the defects. This is of particular interest as courts in different English and Singapore cases had expressed different views on whether the party's intention to rectify the defects is relevant to the question of whether the "cost of cure" should be awarded as damages.

The Court held that an intention to cure is neither a prerequisite for the award of the cost of cure, nor does it carry a significant weight. Rather, it is only one of the factors to be taken into account when assessing whether it is reasonable and proportionate to seek the cost of cure as damages. Accordingly, the Court disapproved of a previous decision of the General Division of the High Court in *JSD Corporation Pte Ltd v Tri-Line Express Pte Ltd* [2023] 3 SLR 1445 ("**JSD Corp**"), which had expressed the opposite view.

Taking into account the relevant factors, including the claimant's lack of intention to rectify the alleged defects, the Court found that it was not reasonable or proportionate to award the cost of cure to the claimant. As the claimant had not led any evidence of a diminution in value caused by the alleged defects, the Court awarded only nominal damages.

This Update provides a summary of the key points of the Court's decision.

Brief Facts

The claimant, Terrenus, had engaged the respondent, Attika, as the main contractor for the construction of a solar power generation facility pursuant to a Main Builder Agreement ("**MBA**"). In the

course of the project, Terrenus terminated Attika's engagement on a without default basis, as it was entitled to do under the MBA.

Terrenus subsequently commenced proceedings against Attika for damages arising from allegedly defective works. In particular, Terrenus alleged that Attika failed to ensure that solar panel mounting structure rods ("**PEG Rods**") were installed to the required depth. Terrenus contended that it was entitled to the cost of rectification of the PEG Rods as the failure to embed them to the right depth gave rise to the risk of structural failure during high winds. In response, Attika argued that Terrenus had failed to prove both the extent of non-compliance, if any, and that such non-compliance led to the risk of structural failure during high winds.

The High Court Judge ("**Judge**") held that Terrenus had failed to discharge its burden of proving the extent of Attika's non-compliance and the risk of structural failure. As a result, Terrenus was awarded only nominal damages. The Judge also held that Terrenus was not allowed to claim general damages for delay and allowed Attika's counterclaim for payment of the remaining contractual sum under the MBA, subject to certain deductions in respect of amounts that parties had been agreed should be determined in neutral evaluation.

Holding of the Appellate Division

The Court upheld the Judge's decision on damages, finding that Terrenus was not entitled to substantial damages for Attika's non-compliance with the minimum embedment depth for the PEG Rods as provided for in the MBA.

Cost of cure

As a preliminary point, the Court found that Terrenus had not discharged its evidential burden of establishing the number and extent of non-compliant PEG Rods. Nonetheless, the Court went on to consider whether the cost of cure would be available, if non-compliance were made out.

In reaching its decision, the Court provided insight on when it would be appropriate to order the cost of cure as damages. In particular, the Court considered the relevance of Terrenus' intention (or lack thereof) to rectify the alleged defects.

In a contractual claim, the claimant is ordinarily to be compensated for its expectation loss – the gap between what was actually received and what was promised under the contract. Expectation loss can be addressed by: (i) diminution in value of the delivered product; or (ii) cost of cure, which aims to place the claimant in the actual position it would have been had the contract been performed. In other words, the purpose of damages is to compensate the plaintiff for his or her loss by putting the plaintiff as nearly as possible in the same position as he or she would have been in had he or she not suffered the wrong. The damages are awarded to remedy the expectation loss which crystallises at the point the breach is suffered.

That said, when awarding the cost of cure as damages, the court will be limited by considerations of reasonableness and proportionality, as there may be situations where the quantum of the cost of cure is disproportionate to the value of the expectation loss.

- When assessing the reasonableness or proportionality of awarding the cost of cure, the claimant's intention to effect the cost of cure is a relevant factor.

- However, it is neither a prerequisite nor generally a weighty factor in favour of the award of the cost of cure. This is because the court is not concerned with how a successful claimant uses the damages awarded.
- Various other factors are also relevant, including: (i) the level of disproportionality between the cost of cure and the benefit that will accrue to the promisee; (ii) the extent and seriousness of the defect and its consequences; (iii) the nature and purpose of the contract, and the degree to which the contractual objective has been substantially achieved; and (iv) any personal subjective value attached to what had been promised under the contract or the "consumer surplus".
- The intention to cure is most relevant as a fact where it comes to showing the claimant's "consumer surplus", which is the subjective value of the agreed performance of the contract to the claimant over and above the objective value.
- The above analysis applies equally to situations involving two contracting parties as well as situations involving contracts for the benefit of a third party.

The Court considered earlier English and Singapore decisions, including some which considered intention to effect the cure to be a prerequisite for awarding the cost of cure. In particular, the Court considered the decision in *JSD Corp*, where it was held that the intention to cure is a *weighty* factor in assessing the reasonableness of awarding the cost of cure as damages. However, the Court disagreed with the decision in *JSD Corp*, and held that the intention to cure was only one of several factors to be taken into account in assessing whether it is reasonable to award the cost of cure; intention to cure was not a prerequisite or a weighty factor generally.

Application to the facts

On an assessment of the factors on the facts of the case, the Court held that it was not reasonable or proportionate to award Terrenus the cost of cure.

- On the facts, the Court found that Terrenus did not intend to rectify the alleged defects as there was no structural risk.
- Terrenus had not proven the existence of structural risk. Without this, it could not be shown that the minimal deviation from the contractually specified embedment depth of the PEG Rods would justify granting the cost of cure.
- Terrenus also did not claim that there was any "consumer surplus" or subjective value to be garnered by actual performance of the agreed embedment depth.

As Terrenus produced no evidence of a diminution in value, the Court held that the Judge was correct in awarding only nominal damages in respect of the PEG Rods.

In any event, the Court held that Terrenus had failed to discharge its evidential burden of establishing the number and extent of non-compliant PEG Rods. Therefore, its claim for the cost of cure as damages was not made out.

For completeness, the Court also held that Attika was entitled to certain extensions of time, and that Terrenus could not claim general damages for delay, in addition to liquidated damages.

Concluding Words

The Court's decision provides helpful guidance on the applicability of "cost of cure" as a measure of damages. It sets out the considerations the court will take into account when determining whether cost of cure is appropriate and, in particular, the relevance of the claimant's intention to cure. Importantly, the Court has highlighted that the claimant's lack of intention to cure the defects does not preclude the award of "cost of cure" as damages. Rather, the court will assess all relevant factors, including the intention to cure, to determine whether to award "cost of cure".

For further queries, please feel free to contact our team.

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