

Quantifying Damages for Delayed Completion: Singapore Appellate Division Weighs In

How should an employer go about quantifying its general damages for delayed completion of a construction development?

This question is particularly relevant in construction contracts with missing or unenforceable liquidated damages clauses, as only general damages may be claimed for delayed completion in such cases.

The decision of the Appellate Division of the Singapore High Court (**Appellate Division**) in *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd and other appeals* [2023] SGHC(A) 9 sheds some light on this question.

Background

Facts

Crescendas Bionics Pte Ltd (**Crescendas**), a property developer, engaged Jurong Primewide Pte Ltd (**Jurong Primewide**) as the management contractor to build Biopolis 3, a seven-storey multi-tenanted business park development envisaged as a research and development hub for biomedical sciences. The parties' agreement was contained in a Letter of Intent (**LOI**).

The LOI required Jurong Primewide to complete Biopolis 3 by 22 January 2010, but this completion date was not met. Crescendas therefore brought an action against Jurong Primewide for the delay.

Liability for Delay

At the first stage of the suit, the courts dealt with the liability of the parties for the delay. Both the General Division of the Singapore High Court (**High Court**)¹ and the Singapore Court of Appeal² ruled that the completion of Biopolis 3 was delayed by a total of 334 days (**Combined Delay**). Out of the 334 days, Crescendas was responsible for 173 days of delay, while Jurong Primewide was responsible for 161 days.

Damages for Delay

The second stage of the suit concerned the damages to be awarded to Crescendas for the 161 days of delay which Jurong Primewide was responsible for.

In the High Court,³ Crescendas was awarded the sum of S\$1,789,398.82 for loss of net rental revenue, based on the following key findings:

- (a) The Combined Delay caused Crescendas to lose five pre-commitment tenants, including PetNet Solutions Pte Ltd (**PetNet**) and Philip Morris Products SA (**Philip Morris**).
- (b) Crescendas' claim for pre-completion net rental revenue was not too remote, but its claim for post-completion net rental revenue loss was.

¹ *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4

² *Jurong Primewide Pte Ltd v Crescendas Bionics Pte Ltd and another appeal* [2019] SGCA 63

³ *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2021] SGHC 189

- (c) With respect to the quantification of Crescendas' net rental revenue loss, the "single-year model" (**Single-Year Model**) was preferred to the "multi-year model" (**Multi-Year Model**) to calculate damages.

The Appellate Division's Decision

The Appellate Division largely overturned the decision of the High Court on Crescendas' loss of rent and allowed, for the most part, Crescendas' appeal. The following issues were considered:

- (a) Whether Crescendas had proven causation between Jurong Primewide's delays and its loss;
- (b) Whether Crescendas' loss of rent was too remote; and
- (c) Whether the Single-Year Model or Multi-Year Model should be used to calculate loss of net rental revenue.

Whether Crescendas had proven causation between Jurong Primewide's delays and its loss

Damages for a loss are recoverable where the breach of contract was the effective cause of the loss. The breach need not be the sole cause of the loss.

Applying this established principle of law, the Appellate Division agreed with the High Court Judge that *both* Crescendas' and Jurong Primewide's delays were each independent and effective causes of Crescendas' loss. Both Crescendas' delay (173 days) and Jurong Primewide's delay (161 days) were almost *evenly balanced*, and were *interspersed throughout the period of construction*.

With this, the Appellate Division turned to the issue of whether the Combined Delay (of both Crescendas and Jurong Primewide) caused Crescendas to lose Philip Morris and PetNet as pre-commitment tenants.

- (a) Philip Morris: The Appellate Division agreed with the High Court Judge that the Combined Delay caused the loss of Philip Morris as a tenant. This was because the evidence showed that the timeline of completion was an important factor of Philip Morris' decision to lease premises in Biopolis 3.
- (b) PetNet: The Appellate Division however disagreed with the High Court Judge and found that the Combined Delay did not cause Crescendas to lose PetNet as a tenant because:
 - (i) Save for an isolated email on 8 January 2009 in which PetNet told Crescendas that the delays in Biopolis 3's construction were making PetNet nervous, PetNet did not raise the issue of delay in its negotiations with Crescendas. In fact, up until nine months after Biopolis 3 was completed in January 2011, PetNet continued to negotiate the terms of the lease agreement with Crescendas.
 - (ii) Crescendas had issued invoices to PetNet for rent from August 2011 to September 2012. While all parties agreed that Crescendas did not receive any payment on the invoices, there was no suggestion that PetNet had disputed Crescendas' right to issue the invoices, which in turn suggested that, despite the Combined Delay, PetNet acknowledged that there was already a binding commitment on its part to rent premises at Biopolis 3.
 - (iii) Crescendas had received a settlement sum from PetNet. This payment strongly suggested that PetNet was "*not walking away [from the agreement] because of any delay in the construction*".

Therefore, while Crescendas had proven causation as regards the loss of Philip Morris as a tenant, this was not the case for PetNet.

Whether Crescendas' loss of rent was too remote

The remoteness rule under the law has two limbs:

- (a) "Ordinary" damage – for loss arising naturally from the breach of contract and flowing from what may reasonably be contemplated by both parties at the time they made the contract.
- (b) "Extraordinary" damage – for loss which does not flow naturally from the breach of contract and is not within the reasonable contemplation of contracting parties. The contract breaker must have had actual knowledge of these special circumstances to be liable for extraordinary damage.

The Appellate Division disagreed with the High Court Judge that *post-completion* net rental revenue loss constituted extraordinary damage (requiring proof of actual knowledge). It instead considered that both *pre-completion* and *post-completion* losses of rent were *ordinary damages* arising from delayed completion.

In holding that *post-completion* loss of rent should be considered ordinary damages, the Appellate Division took the view that Crescendas and Jurong Primewide would have reasonably contemplated, at the time of contracting, that:

- (a) Biopolis 3 was to be a multi-tenanted development which would have taken several years to fill up.
- (b) Considerable delay in completion would ordinarily cause potential tenants to walk away.
- (c) Biopolis 3 could only be leased out to tenants in the biomedical sciences research and development industry, and tenancies in this industry would also run for several years due to costs incurred in fitting-out and relocation.

Hence, it would have been in the parties' reasonable contemplation that a considerable delay in completion would cause Crescendas to lose tenants and rental revenue for *several* years. Crescendas' claim for post-completion net rental revenue loss was thus held to not be too remote.

Whether the Single-Year Model or Multi-Year Model should be used to calculate loss of net rental revenue

The computation of the total loss in net rental revenue suffered by Crescendas turned on the question whether Crescendas' loss should be assessed based on the Single-Year Model or Multi-Year Model.

The Appellate Division's comparison of the Single-Year Model and Multi-Year Model is summarised below.

Single-Year Model	Multi-Year Model
Assessed the net rental revenue loss during the period of the Combined Delay which was about one year i.e., from 23 January 2010 to 22 December 2010	Assessed the net rental revenue loss over a number of years beyond the Combined Delay i.e., from 23 January 2010 to January 2015 (the date on which stabilised occupancy ⁴ was attained)
Both models adopt the following formula in calculating loss in net rental revenue: <i>Loss in net rental revenue = net rental revenue that Crescendas would have earned if the Combined Delay had not occurred (No-Delay Scenario) – net rental revenue that Crescendas would have earned if it had taken reasonable mitigatory steps in light of the Combined Delay (Delay Scenario)</i>	

⁴ The date of stabilised occupancy refers to the date on which the percentage of occupancy level at the Biopolis 3 achieved its market potential and remained steady over a long period of time.

Departing from the High Court Judge's position, the Appellate Division held that the Multi-Year Model was more appropriate to assess Crescendas' loss, based on the following factors:

- (a) The Combined Delay caused Crescendas to suffer *post-completion* net rental revenue loss over multiple years, which pointed strongly in favour of using the Multi-Year Model.
- (b) None of the experts endorsed the Single-Year Model. Crescendas' expert and the court's expert preferred the Multi-Year Model. Jurong Primewide's expert acknowledged the possibility of using the Single-Year Model but observed that it would not fully reflect the typical tenancy period of three or more years.
- (c) The Appellate Division disagreed with the High Court Judge's finding that the Multi-Year Model was too speculative, noting that:
 - (i) In circumstances (as here) where uncertainty is inherent in the loss quantification process, the law only requires a claimant to "*put forward cogent evidence in an attempt to do its level best to prove its loss*"; and
 - (ii) Crescendas had done its best in the proof of quantum by submitting sufficient data and trends that provided a foundation upon which multi-year projections of net rental revenue in both the Delay and No-Delay Scenarios could be made. Along with market data collected by Jurong Primewide's expert, the court could make reasoned estimates based on the evidence. Further, a discount could be applied to account for uncertainty.
- (d) The Appellate Division disagreed with the High Court Judge that the Multi-Year Model should be rejected on the basis that it depended on variables outside the contract-breaker's (Jurong Primewide's) control. It was quite often the case that a claimant's loss was beyond the control of the contract-breaker. However, this would be tempered by the need for the claimant to prove the quantum of his loss, that he has mitigated his loss, and that the loss is not too remote.

Quantification of net rental revenue loss

Overall, the Appellate Division adopted the Multi-Year Model and quantified Crescendas' claim for net rental revenue loss in the sum of S\$4,185,802.60 as follows:

Step 1: Computed the loss in net rental revenue (No-Delay Scenario – Delay Scenario) using the Multi-Year Model.

Step 2: Applied the applicable discount rate to the figure in Step 1 to account for uncertainties.

Step 3: Apportioned the loss to reflect Jurong Primewide's share of the Combined Delay.

Concluding Observations And Key Takeaways

The Appellate Division's decision shows that the Singapore courts will not shy away from awarding a party full compensation simply because there may be uncertainties inherent in the calculation of damages.

We set out below key takeaways for employers to consider before and when claiming general damages against contractors for delayed completion.

These takeaways are also important to contractors who wish to manage their risks and exposure associated with delays in completion of a development.

- ✓ Bring to the contractor's attention *at or before the time of contracting* the use and nature of the development, as well as the losses which would flow from construction delays, in particular *extraordinary* losses. This may increase the chance of a court or arbitrator considering that such losses are not too remote, and thus claimable by an employer.
- ✓ Ensure the existence of a proper paper trail that would prove losses effectively caused by the delay, e.g., lost potential tenants. In the present case, the Appellate Division relied on contemporaneous documentary evidence such as emails and invoices when considering if the delay had caused Crescendas to lose Philip Morris and PetNet as tenants.
- ✓ Compile sound evidence (e.g., empirical and market data) to prove projected (and inevitably uncertain) losses that will take place. The Appellate Division has, after all, emphasised that it is important for a claimant to provide cogent evidence when quantifying its loss, even if certainty may be impossible in the process of quantification.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



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