IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 205

Suit No 907 of 2021

Between

Pro-Active Engineering Pte Ltd

… *Plaintiff*

And

Prime Structures Engineering Pte Ltd

… *Defendant*

JUDGMENT

[Building and Construction Law — Building and construction contracts]
[Building and Construction Law — Contractors' duties — extension of time and liquidated damages]
[Building and Construction Law — Damages — Delay in completion]
[Building and Construction Law — Damages — Failure to complete]
[Building and Construction Law — Scope of work — Variations]
[Building and Construction Law — Back charges]
[Civil Procedure — Discontinuance]

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v
Prime Structures Engineering Pte Ltd

[2023] SGHC 205

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Lai Siu Chiu SJ
6–8 December 2022, 28 February, 2 May 2023

31 July 2023 Judgment reserved.

Lai Siu Chiu SJ:

Introduction

1 In Suit 907 of 2021 ("this suit"), Pro-Active Engineering Pte Ltd ("Pro-Active") is suing Prime Structures Engineering Pte Ltd ("Prime") for $558,559.97 ("the claim") arising out of works carried out on a building known as SOUTHERNWOOD located at No 79 Robinson Road, Singapore ("the project"). The completed project is now known as CapitaSky.

2 The developer of the project was Capitaland and the main contractor was Shimizu Corporation (Singapore) Ltd ("Shimizu"). One of Shimizu's contractors was Positive Engineering Pte Ltd ("Positive") while one of its subcontractors was Prime which was contracted to provide engineering works for the project.

3 In turn, Prime engaged Pro-Active to supply, fabricate and install steel works for part of the project. This was done by way of a letter of appointment dated 9 January 2019 from Prime to Pro-Active ("the LOA")[1] which both parties countersigned in February 2019[2].

4 Under the terms of the LOA, Pro-Active would be paid $1,161,204.58 ("the contract sum") for its scope of works which was to supply, fabricate and install steel works at the shopfront, roof crown, sky terrace and roof trellis/screen ("the contracted works") which were located on the first, second, twenty-first and twenty-eight floors. Henceforth, where reference is made to the "roof crown works", it will mean the roof crown steel works contracted by Pro-Active. The contracted works would commence on 9 January 2019 and were to be completed on or before 30 June 2019. The contracted works would be subject to re-measurement with payment to be based on the actual works carried out. The court will return to the LOA and its material terms later in the course of the judgment. It should be noted that it was Pro-Active's case that it carried out variation works for the project as well.

5 The person in charge of the contracted works for Pro-Active was its project manager Kuon Yee Yen ("Kuon") who is known as Gary while Prime's persons in charge were its project director Yap Wai Keong (known as "Frankie") and its project manager Wong Junjie Andrew ("Andrew").

6 Under the original schedule for the contracted works, the following were the timelines:

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1 See Agreed Bundle ("AB") at AB14–19.

2 See AB19.

(a) 18 July to 3 September 2019 – fabrication and supply of steel columns;

(b) 14 August to 21 September 2019 – delivery of steel columns to Singapore from China; and

(c) 2 September to 10 October 2019 – installation of steel columns.

Pro-Active failed to meet the above timelines as well as the completion timeline of 30 June 2019 in [4] for reasons which are set out below.

7 In his affidavit-of-evidence-in-chief ("AEIC"), Kuon affirmed[3] that he decided to, and did, source the materials for the roof crown works from China, in particular from a steel supplier in Qingdao called Qingdao Eternity Industry Co Ltd ("Qingdao Co"). He informed Prime which informed Shimizu in turn on 12 July 2019. On 15 July 2019, Shimizu e-mailed Prime with a list of queries and its concerns about the quality of steel purchased from China. Prime replied on the same day to allay Shimizu's concerns.

8 On 30 August 2019, Prime sent Pro-Active a list of instructions/inquiries and requirements in regard to the roof crown works. These were:

(a) Prime would hire a neutral third party ("the third party") to ensure that all steel supplied and fabricated by Qingdao Co complied with specifications;

(b) where would the third party be staying while in China and what provisions would be made for his transport and meals;

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[3] In para 20.

(c) Pro-Active had to confirm the standard and grade of steel to be used;

(d) Pro-Active was to confirm the date five days before the factory viewing appointment; and

(e) after the first factory visit, Pro-Active was to courier to Singapore a list of materials for testing.

Kuon claimed he complied with Prime's requirements in order to proceed with the contracted works.

9 On 5 September 2019, Andrew sent a lengthy e-mail to Pro-Active setting out instructions on works to be done, how they were to be carried out, when the works were to be completed and to cease certain steel works pending approval by the Building and Construction Authority ("BCA"). In regard to the roof crown works, Andrew warned Pro-Active that the owner was considering revoking those works from Pro-Active's scope of works if not for the fact that Prime said it had purchased the steel. Andrew added that there were strong objections to Pro-Active's request to fabricate the steel for the roof crown works in China. He also referred to Pro-Active's slow progress, warning Pro-Active that Capitaland may exercise their right to liquidated damages for the delay.

10 Around 29 October 2019, Prime instructed Pro-Active to carry out certain works for the roof crown beams which included installing bigger baseplates without holes on the trusses which were to be fabricated by Qingdao Co. Pro-Active took this conduct as a sign that Prime did not object to Pro-Active's sourcing for materials in China for the roof crown works.

11 In or about early December 2019, Kuon went to China to supervise the fabrication of materials for the roof crown works. However, after the materials he ordered had been shipped on 25 December 2019 to Singapore, he alleged that he received a call from Prime telling him that Pro-Active no longer needed to do the roof crown works. Kuon was shocked as days earlier, he was in communication with Prime on securing nuts and bolts for the roof crown works. He had even sent a summary list of the nuts and bolts meant for those works. He claimed there was no prior indication that Prime intended to terminate the services of Pro-Active.

12 As such, in Kuon's AEIC[4], he argued that the roof crown works should be deducted from Pro-Active's scope of works and the amount deducted from the contract sum which should then be adjusted, to reflect the actual works done by Pro-Active. He pointed out that the contracted works were a re-measurement contract in any case. It should be noted at this stage that the materials purchased from Qingdao Co for the roof crown works were paid by a letter of credit ("the L/C") established by Prime at Pro-Active's request as the latter did not have the means to make payment.

13 The upshot of the communication between Pro-Active and Prime was that in and after December 2019, Pro-Active stopped doing any work relating to the roof crown and Prime and/or Shimuzu arranged for the roof crown works to be carried out by another subcontractor Kong Hwee Iron Works & Construction Pte Ltd ("Kong Hwee").

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4 At para 29.

14 Kuon's AEIC[5] alleged that Pro-Active carried out additional/variation works for Prime on the project. In that regard, the parties entered into a Variation Order dated 6 January 2020[6] ("the Variation Order"). Kuon disclosed that Pro-Active had been paid for some of the variation works in the progress claims that he submitted. The variation works were initially estimated to amount to $1,351,320.95. Kuon alleged that Pro-Active's works were delayed by Prime's delay in making payment on Pro-Active's progress claims. This allegedly led to financial difficulties for Pro-Active and affected the latter's materials procurement, its payment of salaries and expenses, and its payments to its suppliers. Kuon complained that it was unfair for Prime to charge Pro-Active for delay when the delay was caused by Prime's requests for additional works. The court will return to the issue of variation works and delay later in the judgment.

15 Kuon added[7] that Pro-Active would have completed the contracted works on time if not for Prime's delayed payments. He claimed that Pro-Active, by 14 February 2020, had only 10% of its scope of works left to be completed. Kuon alleged[8] Prime was still giving instructions to vary the scope of the contracted works after the contractual completion deadline. He added that in so doing, Prime gave Pro-Active the impression that the project's completion date would be pushed back.

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5 At paras 38, 39, 41 and 42.

6 See AB537.

7 At para 45 of his AEIC.

8 Ibid para 49.

16 Pro-Active disputed the back charges Prime levied on Pro-Active, part of which related to installation costs charged to Prime by Shimizu for the roof crown works carried out by Kong Hwee. Another item of back charge related to interest charged on extending the L/C[9] to pay for the roof crown materials from China.

17 In his AEIC[10], Kuon asserted that Pro-Active had completed all the contracted works (save for the omitted roof crown works). The project's Temporary Occupation Permit ("TOP") was issued on 28 April 2020. Consequently, Pro-Active should be paid for the contracted works as well as for the additional variation works Prime requested. Kuon deposed that Prime had paid Pro-Active $822,011.15 leaving the claim amount as the balance outstanding on the contract sum. As for variation works, Pro-Active claimed $679,443.35.

18 When Pro-Active did not receive payment of the two sums in [17], it commenced proceedings in this Suit.

The pleadings

19 On 6 November 2021, Pro-Active filed the writ of summons in this suit. In its statement of claim ("SOC"), Pro-Active referred to and relied on the terms of the LOA, in particular clauses 1.2 (on re-measurement), 5 (on progress payments) and 5.5 (on retention moneys) for its claim.

20 The computation by Pro-Active for its claim is as follows:

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9 See AB326.

10 At para 59.

Description	Amount
(i) Contracted works (less the roof crown works)	$666,978.46
(ii) Variation works	$677,051.35
Sub-total	$1,344,029.81
Less:	
(i) Payments received	$822,011.15
Sub-total	$522,018.66
Add:	
7% Goods and Services Tax ("GST")	$36,541.31
Balance	$558,559.97

21 In the alternative, Pro-Active claimed damages on a *quantum meruit* basis, quantified based on the claimed sum of $558,559.97.

22 Apart from one paragraph[11] in the SOC, Pro-Active made no reference to the removal of the roof crown works from Pro-Active's scope of works. In para 8, Pro-Active averred that some time in December 2019, it was instructed by Prime that its services were no longer required for the roof crown works. Consequently, Pro-Active deducted that portion from the contracted works.

23 In contrast to the brief SOC, Prime filed a lengthy defence and counterclaim ("D&CC"). Other than the clauses Pro-Active referred to in the SOC which were alluded to earlier at [20], Prime relied on other clauses in the LOA. These included clause 4.1 (on liquidated damages), clause 5.7 (on right

[11] At para 8.

of set-off), clause 8 (requirement of weekly progress reports) and clause 9 (on default by Pro-Active). Prime also cited clause 1(b)(i) of Appendix C to the LOA wherein Pro-Active has to indemnify Prime for costs, claims, damages *etc* if Pro-Active fails to perform in accordance with the LOA.

24 Prime averred that the final contract sum for Pro-Active's scope of works (including variation works) was $2,512,531.53.

25 Prime denied that it had instructed Pro-Active that its services were no longer required for the roof crown works. Consequently, Pro-Active was not entitled to remove all costs in relation thereto ($494,232.12) from the contracted works as well as from the variation works.[12]

26 Prime alleged that in or around December 2019 it because apparent that Pro-Active was unable to carry out works relating to the roof crown. Prior thereto, Prime had issued multiple delay notices (in September and October 2019) to Pro-Active relating to the contracted and variation works. Shimizu had informed Prime that if the roof crown works could not be carried out, Shimizu would take over the same and charge Prime for all the costs thereby incurred.

27 Prime issued a catch-up schedule to Pro-Active on 6 December 2019 but Shimizu informed Prime on the same day that it had no confidence in Pro-Active's carrying out the installation component of the roof crown works. As such, Shimizu would hire its own contractor to carry out the installation component of the roof crown works and Shimizu would set-off the costs against payment due to Prime. In turn, Prime informed Pro-Active on 9 December 2019

12 See para 11 of the D&CC.

that it would invoice Pro-Active for the costs Shimizu charged to Prime for the installation component of the roof crown works.

28 Prime denied it owed any money to Pro-Active and asserted it had paid Pro-Active $1,581,681.15 as follows:

(a) $45,557.69 as advance payment;

(b) $765,875.00 for the L/C; and

(c) $770,248.46 as progress payments.

29 Prime alleged that Pro-Active breached the LOA as it was unable to carry out the installation component of the roof crown works including the variation works. As a result, Prime suffered loss and damage as Shimizu back charged Prime $1,018,678.49 for those works:

(a)	Installation costs for the roof crown:	$582,483.66
(b)	Back charges:	$436,194.83
		$1,018,678.49

Prime contended it was entitled to set off the sum of $1,018,678.49 against Pro-Active's claim which resulted in Pro-Active owing $93,976.08 as seen in the following breakdown[13]:

No	Item	Amount
1	Total contract sum	$2,512,531.53
2	Total sum paid to Pro-Active	$1,581,681.15

[13] See para 15 of the D&CC.

	Balance	$930,850.38
3	Total sum claimed against Pro-Active	$1,018,678.49
	Shortfall ($1,018,678.49 - $930,850.38)	$87,828.11
4	Add 7% GST	$6,147.97
	Total	$93,976.08

30 Prime averred that Pro-Active was in delay for the contracted works as well as the variation works and failed to complete the same by the prescribed completion date of 29 November 2019. Pro-Active only completed all the works on 4 January 2020. Consequently, Prime claimed liquidated damages against Pro-Active for 36 days of delay amounting to $90,450.92 (based on 0.1% of the total contract sum per day). Prime's claim therefore totalled $1,109,129.41 ($1,018,678.49 + $90,450.92).

31 In its Reply and Defence to the Counterclaim ("R&DCC")[14], Pro-Active not surprisingly disputed Prime's allegation that it did not instruct Pro-Active that the latter's services were not required for the roof crown works.

32 Pro-Active further denied Prime's counterclaim for the back charges rendered by Shimizu and Prime's claim to a set-off and liquidated damages. Pro-Active asserted that even if it did not complete the contracted works by 29 November 2019 (which it denied), it was not liable for any liquidated damages due to various acts of prevention by Prime and/or variation works that Prime instructed which caused delay to Pro-Active's contracted works.

[14] At para 4 of the R&DCC.

33 Pro-Active relied on Prime's Variation Order No VO3 dated 6 January 2020[15] as evidence of Prime's instructions on variation works. Pro-Active listed ten items of variation works that Prime allegedly instructed Pro-Active to carry out. Since there was no extension of time clause in the LOA, Pro-Active contended that time was at large and Prime was not entitled to impose liquidated damages on pro-Active.[16]

34 In the alternative, Pro-Active averred[17] that by issuing instructions to Pro-Active after 29 November 2019 (at [33]), Prime had communicated its intention to continue with the LOA notwithstanding Pro-Active's alleged failure to complete the contracted works by 29 November 2019.

35 Consequently, Pro-Active denied Prime was entitled to any relief claimed in its counterclaim. Prior to the commencement of trial, Prime indicated it would discontinue its counterclaim and leave the issue of costs of discontinuance to the court to determine.

The evidence

36 Four witnesses testified at the trial of this Suit. Kuon was Pro-Active's only witness while Prime had three witnesses who were its managing-director Sonny Bensily ("Sonny"), its project director Frankie and its project manager Andrew (see [5] above).

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15 At AB537.

16 At para 7(c) of the R&DCC .

17 Ibid para 9.

(i) Pro-Active's case

37 The court turns to Kuon's cross-examination for the additional facts that were adduced in this Suit as his AEIC contained more arguments in meeting Prime's D&CC than facts. During cross-examination, Kuon did not dispute the obligations of Pro-Active as set out in the LOA and which Prime relied on in the D&CC[18]. He further agreed that Pro-Active's contract was a re-measurement contract[19]. However, he repeatedly insisted that as Pro-Active did not carry out the roof crown works, those works should simply be taken out of Pro-Active's scope of works and deducted from the contract price (to which Prime disagreed).

38 On the issue of delay, Kuon's attention was drawn to Andrew's e-mail to Pro-Active dated 5 September 2019[20] which set out detailed instructions to Kuon for various types of work on various floors. The e-mail contained the following extracts:

> You are advised of the following schedule which we have managed to plead from capital land, deference or slow progress and they will exercise their liquidated damage right. Originally we are to handover Lv 2 to them partially from 30th Sept
> …
>
> With this instructions (sic) and schedules, I hope this can guide you towards planning to finish your contractual works onsite.

Despite the clear wording in the above extracts, Kuon disputed Pro-Active was in delay in the contracted works. He said he did not reply to Andrew's e-mail as he chose instead to complete the outstanding works as soon as possible.

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18 See Kuon's cross-examination at transcripts on 6 December 2022 at pp 15 and 24–25.

19 Ibid p 22.

20 Exhibited at p 85 of Kuon's AEIC.

39 The schedule of works for the roof crown on the 28th floor was exhibited in Andrew's AEIC[21]. His AEIC also contained e-mails from Prime to Pro-Active[22] that showed the latter was informed on 22 August 2019 that approval from the relevant authorities had been obtained for the roof crown works and Pro-Active was instructed "to proceed to start the purchase & fabrication of the roof crown steel works". Then on 30 August 2019[23], Andrew e-mailed Pro-Active to inquire about fabrication of the roof crown materials in China. He further inquired about the proposed visit on 9 September 2019 to the Chinese factory producing the materials by a checker from Arup Singapore Pte Ltd ("Arup") and representatives from Prime and Capitaland. After the inspection, Andrew required Pro-Active to courier to Singapore for testing the raw steel and galvanised steel to be fabricated to ensure the latter complied with the specifications S355 and Q345.

40 On 31 October 2019[24], Andrew e-mailed to Pro-Active a formal delay notice citing three instances of delayed works for the contracted works at level 2. Prime gave notice that unless Pro-Active showed immediate and considerable improvement, Prime would be forced to terminate Pro-Active's services and find a replacement contractor. Cross-examined, Kuon did not deny the delay[25] but pointed out it had nothing to do with the roof crown works. He did not reply but decided to resolve the delay issue by adding more manpower to expedite the outstanding works. To Kuon, the letter was "just any other normal letter"[26] and

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21 At WJJA-1 at pp 11 and 12.

22 At pp 20–22.

23 At pp 37–38 of his AEIC.

24 Ibid at pp 41–42.

25 See transcripts on 6 December 2022 at p 38.

26 Ibid p 39.

Kuon took it as a need for him to ramp up his manpower resources. He further claimed there were no other letters informing Pro-Active of delays to works on levels 1 and 2 and even on the 21st floor. Kuon disagreed the letter constituted a final warning to Pro-Active. He added that Pro-Active completed the scheduled works in November or December 2019.

41 Kuon was then confronted with Andrew's e-mail dated 6 December 2019[27] where Andrew noted Pro-Active only had eight workers on-site on 5 December with five workers on night shift, even though there were three main areas of work and that was "the last straw". Andrew added

> I'm also tired of arranging supply workers for you and using yabo men to falsely cover up your manpower.

Andrew's reference to "Yabo" was to another subcontractor of Prime. Despite Andrew's aforesaid e-mail, Kuon disagreed inadequate manpower was one reason for the delay in Pro-Active's works.[28]

42 Adding to Pro-Active's woes, Prime had as far back as July 2019, e-mailed Kuon[29] that Prime's quality assessor/control engineer had issued non-conformance reports ("NCR") against Pro-Active for missing anchor bolts/nuts and rusty bolts/nuts. Koun continued to maintain his disagreement[30] pointing out that the issuance of an NCR was not a performance issue. NCRs were to Kuon part of an entire process and very common. It was the responsibility of

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27 At pp 45–46 of Andrew's AEIC.

28 See transcripts on 6 December 2022 at p 49.

29 See pp 15–19 of Andrew's AEIC.

30 See transcripts on 6 December 2022 at pp 50–51.

the quality assessor/engineer to bring such NCRs to his notice for rectification before the time of inspection arrives.

43 It did not help Pro-Active that there was subsequently a delay notice addressed to Sonny and Frankie by Shimizu's project manager on 3 December 2019 relating to the roof crown works[31]. This was after the inspection of the factory in China as is apparent from the extracts set out below from Shimizu's e-mail:

> We were very disappointed after the visit to China factory. The first batch of material for Zone C (6 sets) was expected to be loaded for shipment to Singapore ETA on 29 Nov. 19 but was still in the process of welding and fabrication, not even 1 set was painted.
>
> Zone A materials (6 sets) were shown to our representatives, Mr. Bablu and Mr. Yokota but cannot tell if they are fully accountable. There are no sign of Zone B material.
>
> These have totally deviated from your plan submitted to us on 11 Nov. 2019.

Although Kuon admitted he sourced for the factory, he disagreed that he failed to ensure that the fabrication and supply was on schedule. Kuon claimed that Prime, and Andrew in particular, was in close contact and liaised direct with, Qingdao Co. However, because he was originally in charge of doing the installation, Kuon claimed he took the initiative to make sure the materials would arrive in Singapore in time for the installation. He merely acted as a coordinator to ensure the materials were shipped to Singapore[32].

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31 See p 43 of Andrew's AEIC.

32 See transcripts on 6 December 2019 at p 44.

44 Kuon maintained his stand even when Pro-Active installed undersized steel frames, according to an e-mail from Shimizu to Andrew dated 28 August 2019.[33]

45 Kuon's attention was drawn to Andrew's e-mail to Kuon, with Sonny and Frankie as recipients as well, on 6 December 2019, setting out a catch-up schedule with a delay of seven days to the original date of 30 January 2020. Andrew added that there was a need for three fabrication factories and a separate factory for painting was required.

46 On 13 December 2019[34], Shimizu rejected Prime's programme to finish the installation portion of the roof crown works by February 2020. Shimizu cited the reason for the delay to works on levels 1, 2 and 21 to be due to poor performance and shortage of manpower. Questioned, Kuon claimed he was in China when Shimizu's e-mail was received. He said there was no discussion about a third party contractor taking over the roof crown works because while he was in China, the focus then was on the schedule of work and arranging for the materials to be shipped to Singapore. Kuon added he did not receive any delay notice either from Prime or Shimizu. He claimed he was unaware of Shimizu's meeting with Prime on 12 December 2019 and denied he was told by Frankie in a telephone call after that meeting that Pro-Active need not carry out the installation component of the roof crown works.

47 Kuon claimed that Frankie had informed him only on or about 15 December 2019 that Shimizu was considering looking for another subcontractor

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33 At pp 25–36 of Andrew's AEIC.

34 See AB882.

(Kong Hwee). Andrew told him over the telephone on 27 December 2019 that Pro-Active's services were terminated. Kuon testified[35] he felt "betrayed" as he had provided so much assistance and co-ordinated the shipment to Singapore of the steel supplied by Qingdao Co. He was then still in China[36] and returned to Singapore on 4 January 2020.

48 Kuon further denied receiving an e-mail dated 16 December 2019[37] (see p 382 of Sonny's AEIC) from a façade checker Sonny Roflo ("Roflo") from Arup, stationed at Qingdao Co, who pointed to the fabricated steel being non-compliant with the specifications set out earlier at [39]. Thereafter, Pro-Active was back charged by Prime $11,242.23 on 30 November 2019 for Roflo's visits in September/October 2019 for the inspection. Arup had charged Prime for Roflo's inspection visit and in turn Prime back charged Pro-Active. Kuon disputed this back-charge[38] on the basis it was never agreed to by Pro-Active. Kuon pointed out that as the installation works had been taken out of Pro-Active's scope of works, Pro-Active should not have to bear the back charge. If there was to be inspection, the inspection should have been done in Singapore.

49 Even though Prime on Pro-Active's behalf paid the L/C amount of $275,000[39] to Qingdao Co, Kuon initially would not admit that it was due to Pro-Active's financial difficulties, until pressed by the court for his answer[40]. He had further agreed that Pro-Active would pay Prime 3% commission for the

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35 See transcripts on 7 December 2022 at p 117.

36 See transcripts on 6 December 2022 at p 45.

37 See p 382 of Sonny's AEIC.

38 See transcripts on 7 December 2022 at p 121.

39 At AB582.

40 See transcripts on 6 December 2022 at p 56.

issuance of the L/C in his e-mail to Prime dated 2 September 2019[41] and yet, he disputed Prime's claim for interest on the L/C.

50 In his AEIC, Kuon[42] had deposed that he purchased nuts and bolts for the roof crown works. This statement was found to be untrue when he was cross-examined[43].

51 It was said by Kuon during re-examination[44] that the contractual completion date of 30 June 2019 kept being pushed back due to changes in drawings which necessitated the purchase of additional materials. The change in drawings (which was sometimes more than one revision) resulted in an increase of 2.5 times in tonnage of raw materials.

Prime's case

52 As stated earlier at [36], Prime had three witnesses. Sonny was Prime's first witness. Nothing really turns on Sonny's testimony. As the managing-director of Prime, he was not on site at the project unlike Andrew and Frankie although he attended site meetings either at the site office of Shimizu or at its office. However, Sonny was aware of site conditions and of Pro-Active's work progress. He would be updated on work progress by either Andrew and/or Frankie, at site meetings and/or from correspondence exchanged between Prime and Pro-Active or between Shimizu and Prime.

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41 See AB863.

42 At para 27.

43 See transcripts on 7 December 2022 at p 103.

44 Ibid at p 110–111.

53 In his AEIC[45], Sonny set out a chronology of Pro-Active's work performance. He deposed that by early December 2019 it became apparent to Prime that Pro-Active did not have the manpower to carry out the installation component and the Variation Order in relation to the roof crown works. Around that time, Shimizu had already informed Prime that if those works could not be carried out according to schedule, Shimizu would take over the installation component of the roof crown works and look to Prime for all costs incurred thereby. Hence, Prime, via Andrew, issued the catch-up schedule to Pro-Active on 6 December 2019. Sonny deposed in his AEIC[46] that on or about the same day, Shimizu informed Prime that Shimizu had no confidence in Pro-Active's carrying out the installation component of the roof crown works. This was then followed by Shimizu's e-mail of 13 December 2019 set out at [82] below.

54 Frankie was Prime's second witness. He no longer works for Prime as a project director and has in fact left the construction industry altogether.

55 Frankie confirmed he telephoned Kuon on 12 December 2019 while the latter was in China to inform Kuon that Pro-Active need not do the roof crown installation works. On that day. Frankie had also flown to China after making the call to Kuon. Frankie denied Kuon's allegation that someone from Prime had called and told Kuon the news on 27 December 2019.

56 Andrew was Prime's third and last witness. Like Frankie, Andrew no longer works for Prime. He left Prime's services around June 2021[47].

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45 At para 17.

46 At para 17(e).

47 See transcripts on 28 February 2023 at p 202.

57 During cross-examination, Andrew disclosed[48] that Pro-Active started construction late. It should have started with the fabrication and supply of the steel columns for the roof crown on 18 July 2019 but only did so on or about 31 October 2019. Andrew recalled that Pro-Active purchased the steel materials early (by October 2019) but for reasons unknown to him, Pro-Active could not get the fabrication done before December 2019.

58 Part of the problem was due to Pro-Active's inability to get the required steel grade (355) from China. Pro-Active then proposed an alternative steel grade (Q345B or C) which necessitated Prime's engineer going back to the BCA for fresh approval.

59 Counsel for Pro-Active suggested to Andrew that the changes in drawings made by Prime caused Pro-Active's delay, one example being the increase in size of the baseplates (without holes) for the trusses (see [10] above). Andrew agreed with counsel that there were other changes in the drawings but testified that those changes were minor.

60 Andrew testified that as Prime's project manager, his issue with Pro-Active was that the latter was slow in its work – it was all due to their having insufficient manpower to carry out the contracted works. He had no issues with the quality of Pro-Active's work. Due to Pro-Active's inadequate manpower, its scope of works started to stack-up, resulting in delays when additional manpower was not deployed[49] both for the contracted works as well as for the remedial works.

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48 Ibid at p 206.

49 Ibid at pp 215 & 216.

61 Counsel for Pro-Active had suggested to both Sonny and Andrew that if indeed Pro-Active was slow, Prime would not have requested Pro-Active to take over Yabo's scope of works[50]. Sonny explained that the roof trellis work was a very small piece of work, it was not part of the critical path and it would not have caused any delay[51]. Indeed, Andrew disclosed that it was Pro-Active that had requested more work in order to increase its profits. Yabo was then in charge of aluminium works in the roof trellis which work involved some element of steel works. Pro-Active requested Andrew that it be allowed to take over Yabo's works at the roof trellis since it already had the manpower for the roof crown works. Andrew was agreeable to Pro-Active's request provided Yabo agreed, which it did. The Variation Order alluded to at [14][52] included the trellis works.

62 When the court questioned Andrew[53] on Prime's scope of works for the project, he testified it included levels 1 and 2 which steelworks were subcontracted to Pro-Active. Due to Pro-Active's supply and installation of steel not in accordance with BCA's approved thickness, all of the steel works installed by Pro-Active had to be dismantled and replaced, resulting in a delay of 4–5 months. By then the cladding had already been done and that too had to be torn down.

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50 Ibid at p 216.

51 See transcripts on 8 December 2022 at pp 140–141.

52 At AB537.

53 See transcripts on 28 February 2023 at pp 234–235.

The submissions

63 Before the court makes its findings, it would be appropriate at this juncture to look at the submissions put forward by the parties after the close of the trial.

(i) Pro-Active's submissions

64 In Pro-Active's closing submissions[54], it was submitted that it would be unjust and unfair for Prime to be allowed to add the value of the entire roof crown works to the contract sum and then purport to deduct a large back charge for the same. That would mean that Pro-Active performed the entire roof crown works when Pro-Active was instructed not to (at least for the installation component).

65 Pro-Active argued that the installation component of the roof crown works must be removed or "de-scoped" from Pro-Active's scope of works, since that component was taken over by Shimizu. That was because according to the LOA[55], it is a re-measurement contract. Pro-Active then made the following calculations, based on "de-scoping" the installation of the roof crown from its scope of works:

288,480kg x $2.80 per kg	$807,744.00
Less:	
Payment to Qingdao via letter of credit	$765,865.00
	$ 41,879.00

[54] At para 20(c).

[55] See AB511 clause 1.2.

Even taking into account 3% interest charged by Prime on the payment to Qingdao Co *ie,* $22,975.95 ($765,865.00 x 3%), a sum of $18,903.05 is still payable to Pro-Active by Prime ($41,879.00 - $22,975.95).

66 Pro-Active further submitted[56] that as there is no extension of time clause in the LOA, time is set at large. There was also the addition of the Variation Order. Therefore, Pro-Active was required to complete the contracted works within a reasonable time as opposed to a contractually stipulated deadline. Pro-Active alleged that besides the Variation Order, Prime had engaged in acts of prevention (not specified) that caused delays in the project. It should not be allowed to take advantage of its own wrongdoing, citing *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111 ("*Peak Construction*").

67 Pro-Active drew a distinction[57] between delays caused by Pro-Active and those caused by Prime. Pro-Active alleged that there was evidence that even before the LOA was signed on 28 February 2019, Shimizu had complained of Prime's slow progress on site. Pro-Active relied on its counsel's cross-examination of Frankie[58] and Shimizu's e-mail to Prime dated 27 February 2019[59]. This submission is incorrect as Frankie had pointed out[60] that Shimizu's complaint related to the monitoring of the mock-up schedule and had nothing to do with the main scope of works.

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56 At para 22 of its closing submissions.

57 Ibid at para 33.

58 At transcripts on 8 December 2019 at pp 179–180.

59 At AB903.

60 At transcripts on 8 December 2019 at p 181.

68 Pro-Active made much of the fact[61] that there was no evidence tendered by Prime in respect of correspondence between Positive (who was Prime's immediate main contractor[62]) and Prime and between Positive and Shimizu. It argued that it was pure speculation to decipher what Positive's stance was in respect of Shimizu's decision to engage a third party contractor (Kong Hwee) to carry out the roof crown installation. Prime had produced Shimizu's letter dated 18 March 2020 to Positive[63] and Shimizu's contra charge of the same date[64] to Positive in the amount of $652,918.10. However, there was no evidence that those contra charges were back charged to Prime and there was also no privity of contract between Shimizu and Prime.

69 Pro-Active raised the possibility[65] that Positive had reached a compromise with Shimizu in respect of Kong Hwee's engagement and that may explain the lack of evidence in respect of Positive's back charge to Prime for the installation cost of the roof crown. Hence, Prime has not shown it incurred the installation cost. Accordingly, Pro-Active should not be liable for such costs as it was no longer the responsibility of Pro-Active (which was also Prime's case).[66] Pro-Active accused Prime of being opportunistic and wrongfully withholding payment to Pro-Active. The court dismisses this argument of Pro-Active as pure speculation without any basis whatsoever.

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61 At para 41 of its closing submissions.

62 At para 7 of Sonny's AEIC.

63 At AB789.

64 At AB790.

65 At para 58 of its closing submissions.

66 At paras 60–61 of its closing submissions.

70 Pro-Active asserted that its calculations at [20] is correct for its claim based on the fact that the roof crown works had been deducted from Pro-Active's contracted works. Conversely, Prime's calculations in [28]–[29] were erroneous. If the supply and fabrication components of the roof crown works were not "de-scoped" from the contracted works, it meant that Prime would still have to pay Pro-Active $41,879.00 based on the following calculations:

288,480 kg x $2.80 per kg of steel	$807,744.00
Less:	
Payment to Qingdao Co	$765,865.00
	$ 41, 879.00

For the reasons set out below at [107]–[108] and [120], the court disagrees with Pro-Active's calculations and does not accept that the roof crown works had been "de-scoped" from the contracted works by reason of Shimizu's decision to remove those works from Pro-Active's contract.

71 Pro-Active had argued[67] that whilst "de-scoping" the roof crown works may affect the heads of items that are calculated in deriving the contract sum and in calculating the sum Pro-Active is entitled to, there will not be a significant effect on the amount that is ultimately derived. That argument is misconceived as can be seen from the court's calculations set out at [129] below.

72 Pro-Active had further submitted that Prime failed to provide reasonable notice to Pro-Active to "de-scope" the installation component of the roof crown works. Pro-Active submitted that Prime's letter dated 6 December 2019 at [80]

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67 At para 49 of its closing submissions.

below was not adequate or proper notice, citing *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 ("*Vim's* case").

(ii) Prime's submissions

73 Prime had listed in its closing submissions[68] the incidents wherein Pro-Active failed to carry out the contracted works diligently as well as expeditiously[69]. The court is of the view that the instances cited by Prime constitute breaches by Pro-Active of clause 9 of the LOA. The relevant portion of that clause headed Termination states:

> 9.1 If the Subcontractor should commit any of the followings:
>
> > 9.1.1 Fail to proceed the Subcontract Works expeditiously and with due diligence either in whole or in part;
> >
> > …
>
> 9.2 The Contractor fully reserves the right to serve upon the Subcontractor a notice of termination stating the default committed by the Subcontractor, and requiring the Subcontractor to immediately cease and rectify the same.

74 Clause 9.1 of the LOA is reinforced by clause 3.2 which states:

> The subcontractor shall proceed with the Works diligently and with due expedition at all times in accordance with the respective time for completion as stipulated in the Contractor's construction schedule with and including any revisions thereto. If in the Contractor's view that the works is (*sic*) in delay, the Subcontractor must implement among others but not limited to the addition of skill workforce and resources, double shift works and all other necessary resources and equipment to mitigate the delays at **NO** additional cost to the Contractor. [emphasis in original]

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68 At para 80(f).

69 At para 80(g).

Undoubtedly, when Andrew chased Pro-Active repeatedly in his numerous e-mails to increase its manpower to "catch-up" on delays to the contracted works, Prime was exercising its rights under clause 3.2 of the LOA. Unfortunately, Pro-Active failed to comply with Prime's/Andrew's instructions, prompting Shimizu to take back the installation component from Prime's contract and Pro-Active's scope of works.

75 As regards Pro-Active's dispute on Prime's back charges, Prime's closing submissions[70] referred to Pro-Active's own progress claim no. 17 dated 25 October 2020 exhibited at pages 79–80 of Kuon's AEIC which included Shimizu's back charges of $384,750.00. Prime's submissions pointed out that progress claim no. 17 also acknowledged that Pro-Active had received $1,154,191.65 in payments from Prime. Yet, in its SOC, Pro-Active stated[71] it received $822,011.15.

76 Although Kuon repeatedly stated during cross-examination that he would elaborate later on his disagreements with counsel for Prime, he did not do so in re-examination. Prime's submissions highlighted[72] seven instances where Kuon failed to explain his disagreement on crucial issues.

The issues

77 The issues that require the court's determination are:

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70 At para 59.

71 At para 10.

72 At para 72.

(a) Did Pro-Active carry out the contracted works expeditiously as required under clause 9.1.1 of the LOA? If not, was the delay attributable to Pro-Active or to other factors?

(b) Did Prime serve a valid notice of termination on Pro-Active?

(c) Is Prime entitled to levy back charges on Pro-Active?

(d) What is the value of the works carried out by Pro-Active?

(e) The impact of Prime's decision to discontinue its counterclaim.

The findings

78 The court starts by reviewing the evidence adduced for Pro-Active's case from its only witness, Kuon.

(a) Did Pro-Active carry out the contracted works expeditiously as required under clause 9.1.1 of the LOA? If not, was the delay attributable to Pro-Active or to other factors?

79 The court notes that Kuon consistently disagreed with counsel for Prime on all allegations made by Prime relating to Pro-Active's delayed and/or defective contractual works as well as the roof crown works. Even when the court conveyed to Kuon[73] that Prime's case was that Pro-Active could not do the work due to delay and other reasons and hence, Pro-Active's services were terminated, Kuon would not agree despite the clear evidence presented to the court. This included Andrew's oral testimony, the numerous e-mails attached to Andrew's AEIC which included that dated 6 December 2019[74] as well as

[73] See transcripts on 6 December 2022 at p 61.

[74] At p 45 of Andrew's AEIC.

Andrew's letter of notification of delay dated 31 October 2019 (and see [39] above)[75] which he said was Prime's "final warning". Other instances of Pro-Active's delay and poor workmanship are set out in Prime's closing submissions.[76]

80 In his e-mail dated 6 December 2019, Andrew had provided a summary of Pro-Active's manpower with Shimizu's comments. That e-mail contained the following extracts which are telling of Pro-Active's performance:

> 1 we (Prime and Proactive) committed 22 men per day (irregardless day or night) in bid to catch up
>
> 2 Total workers observed is mostly always 13 to 14 men per day
>
> 3 No night works done at all (8am to 5am shift arranged) until 4th Dec for maxwell link
>
> 4 required 2-3 box frames and 2 subframes to complete per day – currently on average 1 box frame & 1 subframe per day
>
> Basically I'm extremely tired of finding excuses for proactive manpower and speed of works – Yabo has practically got their act together & caught up to Proactive
>
> …
>
> I have shimizu Murayama hounding me daily on your manpower & takashi asking me why no night shift works (working till 10am is extended shift and not night shift).
>
> …
>
> I have also at times reminded you to add manpower but I know it gets ignored and you shift topic to other issues and I forget about this
>
> I think 5th Dec having 8 workers is the last straw, there are 3 major areas for you to work at and fabrication on site – 8 workers day time is no way enough.

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75 At AB241.

76 At paras 28–29, 32 and 40.

> There is simply no commitment to want to finish works – it becomes a daily grind waiting for something to happen
>
> I'm also tired of arranging supply workers for you and using Yabo men to falsely cover up your manpower.
>
> I get it that more man = more salary payout for you, but it has come to a point where the workers progress will harm Prime structure schedule and commitment to the project
>
> Shimizu has offered to add men for proactive – 10 men. I am in no position and have no fighting grounds to refuse. I cannot be paying this amount for you.

81 Andrew's earlier letter of notification of delay dated 31 October 2019[77] addressed to Kuon could not be clearer on Pro-Active's poor performance either. The letter is set out in full below:

> You are hereby advised that your performance on the Southernwood project has delayed to a level that is no longer acceptable nor tolerable. This poor performance issue has resulted in creating many other problems on the project including subsequent cladding and glass installation. Even more disturbing is the fact that, despite having already expressed our concerns to you regarding these delay issues, there has not been any significant attempt on your part to improve your performance. Regardless of the many promises for schedule you've made to Prime Structures, no firm action has been taken.
>
> The current issues at hand concerning your poor performance include:
>
> - 1st Delay to schedule to Lv 2 type F shopfront issued on 5th Sept – where you are instructed to complete Gridline A by 1st Oct 2019 & Gridline D by 30th Oct 2019
> - 2nd Delay to schedule to Lv 2 type F shopfront issued by Prime structure on 8th Oct 2019 – where you are issued our committed dates to Capital land to complete Gridline A by 17th Oct 2019 & Gridline D by 7th Nov 2019
> - 3th Delay to schedule to Lv 2 type F shopfront on site on 25th Oct 2019 – where by micro schedule you will fail to deliver Type B 5 complete sets on 1st Nov

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77 At AB241.

> To recap, the date where the replacement of steel works occurred during 4th Sept 2019
>
> The intent of this letter is to clearly inform you that unless there is immediate and considerable improvement on your part, we will be forced to terminate your services and hire another contractor to take over these tasks. Please be made fully aware that if this action is taken, it will be done at your expense. To be quite clear on this issue, not only will the cost of hiring another contractor be applied to your account, we will also hold you liable for any other costs we incur as a direct result of the delays and problems that your lack of performance caused.
>
> There is no more room for discussion on this matter. Please consider this your final warning.

82 Obviously, Prime's "final warning" above did not have its desired effect as seen in the fact that Prime (again through Andrew) had to send his e-mail of 6 December 2019 at [81] (see also [41] above). Again, it seemed that Pro-Active's work performance did not improve even after 6 December 2019 as Shimizu sent an e-mail dated 13 December 2019[78] to Prime.

83 The e-mail from Shimizu[79] is most telling and reads as follows:

> Dear Sonny/Frankie/Andrew,
>
> Further to your email on 6th December 2019 and our letter of Notice of delay to you dated 5th December 2019. we are unable to accept your programme to install the roof crown and complete only in February 2020.
>
> In consideration of the delay you have caused us due to your poor performance and shortage of manpower in the various locations – 1st, 2nd & 21st storey, we have decided to engage a 3rd party sub-contractor to install the roof crown including painting and the trellis work in order to mitigate the delay caused by you, so you can concentrate on 1st, 2nd and 21st storey progress.
>
> We have informed you last evening of our decision. All cost incurred in the installation shall be recovered from you.

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78 At AB882.

79 At AB882.

> In addition, following the email from you today at 1335hr. we shall also engage a 3rd party subcontractor to finish the structure steel on your behalf and recover the cost incurred from you.

84 Notwithstanding Kuon's repeated denials in the witness stand, there is little doubt that Pro-Active's work was slow and behind schedule. The court does not accept his explanation (at [40] above) he did not see the need to reply to the notification of delay from Prime in [81] but chose to increase his manpower and expedite the contractual works. His testimony is untrue in any case in the light of Shimizu's e-mail in [83] terminating the roof crown portion of Pro-Active's scope of works. Had Kuon really deployed more and adequate manpower as Prime (and Shimizu) requested, the roof crown works as well as the trellis works, which Pro-Active took over from Yabo (see [61] above), would not have been removed from Pro-Active's contract.

85 During cross-examination of Andrew, counsel for Pro-Active had latched onto Andrew's e-mail at [80] and Andrew's words "Yabo has practically got their act together & caught up to Proactive" to contend[80] that Yabo was equally guilty of delay and failing to work diligently. Andrew pointed out that part of Yabo's delay was due to its having to add manpower to tear down works completed by Pro-Active.[81]

86 In any case, the court cannot see how any delay on Yabo's part assists Pro-Active or exculpates its repeated delays when Yabo's progress or lack thereof in no way impacted on Pro-Active's scope of works. In this regard, the case of *Peak Construction* (see [67] above) cited in Pro-Active's closing

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80 See transcripts on 28 February at p 214.

81 Ibid at p 214.

submissions[82] does not assist Pro-Active. There, one of the heads of damages in dispute was a sum for liquidated damages payable by the plaintiff main contractor to the overall employer (*Peak Construction* at 121). The argument made by the plaintiff main contractor was that it was liable to pay liquidated damages to the overall employer because of a 58-week delay in completion, and this delay was caused by the defendant subcontractor's breach of its sub-contract. On the plaintiff main contractor's case, they could recover this sum as damages from the defendant subcontractor. On appeal, the United Kingdom Court of Appeal held that the plaintiff main contractor was not liable to pay any liquidated damages for delay to the overall employer (*Peak Construction* at 121), and therefore cannot claim this sum as damages from the defendant sub-contractor. The court held that no liquidated damages were payable to the overall employer because the failure to complete on time was at least partly "due to the employer's own fault or breach of contract", and that "liquidated damages and extension of time clauses in printed forms of contract must be construed strictly *contra proferentum*". Here, Pro-Active could not/did not substantiate Kuon's allegation (see [14] above) that Prime was responsible for its delayed works. Moreover, Andrew's testimony (see [57]–[62] above) and correspondence (see [81]–[82] above) rebutted Kuon's allegation.

(b) Is Prime entitled to impose back charges on Pro-Active?

87 Prime's entitlement to back charges from Pro-Active is found in clause 7.1 of the LOA which states:

> The Subcontractor must remain contactable by Contractor's project staff during contract period. Otherwise, the contractor reserves the rights to ask another party to complete the

[82] At footnote 18 for para 22.

> Subcontractor's work and all cost plus 15% admin charges shall be payable by the Subcontractor.

88 Kuon had taken out from Pro-Active's scope of works the portion relating to the installation component of the roof crown works and in so doing, he failed to give credit to Prime for the L/C payment made to Qingdao Co which was one item of Prime's back charges to Pro-Active. Pressed by the court[83], Kuon agreed that Prime could recover the L/C sum (which had increased to $765,875.00 before GST).

89 In Pro-Active's progress claim no 11 dated 25 February 2020[84] as well as in its progress claim no 17 dated 25 October 2020[85], the roof crown works were still included in Pro-Active's scope of works. Despite the court's question to him[86], Kuon refused to answer whether Shimizu's back charge to Pro-Active of $1.35 per kg totalling $222,015.60 related to installation cost for the roof crown works, even though the item appeared in Pro-Active's own progress claim no 17 which Kuon exhibited in his AEIC[87]. Kong Hwee apparently charged $482,000.00 for installation of the roof crown[88] for which Prime looked to Pro-Active for recovery.

90 There was correspondence[89] before the court which showed that Kuon requested Prime to pay invoices addressed to Pro-Active. Kuon himself had

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83 See transcripts on 7 December 2022 at pp 76–77.

84 At Kuon's AEIC at p 117.

85 Ibid at p 79.

86 See transcripts on 7 December 2022 at p 82.

87 At p 79.

88 See AB790 and transcripts on 7 December 2023 at p 85.

89 See p 445 of Sonny's AEIC.

signed Pro-Active's letter dated 27 August 2019 addressed to Prime for Frankie's attention requesting Prime to establish the L/C in favour of Qingdao Co for $275,000.00[90]. Kuon asked for the L/C to be issued by 1 September 2019 and added that he would not object to Prime's deducting the L/C amount from Pro-Active's monthly progress claim together with interest charges incurred. Yet, Kuon denied Pro-Active was cash-strapped. Pressed to answer the court's question[91], Kuon eventually acknowledged that Prime was entitled to back charge Pro-Active for the payments it made on Pro-Active's behalf.

91 Prime had also back charged Pro-Active for other items such as galvanising charges, course attendance fees paid for Pro-Active's workers, medical fees, supply of manpower and 15% administrative charges. Kuon had disputed liability on all these items. During re-examination, Kuon clarified that administrative fees were for purchase and supply of material and equipment by Prime for Pro-Active[92]. He disputed liability because the charges should, but were not, discussed between the parties first. However, apart from Kuon's bare assertion, there is no provision in the LOA that stipulates there must be a discussion between the parties before Prime can back charge Pro-Active for charges it incurred on Pro-Active's behalf.

92 In its closing submissions (see [68]–[69] above), Pro-Active had argued that there was no evidence before the court of any back charging by Shimizu to Prime for the roof crown works carried out by Kong Hwee. It is true that Prime did not produce by way of primary evidence an invoice from Shimizu to Prime

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90 Ibid p 459.

91 At transcripts on 7 December 2022 at p 90.

92 Ibid p 110.

or an invoice from Kong Hwee to Shimizu for the cost incurred by Shimizu for the roof crown works. What was before the court was a contra charge[93] from Shimizu to Positive dated 18 March 2020 where Prime and Kong Hwee were named as the parties on whose behalf Positive was charged by Shimizu for $652,918.10 with Kong Hwee's charge under item 4 of $482,000.00 being for the installation of roof crown steel works including three coat system painting.

93 However, in Prime's closing submissions[94], it pointed out that its claim against Pro-Active has nothing to do with the issue of privity of contract. It is based on the fact that Pro-Active is contractually obliged to pay for the installation *vis-à-vis* the roof crown works as long as Prime engaged another subcontractor to carry out that installation. It was not disputed that Kong Hwee did carry out those works, subject to the caveat that its appointment was done by Shimizu. Prime added that it makes no difference to Pro-Active whether Kong Hwee's appointment was done by Shimizu or Positive or Prime as long as it was a subcontractor which was appointed to carry out the installation of the roof crown works which Pro-Active did not do.

94 It is precisely because there is no privity of contract between main contractor, subcontractors and sub-subcontractors that the construction industry coined the words 'back charges" and came up with the practice of the main contractor(s) charging its own subcontractors for *inter alia* rectification of defective works, provision of manpower and materials *etc* which the subcontractors pass downstream to its sub-subcontractors and to the party ultimately liable for the back charge in question.

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93 At AB790.

94 See para 82(b).

95 Kuon's dispute of the 15% administrative charge levied by Prime is also unsustainable in the light of clause 7.1 of the LOA[95] set out at [87] above, as well as item 40 of Appendix D to the LOA,[96] which provides for "15% Administration charges on all materials, tools and equipment purchased by Subcontractor through Contractor". Since Prime has a contractual right to charge a 15% administrative fee to Pro-Active, the latter's consent is not required nor can it dispute the charge.

96 In Pro-Active's closing submissions, it set out[97] the invoices in Sonny's AEIC that formed the basis for Prime's back charges which it disputed. Pro-Active's dispute largely related to labour that was sourced from a number of construction companies. Pro-Active's primary objection to the invoices was that Kuon was not given prior notice of nor was there prior discussion, of those charges before they were levied.

97 As was noted at [95] and from clause 7.1 at [87] and item 40 of Appendix D to the LOA, there is no contractual provision in the LOA that obliges Prime to give prior notice of or have a prior discussion, of back charges before they were imposed either directly on Pro-Active by Prime or indirectly when back charged by Shimizu or by Positive downstream to Prime. If Prime was not given notice by the party imposing the back charges, by the same token, Pro-Active should not expect Prime to give notice when those same back charges were passed onto Pro-Active.

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95 At AB514.

96 At AB530.

97 At Annex A.

98 In regard to the labour back charges, Pro-Active again produced no evidence whatsoever to rebut Andrew's evidence that it had insufficient manpower on site for the contracted works and that was why its progress was behind schedule and which prompted Shimizu to remove the roof crown from Pro-Active's scope of works.

99 Consequently, on a balance of probabilities which is all that Prime is required to prove, the court finds that the back charges imposed by Prime on Pro-Active are legitimate or valid. As one example, the court refers to the charge for Roflo (see [48] above) of $11,242.23 (before 15% administrative charge and GST) for conducting the façade inspection at the Qingdao Co. That is clearly a legitimate charge as Roflo had to ensure the quality of the façade was in compliance with the specified standard before the material was shipped to Singapore. It was absurd of Kuon to contend (see [48] above) that any inspection should have been conducted in Singapore. That would have been too late – the quality of Qingdao Co's materials should rightly be checked *before* the materials leave the factory where it was fabricated. It was equally absurd of Kuon to say that quality control was no longer Pro-Active's responsibility. He had admitted (after considerable prevarication) that Qingdao Co was Pro-Active's supplier[98]. Pro-Active's contractual obligation under the LOA included the "supply, fabrication and installation" of the roof crown. Only the "installation" component had been removed from its scope of works by Shimizu's termination. Supply and fabrication remained its responsibility.

[98] See transcripts on 6 December 2022 at p 19.

100 Pro-Active relied on *Vim's* case to argue[99] that it should have been given reasonable notice prior to the "de-scoping" of the roof crown installation from its scope of works. Pro-Active pointed out it received Prime's catch-up schedule only on 6 December 2019 (see [80] above) and on 9 December 2019, Prime asserted it would look to Pro-Active for Shimizu's contra charges for the installation costs. Pro-Active's submission conveniently overlooked Andrew's e-mail dated 31 October 2019 where a final warning was issued to Pro-Active (see [81] above).

101 Pro-Active also relied on *Vim's* case to submit that Prime's back charges had not been proven[100]. In *Vim's* case, the Appellate Division of the High Court was highly critical of the defendant Deluge for producing unreadable and/or un-decipherable documents/photographs leading the court to conclude there was woefully inadequate substantiation put forward by Deluge for its claim for substantial back charges from Vim. Was that the case here as Pro-Active submitted?

102 It would be appropriate at this juncture to quote the same helpful extract from B. R. Burrows J's judgment in *Impact Painting Ltd v Man-Shield (Alta) Construction Inc* [2018] AWLD 582 that the court in *Vim's* case did at [102]:

> In my view, the onus is on the party claiming a back charge to prove that:
>
> 1. The back charge is for an expense actually, necessarily and reasonably incurred by the party claiming the back charge.
>
> 2. By the terms of the subcontract, or by some other agreement between the parties, the charge is one, or is

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99 At para 63 of its closing submissions.

100 Ibid at paras 71–77.

> in relation to some task, for which the subcontractor undertook responsibility.
>
> 3. The general contractor incurred the expense because the subcontractor defaulted on the responsibility to which the charge relates.
>
> 4. Prior to incurring the charge, the general contractor gave notice to the subcontractor of its default and a reasonable opportunity to cure it.

103 The court is of the view that Prime fulfilled all four requirements in this case. In regard to s/n 1, 2 and 3 in [102], by the terms of the LOA namely clauses 3.2, 5.7 (read with clause 1(b)(i) of Appendix C), 9.1 and 9.3 (see [108] above). Prime necessarily incurred the back charge(s) because of Pro-Active's delayed works and/or omission of the roof crown works from its scope of works. For s/n 4 in [103], Andrew's correspondence with Kuon at [80] to [81] gave notice that Pro-Active must speed up its works by deploying more manpower if it did not want to face the dire consequences.

104 Consequently, all back charges incurred by Prime that arose from Shimizu's removal of the installation component of the roof crown works must necessarily be for Pro-Active's account. A quick review of the back charges show (apart from labour supply to enable Pro-Active to catch up) that the items were all related to the installation of the roof crown. This would include Kong Hwee's installation charge, the supply of stainless bolts and washers and expenses incurred for the import and galvanising of the steel materials ordered from Qingdao Co. Such expenses would include import clearance charges, unstuffing (of containers) and delivery charges for the roof crown steel support. A crane is definitely required for the roof crown installation and the court dismisses Pro-Active's objection to the back charge of $22,078.31 in this regard as well as its objection to the charges for, amongst other things, the erection and dismantling of scaffolding for installation, amounting to $39,426.40.

105 The only items that the court does not accept as valid back charges are the medical fees incurred for Vaitilingam Padmanaban ($248.78) and Islam Anwarul ($701.28) and for the basic traffic control courses ($459.99) attended by several workers who were identified. No details or evidence were provided for these items. The total sum disallowed is $1,410.05.

106 Prime had contended that Pro-Active had admitted all but $82,809.77 of the back charges[101]. This was because in Prime's Payment Response sheets to Pro-Active's progress payment claims, Prime would deduct the back charges before setting out the sums it would and did pay, to Pro-Active (see [75] above)[102].

107 Consequently, the court finds that Prime was entitled to back charge Pro-Active for the roof crown works that it failed to carry out, for the L/C established in favour of Qingdao Co, for other charges incurred on Pro-Active's behalf and for all other back charges imposed by Shimizu on Positive who in turn back charged to Prime, that related to Pro-Active's scope of works. Only the items in [105] are disallowed. The allowed back charges, which are evidenced by tax invoices billed by Prime to Pro-Active setting out the details of the back charges,[103] total $751,699.34.

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101 At para 14(b) of the D&CC.

102 See example at AB271 where Prime deducted $46,592.83 from Pro-Active's progress claim no 7.

103 Sonny Bensily's AEIC at pp 121, 134, 140, 148, 155, 162, 169, 176, 187, 193, 198, 206, 216, 224, 231, 240, 249, 256, 264, 269, 274, 279, 288, 292, 294, 302, 303 and 318.

108 Pro-Active had attempted to "de-scope" and deduct the entire roof crown works from the contract sum. Prime's closing submissions[104] pointed out that there is no clause in the LOA that allows Pro-Active to de-scope such works. Prime added that Pro-Active is not even entitled to omit the installation component of the roof crown works from its scope of works as Prime has the right to engage other subcontractors to complete the work of Pro-Active and recover all incurred costs and expenses from Pro-Active. Prime relied on clause 9.3 of the LOA which states:

> The Contractor shall, but is not obliged to, make an assessment of the value of work done by the Subcontractor up to the point in time of termination. The Contractor shall further be entitled to engage other subcontractor/s to complete any outstanding subcontract works and recover all incurred costs and expenses from the defaulting Subcontractor.

Clause 9.3 entitles Prime to recover by way of back charges what it expends on other subcontractors to complete Pro-Active's contracted works or whatever sums that were back charged to Prime by Shimizu after it carried out works on behalf of Pro-Active.

109 Reliance was also placed by Prime on cl 5.7 of the LOA which states:

> The Contractor fully reserves the right to set off any monies owing by the Subcontractor to the Contractor from any monies due or to become due to the Subcontractor.

110 Clause 5.7 is to be read with clause 1(b)(i) of Appendix C to the LOA[105] which states:

> The Subcontractor be liable for and shall fully indemnify and save harmless the Company against and from

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104 At para 80(h).

105 See AB23.

> i) any breach, non-observance or non-performance by the Subcontractor, his servants or agents of any of the provisions of the Contract, in so far as they relate and apply to the Subcontract;

The court accepts Prime's interpretation of the various clauses as to its right to an indemnity from Pro-Active in regard to back charges incurred arising out of Pro-Active's scope of works and/or the omission of the installation portion of the roof crown works from its scope of works.

111 At this juncture, the court would point out that it does not believe or accept Kuon's version of events nor his interpretation of the reduced scope of the contracted works. It is reprehensible the extent to which Kuon would go, to deny or dispute facts despite overwhelming evidence. The court cites as an example his denial that Pro-Active was in financial difficulties (see [49] above)[106] despite his own letter on behalf of Pro-Active to Prime dated 27 August 2019 requesting Prime to establish the L/C in favour of Qingdao Co (see [90] above).

112 Another instance of Kuon's refusal to admit the obvious was his disavowal of the Variation Order on the basis that he did not sign the document[107] even though the document contained the additional steel works at the trellis area that Pro-Active requested to, and did, take over from Yabo. Andrew had testified (which evidence the court accepts) that Pro-Active requested to do the work in order to increase its profits (see [61] above). A third instance of Kuon's untruthful evidence relates to back charges set out earlier as

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106 See the transcripts on 6 December 2022 at p 56.

107 See the transcripts on 6 December 2022 at p 14.

well as his claim that he had purchased nuts and bolts for the roof crown works (see [50] above).

113 The court prefers the testimony of Frankie and Andrew as they were more credible witnesses. Their evidence was consistent with the documentary evidence that was before the court. Both persons no longer work for Prime and they have no reason not to speak the truth or to recall events as they actually happened.

(c) Did Prime serve a valid notice of termination on Pro-Active for the roof crown works?

114 The court moves next to the issue of whether and when Pro-Active/Kuon was given notice of Shimizu's notice of termination in [83]. In his AEIC[108] as well as in his oral testimony[109], Andrew stated that he had forwarded to Kuon Shimizu's notice of termination. In cross-examination he candidly acknowledged there was a possibility he did not forward the e-mail, Unfortunately, Andrew was unable to locate and produce the forwarded copy for the court. Kuon not surprisingly denied receiving notification of Shimizu's notice of termination[110].

115 In Frankie's AEIC[111] as well as in his oral testimony, he had stated that he was very certain he had made a phone call to Kuon[112] around midnight of 12 November 2019 or in the early hours of 13 December 2019 to convey to the

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108 At para 9(l).

109 See transcripts on 28 December 2022 at p 226.

110 See transcripts on 6 December 2022 at p 41 lines 20–21 & p 43 at lines 13, 14 and 23.

111 At para 10.

112 See transcripts on 8 December 2022 at pp 190, 191 & 196.

latter that Shimizu no longer required Pro-Active to do the roof crown works. He was then at Changi Airport waiting for his flight to Qingdao to take off. Frankie recalled that his flight was scheduled to depart at 1.55am on 13 December 2019 but it was delayed until 5.15am. He arrived at Changi Airport at around 11.30pm on 12 December 2019 and decided to call Kuon who was then already in China. Besides being Prime's subcontractor, Frankie disclosed that Kuon was also his then neighbour and he recalled clearly that Kuon's wife had then asked Frankie to bring some of Kuon's belongings to the latter in China which he did.

116 Assuming *arguendo*, that Andrew did not forward Shimizu's e-mail in [83] to Kuon (who denied receiving any such e-mail) or that Kuon did not receive the forwarded e-mail (because he said he could only receive e-mails sent to certain domain names whilst in China[113]) the court finds that Frankie did telephone Kuon on 12 December 2019 to inform him of Shimizu's decision while Frankie was at Changi Airport waiting for his flight to Qingdao.

117 Contrary to Pro-Active's closing submissions[114], Kuon's version of when he was notified of Pro-Active's termination is neither credible nor corroborated by documentary evidence. The court finds it highly implausible that Prime would not immediately notify Pro-Active/Kuon of Shimizu's decision to remove the installation component of the roof crown works from Pro-Active's scope of works. Andrew more likely than not forwarded to Kuon Shimizu's e-mail in [83] once Prime received it while Frankie orally informed Kuon of Shimizu's decision on the same night. Moreover, in his own AEIC,

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113 See transcripts on 7 December 2022 at p 70.

114 At para 44.

Kuon had deposed[115] that in Prime's e-mail dated 5 September 2019 (see [38] above), Prime had mentioned that Shimizu had considered revoking the roof crown works if not for the fact that Prime had already purchased the necessary steel. Kuon was fully aware of Shimizu's dissatisfaction with Pro-Active's slow progress and the real possibility of Pro-Active's services being terminated.

118 In this regard, the court rejects as untrue Kuon's evidence[116] that he received official notice from Prime only on 27 December 2019, that Pro-Active had been taken off the roof crown works. Kuon should not have been surprised by Shimizu's decision in the light of the many e-mails he previously received from Andrew warning him of what would happen if Pro-Active did not increase the manpower it deployed and accelerate the contracted works.

119 Kuon's excuse that he was in China between 13 and 27 December 2019 does not mean that he did not know of Shimizu's decision in view of its past unhappiness with Pro-Active's pace of work. Moreover, he himself revealed he could receive e-mails sent to his yahoo account in China[117].

120 The court is of the view that pursuant to Andrew's letter of notification dated 31 October 2019 set out at earlier at [81], Pro-Active had been issued a "final warning" by Prime. Despite that final warning, Pro-Active's rate of progress did not improve prompting Shimizu to terminate Prime's contract and Prime in turn to validly terminate Pro-Active's contract for the roof crown works.

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115 At para 24.

116 At transcripts on 6 December 2022 at p 47.

117 Ibid at p 70.

(d) What is the value of the works carried out by Pro-Active?

121 It was during his re-examination[118] where Kuon attempted to shirk Pro-Active's obligations and shift to Prime the responsibility for the fabrication and supply of the steel materials, claiming Pro-Active's role was only that of a co-ordinator between Prime and Qingdao Co. It was even more absurd of Kuon to suggest[119] that Qingdao Co took over fabrication and installation of the roof crown works.

122 Pro-Active's contractual obligation under the LOA was *the supply, fabrication and installation of steel works*[120]. Due to its financial constraints, it did not have the means to pay Qingdao Co and approached Prime for assistance. The fact that Prime paid Qingdao Co on Pro-active's behalf does not *ipso facto* place on Prime the responsibility for the supply and fabrication of the steel needed for the roof crown works. That remained the responsibility of Pro-Active. Consequently, the court rejects Pro-Active's argument that the roof crown works had been de-scoped from its scope of works.

123 Pro-Active cannot unilaterally remove and deduct the roof crown works from its scope of works as Kuon attempted to do in the SOC. Consequently, Pro-Active's computation in [20] is incorrect.

124 In Pro-Active's closing submissions[121], it had set out in the table below its computation of the reduced sum of $260,615.68 due to Pro-Active should

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118 At transcripts on 7 December 2022 at p 112.

119 See transcripts on 6 December 2022 at p 16.

120 See the LOA at AB511.

121 At para 104.

the court be of the view that the roof crown works were not de-scoped from Pro-Active's scope of works:

	Items	**Amounts S$**
A	Total contract sum	2,512,531.53
B	Progress payments to Pro-Active	822,011.15
C	L/C payment	765,875.00
Less	(i)Further back charges	(117,498.71)
	(ii) 3% commission on L/C	(22,975.95*)
	(iii) Installation costs	(582,483.66)
	(iv) sum unaccounted based on actual quantity of materials supplied and fabricated by Qingdao Co	41,879.00
	Subtotal	243,566.06
Add	7% GST	17,049.62
Total		260,615.68

* The correct figure should be $22,976.25

125 If the installation component in Pro-Active's contracted works, which was quantified as $370,500.55[122], was used in place of Kong Hwee's installation charge of $582,483.66, Pro-Active submitted it should be paid $522,018.66 (before GST) or the claim ($558,559.97) after GST. The court does not accept either $260,615.68 or the claim amount as being due to Pro-Active.

[122] Pro-Active's closing submissions at para 96.

126 In its closing submissions (see [68]–[69] above), Pro-Active had further argued that there was no evidence before the court of any back charging by Shimizu to Prime for the roof crown works carried out by Kong Hwee. It is true that Prime did not produce by way of primary evidence an invoice from Shimizu to Prime or an invoice from Kong Hwee to Shimizu for the cost incurred by Shimizu for the roof crown works. What was before the court was a contra charge[123] from Shimizu to Positive dated 18 March 2020 where Prime and Kong Hwee were named as the parties on whose behalf Positive was charged by Shimizu for $652,918.10 with Kong Hwee's charge under item 4 of $482,000.00 being for the installation of roof crown steel works including three coat system painting.

127 In Prime's closing submissions[124], it pointed out that its claim against Pro-Active has nothing to do with the issue of privity of contract. It is based on the fact that Pro-Active needed to pay for the installation *vis-à-vis* the roof crown works as long as Prime engaged another subcontractor to carry out that installation. It was not disputed that Kong Hwee did carry out those works, subject to the caveat that its appointment was done by Shimizu. Prime added that it makes no difference to Pro-Active whether Kong Hwee's appointment was done by Shimizu or Positive or Prime as long as it was a subcontractor which was appointed to carry out the installation of the roof crown works which Pro-Active did not do.

128 It is precisely because there is no privity of contract between main and subcontractors that the construction industry coined the words "back charges"

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123 At AB790.

124 See para 82(b).

and came up with the practice of the main contractor(s) charging its subcontractors for *inter alia* rectification of defective works, provision of manpower and materials *etc* which the subcontractors pass down the line to sub-subcontractors and to the party ultimately liable for the back charge in question.

129 The correct computation for Pro-Active's claim and/or the work it carried out is set out in the table below:

Item	**Particulars**	**Amount (S$)**
	Revised Contract sum*	1,161,210.58
Add	Agreed variation works	1,351,320.95
	Total	2,512,531.53
Less	(i) Advance payment $45,557.69	
	(ii) L/C payment $765,875.00	
	(iii) Progress payments $770,248.46	(1,581,681.15)
	(v) Allowed back charges (see [107] above), inclusive of charges associated with Kong Hwee's installation work, and inclusive of GST	($751,699.34)
Balance		$179,151.04

*The revised contract sum was accepted by both parties against the original figure in the LOA of $1,161,204.58.

130 In the Defence component of its D&CC (see [30] above), Prime had claimed $93,976.08[125] (inclusive of GST) from Pro-Active. In addition, in the Counterclaim component of its D&CC, Prime had counterclaimed liquidated damages of $90,450.92 for Pro-Active's delay of 36 days in completing the contracted works on 4 January 2020 instead of on 29 November 2019[126]. If the counterclaimed sum is set off against the balance of $179,151.04 the court finds is due to Pro-Active, the remaining sum due to Pro-Active is $88,700.12 ($179,151.04 - $90,450.92).

(e) The impact of Prime's decision to discontinue its counterclaim.

131 In its opening statement and in its closing submissions, Prime indicated it intended to withdraw its counterclaim for liquidated damages.

132 However, in its closing submissions[127], Pro-Active reserved its rights to seek costs from Prime for the late withdrawal of its counterclaim as well as the wasted hearing date of 9 December 2022 due to Andrew's unavailability to attend court that day.

133 Undoubtedly, a party that withdraws its clam or counterclaim at the eleventh hour is liable to pay costs to the other party. Should an exception be made in this case? The court is of the view that the evidence adduced in court

125 At para 15 of D&CC.

126 At para 23 of D&CC.

127 At para 107.

would have likely supported a finding in favour of Prime of liability on Pro-Active's part for liquidated damages as there was undoubtedly a delay in completion of the contracted works, even before the roof crown works were removed from Pro-Active's scope of works. However, because of Prime's intention not to pursue its counterclaim, no evidence was led in that regard other than the computation for liquidated damages set out in the D&CC (see also [30] above)[128].

134 Consequently, the withdrawal of Prime's counterclaim was not because its claim for liquidated damages was unfounded. That being the case, there should only be nominal costs awarded to Pro-Active for the withdrawal of Prime's counterclaim which the court fixes at $3,000 plus another $2,000 for the wasted hearing day of 9 December 2022.

135 Pro-Active on the other hand has not proven its claim. Instead of $558,559.97 (see [20] above), Pro-Active is only entitled to the sum of $179,151.04. It fails in its claim for the claim amount of $558,559.97 or $260,615.68 (see para [125] above).

Conclusion

136 Accordingly, the court awards judgment to Pro-Active in the sum of $179,151.04 together with interest at 5.33% per annum from the date of the writ (6 November 2021) until payment. Costs to Pro-Active are on the State/District Courts scale in view of the judgment sum awarded being below the jurisdiction of the High Court. The sum of $5,000 awarded to Pro-Active in [134] should be

128 At para 21 of the D&CC.

added to the costs here which are to be taxed on the State Courts scale unless otherwise agreed.

Lai Siu Chiu
Senior Judge

Yong Zhee Hoe and Remya Pisharath (Rajwin & Yong LLP) for the plaintiff;
Lee Wei Fan (Li Weifan) (Anthony Law Corporation) for the defendant.
