IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 246

Suit No 1063 of 2013

Between

CAA TECHNOLOGIES PTE LTD

… Plaintiff

And

NEWCON BUILDERS PTE LTD

… Defendant

And

NEWCON BUILDERS PTE LTD

… Plaintiff in Counterclaim

And

CAA TECHNOLOGIES PTE LTD

… Defendant in Counterclaim

GROUNDS OF DECISION

[Building and construction law] – [Building and construction contracts]

[Building and construction law] – [Sub-contracts] – [Compensation for delays]

[Building and construction law] – [Terms] – [Implied terms]

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CAA Technologies Pte Ltd
v
Newcon Builders Pte Ltd

[2016] SGHC 246

High Court — Suit No 1063 of 2013
Vinodh Coomaraswamy J
26, 27, 28, 29 May; 2 June 2015; 29 April 2016

29 November 2016

Vinodh Coomaraswamy J

1 The defendant was the main contractor for a substantial building project in Jurong. It sub-contracted the design, production and delivery of key structural elements of the project to the plaintiff. The plaintiff failed to deliver those elements as promised. The defendant revised the delivery schedule to accommodate the plaintiff's failure. The plaintiff failed to meet even the revised schedule. Although the plaintiff eventually did deliver some of the elements, its delivery was out of sequence, incomplete and badly behind schedule. The defendant therefore terminated its contract with the plaintiff and engaged a substitute contractor. The plaintiff treated the defendant's termination as a breach of contract.

2 In this action, the plaintiff seeks damages from the defendant for its breach of the parties' contract in terminating their contract without basis. The

defendant, in turn, counterclaims damages from the plaintiff for its breach of the parties' contract in failing to deliver the structural elements as promised.

3 Having heard and considered the parties' evidence and submissions, I have disallowed substantially the whole of the plaintiff's claim and allowed substantially the whole of the defendant's counterclaim.

4 The plaintiff has appealed against my decision. I now set out the reasons for my decision.

The facts

The parties

5 The plaintiff is CAA Technologies Pte Ltd ("CAA"). CAA designs, produces and installs pre-cast concrete structural elements for building projects.[1] These structural elements include precast concrete hollow core slabs.

6 The defendant is Newcon Builders Pte Ltd ("Newcon"). Newcon is a main contractor for building projects.[2]

The letter of intent

7 By a contract entered into in 2012, the Jurong Town Corporation ("JTC") engaged Newcon as the main contractor for a project to build a medical technology hub in Jurong.[3] The defendant, in turn, sub-contracted to

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1 AEIC of Chen Linhui dated 4 May 2015 at paragraph 4.

2 AEIC of Cao Wei Min dated 5 May 2015 at paragraph 6.

3 AEIC of Chen Linhui dated 4 May 2015 at paragraph 5.

the plaintiff the production and delivery of all the precast concrete hollow core slabs for the project.

8 The origin of the legal relationship between the parties is a letter of intent dated 2 November 2012.[4] The letter of intent is a brief three-page letter from Newcon to CAA. It is brief because the letter of intent itself enabled the parties to replace its terms with a comprehensive contract setting out their obligations in greater detail in terms to be agreed between the parties. The letter of intent refers to this comprehensive contract as the "letter of acceptance". Despite this, however, it is common ground that the letter of intent has contractual force in and of itself. It is common ground, in other words, that the letter of intent is not a mere (and unenforceable) agreement to agree.

9 The letter of intent begins by informing CAA that Newcon has awarded to CAA the contract to design, produce and deliver slabs for the project as well as to provide ancillary services such as quality assurance and quality control.[5] It then sets out the breakdown of the total contract value of just over $1.6m. The breakdown is in tabular form, and lists the dimensions of the four thicknesses of the slabs which CAA was to supply, the provisional quantity required of each type, the rate to be applied to each type and the total value of each type. The table also describes certain ancillary supplies and ancillary services and sets out their value.

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4 AEIC of Cao Wei Min dated 5 May 2015 at paragraph 8; AEIC of Chen Linhui dated 4 May 2015 at pages 41 to 64.

5 AEIC of Chen Linhui dated 4 May 2015 at page 41.

10 On the second page of the letter of intent, immediately after the table, are the terms and conditions. These are set out in only eight numbered clauses. The only express term which deals with CAA's obligation as to timely production and delivery is cl 2. That clause reads as follows:[6]

> 2) Overall main contract period shall be from 1st Nov 2012 to 31st Jan 2014 (15 months). You have agreed to follow the site progress and including any revisions to construction programme schedule for your Sub-Contract Works.

11 Immediately following the eight terms and conditions is Newcon's formal instruction to CAA to commence work:[7]

> This letter of intent shall be treated as the official "Instruction to Proceed". You are to commence immediately with the submission of all necessary documents, samples and shop drawings for Consultants' approval in accordance with the design intent, our requirements and timeline as below:-
>
> …

12 The final sentence of the letter of intent, immediately above the signature block, reads: "The letter of acceptance for the Sub-Contract Works shall be sent to you for execution in due course."[8]

13 The letter of intent has three attachments. The first attachment is a single page comprising an acknowledgment for CAA to countersign and return. The acknowledgment reads as follows:[9]

> **ACKNOWLEDGEMENT**
>
> The undersigned acknowledge [*sic*] receipt of the above letter (Ref: NCB/JTC/MTH/12/348 dated 2nd November 2012), a

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6 AEIC of Chen Linhui dated 4 May 2015 at page 42.

7 AEIC of Chen Linhui dated 4 May 2015 at page 42.

8 AEIC of Chen Linhui dated 4 May 2015 at page 43.

9 AEIC of Chen Linhui dated 4 May 2015 at page 44.

> copy has been retained and hereby confirms that the terms and conditions herein are accepted and agreed to.

CAA's General Manager, Mr Chen Linhui, countersigned the acknowledgment, dated it 17 November 2012 and returned it to Newcon.

14 The second attachment comprises extracts from the main contract between JTC and Newcon. These extracts set out the specifications for all the pre-cast concrete units required under the main contract. These units include the slabs which Newcon had engaged CAA to design, produce and deliver.

15 The third attachment to the letter of intent is the construction schedule referred to in cl 2.[10] This schedule sets out, line by line, each item of work comprised in Newcon's scope of works under the main contract and sets out the duration, start date and finish date for each item.[11] The schedule is presented in the diagrammatic form typical to construction contracts. It therefore shows which items of work are critical works and which items of work can proceed in parallel with other works.

16 One of the items of work in the construction schedule is the project's superstructure works. The schedule shows the superstructure works to be critical works. The superstructure works are scheduled to start on 27 January 2013 and to finish on 18 October 2013.[12] The schedule expressly lists the installation of the plaintiff's slabs – identified by the abbreviation "HCS" – as part of the superstructure works. The first reference to these slabs is in the item described as "2nd Sty Beam/Slab, HCS & Topping". The schedule states

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10 AEIC of Chen Linhui dated 4 May 2015 at page 41.

11 AEIC of Chen Linhui dated 4 May 2015 at pages 58 to 64.

12 AEIC of Chen Linhui dated 4 May 2015 at page 58.

expressly that this work was to begin on 26 February 2013 and to finish on 17 March 2013.

17 CAA's slabs were essential part of the superstructure works. Those works could not commence, continue and complete on time unless CAA produced and delivered its slabs on time, in the correct numbers and in the correct sequence.

The letter of acceptance

18 On 11 January 2013, Newcon sent to CAA the letter of acceptance foreshadowed in the letter of intent (see [12] above).[13] It is dated 28 December 2012. In contrast to the brief letter of intent, the letter of acceptance is a lengthy and detailed document comprising 153 pages in a 22-page main body with 131 pages of appendices. The main body expands in great detail on the eight terms and conditions set out in the three-page letter of intent.[14] The appendices include drawings and specifications as well as the letter of intent itself and the construction schedule which was attached to it.

19 The first attachment to the letter of acceptance is a one-page acknowledgment for CAA to countersign, date and return to Newcon. It is common ground that CAA never signed the acknowledgment and, obviously, never returned it.[15] CAA's case, therefore, is that the parties' contract is found only in the letter of intent, with the letter of acceptance forming no part of that contract. I resolve this dispute at [60] to [88] below.

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13 AEIC of Chen Linhui dated 4 May 2015 at paragraph 38.

14 AEIC of Cao Wei Min dated 5 May 2015 at pages 58 to 210.

15 AEIC of Cao Wei Min dated 5 May 2015 at page 80.

20 It suffices for present purposes to describe only three clauses in the letter of acceptance. These three clauses deal expressly with: (i) CAA's obligations to produce and deliver slabs; (ii) Newcon's right to terminate the contract for breach; and (iii) CAA's obligation to pay liquidated damages. None of these provisions appear in the letter of intent, not even in rudimentary form.

21 Clause 7.10 sets out expressly CAA's obligations to produce and deliver slabs:

> Programme Work
>
> The programme for the Supply contract shall be in accordance with the time schedule as set out in our programme. You are required to liaise very closely with our Director/Project Manager regarding the schedule of work.
>
> The Date of Commencement, Contract Period & Completion Date for our Main Contract Works : -
>
> | | | |
> |---|---|---|
> | Date of commencement | : | 1st November 2012 |
> | Overall Main Contract Period | : | 15 months |
> | Date of Completion | : | 31st January 2014 |
>
> The tentative delivery schedule for the precast hollow core slab … for the respective storey is as follows:-

No	**Level**	**Delivery Schedule**		
		Zone 1	**Zone 2**	**Zone 3**
1	2nd Storey	18th Feb 2013	23rd Feb 2013	28th Feb 2013
2	3rd Storey	1st Apr 2013	4th Apr 2013	9th Apr 2013
3	4th Storey	26th Apr 2013	29th Apr 2013	29th Apr 2013
4	5th Storey	18th May 2013	21st May 2013	21st May 2013

No	**Level**	**Delivery Schedule**		
		Zone 1	**Zone 2**	**Zone 3**
5	6th Storey	9th Jun 2013	12th Jun 2013	12th Jun 2013
6	7th Storey	1st Jul 2013	5th Jul 2013	N.A
7	8th Storey	23rd Jul 2013	26th Jul 2013	N.A
8	9th Storey	14th Aug 2013	18th Aug 2013	N.A
9	Roof	5th Sep 2013	9th Sep 2013	N.A

…

22 Clause 7.13 gives Newcon an express right to terminate the parties' contract upon notice following an unremedied breach:

> Determination of Supply Contract by the Contractor
>
> (a) If the Supplier:
>
> (i) fails to proceed with the Supply Contract Works with due diligence after being required in writing to do so by the Contractor ; or
>
> (ii) fails to execute the Supply Contract Works or to perform his other obligations in accordance with the Agreement after being required to do so by the Contractor; or
>
> …
>
> … then in such event and without prejudice to any their [*sic*] rights or remedies, the Contractor may after given [*sic*] seven (7) days written notice to the Supplier forthwith determine the Supplier's employment under this Agreement and complete the Supply Contract Works under other arrangement and the Contractor shall be entitled to compensation for all the damage and loss suffered as a consequence of the termination.

…

23 Clause 7.15 sets out CAA's obligation to pay liquidated damages to Newcon of $18,500 per day for delays caused by CAA's default:

> Liquidated Damages
>
> In the event of any delays due to your default, you are required to reimburse us the Liquidated Damages as a result of your delays.
>
> In clarification of this clause the following shall apply:-
>
> a. The liquidated Damages under the Main Contract is $18,500.00 per calendar day.
>
> You will only be liable for the full amount in the event that your delays have solely contributed to the project delay. In cases [*sic*] your delay is concurrent with delays by third parties or the Main Contractor, then Liquidated Damages will be apportioned fairly between the parties causing delay.
>
> b. Adequate notice of delay will be given by Main Contractor as soon as it is apparent that your works are or are likely to be in delay so as to give you an opportunity to mitigate or pull back the delay.
>
> c. Under all circumstances, you must follow the Main Contract Programme or any revision thereto, you are to highlight to the Main Contractor any matters that could delay the works with a view to overcome such problems and avoid delay.

Newcon's requests for delivery

24 On 30 January 2013, Newcon asked CAA to submit various items before commencing production of the slabs.[16] Amongst these items was CAA's schedule for the first casting. This was important because JTC required one of its representatives to witness the first casting. Newcon asked CAA to respond to this email urgently because Newcon needed the first batch of slabs

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[16] AEIC of Cao Wei Min dated 5 May 2015 at page 211.

to be delivered "by mid Feb 2013". That indication was consistent with the delivery schedule in the letter of acceptance (see [21] above).

25 CAA did not respond to this email.[17] Newcon then emailed CAA again on Monday, 4 February 2013, largely repeating the contents of its earlier email.[18] The notable point about this email is that Newcon reminded CAA again that it was to deliver the first slabs by the middle of February 2013 and that that meant that CAA had to start production within the week. Newcon asked for CAA's response by the next day, 5 February 2013. CAA did not respond by 5 February 2013. Newcon sent reminders on 7 and 8 February 2013.[19]

26 The construction schedule attached to the letter of intent (see [16] above) had indicated that Newcon was to commence superstructure works by 26 February 2013. As matters transpired, CAA did not even carry out its first casting until 26 February 2013.[20] As at the end of February 2013, CAA had delivered no slabs at all to Newcon.[21]

Revised delivery schedule of 1 March 2013

27 On 1 March 2013, Newcon sent CAA by email a revised schedule for CAA's initial delivery of slabs. This initial delivery was needed for the superstructure works on the second storey.[22] The email reads as follows:[23]

> Hi Mr. Chen / Mr Koo,

17 AEIC of Cao Wei Min dated 5 May 2015 at paragraph 21.

18 AEIC of Cao Wei Min dated 5 May 2015 at paragraph 22 and page 212.

19 1DBD at 47.

20 ABD at 253.

21 AEIC of Cao Wei Min dated 5 May 2015 at paragraph 24.

> Please arrange your delivery of hollow core slab as per attached schedule for 2nd storey structural works. I.e.
>
> 1. For area 2a, delivery of HCS by 08/03/13
> 2. For area 2b, delivery of HCS by 12/03/13
> 3. For area 2C, delivery of HCS by 20/03/13
> 4. For area 3, delivery of HCS by 24/03/13
> 5. For area 1, delivery of HCS by 31/03/13
>
> We should inform you on the delivery for 3rd storey onwards in due course. Thank you.
>
> …

Attached to the email was a building plan of the second storey of the project, with the areas referred to in revised delivery schedule marked. The new delivery dates for each area were handwritten on the right side of the plan.

28 CAA did not deliver any slabs on the first two dates specified in the revised delivery schedule, *ie*, 8 March 2013 and 12 March 2013. On 12 March 2013, Newcon emailed CAA recording CAA's failure to deliver any slabs thus far. Newcon instructed CAA to deliver the first slabs by 13 March 2013 and the remaining slabs in accordance with the revised delivery schedule.[24]

29 By 15 March 2013, CAA had delivered no slabs at all. Newcon sent yet another reminder to CAA on that day.

Delivery commences on 16 March 2013

30 It was not until 16 March 2013 that CAA delivered its first batch of slabs. But CAA delivered this batch out of sequence. The slabs matched the

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22 AEIC of Cao Wei Min dated 5 May 2015 at paragraphs 25 to 27.

23 AEIC of Cao Wei Min dated 5 May 2015 at pages 213 to 214.

24 AEIC of Cao Wei Min dated 5 May 2015 at pages 215 to 216.

specifications for area 2b, not for area 2a,[25] as stipulated in the revised schedule of 1 March 2013 (see [27] above). CAA delivered another batch of slabs the next day, 17 March 2013. These slabs again matched the specifications for area 2b, not for area 2a.[26]

31 On 18 March 2013, CAA finally delivered slabs which matched the specifications for area 2a. But this delivery comprised only five slabs, well short of the total of 57 slabs which Newcon required for the works at area 2a.[27]

Proposed delivery schedule of 21 March 2013

32 On 21 March 2013, Newcon emailed to CAA a "Proposed Delivery Schedule for Hollow Core Slab – Medtech Hub project". The email reads as follows:[28]

> Dear Mr. Tony Chi / Mr. Chen,
>
> Attached please find the proposed delivery schedule for hollow core slab in our project for your arrangement of fabrication and delivery. Please note that the dates indicated are for the last delivery of hollow core slab panel for the respective areas.
>
> Please also deliver the following items for our installation and construction,
>
> 1. Another hoisting beam (9m) length for hoisting of 11m HCS panels
> 2. Rubber pad for cushioning in between the hollow core slab and cast-in-situ beams constructed
>
> We would like to schedule for a meeting with your goodself by this Friday (22/03/13) or Saturday (23/03/13) at your office to go through the detail [*sic*] schedules for the hollow core slab. Please let me know your available time.

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25 AEIC of Cao Wei Min dated 5 May 2015 at paragraph 32.

26 AEIC of Cao Wei Min dated 5 May 2015 at paragraph 33.

27 AEIC of Cao Wei Min dated 5 May 2015 at paragraph 34.

28 AEIC of Cao Wei Min dated 5 May 2015 at pages 231 to 239.

…

33 Attached to this email were several building plans on which delivery dates were handwritten. Each delivery date was cross-referenced to a set of gridlines describing the relevant section of the building plans. The proposed delivery dates can be summarised as follows:[29]

(a) All slabs for gridlines 1-4/A-D to be delivered no later than 28 March 2013;

(b) All slabs for gridlines 1-4/D-H2 to be delivered no later than 11 April 2013;

(c) All slabs for gridlines 1-5a/H2-Q to be delivered no later than 25 April 2013; and

(d) All slabs for gridlines 4-8b/E1-H2 to be delivered no later than 18 April 2013.

Meeting on 22 March 2013

34 Newcon and CAA had a meeting on 22 March 2013. CAA was represented at this meeting by Dr Chi Chao-Ton Tony, CAA's chairman, and by Mr Koo Min Ing, CAA's marketing director.[30] Newcon was represented by Mr Lin Haifeng, its project manager for this project.[31]

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29 AEIC of Cao Wei Min dated 5 May 2015 at paragraph 39; AEIC of Chen Linhui dated 4 May 2015 at paragraph 74.

30 AEIC of Chi Chao-Ton Tony dated 30 April 2015 at paragraph 28.

31 AEIC of Lin Haifeng dated 5 May 2015 at paragraph 31.

35 The parties disagree on what happened at this meeting. Mr Lin says that CAA's representatives told him that it was unable to meet Newcon's proposed delivery schedule of 21 March 2013 (see [32] above)[32] and that he, in response, raised the possibility of Newcon terminating the contract. CAA's representatives say that the proposed delivery schedule and the possibility of termination were at no time discussed at the meeting.[33]

Notice of delay

36 CAA delivered yet more slabs between 21 March and 25 March 2013. Of these slabs, however, only 12 were suitable for installation at area 2a.[34]

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[32] AEIC of Lin Haifeng dated 5 May 2015 at paragraph 31.

[33] AEIC of Chi Chao-Ton Tony dated 30 April 2015 at paragraph 30.

[34] AEIC of Cao Wei Min dated 5 May 2015 at paragraph 35.

37 On 23 March 2013, Newcon sent CAA an email titled "Letter 027 – Notice of Delay – Slow Progress in Supply of Hollow Core Slab".[35] The email put CAA on notice that Newcon was ready to receive slabs at area 2a but that CAA had failed to deliver. It asked CAA to respond within two days with proposals to recover the slippage in the delivery schedule caused by CAA's slow progress.

38 This email also enclosed formal written notice of delay, in the form of a letter dated 23 March 2013 from Newcon to CAA. The subject line of the letter is: "Notice of Delay – Slow Progress in Supply of Hollow Core Slab". The notice – said to be served under cl 7.13(a) of the letter of acceptance (see [22] above) – referred to the letter of intent and the emails sent in March 2013, and continues as follows:

> …
>
> 6. We have received 47 pieces of hollow core slab panels to-date
>
> 7. We are yet to receive the hollow core slab panels for the areas at gridline 1 ~ 4 / B ~ D, please note that we have completed the beams at gridline 1 ~ 4 / A ~ D
>
> 8. We are yet to receive the rubber pad for the installation of the hollow core slab panels
>
> 9. We are yet to receive the 9m hoisting beam with clamps for unloading and hoisting of hollow core slab panels
>
> We would like to place in record that your slow progress in delivery of the hollow core slab panels are far behind our schedule, which had caused delay to the progress of our structural works.
>
> You are hereby directed to revert to us, by Monday 25/03/13, on how you can expedite your fabrication and delivery of the hollow core slab panels for the project according to our

[35] AEIC of Cao Wei Min dated 5 May 2015 at paragraph 41 and pages 240 to 241; AEIC of Chen Linhui dated 4 May 2015 at paragraph 89.

> schedule and how to catch back the delay caused due to your current slow delivery progress.
>
> …

39 CAA did not respond to Newcon by 25 March 2013.[36]

Notice of termination

40 On 25 March 2013, Newcon sent to CAA formal written notice of termination. The notice of termination – said to be served under cl 7.13(b) of the letter of acceptance (see [22] above)[37] – referred to the notice of delay and asserted that: (i) CAA's delivery of the slabs was far behind Newcon's schedule; (ii) CAA's delay had caused serious delay to the progress of Newcon's structural works; and (iii) CAA had failed to respond by 25 March 2013 with a proposal to recover the delay. The notice of termination continued as follows:

> Pursuant to Clause 7.12 and 7.13 in our letter of acceptance and our said Notice of Delay, you failed to respond to our Notice of Delay and show no commitment to continue to supply for our project. As such, this letter shall serve as a Letter of Termination of your supply contract with us due to your slow delivery progress which has delayed our construction schedule.
>
> …

41 On the next day, 26 March 2013, CAA sent two letters in reply to Newcon.

42 In its first letter, CAA claimed that Newcon's site was not ready to receive and install CAA's slabs because Newcon had not yet cast the main beams. Accordingly, CAA asserted that it had not delayed Newcon's schedule.[38]

[36] AEIC of Cao Wei Min dated 5 May 2015 at paragraph 42.

[37] AEIC of Cao Wei Min dated 5 May 2015 at pages 242 to 243.

CAA attached to this letter a series of photographs of the site which it claimed were taken the previous day, *ie*, on 25 March 2013, and which showed that Newcon was not yet ready to install the slabs.[39]

43 In its second letter, CAA made three points. First, Newcon had failed to give CAA reasonable time to respond. CAA asserted that it had received Newcon's notice of delay only on Monday, 25 March 2013 because it had been sent at 6.16 pm on Saturday, 23 March 2013, while CAA's office was closed. Second, CAA denied responsibility for the delay on site. CAA reiterated its position that the root cause of the delay was Newcon's own failure to cast the columns and beams in time in order to be ready to receive and install CAA's slabs. Finally, CAA informed Newcon that it would stop casting and delivering slabs as a result of Newcon's purported termination of the parties' contract.[40]

44 Later that day, Newcon responded to CAA's photographs.[41] In summary, Newcon denied that the photographs showed that it was not ready to receive and install CAA's slabs on site. Newcon then reminded CAA that its representatives had admitted at the parties' meeting on 22 March 2013 (see [34] above) that CAA was unable to produce slabs in the time and sequence necessary to avoid delay to the project's critical path:

> 5. It was mentioned by your goodself, in the meeting on 22/03/13, that you are unable to produce the hollow core slab panels for our 2nd storey areas at gridline 4 ~ 8b / E1 ~ H2 at this moment, which you could only start the production after 2 months later upon

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38 AEIC of Cao Wei Min dated 5 May 2015 at pages 244 to 245.

39 AEIC of Cao Wei Min dated 5 May 2015 at pages 250 to 257.

40 AEIC of Cao Wei Min dated 5 May 2015 at pages 246 to 247.

41 AEIC of Cao Wei Min dated 5 May 2015 at page 262.

> completion of the 4th storey hollow core slab for the main tower block areas at gridline 1 ~ 4 / A ~ Q. Which is totally unacceptable to us as this is also on the critical path of the project.
>
> 6. We would like to further place in record that you have delivered total of 53 pieces of hollow core slab panels from 16/03/13 to 25/03/13 (total 10 days), which on average, you are only able to supply us average of 5 pieces of hollow core slab panels per day. Please be reminded that we have more than 480 pieces of hollow core slab for 2nd storey alone, which would take you almost 96 days to delivery [*sic*] based on your current progress. This clearly shows that you are unable to comply with our 21 days cycle for the super-structure works.
>
> …

Letters before action

45 On 16 May 2013, CAA sent Newcon a letter before action.[42] In it, CAA demanded the sum of $144,979.90 as damages for Newcon's repudiatory breach of contract in terminating the parties' contract without legal basis.

46 Newcon did not pay the sum demanded. Instead, on 11 June 2013, Newcon replied to CAA.[43] Newcon rejected the allegation that it had terminated the parties' contract without legal basis. To justify its termination, Newcon cited CAA's failure to meet its delivery obligations in March 2013 coupled with Newcon's express right of termination under cll 7.12 and 7.13 of the letter of acceptance. Newcon concluded by putting CAA on notice that it would claim compensation from CAA for the loss and damage arising from CAA's breach of contract.

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42 AEIC of Cao Wei Min dated 5 May 2015 at page 375.

43 AEIC of Cao Wei Min dated 5 May 2015 at page 372.

47 On 18 July 2013,[44] Newcon wrote to CAA quantifying its loss and damage at $1,554,259.93, asserting a right to recover that sum under cll 7.12 and 7.13 of the letter of acceptance and demanding that CAA pay this sum.

48 CAA did not pay the sum demanded.

Action commenced

49 On 21 November 2013, CAA commenced this action against Newcon. CAA's case is that Newcon breached the terms of the parties' contract by failing to pay CAA sums due under the contract and by purporting to terminate the contract without any basis in law to do so. It claims the following sums from Newcon as damages for breach of contract:[45]

(a) $144,979 for work done by CAA or, alternatively, compensation for that work to be assessed on a *quantum meruit* basis;

(b) $329,266.80 as the profits which CAA lost by reason of Newcon's wrongful termination of their contract;

(c) $28,050 as rent for CAA's lifting equipment and I-beams that Newcon continued to hold and use after the termination; and

(d) $2,000 for setting up a hollow core machine for CAA to perform work after 25 March 2013 which would not have been incurred had Newcon not wrongfully terminated their contract.

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44 AEIC of Cao Wei Min dated 5 May 2015 at page 337.

45 Statement of claim (Amendment No. 1) dated 3 December 2014 at pages 9 and 10.

50 Newcon rejects CAA's claim entirely. Instead, it counterclaims against CAA the following sums as damages for breach of contract:

(a) Liquidated damages of $333,000 under cl 7.15(a) of the letter of acceptance (see [23] above) for CAA's 18 days of delay, alternatively damages to be assessed for that delay;

(b) $488,166.62 being the additional cost which Newcon incurred in engaging a substitute contractor to complete CAA's scope of works; and

(c) $96,044.44 for expenses which Newcon incurred as a result of CAA's breach, comprising:

(i) $32,093.19 for idle crawler crane and manpower;

(ii) $1,321.85 for overtime paid to workers because CAA delivered slabs after 5 pm between 16 and 23 March 2013; and

(iii) $62,629.40 for rental of system formworks which would not have been incurred but for CAA's delay in delivering slabs.

The key disputed issues

51 CAA's claim in this action turns entirely on whether Newcon was justified in terminating the parties' contract as it did. It is therefore Newcon's counterclaim which defines all of the issues I have to resolve in order to determine both the claim and the counterclaim.

52 Newcon's counterclaim in this action raises four issues:

(a) Whether the letter of acceptance formed part of the parties' contract;

(b) What were CAA's contractual obligations, whether express or implied, to produce and deliver slabs; and

(c) Whether CAA breached those contractual obligations;

(d) If so, whether that breach entitled Newcon to terminate the contract.

53 On these issues, I have held that:

(a) The letter of acceptance did not form part of the parties' contract because CAA did not accept the offer comprised in it, either expressly or by its conduct;

(b) CAA had an express obligation to follow Newcon's progress on site in producing and delivering slabs, and to do so in accordance with a delivery schedule which the letter of intent envisaged would be provided, supplemented and revised from time to time. CAA also had an implied obligation to proceed with producing and delivering slabs with due diligence and expedition at all times until completion. In respect of this latter obligation, time was of the essence.

(c) CAA breached both the express and implied terms of the parties' contract; and

(d) CAA's breach of contract constituted a repudiatory breach of contract and entitled Newcon to terminate the parties' contract either

pursuant to the common law right to terminate for repudiatory breach or under the implied term making time of the essence in relation to the implied term of due diligence and expedition.

54 I now set out my reasons for my holding on each of these issues. I begin by making some general observations on the credibility of each party's witnesses.

CAA's witnesses lacked credibility generally

55 I had the opportunity of observing both parties' witnesses under cross-examination across five days of trial. I also reviewed the witnesses' affidavits of evidence in chief and assessed each witness's evidence for consistency with the contemporaneous documentary evidence and the inherent probabilities, taking into account that witness's cross-examination and re-examination at trial and the evidence of the other witnesses.

56 As a result of that review, I find that the account of the facts provided by Newcon's witnesses is, on the whole, the more coherent and believable. Their evidence was substantially corroborated by the documentary evidence. In contrast, CAA's witnesses proposed a version of events which frequently raised more questions than it supplied answers. I give examples at [71] – [77] below.

57 In particular, I find Dr Chi to be an unreliable witness in virtually every material respect of his evidence on CAA's case. Under cross-examination, Dr Chi displayed a marked tendency evade difficult questions by providing irrelevant responses. He also prevaricated in his account of events and had a tendency to make bare assertions which were either inconsistent

with or contradicted by the contemporaneous documentary evidence and the inherent probabilities.

58 I accept that the evidence of Newcon's witnesses was also not without its difficulties. But those difficulties related principally to immaterial facts and, even when they did not, were minor in nature compared to the discrepancies in CAA's witnesses' evidence. In addition, I do not consider that these difficulties reflected on the general credibility of Newcon's witnesses.

59 On all disputes of material fact, therefore, I prefer the evidence of Newcon's witnesses over that of CAA's witnesses. In my view, both of CAA's witnesses were more concerned with ensuring that their evidence maximised CAA's chances of succeeding in this action than with ensuring that their evidence accorded with the truth.

Status of the letter of acceptance

Newcon's submissions

60 As I have mentioned, it is common ground that CAA did not sign the acknowledgment attached to the letter of acceptance (see [19] above). Newcon's case is that the parties' contract nevertheless comprises both the letter of intent and the letter of acceptance, read together. It advances this case in order to have a legal basis to rely on the express obligations set out in the later of acceptance as to production and delivery (see [21] above), termination for breach (see [22] above) and liquidated damages (see [23] above).

61 Newcon's argument that the letter of acceptance binds CAA rests on two limbs.[46] First, CAA remained silent after it received the letter of

acceptance. Second, CAA performed the works comprised in the letter of acceptance.

62 For the first limb, Newcon points out that CAA received the letter of acceptance on 11 January 2013 and failed to respond to two follow-up emails in February 2013.[47] First, in an email dated 18 February 2013, Newcon expressed its hope that CAA would sign and return the letter of acceptance by email. Second, in its email of 22 February 2013, Newcon noted that CAA had not replied regarding the letter of acceptance, and asked CAA to sign and return it by 25 February 2013. CAA did not respond to either email.[48]

63 For the second limb of its argument, Newcon points to Mr Chen's evidence that at the first casting on 26 February 2013, he and Mr Lin agreed to follow the casting sequence set out in cl 7.10 (see [21] above) of the letter of acceptance. CAA thereafter attempted to comply with that casting sequence, albeit unsuccessfully.[49] The letter of intent contained no casting sequence.

CAA's submissions

64 CAA's case is that it rejected the letter of acceptance, both impliedly and expressly, and that the letter of acceptance therefore does not form part of the parties' contract.

65 CAA says it impliedly rejected the letter of acceptance because it never signed or returned the acknowledgment page.[50] CAA also points out that the

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46 Defendant's closing submissions dated 14 July 2015 at paragraph 51.

47 Defendant's closing submissions dated 14 July 2015 at paragraph 56; ABD at 254.

48 Defendant's closing submissions dated 14 July 2015 at paragraph 57.

49 Defendant's closing submissions dated 14 July 2015 at paragraphs 81 to 85.

letter of acceptance is not a crucial or fundamental document without which the parties' contract would have been impossible to perform.[51]

66 CAA also says that it expressly rejected the letter of acceptance on three specific occasions. First, Mr Chen says that after he received the letter of acceptance, he called Newcon's senior quantity surveyor and informed her that the terms set out in the letter of acceptance had not been raised, let alone agreed, in the discussions leading to the letter of intent.[52] He told her, therefore, that CAA rejected it.

67 Second, after receiving Newcon's email asking CAA to sign and return the letter of acceptance on 22 February 2013 (see [62] above), Mr Chen says he called the writer of the email to say again that he would not sign the letter of acceptance because CAA had never agreed to its terms, none of which had even been brought to CAA's attention during the tender stage.[53]

68 Third, at a meeting on 19 March 2013 between Dr Chi representing CAA and Mr Cao Wei Min (a director of Newcon) and Mr Lin representing Newcon, Dr Chi says he informed Newcon's representatives that CAA would not sign the letter of acceptance because it included terms which were never raised before CAA signed the letter of intent. Dr Chi also said that, since the letter of intent was the official instruction to proceed, CAA would treat the letter of intent "as [the] four corners of the sub-contract".

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50 Plaintiff's closing submissions dated 14 July 2015 at paragraph 13.

51 Plaintiff's closing submissions dated 14 July 2015 at paragraph 17.

52 AEIC of Chen Linhui dated 4 May 2015 at paragraph 42.

53 AEIC of Chen Linhui dated 4 May 2015 at paragraph 43.

69 CAA's case is that Newcon was therefore always aware that CAA's failure to sign the letter of acceptance resulted from a positive rejection of its terms and not merely from inertia. CAA submits that Newcon cannot therefore now rely on CAA's silence as constituting contractual assent to the letter of acceptance.[54]

CAA did not reject the letter of acceptance

70 CAA's evidence that it positively rejected the letter of acceptance is not credible. As a result, I find that CAA did not, at any time, positively reject the letter of acceptance. I say that for two reasons.

71 First, Dr Chi's and Mr Chen's oral evidence that they expressly rejected the letter of acceptance is wholly unsupported by any evidence in writing or indeed by any evidence at all, other than their bare assertions. Further, their assertions are inconsistent with whatever contemporaneous documentary evidence is available.

72 If Mr Chen had indeed expressly rejected the letter of acceptance on the first of the three occasions (see [66] above), it appears to me illogical that Newcon's next communication with him on 18 February 2013 on the same issue would have been simply another routine reminder to sign and return the letter of acceptance (see [62] above). Further, if CAA indeed considered that the letter of acceptance formed no part of its contract with Newcon, it is equally illogical that CAA would have accepted without objection, as it did, Newcon's express reliance on provisions found only in the letter of acceptance as the legal basis for its notice of delay (see [37] above), its notice of

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[54] AEIC of Chi Chao-Ton Tony dated 30 April 2015 at paragraphs 13 and 14.

termination (see [39] above) and its letters before action (see [46] and [47] above).

73 Second, I reject Dr Chi's evidence that he expressly informed Newcon at the meeting on 19 March 2013 (see [68] above) that he rejected the letter of acceptance. It is common ground that a meeting did take place on 19 March 2013. But cross-examination showed Dr Chi's evidence about this meeting to be contradictory. Dr Chi initially claimed that one of the items which the parties discussed at the meeting on 19 March 2013 was Newcon's proposed delivery schedule (see [33] above). But Newcon did not furnish that proposed delivery schedule to CAA until 21 March 2013, as an attachment to Newcon's email of that day (see [32] above). Counsel for Newcon put it to Dr Chi specifically that he might be confusing the meeting on 19 March 2013 with the meeting on 22 March 2013 (see [34] and [35] above). Dr Chi was adamant that he was not. Counsel for Newcon then revealed to Dr Chi that the proposed delivery schedule was not available on 19 March 2013. Dr Chi then changed his position diametrically and claimed that he had indeed confused the two meetings.[55]

74 I accept Newcon's witnesses' evidence that the letter of acceptance was not discussed at all at this meeting.[56] I find to be more credible their evidence that the matters discussed at this meeting were only Dr Chi's request for an advance payment and CAA's failure to meet the delivery schedule for the slabs.[57] I accept also their evidence that Dr Chi did not reject the letter of acceptance at the meeting on 22 March 2013.

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55 Defendant's closing submissions dated 14 July 2015 at paragraph 69(a) to (e).

56 Defendant's closing submissions dated 14 July 2015 at paragraph 68.

57 Defendant's closing submissions dated 14 July 2015 at paragraph 66; AEIC of Cao Wei

75 Finally, Dr Chi's cross-examination showed him in general to be a thoroughly unreliable witness. Two examples will suffice.

76 First, Dr Chi claimed that he showed Mr Cao certain drawings at the meeting of 19 March 2013. These drawings bear handwritten annotations by Mr Lin. But CAA received these drawings with Mr Lin's handwriting only on 21 March 2013. When confronted with this discrepancy, Dr Chi was unable to provide a convincing explanation for his evidence.[58]

77 Second, Dr Chi's evidence was that he went through the erection and delivery sequence in detail with Mr Cao at the meeting on 22 March 2013. But Mr Cao did not attend the meeting on 22 March 2013. When confronted with this fact, Dr Chi was unable to give a credible explanation for his evidence. He was driven finally to claim that he could not remember if such a discussion with Mr Cao had taken place.[59]

78 I therefore find as a fact that CAA never positively rejected the letter of acceptance. The reason it did not sign and return the acknowledgment page of the letter of acceptance to Newcon was purely because of its own inertia. That was also the reason it did not respond to Newcon's email requests that it sign and return the acknowledgment page.

79 That finding of fact, however, does not suffice to determine the first issue in favour of Newcon. It remains for me to consider whether CAA's

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Min dated 5 May 2015 at paragraphs 13 and 14.

58 Defendant's closing submissions dated 14 July 2015 at paragraph 69(g).

59 Defendant's closing submissions dated 14 July 2015 at paragraph 69(f).

inertia in the face of the letter of acceptance is capable as a matter of law of constituting acceptance of Newcon's offer set out in that letter.

CAA did not accept the letter of acceptance

80 The central difficulty with Newcon's case on the letter of acceptance is that CAA's response to it was silence. The well-established contractual rule is that silence in response to an offer does not constitute acceptance of that offer because it is equivocal: *Felthouse v Bindley* (1862) 142 ER 1037; *Re Selectmove Ltd* [1995] 1 WLR 474.

81 To overcome this difficulty on the law, Newcon relies on *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 ("*Midlink*"). In *Midlink,* V K Rajah JC (as he then was) accepted that silence is ordinarily equivocal and therefore incapable of constituting acceptance. He observed, however, that it is rare for an offeree to respond to an offer with *complete* silence, at least in the context of a typical bilateral commercial contract. It is therefore a question of fact in every such case whether the offeree's response was complete silence and, even if so, whether the effect of the silence, objectively ascertained against the factual background, supports the existence of a contract. I accept this proposition to be correct.

82 Newcon submits that CAA is bound by the letter of acceptance because its response to it was not complete silence. CAA in fact acted on the letter of acceptance by adopting the casting sequence set out in cl 7.10 (see [21] above). That conduct prevents CAA's failure to accept the letter of acceptance expressly from being characterised as equivocal.[60]

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[60] Defendant's closing submissions dated 14 July 2015 at paragraph 87.

83 I cannot accept Newcon's submission. CAA did nothing after receiving the letter of acceptance which manifested an unequivocal intent, objectively ascertained, to accept the offer set out in the letter of acceptance. That is because everything which CAA did after receiving the letter of acceptance was done against the background of its existing contractual obligations to Newcon under the letter of intent.

84 Newcon's offer to CAA comprised in the letter of *acceptance* was preceded by Newcon's separate and earlier offer in the letter of *intent*. Both letters covered the same scope of work. The parties' common position is that: (i) CAA accepted Newcon's offer set out in the letter of intent; and (ii) that acceptance gave rise to a contract. It is implicit in this common position that the letter of intent, in and of itself, carried the certainty necessary to give rise to a contract.

85 Nothing which CAA did after receiving Newcon's offer set out in the letter of acceptance can be characterised as being objectively referable to – and *only* to – an intent to accept that offer. To put it another way, everything which CAA did after receiving the letter of acceptance, when examined objectively, is equivocal: it is as capable of being referable to its intent to perform its existing obligations under the letter of intent as it is capable of being referable to an intent to accept Newcon's offer set out in the letter of acceptance.

86 Newcon submits that CAA acted on the casting sequence set out in cl 7.10 of the letter of acceptance (see [21] above) and, in that way, manifested an intent, objectively ascertained, to accept the letter of acceptance. I cannot accept that submission for two reasons. First, even if CAA did act on information supplied in one clause of the letter of acceptance, that is not an

unequivocal indication of its objective intent to accept as contractually binding every clause of the letter of acceptance. It is equally consistent with a simple desire to perform its obligations under the letter of intent in the light of new information which Newcon had supplied to it. Second, I cannot accept Newcon's submission that Mr Chen agreed with Mr Lin to adopt this casting sequence during the first casting on 26 February 2013 (see [63] above). But it is Newcon's own case that there was no such agreement and that CAA's evidence of this agreement is an afterthought.[61] Newcon cannot be permitted to rely on Mr Chen's evidence to support one aspect of its case and then reject the same evidence on another.

87 I have already accepted that, if CAA's case that it expressly rejected the letter of acceptance were true, one would have expected CAA to have objected to Newcon's reliance on the terms of the letter of acceptance in its notice of delay, notice of termination and letters before action (see [71] above). Newcon relies on this failure as further evidence of the objective significance of CAA's silence in response to the letter of acceptance. But in my view, this failure is simply another consequence of CAA's inertia. I cannot find that this failure is sufficient to convert CAA's equivocal silence – which is what I have found it thus far to be – into unequivocal acceptance.

88 In the circumstances, I cannot find that anything which CAA did in the face of the letter of acceptance was sufficiently unequivocal to constitute an intention, objectively ascertained, to accept its terms. I accordingly hold that it is only the letter of intent – and not the letter of acceptance – which governs the parties' contractual relationship. The consequence of this holding is that the express provisions as to the time and sequence of delivery, as to

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[61] Defendant's closing submissions dated 14 July 2015 at paragraphs 156 to 159.

termination and as to liquidated damages in the letter of acceptance do not form part of the parties' contract.

89 Newcon's counterclaim therefore stands or falls upon only the express and implied terms of the letter of intent. I now turn to consider those terms.

CAA's obligations under the letter of intent

Express terms

Three express provisions

90 The letter of intent contains three express provisions which deal with CAA's production and delivery obligations.

91 First, cl 2 of the letter of intent requires CAA to follow Newcon's progress on site during the 15-month period of the main contract:[62]

> 2) Overall main contract period shall be from 1st Nov 2012 to 31st Jan 2014 (15 months). You have agreed to follow the site progress and including any revisions to construction programme schedule for your Sub-Contract Works.

92 Second, the letter of intent incorporated, as an appendix, Newcon's construction schedule under the main contract and expressly drew CAA's attention to it. Thus, the first page of the letter of intent provides:[63]

> The construction programme schedule and the relevant civil & structural specification and supplementary specification are enclosed herewith for your reference.

I have described the construction schedule at [15] and [16] above. It provides expressly that Newcon is to commence the superstructure works on

[62] AEIC of Chen Linhui dated 4 May 2015 at page 42.

[63] AEIC of Chen Linhui dated 4 May 2015 at page 41.

26 February 2013. Implicit in that, of course, is the parties' contractual intention that CAA should produce and deliver the slabs required for that initial phase of the superstructure works a reasonable time before 26 February 2013.

93 Third, the letter of intent also contains an immediate instruction to CAA to commence performance and an express timeline for the pre-casting phase of its scope of work. Thus, the following paragraph appears on the second page of the letter of intent:[64]

> This Letter of Intent shall be treated as the official "Instruction to Proceed". You are to commence immediately with the submission of all necessary documents, samples and shop drawings for Consultants' approval in accordance with the design intent, our requirements and timeline as below:-
>
> (1) Site organisation chart including all contact numbers within 1 week from date of this Letter of Intent.
>
> (2) Method statement and risk assessment to us for approval within 1 week from date of this Letter of Intent.
>
> (3) Shop drawings and material specification, samples to Consultants for their approval within 2 weeks from the date of this Letter of Intent.

Contract envisaged information to be provided separately

94 The express terms of the letter of intent, and in particular cl 2, had a threefold effect. First, CAA had to perform all of its design, production and delivery obligations within the 15-month main contract period. Second, and more importantly, CAA was obliged to produce and deliver slabs in order to follow Newcon's progress on site. Third, while following Newcon's progress on site, CAA was obliged to adjust performance of its production and delivery

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64 AEIC of Chen Linhui dated 4 May 2015 at page 42.

obligations to accommodate any revisions to the construction schedule which were relevant to CAA's scope of work. The letter of intent, by its express terms, thereby obliged CAA to meet a delivery schedule which the letter of intent envisaged would be provided, supplemented and revised from time to time, as Newcon performed its own obligations under the main contract.

95 The first time Newcon provided a delivery schedule to CAA was in cl 7.10 of the letter of acceptance. There is no doubt, for the reasons I have found, that the letter of acceptance does not have contractual effect. But that does not mean that the letter of acceptance is a total nullity as far as the parties' contract is concerned. CAA does not deny that it was aware of the *content* of this delivery schedule in cl 7.10. This schedule served to convey to CAA, at the very least, the timeline for the first deliveries scheduled for February 2013. It therefore had contractual effect, not as a term of the letter of acceptance, but as a delivery schedule brought to CAA's attention post-contractually, precisely as the letter of intent envisaged.

96 Newcon revised the delivery schedule on 1 March 2013 (see [27] above) by specifying new dates for CAA to deliver slabs for the second storey structural works. That revision thereafter governed CAA's contractual obligation under the letter of intent to deliver those slabs. According to the revised schedule, CAA was to deliver slabs for area 2a, as marked in the building plan attached to the schedule, by 8 March 2013 (see [27] and [28] above). The effect was to stipulate 8 March 2013 as the *last* permitted date for CAA to effect delivery of *all* the slabs required for work to commence and conclude at area 2a.

97 I therefore find that CAA had an express obligation to follow Newcon's progress on site in producing and delivering slabs, and to do so in

accordance with a delivery schedule which the letter of intent envisaged would be provided, supplemented and revised from time to time. In case I am wrong in this finding, I turn now to consider the implied terms of the letter of intent.

Implied terms

The parties' positions

98 Newcon submits that the letter of intent contains two implied terms. The first is that time is of the essence. The second is that CAA must proceed with its works with due diligence and expedition at all times until completion.[65] Newcon submits that these two terms are implied into the parties' contract either in fact or in law.

99 Newcon argues that the circumstances in which the parties signed the letter of intent, as well as the terms set out in the letter of intent itself, satisfy the requirements for both these terms to be implied into the parties' contract in fact.[66] For this aspect of its submissions, Newcon relies on the decision of the Court of Appeal in *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518 ("*Ng Giap Hon*").[67]

100 Newcon also submits that both terms are terms implied into the parties' contract in law. For this aspect of its submission, Newcon relies on the Court of Appeal's decisions in *Chua Choon Cheng and others v Allgreen Properties Ltd and another appeal* [2009] 3 SLR(R) 724 ("*Chua Choon Cheng*") and

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65 Defendant's closing submissions dated 14 July 2015 at paragraph 89.

66 Defendant's closing submissions dated 14 July 2015 at paragraph 91.

67 Defendant's closing submissions dated 14 July 2015 at paragraph 90.

Jurong Engineering Ltd v Paccan Building Technology Pte Ltd [1999] 2 SLR(R) 849 ("*Jurong Engineering*").[68]

101 CAA rejects both of Newcon's submissions. Its submissions were, however, somewhat abbreviated. Its case is that cl 2 of the letter of intent "clearly provides for a schedule that [CAA] has to follow (*ie*, the site progress)". Neither term can therefore be implied in fact because the intention of the parties as to CAA's obligation to produce and delivery slabs is clear from cl 2. And neither term can be implied in law because each runs contrary to the express words of cl 2. This was the very limited extent of CAA's entire submission on implied terms.

102 I begin with the law on implied terms.

Terms implied in fact

103 In *Ng Giap Hon*, the Court of Appeal discussed (at [34] to [40]) the principles on which terms will be implied in fact into a contract, as set out in the cases of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 and *Jet Holding Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769. These principles are now well-established, even if their application is not always without difficulty.

104 In determining whether a contract contains an implied term in fact, the court is concerned only with analysing the specific facts of the specific case before it. That analysis will seek to identify and advance the intention of the actual contracting parties, ascertained objectively.

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[68] Defendant's closing submissions dated 14 July 2015 at paragraphs 94 to 97.

105 The courts have traditionally used two tests to determine whether a contract contains a term implied in fact. The first is the business efficacy test put forward by Bowen LJ in *The Moorcock* (1889) 14 PD 64. The second is the officious bystander test most famously put forward by MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Limited* [1939] 2 KB 206 at 227.

106 Under the business efficacy test, the touchstone is necessity. A term is an implied term of a contract under this test only if implying that term is necessary to give the contract business efficacy. In the words of Bowen LJ in *The Moorcock* (at [29]), "what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are [businessmen]".

107 Under the officious bystander test, the touchstone is obviousness. That test, as framed by MacKinnon LJ, is as follows:

> *Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'

108 The business efficacy test and the officious bystander test are complementary: *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp*") at [90]. Thus, the business efficacy test identifies a gap in a contract and the officious bystander test fills the gap with a term reflecting the parties' presumed intention: *Sembcorp* at [91].

109 *Sembcorp* outlines (at [101]) a three-step process for ascertaining whether a contract contains a particular implied term in fact:

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

Terms implied in law

110 On the principles governing implied terms in law, Newcon cites the synthesis in the Court of Appeal's decision in *Chua Choon Cheng* (at [68] and [69]). The principles can be stated briefly. Implying a term in law lays down that term as a default provision in all contracts of a definable class, subject of course to contrary agreement. When implying a term in law, the court is concerned with considerations of fairness and policy in a defined class of contracts rather than with ascertaining objectively and advancing the intentions of the parties in the specific contract under consideration. A court should ordinarily exercise considerable restraint in holding a particular term to be one implied in law, given that that term will then be an implied term of all contracts of that class. All terms which are implied in law must be reasonable, but a term will not be implied in law simply because it is reasonable.

111 Newcon argues that the parties' contract contains terms implied in law: (i) making time of the essence; and (ii) obliging CAA to proceed with its works with due diligence and expedition at all times until completion. Newcon cites[69] the view to this effect expressed fairly firmly in *Hudson's Building and*

Engineering Contracts (Sweet & Maxwell, 11th Ed, 1994) ("*Hudson (11th Ed)*") at §9-034.

112 In this passage, which the Court of Appeal cited with approval in *Jurong Engineering* (at [51]), *Hudson* expressed the view that:

> … [E]ven in the absence of an express term for due diligence and of any linked termination clause, both such terms *require to be implied by law*, in construction contracts and subcontracts generally, as a matter of business efficacy.
>
> [emphasis added]

I do not think that this passage supports Newcon's case on implied terms in law for three reasons.

113 First, *Hudson* is not in this passage suggesting that there is an implied term in law in every construction contract requiring a contractor to proceed with due diligence and expedition, for breach of which the contract may be terminated. Although this passage uses the phrase "implied by law", it relies on the business efficacy test to justify that implication. But the business efficacy test is the hallmark of a term implied in fact, not of a term implied in law. It appears to me, therefore, that this passage in *Hudson* is in fact considering implied terms in fact, not in law.

114 Second, *Jurong Engineering's* approval of this passage in *Hudson* was *obiter*. As the Court of Appeal noted (at [52]), the contract in *Jurong Engineering* contained a clause expressly entitling the main contractor to terminate the contract if the sub-contractor failed to proceed with due diligence. *Jurong Engineering* is therefore no authority that there is a term implied in law in all construction contracts obliging the contractor to proceed

[69] Defendant's closing submissions dated 14 July 2015 at paragraphs 94 to 97.

with due diligence and entitling the counterparty to terminate the contract for breach of that implied term.

115 Third, *Hudson* no longer holds the view expressed so firmly in the passage on which Newcon relies. The 13th edition of *Hudson*, published in 2015 ("*Hudson (13th Ed)*"), now says at §6-021 simply that a term to proceed with due diligence and expedition may *in some cases* be an implied term of a construction contract:

> [6-021]… [E]ven in the absence of an express term for due diligence and of any linked express termination clause, both such terms *may in some cases be implied by law*, in construction contracts as a matter of business efficacy.
>
> [emphasis added]

The reformulation of this passage makes it even clearer that what *Hudson* is considering is whether an obligation to proceed with due diligence may be implied in fact in a particular construction contract, not in law in all construction contracts.

116 Although I was initially attracted to Newcon's arguments on implied terms in law, I consider them to be contrary to the weight of authority. In any event, it is unnecessary for my decision to come to a conclusion on whether the terms contended for by Newcon are implied in law in all contracts.

117 I therefore confine the discussion which follows to implied terms in fact.

Implied terms in fact and construction contracts

118 The prime difficulty with concluding that a construction contract contains the implied terms contended for by Newcon is that the usual

construction contract will typically contain express clauses which militate against those implied terms. These express clauses are of three types: (i) a liquidated damages clauses; (ii) extension of time clauses; and (iii) termination clauses.

119 The existence of these typical clauses, and the detail in which they are usually spelled out in the usual construction contract, will ordinarily suggest (to paraphrase *Sembcorp* (see [109] above)) that the parties have not left a gap in their contract which they have failed to contemplate, whether as to the contractor's obligations to produce and deliver, as to the consequences of the contractor's breach of those obligations or as to the counterparty's remedies, including the right to terminate the contract, for the contractor's breach of those obligations. That is the field covered by the two implied terms contended for by Newcon. It is therefore difficult for a party arguing in favour of these implied terms in the usual construction contract to satisfy even the first step of the three-step test in *Sembcorp*.

120 Nevertheless, the leading textbooks and authorities which I shall now analyse make clear that there is no absolute rule which excludes either of these implied terms in a particular construction contract. Whether either term is to be implied in fact into a given contract is a question to be decided on the particular facts of each case, applying the usual contractual principles.

Hudson and Keating

121 *Keating on Construction Contracts* (S Furst & V Ramsey eds) (Sweet & Maxwell, 10th Ed, 2016) ("*Keating*") takes the view (at §8-004) that a term requiring a contractor to proceed with due diligence and expedition will not

ordinarily be an implied term of a construction contract, but may be in some cases:

> … It has been suggested that, where there is no express provision as to progress, business efficacy requires the implication of a term that the contractor will proceed with reasonable diligence and maintain reasonable progress. *It is thought that while such a term may have to be implied in some cases each contract and its surrounding circumstances must be considered, and that there is no such rule of general application.* It may well be that in some cases the contractor's only duty is to complete by the due date. …
>
> [emphasis added]

122 As for the consequences of a breach of that implied term, *Keating* takes the view (at §8-008) that it is the normal rule that time is not of the essence in a construction contract:

> It is possible by express provision in the contract to make time of the essence even if it would not be so otherwise. … In general, time is of the essence in mercantile contracts, although it cannot be so if a date is neither specified nor capable of exact determination by the parties. Construction contracts are not mercantile contracts and *the normal rule is that time is not of the essence in construction contracts, unless it is expressly so provided.* It seems that *ordinarily it is not of the essence where the contract includes provisions for extension of time and the payment of liquidated damages for delay. …*
>
> [emphasis added]

123 While both passages indicate that it will be unusual to find that either of the two terms which Newcon contends for are implied terms of the typical construction contract, neither passage excludes such a finding in an appropriate case.

124 As I have pointed out (see [115] above), *Hudson (13th Ed)* now agrees with *Keating* that a term to proceed with due diligence and expedition may *in some cases* be an implied term of a construction contract. The difference

between *Hudson* and *Keating* on this particular term is now one of emphasis rather than substance.

125 The English courts have considered the status of an implied term obliging a contractor to proceed with due diligence and expedition in a number of decisions. I consider only two: (i) *Greater London Council v Cleveland Bridge & Engineering Company Ltd* (1984) 34 BLR 50 ("*Cleveland Bridge*"); and (ii) *Leander Construction Limited v Mulalley and Company Limited* [2011] EWHC 3449 (TCC) ("*Leander*").

Cleveland Bridge

126 In *Cleveland Bridge*, a contract between an owner and a contractor permitted the owner to terminate the contract if the contractor failed to execute its works with due diligence and expedition. The contract also contained a price-escalation clause which entitled the contractor to enhanced rates if certain price-rises during the contract period triggered its operation and if the contractor was not in breach. The contractor met each milestone date set out in the contract but the price-escalation clause was nevertheless triggered. The contractor claimed the enhanced rates. The owner alleged that the contractor was not entitled to do so because it had failed to complete its works before the contractual milestones so as to avoid triggering the price-escalation clause, and had thereby breached an obligation to execute its works with due diligence and expedition. In the ensuing arbitration, the parties placed before the arbitrator for a preliminary ruling the following question of law: did the contractor have any obligation under the contract to complete its works with due diligence and expedition? The arbitrator held against the owner. The owner appealed to the court.

127 Staughton J (as he then was) heard the appeal. He held that the contract contained no such express obligation. The termination clause did not, in terms, impose a positive obligation on the contractor to execute its works with due diligence and expedition; it merely made termination available to the owner as a remedy if the contractor failed to do so.

128 Staughton J then considered whether there was an implied term to that effect. He noted the difference of opinion which there then was between *Hudson* and *Keating* and agreed with *Keating*, holding that there was no such implied term. His view (at 66) was that there was "a general principle applicable to building and engineering contracts that in the absence of any indication to the contrary, a contractor is entitled to plan and perform the work as he pleases, provided always that he finishes it by the time fixed in the contract".

129 Staughton J proceeded as follows (at 67):

> One's first impression … is that the contract does, as a matter of construction or by implication, provide that the contractors shall carry out the contract works with due diligence and expedition. But on further consideration, I do not think that that is the right conclusion. The point is very nicely balanced … . I see no sufficient reason to disagree with the answers that [the arbitrator] gave. Accordingly, I conclude that *although neglect by the contractors to execute the works with due diligence and expedition would entitle the employers to discharge them … it would not by itself be a breach of contract on the part of the contractors*.
>
> If I had not reached that conclusion, I would have held, without hesitation, that due diligence and expedition must be interpreted in the light of the other obligations as to time in the contract. …
>
> *If there had been a term as to due diligence, I consider that it would have been, when spelt out in full, an obligation on the contractors to execute the works with such diligence and expedition as were reasonably required in order to meet the key dates and completion date in the contract. …*

> [emphasis added]

130 The Court of Appeal dismissed the owner's further appeal. Parker LJ held that it was not an implied term of the contract that the contractor proceed with due diligence and expedition so as to complete its work earlier than the contractual milestones in order to avoid triggering the price-escalation clause. Such a term, he held, failed both the business efficacy test and the officious bystander test (at 77 to 78):

> … it is submitted that if there is no express term such as is contended for by the appellants, there must have been an implied term to that effect. I can for myself see no possible basis upon which it could be said that any such implied term as is contended for is necessary to give business efficacy to the contract on the *Moorcock* principle, or how any innocent bystander test, if one approaches it in that way, could result in an affirmative answer to the question, "What is to happen if there is more time taken than is strictly necessary if one were proceeding with maximum speed?" Nobody could say that the answer that the innocent bystander would give would be, "He must proceed at such pace as will ensure that the price indices do not rise". That is an impossible conception. There is no other basis on which I can for myself see that any implied term such as is contended for could be introduced into this contract.

131 *Cleveland Bridge* has been taken as authority for the proposition that there is no scope for an implied term in a construction contract obliging a contractor to proceed with due diligence and expedition. But that is not the *ratio* of the case. The facts of *Cleveland Bridge* were unusual. The contractor performed and completed its works so as to meet every contractual milestone. The owner's case was, in effect, that the contractor had an obligation to complete its works earlier than those milestones in order to maximise the owner's financial benefit. Parker LJ (at 77) correctly appreciated that such an implied term was unworkable:

> It is contended, however, that if a manufacturer who has four years in which to complete a piece of equipment which could

> take as little as ten months to complete begins to do the job at the beginning of the period, he is obliged, nevertheless, still to complete within the period in which it could have been completed. I ask myself why, and indeed Mr Lloyd was asked why. *He conceded that, in taking a longer period, the contractor would not be in any way in breach of his operational obligations, but it was said that he would be in breach of some financial obligation.* Then one looks to see what this financial obligation could be. If it was said it was the obligation so to programme his work as to ensure that [the price-escalation clause] provided the least benefit to himself and the maximum benefit to the employer, he would be quite unable to know at any one time … whether it would suit the employer better for him to start late, or whether it would suit the employer better for him to start early, or whether it would suit the employer that he should take a long period or a short period. The suggestion is in my view unworkable.

132 Parker LJ also observed in *Cleveland Bridge* (at 77) that diligence as a concept does not operate in a vacuum:

> The contention which is put forward is that while the contractor is entitled to choose the period at which he will manufacture, once he has started manufacture he must, as Mr Lloyd put it, "get on with it". I am not wholly surprised that it was put in colloquial terms, because it is very difficult to see how any specified obligation could be spelt out. What is said in the notice of motion is that there should be an obligation to proceed "with due diligence and expedition", but *what is due diligence and expedition depends, of course, on the object which is sought to be achieved.* If one is obliged to achieve a certain object within twelve weeks, it may be necessary to exercise much more speed than if your only obligation is to produce it in twenty-four weeks or indeed in four years. The same applies to diligence. *You cannot have diligence in the abstract. It must be related to the objective.*
>
> [emphasis added]

133 In my view, *Cleveland Bridge* does not exclude the possibility of an implied term of due diligence and expedition which is related to achieving, rather than surpassing, contractual obligations (see also *Hudson (13th Ed)* at p 729). I also agree with Parker LJ's observation (cited immediately above)

that the content of an implied term to proceed with due diligence and expedition must be assessed in light of the contractor's obligations as to time.

Leander

134 The next case I consider is the fairly recent case of *Leander Construction Limited v Mulalley and Company Limited* [2011] EWHC 3449 (TCC) ("*Leander*"). The main contractor in that case argued that its sub-contractor owed it an implied obligation to proceed regularly and diligently with the sub-contract works. The main contractor argued, further, that the sub-contractor's compliance with that implied term should be measured against the dates and periods set out in a sub-contract document which did not have contractual effect.

135 Coulson J considered *Cleveland Bridge*, amongst other cases, and held that the comprehensive treatment of time in most construction contracts, and indeed in the contract before him, meant that an implied term to proceed with due diligence and expedition would fail the test of necessity:

> 39. In short, therefore, all the authorities point the same way: *the courts have been very reluctant to imply additional terms as to the timing or regularity of the contractor's performance prior to the contract completion date*. In the case most in point, namely *GLC v Cleveland Bridge*, both Staughton J and the Court of Appeal refused to imply an obligation to proceed regularly and diligently, notwithstanding the express words of the termination clause.
>
> …
>
> 40. In my judgment, [the main contractor] has failed in the "ambitious undertaking" of demonstrating the need for the alleged implied term as a matter of business efficacy. I have reached that view partly for general reasons (Section 5.2 below); partly as a result of the construction of the sub-contract itself (Section 5.3 below); and partly because of my rejection of [the main contractor's] specific submissions as to the inferences to be drawn in this case (Section 5.4 below).

…

41. The cases set out … above demonstrate that the courts are generally slow to imply terms into a contract, particularly where, as here, there are already detailed terms and conditions. The touchstone remains the test of necessity, as Lord Clarke emphasised in *Mediterranean Salvage and Towage*: is the proposed implied term necessary to make the contract work? Or to put the question another way: in the absence of the implied term, does the contract fail to deliver the bargain which the parties had agreed? In my view, [the main contractor has] *not come close to demonstrating that the alleged term is necessary to make the contract work. It operates perfectly satisfactorily without the implied term, and there was really no suggestion to the contrary*.

42. The second general reason for my conclusion is based on the review of the authorities set out … above. In all of those cases, in one way or another, *the courts declined to imply a term that would have imposed upon the contractor or sub-contractor interim obligations as to rate of progress and detailed performance*. In those cases, *the court repeatedly gave priority to the principle that, provided that the main contractual obligation was an obligation to complete by a certain date, it was unnecessary and unhelpful to impose other interim progress obligations upon the contractor*.

43. Obviously the decision in *GLC v Cleveland Bridge* is most in point, because, as is the case here, the alleged implication was founded on the termination provisions. Both Staughton J and the Court of Appeal rejected that argument. Whilst that decision is not binding on me, because the terms of the contract under review are different, it seems to me that, unless there is a good reason to distinguish between the relevant terms of the respective contracts, I should follow that decision. In my view, there is no good reason to distinguish between the contracts; indeed, the respective termination provisions are, to all intents and purposes, the same. Therefore I consider that it would be wrong for me to reach a conclusion different to that of the Court of Appeal in *GLC v Cleveland Bridge*.

44. Those general reasons for concluding that no term should be implied are, of course, consistent with the passage in *Keating* cited … above. It means that I take a different view to that expressed by the learned editors of *Hudson*, but, as the judgment of Staughton J in *GLC v Cleveland Bridge* makes plain, *Hudson* has always taken a singular approach to this issue. As yet, although their argument is entirely understandable, and gives rise to what Staughton J called a

> "nicely balanced" point, the editors have been unable to found their view on any reported authority.
>
> [emphasis added]

CAA had an implied obligation to proceed with due diligence

136 Applying the *Sembcorp* three-step test (see [109] above), I find that the parties' contract does contain both implied terms that Newcon argues in favour of: (i) that CAA will produce and deliver the slabs with due diligence and expedition; and (ii) that time is of the essence.

First step: identify the gaps and how they arose

137 At the first *Sembcorp* step, I must consider the gaps in the parties' contract to which Newcon points and ascertain whether those gaps arose because the parties failed to contemplate them (in which case, I can proceed to the second *Sembcorp* step) or whether those gaps arose for some other reason (in which the inquiry as to implied terms ends).

138 The entire commercial purpose of the parties' contract was for CAA to supply structural elements to Newcon in full, in sequence and in time. Newcon engaged CAA in order to enable Newcon to perform meet its own performance obligations under the main contract. That commercial purpose required CAA to deliver slabs on time, in the proper sequence and in the number required. This was fundamental to the parties' bargain. A failure to deliver slabs at all, a failure to deliver them in sequence or a failure to deliver them in full all carried serious contractual consequences for Newcon under its main contract. CAA knew that Newcon faced consequences under the main contract if CAA breached its obligations to JTC.[70]

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[70] Defendant's closing submissions dated 14 July 2015 at paragraph 91.

139 Despite accurate and timely production and delivery being the commercial purpose of the parties' contract, the letter of intent contains no express provisions on this point at all. Thus, it contains no express provision setting out in absolute or relative temporal terms a production and delivery schedule for CAA to meet. It contains no procedure for CAA to claim an extension of time to perform its obligations under the contract or obliging Newcon to grant such an extension if certain conditions were satisfied. It contains no express clause – typical in construction contracts – requiring the party delivering party (CAA in this case) to pay liquidated damages for breach to the receiving party (Newcon in this case). It contains no protocol governing the receiving party's express right to terminate the contract as a whole in the event that the delivering party persists in failing to perform its bargained-for promises.[71]

140 These gaps arose because the parties failed to contemplate them. The gaps are the result of the rudimentary form, and perhaps haste, in which the parties reduced their agreement into writing in the letter of intent. From Newcon's perspective, the rudimentary form of the letter of intent is the result of its expectation that the parties would in due course and by consent replace its abbreviated contractual content with the more comprehensive content set out in the letter of acceptance.

141 I do not accept CAA's submission that cl 2 of the letter of intent precludes a finding that the parties' contract contains these gaps. Clause 2 simply identifies the event markers that CAA was to follow in carrying out its sub-contract works, *ie*, the "site progress" and "any revisions to construction … schedule". It makes no provision for the manner in which CAA was to

[71] Defendant's closing submissions dated 14 July 2015 at paragraph 92.

carry out its works in order to put itself in the position necessary to meet those event markers. Nor can I, from the existence of cl 2 alone, conclude that the parties contemplated and agreed that CAA would fulfil its obligations under the contract so long as it delivered slabs at any time and in any sequence.

142 It is true that Newcon's act in drawing up the letter of acceptance shows that Newcon, at the very least, did contemplate these gaps. That is why Newcon wanted to take the opportunity in the letter of acceptance to introduce express terms which would have addressed each of these gaps. However, the letter of acceptance post-dates the letter of intent and therefore post-dates the meeting of the minds which gave rise to the parties' contract which the letter of intent records. Indeed, Newcon's belated attempt to add new terms to the parties' bargain in the letter of acceptance is the very reason CAA gave for not accepting its terms. To the extent that Newcon did contemplate and fill in the gaps in the letter of intent, it did so after the parties had bound themselves contractually. The existence of the detailed proposed provisions in the letter of acceptance does not preclude a finding that the parties failed to contemplate the gaps in the letter of intent at the time they bound themselves contractually to its terms. Newcon's contemplation of these gaps when it drew up the letter of acceptance does not, therefore, take the present case outside the first *Sembcorp* step.

143 I therefore find that the first *Sembcorp* step is satisfied.

Second step: apply the business efficacy test

144 At the second *Sembcorp* step, I must consider whether "it is necessary in the business or commercial sense to imply [each] term in order to give the contract efficacy" (see [109] above).

145 I begin the analysis on this step with a passage in *Hudson (13th edition)*. This passage (also from §6-021) appears immediately after the passage I have set out at [115] above. *Hudson* here posits a contractor who persists in an unreasonable rate of progress despite warning and suggests why that contractor should be vulnerable to having its contract terminated for repudiatory breach:

> … *[I]f a contractor persists in a rate of progress bearing no relation either to a contractually promised or reasonable date of completion, and the Employer accordingly gives notice requiring a reasonable or improved rate of progress but the Contractor then fails to proceed at a reasonable rate, it is submitted that the Contractor will be evincing either inability to complete, or an intention no longer to be bound by the Contract, in either case justifying termination by the Employer.* Otherwise, provided the Contractor does not by unequivocal refusal openly evince an intention no longer to be bound (thus exposing itself to the assertion of an anticipatory repudiatory breach), the Employer will, in the absence of such an implied term, be without remedy until the completion date has passed, and in the usual case where time is not of the essence probably not even then, until a still later notice is served.

146 What is of especial importance is that *Hudson* follows this submission immediately with a description of the type of construction contract into which these terms will be more easily implied:

> This submission can be tested by considering a short and relatively informal construction contract with a stipulated contractual completion date, but with no, or a relatively small liquidated damages provision. If, for example, it is assumed that the Contractor has the opportunity of taking on profitable work elsewhere, and with limited resources reduces its efforts so as to accommodate the other contract …. It would be absurd, it is submitted, if the Employer was to be without remedy until after a perhaps distant completion date, and then only for the perhaps inadequate damages resulting from late completion simpliciter (and by which time, moreover, a failing Contractor might well be in liquidation). Equally, if in the same informal contract the Employer had to the knowledge of the builder entered into the usual commitments with third parties, on the basis of the Contractor proceeding with reasonable diligence in the light of the promised or a

> reasonable completion date, it would be absurd that it should escape all responsibility for the resulting damage suffered by the Employer. Indeed, it is submitted that the universally accepted term unquestionably implied by law for completion within a reasonable time … can in practice only be given effect … by analysis of the time required by a Contractor of the appropriate class on the assumption that it performs with due diligence.

147 *Chow Kok Fong*, the leading local treatise on construction contracts, echoes this analysis with express reference to *Hudson*:

> UNSATISFACTORY PROGRESS OF WORKS
>
> Position under Common Law
>
> 13.69 An owner may seek to terminate a construction contract because the progress of the works is unacceptably slow. In this situation, *unless the inept contractor is removed, there may be little prospect of the works being completed in time to ensure that the commercial objectives of the owner are not effectively defeated*. However, in the absence of any express provision on this matter in the contract, the recourse of such an owner under common law is quite limited. He has to basically wait for the original contract date to pass and then for the delay to reach a stage which justifies the formulation of an action for fundamental breach before he could resort to termination of the contract. His recourse to damages, of course, remains but, in many situations, this is poor compensation when the momentum of a commercial opportunity is lost.
>
> Obligation to Proceed "Regularly and Diligently"
>
> 13.70 As noted earlier, most modern construction contracts contain provisions which enable an employer to terminate the contract where there are sufficient indications to suggest that the original contractor is unlikely to complete the works within an acceptable time frame. This recourse is premised on the existence of an obligation on the part of the contractor to sustain a reasonable rate of progress with the works, an obligation which is distinguishable from the more obvious obligation of completing the works on time. *The learned editor of the* Hudson *12th Ed considered that such an obligation must, if necessary, be implied*. He suggested that it would be absurd if the owner was to be without remedy until perhaps a distant completion date, and then only for the perhaps inadequate damages resulting from late completion *simpliciter*. It was further pointed out that, by that time, a failing contractor

> might well be in liquidation. The learned editor considered that, *at any rate, in situations where the works are to be completed within a reasonable time, the period to be allowed for the completion of the works can only be established on the assumption that the contractor does proceed with due diligence.*
>
> [emphasis added]

148 The contract between Newcon and CAA is just the type of "short and relatively informal contract" which *Hudson* contemplates. The parties intended the letter of intent to govern CAA's entire obligation to design, produce and deliver slabs to Newcon. These slabs, being structural elements, were essential for Newcon to perform its time-critical obligations to JTC under the main contract. CAA knew the direct connection between timely performance of its production and delivery obligations to Newcon and Newcon's timely performance of its obligation to JTC. CAA knew this from the tender discussions and also from the contract period and construction schedule in the letter of intent itself.[72]

149 Further, CAA's obligation under the letter of intent was not simply to produce a single finished product to Newcon at the end of a 15-month contract period. CAA undertook a recurring obligation over the course of the contract to produce and deliver slabs to Newcon. Further, the slabs which CAA undertook to deliver required significant lead time to produce, marshal and transport to the construction site. They also had to be delivered in a particular sequence because the main contract, and indeed the laws of physics, required Newcon to perform the superstructure works in a particular sequence. In those circumstances, business efficacy all the more necessitates an implied term as to timeliness in producing and delivering slabs and for a contractual consequence for breach of that implied term.

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[72] Defendant's closing submissions dated 14 July 2015 at paragraph 91.

150 That finding upon applying the business efficacy test does not necessitate, however, that any of the other gaps which I have found in the parties' contract (at [139] above) be filled. Thus, for example, the contract's commercial purpose can be quite easily achieved without implying a provision obliging CAA to pay liquidated damages to Newcon, or without implying a protocol for contractual extensions of time. Likewise, although business efficacy necessitates a contractual consequence for failing to failing to produce and deliver slabs in a timely manner, it does not require that time under the contract be of the essence in all respects and for all reasons.

151 Given the commercial purpose of the parties' contract, I accept that their contract would lack business efficacy without an implied term relating to timeliness in producing and delivering slabs and without an implied term relating to termination for breach of that term.

152 For the actual content of these implied terms, it is necessary to proceed to the third *Sembcorp* step.

Third step: the content of the terms

153 I accept Newcon's submission that the commercial purpose of the parties' contract makes it necessary to imply a term CAA to proceed with its works with due diligence and expedition at all times until completion. That term, qualified at it is by a requirement of reasonableness, goes no further than imposing the minimum necessary obligation upon CAA in order to achieve the contract's commercial purpose. One effect of this implied term is to require CAA to meet the delivery dates which Newcon would make known to CAA from time to time. Another – and perhaps more important – effect is to oblige CAA to arrange its work processes between the delivery dates so that it makes

reasonable progress on production and is therefore able to deliver slabs on time, in sequence and in full on the appointed dates.

154 I accept also that it is necessary that time be of the essence, but only with respect to this implied term of due diligence and expedition. The effect of time being of the essence in relation to this term is to give Newcon the right to terminate the contract if CAA were guilty of persistent breach of its obligation of due diligence and expedition which evinces either an inability to perform its contractual obligations or an intention no longer to be bound by the contract. This second implied term is deliberately drawn in narrow terms. It does not entitle Newcon to terminate the contract for any breach of any time provision under the contract. It is confined to a breach of the implied term as to due diligence and expedition. Even then, it does not give Newcon the right to terminate the contract for any breach of the implied term as to due diligence and expedition. It gives Newcon that right only if the breach, taken together with other breaches, goes to the root of the parties' bargain.

155 Without this implied term making time of the essence, as *Hudson* (see [145] above) and *Chow Kok Fong* (see [147] above) have pointed out, Newcon would have to wait patiently for CAA to miss each delivery date and even then, it would have no right to terminate the contract but a right only to sue for damages. Newcon's remedy would be limited in this manner even if it knew well in advance of the delivery date for a particular batch that CAA was not making the progress necessary to deliver that batch in full by that date. Newcon's remedy would be limited in this manner even if CAA had demonstrated clearly on any objective view that it had no ability to produce and deliver a particular batch or all of the slabs on time and in sequence. A term making time of the essence, but only in these circumstances, is necessary

in order to give the parties' contract business efficacy. It also goes no further than necessary to achieve that efficacy.

156 I therefore conclude that the following two terms are necessary to give business efficacy to the parties' agreement on the facts of this case: (i) a term obliging CAA to proceed with its works with due diligence and expedition at all times until completion; and (ii) a term entitling Newcon to terminate the contract for persistent breach of that obligation in the circumstances I have outlined above at [154].

CAA breached its express and implied obligations

157 I find that CAA breached both its express and implied obligations under the parties' contract to produce and deliver slabs.

CAA breached its express obligations

158 Newcon submits that CAA breached cl 2 of the letter of intent by failing to meet the delivery schedule in cl 7.10 of the letter of acceptance and the revised delivery schedule of 1 March 2013.[73]

159 I accept Newcon's submission. Clause 2 of the letter of intent imposed a contractual obligation on CAA to follow the site progress and the attached construction schedule. The construction schedule indicated that superstructure works involving CAA's slabs were critical tasks and were to commence on 26 February 2013. Consistent with the indication in the construction schedule, the delivery schedule set out in cl 7.10 of the letter of acceptance required CAA to complete delivery of its first batch of slabs by 18 February 2013. The revised

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[73] Defendant's closing submissions dated 14 July 2015 at paragraph 100.

delivery schedule of 1 March 2013 required CAA to deliver slabs for area 2a by 8 March 2013.

160 CAA delivered its first batch of slabs only on 16 March 2013 (see [30] above). Even then, the slabs were delivered out of sequence, and were therefore unsuitable for installation at that time. CAA thereby also failed to follow Newcon's site progress, as cl 2 obliged it to. CAA therefore breached the express terms of the contract.

CAA breached its implied obligations

161 CAA also breached its implied term to proceed with its works with due diligence and expedition at all times until completion. CAA failed to plan its production so as to be able to deliver slabs on time, in full and in sequence. As a result, CAA actually did fail to deliver on time, in full and in sequence before Newcon terminated the contract.

162 Not only did CAA breach its obligations in this respect, it did not even respond to Newcon's several emails asking CAA to submit certain items and to make arrangements for JTC and Newcon to witness the first casting, as well as Newcon's various chasers for delivery of slabs.

163 An overall review of the events that transpired lead me to the conclusion that CAA did not proceed with its sub-contract works with due diligence and expedition. It was therefore in breach of its implied contractual obligations.

CAA's counterarguments

164 CAA's counterargument is that the delay from 9 March 2013 to 30 April 2013 was not caused by CAA but by Newcon and its other sub-contractors. It submits that Newcon committed acts of prevention making it more difficult for CAA to produce and deliver slabs by the contractually-agreed timeline.[74]

165 CAA alleges that Newcon committed the following acts of prevention:

(a) Newcon was not ready to receive the slabs at the work site.[75]

(b) Newcon repeatedly postponed the witnessing of the first casting of the slabs. The witnessing of the first casting could only be fixed for 26 February 2013, which meant that CAA could only begin production then.[76]

(c) Newcon repeatedly changed the delivery schedule and design specifications. CAA points to the following:

(i) At the first casting on 26 February 2013, Mr Chen and Mr Lin discussed and reached an agreement on the casting sequence and quantity of the hollow core slabs.[77]

(ii) Newcon sent CAA emails repeatedly changing the division of the gridlines and changing the delivery schedule,

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74 Plaintiff's closing submissions dated 14 July 2015 at paragraphs 31 and 32.

75 Plaintiff's closing submissions dated 14 July 2015 at paragraph 28(a).

76 Plaintiff's closing submissions dated 14 July 2015 at paragraph 28(b) and (c).

77 Plaintiff's closing submissions dated 14 July 2015 at paragraph 28(d).

including the delivery schedule in Newcon's 21 March 2013 email.[78]

(iii) Newcon required CAA to make detailed changes to the mechanical and engineering ("M&E") works.[79]

(iv) Newcon also required changes to the M&E openings, the structural gradient and subsequent toppings. CAA's professional engineer had to check the design impact of each change. CAA had to resubmit the designs for approval before casting.[80]

(d) CAA was not in delay because, following the delivery schedule in Newcon's 21 March 2013 email, the first delivery date of the slabs was scheduled for 28 March 2013.[81]

166 CAA submits that the consequence of these acts of prevention was that time for CAA's completion of the works was set at large, relying on *Chua Tian Chu and another v Chin Bay Ching and another* [2011] SGHC 126.[82] Further, Newcon's acts of prevention extinguished its right to terminate the contract based on the delay in completion.[83]

167 I will explain my findings on each of these points in turn.

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78 Plaintiff's closing submissions dated 14 July 2015 at paragraph 28(e).

79 Plaintiff's closing submissions dated 14 July 2015 at paragraph 30(a).

80 Plaintiff's closing submissions dated 14 July 2015 at paragraph 30(b).

81 Plaintiff's closing submissions dated 14 July 2015 at paragraph 29.

82 Plaintiff's closing submissions dated 14 July 2015 at paragraph 33.

83 Plaintiff's closing submissions dated 14 July 2015 at paragraphs 34 to 36.

168 I reject CAA's submission that Newcon was not ready to receive the slabs at the work site. CAA relies on photographs of the worksite that it allegedly took on 25 March 2013. It claimed in its first letter of 26 March 2013 that these photographs show that only a few columns had been "cast in half", that most of the columns were still in preparation of rebar cages, with many locations which were "still preparing for the ground beams" (see [42] above). CAA claims that these photographs show that no beams had been cast, and that there was not even any formwork and rebar cages prepared for beam casting.

169 I do not accept that these photographs prove what CAA claims. I accept the explanation which Newcon furnished in its email of 26 March 2013 replying to CAA's letters: that the site was ready for installation of CAA's slabs at area 2a.[84] In any event, CAA never raised this allegation at any time before Newcon issued its notice of termination on 25 March 2013. It made this allegation only in its letter of 26 March 2013. If this were the true reason for CAA's late delivery and non-delivery of slabs, the inherent probabilities are that it would have raised this point to Newcon much earlier. There was no evidence that Newcon had ever turned away CAA's delivery of the slabs on the basis that Newcon was not ready to take delivery. I also agree with Newcon's submission that CAA's obligation to deliver the slabs in accordance with the delivery schedule was independent of the site progress of the structural works.[85] I therefore find that this aspect of CAA's claim was an ill-considered afterthought, utterly without basis, and nothing more than an attempt to push blame to Newcon.

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84 AEIC of Cao Wei Min dated 5 May 2015 at page 262.

85 AEIC of Cao Wei Min dated 5 May 2015 at paragraph 47.

170 I also reject CAA's submission that Newcon repeatedly postponed the witnessing of the first casting. The documentary evidence made the true position clear. Newcon referred me[86] to four emails sent by Mr Lin to CAA between 30 January and 8 February 2013 (see [24] to [25] above) in which Mr Lin made repeated requests to CAA to schedule its first casting of the slabs and to make arrangements to transport the resident engineer, resident technical officer and Newcon's representative to witness the first casting at CAA's plant. CAA did not respond to any of these emails. I therefore find that any delay in the first casting was caused entirely by CAA.

171 I find no merit in CAA's submission that Newcon repeatedly changed the delivery schedule and design specifications. On this point, CAA first relied on the evidence of Mr Chen, who claimed that during the first casting on 26 March 2013, he reached an agreement with Mr Lin that the casting sequence and quantity of hollow core slabs would be as follows:[87]

(a) Grid Line 1-5a/H-L (Zone 1) – 88 pieces of 325mm hollow core slabs;

(b) Grid Line 1-5a/L-Q (Zone 2) – 90 pieces of 325mm hollow core slabs;

(c) Grid Line 1-5a/A-H (Zone 2) – 115 pieces of 325mm hollow core slabs and 40 pieces of 360mm hollow core slabs; and

(d) Grid Line 5-10/E-H2 (Zone 3) – 170 pieces of 325mm hollow core slabs.

172 CAA was unable to point to any documentary evidence of such an agreement. I do not accept that an agreement at this level of detail – on matters as important as the casting sequence, the quantity and the size of the slabs –

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86 Defendant's closing submissions dated 14 July 2015 at paragraph 148.

87 AEIC of Chen Linhui dated 4 May 2015 at paragraph 53.

would have been left as a mere oral agreement. I also agree with Newcon that if this agreement had been reached on 26 February 2013, it defied logic that Newcon would have sent a revised delivery schedule to CAA barely three days later, on 1 March 2013, setting out a different delivery sequence. In the circumstances, I reject CAA's submission.

173 CAA's suggestion that Newcon repeatedly changed the division of the gridlines and the delivery schedule was a gross overstatement. In fact the only reason Newcon had to make or propose changes to the delivery schedule was because of CAA's failure to deliver the slabs on time. CAA's argument in this regard is therefore not only utterly devoid of merit but also one which lies ill in its mouth to make.

174 I also reject CAA's submission that Newcon caused delays by directing changes to M&E and other works. CAA referred me to an email sent by Mr Lin to CAA on 15 March 2013, where Mr Lin directed CAA to allow rainwater downpipe penetration in slabs on the second and third storeys, and made several queries in this regard.[88] As Newcon observed,[89] Mr Chen replied on the same day, providing his solution to the rainwater downpipe issue, *ie*, to contain the scupper drain within the concrete topping at the top of the hollow core slabs rather than to cut into the top flanges of the slabs. Thus, the rainwater downpipes could be accommodated without changing the design of the hollow core slabs. I therefore do not find that Newcon's email of 15 March 2013 caused any delay.

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88 AB 263 and 264 and 263A and B.

89 Defendant's closing submissions dated 14 July 2015 at paragraph 150.

175 CAA also relies on an email sent by Mr Lin on 20 March 2013, in which Mr Lin sought confirmation from Mr Chen that the structural gradient of the beams and slabs and subsequent structural topping at certain areas of the building were in accordance with the design of the slabs.[90] Mr Chen responded the next day, informing Newcon that the slabs for the areas mentioned by Mr Lin had been designed with additional screed finishing and that there was an allowable concrete topping of 125mm due to the screed finishing.[91] As Newcon explained, this was Mr Chen's confirmation that the slabs could accommodate the slope through the simple solution of additional concrete topping.[92] None of this provided any credible excuse for CAA's delay.

176 CAA submits that Newcon again revised the delivery schedule on 21 March 2013 (see [32] – [33] above), when it stipulated 28 March 2013 as the time for CAA to make its initial delivery of slabs. I reject CAA's submission.

177 The delivery schedule attached to the 21 March 2013 email is quite different from the revised delivery schedule of 1 March 2013 (see [27] above. The latter was an unconditional revision of delivery dates which Newcon put unilaterally to CAA. The delivery schedule sent on 21 March 2013 differed from that in two respects. First, it was merely a *proposal* for a revised delivery schedule. That is set out expressly in the title and in the first sentence of the covering email. Second, the proposed revisions were, by the express terms of this email, subject to discussion and agreement at a future meeting.

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90 AEIC of Chen Linhui dated 4 May 2015 at page 125.

91 1DBD at 48.

92 Defendant's closing submissions dated 14 July 2015 at paragraph 155.

178 That future meeting took place on 22 March 2013. Although the parties disagree on what occurred at that meeting (see [35] above), it is neither party's case that the parties agreed at this meeting that the proposed delivery schedule would become an agreed delivery schedule. In fact, it was CAA's own case that the proposed delivery schedule was not even discussed at this meeting. The condition which Newcon attached to the delivery schedule by qualifying it with the adjective "proposed" was accordingly never met. I therefore hold that the proposed delivery schedule of 21 March 2013 had no contractual effect under the letter of intent. CAA cannot rely on compliance with the delivery schedule in Newcon's 21 March 2013 email to argue that it was not in breach by reason of delay.

179 Consequently, I find that Newcon did not commit any acts of prevention. There is therefore no basis for CAA's submission that time was set at large.

CAA's obligation fell on the critical path

180 CAA's alternative counterargument is that its obligation to deliver the slabs did not fall on the critical path of Newcon's work.[93] Area 2a did not lie on the critical path because it was not an area on which additional stories would be built. The only evidence which CAA presented of this was a mere assertion by Dr Chi during cross-examination that this was the case.[94]

181 Newcon refers to the construction schedule attached to the letter of intent,[95] and emphasises that the component described as "2nd Sty-Beam/Slab, HCS & Topping" is marked in the schedule as a "Critical Task".

93 Plaintiff's closing submissions dated 14 July 2015 at paragraphs 37 and 38.

94 Transcript of 28 May 2015 at page 98 lines 16 to 25.

182 During cross-examination, Dr Chi was shown the building plans for the 2nd and 3rd storeys. It was pointed out to him that columns were to be erected at gridline D on the plans.[96] It would not be possible for these columns to be erected if the slabs on the left side of gridline D were not first installed. When confronted with these building plans, Dr Chi doggedly insisted that the slabs for area 2a did not lie on the critical path of the main contract works, without providing any explanation.

183 In the circumstances, I find that the columns for the third storey at gridline D and all structural works above that could take place only after CAA delivered and Newcon installed the slabs for area 2a. I therefore find that CAA's obligation to produce and deliver the slabs for area 2a fell on the critical path of Newcon's main contract works. CAA's failure to meet its obligations directly contributed to the delay in the main contract works.

Newcon was entitled to terminate the contract

184 Newcon issued its notice of termination to CAA on 25 March 2013. It purported to terminate the contract on the basis that CAA's continued failure to deliver the slabs on time caused delay to its construction schedule.

185 Newcon's primary submission is that it was entitled to terminate the contract pursuant to the express right of termination found in the letter of acceptance. Given my finding that CAA never accepted the letter of acceptance, I reject Newcon's primary submission.

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95 Defendant's closing submissions dated 14 July 2015 at paragraph 289.

96 Transcript of 28 May 2015 at page 101 line 31 to page 103 line 2.

186 The letter of intent (unlike the letter of acceptance) does not contain an express termination clause. Newcon's termination is justified, therefore, only if it can be characterised as an exercise of: (i) Newcon's right under the implied term making time of the essence in relation to CAA's implied term as to due diligence and expedition; or (ii) Newcon's common law right to terminate the contract for repudiatory breach. That is Newcon's alternative submission. It submits that CAA committed repudiatory breaches of the contract by breaching: (i) cl 2 of the letter of intent;[97] and (ii) the implied term of due diligence and expedition.[98]

187 I accept Newcon's submission. I begin with cl 2 of the letter of intent. Clause 2 states that the main contract period lasts 15 months, from 1 November 2012 to 31 January 2014, and requires CAA to follow progress on site, including any revisions to the construction schedule, in producing and delivering slabs.

188 Clause 2 is in my view a condition of the contract. Whether a term is a condition is, of course, to be determined by ascertaining the objective intentions of the parties on the contract's proper construction in light of all the surrounding circumstances: *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 ("*Man Financial*") at [174]. The commercial purpose of the contract was for CAA to deliver slabs to Newcon for installation, on time and in sequence. Both parties knew that timely delivery of the slabs was necessary to ensure that Newcon could adhere to the main contract timeline set out in the construction schedule. This was exactly the subject of cl 2. CAA's eventual

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97 Defendant's closing submissions dated 14 July 2015 at paragraph 122.

98 Defendant's closing submissions dated 14 July 2015 at paragraph 121.

breach of cl 2 resulted precisely in the anticipated consequence – *ie*, delays in Newcon's performance and completion of the main contract, and Newcon's liability to pay liquidated damages to JTC in the amount of $407,000.

189 The commercial purpose of the contract similarly drives me to conclude that the implied term of due diligence and expedition was a condition of the contract.

190 Even if cl 2 and the implied term of due diligence were not conditions of the parties' contract, the *Hongkong Fir* approach (summarised in *Man Financial* at [157]) applied to the present facts leads me to conclude that the nature and the consequences of CAA's breaches of both terms were such as to deprive Newcon of substantially the whole benefit it intended to obtain from the contract. That too suffices to confer upon Newcon a right at common law to terminate the contract upon CAA's breach. It sufficed also to trigger the implied term I have found which permits Newcon to terminate the contract if CAA were guilty of persistent breach of its obligation of due diligence and expedition which evinces either an inability to perform its contractual obligations or an intention no longer to be bound by the contract.

191 For these reasons, I hold that Newcon was entitled to terminate the contract as a result of CAA's repudiatory breaches of the contract's express and implied terms. That is so either under the common law right to terminate for repudiatory breach and also pursuant to the implied term making time of the essence in relation to the implied term of due diligence and expedition.

My findings on the claim and counterclaim

192 I will now explain my findings on the remaining elements of the claim and counterclaim and my decision on quantum.

CAA's claim

193 Newcon did not wrongfully terminate the parties' contract.[99] Thus, the bulk of CAA's claim fails. It is not entitled to recover: (i) damages of $329,266.80 for loss of the profits that it would have received if the contract had not been terminated;[100] or (ii) $2,000 as the amount spent to set up the hollow core machine for work to be performed by CAA after 25 March 2013 (*ie*, the date of the notice of termination).[101]

194 However, CAA is entitled to be paid under the contract where the right to payment accrued before termination. That entitlement is unaffected by Newcon's termination. Under this head, CAA claimed $144,979 as the value of work it did up to 25 March 2013.[102] This sum consisted of the following components:[103]

(a) $17,790.30 for slabs actually produced and delivered;

(b) $10,000 for the design and shop drawings; and

(c) $117,189.60 for slabs produced but not delivered before termination.

I accept that CAA is entitled to be paid the sum of $17,790.30 for the slabs it produced and delivered and $10,000 for the cost of design and shop drawings.

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99 Statement of claim (Amendment No. 1) at paragraphs 13 to 17.

100 Statement of claim (Amendment No. 1) at paragraph 17(a).

101 Statement of claim (Amendment No. 1) at paragraph 17(b).

102 Statement of claim (Amendment No. 1) at paragraph 11.

103 AEIC of Chen Linhui dated 4 May 2015 at paragraph 131.

195 Newcon resists CAA's claim for $177,189.60 for slabs allegedly produced but not delivered before termination. Its submission is that there is simply no evidence that any such slabs exist.[104] I agree with Newcon that the documentary evidence produced by CAA in support of this aspect of its claim was wholly insufficient. Further, I do not accept that CAA would not have delivered or attempted to deliver these slabs to Newcon if they had really been produced and were suitable for Newcon's needs.

196 The remaining component of CAA's claim is the sum of $28,050 for rental of lifting equipment and I-beams. According to CAA, Newcon failed to return the equipment after 16 May 2013. CAA therefore claims a "rental fee" of $150 per day from 16 May 2013 up to the date of commencement of this action.

197 CAA's claim lacks a cause of action. The obvious cause of action would be a claim for damages in tort for wrongful detention of property (see, *eg*, *ACES System Development Pte Ltd v Yenty Lily (trading as Access International Services)* [2013] 4 SLR 1317). But CAA relies neither on tort nor on contract for Newcon's liability to pay this "rental fee". Indeed, during oral closing submissions, counsel for CAA could not articulate a legal basis for the claim.

198 Even on quantum, CAA does not explain how it arrives at the figure of $150 per day. CAA makes no attempt to demonstrate, for instance, that this was the market rent for these items at the material time. The figure appears to be entirely arbitrary.

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[104] Defendant's closing submissions dated 14 July 2015 at paragraphs 213 to 229.

199 In any event, Newcon never refused to return the I-beams, wrongfully or otherwise. Newcon stored the I-beams on site from the time that CAA ceased to deliver slabs from end March 2013. CAA could have collected them at any time. Indeed, CAA did collect them on 25 February 2014 immediately upon receiving an email reminder from Newcon.

200 I reject this claim. The legal and evidential basis for this claim was woefully inadequate.

Newcon's counterclaim

201 I set out again for ease of reference the sums sought by Newcon in its counterclaim:

(a) Liquidated damages of $333,000 under cl 7.15(a) of the letter of acceptance for delay caused by CAA or, alternatively, damages to be assessed;

(b) $488,166.62 for costs incurred in engaging a third party supplier to complete CAA's scope of works; and

(c) $96,044.44 for expenses incurred in reliance on the contract, consisting of:

(i) $32,093.19 for idling of crawler crane and manpower;

(ii) $1,321.85 for overtime fees for workers due to delivery of hollow core slabs after 5 pm from 16 to 23 March 2013; and

(iii) $62,629.40 for additional costs for extended period of rental of system formworks incurred due to CAA's delay in delivery of hollow core slabs.

202 I have dismissed Newcon's liquidated damages claim. The letter of acceptance does not form part of the contract governing the parties' relationship. Newcon cannot therefore rely on cl 7.15(a) of the letter of acceptance as the basis for a claim for liquidated damages. It is not suggested, quite rightly, that there could be any implied term in the letter of intent justifying this claim.

203 I have allowed Newcon's claim of $488,166.62 for the additional cost it incurred in engaging a replacement sub-contractor, Eastern Pretech, to complete CAA's scope of works. Newcon had to obtain a replacement sub-contractor at short notice after it terminated the parties' contract. It had few alternatives available. Eastern Pretech was willing to take on the project.[105]

204 Newcon acted entirely reasonably in turning to Eastern Pretech to replace CAA in March 2013. Eastern Pretech had earlier submitted a bid at the tender stage, but had not been awarded the contract.[106] Eastern Pretech therefore had some familiarity with the project, the specifications for the slabs and the scope of work generally. Newcon was also able to mitigate its loss, despite its reduced bargaining power arising from the urgency of the situation, by getting Eastern Pretech to agree a discount on its initial quotation in March 2013.[107]

205 I accept that Newcon was entitled to recover this sum in full from CAA. It was reasonably foreseeable that, if CAA failed to perform its contractual obligations to produce and deliver slabs, Newcon would have to

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105 AEIC of Cao Wei Min dated 5 May 2015 at paragraph 64.

106 1DBD at 55 to 62.

107 Defendant's closing submissions dated 14 July 2015 at paragraph 249(c). 1DBD at 63 and 70.

engage an alternative contractor to do that work. The additional sum that Newcon had to pay Eastern Pretech, over and above CAA's contract price, was therefore either loss arising in the ordinary course from CAA's breach or loss which CAA reasonably foresaw, given its knowledge of Newcon's obligations as to time to JTC under the main contract.

206 I have found also that Newcon is entitled to $32,093.19 for idling of the crawler crane and associated overtime charges. The crawler crane was used to hoist the slabs. Because CAA failed to deliver the slabs on time, the crane was on standby from 25 to 28 February, 1 to 31 March (excluding 16 and 25 March 2013 when CAA in fact delivered) and 1 to 16 April 2013, save for a total of 17 hours during these periods.[108] Newcon's workers also had to work overtime due to the idle crane.

207 CAA argued that since the first casting was witnessed only on 26 February 2013, it was a "factual impossibility" for CAA to produce and deliver slabs between 25 February 2013 and 28 February 2013.[109] As I have found (at [170] above), CAA had only itself to blame for not responding more quickly to Newcon's repeated instructions for CAA to make arrangements for the first casting. In relation to the idle crawler crane between 1 March 2013 and 31 March 2013, CAA suggests that Newcon impeded CAA's delivery progress by giving it notice of new delivery timelines, revised zonings and design changes. I have already rejected this aspect of CAA's case at [171] to [179] above. I have also rejected CAA's further contention that there was no causative link between CAA's delay and Newcon's loss.

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108 AEIC of Cao Wei Min dated 5 May 2015 at paragraph 71.

109 Plaintiff's closing submissions dated 14 July 2015 at paragraph 74(a).

208 I have allowed Newcon's claim for $62,629.40 for renting system formwork. Newcon used the system formwork to cast columns and beams. As a result of CAA's failure to produce and deliver slabs, Newcon had to rent the system formwork for a longer period of time. CAA's objection to this claim is based on Newcon's 21 March 2013 email. CAA suggests that the delivery schedule had been revised following this email.[110] I have explained (at [176] above) my finding that this was merely a *proposed* delivery schedule and did not bind Newcon.

209 I have disallowed Newcon's claim for $1,321.85 for overtime charges it incurred when CAA delivered slabs to the site after office hours. There was no basis for any obligation on CAA to deliver its slabs during office hours or in a manner which minimised or eliminated Newcon's obligation to pay overtime to its workers.

210 I turn finally to Newcon's claim for liquidated damages paid by Newcon to JTC. In its closing submissions, Newcon quantifies this claim against CAA as being for $980,500 for 53 days of delay at $18,500 per day. Liability for 53 days of delay is Newcon's worst-case scenario under the main contract. Newcon's alternative quantification of this claim is $407,000, being the actual sum which JTC has so far deducted as liquidated damages. JTC deducted this sum as liquidated damages for 22 days of delay at $18,500 per day under an interim final payment certificate dated 13 April 2015 issued under the main contract.

211 CAA denies that it is liable to Newcon under this head. Its case is that it was Newcon's other subcontractors, and not CAA, which caused Newcon's

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[110] Plaintiff's closing submissions dated 14 July 2015 at paragraphs 79 and 80.

liability to pay liquidated damages to JTC. CAA refers to a sequence in Mr Cao's cross-examination in which he accepted that there were other sub-contractors involved in Newcon's main contract works and that following delay caused by one such sub-contractor, JTC awarded Newcon an extension of time of 59 days.[111] In my view, this evidence lent no support to CAA's argument. Mr Cao explained in cross-examination and re-examination that this sub-contractor's delay had been in respect of installing an additional stair lift, which was a requirement imposed by the Building and Construction Authority (BCA).

212 Mr Cao also accepted that there was delay caused by an aluminium works sub-contractor. But I accept his evidence that this delay was "very marginal" (*ie*, only "[a] couple of days") and occurred only at the "completion stage of the projects" as the aluminium works concerned the "external façade" of the building. I therefore accept Newcon's submission that any delay caused by the aluminium works sub-contractor could not have been concurrent with the delay caused by CAA.[112] CAA's delay occurred at the very outset of construction, affected the structural works and was the root cause of Newcon's overall delay in completion.

213 I therefore accept that CAA is liable to Newcon for damages under this head. Newcon's loss in paying liquidated damages to JTC either flowed directly from CAA's breach or was loss which was within the parties' reasonable contemplation if CAA failed to perform its obligations.

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111 Transcript of 2 June 2015 at page 14 line 10 to page 15 line 3.

112 Defendant's closing submissions dated 14 July 2015 at paragraph 301.

214 I have, however, limited Newcon's recovery to the $407,000 which JTC has actually deducted from the main contract sum. In oral closing submissions, counsel for Newcon confirmed that JTC had not made any attempt since the interim final payment certificate (see [210] above) to recover additional liquidated damages from Newcon. There is therefore no basis on which Newcon can claim that it continues to be exposed to a claim by JTC for additional liquidated damages.

Conclusion

215 In respect of CAA's claim, I have found that it is entitled to recover $17,790.30 for producing and delivering slabs before Newcon terminated the parties' contract and $1,500 for the cost of design and shop drawings. I have found that it is not entitled to any other aspects of its claim.

216 As for Newcon's counterclaim, I have found that it is entitled to be paid $488,166.62 for the additional cost of engaging Eastern Pretech to complete CAA's scope of works, $32,093.19 for wasted costs incurred by the idle crawler crane, $62,629.40 for renting system formwork and $407,000 for the liquidated damages which JTC deducted. I have rejected Newcon's claim for $1,321.85 for overtime fees.

217 As regards costs, I reject Newcon's submission that CAA should pay indemnity costs. Although I made findings against the credibility of CAA's two witnesses (*ie*, Dr Chi and Mr Chen), I do not think that CAA the manner in which CAA had conducted the litigation warranted an award of indemnity costs. I have therefore ordered CAA to pay costs to Newcon on the standard basis.

218 I accept CAA's submission that the costs it pays Newcon should be discounted to reflect the fact that CAA succeeded in establishing that the letter of acceptance did not form part of the parties' contract. Although that argument did not ultimately make a substantial difference to the outcome of this action – as CAA was nevertheless found liable on the counterclaim in large part – that issue of law did take up a significant part of the oral and written closing submissions presented to me.

219 I have therefore ordered CAA to pay 75% of Newcon's costs of and incidental to the claim and the counterclaim, such costs to be taxed on the standard basis.

Vinodh Coomaraswamy
Judge

Irving Choh, Lim Bee Li and Melissa Kor (Optimus Chambers LLC)
for the plaintiff;
Joseph Lee and Tang Jin Sheng (Dentons Rodyk & Davidson LLP)
for the defendant.