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

[2021] SGHC 277

Suit No 1282 of 2019

Between

Zhong Kai Construction Co Pte Ltd

… *Plaintiff*

And

Diamond Glass Enterprise Pte Ltd

… *Defendant*

And Between

Diamond Glass Enterprise Pte Ltd

… *Plaintiff in counterclaim*

And

Zhong Kai Construction Co Pte Ltd

… *Defendant in counterclaim*

JUDGMENT

[Building and Construction Law] — [Damages] — [Liquidated damages]
[Building and Construction Law] — [Scope of works] — [Variations]
[Building and Construction Law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act]
[Building and Construction Law] — [Termination] — [Repudiation of contract]

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v
Diamond Glass Enterprise Pte Ltd

[2021] SGHC 277

General Division of the High Court — Suit No 1282 of 2019
Kwek Mean Luck JC
29, 30 June, 1, 2, 6–8, 13, 14, 16, 19 July, 11 November 2021

02 December 2021 Judgment reserved.

Kwek Mean Luck JC:

Introduction

1 The plaintiff, Zhong Kai Construction Co Pte Ltd, is a Singapore-incorporated company in the building and construction industry. Its principal business is in building and construction.[1] The defendant, Diamond Glass Enterprise Pte Ltd, is a Singapore-incorporated company in the building and construction industry. It is engaged in the design, manufacture, supply, installation and maintenance of architectural glass.[2]

2 The plaintiff was a subcontractor involved in a project for the construction of equipment buildings and facilities at the Singapore Changi

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1 Statement of Claim (Amendment No 1) dated 16 March 2020 ("SOC") at para 1.

2 Defence and Counterclaim (Amendment No 2) dated 12 May 2021 ("Defence") at para 5.

Airport (the "Project").[3] The owner of the Project was the Civil Aviation Authority of Singapore ("CAAS"). Surbana Jurong Infrastructure Pte Ltd ("SJ") was CAAS' consultant for the Project.[4] SCB Building Construction Pte Ltd ("SCB") was the main contractor for the Project.[5] The plaintiff was a subcontractor of SCB for the Project.

3 By a letter dated 7 November 2016[6] (the "Subcontract"), the plaintiff engaged the defendant as a subcontractor for the supply of materials, equipment and tools to carry out and complete the aluminium cladding of the external facade, blast/ballistic doors and windows, aluminium doors, and window works for the Project.[7] The Subcontract Sum was a Provisional Sum of $558,055 excluding GST.[8]

4 In this suit, the plaintiff claims against the defendant for Liquidated Damages ("LD") arising from the defendant's delays, for replacement works arising from the defendant's abandonment of the worksite around 6 June 2018 and for rectification works done. The plaintiff also seeks to overturn the adjudicated amount that was awarded to the defendant in an adjudication determination under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA"). The defendant counterclaims

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3 Lu Zhi's Affidavit of Evidence-in-Chief ("AEIC") dated 5 May 2021 ("Lu's AEIC") at para 2.

4 Lu's AEIC at paras 9–10.

5 Lu's AEIC at para 12.

6 The defendant disputed at trial that the Subcontract was concluded on 7 November 2016 and argued that it was instead concluded sometime in December 2016. However, the exact date the Subcontract was concluded is not relevant to the determination of the issues before me.

7 Agreed Bundle volume 1 ("1 AB") at pp 3–54.

8 1 AB at p 3.

for payments due under the four variation orders ("VOs"), the remainder of the unpaid sums under the Subcontract and for legal costs associated with the adjudication determination.

5 I allowed the plaintiff's claims for LD and the costs of replacement and rectification works in part and set aside three of the VOs that were the subject of the adjudication determination. I allowed one of the defendant's claim for VO and dismissed the defendant's other claims. I set out my reasons below.

Factual Background

6 The Subcontract was divided into two phases, namely, Phase 1 and Phase 2A. Phase 1 related to works for an eight-storey Equipment Building ("Phase 1 Works") while Phase 2A related to works for a two-storey Annex Building ("Phase 2A Works").[9]

7 According to the plaintiff, the defendant began to show signs of delay in meeting the schedule for the Subcontract works sometime in February 2017.[10] SCB and the plaintiff gave many written notices and reminders to the defendant from February 2017 to February 2018.[11]

8 According to the defendant, these delays were not caused by them but by the plaintiff and/or those further up the contractual chain.[12] The delay was caused by, among other things, the plaintiff's delay in obtaining the requisite approval from the Building and Construction Authority ("BCA") to carry out

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9 1 AB at p 4.

10 Chai Yoke Choo's AEIC dated 16 April 2021 ("Chai's AEIC") at para 20 and pp 124–127.

11 Chai's AEIC at para 21 and pp 124–346.

12 Rethna Balan Rajeesh's AEIC dated 6 May 2021 ("Rajeesh's AEIC") at para 12.

the structural works for Phase 1, the change in glass specifications, and the plaintiff's refusal to agree to payment claims or to make payment on time and in full.[13]

9 The disagreement between the parties continued in April 2018. This is evidenced by email correspondence between them concerning the purchase of cabin glass that the defendant was obliged to install on the eight-storey Equipment Building under Phase 1 Works.

10 In an email by SCB dated 17 April 2018, addressed to both the plaintiff and the defendant, it was stated that "[t]ill date, despite our repeated reminders, you have not placed order for the cabin glass and there has been no progress update".[14]

11 On 25 April 2018, the defendant sent a letter via email to the plaintiff, with the header "Cancellation of Purchase Order for Cabin Glass".[15] In that letter, the defendant stated that "[d]espite our very lucid explanation of the facts and the various issues regarding payment of monies due and owing to us plus our requirement that the relevant parties accept responsibility for the costs of airfreight, we have not received any substantive reply from [the plaintiff]".[16] As such, the defendant had "no choice but to cancel the Purchase Order for Cabin Glass with immediate effect".[17] The defendant also sought written confirmation from the plaintiff to bear the liability to pay $48,380 to settle the defendant's claims, without which they would not be able to proceed further.

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13 Rajeesh's AEIC at para 12.

14 11 AB at p 80.

15 11 AB at p 106.

16 11 AB at p 106.

17 11 AB at p 106.

12 In response, the plaintiff sent an email to the defendant on the same day stating that "to cancel the purchase order for cabin glass is a serious impact to achieve overall completion to work [*sic*]".[18] The plaintiff also stated that they would purchase the cabin glass and the cost incurred would be deducted from the defendant's progress payment claim.[19]

13 On 30 May 2018, the defendant replied to the plaintiff's email stating:[20]

> **Repudiatory Breach of Contract**
>
> …
>
> For the reasons set out in our correspondence on **19 April 2018** we have explained and established that there was no delay by [the defendant] in their project from the moment the glass specifications were changed …
>
> Further, it is painfully obvious that despite our progress claims, no payment has been made on the sum outstanding of **$261,006.74**. [The plaintiff]'s refusal to approve the variation work quotes and total failure to obtain payment for all the variation works requested puts us in jeopardy of making a loss in this project.
>
> …
>
> [emphasis in original]

14 The defendant then demanded payment of $149,436.99 by 12.00pm on 5 June 2018. Should the plaintiff fail to meet the deadline, the defendant would treat the contract as terminated.[21] The plaintiff did not make the demanded payment by the deadline. On 6 June 2018, the defendant abandoned the work site.

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18 11 AB at p 112.

19 11 AB at p 112.

20 11 AB at pp 142–143.

21 11 AB at pp 142–143.

15 On 26 June 2018, several emails were exchanged between the parties in relation to the calculation of the sums alleged as due by the defendant. On 29 June 2018, the defendant sent a letter to the plaintiff via email stating that it had "no choice but to accept [the plaintiff's] repudiatory breach and terminate the contract" due to the lack of payment in full, unsigned variation quotations, and *etc*.[22] The defendant also stated that as a gesture of goodwill, it was willing to complete the works on the condition that the plaintiff gives assurance that the plaintiff would pay the defendant fully upon completion of the works and that the plaintiff pays the defendant $50,000 upfront immediately.[23]

16 The plaintiff replied the next day on 30 June 2018 and stated that "all the figures and matters [in the 29 June 2018 letter] are untrue and misleading".[24] The plaintiff also stated that it had no choice but to engage third parties to complete the remaining works and remedy any defects on the defendant's behalf, and that the defendant would be responsible for the consequences that would occur.[25]

Procedural history

The progress claim and Suit No 917 of 2019

17 On 28 August 2019, more than a year after the defendant's letter of 29 June 2018 (see above at [15]), the defendant served a progress claim on the plaintiff, demanding a sum of $261,006.74.

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22 11 AB at pp 209–212.

23 11 AB at pp 209–212.

24 11 AB at p 213.

25 11 AB at p 214.

18 On 14 September 2019, the plaintiff commenced Suit No 917 of 2019 ("S 917") in the High Court, claiming for the sum of $317,559.90 for "goods sold and delivered and services rendered to the [d]efendants".[26] This action was commenced by the plaintiff through its then solicitors Peter Ong Law Corporation.

19 On 16 September 2019, the plaintiff responded to the defendant's progress claim for $261,006.74. The plaintiff either declined to certify or did not certify in full the amounts claimed by the defendant. The reasons provided by the plaintiff included, *inter alia*, that the works were not in fact done, or that the variation works claimed for were under the original scope of the Subcontract.[27]

The Adjudication Application

20 On 1 October 2019, the defendant commenced Adjudication Application No 339 of 2019 ("AA 339") under the SOPA for the sum of $264,789.08.[28] In the plaintiff's written submissions in AA 339, it was argued that the defendant had failed to carry out the terms of the Subcontract and that most of the works done were either incomplete, defective and/or did not go through a "final handing over process".[29] The plaintiff therefore had to rectify the defects of the defendant's works using third-party contractors, complete the remainder of the works and prepare the works for the final handing over.[30]

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26 Statement of Claim in HC/S 917/2019 dated 14 September 2019 at para 3.

27 Rasanathan s/o Sothynathan's Affidavit of Evidence-in-Chief ("Rasanathan's AEIC") dated 6 May 2021 at pp 192–200.

28 3 AB at pp 227–240.

29 5 AB at p 18.

30 5 AB at p 19.

21 An Adjudication Determination (the "AD") was issued on 15 November 2019 where the adjudicator awarded the sum of $197,522.83 (the "Adjudicated Amount") plus interest, costs and adjudicator's fees to the defendant.[31]

Suit No 1282/2019

22 The plaintiff did not make payment of the Adjudicated Amount. Instead, on 19 December 2019, the plaintiff, without discontinuing S 917, commenced this suit, Suit No 1282 of 2019 ("S 1282"), through another set of solicitors, Zenith Law Corporation, against the defendant.

23 On 11 March 2020, on the plaintiff's application, S 917 and S 1282 were consolidated (the "Consolidated Suit") under S 1282. The sums claimed in the Consolidated Suit were identical to the sums claimed when S 1282 was first commenced.

The winding up application and the Court of Appeal decision

24 On 17 January 2020, the defendant obtained a court order to enforce the AD as a judgment debt ("DC/OS 5/2020"). The defendant then served a statutory demand on 7 February 2020 on the plaintiff seeking payment of $211,044, being the Adjudicated Amount plus interest for late payment, the cost of DC/OS 5/2020, and 80% of the cost of the adjudication within three weeks of the date of service of the demand.

25 The plaintiff filed Originating Summons No 223 of 2020 ("OS 223") to set aside the statutory demand and in the alternative, seek an order or declaration

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[31] 6 AB at pp 142–181.

that the defendant was precluded from issuing a statutory demand because S 1282 was still ongoing.

26 As the plaintiff did not meet the statutory demand within the three-week deadline, the defendant commenced Companies Winding Up Originating Summons No 95 of 2020 ("CWU 95") on 23 March 2020 to wind up the plaintiff. CWU 95 was served on the plaintiff the following day. On 1 April 2020, the plaintiff filed HC/SUM 1577/2020 ("SUM 1577") to dismiss CWU 95 and alternatively, to stay, restrain, or adjourn CWU 95 until the disposal of the Consolidated Suit.

27 On 24 June 2020, both OS 223 and SUM 1577 were heard in the High Court. The judge dismissed OS 223 but allowed SUM 1577 and stayed CWU 95. The decision to stay CWU 95 was upheld by the Court of Appeal on 21 June 2021 in *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] SGCA 61 ("*DGE v ZK*"), with the added condition that the plaintiff pay the sum of $211,044 into court as security.

The parties' claims in the Consolidated Suit

28 In this action, the plaintiff claims for the following:

(a) LD totalling $501,800;

(b) rectification and replacement works totalling $340,233.10; and

(c) the adjudicated amount in the AD to be over-turned in its entirety.

29 The defendant counterclaims for the following:

(a) four VOs in the amount of $65,849.45;

(b) 5% of the Retention Sum for the Subcontract (valued at $561,019.90), that is $28,051;

(c) remainder of the Subcontract sum of $561,019.90, minus payments received of $339,136.60, the disputed VO sum of $65,849.45, and the 5% Retention Sum of $28,051, that is $127,982.85; and

(d) legal costs associated with the AD.

30 I will deal with each claim in turn.

Claim 1: Liquidated Damages

31 The plaintiff claims from the defendant LD totalling $501,800, computed on the basis of:

(a) 213 days of delay in Phase 1, totalling $383,400; and

(b) 148 days of delay in Phase 2A, totalling $118,400.

32 The plaintiff's case is as follows:

(a) The contractual completion date for the works relating to Phase 1, which the defendant was responsible for, was 31 July 2017. This completion date is derived from cl 4 of the Subcontract. The actual completion date was 30 September 2018. There were 213 days of delay.[32]

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[32] SOC Amendment No 1 ("SOC A1") at para 19(1).

(b) The contractual completion date for the works relating to Phase 2A, which the defendant was responsible for, was 15 February 2017. This date is also derived from cl 4 of the Subcontract. The actual completion date was 15 July 2017. There were 148 days of delay.[33]

33 The defendant's case is as follows:

(a) The completion dates for Phase 1 and Phase 2A were 16 March 2018 and 29 December 2017 respectively, as derived from cl 6 of the Subcontract instead of cl 4 of the Subcontract.[34]

(b) The delay period pleaded by the plaintiff was unsubstantiated and arbitrary. It did not take into account the plaintiff's refusal to pay the defendant their lawful and due payments, which resulted in the plaintiff's repudiatory breach of the Subcontract. The defendant had no choice but to accept the plaintiff's repudiatory breach and terminate the Subcontract, which led to any or all of the delays. It also did not take into account changes in the timeline caused by the plaintiff's failure to give clear and timely instructions to the defendant.[35]

(c) Clause 6 is not a LD clause but a penalty clause and hence unenforceable.[36]

34 There are three main issues arising under this claim:

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33 SOC A1 at para 19(2).

34 Rasanathan's AEIC at para 6(a).

35 Defence Amendment No 2 ("Defence A2") at para 20.

36 Defence A2 at para 20.

(a) Do the completion dates in cl 4 or cl 6 of the Subcontract apply for the purposes of the LD clause?

(b) Were there justifiable reasons for reducing the period of delay?

(c) Is the LD quantum in cl 6 of the Subcontract a penalty?

Do the completion dates in cl 4 or cl 6 of the Subcontract apply to LD

35 The LD clause is set out in cl 6 of the Subcontract, which is headed "Liquidated and Ascertained Damages". Clause 6 states that LD for late completion of the Subcontract works shall be at the rate as follows per calendar day for each day the works still remain incomplete:

Description of works	**Duration of works**	**LD (per day)**
Phase 2A 2-storey Annex Building	16 June 2016 to 29 December 2017	$800
Phase 1 8-storey Equipment Building	16 June 2016 to 16 March 2018	$1,800

36 The defendant submits that pursuant to cl 6, the assessment of LD should start:

(a) for Phase 2A – immediately after 29 December 2017, that is, on 30 December 2017; and

(b) for Phase 1 – immediately after 16 March 2018, that is, on 17 March 2018.

37 The plaintiff, however, submits that the dates in cl 6 are not applicable in determining when the assessment of LD starts. Instead, the applicable dates for the imposition of the LD rates set out in cl 6, are found in cl 4, which is titled "Contract Period/Programmed [*sic*]".

38 Clause 4 states that the Subcontract period "shall be strictly in accordance with our Master Programme as attached and any revision thereafter. The commencement … is with immediate effect and the completion date for the whole of the subcontract shall be not later than as follows":

Phases	Description of works	TOP ready date	Date for completion
Phase 1	8-storey Equipment Building	10 November 2017	31 July 2017
Phase 2A	2-storey Annex Building	17 March 2017	20 February 2017

39 The plaintiff makes the following arguments in support of its position:[37]

(a) The "Duration" in cl 6 did not refer to the duration of the completion of the Subcontract works. This is because the dates in cl 6 are actually the completion dates for the main contract between SCB and the plaintiff (the "SCB-ZK contract"), and not the Subcontract.

(b) It is absurd to say that the completion date between the main contractor SCB and the subcontractor plaintiff, would be the same as that between the plaintiff and the sub-subcontractor defendant. The plaintiff was responsible to SCB for multiple phases of the Project, not

[37] Plaintiff's Closing Submissions ("PCS") at paras 357–361.

just Phase 1 and Phase 2A. The completion date given by the SCB to the plaintiff should hence be later than that given by the plaintiff to the defendant.

(c) Nothing in cl 6, read purposively, circumscribes the starting date for calculating LD to begin only after 16 March 2018 for Phase 1 and only after 29 December 2017 for Phase 2A.

(d) This is reinforced by cl 4 which states that the commencement of the Subcontract is with immediate effect, which the plaintiff asserts is 7 November 2016, the date of the Subcontract. Even on the defendant's case that the Subcontract was effected only sometime in December 2016, the duration in cl 6, which starts from 16 June 2016, is inconsistent with an actual start date of December 2016.

(e) Moreover, cl 4 states that the "completion date" shall be no later than the dates stated therein in cl 4. The "Duration" in cl 6 ends later than the cl 4 dates and are inconsistent with them.

40 In effect, the plaintiff is relying on cl 6 to impose LD, at the rates stated in cl 6 for each phase, but submitting that the dates stated in cl 6 should be ignored and the dates in cl 4 should be applied instead for determining when LD begins to apply.

41 I do not find the plaintiff's arguments on this to be persuasive for the following reasons:

(a) The plaintiff submits that the dates in cl 6 should be ignored. But there is nothing in cl 6 that says that the dates in cl 6 should be disregarded and that the dates in cl 4 apply instead to determine LD.

(b) The plaintiff submits that the dates in cl 6 actually refer to the contractual completion dates between SCB and the plaintiff. But there is nothing in cl 6 that states that the duration of works there refers to the SCB-ZK contractual completion dates. In fact, there is no mention of the SCB-ZK contract anywhere in the Subcontract.

(c) Moreover, the plaintiff has chosen not to adduce the SCB-ZK contract. There is therefore no evidence of the scope of works between them, or the completion dates for any of the phases of work that the plaintiff is responsible to SCB for. What was adduced, following cross-examination of Mr Gan by counsel for the defendant, is a one-page document which the plaintiff states is an extract from the SCB-ZK contract. This states that for the purposes of LD, the completion date is 29 December 2017 for Phase 2A and the completion date is 16 March 2018 for Phase 1.

(d) In other words, on the plaintiff's evidence, the dates in the Subcontract under cl 6 for Phase 2A and Phase 1 are exactly the same as the LD dates in the SCB-ZK contract. There is nothing irrational about such an arrangement. Indeed, aligning the dates at which LD would start, would allow the plaintiff to potentially claim LD from its subcontractor, the defendant, during the same period that it is liable to its main contractor, SCB, for LD.

(e) A plain reading of cl 6 and cl 4, indicates that the relevant dates for assessing LD are those found in cl 6, rather than those in cl 4. Clause 6 is titled "Liquidated and Ascertained Damages". The quantum for LD per day is found in cl 6 and not cl 4. The plaintiff is seeking to impose LD pursuant to cl 6, not cl 4. To disregard the dates in cl 6 and apply the

dates in cl 4 to assess LD would render the dates in cl 6 otiose, and is not supported by the plain wording of the contract.

(f) This does not render the Subcontract inconsistent. As a clause for LD, cl 6 has no impact on the commencement date of the Subcontract. That the duration in cl 6 has a different start date from the actual start date of the contract, is immaterial to the issue of LD, as LD is counted from the end date of the stated duration and not the start date. Neither is it inconsistent with cl 4 which states that the completion of the Subcontract is no later than the dates stated therein. In effect, the defendant is to comply with the Master Programme and complete the Project no later than the dates stated in cl 4. Where the defendant fails to do so, the plaintiff may, for example, seek to claim for general damages arising from late completion based on the dates in cl 4. But the imposition of a fixed daily quantum in the form of LD, will only take effect after the dates stated in cl 6.

42 The defendant also submits that pursuant to the *contra proferentem* rule, the ambiguity in the Subcontract should be interpreted against the plaintiff, who drafted the Subcontract. There were negotiations that led to changes in the quantum of the LD imposed under cl 6 of the Subcontract, but the plaintiff did not amend the completion dates therein or resolve any conflict between cl 4 and cl 6. As the plaintiff are now seeking to rely on cl 6 to make the claim of LD, they "should stand or fall on this clause which very clearly spells out the completion dates".[38]

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[38] Defendant's Closing Submissions ("DCS") at paras 11–15.

43 In *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 at [51] the Court of Appeal held that for the *contra proferentem* rule to be applicable to a case, the contract must contain ambiguity within its term(s) which cannot be resolved by applying an interpretation that would fit the context of the contract. Mere difficulty in interpretation, without more, does not immediately trigger the application of the *contra proferentem* rule. For the reasons stated above, the ambiguity here can be resolved by applying an interpretation that fits the context of the contract. Hence, my view is that the *contra proferentem* rule need not apply here.

44 I will next consider the implication of the dates in cl 6 being the relevant dates for assessing LD. The plaintiff's case for Phase 2A is that:

(a) the contractual or scheduled completion date is 20 February 2017 per cl 4 of the Subcontract (although para 19 of the Statement of Claim ("SOC") states that the contractual or scheduled completion date is 15 February 2017, which is inconsistent with the date in cl 4);

(b) the defendant was 148 days late in completing Phase 2A; and

(c) the actual completion date for Phase 2A is 15 July 2017.

45 This is an inconsistent position, since 148 days from 20 February 2017 is 18 July 2017 and not 15 July 2017. Even if the wrongly pleaded contractual completion date in the SOC of 15 February 2017 is adopted, 148 days from 15 February 2017 is 13 July 2017 and not 15 July 2017. Under cross-examination, Ms Chai Yoke Choo ("Ms Chai"), the contracts manager for the

plaintiff, affirmed that the plaintiffs are maintaining that the actual completion date for Phase 2A is 15 July 2017.[39]

46 In the Plaintiff's Closing Submissions, the plaintiff clarifies that 15 February 2017 was wrongly pleaded. The contractual completion date for Phase 2A should be 20 February 2017 as set out in cl 4. The actual completion date for Phase 2A should be 20 July 2017 (and not 15 July 2017 as wrongly pleaded), based on Dembicon Equipment Pte Ltd's ("Dembicon") payment claim records.[40] However, even taking the plaintiff's case on that basis, 20 July 2017 is before 29 December 2017, the completion date for Phase 2A as set out in cl 6. The plaintiff is therefore not entitled to LD for Phase 2A.

47 The plaintiff's case for Phase 1 is that:

(a) the contractual or scheduled completion date is 31 July 2017;

(b) the defendant was 213 days late in completing Phase 1; and

(c) the actual completion date for Phase 1 is 30 September 2018.

48 Again, this is an inconsistent position since 213 days from 31 July 2017 is 1 March 2018 and not 30 September 2018. The quantum sought by the plaintiff for LD under Phase 1 is pleaded and calculated on the basis of 213 days.[41] Ms Chai acknowledged on the stand that the plaintiff's calculations for the number of days for LD for Phase 1 was wrong,[42] and affirmed that the

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39 Notes of Evidence ("NE") 1 July 2021 at p 51.

40 PCS at paras 376–377.

41 SOC A1 at paras 19 and 19(1).

42 NE 1 July 2021 pp 51–52.

plaintiff is maintaining the actual completion date for Phase 1 as 30 September 2018.[43]

49 The defendant submits that the plaintiff was not able to prove why 30 September 2018 should be the operative date for LD. First, Ms Chai referred to an invoice for mobile crane work done on 30 September 2018 that she said is related to the installation of the glass panels.[44] But this was not pleaded. In addition, the invoice is for mobile crane works and says nothing about the installation of glass. Second, the plaintiff also did not adduce any other evidence that works were completed on 30 September 2018.

50 I note that the evidence is clear that the Subcontract works for Phase 1 were uncompleted when the defendant abandoned the works on 6 June 2018 and that as of 30 June 2018, such works were still not completed. Following the abandonment of works, the parties had engaged in correspondence, and by a letter dated 30 June 2018, the plaintiff informed the defendant that they would need to engage third parties to complete the remaining works.

51 In so far as 30 September 2018 being the operative date from which LD begins, I note that the plaintiff did plead 30 September 2018 as the actual completion date for Phase 1 at para 19(1) of the SOC. In relation to whether there is evidentiary support for this, I note that there was no certification from SCB, CAAS or SJ that works were completed at that point. However, while certification from SCB, CAAS or SJ as to the completion of works would have tidied up this issue more neatly, it is also undisputed that there were works remaining when the defendant abandoned the work site on 6 June 2018. This

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43 NE 1 July 2021 at p 51.

44 NE 2 July 2021 at p 108; Plaintiff's Core Bundle vol 6 ("6 PCB") at pp 266–270.

included the installation of the glass panels, which was one of the biggest parts of the defendant's work scope, and which in turn required the use of mobile cranes to install. Mr Rethna Balan Rajeesh ("Mr Rajeesh") of the defendant admitted that the installation of 13 pieces of glass was outstanding.[45] It is also undisputed that the cabin glass needs to be installed on an eight-storey Equipment Building. A mobile crane would be needed for such installation. The plaintiff had adduced through Ms Chai's Affidavit of Evidence-in-Chief ("AEIC"), the invoice from Beng Huat Crane Pte Ltd dated 30 September 2018 (with the last supply of mobile crane being on 30 September 2018) ("Beng Huat Invoices").[46] During cross-examination, Ms Chai explained that in determining the length of delay, the plaintiff chose the date relating to cabin glass installation as that was the most important delay amongst other delays.[47] She testified that the last date of glass installation, which was 30 September 2018, was used as the completion date and that the invoices for mobile cranes provided the relevant date.[48] Taking into consideration the totality of the surrounding evidence, I accept Ms Chai's testimony that 30 September 2018 was used as the completion date as that was the last date for the mobile crane work for the glass installation. Ms Chai was a credible witness, who acknowledged defects in the plaintiff's case where they arose, and I saw no reason to disbelieve her on this.

52 As explained above, it is the completion date in cl 6 that is applicable to the calculation of LD. The calculations for LD for Phase 1 should therefore start after 16 March 2018. Taking the actual completion date for Phase 1 of 30 September 2018, this would be 198 days of delay. As the LD quantum for

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45 NE 14 July 2021 at p 11.

46 Chai's AEIC at p 484.

47 NE 1 July 2021 at p 49.

48 NE 2 July 2021 at p 108.

Phase 1 under cl 6 is at $1,800 per day, the total LD that the plaintiff would be entitled to for Phase 1 would be $356,400.

53 In summary, the plaintiff is not entitled to LD for Phase 2A. The plaintiff is entitled to LD of $356,400 for Phase 1.

Whether the plaintiff is entitled to damages for late completion in Phase 2A

54 Where an LD clause has been found to be unenforceable, damages may still be awarded so long as the plaintiff can prove that it had suffered actual losses: see *Halsbury's Laws of Singapore* vol 7 (LexisNexis Singapore, 2019) at para 80.575. This principle should similarly apply where the LD clause is found to be inapplicable as opposed to unenforceable.

55 Given my finding that LD does not apply for Phase 2A, I next considered whether the plaintiff may still be awarded general damages arising from late completion in Phase 2A. There were two difficulties here.

56 First, the plaintiff's assertion that 20 July 2017 was the actual completion date for Phase 2A is based on ambiguous evidential grounds. In the Plaintiff's Closing Submissions, the plaintiff states that 20 July 2017 is chosen because Dembicon, an external subcontractor, completed the removal of rockwool in July 2017.[49] However, this came purely from counsel in the Plaintiff's Closing Submissions, referring to an invoice from Dembicon.[50] There is nothing from the plaintiff's witnesses, whether in their AEICs or oral testimony, that explains why 20 July 2017 was the actual completion date.

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49 PCS at paras 371–378.

50 6 PCB at pp 67–70.

57 The plaintiff seized on a line in the defendant's closing submissions at para 95(c)(i) that states that the "installation and alignment of the metal claddings for the Annex Building were completed even earlier in July 2017, prior to the inspection, verification, and confirmation by Mr Joseph Lugtu." The plaintiff submits that from this, the defendant admits that the installation and alignment for the Annex Building were completed in July 2017. However, the defendant's submission on this was not in relation to the completion date for Phase 2A, for which the defendant's general position was that "[t]he number of days of alleged delay are contrived at worst or arbitrarily derived, at best, by [the plaintiff]".[51] Rather the defendant's point was made in relation to whether the plaintiff could claim for rectification works relating to the realignment of the panels after removal of the rockwool. This is clear from the reference made by the defendant in that part of their submission to Mr Rajeesh's AEIC at pp 163–166, which contains his notes to this effect.

58 In addition, there is a second and fundamental difficulty, as there were no details provided as to actual losses that the plaintiff had suffered due to the alleged delays caused by the defendant in Phase 2A, beyond the delay works claimed for by the plaintiff. *Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) ("*Singapore Civil Procedure*") at para 18/12/13 states that particulars need not be given for general damages, but where the damage suffered is of a kind which is not the necessary and immediate consequence of the wrongful act, full particulars must be provided to show the nature and extent of the damages. This is so that the defendant would be fairly informed of the case to be met and to aid in computing the amount of damages to be paid. The mere statement or prayer for a claim of "damages" would not suffice.

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[51] DCS at para 3.

59 The plaintiff, in its SOC, had claimed $340,233.10 for replacement and rectification of defective works. But beyond this, there are no particulars as to what losses the plaintiff is claiming for in respect of the delays. For example, there is no mention of how much LD the plaintiff had to pay SCB as a result of the delays and whether such LD was in fact paid. All that was prayed for was for "damages to be assessed". This is clearly insufficient in providing notice to the defendant of the case that it has to meet, especially when such losses are not the necessary and immediate consequence of the delay. The lack of particularity in pleading is compounded by the lack of any evidence on the losses suffered, beyond the rectification and repair works claimed.

60 I therefore find that the plaintiff is not entitled to any damages for alleged delays caused by the defendant for Phase 2A works. I will next consider the other two main issues under this claim, namely whether the period for LD should be reduced due to alleged delays by the plaintiff, and whether the LD is unenforceable for being a penalty.

Were there justifiable reasons for the delay

61 The defendant submits that the delay, if any, was caused by the plaintiff. First, the plaintiff's refusal to pay the defendant their lawful and due payments resulted in the plaintiff's repudiatory breach of the Subcontract. The defendant had no choice but to accept the plaintiff's repudiatory breach and terminate the Subcontract, which led to any or all delays. Second, the plaintiff failed to give clear and timely instructions to the defendant.[52]

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52 Defence at para 20.

Delay from acceptance of the plaintiff's repudiatory breach

62 The defendant's first submission, that delays arose from the defendant's acceptance of the plaintiff's repudiatory breach, requires an examination of whether the plaintiff indeed committed a repudiatory breach from its non-payment or delay of payment to the defendant.

63 A summary of the legal principles on when payment delays amount to repudiation of a contract was set out by the Court of Appeal in *DGE v ZK* at [96]:

> … There may be instances in which a persistent course of payment delays, or a protracted delay in the payment of a very substantial sum amounts to a repudiation of the contract: see for example *AL Stainless Industries Pte Ltd v Wei Sin Construction Pte Ltd* [2001] SGHC 243 at [194], citing Chow Kok Fong, *Law and Practice of Construction Contract Claims* (Longman, 2nd ed, 1993) at p 264. However, not every instance of non-payment by a contracting party will suffice to constitute repudiation. This was made clear in *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 ("*Jia Min*") at [55], where the court stated, citing *Lubenham Fidelities and Investments Co Ltd v South Pembrokeshire District Council* (1986) 33 BLR 46: "[i]t appears settled law that a contractor/subcontractor has no general right at common law to suspend work unless this is expressly agreed upon. This is so even if payment is wrongly withheld". The court also cited *Halsbury's Law of Singapore, vol 2* (LexisNexis Singapore, 2003 Reissue) at para 30.321, *Keating on Building Contracts* (Sweet & Maxwell, 7th ed, 2001) at para 6-96 and *Hudson's Building and Engineering Contracts*, vol 1 (Sweet & Maxwell, 11th ed, 1995) at para 4-223 for the same principle. The rationale for this, the court explained, was that "the existence of such a right [to suspend work upon the other party's failure to make payment] could create chaos within the building industry if contractors were to muscle their way through disputes with threats or actual threats or suspension instead of having their disputes adjudicated" (at [57]).

64 On 30 May 2018, the defendant wrote to the plaintiff demanding payment of $149,436.99 by 12.00pm on 5 June 2018 (see above at [13]–[14]).

In that letter, the defendant referred to three items, but it is not clear on the face of the letter how their respective quantum adds up to $149,436.99. The items, equivalent to $111,569.75, are described as:

(a) three pieces of mock-up glass balance amount – $18,065.17;

(b) thirteen pieces of balance glass – $83,018.88; and

(c) sea freight costs for the 13 pieces of balance glass – $10,485.70.

65 By 5 June 2018, the plaintiff failed to pay the defendant the sum of $149,436.99. The defendant's case is that the plaintiff thereby evinced intention to no longer be bound by the Subcontract entered into between the parties. Accordingly, on 5 June 2018, the defendant accepted the plaintiff's repudiatory breach and terminated the Subcontract on the ground of non-payment for work completed.[53] They then abandoned the work site on 6 June 2018.

66 While the defendant's case is that there were multiple instances of non-payment by the plaintiff, their letter of 30 May 2018 on which the ultimatum was made, does not refer to earlier instances of non-payment. Moreover, to avoid delay to the project, the plaintiff had agreed by way of email to the defendant dated 27 April 2018, to purchase the balance cabin glass on behalf of the defendant and to deduct the monies from the defendant's progress claim.[54] Since the plaintiff had agreed on 27 April 2018 to first pay for the balance glass, there was no issue of non-payment from the plaintiff to the defendant holding back the procurement of the balance glass, which is the major item that payment is demanded for by the defendant in their letter of 30 May 2018. In addition, the

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53 Defence A2 at paras 33–35.

54 Chai's AEIC at para 83 and p 380.

plaintiff had also agreed to first make payment to the glass supplier, Singapore Safety Glass ("SSG") for the three pieces of mock-up glass, which was scheduled for 30 May 2018.[55] The defendant's evidence is that the three pieces of mock-up glass were installed by 2 June 2018.[56] Thus, neither was there any issue of non-payment from the plaintiff to the defendant for the procurement of the three pieces of the mock-up glass.

67 Furthermore, out of the three items listed as adding up to the demanded $149,436.99, two substantial items, the 13 pieces of balance glass and its sea freight costs, are clearly within the scope of the defendant's work under the Subcontract and are not VOs. As of 30 May 2018, the defendant had not delivered on this. In fact, the defendant was unable to produce any documentary evidence that as of 30 May 2018, it had already ordered the 13 pieces of balance glass.

68 In other words, in the defendant's letter of 30 May 2018, it threatened to terminate the contract, not because of earlier instances of alleged non-payment, but because the plaintiff would not pay them in advance for work that the defendant had not completed.

69 As the Court of Appeal observed in *DGE v ZK* at [96], there is no general right at common law to suspend work unless this is expressly agreed upon. This is so even if payment is wrongly withheld. However, there may be instances in which a persistent course of payment delays, or a protracted delay in the payment of a very substantial sum amounts to a repudiation of the contract. In this case though, the defendant's ultimatum was delivered not on the ground of

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55 Chai's AEIC at p 388.

56 Rajeesh's AEIC at para 34(c).

a persistent course of payment delays. Rather, the ultimatum in effect was that the defendant will terminate the Subcontract if the plaintiff did not provide advance payment for work yet to be done by the defendant and for which the plaintiff had already agreed to prepay to third party vendors supplying some of the key materials for the defendant's works. That is clearly not a basis for the defendant to treat the Subcontract as repudiated by the plaintiff.

70 In any event, the defendant has not shown that the plaintiff had persistently withheld payments unreasonably, through a "persistent course of payment delays or a protracted delay in the payment of a very substantial amount" as per *Al Stainless Industries Pte Ltd v Wei Sin Construction Pte Ltd* [2001] SGHC at [194]. Prior progress claims were not fully rejected but certified for lower sums. It is undisputed that the plaintiff has substantially paid on the amounts that were certified. The defendant invoiced on the amount of $344,263.72 and the plaintiff made payments of $339.136.06. The Provisional Sum indicated in the Subcontract was $558,055. At para 16 of her AEIC, Ms Emily Javier of the defendant provided a summary of the amounts claimed by the defendant and paid by the plaintiff. This was updated at para 50 of the Defendant's Closing Submission to reflect the correct breakdown, with a slight reduction in the VO amount. The defendant's position was that the total amount payable by the plaintiff was $623,770.55, with $561,019.90 being the value of work done in the main contract and $62,750.65 being VOs. On the defendant's calculations, the plaintiff had paid on 54% of their claims. In addition, the plaintiff also provided the defendant with three interest-free loans, totalling $110,000, to ease the defendant's cashflow problems.

71 For the amounts that were uncertified, the quantum was disputed by the plaintiff. For example, in Payment Claim ("PC") 13 dated 24 April 2018,[57] the defendant claimed for $40,960 for 80% work done for "W7 – 2040mm x 2700mm Full Height Cabin Glass". At that stage of works, three out of the 16 pieces of cabin glass had been installed but one piece had cracked. The plaintiff certified for 12% of the work done, on the basis of two out of 16 pieces installed. On the evidence, I find that this was justified.

72 On the whole, I find that the defendant has not proven that the works in the payment claims were consistently under-certified by the plaintiff. Mr Rajeesh's AEIC at pp 8–10 sets out what he states as "evidence … that works have been duly completed" by the defendant. At para 9(b)(ix) this includes a photograph of 16 pieces of the cabin glass for the eight-storey equipment building. But Mr Rajeesh also admitted on the stand that the installation of the 13 pieces of cabin glass was outstanding when the defendant abandoned works on 5 June 2018. The evidence is that the 13 pieces of cabin glass were only delivered by SSG on site on 14 and 16 July 2018, well after the defendant abandoned the works on 5 June 2018.[58]

73 The Defendant's Reply Submissions raised an instance relating to the plaintiff's 0% certification in Payment Claim 9 ("PC 9") for glass works, which the defendant submits is wrong because although no cabin glass was installed, the framing system was installed.[59] The plaintiff explained that in PC 9, the defendant made a claim for 25% of work done for aluminium cladding with insulation. The plaintiff had certified this as 0% of work done as such works

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57 2 AB at p 82.

58 6 PCB at pp 111–115.

59 Defendant's Reply Submissions ("DRS") at para 27.

had been omitted earlier when the defendant submitted as-built drawings that did not include such insulation works. In PC 10, the defendant reverted to stating that there was 0% of work done for this.[60] For aluminium cladding without installation, the defendant claimed for 40% work done. The plaintiff certified 50% for Elevation 1, 10% for Elevation 3 and 10% for Elevation 4, on the basis that the runner, bracket and L-angle were not completed by the defendant. In the absence of further evidence, it cannot be said that on the balance of probabilities, the plaintiff unreasonably under-certified and withheld payment in respect of this.

74 Despite the presence of disputes over the certification, there is no evidence that the defendant sought to have such disputed quantum adjudicated, for example through the SOPA procedures. This is despite its progress claims having received lower certification since August 2017. Instead on 30 May 2018, the defendant took the very drastic step of issuing an ultimatum that it be paid $149,436.99 by 5 June 2018, followed by its abandoning of works on 6 June 2018.

75 None of the affidavits filed by the defendant's witnesses explained why the defendant took this very sudden and drastic step. When asked about this, Mr Kesavan s/o Sathyamoorthy ("Mr Kesavan"), the director of the defendant, said that the defendant then had payroll issues, it had to take on high interest loans, it could not make the interest payments and its variation requests were not being honoured.[61] In other words, it appears that the defendant was then having cashflow difficulties, which may have made it difficult for the defendant

60 PCS at para 168; 1 AB at p 272.

61 NE 8 July 2021 at p 97.

to order the remaining 13 pieces of balance glass without receiving monies from the plaintiff.

76 The defendant subsequently sought adjudication through SOPA in October 2019, seeking the sum of $264,789.08. The AD was issued on 15 November 2019 for the sum of $197,522.83, out of which $136.579.13 related to main works claimed and $60,943.70 related to VOs. For the reasons set out later when I deal with the plaintiff's submission that the AD be set aside, three of the VOs allowed in the AD are to be set aside. On the whole, the defendant was successful in slightly over half of its claims in the AD. Pertinently, the AD proceeded on the basis of PC 17 and did not examine in detail the alleged under-certification in the PCs before this. The AD cannot hence be regarded as the basis for finding that the plaintiff engaged in a persistent course of payment delays.

77 Assessing the evidence in totality, I find that the defendant has not shown that there was a persistent course of payment delays that justified the defendant's repudiation of the Subcontract. Accordingly, I find that it is the defendant that wrongfully terminated the Subcontract. There is therefore no basis for the defendant to reduce the period of delay on account of alleged repudiatory breach by the plaintiff.

Was there delay from the plaintiff's failure to give timely and clear instructions

78 The defendant also submits that SCB and the plaintiff committed "acts of prevention" which prevented the defendant from completing the works on time: *Lian Soon Construction Pte Ltd Guan Qian Realty Pte Ltd* [1999] 3 SLR(R) 518 at [18]. In particular, the plaintiff so prevented the defendant from completing the works by failing to give timely and clear

instructions to the defendant. In the main, the defendant submit that their delay was caused by changes in the glass specifications on the part of CAAS, SJ, SCB, and/or the plaintiff.

79 The relevant facts in relation to the alleged delay caused by changes in the glass specifications are set out below.

Dates	Event
Undated	Tender Corrigendum No 4 states the required glass specifications and limits the suppliers to a pool of three manufacturers – Guardian Glass, AGC or SSG.[62]
4 April 2017	The defendant emails SCB on the tower cabin glass specification data.[63]
8 May 2017	Presentation slides by the defendant on the installation of four pieces of cabin glass mock-up[64] were emailed from the defendant to the plaintiff, SCB and SJ from 8–24 May 2017.[65]
7 June 2017	SCB informs the defendant to arrange for six pieces of mock-up glass instead of four, pursuant to CAAS' request.[66].
30 August–11 September 2017	The defendant provides comparison data of Saint-Gobain glass with SSG glass.[67]

62 12 AB at p 240.

63 7 AB at pp 271–272.

64 12 AB at pp 252–267.

65 8 AB at pp 73–76.

66 8 AB at p 101.

67 8 AB at pp 230–234.

Early September 2017	In early September 2017, the defendant recommended Saint-Gobain glass because, *inter alia*, the "[c]larity of glass is better" and "energy saving is ensured".[68] In a later email dated 17 January 2018 from the defendant, it was explained that sometime in September 2017, they had recommended Saint-Gobain glass "due to [the] overwhelming costs of complying with the designated type of glass required by CAAS plus the number of panels".[69]
13–14 September 2017	On 13 September 2017, SJ rejected Saint-Gobain glass via email because it "does not meet the requirements of the contract specifications".[70] It was also stated in this email that "[in] order to show that the reflectance of Saint-Gobain Glass will not be a problem, [the defendant] informed that they will expedite 3 panels of Saint-Gobain … for the Viewing Mock Up …"[71] SJ's 13 September email was forwarded by SCB to the defendant on 14 September 2017.[72]
25–27 September 2017	SJ issues Superintending Officer's Instruction ("SOI") 13 in their letter to SCB, informing that "[i]n the event that the [visual mock-up] is rejected by Client and/or Consultant, SCB is to revert to the previously approved SSG glass for the R3 Tower Cabin without delay to meet the original contract completion date."[73] SCB informs the defendant of SOI 13 by email on 27 September 2017 and asks for a warranty letter from the defendant, that if the Saint-Gobain glass is not accepted by client, the defendant "will proceed with the previously approved Singapore Safety Glass, accordingly."[74] SCB was concerned that the "specifications of the proposed Saint Gobain DGU unit is not equivalent to the previously approved SSG glass".

68 8 AB at p 235.

69 9 AB at p 287.

70 Gan King Ann's AEIC dated 6 May 2021 ("Gan's AEIC") at pp 46–48.

71 Gan's AEIC at pp 46–48.

72 Gan's AEIC at p 46.

73 8 AB at pp 248-250.

74 8 AB at p 246.

25 October 2017	A letter of assurance was sent by the defendant to the plaintiff stating that "in events [*sic*] that the newly proposed Saint-Gobain glass is not accepted by the client and user with written email or letter, we will proceed with the previous approved [*sic*] Singapore Safety Glass".[75]
13 November 2017	In SOI 18 dated 13 November 2017, SJ stated that "[t]he SETSCO Test report … indicates that the tested … Saint-Gobain … <u>is not equivalent</u> to the previously approved Singapore Safety Glass … or our Contract Specifications, especially in terms of the Indoor and Outdoor Visible Light Reflectance".[76] [emphasis in original] This document was sent to the defendant by SCB via email on the same day.[77]
29 December 2017	SJ emails SCB, copying the defendant, stating that "Saint-Gobain glass does not comply with the contract specification." SCB is urged to expedite SSG glass viewing based on the previously approved SSG glass without further delay.[78]
9 January 2018	The defendant sent an email to the plaintiff and SCB stating that "I was astonished to understand that [CAAS] does not want to accept the current cabin glass specifications given under the contract which requires a **<u>centre mullion</u>**. … To achieve what he wants … [f]rom our knowledge only Saint-Gobain can achieve this."[79] [emphasis in original]

75 9 AB at p 54.

76 9 AB at p 115.

77 9 AB at p 112.

78 9 AB at pp 247–249.

79 9 AB at p 262.

12 January 2018	In an email from SJ to SCB on 12 January 2018, it was stated that "[w]e are certain that Saint-Gobain glass can achieve the full panel size as seen from the mock up. As much as we are keen to have large panel glass, the glass performance in terms of clarity and reflectivity, cannot be compromised. … [W]e have concurrently sought [SSG] to review the DGU in order to omit the centre mullion to achieve a larger glass panel, yet possess equivalent glass performance as per contract specification. SSG informed that minor adjustment to the DGU make up is required to achieve this."[80] [emphasis in original] It was also stated in this email that "time is of essence and we have lost much time reviewing SCB's alternative cabin glass proposal which is not fully compliant to the contract specification" and that SSG informed SJ that the "glass lead time and cost remains unchanged, please submit catch up schedule …"[81][emphasis in original] This email was forwarded to the defendant on the same day.[82]
17 January 2018	The defendant wrote to the plaintiff. At para 4(a), the defendant acknowledged that in September 2017, the defendant recommended a change in specifications in glass due to the overwhelming costs of complying with the designated type of glass required by CAAS plus the number of panels.[83]

80 Gan's AEIC at pp 99–100.

81 Gan's AEIC at pp 99–100.

82 Gan's AEIC at p 98.

83 9 AB at pp 287–289.

27 and 29 January 2018	SJ sent an email to SCB on 27 January 2018 stating that they "[h]ave not received an update of the actual schedule from the Cabin glass" and that "glass lead time and cost remains unchanged, compared to the original approved [SSG]".[84] This email was forwarded to the defendant on the same day. The defendant replied on 29 January 2018 saying they will work on what is requested from the Qualified Person.[85]
17 April 2018	In an email from SCB to the plaintiff and the defendant on 17 April 2018, it was stated that "[t]ill date, despite our repeated reminders, you have not placed order for the cabin glass and there has been no progress update".[86]

80 From the documentary evidence, the defendant recommended Saint-Gobain glass in September 2017. Saint-Gobain glass is not in the pool of approved manufacturers under Tender Corrigendum No 4. SJ quickly rejected this in an email dated 13 September 2017, noting that the Saint-Gobain glass did not meet the contract specifications. This was followed up by the issuance of SOI 13 by SJ to SCB on 27 September 2017, stating that in the event the visual mock-up is rejected by CAAS, SCB is to revert to the previously approved SSG glass without delay. SCB informs the defendant of SOI 13 on the same day and asks for a warranty letter from them that if Saint-Gobain glass is rejected by CAAS, the defendant will proceed with the previously approved SSG glass. The defendant later explained on 17 January 2018, that they had recommended Saint-Gobain glass in September 2017 "due to the overwhelming cost of complying with the designated type of glass required by CAAS plus the number of panels".

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84 Gan's AEIC at p 104.

85 Gan's AEIC at p 103.

86 11 AB at p 80.

81 On 25 October 2017, the defendant issued a letter of assurance stating that if the newly proposed Saint-Gobain glass was not accepted, they would proceed with the previously approved SSG glass. In a letter dated 13 November 2017, SCB informed the defendant that the tests show that Saint-Gobain glass is not equivalent to the previously approved SSG glass in terms of reflectance levels. By then, the defendant should have known that Saint-Gobain glass would not be approved. There is, however, no evidence that they started work then on procuring the SSG glass. The rejection of Saint-Gobain Glass is reiterated by SJ on 29 December 2017, in their email to SCB copying the defendant.

82 On 9 January 2018, the defendant emailed SCB and the plaintiff to state that they discovered that CAAS did not want the SSG glass which had a centre mullion. This is quickly responded to by SJ, who in their email of 12 January 2018, continued to firmly reject Saint-Gobain glass. They also informed that they have concurrently liaised with SSG, who informed SJ that minor adjustments can be made to the SSG glass to allow for larger glass panels of equivalent glass performance, without a centre mullion. The glass lead time and cost remain unchanged. SJ emphasised that time is of essence, that much time had been lost reviewing the alternative cabin glass proposal and asked for the submission of a catch-up schedule. On 27 January 2018, SJ sent another email informing that they have not received the schedule for the glass. The defendant acknowledged SJ's request in their reply on 29 January 2018. There is no documentary evidence that the defendant did provide SJ with such a catch-up schedule.

83 The defendant submits that there were two types of SSG glass panels that were approved, with different specifications, what they term as SSG-1 which was approved by SJ on 28 July 2017 and SSG-2 which was approved by

SJ on 30 January 2018.[87] However, even then, this does not explain why the defendant did not follow up each time as the SSG glass was approved, whether on 28 July 2017 for SSG-1 or on 30 January 2018 for SSG-2.

84 In summary, the documentary evidence reveals that delays in the procurement of the glass were not due to CAAS/SJ/SCB/the plaintiff changing their minds, from what the defendant terms "SSG-1" glass, to Saint-Gobain glass, and then to what the defendant terms "SSG-2" glass. Nor was there any delay in instructions from the relevant parties to the defendant to proceed with SSG glass.

85 On the contrary, Saint-Gobain glass was proposed by the defendant in September 2017 due to the "overwhelming costs" for them. Despite clear indications from SJ to proceed with SSG glass on 13 November 2017 and 29 December 2017 and later on 12 January 2018, to proceed with the modified SSG glass, the defendants showed no signs of doing so. In fact, an email from SCB dated 17 April 2018 shows that as of that date, the defendant had still not placed any order for the modified SSG glass.

86 The defendant's only explanation for this delay was the plaintiff's alleged non-payment. But they have not explained why that justifies their delay in ordering the SSG glass. As set out above, there were disputes over the amounts certified in the defendant's progress claims, but the defendant has not proved that the amounts were wrongly certified.

87 In relation to Phase 1 and the installation of the glass, the defendant also submits that CAAS had by a letter from SJ dated 24 April 2018, informed SCB

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87 DCS at para 46.

that the completion date was extended to before 1 July 2018 and on that basis, the operative date for LD for Phase 1 to be imposed on the defendant should be after this date.[88] However, an examination of this letter[89] and the relevant correspondence leading up to this letter, reveals that this is a letter from SJ to SCB, and not from the plaintiff to the defendant. Moreover, what SJ indicated to SCB was simply that SCB was not to delay any further and should complete the installation of glass panels before July 2018. The letter also states at paragraph (e) that there "shall be no claims for Extension of Time and/or additional cost arising from this SOI". The letter does not state that SJ would change the completion date for SCB, and it certainly does not state that the plaintiff would change the LD start date of the defendant to after 1 July 2018.

88 The defendant has also submitted that the plaintiff's delay in securing the BCA permit contributed to the defendant's delay. This is not borne out by the evidence.

89 First, I find that there is no ambiguity as to who was to make the BCA submission, contrary to the defendant's submission that by failing to specify who was responsible to make the BCA submission, the plaintiff had effectively borne the risk of any delay which may result because of the ambiguity.[90] There is clear correspondence from SCB to the defendant on 27 December 2016 that the defendant was to make the "ST submission" to BCA by December 2016.[91] The defendant acknowledged this on 30 December 2016. In their reply, they did not refute that they would make the BCA submission, but instead said that the

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88 DCS at para 5.

89 Gan AEIC at p 130.

90 DCS at para 25.

91 7 AB at p 199.

"ST number" had been requested from a Mr Art Ruaro of SCB.[92] This showed that the defendant took the necessary steps towards making the BCA submission and assumed the responsibility of making the BCA submission. They cannot now say that there is ambiguity as to who was to make the BCA submission.

90 Second, the defendant has not shown any evidence of how their works were delayed as a result of the alleged delay in obtaining BCA approval. Indeed, the defendant's position, is that they did not stop working for Phase 2A even though BCA approval had not been given.[93] In respect of Phase 1, the BCA permit was secured around January/February 2018. Pertinently, a large part of the delay related to the delay in procuring and installing the glass. However, the defendant had yet to order the glass by April 2018, even though the BCA permit for Phase 1 was secured in January/February 2018 and SJ informed them by 27 January 2018 that the Saint-Gobain glass was rejected and that they were to proceed with the modified SSG glass.

91 The defendant also submitted that there were delays caused by the plaintiff because of the plaintiff's delay in approving the sealant for the rockwool. This issue also arises in the defendant's counterclaim in VO DV0006, for $32,602.50 to supply labour to dismantle aluminium panels with rockwool and reinstall the aluminium panels. For the reasons stated when I deal with DV0006 later (see below at [235]), I find no evidence that the plaintiff caused any delay when executing its role in relation to the sealant for the rockwool.

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92 7 AB at p 255.

93 DCS para 29.

92 In its closing submissions, the defendant also alluded to the plaintiff's delay in getting instructions from SCB or CAAS on colour code.[94] There was no explanation of this submission beyond the one line stated there. The footnote references an exchange with Ms Chai on a colour code being chosen only on 6 February 2017.[95] But in that same exchange, Ms Chai also explained that the colour code was chosen by SJ or CAAS. There was no delay from the plaintiff in getting instructions from SJ or CAAS on the colour code. She also explained that the colour code only applied to the panels and before the panels could be installed, the defendants had to do works relating to the brackets and runners. Even at that stage, there were serious issues concerning the lack of manpower to do the bracket and runner works. I hence find no merit to the defendant's submission on delay in relation to the colour code.

93 On the whole, I find no merit to the defendant's submission that the delay period should be reduced because of the plaintiff's alleged failure to give timely or clear instructions.

Is the LD quantum in cl 6 of the Subcontract a penalty

94 The defendant submits that the LD quantum is not enforceable because it is not a genuine pre-estimate of loss and is a penalty. The thrust of their submission on this, is that the plaintiff "could not show [the defendant] any proper calculation of their genuine pre-estimate of losses when [the defendant] asked [the plaintiff] to substantiate the amounts. Accordingly, it appears that this sum was an arbitrary value" that was plucked from another contract.

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94 DCS at para 23(vi).

95 NE 1 July 2021 at pp 43–45.

95 In *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 ("*Denka Advantech*") at [254], the Court of Appeal held that a clause will be a penalty if the sum stipulated for is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach, such that the sum stipulated for is not a genuine pre-estimate of the likely loss (*Denka Advantech* at [185]). Whether a clause is a penalty is a matter of construction, depending on the terms and the inherent circumstances of each particular contract based on the time the contract was made (*Denka Advantech* at [65]).

96 The defendant's case is that the plaintiff could not show the defendant any calculations for the basis of the stipulated sum in cl 6 of the Subcontract. Mr Rasanathan claims that during the negotiations of the Subcontract, he attended a meeting at the plaintiff's office, and told Ms Chai that the amount in cl 6 was excessive. Ms Chai, however, replied that this merely reflected the LD clause under the SCB-ZK contract. Mr Rasanathan claims that although they felt the proposed $1,800 per day for Phase 1 in the Subcontract was excessive, they had little choice but to go along with this.[96]

97 The LD amount imposed by SCB on the plaintiff came out during the cross-examination of Mr Gan King Ann of SCB.[97] This was subsequently referred to at para 28 of Mr Rajeesh's Supplementary AEIC, a witness for the defendant.

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96 Rasanathan's AEIC at para 36.

97 NE 29 June 2021 at p 26.

98 The LD for the SCB-ZK contract for Phase 1 is $2,900 per day compared to the LD under the Subcontract of $1,800 per day.[98] For Phase 2A, the SCB-ZK contract LD is $1,400 per day compared to the Subcontract contract LD of $800 per day.[99]

99 In other words, the Subcontract LD is about 60% of the SCB-ZK contract LD. Given that the plaintiff has other subcontractors and the defendant's failure, in and of itself, could potentially trigger the higher amount of LD owing by the plaintiff to SCB, I find that the Subcontract LD quantum is not extravagant and unconscionable compared to the greatest loss that can be proved to have followed from a breach of the Subcontract.

100 In their closing submission, the defendant also submits that SCB's evidence that there was LD due by the plaintiff to SCB is unreliable. They submit that SCB were acting in concert with the plaintiff. The LD quantum between SCB and the plaintiff was not pleaded earlier because it would expose SCB as a party with economic motivations to testify in favour of the plaintiff, as SCB cannot collect the LD from the plaintiff unless they collected this amount from the defendant.

101 While this was a theme that the defendant pursued at the trial, they have not proved it on the evidence. In their testimonies in court, both SCB witnesses, Mr Gan King Ann and Mr Lu Zhi testified in their capacity as the main contractor for the project. Their testimony was not favourable to the defendant, as they spoke of the delays of the defendant, but they did so with reference to contemporaneous written correspondence from SCB to the defendant about

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98 Rajeesh's Supplementary AEIC dated 12 July 2021 at p 89.

99 Rajeesh's Supplementary AEIC dated 12 July 2021 at p 89.

such delays. While Ms Chai did testify that the plaintiff had not paid SCB the LD owed to SCB yet, the defendant has not surfaced any evidence that SCB were in collusion with the plaintiff. The defendant relies in the main on the plaintiff awarding a $9.6m contract to the plaintiff despite the plaintiff's paid up capital being only $300,000. However, Mr Gan testified that that in the construction industry they normally work by trust of performance, that SCB had worked with the plaintiff previously, and this was the third project that SCB had with the plaintiff.[100]

102 Accordingly, I find the LD quantum in cl 6 of the Subcontract to be a genuine pre-estimate of loss and not a penalty.

Claim 2: Replacement and rectification of defective works

103 The plaintiff claimed for replacement and rectification works amounting to $340,233.10. In support of its claim, various invoices were displayed in Ms Chai's AEIC. During trial, the defendant submitted that the makers of the invoices should be called to testify as the documents were otherwise hearsay.[101] However, I found that these invoices fell within the exception under s 32(1)(*b*) of the Evidence Act (Cap 97, 1997 Rev Ed) as they were made in the ordinary course of business. They were therefore admissible, and the makers of these invoices need not be called to testify.

104 The defendant submits that the pleadings for these claims at para 14 of the SOC are "vague and unclear". I do find these claims to lack particularity. In addition, I note that for many of these invoices, there was no explanatory evidence coming from the AEICs or oral testimony of the plaintiff's witnesses.

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100 NE 29 June 2021 at p 21.

101 NE 2 July 2021 at p 16.

Neither did the Plaintiff's Closing Submissions explain these claims in any detail, beyond reiterating the list of claims as set out in Ms Chai's AEIC.[102] The Plaintiff's Reply Submissions did not assist in taking this further, with the generic statement that "[t]he Plaintiff submits that all costs and expenses set out in this documentary evidence are proved on the balance of probabilities, and/or in the absence of evidential dispute by the Defendant" tagged on to most of the claims. The plaintiff's position on these invoices only surfaced through the "put" questions of the plaintiff's counsel during cross-examination of the defendant's witnesses. But this does not constitute evidence from the plaintiff's witnesses on the details pertaining to these invoices. The defence did not have the opportunity to cross-examine the plaintiff's witnesses on the positions taken in these "put" questions by plaintiff counsel. Naturally, limited weight would be placed on such "put" questions from an evidentiary viewpoint.

105 In addition, the defendant raises the general point that even if the defendant were liable for the works done by third party contractors after termination, the plaintiff has not shown that it took all reasonable steps to mitigate the losses arising from the breach, as required by *The "Asia Star"* [2010] 2 SLR 1154 at [24], by obtaining the most competitive quote amongst the contractors.[103]

106 In *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 ("*Jia Min*"), it was held at [71]–[75] that the burden of proving that the loss has not been mitigated lies squarely on the party in breach. In addition, if the party in breach intends to contend that the claimant has failed to act reasonably in mitigating damages, notice of such an assertion ought to be

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102 PCS at paras 308–320.

103 DCS at paras 111–114.

pleaded. In assessing the reasonableness of the claimant's conduct, the court will take cognisance of the fact that the claimant is "not bound to nurse the interests of [the party in breach]" but, at the same time, it cannot disregard the defaulting party's interests. When a duty to mitigate arises, the standard of reasonableness to be applied to the decision of the innocent party is not a high one. The fact that the damages claimed substantially exceed the contractual price is, by itself, not a valid objection. In *Jia Min*, the court found that given the urgency of the situation, the defendant's engagement of certain other contractors and some of its workers was reasonable. The court noted that it "will not audit every decision made in the turmoil of a difficult and fluid commercial situation" (*Jia Min* at [73]). The plaintiff there had contended that the defendant ought to have tendered for quotes, but the court noted that it is trite law that a claimant will not be disentitled to recovery merely because the party in breach can suggest other measures less burdensome to him that might have been taken.

107 I fully agree with the analysis set out in *Jia Min*. In this case, besides the fact that the defendant did not plead that the plaintiff failed to act reasonably in mitigating losses, the defendant has not discharged the burden of proving that losses have not been mitigated properly. The defendant's submission is not even that the prices in the claims are excessive, but rather, that the plaintiff has not shown a process through which they obtained the most competitive quote. At most, the defendant is suggesting that the plaintiff should have sought other quotations before deciding on the contractor, and there may be a *possibility* of a less costly option. The defendant did not in fact show that there was a less costly option. However, as was pointed out in *Jia Min*, a claimant, which is the plaintiff here, is not disentitled to its recovery of costs merely because the defendant can suggest that other measures less burdensome to him might have been taken. The burden of proving that the loss has not been mitigated lies squarely on the defendant, but the defendant has not surfaced evidence that any

of the claims are excessive. I hence find no merit to the defendant's submission in this regard.

Whether the plaintiff is entitled to a 15% administration charge

108 Most of the plaintiff's claims for replacement and rectification of defective works in the table at para 104 of Ms Chai's AEIC included a 15% administration charge. I will examine each item in greater detail when I deal with each claim below. Before I do so, I will address a more general point regarding the applicability of the 15% administration charge.

109 The plaintiff's position is that since it had to engage third parties to supply materials or to carry out works on behalf of the defendant, it was entitled to the 15% administration charge. The plaintiff relies on cl 12.2 of the Subcontract, which states:

> Should you required [the plaintiff] to purchase materials or carry works on behalf [*sic*], a up to 15% administrative charge of the total amount involved will be deducted from your progress claims.

110 The plaintiff also relies on Items 16.9 and 16.10 of Annex B of the Subcontract, which state:

> 16.9 Materials order on behalf of for the Sub-Contractor with 15% administrative charges.
>
> 16.10 All works carried out on behalf of Sub-Contractor is subject to 15% administrative charges.

111 The defendant's response to cl 12.2 is that since the defendant never "made a request" to the plaintiff to purchase materials or to carry out works on the defendant's behalf, cl 12.2 of the Subcontract does not apply.[104] The

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104 NE 2 July 2021 at p 74.

defendant did not submit specifically against the application of Items 16.9 and 16.10 of Annex B of the Subcontract but submitted that for Items 5(a), 5(b), and 5(c) (relating to the 30% deposit for 13 pieces of glass, 70% deposit for 3 pieces of glass and 70% balance for the 13 pieces of glass) the 15% administrative charge should not be applied as the defendant would have done the work if it was paid its dues.

My decision

112 Clause 12.2 of the Subcontract requires that there be a request made by the defendant and that the deduction be made from the progress claim. Given that cl 12.2 of the Subcontract imposes a flat charge, it should be read within the confines of its natural wording. There is no evidence of requests made by the defendant in respect of the claims for which the plaintiff seeks to impose the 15% administrative charge. Neither were the charges to be deducted from the defendant's progress claims. Clause 12.2. is therefore not applicable to any of the plaintiff's claims for replacement and rectification works amounting to a total of $340,233.10.

113 In contrast, Items 16.9 and 16.10 of Annex B of the Subcontract allow for the imposition of a 15% administration charge, where materials are ordered or work is done "on behalf" of the defendant, without there being a request from the defendant, and without the payment being made through a deduction from the progress claim. The defendant's submission is that the materials ordered or work done would not have been carried out by the plaintiff "on behalf" of the defendant, if the defendant was duly paid. As I have found above that the defendant has not proven that there was a persistent course of payment delays from the plaintiff, I would reject the defendant's submission that the 15% administrative charge should not be applied for Items 5(a), 5(b) and 5(c).

114 I will next deal with each claim in detail. For ease of reference, I will be referring to each claim as it appears at para 104 of Ms Chai's AEIC. Each of these claims is supported by a main invoice from the plaintiff to the defendant and various other invoices and documents from third parties.

Items 1(a)–(e): Mobile crane supply and operation

115 The plaintiff claims for "mobile crane supply and operation" totalling $21,665.20 and displayed multiple invoices in Ms Chai's AEIC.[105]

116 As a general point, the defendant submits that access through mobile cranes is to be provided by the plaintiff under Item 6.1 of Annex B of the Subcontract. This states that the subcontractor "shall be allowed to use … mobile crane on site. However, the main contractor reserves the right to allocate the usage." In addition, Item 2.1 of Annex B states that the plaintiff is to provide "general access".[106]

117 Item 2.1 is a general provision, which would be subject to the more particularised items in Annex B. Item 6.1 of Annex B is followed by item 6.2 Annex B of the Subcontract, which states clearly that the subcontractor is to provide his own cranage. It states that "[n]otwithstanding item 6.1, it is the Sub-contractor [*sic*] duties to provide his own cranage."

118 Item 6.1 of Annex B of the Subcontract does not contradict Item 6.2. What Item 6.1 provides is that where the main contractor has a mobile crane on site, the subcontractor is allowed to use it, subject to the main contractor's right to allocate such usage. Such reservation of right to allocate, would allow the

105 Chai's AEIC at pp 459–492.

106 DCS at para 104.

main contractor to allocate the use of the cranage between the main contractor's workers or any of the subcontractors. The existence of such reservation of right to allocate to the main contractor, clearly denotes that Item 6.1 of Annex B of the Subcontract did not intend to impose an obligation on the main contractor to provide access to the subcontractor, in the form of mobile cranes. I reject the defendant's reliance on Item 6.1 of Annex B of the Subcontract, as a basis for not paying for the crane operations provided by the plaintiff.

Item 1(a)

119 The plaintiff displayed an invoice dated 26 December 2017 for "Mobile Crane Operator Overtime [on] 7/12/2017 (1700–2300hr) [at] 6 hrs x $100.00" for $642.00 (inclusive of 7% Goods and Services Tax ("GST")).[107] The 15% administration charge was not included here.

(1) The plaintiff's position

120 Ms Chai testified that the plaintiff rented the crane to install the Saint-Gobain mock-up glass. However, the plaintiff only charged the defendant for the overtime costs.[108]

121 This invoice states "Serangoon" as the project name.[109] Ms Chai testified that this was a "typographical" error.[110] The supporting invoice and work order that are supposed to be related to this invoice state "Tanah Merah

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107 Chai's AEIC at p 459.

108 NE 2 July 2021 at pp 64–65.

109 Chai's AEIC at p 459.

110 Chai's AEIC at para 105.

Cross Road",[111] which is one of the roads that led to the project area according to the plaintiff.[112]

(2) The defendant's position

122 The defendant denied being involved in any "Serangoon" projects.[113] During cross-examination, the defendant's counsel showed Ms Chai that "Tanah Merah Cross Road" was a seven-minute drive away from Changi Airport.[114] In addition, the supporting invoice from Pollisum Engineering Pte Ltd ("Pollisum") (dated 15 December 2017) states that it was ordered by Mr Joseph Lugtu ("Joseph") from SCB and not the defendant.

(3) My decision

123 I do not find the fact that the supporting invoice from Pollisum (dated 15 December 2017) was ordered by Joseph of SCB to be material. As this invoice was allegedly related to making up for the work not done by the defendant, it is not unusual that someone from SCB or the plaintiff would have ordered for it. What is material is whether the work related to that which ought to be done by the defendant.

124 In this respect, the supporting invoice has on it a handwritten note by Ms Chai that states "Backcharge to Diamond Glass for OT charges" and refers to "tax inv 2017/102", which is the number of this invoice.[115] This is dated

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111 Chai's AEIC at pp 461–462.

112 NE 2 July 2021 at p 65; Chai's AEIC at para 105 and pp 459–462.

113 Rasanathan's AEIC at para 32(a).

114 NE 2 July 2021 at p 65.

115 Chai's AEIC at p 461.

"22/12". This is fairly contemporaneous, about seven days after the date of the work order.

125 The supporting work order from Pollisum refers to "Tanah Merah Cross Road" and "T5 Changi" rather than "Serangoon".[116] Ms Chai testified that during the construction stage, there was no proper road name, so Pollisum would just take a nearby road name. From Google Maps, Tanah Merah Crossroad is one of the roads that leads to the project area.[117] The supporting work order also states that the works were from "0800 to 1200" and "1300 to 2300". The date for the work mentioned in this work order is 7 December 2017, which corresponds to the date stated on the invoice.[118]

126 In addition, the supporting invoice refers to "Mobile Crane" at "Tanah Merah Cross Road" for "14 hrs [from] 0800–2300hrs" at $100 per hour.[119] This is the same rate charged in the main invoice and also covers the time period in the main invoice, which was from "1700–2300hr".

127 As the supporting invoice and work order largely corroborate the main invoice and Ms Chai's evidence, I accept on balance her evidence that it was a typographical error to state "Serangoon" as the project title and that the plaintiff incurred this charge in relation to the defendant's works. I allow this claim.

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116 Chai's AEIC at p 462.

117 NE 2 July 2021 at p 65.

118 Chai's AEIC at p 462.

119 Chai's AEIC at p 461.

Item 1(b)

128 The plaintiff displayed an invoice dated 22 March 2018 for "Supply [of] Mobile Crane to work at Changi T5 [from] 08/02/2018 to 14/02/2018" for $4,565.26 (inclusive of 7% GST).[120] The 15% administration charge was not included here.

(1) The plaintiff's position

129 The plaintiff's case, according to the plaintiff's counsel when cross-examining Mr Rajeesh, is that these invoices relate to cranes that were hired and supplied by them to the defendant for works to be done by the defendant. The reason why the plaintiff had to do so was because the defendant was behind schedule.[121]

(2) The defendant's position

130 The defendant submitted that these invoices on the face of them do not show that they relate to works to be done by the defendant.[122] In addition, the invoice states that the mobile crane was supplied for a project at Tanah Merah Cross Road, which the defendant was not involved in. The invoice also stated the description as "via Samsung Koh Brother JV's gate entrance".[123]

(3) My decision

131 The documents in themselves do not indicate that they relate to the work done by the defendant. There is no explanation of why the invoice is described

120 Chai's AEIC at p 463.

121 NE 14 July 2021 at pp 71–72.

122 NE 2 July 2021 at p 68.

123 DCS at para 105(b).

with reference to "Samsung Koh Brother JV's gate entrance". More importantly, in contrast to the documentation for Item 1(a), where an examination of the documents reveals sufficient linkages to the work of the defendants such that the naming of the project name as "Serangoon" should only be regarded as a typo, the documentation here do not assist in showing the relationship between the invoice and the defendant's work. Neither was there evidence from the plaintiff's witnesses, through their AEICs or on the stand, about how these documents relate to the specific claim. The only thing that was said came through the plaintiff counsel's cross-examination of Mr Rajeesh, where the plaintiff's counsel stated that the crane was hired to carry out works belonging to the defendant in the period before the defendant walked out because the defendant was behind schedule. I find that the plaintiff has not sufficiently proved this claim against the defendant.

Item 1(c)

132 The plaintiff displayed an invoice dated 25 June 2018 for "Rental of Mobile Crane for replacement of 3 pcs glass" for $4,245.23 (inclusive of 7% GST and 15% administration charge).[124]

(1) The plaintiff's position

133 During his cross-examination of Mr Rajeesh, plaintiff's counsel said that this was for the replacement of the three pieces of glass.[125]

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124 Chai's AEIC at p 475.

125 NE 14 July 2021 at p 72.

(2) The defendant's position

134 The defendant submitted that these invoices on the face of them do not show that they relate to works to be done by the defendant.[126] In addition, the invoice states that the mobile crane was supplied for a project at Tanah Merah Cross Road, which the defendant was not involved in. The invoice also stated the description as "via Samsung Koh Brother JV's gate entrance".[127]

(3) My decision

135 For the same reasons stated above for Item 1(b), I find that the plaintiff has not sufficiently proved this claim against the defendant.

Item 1(d)

136 The plaintiff displayed an invoice dated 27 September 2018 for "Rental of Mobile Crane for Installation of Cabin Glass" for $6,306.31 (inclusive of 7% GST and 15% administration charge).[128]

(1) The plaintiff's position

137 The plaintiff's counsel stated during his cross-examination of Mr Rajeesh that these invoices relate to works done by Pollisum Engineering Pte Ltd. They were needed as the defendant did not complete these works before 2 June 2018. [129]

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126 NE 2 July 2021 at p 68.

127 DCS at para 105(b).

128 Chai's AEIC at p 482.

129 NE 14 July 2021 at pp 75–76.

(2) The defendant's position

138 The defendant submitted that the documents on the face of them do not show that they relate to works to be done by the defendant.[130] However, Mr Rajeesh also admitted that the 13 pieces of cabin glass installation were outstanding when the defendant abandoned the worksite.[131]

(3) My decision

139 It is not disputed that the cabin glass is for the eight-storey Equipment Building and that a mobile crane would be needed to install such glass. It was also admitted by Mr Rajeesh that the installation of 13 pieces of cabin glass was outstanding and this invoice relates to the rental of a mobile crane for the installation of the cabin glass. A substantial part of the dispute between the parties was over who bears the cost of the cranage. As I have indicated above, it is clear under Item 6.2 of Annex B of the Subcontract that the defendant as subcontractor, is to provide its own cranage. I allow this claim by the plaintiff.

Item 1(e)

140 The plaintiff displayed an invoice dated 16 July 2018 for "Rental of mobile crane for replacement of 13 pcs glass" for $5,906.40 (inclusive of 7% GST and 15% administration charge).[132]

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130 NE 2 July 2021 at p 68.

131 NE 14 July 2021 at p 78.

132 Chai's AEIC at p 488.

(1) The plaintiff's position

141 The plaintiff submitted that these works were related to the works that were supposed to be done by the defendant.[133] These costs were incurred as a result of the defendant's breach and desertion of the balance of the Subcontract works.[134]

(2) The defendant's position

142 The defendant submitted that these invoices on the face of them do not show that they relate to works to be done by the defendant.[135] However, Mr Rajeesh also admitted that the 13 pieces of cabin glass installation were outstanding when the defendant abandoned the worksite.[136]

(3) My decision

143 The invoice states that it is for "Rental of mobile crane for replacement of 13 pc glass". It is not disputed that the cabin glass is for the 8-storey equipment building and that a crane would be needed to install such glass. Rather, the dispute between parties was over who bears the cost of the cranage. As Mr Rajeesh has admitted that the installation of 13 pieces of cabin glass was outstanding and this invoice relates to that, I will allow this claim by the plaintiff.

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133 NE 2 July 2021 at p 68.

134 NE 19 July 2021 at p 124.

135 NE 2 July 2021 at p 68.

136 NE 14 July 2021 at p 78.

Items 2(a)–(b): Rental of boom lift

144 The plaintiff claims for "Rental of Boom Lift" totalling $7,198.43 and displayed multiple invoices in Ms Chai's AEIC.[137]

Item 2(a)

145 The plaintiff displayed an invoice dated 27 September 2018 for "Rental of Boom Lift for Installation of Cabin Glass" from 29 September 2018 to 28 October 2018 for $2,522.53 (inclusive of 7% GST and 15% administration charge).[138]

(1) The plaintiff's position

146 The plaintiff's counsel put to Mr Rasanathan that by reason of the defendant's breach of the Subcontract and desertion of works, the plaintiff had to rent such machinery to complete the works.[139]

(2) The defendant's position

147 The defendant submitted that there was no evidence that the defendant had requested the plaintiff to rent such machinery.[140]

(3) My decision

148 Mr Rajeesh admitted that the installation of cabin glass was outstanding. However, while the invoice for this claim from the plaintiff to the defendant is

137 Chai's AEIC at pp 493–501.

138 Chai's AEIC at pp 493–495.

139 NE 19 July 2021 at pp 124.

140 NE 2 July 2021 at pp 69–70.

for $2,522.53,[141] the supporting invoices from JP Nelson Access Equipment to the plaintiff are for $4,000 and they state that the work is done for a project entitled "Samsung Koh Brother JV" located at Tanah Merah Cross Road, which the defendant was not involved in.[142] There is no correlation between the invoices and the claim. There is nothing else in the AEICs or the testimony of the plaintiff's witnesses that explains this discrepancy or links the invoice to the defendant's work. This claim is dismissed.

Item 2(b)

149 The plaintiff displayed an invoice dated 28 February 2018 for "Rental of Boom Lift On behalf" from 19 February 2018 to 28 February 2018 for $4,675.90 (inclusive of 7% GST and 15% administration charge).[143]

(1) The plaintiff's position

150 The plaintiff's counsel put to Mr Rasanathan that by reason of the defendant's breach of the Subcontract and desertion of works, the plaintiff had to rent such machinery to complete the works.[144]

(2) The defendant's position

151 The defendant submitted that there is no evidence that the defendant had requested the plaintiff to rent such machinery.[145]

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141 Chai's AEIC at p 493.

142 Chai's AEIC at pp 495–496 and DCS at para 105(d).

143 Chai's AEIC at pp 497.

144 NE 19 July 2021 at pp 124.

145 NE 2 July 2021 at pp 69–70.

(3) My decision

152 The invoices do not explain how the works therein are related to the works of the defendant. Neither was there anything in the AEICs of the plaintiff's witnesses or in their testimony on the stand that explained how this item relates to the defendant. This claim is dismissed.

Items 3(a)–(b): Supply of capping cladding

153 The plaintiff claims for "Supply of capping cladding" totalling $27,931.12 and displayed multiple invoices in Ms Chai's AEIC.[146]

154 During the plaintiff counsel's cross-examination of Mr Rajeesh, he said that this claim is for the Annex Building and re-erection of the scaffolding. The defendant did not complete the works in time for the scaffolding to be removed to make space for other works. Hence, the scaffolding needed to be re-erected.[147]

155 The defendant submitted that it is impossible to tell from the documents[148] how much of the works invoiced related to or were done in relation to the defendant.[149] Further, the height of the Annex Building was around 14 metres, but the claims under Items A.2.1 and A.2.2 of a table displayed at p 508 of Ms Chai's AEIC included scaffolding up to eight-storeys high. Read with the Subcontract, there was no reason to impose charges for external scaffolding.

156 I examine the specific claims below.

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146 Chai's AEIC at pp 502–531.

147 NE 14 July 2021 at p 18.

148 Chai's AEIC at pp 502–531.

149 NE 2 July 2021 at p 71.

Item 3(a)

157 The plaintiff displayed an invoice dated 20 April 2018 for "Annex Building" and "Re-erect Scaffolding" for $9,293.97 (inclusive of 7% GST and 15% administration charge).[150]

(1) My decision

158 The claim is described as "Supply of Capping Cladding" in the table in Ms Chai's AEIC at para 104. But the invoice is for "Annex Building Re-erect Scaffolding". During cross-examination, Ms Chai explained that cladding relates to "the finishes so as to complete the cabin glass".[151] The invoices therefore do not correspond with the claim as described in her AEIC or testimony on the stand.

159 More materially, the amount invoiced for this is $7,553, pre-15% administration charge and GST, but the invoices from Dembicon to the plaintiff at pp 504 and 505 of her AEIC do not have this figure. There is a table at Ms Chai's AEIC at pp 506 and 509 that refers to "re-erect scaffold" at "annex building" for $7,533", but it is not stated what this table is about or for. None of the other documents mention the figure of $7,533. There is no explanation for this from the AEICs or testimony of the plaintiff's witnesses. As such, there is insufficient clarity to prove this claim. I dismiss this claim.

150 Chai's AEIC at p 502.

151 NE 2 July 2021 at p 93.

Item 3(b)

160 The plaintiff displayed an invoice dated 20 September 2018 for "Supply Capping @ R3 Cabin" for $18,637.15 inclusive of 7% GST and 15% administration charge).[152]

(1) My decision

161 The invoice is for "Supply Capping @ R3 Cabin" for $15,146, pre-15% administration charge and GST. There is an invitation to quote at Ms Chai's AEIC at p 529 and a quote for $15,146 from Synthesis Metal Industries Pte Ltd at Ms Chai's AEIC at p 528.

162 However, the payment certificates at Ms Chai's AEIC at pp 515-516 relate to "fabrication, delivery, installation of honeycomb ceiling with perforated panel and main steel framing works". It is not clear from the documents at Ms Chai's AEIC at pp 513–531, that the supporting quote or payment certificates are related to the defendant's works. There is no explanation for this from the AEICs or testimony of the plaintiff's witnesses. As such, there is insufficient clarity to prove this claim. I dismiss this claim.

Items 4(a)–(d): Labour costs and materials

163 The plaintiff claims for "Labour Costs and Materials" totalling $39,074.54 and displayed multiple invoices in Ms Chai's AEIC.[153]

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152 Chai's AEIC at p 513.

153 Chai's AEIC at pp 532–653.

Item 4(a)

164 The plaintiff displayed an invoice dated 27 July 2018 with the description "Hired Third party to supply labour to install cabin glass YJ International" for $27,735.47 (inclusive of 7% GST and 15% administration charge).[154]

(1) The plaintiff's position

165 Ms Chai testified that these are labour costs for supplying labour to install the cabin glass.[155]

(2) The defendant's position

166 The defendant submitted that the documents exhibited do not show that works done were attributable to works allegedly not properly carried out by the defendant. The documents also do not just include labour costs, but costs for materials supplied by third parties as well. There are no documents to show that the materials supplied by third parties are the same materials with specifications similar to the Subcontract. [156]

(3) My decision

167 There is no explanation in the AEICs or testimony of the plaintiff's witness as to what this claim specifically relates to, how the labour costs relate to the defendant's works or how the costs of the materials supplied relate to the claim for labour costs. This claim is dismissed.

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154 Chai's AEIC at p 532.

155 NE 2 July 2021 at p 72.

156 NE 2 July 2021 at p 72.

Item 4(b)

168 The plaintiff displayed an invoice dated 3 September 2018 with the description "To supply labour to repair Metal Blast Glass Door" for $6,952.33 (inclusive of 7% GST and 15% administration charge).[157]

(1) The plaintiff's position

169 The plaintiff's counsel put to Mr Rajeesh that by reason of the defendant's failure to rectify the defects relating to the metal blast glass door, the plaintiff had to engage a third party to rectify the defects.[158]

(2) The defendant's position

170 The defendant denied that the welding works were defective or that any screws were missing, as otherwise the door will not remain attached. Any additional corrective works that needed to be done were minor in nature.[159]

(3) My decision

171 On the face of the invoice,[160] the works relate to repairs of Metal Blast Glass Door at R3 Building. But there are also optional items included, for the amounts of $1,500 and $650. There is no explanation where these came from. At Ms Chai's AEIC at p 638, the highlighted portion is only $3,500, which corresponds to the sum claimed for the supply of labour excluding the optional items. But there is no invoice for the optional items. Moreover, the plaintiff has

157 Chai's AEIC at p 636.

158 NE 14 July 2021 at p 37.

159 NE 13 July 2021 at pp 114–115.

160 Chai's AEIC at p 636.

not shown that the door was defective after the defendant installed it, thereby justifying the repairs of the Metal Blast Glass Door. This claim is dismissed.

Item 4(c)

172 The plaintiff displayed an invoice dated 4 March 2018 with the description "Supply labour welding works" for $2,104.16 (inclusive of 7% GST and 15% administration charge).[161]

(1) The plaintiff's position

173 The plaintiff's counsel put to Mr Rajeesh that these invoices relate to welding works that were done by replacement contractors on behalf of the defendant.[162]

(2) The defendant's position

174 The defendant submits the defendant was only willing to pay S$1,710 before GST for the labour supply. There is no basis for ZK to charge 15% administration charge. The Subcontract was for the defendant to supply labour.[163]

(3) My decision

175 It is unclear from the invoice how this claim is related to the defendant's work. However, the defendant has admitted that it was willing to pay $1,710 before GST, which is the amount stated in the invoice, but not the 15% administrative charge. This claim is hence allowed on the sole basis of the

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161 Chai's AEIC at p 643.

162 NE 14 July 2021 at pp 37–38.

163 DCS at para 96(c).

defendant's admission of agreement to pay for the amount excluding the 15% administrative charge.

Item 4(d)

176 The plaintiff displayed an invoice dated 4 July 2018 with the description "Hired Third party to supply labour and Material for Z-panel" for $2,282.58 (inclusive of 7% GST and 15% administration charge).[164]

(1) The plaintiff's position

177 The plaintiff's counsel put to Mr Rajeesh that the defendant is liable for the sums claimed in the invoice as they are for stainless steel fabrication that is related to the defendant's works.[165]

(2) The defendant's position

178 The defendant submitted that these invoices relate to the supply of stainless steel and it is not clear which works such stainless steel were supplied for. Many other parties involved in the Project would also require stainless steel as well.[166]

(3) My decision

179 The invoices describe the supply and fabrication of, *inter alia*, stainless steel sheets as well as hex bolt/nut/flat washer.[167] On the face of the invoices, they do not clearly relate to the works of the defendant. Neither is there any

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164 Chai's AEIC at p 649.

165 NE 14 July 2021 at pp 38–39.

166 NE 14 July 2021 at pp 39–40.

167 Chai's AEIC at pp 651–652.

explanation in the AEICs or testimony of the plaintiff's witness on this. This claim is dismissed.

Items 5(a)–(c): Mock-up panels

180 The plaintiff claims for "Mock-up Panels" totalling $182,817.08 and displayed multiple invoices in Ms Chai's AEIC.[168]

Items 5(a)–(b)

181 The plaintiff displayed an invoice dated 14 July 2018 for "70% balance for 13pcs panel" for $111,930.27[169] and another invoice dated 26 April 2018 for "30% Deposit for 13pcs mock up panel" for $47,970.11 (both inclusive of 7% GST and 15% administration charge).[170]

182 The plaintiff pointed to Mr Rajeesh admitting under cross-examination that 13 pieces of cabin glass work was outstanding.[171] Items 5(a)–(b) are the amount due for this.

183 In the Defendant's Closing Submission, the defendant raised for the first time, the argument that they had not agreed to supply and install SSG-2 glass. If there was a direction to change to SSG-2 glass, the defendant would have, but for the termination of the contract, put in a claim for a VO for this. The defendant should hence not be made to bear the cost of purchase and installation of the glass.[172]

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168 Chai's AEIC at pp 654–676.

169 Chai's AEIC at p 649.

170 Chai's AEIC at p 668.

171 NE 14 July 2021 at p 11.

172 DCS at [115]–[116].

(1) My decision

184 The defendant's new argument is that they did not agree to install the SSG-2 glass and would have raised a VO in relation to SSG-2 glass, because it was at a higher price than what they anticipated in the Provisional Subcontract Sum at Annex A of the Subcontract. This was not pleaded or attested to by any of their witnesses in their AEICs or at trial. Neither is it consistent with the defendant's position as set out in the documentary evidence. SJ had given the defendant notice to install SSG-2 glass as early as 27 January 2018, before they abandoned the work site on 6 June 2018, but never at any point prior to the abandonment of works, did the defendant give any indication that they did not agree to install SSG-2 glass and would only do so if it was approved as a VO. In an email dated 17 January 2018 from the defendant, the defendant explained that sometime in September 2017, they had recommended Saint-Gobain glass "due to [the] overwhelming costs of complying with the designated type of glass required by CAAS plus the number of panels". In other words, the issue of the higher than anticipated cost of the glass had already surfaced in September 2017, before SSG-2 was even in contemplation. The defendant did not ask for a VO then but instead recommended the Saint-Gobain glass as an alternative to deal with the costs issue. It is also notable that SJ in their email dated 27 January 2018[173] informed the defendant that the cost of the modified glass from SSG (which the defendant terms SSG-2) "remains unchanged, compared to the original approved SSG glass".

185 When the defendant issued their demand to the plaintiff in their letter of 30 May 2018 for monies for the 13 pieces of balance glass, they also did not give indication that they intended to treat SSG-2 glass as a VO. Moreover, cl 2

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173 Gan's AEIC at p 104.

of the Subcontract states that the "Subcontract Sum [of $558,000] shall be inclusive of all ancillary and other works and expenditure of every nature, whether separately or specifically mentioned or described in or to be inferred from the Sub-Contract Documents or not, which are indispensably necessary to carry out and bring to completion the Subcontract Works described in the Subcontract Documents". Mr Rajeesh also admitted that this work was outstanding. The claims in Items 5(a) and (b) are therefore allowed.

Item 5(c)

186 The plaintiff displayed an invoice dated 1 June 2018 for "70% deposit for 3pcs mock up panel" for $22,916.70 (inclusive of 7% GST and 15% administration charge).[174]

187 The defendant noted in its closing submissions that it was willing to pay for the amount of $18,075.17 before 7% GST, and that this amount was mentioned in the defendant's letter dated 30 May 2018 to the plaintiff. As the plaintiff had failed to pay the defendant its dues since April 2018, the defendant had no choice but to let the plaintiff pay first. The 15% administrative charge is hence denied.[175]

(1) My decision

188 The evidence is that the defendant was obliged to provide 16 pieces of glass. From the evidence, three of such pieces would be delivered first, and serve as a mock-up. There are separate claims by the plaintiff for the remaining 13 pieces of glass. Hence, the total number of pieces of glass claimed for by the

174 Chai's AEIC at p 672.

175 DCS at para 96(k).

plaintiff is for 16 pieces (characterised by the plaintiff as three pieces of mock-up glass and 13 pieces of balance glass), which the defendant does not dispute they were obliged to provide under the Subcontract. The three pieces of glass falls under the defendant's obligation. The defendant's position is that it is willing to pay for this claim, but not the 15% administrative charge as the plaintiff only secured this material on the defendant's behalf because the plaintiff did not pay the defendant its dues. For the reasons stated above, I find no basis to the defendant's submission that there was a persistent course of delay in payment from the plaintiff. I therefore allow this claim, including the 15% administrative charge.

Item 6(a): Broken glass

189 The plaintiff displayed an invoice dated 14 July 2018 for "Broken Glass" for $16,663.00 (inclusive of 7% GST and 15% administration charge), [176] and other supporting documents.[177]

190 The plaintiff claimed that the defendant's workers had cracked the glass. The defendant submitted that it had properly installed the glass on 2 June 2018 but was only informed of the damage on 4 June 2018. There is no definitive proof of how the damage occurred. [178]

My decision

191 In SSG's report, its observation is that the possible cause of breakage is impact from the bottom edge of the glass and it could have sustained damage

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176 Chai's AEIC at p 677.

177 Chai's AEIC at pp 678–687.

178 Rasanathan's AEIC at para 32(m).

before or during installation.[179] SSG also observed that delay breakage is possible, that is, the crack could appear "after a period of time" from impact. SSG concluded in its report that "[t]he breakage was probably caused by edge damage from an impact to the outer, lower edge of laminated glass of IGU before or during installation."

192 The SSG report is equivocal in its finding. It acknowledges that the impact could have been caused before the installation with the crack showing up only later or it could have been caused during installation. I hence find that the plaintiff has not shown on the balance of probabilities that the cracked glass was due to the defendant's fault.

Item 7(a): Re-erected scaffolding

193 The plaintiff displayed an invoice dated 1 June 2018 for "Re-erect of scaffold for cabin glass" for $6,767.75 (inclusive of 7% GST and 15% administration charge),[180] and other supporting documents.[181]

194 The plaintiff's counsel stated during his cross-examination of Mr Rajeesh that this cost was incurred to install the cabin glass, which the defendant had admitted was outstanding.[182]

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179 11 AB at pp 215–216.

180 Chai's AEIC at p 688.

181 Chai's AEIC at pp 689–696.

182 NE 14 July 2021 at pp 44–45.

195 The defendant's case is that these expenses were not incurred in relation to works that were supposed to be done by the defendant and there was no proof that such works were done at all.[183]

My decision

196 The supporting invoices from TSB Scaffolding Pte Ltd only mention that the costs relate to supply, erecting and dismantling of scaffolding. Scaffolding could be needed in a variety of construction work. It is not clear from these invoices that they are related to the defendant's works. The plaintiff's invoice states that the scaffold was "for cabin glass". However, beyond this, there is no explanation in the AEICs or testimony of the plaintiff's witness as to how the costs for this claim were incurred or how they relate to the defendant's works for cabin glass. I find that the plaintiff has not sufficiently proved their claim for this. This claim is dismissed.

Item 8(a): Technical submissions and/or applications to BCA

197 The plaintiff displayed an invoice dated 1 March 2018 for "BCA Submission" for $13,904.65 (inclusive of 7% GST and 15% administration charge),[184] and other supporting documents as well.[185]

198 Ms Chai acknowledged that the Subcontract did not state that BCA approval was part of the defendant's work scope.[186]

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183 NE 2 July 2021 at p 73.

184 Chai's AEIC at p 697.

185 Chai's AEIC at pp 698–704.

186 NE 2 July 2021 at p 23.

199 The defendant pointed to the plaintiff conceding that it had forgotten to include such submissions and applications under the scope of the Subcontract. Such expenses therefore cannot be charged to the defendant.[187]

My decision

200 This claim is dismissed as Ms Chai acknowledged that on the face of the Subcontract, the obtaining of BCA approval is not within the work scope of the defendant.

Items 9(a)–(b): Safety violations

201 The plaintiff claims that the defendant is liable for fees totalling $1,538.13 levied for safety violations caused by employees of the defendant.[188]

202 The defendant disputes that it was their staff who committed the safety violations. Their staff must wear the defendant's uniform when on site and the persons in the photographs exhibited by the plaintiff were not wearing the defendant's uniform.[189]

203 I examine the specific claims on this below.

Item 9(a)

204 The plaintiff displayed an invoice dated 20 January 2018 for "Notice to imposed Administration Levy" due to "Fail[ure] to wear necessary PPE" and

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187 NE 2 July 2021 at p 73.

188 NE 19 July 2021 at p 128; Chai's AEIC at pp 705–712.

189 NE 2 July 2021 at p 73; NE 19 July 2021 at p 128.

"Failure to secure ladder" for $184.58 (inclusive of 7% GST and 15% administration charge).[190]

205 Ms Chai clarified that one of the invoices which referenced a "Serangoon" project was erroneous and that this was a typographical error.[191] The defendant submitted that the clarification by Ms Chai that it was a typographical error, was an afterthought.[192]

(1) My decision

206 The typographical error in itself is not fatal to the claim. However, the Whatsapp message exhibited to support this claim does not have a date and is hence unable to provide support as contemporaneous evidence. There is also insufficient evidence to show that the persons photographed were from the defendant. This claim is dismissed.

Item 9(b)

207 The plaintiff displayed an invoice dated 22 March 2018 for "Notice to imposed Administration Levy" for $1,353.55 (inclusive of 7% GST and 15% administration charge).[193]

(1) My decision

208 There is insufficient evidence to show that the persons photographed were indeed employees of the defendant. This claim is dismissed.

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190 Chai's AEIC at p 705.

191 Chai's AEIC at para 106.

192 NE 2 July 2021 at p 73.

193 Chai's AEIC at p 709.

Item 10(a): Cabin capping and annex aluminium cladding

209 The plaintiff displayed documents to support their claim for Item 10(a).[194] The plaintiff's original claim per Ms Chai's AEIC was for $38,935.48.[195] However, during the cross-examination of Rajeesh, the plaintiff's counsel submitted that the claim is now lowered to $20,298.33.[196]

My decision

210 The invoices on their face do not clearly relate to the works of the defendant. Neither is there any explanation in the AEICs or testimony of the plaintiff's witness on this. The invoice at p 720 of Ms Chai's AEIC is also the same as the invoice used in support of Item 3(b) at p 515 of Ms Chai's AEIC. This is no explanation for this duplication. This claim is dismissed.

Item 11(a): Rectification works on cladding

211 The plaintiff displayed documents to support their claim for Item 11(a) for $1,292.03.[197]

212 The plaintiff's counsel stated during his cross-examination of Mr Rajeesh that this invoice relates to billing by Summaze Engineering for cladding modification at level 2.[198]

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194 Chai's AEIC at pp 713–736.

195 Chai's AEIC at para 104.

196 NE 14 July 2021 at p 25.

197 Chai's AEIC at pp 737–741.

198 NE 14 July 2021 at pp 53–55.

213 The defendant submitted that the plaintiff has not proved that such works were to be done by the defendant.[199]

My decision

214 The invoices on their face do not clearly relate to the works of the defendant. Neither is there any explanation in the AEICs or testimony of the plaintiff's witness on this. This claim is dismissed.

Item 12(a): Rectification works on FAP window and other windows

215 The plaintiff displayed documents to support their claim for Item 12(a) for $1,082.84.[200]

216 The plaintiff's counsel stated during his cross-examination of Mr Rajeesh that the plaintiff claimed for the costs to rectify defective works in relation to level 5 FAP window modification.[201]

217 The defendant submitted the plaintiff has not proved that such works were to be done by the defendant.[202]

My decision

218 The invoices on their face do not clearly relate to the works of the defendant. Neither is there any explanation in the AEICs or testimony of the plaintiff's witness on this. This claim is dismissed.

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199 NE 2 July 2021 at p 74.

200 Chai's AEIC at pp 742–745.

201 NE 14 July 2021 at pp 55–56.

202 NE 2 July 2021 at p 74.

Summary of the claims

219 For completeness, I will deal with the defendant's submission that Joseph from SCB had the express or implied authority to approve works on behalf of the plaintiff and therefore his signing of job sheets meant that there were actually no defective works from the defendant.[203] I note that even then, the defendant acknowledged that Joseph did not sign off on the works relating to the glass as it states: "Save for the installation of the 13 SSG-2 glass panels, which were not installed as DGE was forced to terminate the subcontract, there were no outstanding works at the R3 Equipment Building." As the rectification claims, for which I found evidential basis for and allowed, are mainly related to the glass works, the issue of whether Joseph had authority to sign off for the plaintiff, is not material here.

220 I set out below a table summarising my decision on the plaintiff's claims for replacement and rectification of defective works:

Item	Quantum claimed	Status
1(a): Mobile crane rental for 7 December 2017	$642.00	Allowed.
1(b): Supply of mobile crane work from 8 February to 14 February 2018	$4,565.26	Dismissed.
1(c): Rental of mobile crane for replacement of 3 pieces of glass	$4,245.23	Dismissed.
1(d): Rental of mobile crane for installation of cabin glass	$6,306.31	Allowed.

[203] DCS at para 95.

1(e): Rental of mobile crane for replacement of 13 pieces of glass	$5,906.40	Allowed.
2(a): Rental of boom lift for installation of cabin glass from 29 September 2018 to 28 October 2018	$2,522.53	Dismissed.
2(b): Rental of boom lift from 19 February 2018 to 28 February 2018	$4,675.90	Dismissed.
3(a): Supply of capping cladding, invoice dated 20 April 2018	$9,293.97	Dismissed.
3(b): Supply of capping cladding, invoice dated 20 September 2018	$18,637.15	Dismissed.
4(a): Labour cost to install cabin glass	$27,735.47	Dismissed.
4(b): Labour cost to repair metal blast glass door	$6,952.33	Dismissed.
4(c): Labour cost for welding works	$2,104.16	Allowed with GST but without 15% admin charge, for $1,829.70.
4(d): Labour and material cost for Z-panel	$2,282.58	Dismissed.
5(a): 70% balance for 13 pieces of glass panel	$111,930.27	Allowed.
5(b): 30% deposit for 13 pieces of glass panel	$47,970.11	Allowed.
5(c): 70% deposit for 3 pieces of mock-up panel	$22,916.70	Allowed.
6(a): Broken glass	$16,663.00	Dismissed.
7(a): Re-erected scaffolding	$6,767.75	Dismissed.

8(a): Technical submissions and/or applications to BCA	$13,904.65	Dismissed.
9(a): Safety violation, invoice dated 20 January 2018	$184.58	Dismissed.
9(b): Safety violation, invoice dated 22 March 2018	$1,353.55	Dismissed.
10(a): Cabin capping and annex aluminium cladding	$20,298.33	Dismissed.
11(a): Rectification works on cladding	$1,292.03	Dismissed.
12(a): Rectification works on FAP window and other windows	$1,082.84	Dismissed.
Total quantum claimed	$340,233.10	
Total quantum allowed	$197,501.49	

Claim 3: Setting aside the Adjudicated Amount

221 In its closing submissions, the plaintiff sought to set aside the entirety of the Adjudicated Amount on the basis that the Adjudicator erred in allowing VO claims which were not agreed to by the Principal or its representative, when the Subcontract requires such agreement, and that the payment for the main works (excluding the variation works) was reasonably withheld by the plaintiff.[204]

222 The defendant submits that the plaintiff has not adduced evidence to show how the AD was erroneous. The plaintiff did not make reference to its Adjudication Response and show how the AD was erroneous in how the Adjudication Response and Adjudication Application were considered.

[204] PCS at paras 427–428.

Consequently, the plaintiff has not satisfied that on a balance of probabilities, that the AD was wrongly determined.

223 I note that the SOC at para 20 states that "the Plaintiff pleads to and fully disputes the Adjudicated Amount of S$197,522.83." At paras 127–141 of her AEIC, Ms Chai sets out her views on parts of PC 17, which was the subject matter of the AD. However, these points do not reference the AD at all and it is not clear from them that she is raising the points in support of the plaintiff's contestation of the main works awarded under the AD. Moreover, the section of her AEIC entitled "The Adjudication Determination was Wrongly Made in Respect of the Disputed Payment Claims Allowed by the Adjudicator", makes no mention of the plaintiff's positions *viz* the main works awarded under the AD.

224 In any event, leaving aside the lack of reference to the AD at paras 127–141 of Ms Chai's AEIC, the points made therein also do not address the adjudicator's reasons for his decisions in the AD:

(a) At para 127 of Ms Chai's AEIC, she states that the plaintiff only certified 80% of the amount claimed by the defendant for the R3 Tower Equipment Building external façade system without insulation as there were defects which were not rectified. This appears to relate to Item B2 of the AD. At [93]–[94] of the AD, the adjudicator found that the plaintiff had not produced any evidence of the costs of rectification of such defects nor satisfactorily explained why the plaintiff certified only 80%, which appears to be an arbitrary estimate. Nothing in para 127 of Ms Chai's AEIC addresses these points of the adjudicator. There is only a bare assertion that there were "[d]efects, including alignment issues, [that] were found and were not rectified by the [d]efendant".

(b) At para 128 of Ms Chai's AEIC, she states that the plaintiff disputed the defendant's claim for Annex Building façade system works with insulation as they had omitted the insulation works. This appears to relate to Items A1, A4 and A6 of the AD. After examining the parties' positions at the adjudication, the adjudicator found at [61]–[62] of the AD that the rockwool insulation had been installed, but the plaintiff apparently rejected it due to poor workmanship, while the defendant disputed that and alleged that any damage to the insulation was due to the plaintiff's delay in approving the sealant. The adjudicator went on at [69] of the AD to state that "what is not disputed is that the [defendant] did carry out the dismantling of the panels with rockwool insulation …" In other words, the adjudicator found that while there was a dispute over the workmanship of the insulation, the insulation itself was not omitted. It was installed and the defendant did carry out work to remove it. The adjudicator then awarded a combined sum of $139,636.90 for the aluminum cladding work, with and without cladding. Paragraph 128 of Ms Chai's AEIC does not address the adjudicator's reasons for his award.

(c) At paras 129–137 of Ms Chai's AEIC, she states the plaintiff's position on the dispute over the site measurements for the aluminum cladding works. She states that the Subcontract is not a measurement contract and the quantity claimable is not based on actual measurement of quantity. Under cl 2 of the Subcontract, the Subcontract Sum was not subject to adjustment except for variations agreed to by the Principal and/or its representative. The plaintiff also denied that there was an agreement, set out in a handwritten note in the Site Measurement Document, which stated that "[a]s per agreed before signing of contract, DGE can claim any excess of quantity from the original contract

quantity". Also, the plaintiff's position was that Joseph did not have the capacity to approve the quantity of works carried out by the defendant. In the AD at [65], the adjudicator found that the Site Measurement Document signed by Joseph and a representative of the defendant constitutes "*prima facie* evidence that the claimed quantity of 810.92m^2 had been carried out and … approved by a third party". The adjudicator noted that there was a contrary response quantity of 761.88m^2 which was said to be based on plan only, but the adjudicator found that there was no evidence before him that the response quantity of 761.88m^2 had been agreed to between the parties. Again, Ms Chai's AEIC does not deal with the adjudicator's reasons for his decision. In fact, there is nothing in Ms Chai's AEIC about the lack of evidence for the "response quantity of 761.88m^2" or why the handwritten note should be ignored. The plaintiff's case that Joseph did not have authority to approve the quantity of works carried out by the defendant, is also severely undermined by Ms Chai's admission that Joseph was "the archi [*sic*] coordinator of the main contractor, so I believe that he would be able to sign the documents." She testified that she saw Joseph also sign the final measurements and that "because he is the main contractor's coordinator, so he can sign any document."[205]

(d) At paras 138–141 of Ms Chai's AEIC, she cites two examples to support the plaintiff's certifying that there were no sums payable to the defendant for the works relating to the metal claddings, doors and windows. Two examples alone, do not suffice to explain why the plaintiff certified no sum payable at all for the works relating to metal claddings, doors and windows. In any event, the two examples also do

[205] NE 1 July 2021 at p 21–22.

not assist the plaintiff. One example is the door (GD1) for R3 Tower Equipment Building which the plaintiff certified 50% out of 100% claimed because the door had defects. The adjudicator awarded 70% of the claim for this, as he did not find it fair to withhold 50% after noting the nature of the defect, This is at paras 125–126 of the AD. Nothing in Ms Chai's AEIC addresses why the 70% awarded by the adjudicator was wrong. The other example given is certifying 12% out of 100% claimed for the glass panels as only two out of 16 panels had been installed. However, this example is not helpful to the plaintiff's case as that was also the adjudicator's decision at para 108 of the AD.

225 Beyond this, none of the plaintiff witnesses testified, in their AEICs or on the stand, on why the main works awarded under the AD should be overturned. The Plaintiff's Closing Submissions on the various payment claims[206] do not assist, as they relate to the plaintiff's submission that they did not under-certify the payment claims and that hence there was no basis for the defendant's submission that there was a persistent course of payment delay. The plaintiff does not relate the submissions on the payment claims to the parts of the AD which the plaintiff is contesting, and the submissions certainly contain no specific response to the adjudicator's reasons for his award in the AD. Moreover, where portions of the Plaintiff's Closing Submissions do touch on areas dealt with under the AD, the explanations came through counsel rather than the plaintiff's witnesses. As the plaintiff is the party seeking to set aside the AD, the burden is on the plaintiff to provide such evidence through the witnesses. This was not done. Consequently, the defendant did not have a chance to contest this during the trial.

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206 PCS at paras 64–307.

226 I therefore dismiss the plaintiff's claim for overturning the main works allowed by the adjudicator in the AD.

227 In contrast, Ms Chai testified much more specifically on the plaintiff's position regarding the error made by the adjudicator in awarding the VOs in the AD, at paras 146–165 of her AEIC. There was specific reference to para 71 of the AD, an explanation of the plaintiff's position that the adjudicator had erred in applying cl 2 of the Subcontract, and the plaintiff's position on the various disputed VOs awarded under the AD.

228 In respect of the VOs, the Adjudicator correctly cites cl 2 of the Subcontract and states that the variations under the Subcontract must be agreed, at para 71 of the AD.[207] However, cl 2 also states that such agreement must come from the Principal or the representative of the Principal, which is defined in cl 1 as "CAAS" and "SJ" respectively.

229 The Adjudicator does not identify where there has been agreement from CAAS or SJ. Instead, he concludes at para 72 of the AD: "In this case, I have found that there is no specific requirement in the LOA that the variation order must be in writing, although the Claimant did submit a written Variation Order Request, which was not signed or accepted by the Respondent."[208] The respondent in the AD was the plaintiff. The Adjudicator thus focused on whether there was agreement by the plaintiff, when the requirement is agreement by CAAS or SJ. There is no evidence of such agreement by CAAS or SJ for the VOs in dispute.

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207 6 AB at p 158.

208 6 AB at p 158.

230 This affects the following VO claims under the AD, which will be set aside on the basis that there was no agreement from CAAS or SJ as required under cl 2 of the Subcontract:

(a) VO DV0006 for reinstallation of rockwool totalling $32,602.50;

(b) VO DV0008 for airfreight charges totalling $13,185;

(c) VO DV00018 for the BCA submission totalling $5,070.

231 As the above VOs form part of the defendant's counterclaim for VOs, their merits will be dealt with there.

Counterclaim 1: Four VOs

232 As a general point, details are lacking in the pleadings for the four VOs claimed by the defendant in this suit. Out of the $65,849.45 disputed in the four VOs, I allow the claim for VO DV0008 for the BCA submission of $5,070 and dismiss the other three VO claims. The detailed reasons are set out below.

VO DV0006

233 DV0006 is the defendant's VO claim for $32,602.50 to supply labour to dismantle aluminium panels with rockwool and reinstall and align the aluminium panels. The defendant submits that there was prolonged delay on the plaintiff's part in approving the sealant, which led to the rockwool insulation being damaged. The defendant submitted the sealant type for approval by the plaintiff on 3 January 2017. The defendant also sent an email to the plaintiff on 2 March 2017 stating that the defendant urged the plaintiff to approve the sealant type, as the rockwool could become damaged without a sealant, the defendant had applied a temporary seal in the meantime, and the defendant would claim

costs of any works for removing the damaged insulation as a variation work. The architect only confirmed the sealant to be applied on 24 March 2017.

234 The plaintiff submits that CAAS being the employer for the Project had the authority and control over approval of the sealant to be used for the Subcontract works. It was therefore out of the control or work authority of the plaintiff to approve the sealant proposed by the defendant. The relevant issue was not the alleged delay in approval of sealant, but the work measures that the defendant had to take to protect the rockwool installed pending the sealant approval. While awaiting the approval of the sealant, the defendant must ensure that the rockwool would not be exposed or subjected to damage, including water ingress that would damage the rockwool already installed. However, the defendant did not.

My decision

235 I disallow the defendant's claim for this VO. As acknowledged by Mr Rasanathan of the defendant, approval for the sealant came from CAAS / SJ. The plaintiff's role was to seek the approval on behalf of the defendant and convey the approval. There is no evidence that the plaintiff delayed when executing its role. As the installer, the onus is on the defendant to provide the necessary temporary protection for the rockwool. The sealant was approved on 24 March 2017. The defendant has not provided evidence that the time taken to approve the sealant was inordinate for such works. They have not, for example, shown that the temporary seal applied was not expected to last for the relevant duration, where it was properly applied.

VO DV0008

236 DV0008 is the defendant's VO's claim for $13,185 for the airfreight charges for three pieces of the Saint-Gobain glass for mock-up. The defendant's case is that the plaintiff agreed to bear this cost.

237 The plaintiff's position is that it is part of the scope of works of the defendant to procure delivery of mock-up glass. Further or alternatively, the freight costs claimed by the defendant were costs that were indispensably necessary to bring to completion the installation of the mock-up glass. In any event, any agreement to pay for the costs of freight was subject to the plaintiff's condition that the Annex Building metal cladding works, including removal of the rockwool, were completed and handed over to the plaintiff and the main contractor.[209] These conditions were not fulfilled.

My decision

238 I disallow this VO claim. The plaintiff's agreement to pay for the airfreight charges was clearly conditional on the Annex Building metal cladding works (including removal of the rockwool) being completely done and handed over to SCB and the plaintiff. It was undenied by the defendant that these conditions were not met.

VO DV00018

239 DV00018 is the defendant's VO claim for $5,070 for the BCA submission made for Phase 2A. The defendant's case is that the Subcontract clearly excludes submissions to relevant authorities, including BCA, from the defendant's scope of works.

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[209] 8 AB at pp 126–127.

240 The plaintiff's position is that Annex B of the Subcontract stated that neither the plaintiff nor the defendant was contractually obliged to make submissions to the relevant authorities, including BCA. Documentary evidence shows the defendant directly acting upon SCB's request to make submissions to BCA, bypassing the plaintiff. The plaintiff is hence not obliged to pay the defendant.

My decision

241 I allow this VO claim. While it was SCB that made the request to the defendant, the plaintiff was aware of such a request and did not object. In effect, they acquiesced to the request from SCB for the defendant to do the BCA submission. By analogy, if SJ gave instructions to the defendant on the execution of works under the SC, the plaintiff has not (and rightfully so) said that such instructions are unrelated to the Subcontract works simply because it was SJ and not the plaintiff that gave the instructions. The BCA submission was related to the work under the Subcontract between the plaintiff and the defendant. I find that the defendant is hence entitled to claim this VO from the plaintiff.

VO DV00019

242 DV00019 is the defendant's VO claim for $14,991.95 for the cost for the supply of labour for rope access to install the mock-up cabin glass. The defendant's case is that the defendant merely suggested and brought in Saint-Gobain glass at its own costs for the glass panels only, on instructions from the plaintiff for testing. The defendant was not obliged to provide actual sized mock-up samples, and only much smaller glass panels.[210] The plaintiff was the

[210] DCS at para 133.

party that demanded that the defendant erect the mock-up of the Saint-Gobain glass for approval by CAAS. This cost should hence be borne by the plaintiff.

243 The plaintiff denies this amount. At all material times, the plaintiff did not agree, orally or in writing, to pay for the alleged charges for supply of labour of rope access for the mock-up cabin glass. Further or in any event, cl 2 of the Subcontract states that the Subcontract Sum is inclusive of all ancillary works "indispensably necessary to carry out and bring to completion the Subcontract works". Any supply of labour for rope access for the mock-up cabin glass was indispensably necessary to carry out and bring to completion the works for the mock-up cabin glass, which works were necessary for the mock-up samples required before bulk fabrication of the glass. This was clearly set out as part of the technical specifications in the Tender Corrigendum No 4.

My decision

244 I disallow this VO claim. As set out above at [85], the defendant was keen to have CAAS and SJ accept Saint-Gobain glass as the alternative, as this would help with the defendant's costs concerns with the SSG glass. On their own case, the defendant brought in Saint-Gobain mock-up glass at their own costs. The installation of the Saint-Gobain glass was part of the process of securing CAAS and SJ's approval through the viewing of the mock-up glass. The defendant has not provided any evidence of agreement by the plaintiff, CAAS or SJ to pay for the supply of labour for rope access for the installation of the mock-up glass. While it was alleged that there was an oral agreement, the defendant was unable to provide particulars of who, when or what was said for such oral agreement.

Counterclaim 2: Defendant's claim for remainder of the contract

245 The defendant also counterclaims for the remainder of the contract value of $561,019.90 excluding payments received of $339,136.60, *ie*, $297,819.49. This includes the four disputed VOs (see above at [230]), amounting to $65,849.45, which have been dealt with above. Part of this remainder involves the 5% Retention Sum, which I will deal with below as a separate item.

5% Retention Sum of $28,051

246 In respect of the Retention Sum of 5%, amounting to $28,051, the defendant has failed to provide the warranties and indemnities as applied to the Subcontract works, which is a condition precedent to the release of 5% of the Retention Sum, as set out in cl 5 of the Subcontract.

247 The defendant submits that they are not obliged to provide such warranties and indemnities because of the plaintiff's repudiatory breach. In view of my finding that it was the defendant who committed the repudiatory breach by unjustifiably abandoning works, that defence fails. Hence, the defendant is not entitled to 5% of the Retention Sum, for failure to provide warranties and indemnities as required under cl 5 of the Subcontract.

248 The next question is whether the defendant is entitled to the remainder, after excluding the 5% Retention Sum and the four disputed VOs, amounting to $127,982.85. The basis of the defendant's claim for the remainder is that they are entitled because the plaintiff had breached the contract by creating a persistent course of payment delays, entitling the defendant to terminate the contract.[211] As I have found earlier that the defendant was not entitled to

[211] DCS at para 135.

terminate the contract and abandon the works, the defendant is not entitled to the remainder of the contract. As the defendant's claim for general damages is also premised on the plaintiff's alleged breach of contract,[212] for the same reason, I find that the defendant is not entitled to general damages.

Counterclaim 3: Is the defendant entitled to the legal costs associated with the AD?

249 The defendant has claimed for damages in the form of the legal costs associated with the AD, where a sum of $197,522.83 was awarded to the defendant. This is on the basis that but for the plaintiff's breach of the contract, the defendant would not have taken up the adjudication application. Section 30(4) of SOPA provides as follows:

> **Costs of adjudication proceedings**
> **30.** — (4) A party to an adjudication shall bear all other costs and expenses incurred as a result of or in relation to the adjudication, but may include the whole or any part thereof in any claim for costs in any proceeding before a court or tribunal or in any other dispute resolution proceeding.

250 Section 30(4) of SOPA thus allows a party in principle to recover the costs of an adjudication application as damages under s 30(4) of the SOPA. In *GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd* [2020] SGHC 167, the court accepted the operation of s 30(4) of the SOPA but did not allow a defendant to claim the costs of an adjudication as it did not successfully defend all of the plaintiff's claims. As I have allowed for three of the VOs awarded to the defendant under the AD to be overturned, the amount that the defendant would be entitled to under the AD would be $146,647.33 ($197,522.83 less $50,875.5) out of the claimed amount of $264,789.08. In other words, the defendant was unsuccessful in respect of close to half the amount claimed in the

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212 DCS at para 147.

adjudication application. Thus, this is not an appropriate case for the defendant to be awarded the legal costs associated with the adjudication application, as part of damages.

Conclusion

251 In conclusion, I allow the plaintiff's claims for:

(a) LD for Phase 1 in the amount of $356,400;

(b) Replacement and rectification works in the amount of $197,501.49; and

(c) The three VOs in the AD to be overturned.

252 I allow the defendant's counterclaim for VO in DV00018 in the amount of $5,070.

253 I will hear parties on costs.

Kwek Mean Luck
Judicial Commissioner

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