IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 165

Suit No 509 of 2017

Between

COMFORT MANAGEMENT PTE LTD

… Plaintiff

And

(1) OGSP ENGINEERING PTE LTD
(2) PINTU KUMAR SARKER

… Defendants

And

OGSP ENGINEERING PTE LTD

… Plaintiff in Counterclaim

And

COMFORT MANAGEMENT PTE LTD

… Defendant in Counterclaim

JUDGMENT

[Building and Construction Law] — [Building and construction contracts] — [Lump sum contract]

[Building and Construction Law] — [Sub-contracts] — [Claims by sub-contractor]

[Building and Construction Law] — [Scope of works] — [Variations]

[Contract] — [Breach] — [Causation]

[Tort] — [Negligence] — [Breach of duty] — [Causation]

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v
OGSP Engineering Pte Ltd and another

[2020] SGHC 165

High Court — Suit No 509 of 2017
Vinodh Coomaraswamy J
9–12, 15–17, 23, 24 April, 29 July 2019

6 August 2020 Judgment reserved.

Vinodh Coomaraswamy J:

Introduction

1 This action arises out of a lump sum construction contract which the plaintiff entered into with the first defendant in October 2013 for a project in Jurong ("the Project"). The first defendant carried out the works for the air conditioning ducting system and mechanical ventilation system ("the Works") for the Project. The main contractor for the Project subcontracted the Works to Lead Management Engineering & Construction Pte Ltd ("Lead"). Lead in turn sub-subcontracted the Works to the plaintiff under a lump sum contract ("the Lead Contract").[1] The plaintiff then sub-sub-subcontracted the Works to the first defendant under a back-to-back lump sum contract ("the Comfort Contract").[2]

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1 Statement of Claim (Amendment No 5) at para 8.

2 Statement of Claim (Amendment No 5) at paras 9 and 11.

2 The first defendant duly commenced work under the Comfort Contract in October 2013. However, it demobilised its team and withdrew from the site on 9 October 2014.[3] It is common ground that the first defendant carried out no works of any kind for the Project after that date.[4] The plaintiff's case in this action is that the first defendant had completed only 65% of the Works before it withdrew from the site.[5] The first defendant's case is that it had completed or substantially completed the Works before it withdrew.

3 In this action, the plaintiff claims the following sums against the first defendant:

(a) approximately $410,000, being the plaintiff's overpayment to the first defendant for the Works;

(b) $81,000 in liquidated damages for 162 days of delay;[6]

(c) $86,606.41, being back charges imposed by Lead on the plaintiff for the first defendant's defective work;[7] and

(d) $918,306.09, being the sum which the plaintiff paid to the first defendant pursuant to an Adjudication Determination ("AD") in 2017.[8]

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3 Notes of Evidence, 16 April 2019, p30(22) to 31(1).

4 Statement of Claim (Amendment No 5) at para 28; First Defendant's Defence and Counterclaim (Amendment No 2) at para 29.

5 Plaintiff's Opening Statement at para 27; Plaintiff's Skeletal Submissions at para 3.

6 Statement of Claim (Amendment No 5) at para 32.

7 Statement of Claim (Amendment No 5) at para 51(2)(b).

8 Statement of Claim (Amendment No 5) at para 51(2)(aa); Plaintiff's Opening Statement at para 15.

In the alternative, the plaintiff claims damages against the first defendant to be assessed.[9]

4 To supervise the Works on site, the plaintiff engaged the second defendant as its project manager.[10] In this action, the plaintiff claims against the second defendant the sum by which the plaintiff alleges it overpaid the first defendant (see [3(a)] above).[11] The plaintiff's case against the second defendant is that he is liable to the plaintiff for this sum because he breached his duties to the plaintiff in contract and in tort by over-certifying the sum due from the plaintiff to the first defendant under the Comfort Contract.[12]

5 The first defendant in turn brings a counterclaim in this action against the plaintiff seeking the following relief:[13]

(a) if the AD is set aside:

(i) $180,013.27 as outstanding payment under the Comfort Contract price for completion of the Works;

(ii) $14,300 as outstanding payment for completed works under the first variation order dated 21 August 2014 ("VO1");

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9 Statement of Claim (Amendment No 5), prayer 2(c).

10 Statement of Claim (Amendment No 5) at para 19E.

11 Plaintiff's Closing Submissions at para 121.

12 Statement of Claim (Amendment No 5) at para 19E; Plaintiff's Opening Statement at para 4; Plaintiff's Closing Submissions at para 31.

13 First Defendant's Defence and Counterclaim (Amendment No 2) at para 49, prayers (1) and (2).

(iii) $621,828.73 as outstanding payment for completed works under the alleged second variation order ("VO2"); and

(iv) $30,178.78 arising from materials which the first defendant alleges it purchased at the request of the plaintiff;[14]

(b) if the AD is not set aside, a declaration that the first defendant is entitled to the moneys awarded under the AD; or

(c) alternatively, a *quantum meruit* for the work the first defendant actually did.[15]

The issues

6 The claim and counterclaim raise the following issues:

(a) How much of the Works did the first defendant complete before it left the site on 9 October 2014 and is the first defendant liable to pay liquidated damages for delay ("the Works Issue")?

(b) Were there any defects in the Works and is the plaintiff entitled to impose back charges on the first defendant ("the Defects Issue")?

(c) Did the first defendant order materials on the plaintiff's instructions, thereby entitling the first defendant to claim the cost of those materials from the plaintiff ("the Materials Issue")?

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14 First Defendant's Defence and Counterclaim (Amendment No 2) at para 48.

15 First Defendant's Defence and Counterclaim (Amendment No 2) at para 49.

(d) Is the first defendant entitled to recover on two variation orders and, if so, in what amount ("the Variation Orders Issue")?

(e) Did the second defendant breach his duties in contract or tort by over-certifying the amount of work completed by the first defendant or by acting in a position of conflict of interest, thereby causing the plaintiff to suffer loss ("the Personal Duty Issue")?

7 Having considered and analysed the parties' evidence and submissions, I have come to the following conclusions:

(a) On the Works Issue, I find that the first defendant had completed 95.29% of the Works as at 9 October 2014. I accordingly dismiss the plaintiff's claim that the first defendant has been overpaid. The plaintiff is in fact obliged to pay the first defendant a further sum of $121,138.27. The plaintiff, however, is entitled to recover $81,000 from the first defendant as liquidated damages for 162 days of delay.

(b) On the Defects Issue, I dismiss the plaintiff's claim against the first defendant.

(c) On the Variation Orders Issue, I find that the first defendant is entitled to recover its entire counterclaim of $14,300 on VO1. I find that the first defendant is not entitled to recover its counterclaim on VO2 in contract but is entitled to a *quantum meruit* for the work done on VO2. I assess the value of the *quantum meruit* at two-thirds of its claim of $621,828.73 on VO2.

(d) On the Materials Issue, I dismiss the first defendant's counterclaim against the plaintiff.

(e) On the Personal Duty Issue, I dismiss the plaintiff's claim against the second defendant.

8 I now set out the reasons for my decision.

The Works Issue

9 By the time the first defendant withdrew from the site on 9 October 2014, the plaintiff had paid the first defendant just over $1.18m under the Comfort Contract.[16] After adjusting for variations and back charges, the plaintiff's case is that it had overpaid the first defendant by about $410,000.[17]

10 The contemporaneous evidence on the Works Issue is an email which the second defendant, as the plaintiff's project manager, sent on 9 October 2014 at 6.44am ("9 October Email") to Mr Natarajan Chidambaram ("Mr Ram"), the first defendant's project manager. The second defendant attached to this email a list of items which the first defendant had failed to complete. The second defendant derived this list from a list of outstanding items which Lead had compiled and attached to an email to the plaintiff dated 3 October 2014 (described in more detail at [24] below).[18] Lead followed this with three further emails to the plaintiff after the first defendant withdrew from the site attaching virtually the same list of outstanding items.[19]

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16 Plaintiff's Closing Submissions at para 32.

17 Plaintiff's Closing Submissions at paras 31 and 32.

18 Plaintiff's Opening Statement at para 25; Lim Fatt Seng's AEIC at p19 to 21; Agreed Bundle of Documents, Vol 2, p1006 to 1012.

19 Plaintiff's Closing Submissions at para 35; Agreed Bundle of Documents, Vol 2, p1244 to 1251, p1301 to 1302.

11 The plaintiff's case is that the bulk of the items which it listed in the 9 October Email relate to the Works, *ie*, works within the scope of the Comfort Contract, and not to variations, *ie*, works which the parties agreed outside the scope of the Comfort Contract. To support its case, the plaintiff says it had to spend the substantial sum of over $397,000[20] after 9 October 2014 to complete the Works.[21]

12 The first defendant's case is that the Works were complete or substantially complete by 9 October 2014.[22] It says that the 9 October Email relates entirely to variations and not to any of the Works. In support of its argument, the first defendant relies on Certificate of Payment No 13 ("COP 13") which Lead issued to the plaintiff on 28 September 2014. In COP 13, Lead certified that 95.29% of the Works had been completed as at 15 September 2014.[23] The value of the Comfort Contract was $1.25m. This necessarily implies that, as at 15 September 2014, the value of the outstanding Works was only 4.71% of $1.25m, or $58,875. Further, the first defendant remained on site and continued work from 15 September 2014 until 9 October 2014. The percentage of the Works actually completed by 9 October 2014 is therefore likely to be even more than the 95.29% which Lead certified complete as at 15 September 2014.

13 The first defendant points out that the second defendant, in the 9 October Email, makes no allegation at all that the first defendant had in fact failed to

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20 Lew Sien Yen Wenda's AEIC at para 53; Plaintiff's Closing Submissions at para 37.

21 Plaintiff's Opening Statement at para 26.

22 First Defendant's Defence and Counterclaim (Amendment No 2) at para 17.

23 Pintu Kumar Sarker's AEIC at p413.

complete the Works.[24] The first defendant also relies on another email dated 10 October 2014 which the first defendant sent to the second defendant as the plaintiff's project manager. In that email, the first defendant asserts that the Works were complete. The plaintiff did not reply to this email or challenge this assertion.[25]

14 The first defendant computes its counterclaim of $180,013.27 as follows:[26]

Comfort Contract price	$1,250,000.00
Less amount paid up to 9 October 2014	($1,185,686.73)
Outstanding due for the Works	$64,313.27
Add amount due for variations	$115,700.00
Total due for the Works and variations	$180,013.27

Lump sum contract does not bar the plaintiff's claim

15 I deal at the outset with a preliminary point raised by the first defendant. It argues that it is fundamentally wrong for the plaintiff to reassess the true proportion of the Works completed as at 9 October 2014 because the Comfort Contract is a lump sum contract.[27] It is back-to-back with the Lead Contract. Lead certified the Works to be 95.29% complete and paid the plaintiff

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24 Notes of Evidence, 9 April 2019, p35(3) to 35(11).

25 Notes of Evidence, 9 April 2019, p37(2) to 37(16).

26 First Defendant's Closing Submissions at para 33.1; Defence and Counterclaim at para 42.

27 First Defendant's Opening Statement at para 23.

accordingly. A reassessment is both legally and factually unsustainable. The plaintiff should not be entitled to recover any alleged overpayment to the first defendant.

16 I reject this argument. It is undoubtedly the case that the parties to a lump sum contract cannot reopen the lump sum after entering into the contract because of issues such as an under or over estimation of the price of materials or the costs of manpower. However, where a contractor alleges that a subcontractor failed to complete works contracted under a lump sum contract and has therefore been paid more than its contractual entitlement to be paid, the court must undertake an objective assessment of the proportion of the works which the subcontractor did in fact complete in order to ascertain the actual extent of the subcontractor's contractual entitlement to be paid.

17 Indeed, cl 6.1(c) of the General Conditions of the Lead Contract, read with cl 3 of the Special Conditions provides that the first defendant "shall be paid in the following manner, without prejudice to justifiable deductions … [a]ll progress payment shall be made monthly based on the *actual value of work properly executed on site*" [emphasis added] (see [49] below).[28] This makes clear that the first defendant's contractual entitlement to receive progress payments is based on an objective assessment of the actual value of the Works it has properly executed on a month by month basis. In the event of a dispute alleging that the subcontractor was paid more than it was contractually entitled to be paid, a fact-finder must ascertain objectively the actual value of the work which the subcontractor properly executed on site.

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[28] Plaintiff's Closing Submissions at para 33; Agreed Bundle of Documents, Vol 9, p6015.

18 It is uncontroversial that a contractor is entitled to recover an overpayment from a subcontractor under a lump sum contract, provided that the contractor is able to satisfy the court that the amount paid was not in fact contractually commensurate with the actual work done (see *Mansource Interior Pte Ltd v CSG Group Pte Ltd* [2017] 5 SLR 203).

19 There is thus no merit to the first defendant's preliminary point.

Second defendant's evidence

20 I begin my analysis of the Works issue by considering the evidence of the second defendant. That evidence was before me both in the form of contemporaneous emails which he sent and received in October 2014 and also his oral evidence under cross-examination.

21 I accord great weight to the second defendant's evidence. He was the plaintiff's project manager. He was personally involved in supervising the Works on site on a daily basis.[29] He thus supervised construction personnel and activities on site and coordinated with the other contractors.[30] As such, he dealt personally both with Lead and with the first defendant. Crucially, the second defendant was the only person deployed by the plaintiff to be stationed on site to supervise the Works, both before and after 9 October 2014.[31]

22 It is true that the plaintiff's general manager at the time, Mr Lawrence Wu ("Mr Wu"), also played a role in supervising the Works. But Mr Wu's role

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29 Notes of Evidence, 9 April 2019, p99(16) to 99(18).

30 Notes of Evidence, 10 April 2019, p5(24) to 6(4).

31 Notes of Evidence, 10 April 2019, p7(17) to 8(5).

was not as direct as the second defendant's. In effect, Mr Wu delegated responsibility for the Works and for the daily operations on site to the second defendant.[32] The plaintiff's director, Mr Lim Fatt Seng ("Mr Lim"), accepted this in cross-examination.

23 I now consider the second defendant's contemporaneous emails and his oral evidence at trial. The result is that I accept the second defendant's characterisation of the outstanding items as at 9 October 2014 being mostly variations but including some original Works.

Lead's email of 3 October 2014

24 On 3 October 2014, Lead emailed the second defendant listing the items then outstanding under the Lead Contract, asking the plaintiff to "[k]indly increase your manpower provisions and expedite all of this outstanding works".[33] On the same day, the second defendant responded to say that *most* of the outstanding items contained in the list of 3 October 2014 were variations:[34]

> Dear Jaycee,
>
> Please take note that *all balance outstanding works most of the items is additional works VO*. We had carry out lot of additional works and completed based on latest shop drawings provided by your side.
>
> …
>
> [emphasis added]

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32 Notes of Evidence, 10 April 2019, p6(20) to 6(24).

33 Agreed Bundle of Documents, Vol 2, p1007 to 1009.

34 Agreed Bundle of Documents, Vol 2, p1006 to 1007.

He therefore implied that *some* of these outstanding items were *not* variations, *ie*, part of the Works.

25 The second defendant confirmed this at trial:[35]

> Q: In response to the Lead email and the list, this is what you wrote at page 1006. Can we turn back to that page?
>
> A: Yes.
>
> Q: 'Dear Jaycee, Please take note that *all balance outstanding works most of the [works] is additional works VO.*' Do you have that?
>
> A: Yes.
>
> Q: And the second sentence says: 'We had carry out lot of additional works and completed based on latest shop drawings provided by your side.' Do you have that?
>
> A: Yes.
>
> Q: From these two statements, would you agree that what you are talking about is actually the list which is provided by Lead, found at pages 1010 to 1012? That's what you're referring to, isn't it?
>
> A: Yes.
>
> Q: And what you are telling Lead is that *most* of the items are additional items, not main scope?
>
> A: *Mix.*
>
> Q: But you used the words 'most of the items'.
>
> A: Yes.
>
> [emphasis added]

[35] Notes of Evidence, 23 April 2019, p39(13) to 49(19).

The 9 October Email

26 The second defendant then wrote the 9 October Email to the first defendant's Mr Ram. It bears the title "Outstanding works for ACMV system …". "ACMV" is the industry initialism for "air-conditioning, mechanical and ventilation". Attached to this email is a list of 27 items which the second defendant said were outstanding as at 9 October 2014. This list was drawn from Lead's 3 October 2014 email.[36] I set out an extract from the 9 October Email:[37]

> Dear Ram,
>
> …
>
> The outstanding works details is enclosed in this email.
>
> Should your company fail to increase the necessary manpower and all necessary materials by 12.00 noon on 09th October 2014 we reserve our right to engage 3rd parties to carry out the work on behalf of your company. Please take note this is the final warning to your company to perform as required.
>
> Please take note that we have paid 90% of total contract sum and variation claims of 80% of total VO value. The remaining balance 2.26% of total contract sum and 20% of the remaining variation claims will only be due payable on 15th October 2014. If there are any outstanding progress claims due to you and is not paid, please provide details of claims and we will will [*sic*] process according to the terms and conditions of the contract.
>
> We look forward to your performance in accordance to the terms and conditions of the contract and your commitment to accelerate the work to complete the contract works on schedule.
>
> Best Regards,
>
> Pintu Kumar Sarker

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36 Notes of Evidence, 23 April 2019, p37(17) to 40(11).

37 Pintu Kumar Sarker's AEIC at p326 to 327.

27 It is common ground that the 9 October Email accurately lists the items which were in fact outstanding as at 9 October 2014. Also produced in evidence were three emails which Lead sent to the plaintiff on 16, 17 and 20 October 2014, after the first defendant had withdrawn from the site, repeatedly emphasising the same outstanding items.[38]

28 As mentioned, the fundamental disagreement between the parties is whether the 9 October Email lists items which are part of the Works or which are variations. It is significant to me that the second defendant refers in the body of the 9 October Email *both* to the plaintiff having paid 90% of total contract sum *and* variation claims of 80% of total VO value. That indicates to me that the second defendant intended the 9 October Email, read in context, to list *both* Works *and* variations. He does not, however, characterise each of the outstanding items as either Works or variations or even their respective proportions.[39]

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38 Plaintiff's Closing Submissions at para 35; Agreed Bundle of Documents, Vol 2, p1244 to 1251, p1301 to 1302.

39 Plaintiff's Closing Submissions at para 34.

Cross-examination on the 9 October Email

29 The second defendant confirmed my reading of the 9 October Email in cross-examination. His evidence was that not *all* of the Works were complete by 9 October 2014. He also confirmed that he listed the outstanding items without distinguishing between Works and variations:[40]

> Q: Mr Sarker, you had agreed with me that for some of the items of the outstanding works, these were actually additional works; correct?
>
> A: Yes.
>
> Q: *So in that sense, they cannot be considered outstanding main scope items. Agree?*
>
> A: *Yes, but I never write 'outstanding main works', I just write 'outstanding works details' only.*
>
> Q: Yes, but when you come up with these drawings at page 91 to page 116 of Mr Qiu's affidavit, would you not agree with me that these are not *solely* outstanding main scope items?
>
> A: Yes.
>
> Q: My client's instructions are that as of 9 October 2014, they had completed all their main scope items and these drawings, which are found at pages 91 to 116 of Mr Qiu's affidavit, are all incorrect. Agree or disagree?
>
> A: Disagree.
>
> [emphasis added]

The position after 9 October 2014

30 The second defendant's evidence was to similar effect when he was asked about the position after 9 October 2014. One of the subcontractors

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[40] Notes of Evidence, 23 April 2019, p60(14) to 61(10); Lew Sien Yen Wenda's AEIC at para 53.

engaged by the plaintiff after 9 October 2014 to complete the Lead Contract was a company of which the second defendant is a director. The second defendant's evidence was that the work which that company undertook after 9 October 2014 comprised a combination of both Works and variations:[41]

> Q: Let's go back to your affidavit at paragraph 53. So when Mr Lim asked you to complete the Lead project by whatever means, you said that:
>
> 'The balance outstanding works and rectification works were completed by … RSP/SS Mech…'.
>
> *And that would include the base scope and variations works?*
>
> A: *Yes.*
>
> [emphasis added]

31 I accept the second defendant's evidence. On that basis, I reject the plaintiff's submission that the sum of just over $397,000 which it had spent to carry out works after 9 October 2014 "relate[s] to the original scope of Works" *only*.[42] The plaintiff arrives at this figure by totalling a series of purchase orders and invoices, which it submits were all incurred after 9 October 2014.[43] It relies also on the testimony of Ms Wenda Lew ("Ms Lew"), the plaintiff's general manager. She stated that the reference number appearing on each purchase order was a reference number which the plaintiff assigned only to the Works and not variations.

32 However, Ms Lew conceded that this key fact appeared nowhere in her affidavit of evidence in chief. I find it difficult to believe that such a material

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41 Notes of Evidence, 24 April 2019, p27(7) to 27(15).

42 Plaintiff's Closing Submissions at para 37.

43 Notes of Evidence, 11 April 2019, p52(24) to 53(3).

fact could have been omitted. Further, Ms Lew could not satisfactorily explain how certain items which made up this total of about $397,000 related to the Works at all.[44]

33 I therefore do not accept that the plaintiff spent $397,000 after 9 October 2014 on the Works alone. It spent that sum on both the Works and on items not included in the Works.

The first defendant's 10 October 2014 email

34 On 10 October 2014, the first defendant sent an email to the second defendant asserting that the Works were complete (see [13] above).[45] The second defendant did not respond to the first defendant to deny or challenge this assertion. The first defendant therefore invites me to draw the inference that the list of outstanding items were *all* variations.[46]

35 I decline to draw that inference. It is contrary to the contemporaneous documentation and to the tenor of the second defendant's evidence, which I have accepted. It is also the case that the first defendant in this email did not allege *expressly* that it had completed the Works before withdrawing on 9 October 2014.[47] Quite the contrary. In this email, the second defendant said merely that it had "already completed *almost all main scope* (only certain area which conflicts with the main scope)" [emphasis added].

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44 Notes of Evidence, 11 April 2019, p55(23) to 57(20), p58(20) to 59(20).

45 Agreed Bundle of Documents, Vol 2, p1036; Notes of Evidence, 9 April 2019, p36(3) to 37(16).

46 First Defendant's Closing Submissions at para 48.

47 Notes of Evidence, 16 April 2019, p125(8) to 129(25).

36 This is consistent with the first defendant's reply to the second defendant's 9 October Email which it sent on the same day at 12.54 pm. In that email, Mr Ram said: "[n]ow you are talking only about the actual contract, if main scope urgent *why you never let us finish it first*" [emphasis added]. He reiterated the need for an immediate meeting "in order to finish the project in time".[48] As Mr Ram himself conceded in cross-examination, this email too did not expressly state that the Works were complete.[49]

Conclusion on the second defendant's evidence

37 I accept the second defendant's evidence that the 9 October Email referred to outstanding items which were *both* Works *and* variations. That suffices for me to reject the first defendant's position that the Works were complete as at 9 October 2014.

38 Unfortunately, the second defendant was unable to take a clear and unequivocal position in cross-examination and re-examination on each outstanding item being Works or variations (see Annex 1). Further evidence and analysis is therefore necessary to determine the actual proportion of the Works which the first defendant had completed by 9 October 2014.

COP 13

39 To establish its case as to the proportion of the Works which were complete by 9 October 2014, the first defendant relies on two points. First, Lead issued COP 13 to the plaintiff on 15 September 2014. COP 13 certified that

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48 Agreed Bundle of Documents, Vol 2, p1030 to 1031.

49 Notes of Evidence, 16 April 2019, p128(7) to 129(25).

95.29% of the Works was complete as at 15 September 2014. Second, the first defendant continued with the Works between 15 September 2014 and 9 October 2014. On this basis, the first defendant submits that it had substantially completed the Works by 9 October 2014.

40 The plaintiff accepts – as it must – that COP 13 does in fact certify 95.29% completion of the Works. However, it argues that this certification is at best equivocal. As observed by the plaintiff's counsel in the course of oral closing submissions, Lead itself listed a number of outstanding items in its email to the second defendant dated 3 October 2014. COP 13 cannot, therefore, be taken at face value as representing Lead's position on how much of the Works were complete.

41 I accept that COP 13 accurately sets out the proportion of the Works complete as at 15 September 2014. I do not consider that COP 13 is inconsistent with my finding that the 9 October Email describes both Works and variations. The second defendant confirmed this in cross-examination. His evidence was that 95.29% of the Works, as certified in Lead's COP 13, was in fact complete by 15 September 2014 and that this was consistent with the plaintiff's Progress Claim No 12 issued on 18 September 2014 to Lead:[50]

> Q: And here the certification is for work done as of 15 September 2014; correct?
>
> A: Yes.
>
> Q: And if you look at the original contract scope, it is certified by Lead up to 95.29 percent. Agree?
>
> A: Yes.

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50 Notes of Evidence, 23 April 2019, p50(24) to 52(23).

> Q: And again you don't have any doubt with this Lead certification; correct?
>
> A: No.
>
> …
>
> Q: And you would agree with me that by middle of September 2014, OGPS had achieved 95.29 per cent completion of the original scope of the ACMV works. Agree?
>
> A: Yes, as per Lead certification.
>
> Q: And since by 15 September 2014 they had completed 95.29 per cent, would you agree that by 9 October 2014, OGSP would have substantially completed the main scope of the ACMV works? Agree?
>
> A: Possible.
>
> …
>
> Q: If you look at the claim under this progress claim number 12, you have claimed $1,488,520. Agree?
>
> A: Yes.
>
> Q: So as of this stage, would you not agree with me that OGSP has substantially completed the original scope of the ACMV works?
>
> Court: The question is as of this date –
>
> Q: Yes, as of this date.
>
> Court: – 18 September 2014, 'Would you not agree with me that OGSP has substantially completed the original scope of the ACMV works?'
>
> A: Agree.

This evidence is not inconsistent with the second defendant's evidence that most of the outstanding items in the 9 October Email were variations rather than Works.

42 I therefore find that the first defendant had completed at least 95.29% of the Works by 9 October 2014.

Mr McGeoch's expert report

43 In arriving at this finding, I do not accept the evidence of the plaintiff's expert, Mr Mark Alexander McGeoch ("Mr McGeoch"). Mr McGeoch's evidence is that the first defendant had completed only 65% of the Works by 9 October 2014. But my findings of fact have undercut the assumptions of fact which underlie his expert evidence.

The first defendant's preliminary point

44 The first defendant's submission that I should accept Lead's COP 13 certification over Mr McGeoch's evidence because COP 13 originates from a neutral third-party *ie*, Lead, who has no interest in the outcome of these proceedings. Implicit in that submission is a suggestion that Mr McGeoch's evidence should be discounted simply because he is an expert witness engaged and called by the plaintiff.[51]

45 I reject this submission. The partisan expert is certainly a recurring feature and an intractable problem of adversarial litigation. But in an adversarial system like ours, expert evidence is not discounted simply because the expert is selected, engaged and paid by a party. A party who attacks the evidence of an expert witness must do so on the basis of deficiencies in the expert's credentials, factual premises, methodology or reasoning. The party cannot do so simply because the expert is party-appointed (see *Saeng-Un Udom v Public Prosecutor* [2001] 2 SLR(R) 1 at [26]).

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51 First Defendant's Closing Submissions at para 50.

Mr McGeoch's methodology

46 I proceed to consider Mr McGeoch's methodology. Mr McGeoch, in effect, reconstructed the position on 9 October 2014 based on the documents which the plaintiff provided to him. The plaintiff's representative, Mr Qiu Xuan ("Mr Qiu"), came up with a cost breakdown comparing the tender and as-built value of the Works.[52] The second defendant marked up several drawings in red to reflect the outstanding works as at 9 October 2014.[53] Mr McGeoch based his report on the 9 October Email[54] as well as on drawings marked up by the second defendant.[55] Mr McGeoch also reviewed the tender drawings and the as-built drawings on a sampling basis to crosscheck the accuracy of his findings.[56]

47 Having done all this, Mr McGeoch's conclusion was that by 9 October 2014, the first defendant had completed only 65% of the Works.[57] In arriving at this conclusion, Mr McGeoch made two critical assumptions. First, he assumed that the 9 October Email was an accurate description of the outstanding items. That assumption is common ground and is not controversial. Second, however, he assumed that *all* of the outstanding items were Works rather than variations. Mr McGeoch candidly accepted that if the factual premises underlying his opinion were wrong, his conclusions would also be wrong.[58]

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52 Qiu Xuan's AEIC at p6.

53 Plaintiff's Closing Submissions at para 28.

54 Qiu Xuan's AEIC at para 8.

55 Mark Alexander McGeoch's AEIC at p179 to 187; Notes of Evidence, 12 April 2019, p38(20) to 39(4).

56 Notes of Evidence, 12 April 2019, p48(2) to 48(15).

57 Plaintiff's Closing Submissions at para 48.

58 Notes of Evidence, 15 April 2019, p11(7) to 12(3).

48 Given my finding that the list of outstanding items on 9 October 2014 consisted of *both* Works *and* variations, Mr McGeoch's opinion that the first defendant had completed only 65% of the Works as at 9 October 2014 is of no assistance to me. This is not, of course, to attribute fault to Mr McGeoch. As an expert witness, he cannot be faulted for assuming the factual case of the party appointing him to be correct.

Overpayment

49 Clause 6.1 of the Lead Contract, as amended by cl 3 of Appendix B, governs the terms of payment:[59]

> 6.1 The Contractor shall be paid in the following manner, without prejudice to justifiable deductions:-
>
> (a) Advance payment of 5% of the Contract Price to be provided upon receipt of signed contract. The advance payment will be recovered in 2 stages: a) $50,000.00 upon the progress of work exceeding $100,000.00 of the Contract Price, b) 25,000.00 next payment stage.
>
> (b) 100% of the Contract Price by way of progressive claims submitted by the Contractor and certified by the Purchaser as completed, subject always to the Contractor complying with the form, and furnishing such information and supporting documents as may be required by Purchaser.
>
> (c) All progress payments shall be made monthly based on the actual value of work properly executed on site with thirty (30) days credit terms and subject to six percent (6%) retention of which half will be released to Contractor upon Purchaser's receipt of the Handling Over Certificate (or Completion Certificate of Certificate of Substantial Completion, as the case may be) and the balance will be released upon the Purchaser's receipt of the Maintenance Certificate (or Final Completion Certificate, as the case may be) from the Client or after

[59] Agreed Bundle of Documents, Vol 9, p6015; Statement of Claim (Amendment No 5) at para 13.

> the issue of the Certificate of Statutory Completion for the whole works by the relevant Authority, whichever is the later.
>
> (d) The Monthly Progress Claim & Invoice Submission Procedure shall be complied as per attached Appendix H, Memorandum for Subcontractor ref no: LMEC/EM/COM/002 Dated 20-June-2011.
>
> (e) The Purchaser is entitled to revise earlier certification notwithstanding payment having been made thereon for the purpose of correcting any error, or dealing with any matter which Purchaser was not aware or should have been dealt with at the time of certification, or revising any decision, valuation, computation on which the earlier certification was based on. Such revision shall be duly set forth in writing and served the Contractor upon which, the amount stipulated as paid in excess shall constitute a debt due from the Contractor to the Purchaser, repayable immediately which the Purchaser may at its own option, set off from any amounts due to the Contractor under the Contract.

50 Clause 6.1(c) expressly provides that the first defendant is entitled to be paid every month based on the actual value of the work it has properly executed on site in the preceding month. It is not disputed that the first defendant's progress payment for its final month on site has fallen contractually due.

51 The issue then is to determine the actual proportion of the Works that were completed by 9 October 2014. I begin by reiterating that I have accepted the second defendant's evidence that, although *most* of the outstanding items listed in the 9 October Email were variations, *some* of them were Works. It is therefore necessarily the case that the Works were not complete by 9 October 2014. The first defendant, in its own closing submissions, also relies on the second defendant's evidence that the outstanding items listed in the 9 October

Email were a combination of Works and variations. This implicitly accepts that some of the Works remained incomplete on 9 October 2014.[60]

52 The true quantum of the Works completed by 9 October 2014 must lie somewhere between 95.29% and 100%. However, the first defendant presented an all-or-nothing case that the Works were complete as of 9 October 2014. In particular, the first defendant did not plead or present an alternative case on the proportion of Works it had completed if the 9 October Email were to be found to refer to a combination of Works and variations.[61]

53 The burden of establishing the proportion of the Works actually completed by 9 October 2014 lies on the first defendant. I have no basis to find that, as at 9 October 2014, the first defendant had completed any Works beyond the 95.29% certified in COP 13.

54 The first defendant is therefore entitled to be paid as follows:

Comfort Contract price	$1,250,000.00
Value of 95.29% of the Works	$1,191,125.00
Less amount paid up to 9 October 2014	($1,185,686.73)
Balance due for the Works	$5,438.27
Add amount due for variations	$115,700.00
Total amount due for Works and variation	$121,138.27

60 First Defendant's Closing Submissions at para 45.

61 First Defendant's Closing Submissions at para 29.

55 I therefore dismiss the plaintiff's claim for overpayment and allow the first defendant's counterclaim in part, in the sum of $121,138.27.

Liquidated damages

The parties' cases

56 Clause 17 of Appendix A of the Lead Contract, as amended by cl 7 of Appendix B of the contract, entitles the plaintiff to recover liquidated damages at a rate of $500 per day during the period in which the Works remain incomplete:[62]

> **17. LIABILITY FOR DELAY**
>
> 17.1 Contractor shall diligently perform the Contract Works to ensure compliance with the Works Programme, and to complete the Contract Works on or before the Completion date subject always to extension granted by the Purchaser to the Contractor for any delay due to reasons or causes beyond the Contractor's control.
>
> …
>
> 17.3 Purchaser is entitled to recover from the Contractor liquidated damages agreed at [$500 per calendar day up to maximum of 15% of the Contract Price] during the period which the Contract Works remain incomplete and may, but shall not be bound to deduct such liquidated damages whether in whole or in part, from any monies due under the Contract at any time. The payment or deduction of such damages shall not relieve the Contractor from having to complete the Contract Works or from any other obligations and liabilities under the Contract.

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62 Statement of Claim (Amendment No 5) at para 17; Agreed Bundle of Documents, Vol 1, p20; Agreed Bundle of Documents, Vol 9, p5866.

57 The Temporary Occupation Permit ("TOP") for the Project was issued on 24 December 2014.[63] It is undisputed that the Comfort Contract stipulated that the Works were to be completed by 15 July 2014[64] and that no extension of time was either requested or approved.[65] From 24 December 2014 to 15 July 2014 is 162 days of delay. The plaintiff's case is that it is entitled to rely on cl 17.3 to recover liquidated damages of $81,000 from the first defendant, being liquidated damages for 162 days of delay at the rate of $500 per day.[66]

The liquidated damages clause is not a penalty clause

58 The first defendant submits that there was in fact no delay in completing the Works. And that even if there was delay, it was not caused by the first defendant but by the plaintiff's own failure to issue proper written instructions or drawings.[67] Moreover, given that the Works were complete by 9 October 2014, any liquidated damages should run up to 9 October 2014 and not to 24 December 2014.[68]

59 The first defendant pleads that liquidated damages of $500 per day "do not represent a genuine pre-estimate of loss and thus, [the liquidated damages clause is] void and unenforceable".[69] This puts in issue whether the liquidated

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63 Defence and Counterclaim (Amendment No 2) at para 41; Plaintiff's Opening Statement at para 30.

64 Statement of Claim (Amendment No 5) at para 12.

65 Notes of Evidence, 24 April 2019, p3(8) to 3(10).

66 Statement of Claim (Amendment No 5) at para 32.

67 Defence and Counterclaim (Amendment No 2) at para 13.

68 Defence and Counterclaim (Amendment No 2) at para 32B.

69 Defence and Counterclaim (Amendment No 2) at para 32C.

damages clause is enforceable as a penalty. But the first defendant did not pursue this issue in the evidence or in any of its submissions. The plaintiff submits that $500 is only 0.04% of the total contract price under the Comfort Contract and "is not extravagant nor unconscionable in amount in comparison with the greatest loss conceivable from a breach of the Subcontract". The plaintiff goes on to point out that besides a bare assertion, the first defendant "has not adduced any such evidence at trial and as such, failed to discharge its legal burden of proof".[70]

60 I accept the plaintiff's submissions. To the extent that the first defendant continues to take the point that the liquidated damages clause is unenforceable as a penalty, I find that it is not.

The plaintiff need not prove loss

61 I deal first with a preliminary point raised by the first defendant. The point is that the plaintiff is not entitled to liquidated damages given that the Comfort Contract is back-to-back with the Lead Contract and Lead imposed no liquidated damages on the plaintiff. In short, the argument is that the plaintiff has suffered no actual loss, even if delay is proven.[71]

62 This argument is without merit for two reasons. First, it misunderstands what a back-to-back contract entails. The term "back-to-back" is "not a term of art, even though it is a term found with some regularity in sub-contracts in the construction industry" (*GIB Automation Pte Ltd v Deluge Fire Protection (SEA)*

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70 Plaintiff's Closing Submissions at para 114.

71 First Defendant's Closing Submissions at para 97.

Pte Ltd [2007] 2 SLR(R) 918 at [35]). It is essentially a pragmatic term of incorporation, allowing a subcontract to use that phrase to incorporate the terms of the head contract. Despite these words of incorporation appearing in a subcontract, the subcontract and the head contract remain distinct contracts. The two contracts have distinct sets of parties and create two distinct sets of contractual rights and obligations.

63 Second, this argument also misunderstands the role of a liquidated damages clause in contracts and in construction contracts in particular. An enforceable liquidated damages clause does not cease to yield damages simply because the party seeking to rely upon the clause has, in fact, suffered no loss. The plaintiff's right to recover liquidated damages in accordance with the clause accrues when the contract is made and does not depend on proof of loss when the contract is breached. Therefore, whether Lead in fact imposed liquidated damages on the plaintiff is a *legally* irrelevant consideration and does not affect the plaintiff's right to recover liquidated damages from the first defendant under the Comfort Contract. After all, there could be any number of reasons for Lead not levying liquidated damages on the plaintiff under the Lead Contract which would have no bearing at all on the first defendant's liability to the plaintiff under the Comfort Contract. For example, Lead could have agreed to waive its right to liquidated damages against the plaintiff as a gesture of goodwill, as part of a compromise or as a calculated commercial decision in light of potential future dealings with the plaintiff.

The first defendant is liable for liquidated damages

64 For the reasons that follow, I find that the plaintiff is entitled to recover liquidated damages from the first defendant amounting to $81,000.

65 Mr Ram's evidence was that the first defendant had never received any complaints from the plaintiff or Lead about slow progress in the Works.[72] I do not accept this evidence. A chain of emails from 7 September 2013 to 27 August 2014 establishes that the plaintiff and Lead expressed concerns repeatedly to the first defendant about its ability to complete the Works in time.[73] When confronted with this chain of emails, Mr Ram conceded that they showed complaints about the first defendant's slow pace in carrying out the Works.[74] I also note that in an email dated 25 September 2014 to Mr Ram, the second defendant informed that "based on contract outstanding works still haven't completed yet and suppose to completed based on contract by 15th July 2014".[75] At trial, the second defendant confirmed that this referred to Works that remained incomplete as of 25 September 2014.[76]

66 It follows from my findings above at [53] that the first defendant did not in fact complete the Works by 9 October 2014. I accept the plaintiff's submission that this *prima facie* caused delay entitling the plaintiff to claim liquidated damages under cl 17.3 of the Lead Contract.

Variations not proven to be the cause of the delay

67 The first defendant submits in response that any delay in the first defendant completing the Works on time is attributable to the substantial and

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72 Natarajan Chidambaram's AEIC at para 42; First Defendant's Closing Submissions at para 83.

73 Agreed Bundle of Documents, Vol 1, p110 to 111; p213, p426, p552; Vol 2, p776.

74 Notes of Evidence, 17 April 2019, p97(12) to 97(13), p98(24) to 101(15).

75 Pintu Kumar Sarker's AEIC at p300.

76 Notes of Evidence, 24 April 2019, p2(14) to 2(25).

extensive variations that the plaintiff asked the first defendant to undertake, which were in turn triggered by variations which Lead asked the plaintiff to undertake. In total, Lead issued four variation orders to the plaintiff. I will refer to them by the abbreviations used at trial: (a) CVO1 valued at $50,000; (b) CVO2 valued at $50,000; (c) CVO3 valued at $260,000; and (d) CVO4 valued at $300,000. These are reflected in Lead's Statement of Final Account dated 8 April 2015.[77]

68 The first defendant submits further that the value of these variation orders in total is $660,000. They were coupled with a back charge of $86,606.41 to total almost $750,000. The price under the Lead Contract was only $1,500,000. The variation orders issued by Lead to the plaintiff amounted to almost 50% of the value of the Lead Contract. These must therefore be regarded as substantial variations which inevitably would have contributed to a delay in the first defendant completing the Works.[78]

69 I am unable to accept this submission. I agree with the plaintiff's submission made in the course of oral closings that the principles developed in the context of extensions of time, and in particular, the notion of criticality, are helpful in considering liability for delay.

70 Generally, only a supervening activity or an event which lies on the critical path will suffice to relieve a contractor of liability for delay. As set out in Chow Kok Fong, *Law and Practice of Construction Contracts*, vol 1 (Sweet

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77 Lew Sien Yen Wenda's AEIC at p309 to 313.

78 First Defendant's Closing Submissions at paras 94 to 95.

and Maxwell, 5th Ed, 2018) ("*Law and Practice of Construction Contracts*") at para 9.272:

> The critical path consists of the sequence of activities in a construction programme which determines the overall time taken to complete the project. Conceptually, a delay in respect of any [of] these activities would have the effect of prolonging the overall completion period for the project. Delays to activities which fall outside the critical path may be absorbed by 'float time' allowed in the scheduling of the programme so that it need not impinge on the completion date. Thus, on one view, where the concurrent delays just discussed are accounted for by two events, one lying on the critical path and the other falling outside the critical path, the delay in the non-critical path event may be ignored to the extent that it can be accommodated by the 'float time' allowed for in the construction programme.

71 It is the first defendant who asserts that the delay arose as a result of the variation orders. The burden is therefore on the first defendant to prove the variations are on the critical path, and hence were causally connected to the delay. However, the first defendant provided no delay analysis at all to establish this.

72 Moreover, the reasoning underlying the first defendant's submission is tenuous at best. I leave aside the issue of whether the variation works under the Lead Contract even affected the Works. The first defendant failed entirely to establish even this fundamental issue. I leave aside also the true value of CVO4 (which I consider in greater depth below). Even with these concessions, it requires a leap of logic to say that the variations were substantial variations simply because they totalled 50% of the Lead Contract's value. The relative value of variation works to the Lead Contract reveals little, if anything, about their delay-causing potency. That critical factor depends ultimately on the nature of the variations and the manpower and time required to carry them out. For example, the high value of CVO4 may be reflective of nothing more than

the high cost of the materials involved. Furthermore, I fail to see the relevance of factoring the value of CVO1 and CVO2 into the overall metric. This is because it was not the first defendant who carried out the works under CVO1 and CVO2 (see [135] below).

73 Relative value also fails to address the causal relationship between the variations and the delay occasioned to the Works. For example, if work on the variations could not commence until the first defendant completed the Works, then the variations quite clearly could not have caused the delay. Likewise, if the variations could have been carried out concurrently with the Works, that may – but will not necessarily – imply liability for delay. Another facet relates to the extent which the variations might have in fact delayed the completion of the original Works *ie,* the amount of additional time required. All these critical variables remain entirely unaddressed by the first defendant's broad-brush metric of proportionate value.

Start date for the delay

74 It is common ground that the first defendant did not ask the plaintiff for any extension of time.[79] As such, any delay in completion of the Works should run from 16 July 2014, the contractual completion date provided in Appendix D of the Lead Contract.

75 The inference I draw from the first defendant's failure to seek an extension of time is particularly adverse to the first defendant. If the first defendant was reasonably of the view that these variations might give rise to

[79] Notes of Evidence, 17 April 2019, p94(22) to 94(25).

any delay, it would be expected to seek an extension of time from the plaintiff. Alternatively, it would be expected to have sought a waiver of the plaintiff's rights under the liquidated damages clause. The first defendant, having been in the construction industry since 2008 and specialising in sheet metal fabrications, thermal installations, fire protections and air-conditioning ducting and mechanical ventilation works and having been involved in more than a dozen projects,[80] must surely not have been ignorant as to its rights and obligations under a construction contract.

Conclusion

76 As such, I allow the plaintiff's claim for liquidated damages arising from the first defendant's delay in completing the Works. For this purpose, I adopt the date of TOP as the *de facto* date of completion. The liquidated damages will therefore run as claimed for 162 days from 16 July 2014 to 24 December 2014, and amount in value to $81,000.

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[80] Notes of Evidence, 16 April 2019, p27(4) to 27(22).

The Defects Issue

77 The plaintiff's case on the Defects Issue is that Lead, by Lead's BC003 and BC004, imposed a back charge of the $86,606.41 on the plaintiff for costs incurred by Lead as a result of the first defendant's defective work.[81] The plaintiff therefore seeks to recover this sum under cl 18.4(a)(ii) of Appendix A of the Lead Contract, incorporated back-to-back into the Comfort Contract. That clause entitles the plaintiff to recover from the first defendant any cost or expense it incurs in engaging a third party to rectify the defendant's defective work:[82]

> **18. TERMINATION**
>
> …
>
> 18.4 The right of termination conferred by this clause shall be without prejudice to the Purchaser's other rights or remedies under the Contract and in law, and shall include, without prejudice to the generality of the foregoing:–
>
> (a) *All cost and expense of employing or engaging other persons to*
>
> i. complete the remaining Contract Works and any variations of such works;
>
> ii. *rectify all defective Contract Works and / or replacement of Contract Materials whether or not discovered and notified to Contractor pursuant to clause 10 above, or discovered after termination*; and
>
> iii. dismantling any temporary works or structure put up by Contractor, or removing any Contract Materials or Plants belonging to Contractor which Contractor has failed to

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81 Plaintiff's Opening Statement at para 55; First Defendant's Closing Submissions at para 31.2.

82 Agreed Bundle of Documents, Vol 9, p6007; Statement of Claim (Amendment No 5) at para 18.

> dismantle or remove notwithstanding the Purchaser's notice requiring him to do so; and …
>
> [emphasis added]

78 Clause 18.4(a)(ii) requires the plaintiff to establish: (a) that there were defects in the Works; and (b) that it incurred cost and expense in engaging a third party to rectify the defects. I assume without deciding that the plaintiff is entitled under this provision to recover a back charge which Lead imposes on the plaintiff under the Lead Contract. In particular, I assume without deciding that this provision – despite its express words – allows the plaintiff to recover even if the plaintiff did not itself incur any cost or expense in engaging a third party to rectify defects in the first defendant's work.

The first defendant's case

79 The first defendant's case is that it had, on more than one occasion, asked the plaintiff for a list of defects.[83] However, the plaintiff failed to provide a list and did not attend on site to inspect the Works.[84] Moreover, the first defendant points out that the plaintiff failed to adduce any evidence that Lead did in fact impose back charges on the plaintiff amounting to $86,606.41.

80 I begin by reiterating my observation at [62] above. The Comfort Contract and the Lead Contract are two legally distinct sets of contractual rights and obligations. Evidence that Lead imposed a back charge on the plaintiff is not a prerequisite to the plaintiff's right to recover under this provision. Likewise, Lead's failure to impose a back charge does not *ipso facto* extinguish

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83 Natarajan Chidambaram's AEIC at para 10.

84 Defence and Counterclaim (Amendment No 2) at para 14.

the plaintiff's right to recover under this provision. The same reasoning applies to the plaintiff's failure to notify the first defendant of the defects. Notice of defects is not a prerequisite to the plaintiff's right to recover under this provision.

The plaintiff's case

81 The key document on this issue is the email dated 8 April 2015 sent by Lead's Assistant Quantity Surveyor, Ms Hoo Yin Shi ("Ms Hoo"), to the plaintiff, enclosing the Statement of Final Account ("8 April Email"). However, the 8 April Email does not make any reference to the back charge alleged by the plaintiff. In the email, Ms Hoo says that the plaintiff's "Tax Invoice shall state the amount of S$347,413.52 after net [*sic*] off the Agreed Backcharges (BC001 & BC002)".[85] The attachment to the 8 April Email specifies this to be $13,196.25 for BC001 relating to the supply for duct workers and $2,645 for BC002 relating to the fine for hacking of plastered wall.[86]

82 The only reference to the figure of $86,606.41 is found in the attached Variation Order, CVO4, issued by Lead to the plaintiff on 8 April 2015. Yet, that figure is recorded as a "Lump Sum Discount" rather than as a back charge.[87] Ms Lew explained at trial that this figure in fact represented a consolidation of back charges BC003 and BC004 and came about as a result of a meeting with

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85 Lew Sien Yen Wenda's AEIC at p298.

86 Lew Sien Yen Wenda's AEIC at p302.

87 Lew Sien Yen Wenda's AEIC at p312.

Lead's representatives on 7 April 2015. However, she did not know why CVO4 describes the figure as a discount rather than as a "back charge".[88]

83 Moreover, Ms Lew could not point to any contemporaneous evidence to support the assertion in her affidavit that Lead had imposed net additional back charges amounting to $86,606.41 on the plaintiff.[89] She did point to Backcharge Notification BC003 dated 28 October 2014 amounting to $48,403.50.[90] But this clearly fails to account for a sum of $38,197.91 out of the $86,606.41. As for BC004, Ms Lew claimed that Lead did not provide a copy of this back charge after the final settlement. Although it was raised at the meeting on 7 April 2015, Lead subsequently refused to accede to her requests for a copy.[91] Ms Lew also conceded that if there was any defective work, there was no evidence that notice was given to the first defendant to rectify it.[92]

The second defendant's evidence

84 On the other hand, the second defendant's evidence was that the "Lump Sum Discount" in CVO4 was not a consolidation of BC003 and BC004.[93] He testified further that he had rejected Lead's BC003 on behalf of the plaintiff on 19 January 2015.[94]

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88 Notes of Evidence, 11 April 2019, p91(20) to p93(3).

89 Notes of Evidence, 11 April 2019, p88(1) to 88(11).

90 Lew Sien Yen Wenda's AEIC at p1899 to 1900.

91 Notes of Evidence, 11 April 2019, p131(24) to 132(4).

92 Notes of Evidence, 11 April 2019, p89(6) to 89(9).

93 Notes of Evidence, 24 April 2019, p55(8) to 55(17).

94 Agreed Bundle of Documents, Vol 3, p1648.

85 It is telling that in the email disputing BC003, the plaintiff's own position (as taken by the second defendant on its behalf) was that the alleged defects were not the result of the first defendant's failures, but were due to Lead's own actions.

86 The second defendant further denied that the back charge resulted from any delay by the first defendant.[95]

My findings

87 I accept the second defendant's evidence and reject Ms Lew's. The plain text of CVO4, recording this figure as a "Lump Sum Discount", contradicts Ms Lew's evidence. Given that BC001 and BC002 were reflected in the 8 April Email, the failure to refer to BC003 and BC004 is a strong indication that Lead did not impose them in the first place. Ms Lew did not point to any contemporaneous evidence indicating that she had made a request for a copy of BC004 after the final settlement. And if she had made such a request, I am unable to understand why Lead would have refused it. The plaintiff has also not adduced any evidence suggesting the nature of these defects as well as the costs incurred in rectifying them.

88 I am therefore not satisfied that the plaintiff has proven its entitlement to recover under cl 18.4(a)(ii) of the Lead Contract. I therefore dismiss the plaintiff's claim for back charges amounting to $86,606.41. This means that any claim that the plaintiff might advance for the smaller sum of $15,841.25 for the back charges reflected only in BC001 and BC002 is also dismissed. It is the

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95 Notes of Evidence, 24 April 2019, p53(24) to 54(15).

plaintiff's pleaded case that this smaller sum is already accounted for in the figure of $1,185.686.73 which the plaintiff paid to the first defendant up to 9 October 2014.[96]

The Variation Orders Issue

VO1

89 It is undisputed that, in August 2014, the plaintiff accepted a quotation from the first defendant and awarded it VO1 for additional works at an agreed value of $130,000.[97] VO1 related to levels two and three of the Commercial Block[98] and was a subset of the works covered by CVO3, the variation order issued by Lead to the plaintiff.[99] By 2 September 2014, Progress Claim No 1 certified that 80% of the works under VO1 had been completed.[100]

90 The first defendant's case is that it completed all the works comprised in VO1. It was therefore entitled to be paid the full $130,000. However, in breach of contract, the plaintiff has paid the first defendant only $115,700 for VO1. The first defendant relies on Lead's COP 13 issued to the plaintiff which records that CVO3 was 100% complete as at 15 September 2014.[101] The first defendant therefore claims the outstanding sum of $14,300.[102]

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96 Statement of Claim (Amendment No. 5) at para 29.

97 Wu Meng Chong's AEIC at p302; Statement of Claim (Amendment No 5) at para 10; Agreed Bundle of Documents, Vol 15, p10716; Wu Meng Chong's AEIC at p303.

98 Mark Alexander McGeoch's AEIC at p27, para 4.4.2.

99 Notes of Evidence, 24 April 2019, p25(24) to 26(6).

100 Wu Meng Chong's AEIC at p305.

101 Pintu Kumar Sarker's AEIC at p413; First Defendant's Closing Submissions at para 123.

91 The plaintiff argues that the first defendant admitted in Payment Claim 12 ("PC 12"), which formed the basis of the AD, that only the VO2 sums were allegedly left unpaid, thereby impliedly admitting that VO1 works were fully paid.[103] This, the plaintiff asserts, is substantiated by Mr McGeoch's expert report finding that the value of VO1 should at best amount to $115,700. This is in line with the plaintiff's assessment in Payment Claim 11 ("PC 11") and also corresponds to the first defendant's claim in PC 12.[104] Hence, there is nothing due to the first defendant for VO1.

92 At the outset, I do not accept that the first defendant's claim in PC 12 amounts to an admission precluding it from claiming a further payment on VO1 works. It is undisputed that the price of VO1 was $130,000. It is equally undisputed that the plaintiff paid the first defendant only $115,700 for VO1.[105] The plaintiff does not suggest that PC 12 has raised any sort of estoppel against the first defendant and in favour of the plaintiff. In the absence of an estoppel, there is nothing to preclude the first defendant from claiming the outstanding $14,300 now.

93 The plaintiff also does not suggest that Lead's certification CVO3, which comprises VO1 downstream, was not accurate. Indeed, in cross-examination, Mr McGeoch accepted that the first defendant should in fact be allowed to recover the balance under VO1 in light of Lead's certification:[106]

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102 Statement of Claim (Amendment No 5) at para 43.

103 Reply and Defence to Counterclaim (Amendment No 3) at para 24.

104 Mark Alexander McGeoch's AEIC at p28, para 4.4.8.

105 Notes of Evidence, 12 April 2019, p48(16) to 48(21).

106 Notes of Evidence, 15 April 2019, p14(6) to 15(15).

Q: I refer you to sections 4.4.1 and 4.4.2 of your report. Here you say that OGSP's VO1 formed part of the sum of the 260,000, being the VO3 awarded by Lead to Comfort. Agree?

A: Agreed.

Q: If you refer back to Pintu's affidavit at page 413 –

A: Yes.

Q: – you can see under VO3 that –

A: Yes, I've got that.

Q: – Lead has certified 100 per cent completion. Do you have that?

A: Yes.

Q: So it must mean that, as of 15 September 2014, OGSP had achieved 100 per cent completion of VO1. Agree?

A: Agreed.

Q: So there's really no basis for you to allow the sum of 115,700 for VO1; correct?

A: My figure was based on the contemporaneous information at the time.

Q: So OGSP should be entitled to claim for the entire amount of $130,000 for this VO1. Agree?

A: Yes.

94 Given Mr McGeoch's own concession that his figure was based only on information available to him at the time and did not take into account Lead's certification, I allow the first defendant's counterclaim for the outstanding amount of $14,300 under VO1.

VO2

The first defendant's case

95 The first defendant contends that it is entitled to the sum of $621,828.73 under VO2 for work carried out at the Commercial Block.[107] The quantum of this claim is evidenced by a tax invoice which the first defendant issued to the plaintiff on 29 June 2016.[108] The plaintiff is obliged to pay because the second defendant, as the plaintiff's project manager, instructed the first defendant to carry out this work.[109] The second defendant gave these instructions either orally or in the form of written drawings, in both cases accompanied by a promise to pay.[110] The written drawings may be found as part of PC 12[111] as well as drawings issued by the second defendant to the first defendant.[112] The first defendant's case is that it completed the variation works under VO2 sometime in September 2014.[113]

96 The variations comprised in VO2 are broken down in an email which Mr Ram sent to the second defendant.[114] These variations were remedial works

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107 Natarajan Venkatesh's AEIC at para 61; Natarajan Chidambaram's AEIC at para 13; Notes of Evidence, 17 April 2019, p17(13) to 17(17); First Defendant's Defence and Counterclaim at paras 45 and 46; First Defendant's Reply Closing Submissions at para 23.

108 Natarajan Chidambaram's AEIC at p1033.

109 First Defendant's Closing Submissions at para 128.

110 First Defendant's Opening Statement at para 25; Natarajan Chidambaram's AEIC at para 21; Notes of Evidence, 16 April 2019, p100(16) to 101(7).

111 Lew Sien Yen Wenda's AEIC at p981 to 982.

112 Natarajan Chidambaram's AEIC at p569, p815 to 817, p1095 to 1112.

113 First Defendant's Closing Submissions at para 135.

114 Natarajan Chidambaram's AEIC at p1119.

requiring the first defendant to dismantle and dispose of existing ducts and to fabricate and install replacement ducts.[115]

97 Additionally, as Lead had paid the plaintiff a total sum of $560,000 for additional or variation works under Certificate of Payment No 14R1 dated 13 March 2015 ("COP 14") for CVO3 and CVO4, the back-to-back nature of the Comfort Contract means that there is no reason for the plaintiff to dispute the first defendant's entitlement to recover the sum owing under VO2.[116] The first defendant's implicit position is that variation works carried out under VO2 were part of CVO3 and CVO4.[117]

98 The first defendant's case is also supported by the fact that the adjudicator accepted the claim for VO2. This was upheld by the Court of Appeal in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort v OGSP (CA))*.[118] Finally, the first defendant asserts that the particulars of the first defendant's claim under this head have been consistent since 1 October 2014, as evidenced by the email sent from Mr Ram to the second defendant on 1 October 2014 ("1 October 2014 Email").

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115 First Defendant's Closing Submissions at para 129.

116 First Defendant's Opening Statement at para 26; Natarajan Chidambaram's AEIC at para 52.

117 First Defendant's Closing Submissions at paras 145 and 146.

118 First Defendant's Reply Closing Submissions at paras 55 to 57.

The plaintiff's case

99 The plaintiff argues that the first defendant is not entitled to any sums in respect of VO2 because:[119] (a) the Comfort Contract mandates written instructions for a valid variation and there was no quotation and purchase order issued in the same manner as for VO1;[120] (b) the second defendant failed to adduce any evidence that the variations under VO2 were in fact carried out and completed;[121] (c) the fact that Lead paid Comfort for variation orders CVO3 and CVO4 does not excuse the first defendant from having to prove that it carried out the VO2 works;[122] and (d) there is an unexplained discrepancy between the first defendant's claimed amount of $621,828.73 in its defence and $665,358.01 in Mr Ram's affidavit of evidence in chief[123] as well as the amount of $737,582.73 that it claimed in PC 12 for VO1 and VO2 which formed the basis of the AD.[124]

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119 Plaintiff's Closing Submissions at para 52.

120 Plaintiff's Opening Statement at para 39; Statement of Claim (Amendment No 5) at para 49(c); Notes of Evidence, 16 April 2019, p66(3) to 66(13); Plaintiff's Closing Submissions at para 56.

121 Statement of Claim (Amendment No 5) at para 49(c).

122 Plaintiff's Opening Statement at para 42.

123 Natarajan Chidambaram's AEIC at para 13.

124 Natarajan Chidambaram's AEIC at p24; Plaintiff's Closing Submissions at para 54.

The two-stage approach

100 The court undertakes a two-stage approach to a variation claim. As the learned author of *Law and Practice of Construction Contracts* at para 5.008 puts it:

> The establishment of a variation claim may be conveniently described as a two stage process. *First a claimant has to show that a valid instruction has been issued for the variation.* The instruction has to be issued by a person who has been specifically authorised by the contract for this purpose and, where it entails work in respect of which additional payment is sought, it has to be issued on terms which carry an express or implied promise that the claimant would be paid for the varied work. *Second, it has to be established that the work ordered falls within the definition of 'variation' as intended by the contract.* In most cases, this means that the claimant has to demonstrate that the item of work either changes the scope of work to which the original contract sum relates or, alternatively, it is work which is of a different character or has to be executed under different conditions from that originally envisaged. [emphasis added]

101 VO2 constituted variation works within the meaning of the Comfort Contract. The second defendant confirmed this at trial.[125] Hence, I shall proceed to consider whether the contractual requirements for the first defendant to recover have been satisfied.

102 The fact that Lead paid the plaintiff $560,000 for CVO3 and CVO4 does not discharge the first defendant's burden of proving that it carried out VO2. As I have said above at [62], the Comfort Contract and the Lead Contract are distinct contracts with distinct rights and distinct obligations. The burden rests on the first defendant to make out its right under the Comfort Contract to recover its claim on VO2. Relying on Lead's payments for CVO3 and CVO4 as

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125 Notes of Evidence, 23 April 2019, p68(1) to 71(11), p74(2) to 75(2).

evidence that the first defendant should be paid for VO2 presupposes that VO2 falls within CVO3 and CVO4. This is however, disputed. The first defendant must also prove that the conditions precedent for a valid variation under the Comfort Contract are satisfied.

103 Similarly, the Court of Appeal's decision in *Comfort v OGSP (CA)* is of no assistance to the first defendant. The question there was the interpretation of s 17(3) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) and the grounds on which the AD could be set aside. In upholding the adjudicator's award, the Court of Appeal merely upheld the interim finality of the adjudicator's award. The finding does not touch in any way on the ultimate merits of the underlying claim.

The writing requirement

104 The appropriate starting point is cl 11 of Appendix A of the Lead Contract, as amended by cl 5 of Appendix B of the contract. This provision sets out a detailed contractual mechanism for the approval and valuation of variations:[126]

> **11. VARIATION OF THE WORKS**
>
> 11.1 The Contractor shall not alter any of the Contract Works except as approved by the Purchaser, but *the Purchaser shall have the right from time to time during the execution of the Contract Works to request the Contractor by notice in writing to alter, omit (with a corresponding deduction in Contract Price), add or otherwise vary any part of the Contract Works* after consultation with the Contractor without invalidating the Contract, but within the limits of the Contract Price, and the Contractor shall carry out such variation and be bound by the

126 Statement of Claim (Amendment No 5) at para 16; Agreed Bundle of Documents, Vol 9, p6005, 6016 and 6017.

same conditions as far as applicable as though the said variations would in the opinion of the Contractor involve a claim for additional payment, *the Contractor shall before proceeding therewith notify the Purchaser thereof in writing and obtain the Purchaser's approval beforehand.* In the event the variation involved a reduction of contractor's original work scope, the contractor shall not be entitled to claim for loss of profit whatsoever as a result of the scope of work being reduced.

11.2 During the progress of the works at the site, the Purchaser may from time to time require the works and/or services to be rendered by the Contractor, subject to an order for the extra work and the cost thereof shall be calculated and determined by the Purchaser in accordance with the rates specified in the Schedule Of Rates or based on man-hour rates as agreed in the contract. … provided that no payment shall be made for any additional work unless the Purchaser's specific instruction (either an order or substitute thereof) in writing has been issued to the Contractor. The Contractor shall provide relevant supporting documents to justify the proposed cost for Purchaser's review and approval.

11.3 *The Purchaser may, before confirming in writing to the Contractor the variation works, require a written quotation by the Contractor for any proposed variation and the contractor shall be obliged to submit such a written quotation at his own costs within such period as required by the Purchaser. …*

11.4 In no case shall any properly instructed variation works be refused, delayed or suspended by the Contractor. Any disagreement on prices shall be resolved at the final account stage. Payment for variations properly certified shall be paid as part of the interim payment and subject to Conditions of this Contract. In the event of any dispute, including disagreement on prices, the Contractor shall nevertheless commence, continue and complete the performance of the variation works.

…

11.7 All variation works shall be subjected to approval of the Main Contractor/Client on the back-to-back basis and the Purchaser shall reserve the rights in determines the entitlement of such additional payment in respect of any variation claim may due to the Contractor. The Contractor shall supply sufficient particulars to substantiate the whole of the said variation claim to the satisfaction of the Purchaser. The Purchaser may reject the variation claim if in any case of the insufficient substantiation from the Contractor.

[emphasis added]

105 Clause 11.1 requires some form of writing as a condition precedent for the first defendant's right to claim payment for a variation. Further, cl 11.3 allows the plaintiff to require the first defendant to submit a written quotation for any proposed variation within a specified period of time before confirming in writing its instructions to carry out the variation. For example, as stated at [89] above, the first defendant followed this procedure for VO1 by submitting a quotation which the plaintiff accepted.

The evidence

106 The first defendant bases its claim for VO2 on three sets of documents exhibited to Mr Ram's affidavit of evidence in chief which it says brings its claim within cl 11.1 of the Lead Contract. The first document is a spreadsheet detailing the nature, description, location and quantity of the alleged variations which it submitted to the plaintiff attached to the 1 October 2014 Email. In that email, Mr Ram informed the second defendant that attached were the "variation work details. This is not the final list, we are still working on the balance".[127] This spreadsheet was also included as part of the first defendant's written submissions for the AD in June 2016.[128] Second, the first defendant relies on documents which it describes as handwritten sketches or drawings prepared by the first defendant's site supervisors ("Drawings A").[129] Finally, the first

127 Natarajan Chidambaram's AEIC at p1119 to 1132; First Defendant's Closing Submissions at para 134.

128 Natarajan Chidambaram's AEIC at p1134 to 1145.

129 Natarajan Chidambaram's AEIC at p1095 to 1112, 1146.

defendant relies on handwritten drawings that it alleges were prepared by the second defendant ("Drawings B").[130]

107 The plaintiff's defence is simply that the first defendant has failed to adduce any evidence to show that the plaintiff issued a written instruction to the first defendant to carry out VO2. None of the three categories of documentary evidence relied on by Mr Ram contain any request from the plaintiff to the first defendant akin to the purchase order issued for VO1. The conditions precedent for the first defendant to claim payment for a variation under cl 11.1 has not been complied with. The first defendant's claim for VO2 must fail.[131]

My findings

108 I accept the plaintiff's submission. On its very face, the spreadsheet in Mr Ram's affidavit of evidence in chief, which is attached to the first defendant's 1 October 2014 Email, cannot be a written instruction from *the plaintiff* within the meaning of cl 11.1 of the Lead Contract. This does not require any further analysis.

109 I also find that neither Drawings A nor Drawings B are a written instruction from the plaintiff within the meaning of cl 11.1.

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130 Natarajan Chidambaram's AEIC at p569, p719 to 720, p724 to 725, p796 to 797, p809 to 810, p815, p817; Lew Sien Yen Wenda's AEIC at p836, p982 to 984, p935; Agreed Bundle of Documents, Vol 1, p728 to 736, p746 to 748; Notes of Evidence, 11 April 2019, p39(6) to 41(5); Notes of Evidence, 23 April 2019, p76(21) to 80(1), p92(10) to 92(20).

131 Plaintiff's Closing Submissions at para 57.

110 First, Drawings A were not prepared by the second defendant. As Mr Ram testified, these drawings were prepared by the first defendant's site supervisors. They plainly cannot constitute a written instruction *from the plaintiff* as cl 11.1 requires. I also note that, given the importance placed on these drawings by the first defendant, it is curious that Drawings A supposedly in support of VO2 were not part of the bundle of documents submitted by the first defendant as part of PC 12 submitted on 16 March 2017.[132] Drawings A are in fact as-built drawings that have been marked up by the first defendant after the plaintiff disclosed them in this action on 3 October 2017.[133] The markings on the drawings were made by Mr Ram along with his site supervisors and were initially done in red on pieces of paper before being transcribed onto the as-built drawings.[134] Yet, none of these sketches, red markings or the documents that the first defendant's on-site supervisors allegedly had on site to mark-up were disclosed in this action.[135]

111 Second, in respect of Drawings B, it is not even clear in the first place that the second defendant prepared these drawings. There is even doubt as to the significance of Drawings B. Indeed, in his cross-examination, the second defendant disavowed them. He testified instead that the drawings were prepared by the first defendant's on-site supervisors and stated unequivocally that the handwriting on the drawings was not his:[136]

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132 Natarajan Chidambaram's AEIC at p1095 to 1112; Notes of Evidence, 17 April 2019, p11(6) to 11(16).

133 Notes of Evidence, 17 April 2019, p15(15) to 15(23).

134 Notes of Evidence, 17 April 2019, p13(3) to 14(2).

135 Notes of Evidence, 17 April 2019, p16(9) to 16(14).

136 Notes of Evidence, 23 April 2019, p76(16) to 77(19).

> Q: According to my clients, they say that on site, you had instructed them by word of mouth or by handwritten drawings to carry out the variation works. Do you agree?
>
> A: Disagree.
>
> Q: I refer you to Ram's affidavit volume 2, page 736. Ram's affidavit is found at volume 5, tab 6.
>
> A: Yes.
>
> Q: Can you turn to page 736.
>
> A: Yes.
>
> Q: My client's instruct [*sic*] that the page at 736 was actually given to them by you.
>
> A: No.
>
> Q: And that at site you had actually issued and handed it over to either Win or Ram. Do you agree?
>
> A: No.
>
> Q: *So is it your evidence that you have no idea where this page came from?*
>
> A: This is the order paper. *Site supervisor*, normally this – OGSP, Ram sometime come on site, sometime not. Then because I every day morning after the (unclear) meeting finished, site supervisor, they draw this paper as per the shop drawing and they pass to me. The work flow, to get there faster, I email to sometime their supplier and cc to them. Actually, this drawing from the site supervisor. *It's not draw* [*sic*] or *written by me.*
>
> [emphasis added]

112 I accept the second defendant's evidence that these drawings were prepared by the first defendant's site supervisors. The second defendant named those site supervisors in his evidence.[137] These documents bear those same names and the site supervisors' contact numbers at the top.[138] The mere fact that

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137 Notes of Evidence, 23 April 2019, p96(20) to 97(4).

138 Notes of Evidence, 23 April 2019, p97(5) to 97(10).

Drawings B were attached to the second defendant's emails does not mean that these drawings were prepared by the second defendant. As he explained, the work conditions on site were such that the first defendant's site supervisors gave the second defendant the drawings so that he could order the materials expeditiously.[139]

113 I also observe that the first defendant could have called its site supervisors to give evidence at trial to testify that it was the second defendant who prepared these drawings and that they considered these drawings to be written instructions from the plaintiff to carry out VO2. However, the first defendant chose not to do so and offered no explanation for failing to do so.

114 Moreover, the second defendant explained that these were not actually drawings, but rather, order papers for materials.[140] Counsel for the first defendant suggested to the second defendant in cross-examination that that could not be correct: if the first defendant already had shop drawings, it would not require sketches to order materials. The second defendant responded that sketches were still required. This was corroborated by Ms Lew in cross-examination. She also described these drawings as in fact, order chits laying out dimensions of ducts to be ordered.[141]

115 That Drawings B are unlikely to be evidence of a written instruction from the plaintiff to the first defendant is also bolstered by Ms Lew's testimony that it was unclear whether these drawings relate to the Works or to VO2. The

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139 Notes of Evidence, 23 April 2019, p93(9) to 93(16).

140 Notes of Evidence, 23 April 2019, p95(13) to 95(17).

141 Notes of Evidence, 11 April 2019, p39(6) to 41(5).

sketches were of a short piece of ductwork and it was difficult to identify where it belonged.[142]

116 Moreover, Mr Ram also candidly testified that VO2 was not supported by documentation similar to that which supported VO1 even though it was within the power of the first defendant to issue a quotation for the VO2 works:[143]

> Q: You confirm that for VO2 we don't see a quotation from OGSP to Comfort, nor do we see one from Comfort to OGSP; correct?
>
> A: Correct.
>
> Q: I understand that you cannot force Comfort to issue you a purchase order, right, must be because it's not within your control, yes?
>
> A: Yes.
>
> Q: *But the quotation is certainly within your control; correct?*
>
> A: *Yes.*
>
> Q: *But no quotation was ever issued for VO2 by OGSP; correct?*
>
> A: *Yes.*
>
> [emphasis added]

117 I therefore accept the plaintiff's submission that none of the three categories of documents relied upon by the first defendant is a written instruction within the meaning of cl 11.1 of the Comfort Contract.

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142 Notes of Evidence, 11 April 2019, p40(5) to 40(25).

143 Notes of Evidence, 17 April 2019, p73(18) to 74(6).

Waiver

118 This is however not the end of the matter. In *Comfort v OGSP (CA),* the Court of Appeal cited *Law and Practice of Construction Contracts* with approval and highlighted that there may be situations where non-compliance with the express terms of a contract might not bar a claim (at [89]):

> The effect of contractual provisions such as those cited here is that, except for situations which have been specifically exempted, a written variation order serves as a condition precedent for payment of the variation work. If a contractor ignores the requirement for a written variation order, as a general principle, he cannot be found to complain subsequently if he is not paid for the varied work, nor can he contend that he should be paid a reasonable sum for the work merely on the premise that the employer had the benefit of the variation work. However, in a suitable situation, the employer may be estopped by his conduct from denying liability to pay notwithstanding the non-compliance with the formalities stipulated in the contract.

119 In the absence of a written instruction for VO2, the first defendant bears the risk of not being able to recover under it (*Comfort v OGSP (CA)* at [90]). In this respect, the first defendant argues that the plaintiff by its actions waived the condition precedent of a written instruction[144] for a variation because the parties invariably carried out, certified and paid for variations without written instructions. The usual sequence of events was that Lead would orally instruct the plaintiff to carry out a variation. The plaintiff, through the second defendant, would then orally instruct the first defendant to carry out the variation. After carrying out the variation, the first defendant would mark the variation on the drawings and the second defendant would verify the variation with Lead. Evaluation and certification would follow.[145]

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144 First Defendant's Reply Closing Submissions at para 27.

145 First Defendant's Closing Submissions at paras 140 and 141.

120 The Court of Appeal in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 made clear that a waiver by election requires a party to a contract making a clear and unequivocal choice between two inconsistent rights (at [54]):

> This doctrine concerns a situation where a party has a choice between two inconsistent rights. *If he elects not to exercise one of those rights, he will be held to have abandoned that right if he has communicated his election in clear and unequivocal terms to the other party*. He must also be aware of the facts which have given rise to the existence of the right he is said to have elected not to exercise. Once the election is made, it is final and binding, and the party is treated as having waived that right by his election: see *The Kanchenjunga* at 397–398, which was approved by this court in *Chai Cher Watt v SDL Technologies Pte Ltd* [2012] 1 SLR 152 at [33]. [emphasis added]

121 The first defendant relies on Mr Wu's and Ms Lew's evidence that it might have been possible for the first defendant to have commenced variation works *before* a purchase order was issued.[146] In other words, it was unnecessary for the plaintiff to obtain formal confirmation from Lead first, and then obtain a quotation from the first defendant and then issue a purchase order to the first defendant. In particular, the first defendant highlights the following course of dealing in support of this assertion:

(a) **VO1**: It would not be possible for 80% of the VO1 works to be completed by 2 September 2014[147] in response to a purchase order issued on 21 August 2014 *ie,* within 12 days.[148] The first defendant submits that the only plausible explanation, in light of the lead time required to

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146 Notes of Evidence, 10 April 2019, p40(25) to 41(3).

147 Wu Meng Chong's AEIC at p305.

148 Wu Meng Chong's AEIC at p303.

procure materials and to arrange manpower, is that the VO1 works commenced *before* the plaintiff issued the purchase order. Despite this, Mr Wu insisted that there must still be a written instruction from Lead to the plaintiff, before the plaintiff instructs the first defendant to proceed with the variation works.[149]

(b) **Additional Ducting Works:** These works were carried out pursuant to a Field Instruction ("FI") issued by Lead to the plaintiff dated 29 October 2014.[150] However, the plaintiff issued a quotation for the works to Lead only on 17 March 2015, almost five months after the FI.[151]

(c) **Additional Fire Rated Board and Plenum Boxes**: These works were carried out pursuant to an FI dated 21 November 2014.[152] However, the plaintiff issued a quotation for the works to Lead only on 17 March 2015, almost five months after the FI.[153]

(d) **CVO4**: Part of these works, amounting in value to $43,702.83, were carried out pursuant to FIs issued by representatives of Lead between 8 October 2014 and 15 January 2015 and were completed before quotations were issued on 17 March 2015 to regularise them.[154]

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149 Notes of Evidence, 10 April 2019, p43(7) to 43(13).

150 Lew Sien Yen Wenda's AEIC at p264 to 267.

151 Lew Sien Yen Wenda's AEIC at p268.

152 Lew Sien Yen Wenda's AEIC at p271.

153 Lew Sien Yen Wenda's AEIC at p272.

154 Lew Sien Yen Wenda's AEIC at p292; Notes of Evidence, 11 April 2019, p45(12) to 49(13).

122 Further, in cross-examination by the first defendant, the second defendant was referred to the plaintiff's email dated 13 September 2014 to Lead seeking approval for "all additional works" as "we had carry [*sic*] out additional works and most of the additional works already completed".[155] The second defendant agreed that this meant that, although Lead had not yet given formal approval, the first defendant had carried out the variation works. In other words, this was a case in which the first defendant carried out variation works before its quotation was approved.[156]

123 In cross-examination Mr Ram stated the process for a variation order was that the first defendant would issue a quotation followed by the plaintiff's purchase order. This was in fact the process for VO1.[157] In re-examination however, Mr Ram clarified that the second defendant would sometimes give an instruction on a drawing. The first defendant would then carry out the work and mark it in a drawing and then get the second defendant to verify the works. Only upon verification would the second defendant submit the quotation, which would be followed by a purchase order and then an invoice.[158]

124 The plaintiff rebuts this by arguing that the first defendant has merely shown that there was a quotation from the plaintiff to Lead, but has not pointed to any quotation from the first defendant or a purchase order issued to the first defendant. Additionally, in respect of CVO4, the plaintiff points to Ms Lew's clarification in re-examination that certain facets of the variations were required

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155 Agreed Bundle of Documents, Vol 2, p834.

156 Notes of Evidence, 23 April 2019, p100(3) to 100(20), p42(5) to 43(23).

157 Notes of Evidence, 17 April 2019, p73(13) to 73(17).

158 Notes of Evidence, 17 April 2019, p104(3) to 104(13).

to be completed only by 25 March 2015 and thus the quotations issued by the plaintiff to Lead on 17 March in fact preceded it.[159]

125 At trial, the second defendant was adamant that he did not give any oral instructions to the first defendant to carry out variation works and that he did not consider himself to have any authority to instruct the first defendant to carry out variation works.[160]

126 I do not accept that the plaintiff waived the condition precedent of an instruction in writing before its liability to pay the first defendant for a variation under cl 11.1 is engaged. While there is some evidence of a high degree of informality in how the parties dealt with variations in performing both parties' obligations under the Comfort Contract, there is no evidence that in respect of VO2 *specifically*, the plaintiff waived the condition precedent of a written instruction, much less in clear and unequivocal terms. That finding is sufficient to dispose of the first defendant's contractual claim on VO2.

Quantum meruit

127 My rejection of the first defendant's contractual claim for VO2 does not leave the first defendant without recourse. As the learned author of *Law and Practice of Construction Contracts* states at para 5.019:

> As a general principle, it is clear that two consequences flow from an invalid variation order. First, the contractor cannot be compelled to comply with the order; he can in effect disregard it entirely. Indeed, there is some authority to suggest that rigorous insistence by the employer that the contractor has to comply with the variation order may entitle the contractor to

159 Notes of Evidence, 11 April 2019, p133(17) to 135(7).

160 Notes of Evidence, 23 April 2019, p78(19) to 78(23).

> treat the employer as repudiating the contract. Secondly, if the contractor elects to comply with the order and executes the variation work ordered therein, there is no corresponding contractual obligation on the part of the employer to pay for such work, although a contractor may, in an appropriate situation, attempt to recover in *quantum meruit*.

The first defendant thus alternatively relies on a *quantum meruit* claim for an award of a reasonable sum for VO2.[161]

128 In *Eng Chiet Shoong and others v Cheong Soh Chin and others and another appeal* [2016] 4 SLR 728, the Court of Appeal summarised the alternative approaches towards the award of a reasonable sum for work done by a claimant (at [41]):

> To ***summarise***, perhaps the most practical and commonsensical approach is to look to the *substance* rather than the form. In this regard, it is clear that there are two alternative approaches toward the award of a reasonable sum for work done by a plaintiff. The first is *contractual* in nature and can be premised on the basis of either an implied contract *or* an implied term (depending on the precise facts before the court). The second is premised on *restitution or unjust enrichment* (the more historical basis being that of *quasi-contract*). The first will take precedence over the second. From a *terminological* perspective, it might be more appropriate – particularly when viewed from *an historical perspective* – to reserve the use of the term '*quantum meruit*' only for the second (*ie*, restitutionary) basis, whilst referring to the first (*ie*, contractual) basis simply as recovery pursuant to 'contract' (whether by way of an implied contract or an implied term). This last-mentioned approach was, in fact, adopted in *Yip & Goh*.
>
> [emphasis in original]

129 Although the first defendant did not expound upon the basis for its *quantum meruit* claim, it is apparent that it cannot be premised on a contractual

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161 First Defendant's Defence and Counterclaim at para 49.

ground. This is because the express terms of the Comfort Contract (by incorporating the Lead Contract's terms) stipulate writing as a condition precedent for the first defendant's right to claim payment for a variation. It is not therefore possible to imply a term into the Comfort Contract entitling the first defendant to reasonable remuneration for variation work carried out without satisfying the condition precedent. That would run contrary to the express terms of the Comfort Contract and would not satisfy the traditional "business efficacy" and "officious bystander" tests (see *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193). The first defendant's claim can thus only be premised on a restitutionary ground.

130 I accept that the first defendant did carry out at least part of VO2 before it withdrew from the site on 9 October 2014. The benefit of those works on and from 9 October 2014 accrued to the plaintiff, as it has been paid by Lead for those works. I have found that the first defendant is not contractually entitled to recover payment for VO2, either under the express terms of cl 11.1 or by reason of the plaintiff's waiver of the condition precedent for recovery under that clause. I am therefore satisfied that the conditions for the first defendant to recover a *quantum meruit* have been made out. It then falls to me to decide the value of the first defendant's work under VO2.

Value of works

131 I proceed to consider the scope and value of VO2 and how much of these variations the first defendant completed. Unfortunately, because both parties presented all-or-nothing cases,[162] the evidence on this is not entirely satisfactory.

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162 First Defendant's Closing Submissions at para 159.

132 The first defendant argues that VO2 was completed sometime in September 2014 and that it is entitled to be paid the full $621,828.73.[163] Its position is that CVO3 and CVO4 certified by Lead in fact reflect and contain the VO2 works.[164] This was confirmed by Mr Ram at trial:[165]

> Q: So what you seem to be saying, and I want to be very clear here and make sure that I do not misrepresent what are you trying to say. So you listen to me very carefully.
>
> Am I right that you are saying that *everything that is listed in CVO4* given by Lead to Comfort is actually the work that OGSP did and is now claiming as VO2?
>
> A: *Yes.*
>
> [emphasis added]

133 The plaintiff argues that the first defendant has failed to adduce sufficient evidence to show that the value of VO2 was in fact $621,828.73. The plaintiff points to the inconsistent positions taken by the first defendant on VO2, as well as the fact that the works alleged by Mr Ram in his affidavit of evidence in chief as falling within the scope of VO2 are not consistent with the list of works under CVO3 and CVO4.[166] Additionally, some of the works contained in CVO4 include works done pursuant to FIs that were issued only after the first defendant had withdrawn on 9 October 2014 and several quotations were issued for these works after 9 October 2014.[167]

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163 First Defendant's Closing Submissions at para 135.

164 First Defendant's Closing Submissions at para 146; Notes of Evidence, 17 April 2019, p34(22) to 35(4).

165 Notes of Evidence, 17 April 2019, p34(22) to 35(4).

166 Plaintiff's Closing Submissions at para 74.

167 Plaintiff's Closing Submissions at para 82.

134 There are several difficulties with the first defendant's assertion that CVO3 and CVO4 which Lead issued to the plaintiff actually represent the VO2 works carried out by the first defendant. This is in addition to the fact that as a matter of law, CVO3 and CVO4 relate to a separate contract, *ie* the Lead Contract. They thus do not automatically prove that the first defendant is entitled to recover for a variation under the Comfort Contract. I elaborate.

135 First, the total amount paid by Lead to the plaintiff on CVO3 and CVO4 amounts to $560,000.[168] I need not consider further the $100,000 paid under CVO1 and CVO2 as there is no suggestion that VO2 relates to CVO1. In any case, the second defendant adduced clear evidence that parts of CVO1 and CVO2 were in fact carried out by other subcontractors and not by the first defendant.[169]

136 It is also undisputed that CVO3 comprises the works that the first defendant carried out for the plaintiff pursuant to VO1, for which the plaintiff agreed to pay the first defendant $130,000.

137 In the AD, the first defendant quantified its claim on VO1 and VO2 at $737,528.73, as stated in PC 12.[170] The first defendant now claims the sum of $621,828.73 on VO2 alone. It is clear that, even excluding VO1, the first defendant's claim for VO2 exceeds Lead's payments to the plaintiff under CVO3 and CVO4 *ie,* $560,000.[171] This discrepancy is even starker when VO1

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168 First Defendant's Closing Submissions at para 145.

169 Notes of Evidence, 24 April 2019, p24(14) to 25(23).

170 Statement of Claim (Amendment No 5) at para 39.

171 First Defendant's Closing Submissions at para 145.

is included. The first defendant's argument that including the lump sum discounts of $86,606.41 brings the claimed amount closer to $560,000 under CVO3 and CVO3 still fails to take into account the payments for VO1.[172]

138 Furthermore, I agree with the plaintiff's submission made in the course of oral closing submissions that this computation conveniently overlooks the $250,000 price difference between the Lead Contract and the Comfort Contract.[173] It would be uncommercial for the plaintiff to have ordered variation works of an amount equal to or exceeding the amount now claimed by the first defendant; indeed, this was reflected in the Lead Contract and Comfort Contract prices.

139 Second, the list of works cited by Mr Ram in support of the first defendant's claim on VO2, as stated in para 14 of his affidavit of evidence in chief does not correspond clearly with the valuation particulars for CVO3 and CVO4. In cross-examination, Mr Ram's evidence was that only paras 14.1, 14.2 and parts of 14.4 and 14.5 related to VO1. By a process of elimination, paras 14.3, parts of paras 14.4 and 14.5 and paras 14.6 to 14.28 would fall within CVO3 and CVO4.

140 While items number 1 to 19 in the valuation particulars for CVO4[174] are reflected in paras 14.6 to 14.23 of Mr Ram's affidavit of evidence in chief,[175] the remainder of the valuation particulars are unaccounted for. Moreover, the

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172 First Defendant's Closing Submissions at para 153.

173 Notes of Evidence, 17 April 2019, p41(20) to 42(4).

174 Lew Sien Yen Wenda's AEIC at p258 to 259, p307.

175 Notes of Evidence, 17 April 2019, p33(12) to 33(16).

spreadsheet[176] that Mr Ram along with his site supervisors prepared that lists all the alleged VO2 works does not correspond to the works listed in his own affidavit of evidence in chief.

141 For example, para 14.3 of Mr Ram's affidavit of evidence in chief stating "Additional installation of secondary Condensate Water Trays for Air Handling Units for ACMV and CBK, Levels 1, 2 & 3" was not wholly reflected in the spreadsheet.[177] Additionally, a plain reading of the items contained in paras 14.17, 14.19, 14.20 and 14.24 refers to works done at the bus interchange. This is contrary to Mr Ram's own evidence that VO2 related only to the Commercial Block.[178] I note that this was not challenged by the first defendant in its reply closing submissions.[179]

142 Third, I do not think that Drawings B are of much assistance to the first defendant's case. As stated at [111]–[114] above, there is doubt as to whether the second defendant was even the author of these drawings. Some of the sketches are illegible. Only a few of them give locations or refer to contract drawings or subcontract drawings.

143 I also accept Mr McGeoch's observations that some of the drawings refer to areas that are not part of the VO2 claim in the first place *ie,* the Commercial Block.[180]

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176 Natarajan Chidambaram's AEIC at p1034 to 1043.

177 Notes of Evidence, 17 April 2019, p44(17) to 45(6).

178 Notes of Evidence, 17 April 2019, p17(2) to 17(17), p54(3) to 54(25).

179 First Defendant's Reply Closing Submissions at paras 40 to 43.

180 Notes of Evidence, 15 April 2019, p21(18) to 21(25).

144 Fourth, in the valuation particulars of CVO4 issued by Lead[181] comprising 29 items, the cross-referenced quotations for items 1 to 19 reveal that Lead gave FIs for works to be carried out on 8 October 2014 by a letter to the plaintiff of the same date.[182] This is only a day before the first defendant withdrew from the site on 9 October 2014. It is therefore highly unlikely that these variation works were carried out or even completed by the first defendant by 9 October 2014.

145 In addition, for items 20 to 29 of the valuation particulars contained in CVO4, several cross-referenced quotations were issued from a series of dates after 9 October 2014.[183] Even if I accept the first defendant's suggestion that it routinely started to carry out variation works even before issuing a quotation, this does not explain satisfactorily how these variations could have all been completed by the first defendant pursuant to FIs issued by Lead to the plaintiff on 8 October 2014.

146 Mr Ram's explanation was that it might be possible for the plaintiff's other contractors to modify the CVO4 variations completed by the first defendant. Hence, this might lead to FIs being issued after 9 October 2014, after the first defendant had completed its variation works.[184] I find this assertion to be purely speculative. Mr Ram did not provide any basis or details for his assertion. In particular, he did not specify which variation, amongst items 1 to

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181 Lew Sien Yen Wenda's AEIC at p307 to 312.

182 Notes of Evidence, 17 April 2019, p60(16) to 61(4); Agreed Bundle of Documents, Vol 3, p1667.

183 Lew Sien Yen Wenda's AEIC at p262, 307; Notes of Evidence, 17 April 2019, p63(11) to 72(3).

184 Notes of Evidence, 17 April 2019, p36(11) to 36(22), p81(6) to 81(18).

29 of the valuation particulars he was referring to, for which modifications would be required.

147 Another reason I am not persuaded is that if such an FI were to have been issued for the alleged modification, this presupposes that some form of prior variation work be completed by the first defendant pursuant to VO2. One would expect that a separate FI also be issued for the completion of the prior variation work as well. There was however, no such FI reflected or a relevant quotation in Lead's breakdown of CVO4.

148 I am also unable to accept the first defendant's argument that it had completed all of the VO2 variations. A corollary of my finding above at [37] that the 9 October Email listed a combination of both Works and variations is that there were variations outstanding as of 9 October 2014. The first defendant's withdrawal from the site on 9 October 2014 would necessarily mean that these variations were not completed by the first defendant and remained outstanding. This too, is supported by the contemporaneous documentary evidence. For example, in Lead's letter to the plaintiff dated 8 October 2014 confirming the list works for CVO4, Lead asked the plaintiff to "please expedite the above mentioned works so that we can complete the entire Phase 3 by 15 Oct 14".[185] This must have meant that some of the works listed remained incomplete as of 8 October 2014.

149 In fact, when cross-examining Ms Lew, counsel for the first defendant stated that "my client's case is that the outstanding items listed in … [the 9 October Email] are actually related to additional works and not main scope

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185 Agreed Bundle of Documents, Vol 3, p1668.

items".[186] This is further reinforced by Mr Ram's own admission that, if it were in fact true that the 9 October Email included all variations, this would mean a substantial portion of the variations remained incomplete at the time the first defendant withdrew from the site:[187]

> Q: So your position is that this list at page 21 is all variation works?
>
> A: All variation.
>
> Q: And it's *quite clear that these variations works have not been done yet, right, because he's asking you to do it; right?*
>
> A: *Yes.*
>
> Q: And since this email was sent on 9 October 2014, all these variation works could not have been done by OGSP, because OGSP had already left the site, or was leaving the site on 9 October?
>
> A: *After 9 we had not done any job. After 9 October we have not done any job.*
>
> [emphasis added]

150 Indeed, I note that the first defendant, in its own closing submissions, also relied on the second defendant's evidence that the 9 October Email listed both Works and variations. This may be taken as the first defendant implicitly accepting that some variations remained outstanding.[188] Moreover, I do not think that the first defendant can credibly advance any argument that these outstanding variations do not relate to VO2. As was pointed out in the course of oral closing submissions, to do so would effectively leave these outstanding variations orphaned, as works neither related to VO1 nor to VO2.

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186 Notes of Evidence, 11 April 2019, p23(14) to 23(18).

187 Notes of Evidence, 16 April 2019, p120(17) to 121(4).

188 First Defendant's Closing Submissions at para 45.

151 The second defendant was referred to Lead's confirmation for CVO4 on 8 October 2014[189] in cross-examination and clarified whether works remained outstanding or done, cross-referencing quotations given by the plaintiff to Lead:[190]

S/N	**Description**
Quotation Ref	**Status**
002R[191]	Already completed by 8 October 2014
004	Not approved by Lead
005[192]	Already completed by 8 October 2014
007	Not approved by Lead
010[193]	Already completed by 8 October 2014
013[194]	Already completed by 8 October 2014
015	Cancelled by Lead
018R	Cancelled by Lead
019[195]	Already completed by 8 October 2014
020	*Not stated*

189 Agreed Bundle of Documents, Vol 3, p1667.

190 Notes of Evidence, 24 April 2019, p17(21) to 23(5).

191 Agreed Bundle of Documents, Vol 4, p2500.

192 Agreed Bundle of Documents, Vol 4, p2704.

193 Agreed Bundle of Documents, Vol 4, p2502.

194 Agreed Bundle of Documents, Vol 4, p2597.

195 Agreed Bundle of Documents, Vol 4, p2591.

S/N	Description
Quotation Ref	**Status**
021[196]	Completed after 9 October 2014
022[197]	*Not stated*
023[198]	Already completed by 8 October 2014
024[199]	Not completed by 8 October 2014
025 – 034	No submission by Lead
035 – 040[200]	035 and 038 completed by 8 October 2014 040 partially completed by 8 October 2014 036, 037, 039 not completed by 8 October 2014
041[201]	Partially completed by 8 October 2014
042[202]	Not completed by 8 October 2014

152 As I have mentioned, both parties ran all-or-nothing cases on VO2. I am therefore unable to quantify with precision the value of the outstanding variations listed in the 9 October Email. The first defendant did not make any specific submission on this point. Taking a holistic approach and giving weight

196 Agreed Bundle of Documents, Vol 4, p2595.

197 Agreed Bundle of Documents, Vol 4, p2597.

198 Agreed Bundle of Documents, Vol 4, p2599.

199 Agreed Bundle of Documents, Vol 4, p2601.

200 Agreed Bundle of Documents, Vol 4, p2603, 2605, 2608, 2628, 2611.

201 Agreed Bundle of Documents, Vol 4, p2613.

202 Agreed Bundle of Documents, Vol 4, p2615.

to the second defendant's evidence once again, I consider that the first defendant is entitled to recover two-thirds of VO2 on its *quantum meruit*. Two thirds of $621,828.73, rounded off to the nearest dollar, is $414,552.

153 I therefore hold that the first defendant is entitled to recover $414,552 from the plaintiff on a *quantum meruit* basis.

The Materials Issue

154 The first defendant argues that it should be entitled to recover the cost of purchasing certain materials amounting to $30,178.80. The first defendant's case is that it ordered these materials at the request of the plaintiff in September or October 2014[203] and left them behind when it withdrew from the site on 9 October 2014. These materials were additional materials which the plaintiff required and therefore do not fall within the lump sum under the Comfort Contract. Despite the first defendant's request, the plaintiff refused to issue any drawings to let the first defendant know the purpose of the materials.[204]

155 In support of its claim, the first defendant presents a list of 250 materials, setting out the quantity and unit rates of the materials.[205] The first defendant also points to an email dated 11 October 2014 from the first defendant to the plaintiff. That email informs the plaintiff that materials were delivered pursuant to the plaintiff's instructions, attaching a list of materials and photographs.[206] The plaintiff failed to respond to this email in unequivocal terms denying the list of

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203 Natarajan Chidambaram's AEIC at para 33.

204 Natarajan Chidambaram's AEIC at para 34.

205 Natarajan Chidambaram's AEIC at p1158 to 1165.

206 Natarajan Chidambaram's AEIC at p1170.

materials. That failure should be considered as evidence that the plaintiff had accepted that it had in fact instructed the first defendant to buy the material.[207]

156 In response, the plaintiff contends that the first defendant is not entitled to recover the cost of these materials. There is a lack of contemporaneous evidence to support the first defendant's claim that it ordered the material on the instructions of the plaintiff.[208] The plaintiff argues that, to the extent that the materials relate to a variation, there is no valid variation order to ground recovery. To the extent that the materials relate to the Works, the nature of a lump sum contract means the first defendant is precluded from recovering the value of the materials.[209]

157 If it fails in these arguments, the plaintiff relies on Mr McGeoch's expert opinion assessing the value of the materials to be only $17,051.49 and not $30,178.80 as claimed by the first defendant.

158 I am not satisfied that the list provided by the first defendant is an accurate reflection of the nature, quantity and value of the materials it left behind when it withdrew from the site on 9 October 2014. I begin by observing that the first defendant was not forced to leave the site on 9 October 2014. It did so voluntarily. When it did so, it chose to leave its materials and tools behind.[210]

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207 Notes of Evidence, 15 April 2019, p17(12) to 18(20); First Defendant's Closing Submissions at para 170.

208 Plaintiff's Opening Statement at para 46.

209 Statement of Claim (Amendment No 5) at para 49(d).

210 Notes of Evidence, 16 April 2019, p103(23) to 104(12).

159 I also agree with Mr McGeoch's observations that there were several inconsistencies in the list provided by the first defendant. In his expert report, he correctly points out that not all the materials listed by the first defendant are cross-referenced to invoices. Yet, those which are cross-referred to an invoice correspond to invoices dated between December 2013 and May 2014. However, the first defendant's position is that these materials were ordered pursuant to instructions in September or October 2014. Moreover, not all the rates for the materials are substantiated and some of the rates are in excess of smaller sizes.[211] He also notes that there are some materials which are duplicated in terms of thickness, width, height and length.[212]

160 Mr Ram says in his affidavit of evidence in chief that the second defendant, on behalf of the plaintiff, gave the first defendant instructions to order the materials orally.[213] In cross-examination, however, he claimed that the second defendant had in fact given these instructions through hand-drawn sketches.[214] The first defendant did not disclose these sketches. Mr Ram further suggested that the list of materials in his affidavit of evidence in chief was in fact "not the final list", although he admitted that he had not produced any invoices evidencing the purchase of these items.[215] When asked about the discrepancy between the dates on the invoices and the first defendant's claim,

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211 Notes of Evidence, 12 April 2019, p46(24) to 50(10).

212 Notes of Evidence, 15 April 2019, p18(20) to 19(11).

213 Natarajan Chidambaram's AEIC at para 33.

214 Notes of Evidence, 17 April 2019, p87(4) to 87(18).

215 Notes of Evidence, 17 April 2019, p90(7) to 91(1).

Mr Ram tried to suggest that the dates on the invoices did not reflect the actual dates of purchase:[216]

> Q: So for those where it is blank for invoice number, invoice date, it means that either you do not have documentary evidence of the purchase or it has been lost or it cannot be found; correct?
>
> A: Okay, those invoice dated, right, these are the invoice where we refer the price for that size of that. Because for the ducts we don't have a price.
>
> Q: Oh, so therefore, this –
>
> A: Well –
>
> Q: Sorry, listen. You are not saying that the invoice number nor the invoice date here actually refers to the date of purchase of the item?
>
> A: Not this item.
>
> Q: Say again?
>
> A: Not these items.

If so, the first defendant clearly cannot rely on these invoices to assert that it ordered the materials at or around those dates. The first defendant is therefore left with virtually no evidence, apart from the assertion in the list, to prove that it ordered the materials on the second defendant's instructions.

161 The email sent by Mr Ram to the second defendant on 11 October 2014 does not assist the first defendant. That email enclosed a "document of ducting materials we have ordered as per your instruction in last few months".[217] I note that the reference to "last few months" is contrary to Mr Ram's own assertion in his affidavit of evidence in chief that the orders were made only "[s]ometime

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216 Notes of Evidence, 17 April 2019, p89(6) to 89(20).

217 Agreed Bundle of Documents, Vol 2, p1208 to 1209.

around September/October 2014".[218] In any case, the first defendant also submits that the list attached to its 11 October 2014 email is contemporaneous evidence that the second defendant did indeed instruct the first defendant to order materials of the *particular* type, quantity and cost as provided in the attached list.

162 I do not accept this submission. It is true that the second defendant did not, in his reply email on 12 October 2014, reject the suggestion that he had instructed the first defendant to order these materials. All he did in his reply email was to ask the first defendant to "send your supervisor tomorrow morning to the site to check and verify together with us all the balance materials as per your list".[219] The second defendant's insistence that the materials be verified implies that he was not willing to accept the list of materials at face value. But even if I were to take the first defendant's argument at its highest, this amounts to nothing more than the second defendant's tacit admission that he gave the instructions. It does not amount to an admission that he instructed the first defendant to order materials of the type, quantity and cost that it now claims. Nor does this tacit admission detract from the fact that the second defendant's instructions were not in writing and are not supported by any contemporaneous documentary evidence.

163 Additionally, the second defendant sent an email to Mr Ram on 17 October 2014 which said: "your balance materials list doesn't [*sic*] matching with on site materials". To this email was enclosed a separate list of balance

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218 Natarajan Chidambaram's AEIC at para 33.

219 Agreed Bundle of Documents, Vol 2, p1209.

materials as of 10 October 2014.[220] There is no indication that Mr Ram replied to the second defendant's email to contradict the second defendant's assertion.

164 This leaves me to discuss Mr McGeoch's substantive findings on the value of the materials. In his expert report, Mr McGeoch split the first defendant's claim for materials into two parts.[221] The first part consists of materials supported by invoices which total $3,924.20. The second part consists of materials with modified rates. Mr McGeoch carried out a sampling analysis and found that the rates listed were greater than a similar comparable rate. In his view, these rates did not appear to be reflective of quoted or invoiced rates. Given the absence of any delivery notes, purchase orders or invoice references provided to aid verification, Mr McGeoch made a provisional assessment of 50% of the remaining value, amounting to $13,127.29. Hence, his provisional assessment for this head of claim amounts to $17,051.49.

165 The first defendant takes issue with this valuation methodology. In particular, it characterises Mr McGeoch's 50% valuation as "arbitrary and without any basis or support" and submits that Mr McGeoch could have carried out the valuation based on a fair market rate or prices prevailing when such materials were supplied to the plaintiff.[222]

166 Irrespective of which head of assessment I adopt, I still do not think that the first defendant's claim can succeed. The first defendant has not satisfactorily established whether the instructions for these materials relate to the Works or to

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220 Agreed Bundle of Documents, Vol 2, p1269.

221 Mark Alexander McGeoch's AEIC at p35, para 4.7.4.

222 First Defendant's Closing Submissions at paras 167 and 168.

variations and if the latter, whether they relate to VO1 or VO2. Both alternatives pose impediments. For the former, the lump sum nature of the Comfort Contract means that I cannot re-assess the materials required for the Works.[223] For the latter, even if I were to accept that the request for "additional" materials must necessarily refer to variations, this necessarily runs into the written instruction condition precedent for variations stipulated in cl 11 of the Lead Contract. There is no such written instruction in evidence. The first defendant has not raised any argument to suggest that the plaintiff waived this requirement or agreed to vary it with respect to these materials. The first defendant also brings no alternative claim for the value of the materials in restitution by way of a *quantum valebat* or for delivery up of the materials.

167 I am therefore not satisfied that the first defendant has discharged its burden of proving: (a) that the materials in question were ordered in the first place, and (b) that they were ordered on the plaintiff's instructions.

168 I accordingly dismiss the first defendant's counterclaim for the cost of these materials valued at $30,178.80.

The Personal Duty Issue

169 I now turn to consider the plaintiff's claim against the second defendant, its project manager for the Works.

170 The plaintiff's case is that the second defendant owed the first plaintiff several duties. These include: (a) a duty to conduct himself properly in his role

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223 Plaintiff's Closing Submissions at para 99.

as the plaintiff's project manager; (b) a duty not to act fraudulently, dishonestly and/or negligently in performing his role as the plaintiff's project manager; (c) a duty to act in the best interests of the plaintiff; and (d) a duty not to place himself in a position where his interest conflicted with that of the plaintiff. These duties are said to arise from the express terms of an employment contract between the plaintiff and the second defendant[224] or to be within the scope of a duty of care which the second defendant owed to the plaintiff in tort as its project manager.[225]

171 The plaintiff's case is that the second defendant over-certified the actual progress of the Works carried out by the first defendant. This constituted a breach of his duties and caused the plaintiff to suffer loss by overpaying the first defendant for Works that it had not in fact completed.[226] The plaintiff therefore claims that the second defendant should be held jointly and severally liable with the first defendant for the overpayment made to the first defendant.

172 Additionally, the plaintiff alleges that the second defendant ordered materials on behalf of a company known as RSP Engineering Pte Ltd (later known as SS Mechanical & Electrical Engineering Pte Ltd) ("RSP") covertly using the alias "*Shoun Sarker*". The second defendant had an interest in RSP at the material time. By doing this, the second defendant allowed his personal interest to conflict with the plaintiff's interest.[227] The plaintiff did not canvass

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224 Statement of Claim (Amendment No 5) at para 19F.

225 Statement of Claim (Amendment No 5) at para 19G.

226 Statement of Claim (Amendment No 5) at para 25A.

227 Plaintiff's Opening Statement at para 67; Statement of Claim (Amendment No 5) at para 24.

this head of claim further in either its written closing submissions[228] or its skeletal closing submissions.[229]

173 The second defendant argues that he was not, at the material time, the plaintiff's employee. He accepts that he was the plaintiff's employee under an employment agreement dated 24 April 2000, later replaced by an employment agreement dated 1 March 2004.[230] However, he ceased to be the plaintiff's employee on 11 August 2008 when he was appointed an executive director and became a shareholder in a related company: Comfort Specialist (I) Pte Ltd. The second defendant was therefore an independent contractor at the material time.[231]

174 Further, it was representatives of the plaintiff – and not the second defendant – who prepared, approved and then certified back-to-back with Lead all of the payment claims which the first defendant submitted to the plaintiff under the Comfort Contract.[232] It cannot therefore be said that the second defendant over-certified the Works leading to the first defendant being overpaid.

Over-certification

175 Following from my finding above at [42] that the plaintiff did not overpay the first defendant for the Works completed, the plaintiff's claim against the second defendant for over-certification of the Works must

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228 Plaintiff's Closing Submissions at paras 121 to 158.

229 Plaintiff's Skeletal Submissions, 29 July 2019, at paras 20 to 25.

230 Pintu Kumar Sarker's AEIC at para 5.

231 Second Defendant's Defence (Amendment No 2) at para 8D.

232 Second Defendant's Defence (Amendment No 2) at para 12(g).

necessarily fail. In any event, I do not think that the plaintiff's claim against the second defendant could have succeeded in light of the process adopted by the parties regarding the certification of Works. I explain further.

176 It is undisputed that by virtue of his appointment as project manager, the second defendant was tasked with overseeing and monitoring the progress of the Works on site.[233] Mr Wu was in overall charge, but not day-to-day charge.[234]

177 For the plaintiff's claim against the first defendant to succeed – regardless of whether it is founded on contract or tort – it must prove that the second defendant *caused* the loss which the plaintiff claims to have sustained. In *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782, V K Rajah JA observed that there was "no reason why the 'but for' test in tort cannot also be used in contract cases to determine the issue of causation *in fact*" [emphasis in original] (at [63]). Further, the burden of proof lies on the plaintiff to show that the second defendant's breach is the effective cause of its loss (*Chong Yeo and Partners and another v Guan Ming Hardware and Engineering Pte Ltd* [1997] 2 SLR(R) 30 at [12]).

178 The plaintiff's claim against the second defendant requires the plaintiff to disavow Lead's certification. The plaintiff's willingness to do so is unconvincing. After all, the plaintiff placed considerable emphasis on the fact that the outstanding works listed in the 9 October Email were derived from a

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233 Second Defendant's Opening Statement at para 17; Notes of Evidence, 9 April 2019, p22(10) to 22(14).

234 Notes of Evidence, 9 April 2019, p99(1) to 99(18).

similar list compiled by Lead.[235] The plaintiff relied on Lead's certification throughout the Project. It was happy to receive payment from Lead pursuant to Lead's certification. It lies ill in the plaintiff's mouth now to accuse the second defendant of over-certification.

179 I accept the second defendant's evidence as to the process of certifying progress claims for the Works:[236]

(a) The second defendant, on the plaintiff's behalf, would send Lead a progress claim setting out the extent of the Works completed. The second defendant would do this after being instructed by Mr Wu and after discussion with him.[237] In these emails to Lead, the second defendant copied the plaintiff's representatives such as Mr Wu, Mr Lim and/or Ms Lew.[238]

(b) Lead employed its own independent quantity surveyors, site engineers and management personnel and would respond to the plaintiff with its certification.[239]

(c) Based on Lead's certification, Mr Wu (and, after Mr Wu's resignation, Mr Lim) would prepare a progress claim for the first

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235 Plaintiff's Opening Statement at para 25.

236 Notes of Evidence, 10 April 2019, p28(4) to 28(8); Notes of Evidence, 23 April 2019, p7(23) to 15(12).

237 Notes of Evidence, 10 April 2019, p57(21) to 57(23).

238 Bundle of AEICs, Vol 7, Tab 8, p350 to 485.

239 Notes of Evidence, 10 April 2019, p57(24) to 58(2); Second Defendant's Closing Submissions at para 151.

defendant to submit to the plaintiff.[240] Mr Wu (or Mr Lim) signed in the "Approved By" column of the progress claim.[241] Mr Wu (or Mr Lim) would then send it to the second defendant "[f]or [his] necessary follow-up" *ie,* for the second defendant to sign in the "Prepared By" column.[242]

(d) The second defendant would then take the approved progress claim and get either Mr Natarajan Venkatesh ("Mr Win") or Mr Ram, the first defendant's representatives, to sign it.[243]

(e) The first defendant would then render its invoice directly to the plaintiff.[244]

180 This is of course unusual. In the typical process of certification, a subcontractor prepares its own progress claim and passes it up one level in the contractual chain for payment. In effect, the arrangement between the parties here was reversed.[245]

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240 Notes of Evidence, 10 April 2019, p27(19) to 27(24).

241 Notes of Evidence, 10 April 2019, p27(14) to 27(21).

242 Notes of Evidence, 9 April 2019, p101(1) to 101(4); Lim Fatt Seng's AEIC at para 12; Pintu Kumar Sarker's AEIC at p487 to 490.

243 Notes of Evidence, 23 April 2019, p10(24) to 11(14).

244 Notes of Evidence, 23 April 2019, p11(4) to 11(6).

245 Notes of Evidence, 15 April 2019, p43(8) to 45(6).

181 The certification arrangements between the parties meant that Lead's certification was determinative down the contractual chain. Indeed, what was telling was Mr Lim's own admission at trial that Lead's certification would be determinative:[246]

> Q: I put it to you that Pintu did not over-certify the progress claims. It was done by Lawrence and/or by you. It was approved by Lawrence and/or by you.
>
> A: Yes and no. We have a contract. We suppose [*sic*] to pay OGSP based on what – whatever certification that we received from Lead. So that is the arrangement. *So if Lead has over-certified to us, therefore following it administratively, we over-certified to OGSP.*
>
> [emphasis added]

182 Mr Wu also corroborated the second defendant's evidence:[247]

> Q: Okay, I refer you to paragraph 18 of your affidavit where you mention:
>
> '… I was generally aware that Lead would often assess the extent of the actual Works done on the site to be less than what Pintu submitted.'
>
> *Okay. Now, what you're trying to say here is that Lead only certified the actual works done on site carried out by OGSP regardless of what was submitted by Pintu; correct?*
>
> A: *That's right.*
>
> Q: Now, would you agree with me that the logical explanation for this is that *Lead does not accept Comfort's quantification of the extent of work done. Agree?*
>
> A: *That's right.*
>
> Q: Otherwise, Lead will simply certify whatever Comfort claims. Agree?

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246 Notes of Evidence, 9 April 2019, p106(3) to 106(11).

247 Notes of Evidence, 10 April 2019, p29(9) to 30(8).

A: Yes.

Q: In other words, Lead was careful in its certification and would only certify ACMV works properly carried out and completed by OGSP. Agree?

A: That's right.

Q: Therefore, it is not possible for OGSP to claim for works that they had not yet done. Agree?

A: Agree.

[emphasis added]

183 Indeed, Mr Wu agreed that there was no evidence to show that Comfort had ever departed from Lead's certification.[248] And this led Mr Wu to concede fairly that the second defendant did not over-certify the Works:[249]

Q: So based on what you have said so far and what I have shown you, *am I correct to say that Pintu did not over-certify the progress claims to OGSP? Correct?*

A: *That's right. Based on the claims it's correct.*

[emphasis added]

184 The result of this agreed process is that the second defendant's over-certification, *if any*, could not have caused any loss to the plaintiff. This is because the plaintiff, through either Mr Wu or Mr Lim, would ultimately pay the first defendant based on Lead's certification. The plaintiff inevitably adopted Lead's certification lock, stock and barrel.[250] For the plaintiff to say now that the second defendant is responsible for over-certification when it in fact never relied on the second defendant's certification in preparing the first defendant's progress claim to the plaintiff, is unsustainable.

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248 Notes of Evidence, 10 April 2019, p30(9) to 30(16).

249 Notes of Evidence, 10 April 2019, p65(5) to 65(9).

250 Notes of Evidence, 10 April 2019, p30(9) to 30(16).

Conflict of interest

185 I also reject the plaintiff's allegation that the second defendant acted in conflict of interest. The crux of the plaintiff's allegation is that the second defendant worked together with the first defendant on the procurement and supply of ducting materials and manpower amounting to $270,275, as evidenced by the series of invoices from RSP.[251] The alleged impropriety arises from the fact that the initial purchase order issued by the first defendant to RSP on 24 October 2013 was for $245,000,[252] meaning that the invoices issued by RSP to the first defendant containing installation of GI ducting was something that was not included in the purchase order.[253] One problem is that the plaintiff has failed to show, even assuming that such a breach of duty occurred, that the second defendant's actions led to the overpayment of $412,527.[254] Another problem is that at the time when the first defendant issued the purchase order to RSP on 24 October 2013, the second defendant had already stepped down as director of RSP on 23 July 2013[255] and had transferred his shares to an unrelated third party on 5 August 2013.[256] Indeed, the 24 October 2013 purchase order was expressly addressed to this third party who had assumed directorship of RSP.[257]

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251 Natarajan Venkatesh's AEIC at p144 to 148, p151 to 152.

252 Natarajan Venkatesh's AEIC at p143.

253 Notes of Evidence, 16 April 2019, p42(5) to 43(22).

254 Plaintiff's Closing Submissions at para 121.

255 Lew Sien Yen Wenda's AEIC at p1543.

256 Notes of Evidence, 24 April 2019, p64(17) to 64(24); Lew Sien Yen Wenda's AEIC at p1546.

257 Natarajan Venkatesh's AEIC at p143.

186 Overall, it is unclear how the second defendant's actions in this regard could have conceivably caused the loss of $412,527 as claimed by the plaintiff. At the very most, this discrepancy amounts to $25,275. Even so, there are two difficulties in the plaintiff's claim to recover this sum.

187 First, I do not think that any numerical difference between the purchase order request and the invoice payments is a *de facto* indication of any impropriety. A purchase order is an indicative starting point. But to ascertain the actual quantum, one would necessarily look to the actual invoices.[258] If the first defendant had any objections to the materials ordered, it could have very well rejected the orders.[259] It was entirely within its power to do so. As Mr Win, a director of the first defendant, testified at trial, the decision to engage RSP was purely a matter of the first defendant's own volition.[260] Therefore, the plaintiff's suggestion that the second defendant's decision to resign as a director of RSP in July 2013[261] and for the third party to take over was a ploy meant to obfuscate his involvement in RSP cannot hold water.[262]

188 Secondly, it is not apparent that the loss, if any, was even occasioned to the plaintiff. It was the first defendant who paid RSP based on the invoices issued. The lump sum nature of the Comfort Contract also means that no re-assessment of the price is permitted. Plainly put, the risk of underestimating its

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258 Notes of Evidence, 10 April 2019, p71(4) to 71(17).

259 Notes of Evidence, 9 April 2019, p136(1) to 136(12).

260 Notes of Evidence, 16 April 2019, p15(19) to 15(22).

261 Second Defendant's Defence (Amendment No 2) at para 9(b).

262 Notes of Evidence, 24 April 2019, p64(21) to 65(4).

costs in completing the Works fell on the first defendant. It had no contractual recourse against the plaintiff.[263]

189 I also accept the second defendant's evidence that the plaintiff and Mr Lim knew of the second defendant's involvement and participation in RSP by June 2014. Indeed, numerous purchase orders issued by the plaintiff's representatives, Ms Shirley Tan and Ms Lew to RSP between 24 July 2014 and 28 December 2016 for a whole host of projects, all made reference to the second defendant as an authorised representative of RSP.[264] In fact, Mr Lim stated at trial that he supported the plaintiff's subcontracting of work to RSP as early as May 2014, because he wanted to support the second defendant's entrepreneurship.[265] This was also supported by the second defendant's email to Mr Lim on 22 May 2014 informing him of his intention to join RSP.[266] Indeed, even after discovering the second defendant's involvement in RSP, Mr Lim still took the second defendant to a meeting on 7 April 2015 to negotiate the final account with Lead.[267]

190 The present claim against the second defendant is an *ex post facto* allegation of impropriety with no legal or factual basis.

191 In light of my findings, it is unnecessary for me to determine whether the second defendant carried out his duties as project manager as an employee

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263 Notes of Evidence, 10 April 2019, p24(6) to 24(22).

264 Pintu Kumar Sarker's AEIC at p508 to 525.

265 Notes of Evidence, 9 April 2019, p110(12) to 112(13).

266 Pintu Kumar Sarker's AEIC at p502.

267 Lim Fatt Seng's AEIC at para 18.

of the plaintiff or as an independent contractor. On either basis, and whether based in contract or in tort, the plaintiff's claim fails.

192 I therefore dismiss the plaintiff's claim against the second defendant.

Conclusion

193 For the reasons I have set out above, I hold as follows:

(a) The plaintiff's claim to recover overpayment of $412,527[268] under the Comfort Contract from the first defendant is dismissed.

(b) The plaintiff's claim to recover $81,000 in liquidated damages from the first defendant is allowed.

(c) The plaintiff's claim to recover $86,606.41 from the first defendant is dismissed.

(d) The first defendant's counterclaim to recover $180,013.27 against the plaintiff is allowed, but only in part: in the sum of $121,138.27.

(e) The first defendant's counterclaim to recover $14,300 from the plaintiff on VO1 is allowed.

(f) The first defendant's counterclaim to recover $621,828.73 from the plaintiff on VO2 in contract is dismissed.

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268 Plaintiff's Closing Submissions at para 50.

(g) The first defendant's counterclaim to recover a *quantum meruit* for the work done on VO2 is allowed, but only in part in the sum of $414,552.

(h) The first defendant's counterclaim to recover $30,178.78 from the plaintiff for the costs of materials is dismissed.

(i) The plaintiff's claim against the second defendant is dismissed.

194 The final account between the parties will have to be taken bearing in mind my findings in this judgment. In that final account, the first defendant must give credit to the plaintiff for two sums: (a) the total sum of $1,185,686.73 which the plaintiff paid the first defendant up to 9 October 2014; and (b) the sum of $890,262.23 which the plaintiff paid the first defendant under the AD.

195 As a result of my findings, and subject only to any adjustments necessary to account for the incidence of goods and services tax, the final account between the parties is as follows:

The defendant's entitlement for work done under the Comfort Contract (95.29% of $1,125,00.00)	$1,191,125.00
Undisputed value of VO1	$130,000.00
Quantum meruit awarded to the first defendant on VO2	$414,552.00
Less liquidated damages payable by the first defendant	($81,000.00)
Less the plaintiff's payment to the first defendant up to 9 October 2014	($1,185,686.73)
Less the plaintiff's payment to the first defendant pursuant to the AD (net of goods and services tax)	($832,020.78)

Less back charges payable by the first defendant to the plaintiff	Nil
Balance	($363,030.51)

196 This computation shows that the first defendant owes the plaintiff the sum of $363,030.51, subject only to the incidence of goods and services tax on the components which go into calculating that figure. The result is that – although I have found that the plaintiff did not overpay the first defendant for the Works – I have found that the plaintiff has overpaid the first defendant when the Works, the variations and the first defendant's liability in liquidated damages are all taken together.

197 The result is that, when the plaintiff complied with the AD, it paid the first defendant more overall than it was contractually obliged to. The plaintiff submits in that event that the AD be set aside. I do not accept that submission. Setting the AD aside as a consequence of my judgment is not correct in principle and is in any event not necessary. It is not correct in principle because the AD was lawfully made, both procedurally and substantively. The lawfulness of the AD was upheld by the High Court and by the Court of Appeal. The plaintiff was lawfully obliged to make payment under the AD at that time. And the first defendant was lawfully entitled to receive and retain that payment at that time. Further, setting aside the AD is not necessary because an adjudication determination carries only interim finality. The dispute before me in this action is the same as the dispute underlying the AD. Under s 21(1)(*b*) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), the AD ceases to bind the parties as soon as I enter judgment in this action, and thereby finally determine the parties' dispute. There is therefore no reason for

me to order that the AD be set aside. The AD simply falls away by operation of law once judgment is entered in this action.

198 The net sum to be paid by the first defendant to the plaintiff under this judgment will carry interest at 5.33% *per annum* from 6 June 2017, the date on which the plaintiff commenced this action, until the date on which I enter judgment.

199 All of the sums in the table at [195] above exclude goods and services tax, including the component representing the plaintiff's payment to the defendant under the AD from which I have deducted the goods and services tax actually paid. The parties have not addressed me on how to account for goods and services tax in the final judgment in this matter.

200 I am now in a position to enter final judgment in this matter. Before I do so, I will hear parties: (a) on how to account for goods and services tax in calculating the net sum to be awarded to the plaintiff against the first defendant; (b) the costs of the plaintiff's claim against the first defendant and the first defendant's counterclaim against the plaintiff; and (c) the costs of the plaintiff's claim against the second defendant.

Vinodh Coomaraswamy
Judge

Paul Wong, Zhulkarnain Abdul Rahim, Andrea Gan and Francis Wu (Dentons Rodyk & Davidson LLP) for the plaintiff and defendant in counterclaim;
Nicholas Lazarus (Justicius Law Corporation) for the first defendant

and plaintiff in counterclaim;
Anil Lalwani and Adrian Teo (DL Law Corporation) for the second defendant.

Annex 1

A.1 The second defendant's evidence on the list of outstanding items attached to the 9 October 2014 Email[269] (see [38] above)

S/N	Description	Works, Variation or Mixed	Cross-Reference and Comments
1	Fan Coil Units Ducting and Flexible Connection to Linear Grill – FFL Lobby 2 (Level 1 to 17)	Mixed[270]	Item 19 of CVO4, Quotation Ref 042[271], the tender drawings contain ducting and grille and the plaintiff only submitted additional work.
2	Fan Coil Units Ducting and Flexible Connection to Linear Grill – FFL Lobby 2 (Level 1 to 17)	Mixed[272]	Item 19 of CVO4, Quotation Ref 042.[273]
3	Roof Smoke Fans Connection to Grill and 16 Storey Fire Damper and Flexible Connection to Grill to Vertical Duct Shaft	No clear position taken	Items 3 and 6 of Quotation Ref 24[274] are not the same as this, second defendant says that the air-conditioning system as well as the ventilation system both have fire dampers. This quotation here is for the pre-cool air handling unit and not the roof.
4	Vertical Ducting Including Damper and Connection to the Grille, Lobby	No clear position	Quotation Ref 24[275] is not the same as this; second defendant says that if it does not fall within the

269 Lim Kumar Sankar's AEIC at p327.

270 Notes of Evidence, 23 April 2019, p19(19) to 20(5).

271 Lew Sien Yen Wenda's AEIC at p312; Notes of Evidence, 23 April 2019, p18(25) to 20(5).

272 Notes of Evidence, 23 April 2019, p20(6) to 20(9).

273 Agreed Bundle of Documents, Vol 4, p2615.

274 Agreed Bundle of Documents, Vol 4, p2601.

275 Agreed Bundle of Documents, Vol 4, p2601.

	2, Levels 1 to 3	taken	quotation description, then it is within the original scope.
5	External Fire Rated Board Installation, Lift Lobby 2, Levels 7 and 9	Mixed[276]	Quotation Ref 35, Item No 4.[277]
6	External Fire Rated Board Installation, Staircase 7, Level 9	Mixed[278]	Quotation Ref 35, Item No 4.[279]
7	External Fire Rated Board Installation, Staircase 8, Level 7	Mixed[280]	
8	External Façade Opening for Kitchen Exhaust Duct at South Facade Near Vehicle Ramp Level 1	Works[281]	Quotation Ref 46 Items No 2 and 3[282] are not the same as this, as this relates to the façade opening such as for the air duct.
9	Staircase 7 Smoke Free Lobby Going to External, Level 1	No clear position taken	
10	Roof Pre-Cooled Ducting External Insulation on Both 4 Nos AHU's, Roof	Mixed[283]	Quotation Ref 024 Item No 1.[284]

[276] Notes of Evidence, 23 April 2019, p16(15) to 16(17).

[277] Agreed Bundle of Documents, Vol 4, p2603; Notes of Evidence, 24 April 2019, p7(12) to 7(15).

[278] Notes of Evidence, 24 April 2019, p7(1) to 7(21), p14(3) to 14(19).

[279] Agreed Bundle of Documents, Vol 4, p2603.

[280] Notes of Evidence, 23 April 2019, p16(20) to 16(21).

[281] Notes of Evidence, 23 April 2019, p16(22) to 16(23).

[282] Agreed Bundle of Documents, Vol 4, p2672.

[283] Notes of Evidence, 24 April 2019, p7(22) to 8(14).

[284] Agreed Bundle of Documents, Vol 4, p2601.

11	Pre Cooled Ducting Installation Horizontally to Both AHU's Fresh Air Ducting at 16 Storey Vertical Ducting Connections, 16 Story	Mixed[285]	Quotation Ref 50 Item No 1[286] is not the same as this, as this is pre-cooled ducting whereas the quotation refers to AHU ducting.
12	West Side Fresh Air Fire Damper/Grill/Motorize Damper Serving 10-16 AHU'S, 10 – 16 Storey	No clear position taken	Quotation Ref 50 Item No 1[287] is not the same as this.
13	AHUS Room Equipment Supply Connections to Maim Ducting at Wall on West and East Side, 10 to16 Storey	Variation, Works[288]	Quotation Ref 50 Item No 2.[289]
14	East Side Fresh Air Vertical Duct Slab Damper and Grill Motorised Damper Serving 10 to 16 Storey AHU	No clear position taken	Quotation Ref 38 Item No 1[290] is not the same as this.
15	Air Lift Motor Exhaust and Supply Ducting Fans, Roof, Levels 4 and 11	No clear position taken	

[285] Notes of Evidence, 23 April 2019, p17(4) to 17(5), 24 April 2019, p8(3) to 8(14).

[286] Agreed Bundle of Documents, Vol 4, p2688.

[287] Agreed Bundle of Documents, Vol 4, p2690; Notes of Evidence, 23 April 2019, p27(12) to 28(1), 24 April 2019, p8(15) to 9(23).

[288] Notes of Evidence, 23 April 2019, p17(8) to 17(9).

[289] Agreed Bundle of Documents, Vol 4, p2690.

[290] Agreed Bundle of Documents, Vol 4, p2609; Notes of Evidence, 23 April 2019, p28(17) to 29(13).

16	First Storey Retail Units Supply Air Duct Partially Complete Including Connections to Louver, First Storey	Mixed[291]	Quotation Ref 24 Item No 3[292] is not the same as this and the quotation only refers to Item No 10 on the list here.
17	First Storey Retail Units Fire Rated Exhaust Duct Including Connections to Louver Partially Completed, First Storey	No clear position taken	Quotation Ref 51 Items No 1 and 2[293] are not the same as this.
18	Installation of Fire Rated Board for Kitchen Exhaust Ducting, Level 1	No clear position taken	Quotation Ref 46 Item No 3[294] is not the same as this which is for the main duct and kitchen exhaust ducting whereas the quotation is for additional kitchen exhaust ducting.
19	Painting and Labelling for the Ducting and Fans, Roof and all Levels	No clear position taken, Works[295]	
20	Tenth Storey Mechanical Ventilation at Center Toilet Ducting to External, Tenth Storey	No clear position taken	Quotation Ref 19 Item No 1[296] is not the same as this and the quotation is for additional plenum box to connect the flexible duct.
21	AHU Room Pre-Cooled Ducting	Mixed[297]	Quotation Ref 50 Item No 1.[298]

[291] Notes of Evidence, 23 April 2019, p17(14) to 17(15).

[292] Agreed Bundle of Documents, Vol 4, p2601; Notes of Evidence, 23 April 2019, p29(14) to 29(23), 24 April 2019, p10(1) to 11(3).

[293] Agreed Bundle of Documents, Vol 4, p2690; Notes of Evidence, 23 April 2019, p29(24) to 30(7).

[294] Agreed Bundle of Documents, Vol 4, p2672; Notes of Evidence, 23 April 2019, p30(8) to 31(14).

[295] Notes of Evidence, 23 April 2019, p17(20) to 17(21).

[296] Agreed Bundle of Documents, Vol 4, p2591; Notes of Evidence, 23 April 2019, p31(15) to 32(22).

[297] Notes of Evidence, 24 April 2019, p11(4) to 11(19).

[298] Agreed Bundle of Documents, Vol 4, p2688; Notes of Evidence, 23 April 2019, p32(23) to 33(3).

	Have Not Carry Out, Ten to Sixteen Storey		
22	Concourse Area Supply Air Diffuser Haven't Complete Yet, Bus Interchange	Mixed[299]	Quotation Ref 47 Item No 1.[300]
23	Toilet MV System Haven't Carry Out Yet for Installation Works, Bus Interchange	Works[301]	Quotation Ref 39R-2R2[302] does not cover this and covers the mechanical ventilation system inside the toilet.
24	AHU Room Ducting Haven't Carry Out Yet for Installation Works, Bus Interchange	Works[303]	
25	Kitchen Exhaust Air Ducting Haven't Complete Yet for Installation Works, Bus Interchange	No clear position taken	Quotation Ref 39R-2R2[304], Quotation Ref 43[305] and Quotation Ref 44[306] does not cover this because Quotation Ref 39R-2R2 is the bus interchange whereas this item is not the parking area and is a totally different location as there is no kitchen where the buses are.[307]
26	Kitchen Fresh Air Ducting Haven't Complete Yet for Installation Works,	Mixed[308]	Quotation Ref 46[309], does not cover this as this deals with the bus interchange whereas the quotation deals

[299] Notes of Evidence, 24 April 2019, p11(20) to 12(9).

[300] Agreed Bundle of Documents, Vol 4, p2676; Notes of Evidence, 23 April 2019, p33(4) to 33(14).

[301] Notes of Evidence, 23 April 2019, p18(3) to 18(4).

[302] Agreed Bundle of Documents, Vol 4, p2628; Notes of Evidence, 23 April 2019, p33(19) to 35(7).

[303] Notes of Evidence, 23 April 2019, p18(5) to 18(6).

[304] Agreed Bundle of Documents, Vol 4, p2628; Notes of Evidence, 23 April 2019, p35(8) to 35(23).

[305] Agreed Bundle of Documents, Vol 4, p2664.

[306] Agreed Bundle of Documents, Vol 4, p2672; Notes of Evidence, 23 April 2019, p35(24) to 36(18).

[307] Notes of Evidence, 24 April 2019, p12(18) to 13(12).

[308] Notes of Evidence, 23 April 2019, p18(9) to 18(11).

[309] Agreed Bundle of Documents, Vol 4, p2628; Notes of Evidence, 23 April 2019, p35(8) to 35(23).

	Bus Interchange		with level 1.
27	MV System Haven't Carry Out Yet for Installation Works, Bus Interchange	Mixed[310]	Quotation Ref 39R-2R2 Items Nos 2, 3 and 4.[311]

[310] Notes of Evidence, 24 April 2019, p14(2) to 14(12).

[311] Agreed Bundle of Documents, Vol 4, p2628; Notes of Evidence, 23 April 2019, p36(19) to 36(2).